STATE OF HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS

February 9, 1988

To: The Honorable Wayne Metcalf, Chairman
and Members of the House Committee on Judiciary

From: Mario R. Ramil, Director
Department of Labor and Industrial Relations

Re: H.B. No. 2002

The department supports the intent of H.B. No. 2002, and appreciates the efforts made to include the department's concerns contained in its testimony before the Governor's Committee on Public Records and Privacy last summer. The department, however, requests clarification of the language of H.B. No. 2002 as it relates to the following:

1. Confidentiality of investigative files

It is unclear whether Section -13(1) or -13(3) covers this concern. The department's enforcement of labor laws will be hampered should investigative files be open to public disclosure. For example, a complaint alleging a fair employment practice violation could not be fully investigated if the investigator is unable to assure witnesses that the information they provide will be confidential. In most cases, information is obtained from co-workers, some members of management, and some outside persons with a knowledge of the inner workings of the business involved. All of these people are dependent to one degree or another on the busness charged

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with the violation. To have the contents of the file made readily available to anyone requesting it would quickly chill most potential sources of information and make it extremely difficult for the investigators to develop information to prove or disprove the truth of the complaint.

Further, to ensure a complete and thorough investigation, investigators many times have to include unverified allegations and other hearsay information in the complainants' files. Although not admissible in a formal court proceeding, these data are many times necessary in order to obtain leads to admissible evidence. These data could well be sensitive and damaging to individuals if released. Although some hearsay will be able to be proven correct, some will not be. In either case, persons outside the department should not have access to such information.

We also recommend that Section -11(2) be clarified to exclude investigative files.

2. Charges for servicing disclosure requests.

Workload will necessarily increase to accommodate the screening of files to segregate disclosable from non-disclosable information as well as the maintaining of records of all disclosures for all files. For example, the department's workers' compensation caseload alone number about 90,000 open cases and about 35,000-40,000 new cases per year.

To screen, segregate, and verify requesters in the case of personal records will be a burden on the department's operations. To ensure that disclosure activities do not curtail the department's ongoing responsibilities and functions, Section -12(e) should be amended to allow the reasonable charge for services such as searching, screening, segregating, and verifying requesters.

PRESENTATION OF THE
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS

TO THE
HOUSE COMMITTEE ON JUDICIARY

FOURTEENTH STATE LEGISLATURE
REGULAR SESSION 1988

February 9, 1988

STATEMENT ON HOUSE BILL NO. 2002

THE HONORABLE WAYNE METCALF, CHAIRMAN,
AND MEMBERS OF THE COMMITTEE:

The Department of Commerce and Consumer Affairs appreciates the opportunity to testify on House Bill No. 2002, Relating to Public Records. While there is no question that this bill will impose many new burdens on agencies, we welcome the total overhaul of our current laws in this area. There can be no doubt that a new records law would help restore public faith in government, would provide a clear delineation of the public policy in this area, and would provide a firm foundation for the clear and consistent administrative implementation of the records law.

Having been a part of the process which led to this bill and these hearings, I have no desire to "nit-pick" this bill. Like any uniform law it has some provisions I like more than others. It is however, on the whole, an immense step forward.

There are a couple of areas that I would ask the Committee to re-examine. First, I believe that agencies should be allowed to charge for the costs searching for and creating a disclosable

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record. As the bill currently reads (see Section -12(e) at the top of page 7). In the usual case this will not be applicable and only copying charges need be assessed. But in those cases where substantial work will be involved, the individual requesting the material should support the costs of that work rather than the taxpayers. The federal government already uses such a system. In that same section, the prohibition on charging for "expenses incurred in establishing or maintaining the record" should be maintained. And finally with reference to copying charges, it would make implementation considerably easier if the Legislature would simply select a fee. The "currently prevailing commercial rate" standard is likely to produce lots of disputes.

The other area which I believe should be considered is requiring departmental record guides and reports for all records. The current bill requires reports only on personal records (see section -36 on page 31) and that type of information should be provided for all records. All of this information should then be filed with the new Office of Information Practices.

Again however, I would reiterate that the passage of a new records law remains the highest priority and my comments are not intended to in any way impede progress.

PRESENTATION OF THE
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS

TO THE
HOUSE COMMITTEE ON JUDICIARY

FOURTEENTH STATE LEGISLATURE
REGULAR SESSION 1988

February 9, 1988

STATEMENT ON HOUSE BILL NO. 2002

THE HONORABLE WAYNE METCALF, CHAIRMAN,
AND MEMBERS OF THE COMMITTEE:

As Chairman of the Governor's Committee on Personal Records and Privacy Laws, it gives me great pleasure to testify on House Bill No. 2002, Relating to Public Records. Having spent a significant portion of 1987 soliciting input on the subject of records, it is absolutely clear to me that we need a complete overhaul of Hawaii's records laws. This bill represents such an overhaul.

Furthermore the bill addresses many of the items raised during the course of the Committee's work. I believe that those who commented were asking the Legislature to make clear public policy choices on certain types of records. The modifications to the uniform law proposed in this bill are directly related to those requests.

Finally the creation of an office of information practices appears to be the best way to provide the internal appeals process that most who testified felt was important and at the same time to ensure the full and fair implementation of the new records law.

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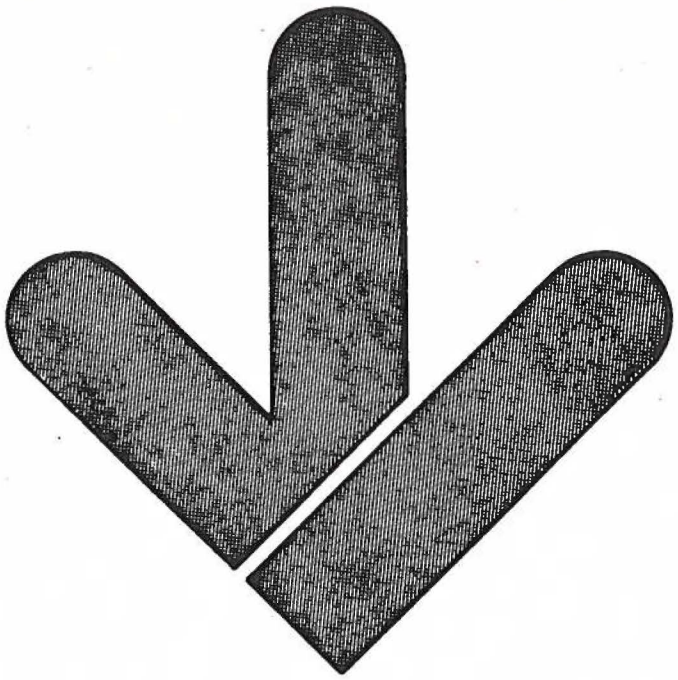
This bill represents the step which the public has long sought and I urge this Committee, on behalf of all of those who testified and commented last year, to move forward with its adoption.



UNIVERSITY OF HAWAII

TESTIMONY

H.B. 2002
Relating to Public Records

Testimony Presented Before
House Committee on Judiciary
February 9, 1988

by
Albert J. Simone
President

HB 2002
Ag. 2/9/88
1:30 p.m.

. Chairman and Members of the Committee:

H.B. 2002 proposes to repeal Chapter 92E, Hawaii revised Statutes, and to add a new chapter entitled "Uniform Information Practices Act." Because the proposed legislation covers many areas and is a complex document and because we have had insufficient time to complete a thorough review of the provisions of H.B. 2002, we would like to request the opportunity to forward additional testimony later.

We would, however, like to submit the following comments as they pertain to some special areas of student and personnel concerns at the University of Hawaii. These concerns have been brought to my attention by the Student Affairs Policy and Program Officer and the Personnel office of the University. First, with regard to concerns expressed by those in charge of student records:

All student education records created and maintained by the University of Hawaii are subject to the requirements of the Federal Family Educational Rights and Privacy Act (codified in 20 U.S.C. §1232g.) as amended; and the federal regulations adopted by the U.S. Department of Education to implement this act (codified in 34 C.F.R. §§99.1-99.67) as amended. These federal rules stipulate the rights of students with respect to their educational records, regulate the disclosure of these records to other parties, and require a variety of procedural safeguards. Based on the review of H.B. 2002, it is believed that the following sections of the bill conflict with federal regulations: Affirmative agency disclosure responsibilities; duties of agency; access to records by record

subject; and limitation on individual access. However, it is believed that these conflicts can be resolved by the addition of language similar to that provided in section -13(11), and section -24.

Because the collection and maintenance of student records are carried out on several campuses of the University system by a variety of offices, the requirement that an agency respond to a written request for access by any person, within seven days, may be unrealistic, especially given the constraints imposed by lack of personnel. In a large, complex organization such as the University, authority over records is vested in a multitude of record custodians.

We believe that the discussion of individual privacy rights contained in section -22, is vague and that the list of examples provided is incomplete.

Those sections of the proposed chapter which provide an appeal of agency decisions to the Office of Information Practices appears to conflict with federal requirements that appeals of University decisions with respect to student educational records be directed to the U.S. Department of Education.

Arguably, the adjudication of disputes involving the amendment of student education records by the Office of Information Practices, as provided in section -27, could be viewed as external interference in the University's affairs and endanger accreditation.

Although the proposed bill does not require the University to disclose individual records for research purposes, the provisions relating to such disclosures, contained in section -29, are less stringent than those currently in place at the University.

In conclusion, we would like now to submit some brief remarks from the department charged with the overall personnel responsibilities of approximately 6,000 individuals of the University sytem, the Personnel Management Office.

In view of limited staff and resources in the Personnel Managment Office, the implementation of the procedures contained in this proposal would be unduly burdensome. Under Part II, Freedom Information, which affects employees as well as students, an agency is allowed 7 calendar days to make a record available to the requester. In a system as large as the University of Hawaii, this is not a reasonable length of time in which to direct the written request to the appropriate office which maintains the record and to make that particular record available for inspection.

Part II, Freedom of Information, §_-13 Information not subject to duty of disclosure, and Part III, Disclosure of Personal Records, §_-25 Access to records by record subject should be amended to include the following limitation on individual access:

Including investigative reports and materials, related to an upcoming, ongoing, or pending administrative proceeding against that individual.

Within the University, there are circumstances where the duty to disclose information during the course of an investigation would hinder the investigative process itself.

Part I, General Provisions and Definitions, should include a definition of "personnel file." An individual may have more than one file maintained in different offices within an agency. It should be noted that at the University, pursuant to the delegation policy, maintenance of files of BOR appointees such as faculty has been delegated to the respective Deans and Directors.

Thank you very much for this opportunity to testify. Again, may I request the opportunity to submit additional testimony later.

JOHN WAIHEE
GOVERNOR OF HAWAII

DISTRICT OFFICES

WEST HAWAII OFFICE
P. O. BOX 125
KAMUELA, HAWAII 96743

EAST HAWAII OFFICE
160 BAKER STREET
HILO, HAWAII 96720

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

DISTRICT OFFICES

MAUI OFFICE
P. O. BOX HHH
WAILUKU, MAUI 96793

MOLOKAI OFFICE
P. O. BOX 198
HOOLEHUA, MOLOKAI 96729

KAUAI OFFICE
P. O. BOX 332
LIHUE, KAUAI 96766

February 9, 1988

MEMORANDUM

TO: The Honorable Wayne Metcalf, Chairman
House Committee on Judiciary

FROM: Ilima A. Piianaia, Chairman
for Hawaiian Homes Commission John Rowe

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

Mr. Chairman and Members of the House Committee on Judiciary, we appreciate the opportunity to testify on H.B. 2002, "Relating to Public Records."

H.B. 2002 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 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. 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 lessess 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 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 is fostered.

The department presently conducts both public and non-public meetings of the Hawaiian Homes Commission. The public section of the meeting and all records at that section are open to public review. However, the non-public section, which basically pertains to actions pertaining to our beneficiaries, is closed to the public as are the records of that section of the meeting.

H.B. 2002, by Section _____ -11(7), would provide public access to the previously confidential non-public section of the Hawaiian Homes Commission and the minutes of that section.

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

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

TO THE

HOUSE COMMITTEE ON JUDICIARY

FEBRUARY 9, 1988

ON

H.B. 2002

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 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, providing that §§ -36 is amended because the Archives Division performs the unique function of serving as the repository for records of other agencies.

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Ag. 2/9/88.

Date of Hearing: February 9, 1988

Committee: Committee of Judiciary

Department: Education

Person Testifying: Charles T. Toguchi
Superintendent of Education

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

Department's Position: The Department supports the need to balance public release of information with the right to privacy and 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, item 8 which relates to the release of information on "revocations or suspensions of a license and the grounds for revocation or suspension," and Section 23, item 3B which relates to disclosure of a personal record to other agencies specifically authorized by statute or compact. This language will enable the Department to responsibly fulfill its commitment to provide the children of Hawaii with competent and qualified teachers.

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

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Atg. 2/9/88

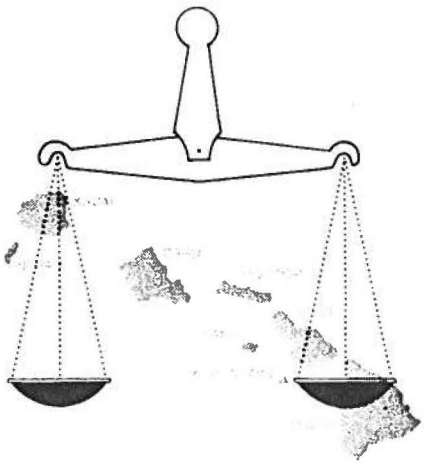
1:30 p.m.
Room 328

The Judiciary
State of Hawaii

Tuesday, February 9, 1988

House Bill No. 2002

Relating To Public Records



Committee Submitted to:

Honorable Wayne Metcalf, Chairman

House Committee on Judiciary

Testimony
to the
Fourteenth Session
State Legislature
1988

Judiciary Representative:

Betty M. Vitousek

Senior Judge

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Ag. 2/9/88

0180L

Y M. VITOUSEK
Senior Judge

NETH K.M. LING
Director

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

February 8, 1988

The Hon. Wayne Metcalf, Chairman
House Committee on Judiciary
The Fourteenth State Legislature
The State Capitol
Honolulu, Hawaii 96813

Dear Representative Metcalf:

RE: H.B. No. 2002 - Public Records

The Family Court of the First Circuit takes no position on the substance of H.B. No. 2002, 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.42-44). 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 4-5). 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 4-5: "... 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 ..."

Sincerely yours,

Betty M. Vitousek

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

JOHN WAIHEE
GOVERNOR

RICHARD F. KAHLE, JR.
DIRECTOR OF TAXATION

GARY S. MIJO
DEPUTY DIRECTOR

STATE OF HAWAII
DEPARTMENT OF TAXATION
P.O. BOX 259
HONOLULU, HAWAII 96809

February 9, 1988

TESTIMONY ON H.B. NO. 2002
RELATING TO PUBLIC RECORDS

The Department of Taxation believes that this bill improves upon Chapter 92E, Hawaii Revised Statutes and attempts to properly balance the individual right to privacy with the public interest in disclosure. The Department supports this bill, subject to the changes requested below.

The State needs to strictly preserve the confidentiality of tax returns and return information in order to protect State revenues. The American system of taxation is a self-assessment system which requires that taxpayers voluntarily assess taxes against themselves by filing tax returns, and voluntarily pay the taxes due. The promise of government that tax returns and return information shall be held strictly confidential is at the heart of this system. Without confidentiality, taxpayers will not voluntarily disclose tax information, and the self-assessment system would fail. European systems of government assessment, rather than self-assessment, are extremely costly.

The Department understands that tax returns and return information are intended to be excluded from the duty of disclosure under this bill by section -13(11). The Department requests that section -13 be amended to specifically exclude tax returns and return information so that there will be no question about this. It should be noted that information sharing agreements with the Internal Revenue Service require the Department to maintain all tax records in strictest confidence.

The Department also requests that section -22(c)(6) be deleted. This provision states that tax information is an example of information in which an individual has a significant privacy interest. This provision is incorrect and misleading because tax information is not subject to disclosure, regardless of the individual's privacy interest and the countervailing public interest in disclosure.

Richard F. Kahle Jr.
RICHARD F. KAHLE, JR.
Director of Taxation

RFK-KTW:mk

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Ag. 2/9/88

OFFICE OF THE LIEUTENANT GOVERNOR
STATE CAPITOL
HONOLULU, HAWAII 96813

BENJAMIN J. CAYETANO
LIEUTENANT GOVERNOR

TESTIMONY OF BENJAMIN J. CAYETANO
LIEUTENANT GOVERNOR
STATE OF HAWAII

TO THE HOUSE COMMITTEE ON JUDICIARY
ON
H.B. 2002: RELATING TO PUBLIC RECORDS

FEBRUARY 9, 1988

Chairman Metcalf and Members of the House Committee on Judiciary, thank you for the opportunity to provide testimony on House Bill 2002 relating to public records.

As we understand it this bill will provide a uniform codification of the laws relating to public records and public access to those records designated as public. As such this bill applies to all governmental entities. While we do not have serious objections to the purpose and scope of the bill we do have several concerns about specific aspects of the bill as currently written.

On page 4 of the bill under Part II, Freedom of Information, the bill provides that final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases, are to be disclosed. This section would conflict with our current policy of holding confidential hearings on denial of Petitions For Change of Name. In addition, again in the area of name change, the Petition and Affidavit are considered confidential and released only to the

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Petitioner. If this law is enacted as currently written it would cause confusion for our office in this area.

On page 5 of the bill there is a requirement that the minutes of all agency meetings including but not limited to proceedings subject to chapter 91, be disclosed. Again we are unsure what would be included in "all agency meetings" and feel that the bill should be amended to clarify this.

On page 16 social security numbers are included as information which is not to be disclosed. However, under §11-14, H.R.S., the county clerks currently require that a newly registered voter provide their social security number on the affidavit. Not only is that affidavit considered a public record under the statute, but the social security number is provided in the register which is on file in our office. If this bill would require social security numbers which are now a matter of public record to be kept confidential, we ask that the bill be amended to more clearly reflect this intent.

Finally, on page 31, the annual reporting requirements of each agency are set forth. The Office of the Lieutenant Governor deals almost exclusively in public records, elections information, state agency rules, Acts of each legislature, etc. From that standpoint these reporting requirements will exact a heavy burden from our staff in terms of compiling the initial report and maintaining records for the yearly reports.

DEPARTMENT OF THE CORPORATION COUNSEL
CITY AND COUNTY OF HONOLULU
HONOLULU, HAWAII 96813

FRANK F. FASI
MAYOR

RICHARD D. WURDEMAN
CORPORATION COUNSEL

February 9, 1988

TO: HONORABLE WAYNE METCALF, CHAIRMAN
AND MEMBERS
HOUSE JUDICIARY COMMITTEE
HOUSE OF REPRESENTATIVES
HONOLULU, HAWAII

FROM: RICHARD D. WURDEMAN, CORPORATION COUNSEL
DEPARTMENT OF THE CORPORATION COUNSEL
CITY AND COUNTY OF HONOLULU
HONOLULU, HAWAII

SUBJECT: PUBLIC TESTIMONY ON H. B. NO. 2002, A BILL FOR AN ACT RELATING TO PUBLIC RECORDS

Mr. Chairman and Members:

I am Richard D. Wurdeman, Corporation Counsel for the City and County of Honolulu.

The City and County of Honolulu appreciates the opportunity to testify on H. B. No. 2002, A Bill for an Act Relating to Public Records. I understand that your Committee intends to incorporate all of the oral and written testimony presented to the Governor's Committee on Public Records and Privacy which has been included in the Report of the Governor's Committee on Public Records and Privacy, Volumes I-IV, December 1987 (hereinafter "Governor's Report"). The City and County of Honolulu's submittal by Jeremy Harris, Managing Director, appears in the Report at Volume II, pp. 116-131 and at Volume III, pp. 369-614. Therefore, I will not reiterate all of the comments previously made by the City. However, when those comments were submitted to the Governor's Committee on Public Records and Privacy, the discussion focused on the existing laws and suggestions for improvements. Now that there

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actually is a Bill before your Committee proposing the repeal of Hawaii Revised Statutes (hereinafter "HRS") Chapter 92, Part V, and HRS Chapter 92E and the adoption of a new law regarding public records and privacy interests, I believe that additional comments are warranted.

1. THE CITY SUPPORTS THE CONCEPT OF H. B. NO. 2002 WITH MODIFICATIONS.

The City and County of Honolulu (hereinafter "City") is in agreement with the overall concept of H. B. No. 2002, namely to repeal HRS Chapter 92, Part V, and HRS Chapter 92E, while adopting a new law which would comprehensively address considerations of freedom of information and the right to privacy pertaining to records maintained by government agencies. However, we anticipate that H. B. No. 2002 will have a significant cost impact on all government agencies that will have to be addressed. We also believe that H. B. No. 2002 will undoubtedly generate disagreements and most probably litigation over such issues, among others, as what constitutes a "clearly unwarranted invasion of personal privacy" [§ ___-22(a)], what constitutes a "significant privacy interest" [§ ___-22(b) and § ___-22(c)] and when the "public interest in disclosure outweighs the privacy interests of the individual" [§ ___-22(a)]. Nonetheless, the City is willing to try a new approach to the issue of public records and privacy rights. It is anticipated that the State Legislature will further refine the law after the government agencies accumulate a year or two of practical experience in implementing a law such as the one proposed in H. B. No. 2002. On this point, the comments to the Uniform Information Practices Code should prove instrumental to governmental agencies in implementing the law. (Governor's Report, Vol. I, Appendix E)

2. OFFICE OF INFORMATION PRACTICES.

Although the City recognizes the desirability of establishing a single agency, such as the Office of Information Practices, that would have the responsibility for interpreting H. B. No. 2002 as it applies in particular instances, we have serious reservations about granting such wide discretion to a State agency to oversee county operations.

If an Office of Information Practices is created, then the City is in support of the establishment of such an office within the Office of the Governor rather than within the Office of the Ombudsman as was proposed in the 1987 S. B. No. 286, A Bill for an Act Relating to the Uniform Practices Act.

It is our understanding of H. B. No. 2002, that pursuant to Section ___-42(c) that office could bring an action against another agency, other than for damages, to enforce the law. This could possibly put the Office of Information Practices in the position of suing an agency to which it had previously rendered advice. However, we note with approval that the Office of Information Practices will not be allowed to file actions on behalf of claimants seeking damages pursuant to Section ___-32. There should be further clarification, however, regarding whether criminal violations will be enforced by the Prosecutor's Office or the State Department of the Attorney General.

3. DEFINITIONS.

H. B. No. 2002 Section ___-4 defines five distinct types of records, namely "accessible records," "government records," "individually identifiable records," "personal records" and "research records." Pursuant to the definitions, a particular record could conceivably fall within the meaning of all of the definitions. If this type of interpretation was not intended, then perhaps the five record terms in the Bill need to be more comprehensively defined.

Another definition of note is that for the term "agency." We interpret the definition as including the legislative branch of the county governments, but not the legislative or judicial branches of the State. If the law is made applicable to the county legislative branches, we would recommend that it apply with equal force to the State legislative branch. We also note that the State Judiciary apparently has no objection to a public records law applying to it, provided that there are adequate safeguards for various confidential records it maintains. (Governor's Report, Vol. II, pp. 1-3 and Vol. I, pp. 94-98)

Finally, the Uniform Information Practices Code includes a definition of the term "individual" as meaning a "natural person." We strongly recommend that this definition be included in H. B. No. 2002 in order to distinguish the terms "person" and "individual" as used in the Bill. The Uniform Information Practices Code envisioned that the right of access to government records would extend to any person, including a corporation, upon request. "In contrast, the right of access to a personal record generally extends to the person to whom it pertains." (See Comments to Uniform Information Practices Code, Governor's Report, Vol. I, Appendix E, § 1-105, p. 9) The privacy considerations protected in H. B. No. 2002 apply to "individuals" and not corporations or other entities. Adding a definition of "individual" would help clarify this point.

4. FREEDOM OF INFORMATION.

H. B. No. 2002, Part II, appears to divide government records into two categories: (1) that which must be disclosed and (2) that information which is exempt from mandatory disclosure.

A. AFFIRMATIVE AGENCY DISCLOSURE RESPONSIBILITIES.

H. B. No. 2002, Section ___-11, requires the disclosure of specified information. We interpret Section ___-11(3) and Section ___-13(5) as not requiring the disclosure of bid proposals even though Section ___-11(3) requires the disclosure of "government purchasing information." If this interpretation is incorrect, then protection for bid proposals will be necessary.

With respect to Section ___-11(5) which requires the disclosure of "land ownership, transfer and lien records including real property tax information and leases of state land," additional specificity may be prudent with respect to what constitutes "real property tax information." The Revised Ordinances of Honolulu 1978, as amended (hereinafter "ROH") Section 8-1.17 provides as follows with respect to real property tax records:

Sec. 8-1.17. Records Open To Public.

> All maps and records compiled, made, obtained or received by the director or any of his subordinates, shall be public records and in case of the death, removal or resignation of any such officers, shall immediately pass to the care and custody of their respective successors. The information and all maps and records connected with the assessment and collection of taxes under this chapter shall, during business hours, be open to the inspection of the public. (emphasis added).

The other counties have similar provisions. Pursuant to ROH Section 8-1.17, the City regards the following records as public and open to inspection: all real property assessments, real property tax maps, real property tax exemptions, the amount of real property taxes due for each parcel and accounts of delinquent real property taxes. We have no objection to these categories of information being specified as records which must be disclosed. However, we would consider internal working documents, certain individually identified records, material prepared in anticipation of litigation and attorney-client communications to be confidential even though they contain "real property tax information."

With respect to Section ___-11(7) which requires the disclosure of the minutes of all agency meetings, including, but not limited to, proceedings subject to HRS Chapter 91, we urge this Committee to consider HRS Chapter 92, "Public Agency Meetings and Records," Section 92-9(b), which provides as follows:

> (b) The minutes shall be public records and shall be available within thirty days after the meeting except where such disclosure would be inconsistent with section 92-5; provided that minutes of executive meetings may be withheld so long as their publication would defeat the lawful purpose of the executive meeting, but no longer. (emphasis added).

We realize that Section ___-13(11) exempts from disclosure information made expressly nondisclosable by state law, but Section ___-11(7) may be misleading and deserves clarification with respect to the nondisclosure of minutes of executive meetings.

Section ___-11(9) states that certified payroll records on public works contracts will be disclosed. The City does not really object to this, however, the Committee should be informed that not only do the payroll records contain the employee's name, rate of pay and taxes, but they may also include such private information as one's payroll deductions such as Christmas Club savings and garnishments. (See Governor's Report, Vol. III, pp. 392, 394)

Section ___-11(10) requires the disclosure of "information on contract hires and consultants employed by agencies." We have no objections to the concept, but perhaps more specificity would be appropriate such as references to the disclosure of the actual contract, compensation, duration of contract and contract objective. Thus, other information maintained by an agency on such an individual would still be subject to the balancing test.

With respect to Section ___-11(11) which requires the disclosure of "building permit information," the phrase is too vague. The City currently treats building permits, building permit applications and plans and specifications as public once the permit has been issued. Prior to that time, the permit application and plans must circulate from the applicant to numerous City Departments for input and review. Often changes must be made by the applicant and the plans are submitted once again. Permit applications and plans could be viewed by the public prior to final issuance, but the public must realize that until the issuance of the permit, the package is not final. One other consideration is the fact that some commercial institutions and hotels, for instance, prefer that their plans and specifications not be viewed by the public due to security reasons.

The City does not have any other objections to Section ___-11.

B. H. B. NO. 2002 SECTION ___-13, INFORMATION NOT SUBJECT TO DUTY OF DISCLOSURE.

This section lists twelve categories of government records which are exempt from the mandatory disclosure requirements.

There are several areas of concern here for the City, the primary one being Section ___-13(a)(1) addressing information compiled for law enforcement purposes. The testimony of the City in the Governor's Report, Vol. II, pp. 122-124, discusses the City's concerns regarding the necessity for confidentiality of various records maintained by the Honolulu Police Department and the Honolulu Police Commission. We fear that H. B. No. 2002 will not adequately protect those records.

Section ___-13(a)(1)(A) basically provides that disclosure is not required of information compiled for law enforcement purposes if the disclosure would "materially impair the effectiveness of an ongoing investigation, criminal operation, or law enforcement proceeding." The City is concerned with future disputes over what constitutes a material impairment and with the fact that the exemption only applies to ongoing investigations, criminal intelligence operations or law enforcement proceedings, if in fact the term "ongoing" modifies all three. However, one might interpret investigation reports, ongoing or not, as protected from disclosure pursuant to Section ___-22(c)(2) because of the "significant privacy interest" in "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." Nonetheless, we strongly believe that the records of the police department and of all other law enforcement agencies, civil or criminal, require added protection from disclosure in order that their effectiveness is not impaired at all by disclosure.

We are in favor of Section ___-13(3) pertaining to material prepared in anticipation of litigation. It is also our position that all attorney-client communications between the Corporation Counsel and the executive and legislative branches is protected pursuant to other

state laws and will continue to be so protected notwithstanding any provisions of H. B. No. 2002, if enacted.

We are in favor of the remaining provisions of Section ___-13(a).

Section ___-13(b) requires an agency to make reasonable efforts to notify the person to whom the record relates and to provide an opportunity to object to disclosure of the record, if an agency decides to grant a request to inspect or copy government records specified in subsections ___-13(8), (10) or (12) which are basically records of proprietary information, trade secrets and individually identifiable records not disclosable under Part III. We assume the Bill leaves the specifics of the notification process and time to object for the agencies to develop pursuant to rules. This notification process could prove to be costly and burdensome for the government agencies if disclosure situations of those documents indeed arise.

5. DISCLOSURE OF PERSONAL RECORDS.

A. SECTION ___-21 LIMITATIONS ON DISCLOSURE TO PUBLIC.

Section ___-21 entitled "Limitations on disclosure to public" provides that "an agency shall disclose or authorize the disclosure of an individual record to any person other than the individual to whom it pertains where the disclosure is . . ." and then goes on to list individually identifiable records that are required to be disclosed notwithstanding privacy interests.

We recommend the use of language identical to the Uniform Information Practices Code Section 3-101, Governor's Report, Vol. I, Appendix E, p. 20, which provides as follows:

ARTICLE 3
DISCLOSURE OF PERSONAL RECORDS

§3-101. [Limitations on Disclosure to Public.] An agency may not disclose or authorize the disclosure of an individually identifiable record to any person other

than the individual to whom the record pertains unless the disclosure is:

. . . .

We prefer the Uniform Code language because it specifically sets forth the general rule pertaining to individually identifiable records, namely that the agency may not disclose an individually identifiable record to any person other than the individual to whom the record pertains unless it falls into the exceptions to the rule. By slightly modifying the language of the Uniform Code in H. B. No. 2002, the meaning of this general rule and the protection of the privacy interest is lost. In addition, the title of Section ___-21 indicates that the section will discuss a limitation on disclosure, but names none. Thus, the Uniform Code language more clearly achieves the intended objective.

We have no objections to the disclosure of the individually identifiable records listed in Section ___-21. However, Section ___-21(7) and Section ___-21(8) may need to consider the fact that some agencies, boards or commissions have the authority to issue subpoenas requiring the production of documents which may include individually identifiable records. Is it intended that the agency not comply with subpoenas issued by administrative boards and commissions, thereby requiring a court order to compel compliance?

B. SECTION ___-22 CLEARLY UNWARRANTED INVASION OF PRIVACY.

This section sets forth a balancing test to use in deciding whether to disclose an individually identifiable record by weighing the individual's privacy interest against the public's need for the information. If the individual's privacy interests outweighs the public interest in disclosure then a clearly unwarranted invasion of personal privacy would occur and thus, the record cannot be disclosed.

Since Hawaii may be the first state to adopt a law based on the Uniform Information Practices Code, this section will have to be applied case by case. Undoubtedly, there will be many differences of opinions in interpreting this section. We interpret subsections ___-22(b) and

(c) as essentially stating that unless otherwise provided by law, no agency will disclose information subject to a significant privacy interest unless the public interest in disclosure is compelled by an imminent threat to public health and safety. This seems to add a further definition to the balancing test set forth in Section ___-22(a). Section ___-22(c) sets forth examples of significant privacy interests. Thus, we assume that agencies will be able to deem other information as constituting significant privacy interests where appropriate. Further clarification of these sections in the House Standing Committee Reports will be most helpful for future implementation.

We also have doubts as to whether the proposed balancing test sufficiently protects the right to privacy set forth in the Hawaii State Constitution, Article I, Section 6, which provides that "the right of the people to privacy is recognized and shall not be infringed without a showing of a compelling state interest . . . ." (emphasis added).

Since we anticipate that the agencies will encounter difficulties in interpreting a new law such as H. B. No. 2022, we question whether Section ___-12(d) is realistic since it requires a response by an agency to a record request within seven days after receiving a written request and possibly up to twenty-one days under certain circumstances. It is anticipated that agencies will need to consult their legal counsel and, quite possibly, the Office of Information Practices, which might be overwhelmed with agency requests during the first year of implementation.

6. PENALTY AND IMMUNITY PROVISIONS.

The City is in support of Section ___-33 providing for a criminal penalty and Section ___-34 which provides immunity from liability to individuals acting in good faith which will help reduce the "chilling effect" caused by the existence of criminal penalties and claims for damages. However, the City is opposed to the recovery of damages up to $10,000.00, exclusive of any pecuniary loss.

7. SEGREGATION OF INFORMATION/SEARCH TIME.

H. B. No. 2002 imposes a duty on the government agencies to search for records and to provide reasonably segregable portions of records to the requester after deleting the undisclosable material. (§ ___-13(f) and § ___-26(c)) Yet, Section ___-12(e) prohibits an agency from charging for the services of government personnel in searching for a record, reviewing its contents and segregating disclosable information from nondisclosable information. Please see the City's comments on this issue at Governor's Report, Vol. II, pp. 127-128. While the City recognizes that excessive fees would defeat the purpose of H. B. No. 2002, it nonetheless is in favor of some reasonable fees for searching and "sanitizing" records since it is anticipated that these duties under the new law will have a significant cost impact on the City, necessitating additional funding and staffing.

8. REPORT OF REQUESTS FOR RECORDS.

Section ___-28(2) requires agencies to maintain a record of all disclosures of individually identifiable records to recipients outside the agency during the preceding three years with certain exceptions. The report must include the identity of the recipient and date of disclosure. Section ___-36(12) also requires records of written requests made, the number denied, etc. These requirements will most certainly require more funding, and possibly, staffing.

9. POLICE DEPARTMENT RULES AND REGULATIONS.

The proposed new HRS Section 52-19 pertaining to police department rules and regulations raises some serious concerns. We have no objection to the requirement that the police department adopt rules and regulations pertaining to its administration, operations functions and services. But to include within this requirement "the manner and method for enforcement of the criminal laws" would result in an intolerable burden on the flexibility necessary for effective law enforcement. The proposed section further states that "this requirement does not apply to the police functions of criminal investigations prior to indictment." This logically raises the question as to what happens to investigations

that continue after indictment. We believe that the rulemaking requirement pertaining to the manner and method of enforcing criminal laws is vague and overbroad and should be deleted from proposed Section 52-19.

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

Very truly yours,

RICHARD D. WURDEMAN
Corporation Counsel

RDW:ct

Date of Hearing: February 9, 1988 Number: HB 2002

Committee: Judiciary

Department: Health

Person Testifying: John C. Lewin, M.D., Director

Title: Relating to Public Records

Purpose: To clearly define standards governing both public and private documents held by government agencies and to create a governmental agency charged with arbitrating problems relating to the release of government records.

Department's Position: Clearly defining the difference between confidential records held by governmental agencies and those to which the public is entitled access, will make the task of government agencies easier in administering a most difficult area of the public interest. We thus strongly support the intent of this measure and wish to make some suggestions which will assist us in administering legislation of this nature:

1. Section -11 - Most subsections of this section appear clear, however, we believe, subsection (7) (p 5, lines 4-5) to be too broad. This section requires affirmative disclosure of "minutes of all agency meetings including but not limited to proceedings subject to Chapter 91." We feel this provision would open all meetings of a agency for which minutes are kept, including purely administrative meetings. While this subsection is limited by subsection 13(2) which does not require the disclosure of inter or intraagency advisory consultative or deliberative materials "other than factual information", we believe that subsection -11(7) is still vague. Many agency meetings contain elements of both information and policy making, and are deliberative in nature. Defining what parts of these meetings would be in accordance with this measure could be quite difficult. We would recommend that minutes of agency meeting be limited to those subject to Chapter 91.

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2. Section -12 (Duties of agency) - In general, these provisions are clear and can be implemented. However, we are concerned that subsection (c) may cause problems with records maintenance. The section seems to assume that individuals interested in copying records could borrow the records and copy or abstract them themselves in facilities each agency would provide for these activities. In addition, however, an agency would also have to provide for some sort of security that documents would not be destroyed, defaced, stolen or, more likely, just not returned. While we are concerned as to the costs of agencies providing copies/abstracts, we believe that the current system in which agencies provide copies/abstracts for a charge would be preferable and would ensure proper standards of records maintenance.

3. Section -13 - The standards outlined in section -13 are clear. We do, however, note that subsection (b) requires reasonable effort to notify the person to whom a particular record relates. Such an opportunity to object to disclosure may conflict with the 21 day requirement for record availability outlined in subsection -12(d)(2). We strongly believe that -13(b) is a very good provision, but recommend that the 21 day limitation in -12(d)(2) be reviewed in light of any potential administrative problems with the -13(b)(5) notification provision.

4. Section -23 - We strongly support this section. It forms the basis for interagency cooperative agreements to share information which would be of benefit on the performance of multiple agency functions. We believe that such information sharing will assist us in developing a single entry case management system which will provide better services to our clientele.

5. Section -26 - For a limited time, subsection (c) will cause problems with our vital statistics program. Until our program is computerized, a

process we have begun to phase in, we will be unable to segregate records as required. Current staffing is insufficient to retrieve and segregate the large volume of the information requested of vital statistics. We would appreciate a 3 year exemption from subsection 26(3)(c) for our vital records operations.

6. Section -28 - Subsection (2) requires the maintenance of a record of disclosure of identifiable personal records. Given the extensive volume of our vital statistics data, the additional staffing would be required. We therefore, request exemption from this provision.

7. Section -36 - We believe that the general standards set forth in this section on record keeping should be further defined by administrative rules adopted by the new Office of Information practices established through this bill.

8. With respect to the new section 578-16 established in this bill, we agree that the genetic and other medical information from the natural parents could well be of benefit to an adopted child. However, we believe the system proposed has limitations in that it does broaden the potential for leakage of sensitive information and it requires the natural parent(s) to pay for the cost of the physician's services in completing the form.

We recommend that such a form be developed for completion by the natural parent(s) prior to adoption, and that it be kept as a part of the adoption records by Family Court. Giving the prior approval for release of such information upon the request of the adoptee obviates the considerable difficulty in locating the natural parents many years after the natural birth. The child could then request the Court for the information, rather than follow the indirect process outlined in the bill. In any case, the Legislature should appropriate finds to the

proper agency to provide the costs of the parent(s)' medical certification.

Despite these lengthy comments, we believe this bill is a major step forward in both opening public records and guaranteeing individual privacy. We would appreciate working with your committee and other agencies in further developing this measure for passage by the 1988 Legislature.

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 JF-CS

February 9, 1988

TO: The Honorable Wayne Metcalf
Committee on Judiciary
The Fourteenth Legislature
State Capitol, Room 428
Honolulu, Hawaii 96814

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

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

Mr. Chairman and Members:

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

The Honolulu Police Department applauds the intent of H. B. No. 2002. 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 list of the type of records that are kept within and by the Honolulu Police Department is a long one. Suffice it to say that they reflect records that any police department would have. We are of the abiding belief that the confidentiality of these records and the rights of persons mentioned therein have been protected by the present laws as evidenced by Chapters 92 and 92E, Hawaii Revised Statutes. We believe that Hawaii's constitutional guarantee of privacy to its citizens demands no less.

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In that light, the Honolulu Police Department would strongly urge that the protections, particularly of Section 92E-3, be carried over in their exact language to this bill. We believe that the proposed language of this bill may cause confusion in many instances which may then promote litigation or, at the very least, delays in the civil and criminal justice systems.

We are further concerned that the costs for implementing legislation of this type will be overwhelming to our agency. The costs include manpower, equipment, and spatial requirements over and above what is currently budgeted for. While we have no firm or fast figures, we can assume that it may be enormous.

The Honolulu Police Department is also 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 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 the opportunity to testify on this bill. Unfortunately we only recently obtained a copy of the Report of the Governor's Committee on Public Records and Privacy. It is also unfortunate that the time frame between introduction of this bill and the setting of this hearing precluded us from more extensive and incisive testimony, but our department stands ready to explore in detail our concerns relative to the rights of the persons within the records, the confidentiality of the records, and the practical problems of implementing this legislation by our agency.

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

for Dennis S. Nakamura
JAMES FEMIA, Major
Records Division

APPROVED:

Warren Tenneira
for DOUGLAS G. GIBB
Chief of Police

DEPARTMENT OF THE PROSECUTING ATTORNEY

CITY AND COUNTY OF HONOLULU

1164 BISHOP STREET, HONOLULU, HAWAII 96813
AREA CODE 808 • 523-4511

CHARLES F. MARSLAND, JR.
PROSECUTING ATTORNEY

TO : REPRESENTATIVE WAYNE METCALF, CHAIRMAN
HOUSE COMMITTEE ON JUDICIARY

FROM : DENNIS M. DUNN, DIRECTOR
VICTIM/WITNESS KOKUA SERVICES
DEPARTMENT OF THE PROSECUTING ATTORNEY
CITY AND COUNTY OF HONOLULU

RE : HOUSE BILL NUMBER 2002
RELATING TO PUBLIC RECORDS
HEARING: TUESDAY FEBRUARY 9, 1988 1:30 P.M.

Good afternoon Mr. Chairman and members of the Judiciary Committee. I am testifying today in regard to HB 2002 which is designed to provide uniform and consistent procedures for the disclosure and dissemination of information contained in "public records".

While the Honolulu Prosecutor's office supports the general principal of allowing free access by citizens to "public information", we would urge that great care be taken by the Committee in defining exactly what records maintained by government agencies should be readily available to the public. In particular we must express grave concern that any records collected in the course of criminal investigations and prosecutions not be carelessly exposed to public view. Although such records may fit the definition of "personal record" contained in HB 2002 we feel that this term may be misleading in view of the fact that the files in criminal cases commonly include references to other parties who may be involved in a reported crime. The ability to prevent premature and inappropriate disclosure of such information is essential to maintaining the integrity of the criminal justice process.

While we appreciate the attempt in Section 13(a)(1) of this bill to protect "law enforcement program files", it would appear that the protection offered is not sufficient to adequately prevent the inappropriate release of information. We would specifically note that conditions attached to the justifications for non-disclosure are actually quite narrow in scope and could easily lead to a rather broad interpretation of what information is actually protected. In fact, under Section 13(1)(A) it would appear that only records of "ongoing" investigations or "law enforcement proceedings" would be protected. Since only active cases may be covered this could leave the door wide open to public perusal to a wide variety of materials which we would normally

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consider confidential. Aside from those records that would otherwise be made public during court proceedings we feel that information collected pursuant to criminal investigations and prosecutions should generally remain closed to public view except when dictated subsequent to judicial review.

We would, however, also like to ask that the Committee also consider permitting some discretion (as is currently the case under HRS 92-51) in releasing certain types of information contained in our files. In the past we have generally permitted the release, to an individual, of a copy of any written statements provided by them to either the police or prosecutor's office. In addition, copies of other documents submitted by complaining witnesses such as medical bills, repair bills, photographs, etc. are normally released upon request. This policy is designed to prevent undue (and unintended) hardship to a crime victim.

One other exception that we believe would also be warranted regarding the release of information from criminal justice records would similarly involve the release of information to crime victims. As is currently provided in Section 571-84(g) relating to juvenile cases in family court, we believe that victims who wish to file civil actions against the perpetrator of a crime should be given appropriate information relating to the name and address of that individual. The police, prosecutor, or other responsible law enforcement agency should be permitted to release such information that in their discretion will not endanger any party or subject them to unwarranted harassment.

Thank you for the opportunity to comment on HB 2002. We urge you to give our suggested amendments your full consideration and support.

Ian Y. Lind

Political Analyst & Consultant

1451-1 Hunakai Street, Honolulu, Hawaii 96816 • Phone (808) 737-5428

Testimony on H.B. 2002, "Relating to Public Records"
Presented by Ian Lind to the House Committee on Judiciary
February 10, 1988, 6:30 PM

Thank you for this opportunity to testify this evening. The issue that this bill addresses is a very important one, and one with which I have had considerable experience. I served as a member of the Governor's Committee on Public Records and Privacy, and I compiled an index to Hawaii's "Sunshine Law" which required that I collect and read through all the opinions of the Attorney General and the Corporation Counsel's of the four counties relating to public records and public meetings. So I have spent quite a lot of time trying to understand our current law and its limitations. On the basis of this experience, I would like to make a few general observations and then address some of the specific provisions of H.B. 2002.

I think that it is fair to say that there is a general consensus that legal interpretations and administrative policies of recent years have been skewed towards nondisclosure of public records and that the intent of H.B. 2002 is to clarify the law to clearly restore access to public records and the public's right to know. Thus, if properly drafted, H.B. 2002 should not cut off access to any government information that is currently available to the public, and it should further broaden and extend public access to government records. Any bill that fails this test should be decisively rejected by this Legislature.

I would like to clarify one additional point prior to proceeding to the details of the bill. This Governor's Committee on Public Records and Privacy did not make specific legislative recommendations, so that H.B. 2002 is not a proposal which came from that Committee. It is an attempt to address the

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problems and concerns that the Committee uncovered, but it does not come to you with the Committee's approval.

Problems with HB 2002 and suggested amendments

I believe that there are three "fatal" flaws in H.B. 2002--that is, the bill would be damaging to the public if passed with these provisions intact. Therefore, I would suggest the following amendments aimed at these specific points:

1. Follow the Uniform Code and the federal FOIA and Privacy Act by adopting the overall standard that government records can be released if they do not constitute "a clearly unwarranted invasion of personal privacy." HB 2002 initially adopts that standard but immediately introduces a second and higher standard that would destroy the balance between public and private information and result in many more records being withheld from public view. This would be inconsistent with the overall intent of the bill and, therefore, section 22(b) on page 14, line 21, should be deleted.

2. Maintain the current applicability of the public records law to the legislature and extend it to the Judiciary. Hawaii's current public records law applies to the Legislature, and there have been no overriding problems which would justify the creation of a new exclusion. In addition, the Judiciary has indicated that it does not oppose being included in a public records statute. Therefore, delete lines 8 and 9 on page 3.

3. The major problem with the current law is that circular references between the public records law and the so-called privacy law (Chapter 92E) which lead to the absurd conclusion that no government record which contains a name or identifies an individual can be released to the public. This part of the law was recently struck down by the Hawaii Supreme Court.

To avoid recreating this confusion, I would suggest (a) that Part II, section -13(a)(12) on page 10 be amended to provide simply that information which would constitute a clearly unwarranted invasion of personal privacy is not required to be disclosed; and (b) Part III, section -21 be amended to add a provision allowing disclosure of "Information required to be released under Part II of this Chapter." These amendments would make clear that a public record would not become secret just because a name is included, but that the other individual rights and agency responsibilities established by Part III (limitations on transfer between agencies, right to correct, etc) would continue to apply to those records. This would parallel comparable provisions of the federal Freedom of Information Act and Privacy Act.

To further underscore the distinction between personal and public records, I would suggest that the definition of a personal record be amended to exclude information related to any official actions taken by a public officer or employee.

In addition, I have certain concerns which, while not necessarily "fatal", would affect the public interest in openness and should be addressed:

4. Make clear that Part II creates a general duty to disclose government records except for those falling within the specific exemptions provided by section -13. This could be accomplished by giving more stress to section -12, and perhaps by incorporating the approach of Chapter 92 HRS and the federal Freedom of Information Act which clearly state that the intent is to make government as open as possible, and that exceptions to the policy of openness are to be narrowly construed in favor of openness.

5. Certain exclusions in Part II, section -13 should be narrowed. Section -13(2)(B) is vague and potentially very broad. I would suggest that it be combined with -13(3) into a section comparable to exemption 5 of the federal Freedom of Information Act.

Certain language in Section -13(5) is also too vague ("frustrate government procurement"). In addition, the provision of that section regarding a roster of employees is unnecessarily restrictive in light of the provision elsewhere in the bill to make the names and other information about government employees public.

6. Part II, section -14(c) should be amended to allow neighbor island residents the option of filing suit in the judicial circuit where they reside. Otherwise most suits would have to be filed in Honolulu. This would again unfairly discriminate against neighbor island residents and would run counter to other current efforts to extend equal access to all residents of the State.

7. I would support the current absence of fees. However, if fees for searching or segregating records are considered, they should either be applicable only to requests for commercial purposes or there should be provisions for waiving fees for requests made that primarily benefit the public.

8. I would concur with the testimony presented by Richard Wurdeman in support of an amendment to include the definition of "individual" as "a natural person".

9. Finally, I would suggest that the Office of Information Practice should provide for public participation in and review of its actions. For this reason, I would suggest that the office include an "Information Practices Commission" which would provide for a public voice in the development and administration of the State's public information policies.

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ulu Star-Bulletin

Feb. 11, 1988

Rep. Wayne Metcalf
Chairman, Judiciary Committee
House of Representatives
State of Hawaii

Mr. Chairman and committee members:

The Honolulu Star-Bulletin much appreciates the work of your committee and staff in drafting House Bill No. 2002, the Uniform Information Practices Act.

The newspaper testified last year before hearings of the Governor's Committee on Public Records and Privacy. Our views are a part of that committee's report, and we understand they also will be included in the record of these proceedings.

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.

It should not be the other way around - where information is assumed to be private unless the public or news media can justify a need to know.

Your committee's bill, H.B. 2002, appears to be a response to the report of the governor's committee. As such, it deserves applause for its effort and thanks for what seems to be the spirit of its intended reforms.

Our views on specific provisions of the bill, however, are not so supportive.

Part IV of the bill would create an "Office of Information Practice" under the governor to serve as a kind of "Freedom of Information Czar" over agencies of the state government. This may seem like a good idea on paper, but we submit that it could provide a solution that is worse than the problem.

It would consolidate a lot of authority in one person answerable to the governor. We can envision such an office becoming a centralized administrative bottleneck, a place where agency officials might detour even the most routine information requests, forcing them to wait days for authorized clearance to answer. Even with the bill's time limits on responding to information requests, we worry about the possible length of waiting periods that could develop as a matter of unnecessary routine procedure.

We would urge the committee to tread cautiously in creating such a powerful office. What is needed instead of a new centralized "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 federal Freedom of Information Act passed in 1966 has its flaws, but it has

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stood up fairly well over the years. We think it would provide a reasonable foundation from which to structure a state law.

We can live with the approach of Section II of this bill which is entitled "Freedom of Information," even though we recognize some reluctance on the part of our colleagues to support it. The establishing of 7-day and 21-day time limits within which an agency must act on information requests could lead to a legitimizing of automatic delays by evasive agencies of government. That would be an abuse of the procedures in the bill, it seems to us, and would set Freedom of Information back instead of advancing it.

This section by itself does offer the basis for a reasonable public information bill, though it may not live up to its title in all respects.

Section III seems largely unneeded, though it would help the cause of open government to provide immunity from liability for civil servants who make information available to the public. Other portions of the section seem weighted more toward concerns of privacy than openness in government. Do we really need them in this bill?

We do not offer a line-by-line analysis of the bill's 47 pages here. We share the views of those who believe the measure is more complex than it has to be, and that if enacted in its present form would result in more confusion among government officials.

We thank the committee for its work. We hope any legislation this session delivers 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

THE LAW OFFICES
JOHN A. CHANIN
ATTORNEY AT LAW
FOUR SOUTH KING STREET
HONOLULU, HAWAII 96813

JOHN A. CHANIN

TELEPHONE
(808) 538-1165

February 11, 1988

REPRESENTATIVE WAYNE METCALF
Chairman
Committee on Judiciary
415 S. Beretania Street
Honolulu, Hawaii 96813

Re: **House Bill No. 2002 Relating To Public Records**

Dear Chairman Metcalf and Committee Members:

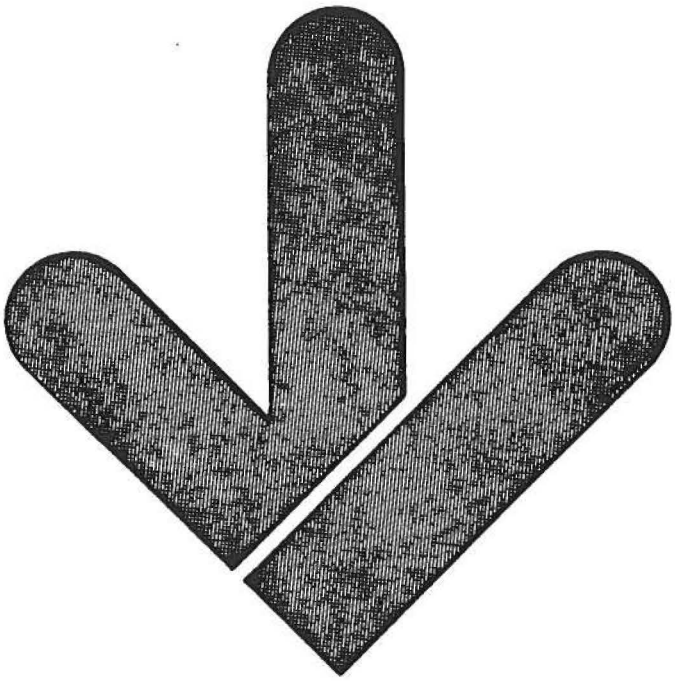
I am writing this letter which is intended to be a summary of my testimony before your committee on Thursday, February 11, 1988 with regard to H.B. 2002. I serve in the capacity as the chairman of the Hawaii Delegation to the National Conference of Commissioners on Uniform State Laws and in that capacity I have served as a member of the drafting committee for the legislation upon which H.B. No. 2002 is based. The drafting committee's work to a great degree drew from the Federal Privacy Act and is also the product of many years of drafting activity, hearings, debate and the like. Parenthetically Chapter 92(e), H.R.S. (Fair Information Practice) is taken from an early draft of the aforementioned uniform legislation. I am enclosing for your consideration and assistance a memorandum outlining the general provisions of the uniform act as these pertain to H.B. 2002. I have had an opportunity to thoroughly review H.B. No. 2002 including the amendments to the uniform act. I find that it will lend great guidance to the agencies which collect, maintain and disseminate individually identifiable records which fall within the purview of the act and I would be most happy to assist the committee in any way that the committee deems appropriate with regard to the furtherance of the committee's work in considering this most worthwhile legislation.

I remain

Very truly yours,

JOHN A. CHANIN
Chairman
Hawaii Committee for the Promulgation
of Uniform State Laws

HB 2002
Ag. 2/10/88



UNIVERSITY OF HAWAII

TESTIMONY

H.B. 2002
Relating to Public Records

Additional Testimony Presented to the
House Committee on Judiciary
February 10, 1988

by
Albert J. Simone
President

HB 2002
Ag. 2/10/88
6:30 p.m.

Mr. Chairman and Members of the Committee:

As we had indicated in our testimony presented on February 9, 1988, we would like to submit the following additional comments and observations on H.B. 2002 Relating to Public Records.

Section 13 of the Act, which enumerates the types of information and records not subject to disclosure by an agency, does not include an exemption for research records and data collected by University faculty, researchers and related personnel. Although research records involving individually identifiable, personal information are addressed in the Act in Sections 29 and 30, this limited definition would not appear to include the wide array of scientific and other research records maintained at the University. It is our understanding that the premature disclosure of such research records prior to the completion of the research project to which they pertain could inhibit significantly the individual's ability to conduct the research, his or her opportunity for publication of the results therefrom, and the University's ability to pursue its copyright and patent rights. Because of the importance of research to any institution of higher education, the University may wish to propose that an exemption from the disclosure requirements of the Act be added for such research records. Obviously, the supporting justification for such an exemption could be more thoroughly addressed by the Offices of Academic Affairs and Research/Graduate Education.

Section 36 (10) of the Act appears to require the identification of a single agency officer to be responsible for the

records of the agency. Because of the size and decentralized nature of the University, we may wish to propose that the University be permitted to designate several such officers at the various campuses within the University system and perhaps for the major departments within the Manoa campus. Because of the limited time frames called for by disclosure requirements of Section 12 of the Act and the reporting requirements of Section 36, it would appear that the imposition of all such duties on a single officer would not be feasible within the University system.

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

Before the House Judiciary Committee
Thursday, February 11, 1988, at 1:30 p.m.
State Capitol Room 328

We believe this is one of the most important bills in the legislature this year for it affects virtually every resident of this state in many different and perhaps unforeseen ways.

We commend the House Judiciary Committee for the attention it has given to this issue by holding interim and regular-session hearings. In addition, the Governor's Committee on Public Records and Privacy is also to be commended for its valuable, four-volume report and for the time and direction provided by its committee members, many of whom were volunteers.

Because we believe this bill is so important, a Honolulu Branch member, using personal funds, commissioned a nationally recognized expert on privacy issues to critique it.

The expert is Robert Ellis Smith, publisher of Privacy Journal since 1974, in which capacity he regularly reviews legislative proposals and court decisions. Since 1975 he has also regularly published a compilation of state and federal privacy laws.

Smith's page-by-page analysis of this Committee's 47-page bill and his biography are attached. We urge your careful study and consideration. In general, he viewed the bill as worthy of support by those concerned about openness in government and protection of personal privacy.

To complement Mr. Smith's expert views from the East Coast, however, the Honolulu Branch would like to offer the views of some laypersons from Hawaii. In addition to the Branch's longstanding interest in open government, it has a special interest in this bill because the most personal and intimate records held by Hawaii's governmental agencies are often women's records.

This special interest in the handling of these intimate records has been heightened recently by the scandal detailed in the Legislative Auditor's report on state and county hospitals.

Because of this new concern of its female members and its longstanding interest in open government, the Honolulu Branch believes it can support this bill only if the following important changes are made:

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11:30 a.m.

1. the slative intent of this should be clearly spelled out and t.. purposes (p. 1) broadene.. This intent and purpose should incorporate the language about privacy from the Hawaii Constitution and its legislative history and the open-government provisions of H.R.S. 92-1.

2. The language exempting personal records from public disclosure (item 12 on page 10) should be changed to read:

> (12) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

3. All references relating to research purposes should be deleted (p. 24 on plus pp. 2-4) unless they explicitly specify any public purpose to be gained, any compelling state need, any limitations on the public nature of the researchers and a mandate for public disclosure about the research.

Unless these changes are made, the medical records of Agent Orange victims who have been promised confidentiality by the State Department of Health could conceivably be reviewed by the manufacturers of dioxin.

Does the Committee actually intend to permit the medical records of female patients in the state and county hospitals to be open to scrutiny by the IUD manufacturers or other non-public entities?

4. The compilation of records maintained on individuals (p. 31) shall be made available to the public (as is the federal practice) rather than shall be made available to the ombudsman upon request. This compilation should be made available by publication in general circulation newspapers in the state and/or through direct mailing to each taxpayer in the state.

In addition, a compilation of all other records maintained by government agencies should similarly be compiled and made available to the public.

Thus provision (b) at the bottom of page 5 should also be deleted. No secret dossiers on businesses are needed by Hawaii's government agencies.

5. The Office of Information Practice (p. 32) should be moved from the executive branch--otherwise this bill merely substitutes a faceless bureaucrat not subject to Senate confirmation for the attorney general.

This Office should be moved to the legislative branch, perhaps as a sub-unit of an expanded legislative auditor's office and function. Because of the competing constitutional rights involved in this multi-faceted issue, the head of this office should be an attorney with demonstrated ability in constitutional issues. Hawaii's citizens--especially women and infants--

remember what ened when the State Dep nt of Health was headed by a polit. al appointee with no medic.. expertise.

Moreover, the legislature should change this bill so that this Office should become an advocate for the citizens of this state, rather than a rubberstamp for the governor. The legislature should also be able to directly insure proper staffing and funding for this Office.

6. The interpretive rulings (bottom of p. 34) requested by a government agency from the Office of Information Practice should be compiled and made available to the public. This change is essential to prevent a recurrence of the attorney general's practice of issuing via secret memo policy interpretations on public records to government agency heads.

7. The provision stating "Information from motor vehicle registration lists which is necessary for recall purposes" should be stricken (p. 14). As every housewife on this Island knows, recalling a car is no more difficult that recalling an electric coffeepot.

The non-disclosure requirement of motor vehicle registration was originally instituted to answer numerous complaints from women and we believe that it should be continued -- for the same reason and for an additional one. The new reason is that the motor vehicle registration lists made public in other states are being computer-matched by the federal government to ferret out young adults who have failed to register for the draft.

The secrecy of the motor vehicle registration information should be held over until this Committee scrutinizes the complex issue of computer-matching between agencies within Hawaii and between Hawaii's agencies and those of the U. S. government.

Thank you for considering this testimony.

Honolulu Branch, AAUW

Beverly Ann Deepe Keever,
Open-Government Chair

Rebecca Ryan Senutovitch, President

STATEMENT OF ROBERT ELLIS SMITH,

PUBLISHER, PRIVACY JOURNAL

attached to the testimony of

HONOLULU BRANCH, AMERICAN ASSOCIATION OF UNIVERSITY WOMEN

on

H.B. 2002

before

HOUSE JUDICIARY COMMITTEE

February 11, 1988

PRIVACY JOURNAL

an independent monthly on privacy in a computer age

P.O. Box 15300
Washington, D.C. 20003
(202) 547-2865

ROBERT ELLIS SMITH
PUBLISHER

Robert Ellis Smith is an attorney and a journalist who publishes Privacy Journal, an internationally recognized newsletter on new technology and its impact on personal privacy. He founded the newsletter in 1974. Since then he has also published annual compilations of state and federal privacy laws.

A major portion of his research, advocacy, and reporting involves governmental recordkeeping and privacy protections. He has compiled a clearinghouse of information on the subject and monitors legislative activity and court cases. Smith maintains a network of civil libertarians, government officials, personnel officers, attorneys, and others who keep him posted on new developments.

Smith has testified before the Privacy Protection Study Commission, the House Subcommittee on Government Information, the House Subcommittee on Civil Rights, the Senate Banking Committee, as well as the Constitutional Convention in Rhode Island, the privacy committee in Indiana, the District of Columbia Council, the privacy task force in Iowa, the Joint Committee on Technology in Florida, and a legislative committee in Michigan on proposed legislation.

In 1984 the Office of Technology Assessment in Congress named Smith to investigate how seven selected states implemented fair information practices (privacy protection). His 100-page report was incorporated into the OTA's study of federal information systems.

Smith is the author of Privacy: How to Protect What's Left of it, which was nominated for the American Book Award in 1980. He has also written Workrights, a 1984 book on individual rights in the workplace, and Celebrities and Privacy, a 1985 report on privacy claims of newsowrthy persons vs. freedom of the press.

He is a graduate of Harvard College (1962) and Georgetown University Law Center (1976). From 1970-73 he served as assistant director of the Office for Civil Rights in the U.S. Department of Health, Education, and Welfare. Part of his responsibility was enforcement of the Freedom of Information Act. He served for three years as a member of the Human Rights Commission of the District of Columbia and as a member of the privacy committees of the American Bar Association and the American Federal of Information Processing Societies. He has lectured on privacy in 40 states, in Quebec, Paris, and Amsterdam.

STATEMENT OF ROBERT ELLIS SMITH,
PUBLISHER, PRIVACY JOURNAL,
WASHINGTON, D.C.,
ON HR. 2002.

A preamble setting out the thrust of the legislation would be helpful.

Page 3 - The definition of agency should not include "officer" or "official." The file cabinet or personal notes of an individual in government service should not be covered. There seems little rationale for excluding the legislative branch from this legislation (although most other states and the federal government do so).

Page 5 - There should be added a subsection (14), "Any other information not expressly exempted from mandatory disclosure in this chapter."

Page 6 - A deadline of seven days seems unrealistic. Why not 21 days unless a requestor labels his or her request urgent? A seven-day limit may result in haphazard fulfillment of requests. An alternative would be to require acknowledgement of the request within seven days, similar to federal law.

Page 8 - Endangering the life or safety of an individual should be grounds for non-disclosure. The federal freedom of information act does not include this provision, and this has been a weakness (see Kiraly v. FBI, 728 F. 2d 273 (6th Cir. 1984). In that regard, the legislature may want to reserve the right to limit requests for information by convicted felons in prison to one per year. Requests from prisoners have burdened federal agencies.

Page 9 - I suggest subsection (4) read, "if disclosure would reveal answers to questions."

Page 10 - I suggest language here protecting the confidentiality of library borrowers' records (see Cal. Govt. Code sec. 6254(j)

or, preferably 's. Stat. sec. 09.25.14(Perhaps the home addresses of government employees in sensitive positions should also be protected.

The seven-day rule will be difficult to comply with, in section (b) on page 10.

Page 12 - A requirement that a lawsuit be filed in the jurisdiction where the agency headquarters or the record is located is onerous, particularly in a state of islands. There should be shared jurisdiction where the complainant resides.

Page 13 - This provision should be reworded, to state, "An agency shall not disclose individually identifiable information unless. . . ." This reverses the emphasis to protect personal information, not to require disclosure of it. The current wording seems to mandate disclosure of certain personal information more than the disclosure of non-personal information (in section -13).

Page 14 - The verbiage in Section -22 creates confusion. In subsection (a), the sentence should be ended at "personal privacy." The public interest vs. privacy interest balancing creates a different standard than the "clearly unwarranted" standard, and therefore is confusing. The shorter language means that disclosure may not be made if it would (1) create an invasion of privacy and (2) create an invasion that was "clearly unwarranted." This language tracks the federal law and permits Hawaii courts to rely on interpretations by other courts of the federal language. Similarly, subsection (b) seems to create a third standard. Further, it would bar disclosure of certain personal information unless compelled by <u>imminent</u> threat to public health and safety. This would bar disclosure of the mental illness of a school bus driver or 20-year-old information about compulsive gambling by a candidate for public office or the salary of the University football coach. Is this intended? Also, is the word <u>examples</u> intended? Isn't <u>exceptions</u> the proper word?

Page 17 - Shouldn't the non-disclosure of donations be limited to donations by individuals?

Page 19 - The Limitations on individual access are excessive, in view of the fact that this is information about the requstor himself or herself that is being sought and in view of the fact that information not subject to disclosure may be deleted before the file is released. I suggest adding to subsection (1) at the bottom of page 19 the following: (5), (6), (7), (9) and (11).

Page 21 - The seven-day rule seems unrealistic.

Page 26 - I suggest that the language in -30 end at "violation of law." Courts are not apt to abuse this authority, and if they do the individual has opportunity to intervene.

Page 27 - I suggest that a section be inserted before section -32 saying, "Whenever a matter in a civil suit filed in a court of this state is referred to a private dispute mechanism, the information in the case shall be presumptively accessible and subject to disclosure under section -11, unless a court shall find disclosure of the information not in the public interest. Disclosure of matters involving a governmental agency, the expenditure of government funds, or the conduct of public officials shall be considered in the public interest." This is intended to protect the public's right to know in significant cases that are resolved in private. It does not cover cases that are initiated or settled without first being filed in a court, like matters in private arbitration. It also would permit a court to withhold information about a family matter or purely private dispute in which the public has little interest.

Page 29 - I suggest that the drafters include provision for disciplinary action against government officials who violate the act - demotion, withholding of pay, fines, or dismissal. Experience has shown that criminal sanctions are rarely invoked (because they

are the "nuclear bomb" in the arsenal of sanctions); therefore they are not a strong deterrent. Is it appropriate to imprison a government official who violates the act? Isn't loss of employment more appropriate, and more feared?

Page 31 - Experience in the ten other states with fair information practices acts shows that the annual reports are a paperwork burden on government agencies with little real value to the public. Reports every five years are more appropriate. The most valuable information, once a law like this is enacted, is the initial publication of an agency's systems of records. After that, updates every five years seem adequate. Of more importance than annual reports is a requirement that the state publish the information in a meaningful format and give it wide dissemination.

For guidance in successful privacy legislation, see Minn. Stat. Ann. sec 15.162, Calif. Civil Code sec. 1798, and N.Y. Pub. Off. Law sec. 91.

February 7, 1988

Painting and Decorating Contractors Association of Hawaii

CHAPTER OF THE PAINTING AND DECORATING CONTRACTORS OF AMERICA

1259 SOUTH BERETANIA STREET • HONOLULU, HAWAII 96814 • TELEPHONE 536-3561

February 10, 1988

Judiciary Committee,
House of Respresentatives,
Fourteenth Legislature, State of Hawaii;
State Capitol,
Honolulu, Hawaii 96813.

Attention: Representative Wayne Metcalf, Chairman.

RE: H.B. NO. 2002, RELATING TO PUBLIC RECORDS.

Thank you for your cordial invitation to present our views before your Committee concerning H.B. 2002. As the construction industry (or at least those contractor associations and the construction labor unions which are members of the Hawaii Construction Industry Association)---which we have the privilege of representing at this hearing--has been one of the groups having a great deal of interest in the rationalization of our present conflicting legal provisions pertaining to public records and privacy, we have been looking forward to seeing the outcome of your Committee's efforts.

We are truly impressed. We don't pretend to have the expertise or the wisdom to render meaningful judgement on each or any of the many and various aspects of H.B. 2002, but, after having waded through parts of the report of the Governor's Committee, and then through the bill itself, we are now fully satisfied that our interests and concerns have been accorded sympathetic hearing and fair consideration. We therefore are fully supportive of H.B. 2002 in its general approach toward separating public records from matters deserving the protection of privacy laws.

But we are here not only to testify that we are in favor of the bill. What really moved us to come was the need we felt to say, "Thank you" to this Committee, and also to the persons who contributed so much of their valuable time and considerable talents to serve on the Governor's Committee, and to all the other people in the community who bothered themselves into making their inputs a part of the record on this very important matter.

Our experience with regard to our limited involvement in this law-making process has been a very gratifying one.

Respectfully yours,

Etsuo Shigezawa

Etsuo Shigezawa, Chairman,
Government Relations Committee;
Hawaii Construction Industry Association.

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Ag. 2/11/88
11:30

TESTIMONY

BEFORE THE

HOUSE JUDICIARY COMMITTEE

February 11, 1988

ON

H.B. 2002

RELATING TO PUBLIC RECORDS

Presented by Jon M. Van Dyke

on behalf of

THE HAWAII FEDERATION OF PHYSICIANS AND DENTISTS
407 Uluniu Street
Kailua, Hawaii 96734

The Hawaii Federation of Physicians and Dentists is pleased to offer its support for H.B. 2002 in its present form. The present draft of this statute is carefully written to balance the needs of citizens to gain information about the functioning of the state government with the equally important need to preserve the privacy of individuals on matters that are personal and private in nature.

The Federation is particularly pleased that the confidential relationship between doctor and patient will be protected through Section 22(c)(1). Information relating to a patient's diagnosis, condition, treatment, or evaluation could be released according to Sections 21 and 22 only pursuant to a court order or legislative subpoena and then only if the interest of the public "in disclosure is compelled by an imminent threat to public health and safety."

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The Federation is also pleased that Section 22(c)(8) provides substantial protection to information gathered in proceedings related to the application for and revocation of professional licenses. The exceptions are items that have been and should remain in the public domain. Pursuant to Section 22(c)(8)(c), some harm to individual reputations may result by the release of information about complaints against health care professionals that prove to be unfounded. This burden must be shouldered by these professionals in order to ensure the public that the medical profession is properly policing its members and thus maintaining the highest possible standards of care.

In summary, H.B. 2002 is a carefully drafted and well balanced piece of legislation that provides the public with access to information without sacrificing valid privacy interests.

League of Women Voters

49 SOUTH HOTEL STREET, SUITE 314 HONOLULU, HAWAII 96813

TESTIMONY TO HB#20002 RELATING TO PUBLIC RECORDS

The League of Women Voters commends your committee for the introduction of legislation designed to provide more openness to government. Toward that end, we urge you to include a statement of intent similar to that of Chapter 92 (concerning government meetings) to clarify and complement Part I -2, which states the purposes of this legislation.

The intent of the legislation should be clear throughout. We therefore suggest that consideration be given to streamlining this omnibus bill, which we find to be rather unwieldy. For example, Sec. II page 8 lists information not subject to disclosure, and Section III page 15 lists information in which an individual has a significant private interest. Adding a phrase such as "all other areas should be considered open to public scrutiny " clearly defines the intent of the law. In cases where agencies must exercise discretion, a growing federal case law is defining the boundaries of privacy and is therefore available for guidance.

We differ with one intent of the legislation, that is to obviate inclusion of the legislature from being subject to this proposed law. 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.

In summary, we applaud certain sections of the bill, and question the wisdom of others. The definition of government records (Sec.I p. 3 l.10) is a good one. Specifying the inclusion of information regarding government employees (Sec. III-21(1) p. 13 l. 6) should eliminate controversy, as should the weighing of public interest against personal privacy (Sec. III-21(11) p. 14 l. 14 and Sec. 22) in a clearly defined balancing test. On the other hand, stating that the public interest must be motivated by an imminent threat to public health and safety (Sec. III -22(b)

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Limiting government record keeping to specifically authorized purposes (Section III-28 p. 23 l. 4) is consonant with League position that government should gather only information that is true and confined to narrowly defined purposes. League has also maintained that police records should be more accessible, and so applauds the inclusion of open police rules and regulations as proposed in Ch.52-9, p.44, l.10.

We question, however, the creation of another layer of bureaucracy in the establishment of an Office of Information practices (Sec. III-41, p. 32 l. 13). Couldn't this oversight responsibility be assigned to an existing office, such as the state Ombudsman?

A companion piece of legislation (HB #2006) provides more access for neighbor island residents, but the provision of court jurisdiction (Sec.II-14(c) p. 12 l. 15) would seem to inhibit those residents from filing suit against a state agency in their own county or judicial circuit.

Finally, League welcomes the inclusion of specific rules regarding adoption records (#578-15 p. 41 l. 15). The revision of state statutes regarding openness of government records is long overdue, and the League again commends the committee for this legislation.

---oOo---

League of Women Voters

49 SOUTH HOTEL STREET, SUITE 314 HONOLULU, HAWAII 96813

TESTIMONY TO HB #2006 RELATING TO THE ESTABLISHMENT OF A STATEWIDE FAIR ACCESS COMMISSION AND MAKING AN APPROPRIATION THEREFOR.

The League of Women Voters of Hawaii applauds this legislation as being long overdue. We suggest that the commission as proposed (Sec. II p. 2 l. 14) consist of seven members from: East Hawaii, West Hawaii, Maui, Lanai, Molokai, Kauai and Niihau to ensure adequate representation of neighbor island residents. This provision should be specifically stated in the legislation.

TESTIMONY TO HOUSE RESOLUTION #11 AND HOUSE CONCURRENT RESOLUTION #8 RELATING TO STATE ARCHIVES

This study seems to be needed; state archives should subsequently adopt rules and regulations regarding retention of records. Disposition of confidential information should fall under proposed legislation (HR 2006).

TESTIMONY TO HOUSE RESOLUTION #9 AND HOUSE CONCURRENT RESOLUTION #6 RELATING TO PUBLIC INFORMATION

A public records index, similar to the "Blue Book" of other states, would facilitate public access to information. The League endorses this resolution.

TESTIMONY TO HOUSE RESOLUTION #10 AND HOUSE CONCURRENT RESOLUTION #7 RELATING TO A STATEWIDE DATA BANK

This is probably an idea whose time has come, but the League again asserts that all government information should be gathered for very narrowly stated purposes, and data inserted into a file must be factual and true.

HEMOPHILIA FOUNDATION OF HAWAII
A National Hemophilia Foundation Chapter

347 N. Kuakini St.
Honolulu, Hawaii 96817
Telephone: (808) 521-5483

February 8, 1988

Testimony Re: H.B. 2002 Relating to Public Records

Chairman Metcalf And Members Of The House Committee On Judiciary:

My name is Dorothy Ono. I am the President of the Hemophilia Foundation of Hawaii(HFH), the only agency in Hawaii solely focused on support for persons with Hemophilia.

As you are probably aware, our Hemophilia population has been identified as an "at risk" group for AIDS. Because persons with Hemophilia in Hawaii are relatively small in number, we follow closely any proposed legislation that has bearing on public records. We are particularly interested in issues relative to confidentiality.

H.B. 2002 Relating to Public Records presents us with an array of concerns. The concerns are:

1. On page three, line seven, are state purchase-of-service agencies included in the definition of "agency?"

2. On page three, lines 12,13, and 14, appear vague and, therefore, dangerous relative to confidentiality.

3. On page four, line 21, we don't understand the [A.

4. On page seven, line 17, add <u>postmarked</u> before within.

5. On page 14, line 16 through 20, worry us. What and who shall be the determiners?

6. On page 15, line nine, does "at any facility" include state purchase-of service agencies?

7. On page 18, line nine and 10, what does "and other identifying particulars" include?

8. The entire 24th page, in our opinion, is difficult to grasp; therefore, page 24 is dangerous relative to confidentiality.

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9. Lastly, on page 45, line 20, what and who shall be the determiners for the office of information practice?

In conclusion, we emphasize the importance of confidentiality relating to public records. We know that confidentiality must be ensured if public health efforts in areas such as AIDS are to be successful.

Thank you for allowing us the opportunity to share our concerns with you. We welcome any and all opportunity to participate in these matters of interest and concern to all of us.

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

Feb. 11, 1988

The Honorable Wayne Metcalf
Chairman of House Judiciary Committee

Mr. Chairman and Committee Members:

A few weeks ago, Gov. John Waihee said: "As I said in my inaugural address, this will be an open government, a government to which the people of our state will have access."

We hope the Legislature and the executive branch will join hands to make the governor's statement a reality.

The Hawaii Chapter of the Society of Professional Journalists, Sigma Delta Chi, wants to thank you for the opportunity to testify on H.B. 2002 -- a measure important not only to us, but for the public at large. As you may see from our title, we are a group of journalists and people in affiliated professions.

In general, we believe H.B. 2002 is a step in the right direction. Whether that step becomes large enough to place government in the sunlight or leave it in the shadows is up to you. It is not an enviable task.

But unfortunately, we feel H.B. 2002 doesn't take that giant stride to ensure that people know what is going on in their government or how their money is being spent. If it can be changed to permit more access to government records (as outlined below), we can support the measure.

H.B. 2002 is patterned after the Uniform Information Practices Code. To our knowledge, no state has adopted the uniform code, and the American Bar Association didn't give the proposal its blessing, principally because of criticism by the news media.

We favor the approach taken by the federal Freedom of Information Act (FOIA) because:

1. The presumption in the FOIA is in favor of openness and says all government records shall be open, except for a few exclusions. H.B. 2002 takes a different tack and makes a presumption more in favor of privacy.

We believe a stronger preamble is needed for this chapter -- something akin to 92-1 HRS, the basis for the Sunshine Law.

2. The FOIA is simple in its construction, giving only a few exemptions. H.B. 2002, on the other hand, is far more complex, and, we fear, much too restrictive.

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3. The link between disclosure and privacy has not been severed in H.B. 2002. This will lead to more confusing debate on the subject. In this bill, privacy dictates disclosure -- an approach opposite that of the interplay between the FOIA and federal Privacy Act.

Under federal law, people can get access to records about themselves and correct them if the information is releasable under FOIA. In essence, disclosure rules privacy in federal law. But in H.B. 2002, privacy controls disclosure.

4. The penalties for release of information in H.B. 2002 appear onerous. We feel this will discourage government workers from disclosing information. Federal law is different. It places penalties on government officials for wilfully failing to disclose information under FOIA and the Privacy Act.

The FOIA is a well-tested law that has proved helpful to the public. There is ample case law developed in the federal courts on its application. No one has seen the uniform code in action and can predict its results.

The FOIA has its obvious drawbacks because it isn't closely tied to local government records. For example, state government doesn't have a CIA or national security interests. However, we feel there is enough similarity between federal and local records -- such as tax, law enforcement and welfare information -- to craft a new bill.

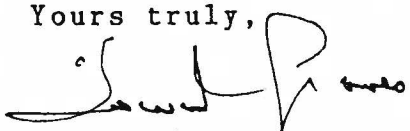
As to creation of the Office of Fair Information Access, we take no position, but point out that the need for such an office should be established to ensure wise use of taxpayers' money. If established, the office should be separate from the governor's office and placed in the legislative branch.

We have attached our detailed responses to H.B. 2002.

In retrospect, creation of Chapter 92E (state privacy code) was an unwise move. It has proved to be a poor and troublesome law. At the time, there was a rush by lawmakers to implement the 1978 constitutional amendment on privacy. We hope there will not be the same pressures this time. The public deserves a well-drafted law that gives it confidence in its government, not one that leaves taxpayers in the dark.

Thank you for your time and attention.

Yours truly,



Howard Graves
President

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

Analysis of H.B. 2002

Page 2 -- Part I, Sec. -2(4)

This places emphasis on privacy over public interest. Suggested wording:
"(4) Protect public access to information when public interest outweighs individual privacy; and"

Page 3 -- Part I, Sec. -4. Definitions

"Individual" is not defined. Without this definition, it might be determined that corporations and other inanimate objects have a personal right to privacy.

"Research purpose" might include a public interest benefit to prevent undue intrusion by industrial or business associations into medical or other sensitive information.

Pages 4-17. Parts II & III

There are four lists of records at different levels of access. There should only be one list of records exempt from disclosure as in the federal Freedom of Information Act. The multiple lists can only cause confusion and provide a limitation on disclosure by privacy. We have no objection to inclusion of medical records in a list of exemptions.

There is another problem with the specific list of records. Does it mean that other regularly open records not listed in Part II, Sec. -11 -- such as police arrest blotters -- are not readily available and are subject to a 7-day waiting period? No one is capable, at present, of listing all the records that fit into this section.

So at least, the first paragraph in Sec. -11 should include the wording: "including but not limited to:"

Page 6 -- Part II, Sec. -12(c & d)

If the record isn't listed for immediate access, does that mean that requesters have to file written requests? Are informal requests allowed?

Page 7 -- Part II, Sec. -12(e)

Charge of "prevailing commercial rate for copying." Vague and subject to differing opinions. Set copying fees already are too high and can discourage requests. They now range from 25 cents to

$1 a page. The federal government allows for waiver of the fees in cases of public interest. California doesn't charge for copies for the news media.

Page 8 -- Part II, Sec. -13

The FBI, IRS, DEA and other federal investigatory agencies have performed under the FOIA without any adverse results. It is inconceivable that local police departments can't operate under the same rules.

We recommend changing subsection 1 to read as the federal law:
"(1) Investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;"

"(2) Inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;"

Eliminate subsections (3) through (8)
The federal government is involved in litigation, licensing, procurement, collective bargaining, eminent domain, technical information and proprietary information. Yet it does not restrict these items in its FOIA.

If those subsections are eliminated, perhaps the end part of subsection (5) should be retained about availability of employee rosters involved in union challenges.

Create a subsection derived from FOIA:
"(3) Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;"

Page 10, Part II, Sec. -13(12)

This is one of the links to the privacy section of the bill. It should be eliminated. It creates unnecessary interweaving that works against disclosure.

If this is eliminated, the bill should retain language on Page 11, Sec. -13(12)(f) allowing segregating of private from public information.

Page 13 -- Part III, Sec. -21 identifies more records that should be open to public. We recommend that this be merged with

the immediately accessible information listed in Part II, Sec. -11.

We do question release of motor vehicle registration information, just for recall purposes (Sec. -21(11)). These records had always been available prior to 1979 when a person presented a request to the city licensing bureau located at the Honolulu Police Department and signed a form. These records contain information about what institutions provided loans for vehicles -- which usually is not available elsewhere.

Pages 14-15 -- Part III, Sec. -22

This whole part is very troublesome. Subsection(a) purports to set up a balancing test. But the wording in subsection (b) nullifies it by creating an impossible standard for most people to meet. It does not match the Uniform Information Practice Code.

In general, we recommend that the privacy portion of the bill only relate to a person's right to access information about himself and correct or update the information. It should not be used to restrict other' rights to get government information.