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GOVERNOR OF HAWAII

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In reply, please refer to:
File:

Senate Committee on Judiciary and Labor

SB 3075, Relating to Epidemiologic Investigations

Testimony of Chiyome Leinaala Fukino, M.D.
Director of Health

February 29, 2008, 1:30 p.m.

Department's Position: This is an administration proposal that the Department strongly supports.

Fiscal Implications: None

Purpose and Justification: This measure would allow the Department the authority to collect samples necessary for epidemiologic investigations. If access during an investigation was denied, a representative of the Department could apply for a warrant in district court. The interruption, containment, and prevention of outbreaks of dangerous diseases depends on timely epidemiological investigations that include determining the source and tracking the spread of disease. Collection and analysis of plant, animal, food, or environmental samples may be necessary to identify the source or specific type of microbiological or chemical contamination. Analytical testing results provide essential data needed to determine how to interrupt an outbreak as well as to prevent future outbreaks. In the case of serious or life-threatening diseases, rapid determination of the cause is critical.

The Centers For Disease Control and Prevention estimates that each year there are 76 million cases of foodborne illness in the United States, resulting in 325,000 hospitalizations and 5,000 deaths nationwide. Locally, recent outbreaks including *E. coli* O157:H7 and *Salmonella,* which have stemmed from contaminated produce and other food items, have demonstrated the need for the Department to be given the ability to efficiently collect samples to quickly determine the cause and source of the outbreak

in order to institute measures to protect the welfare of the public. This measure is necessary for the protection of the public's health because epidemiological investigations have been impeded by the refusal of individuals to allow Department of Health investigators access to property or permission to obtain samples necessary for analysis. Specific examples include an epidemiologic investigation that occurred from April through July 2007 of an E. coli outbreak on the island of Kauai. This investigation was impeded by the reluctance and subsequent refusal of small business owners (farmers) to allow the Department to collect the samples necessary to determine the source of the outbreak. In 2001, a Salmonella disease outbreak also occurred in which access to environmental samples was denied. The lack of timely access to samples resulted in a lengthier investigation and possibly additional cases of disease.

Hawaii would not be alone in granting this authority. Other states, including California and Texas, allow authorized persons the right of entry to collect samples during the course of epidemiologic investigations. If access is denied, California Department of Health representatives can arrest violators and Texas Department of Health representatives can apply to obtain a warrant for access. The Hawaii Department of Agriculture has also been granted the right of entry to maintain pest control or eradication programs via the Hawaii Revised Statutes (HRS), §141-3.6. If entry is refused, the Department of Agriculture is authorized to apply for a warrant to enter the premises. The Department of Agriculture's purview is limited to diseases that are injurious to the environment, vegetation of value, and domestic animals and are generally not applicable to epidemiologic investigations conducted by the Department of Health

Protection of the public's privacy is a high priority within the Department and would be ensured via the search warrant process as well as existing statutory requirements regarding the treatment of confidential information received by the Department during the course of an epidemiologic investigation (HRS §321-29e). If entry onto property is refused and a search warrant is sought, judicial oversight would ensure that there is sufficient cause to allow for the collection of samples before a warrant is granted. Thank you for the opportunity to testify.

BY FAX: 586-6659

Committee:	Committee on Judiciary and Labor
Hearing Date/Time:	Friday, February 29, 2008, 1:30 p.m.
Place:	Room 016
Re:	*Testimony of the ACLU of Hawaii in Opposition to S.B. 3075, Relating To Epidemiologic Investigations*

Dear Chair Taniguchi and Members of the Committee on Judiciary and Labor:

The American Civil Liberties Union of Hawaii ("ACLU of Hawaii") writes in opposition to S.B. 3075. The proposed bill, which has the admirable purpose of protecting the health of Hawaii's citizens, would violate the Fourth Amendment of the U.S. Constitution as well as Article I, Sections 6 and 7 of the Hawaii Constitution.

This bill is based on the premise that no warrant is required unless a landowner expressly refuses to allow a health inspector on her/his property. This is incorrect.

- *Administrative Searches and the Fourth Amendment*

The Fourth Amendment to the United States Constitution applies to "administrative" searches (*e.g.*, searches of a person's property for epidemiological purposes), in much the same way as it applies to searches for evidence of criminal activity. Although the standard for issuance of a warrant for an administrative search is less stringent than that for a search warrant for evidence of a crime, a warrant is required before the search can take place.

If this Committee believes that health inspectors need greater access to private property to protect the public health, then the ACLU of Hawaii respectfully recommends that this Committee pass a bill establishing procedures to obtain administrative warrants (rather than giving health inspectors blanket authority to conduct warrantless searches). These procedures must, at a minimum, provide for the following:

- Procedures for ensuring that any administrative search is limited in scope. A health official searching for tainted water, for example, must not be allowed to search an individual's bedroom drawers. If, during the administrative search, the government official comes across contraband in plain view, that government

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official must obtain a search warrant from a magistrate before engaging in a more thorough search of the property.

- Procedures for ensuring that the government official(s) conducting the search do not violate property owners' and tenants' Fifth Amendment rights against self-incrimination.

- *United States Supreme Court Cases Discussing Administrative Searches*

A search or seizure must generally be based on some degree of specific cause to be constitutional. Indeed, the general rule is that administrative agencies must obtain a warrant to search a premises. In *Camara v. Municipal Court of the City and County of San Francisco*, 387 U.S. 523 (1967), the U.S. Supreme Court held that administrative inspections of private housing for compliance with municipal codes required a search warrant. In discussing the probable cause necessary to obtain a warrant for an area inspection, however, the Court stated that there only need be probable cause to issue a warrant, not probable cause to believe there is a violation. So long as "reasonable legislative or administrative standards for conducting an area inspection are satisfied" there is probable cause to issue a warrant to inspect a specific premises, regardless of whether the structure is presumed to be in violation.

Under the *Camara* approach, the Department of Health or other state agency must still obtain a warrant, but may do so based on reasoning justifying the general inspection of private property. The agency need not show that a particular property owner is in violation of the law, rules or regulations to obtain a warrant. This is what as known as the administrative exception to the probable cause requirement.

It is true that the U.S. Supreme Court has, subsequent to *Camara*, found that there are *limited circumstances* when a search may occur pursuant to a regulatory or administrative plan, even without a warrant and without particularized probable cause. Such limited administrative searches may be conducted at the border, *see, e.g., United States v. Martinez-Fuerte*, 428 U.S. 543, (1976), in airports, *see United States v. Davis*, 482 F.2d 893 (9th Cir, 1973), and in public buildings, see *McMorris v. Alioto*, 567 F.2d 897 (9th Cir. 1978) (courthouses).

However, these cases, and the limited exceptions contained therein, do not authorize the blanket warrantless administrative searches contemplated by S.B. 3075. The Fourth Amendment and Article I, Sections 5 and 6 prohibit violating individual rights in this manner. In *Camara*, the

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U.S. Supreme Court made clear that the "administrative inspections" exception is to be construed very narrowly. In deciding that housing inspectors could search rental properties for violations of the housing code, the Court stressed that a search for housing code violations was aimed at preventing dangerous conditions that could threaten the safety of the whole neighborhood and that only a blanket search would ensure the safety of the neighborhood. The Court never said that the government could undertake a program of administrative inspections that are not based on reasonable suspicion of a violation of the law. And significantly, the Court emphasized that the agency must still obtain an administrative warrant to protect against arbitrary inspections.

Even if the contemplated administrative search scheme fell within the limited category of searches exempted from the warrant requirement, it would still fail constitutional scrutiny. To be clear, administrative searches are *not* an exception to the Fourth Amendment's standard of reasonableness. *Camara*, 387 U.S. at 910. "To meet the test of reasonableness, an administrative screening search must be as limited in its intrusiveness as is consistent with satisfaction of the administrative need that justifies it." *Davis*, 482 F.2d at 910. The proposed bill — which is overly broad and fails to articulate any meaningful standard — fails this test.

Based on these serious constitutional defects, the ACLU of Hawaii respectfully requests that the Committee defer the bill.

The mission of the ACLU of Hawaii is to protect the fundamental freedoms enshrined in the U.S. and State Constitutions. The ACLU of Hawaii fulfills this through legislative, litigation, and public education programs statewide. The ACLU of Hawaii is a non-partisan and private non-profit organization that provides its services at no cost to the public and does not accept government funds. The ACLU of Hawaii has been serving Hawaii for over 40 years.

Thank you for this opportunity to testify.

Sincerely,

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ACLU of Hawai'i

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