
A BILL FOR AN ACT

RELATING TO CONFIDENTIALITY OF FORENSIC MENTAL HEALTH
EXAMINATION REPORTS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The purpose of this Act is to amend the law
2 governing the confidentiality of the reports of examinations of
3 defendants with respect to physical or mental disease, disorder,
4 or defect, fitness to proceed, and penal responsibility.

5 SECTION 2. Section 704-404, Hawaii Revised Statutes, is
6 amended to read as follows:

7 "**§704-404 Examination of defendant with respect to physical**
8 **or mental disease, disorder, or defect.** (1) Whenever the
9 defendant has filed a notice of intention to rely on the defense
10 of physical or mental disease, disorder, or defect excluding
11 responsibility, or there is reason to doubt the defendant's
12 fitness to proceed, or reason to believe that the physical or
13 mental disease, disorder, or defect of the defendant will or has
14 become an issue in the case, the court may immediately suspend
15 all further proceedings in the prosecution. If a trial jury has
16 been empanelled, it shall be discharged or retained at the

1 discretion of the court. The discharge of the trial jury shall
2 not be a bar to further prosecution.

3 (2) Upon suspension of further proceedings in the
4 prosecution, the court shall appoint three qualified examiners
5 in felony cases and one qualified examiner in nonfelony cases to
6 examine and report upon the physical and mental condition of the
7 defendant. In felony cases the court shall appoint at least one
8 psychiatrist and at least one licensed psychologist. The third
9 member may be a psychiatrist, licensed psychologist, or
10 qualified physician. One of the three shall be a psychiatrist
11 or licensed psychologist designated by the director of health
12 from within the department of health. In nonfelony cases the
13 court may appoint either a psychiatrist or a licensed
14 psychologist. All examiners shall be appointed from a list of
15 certified examiners as determined by the department of health.
16 The court, in appropriate circumstances, may appoint an
17 additional examiner or examiners. The examination may be
18 conducted on an out-patient basis or, in the court's discretion,
19 when necessary the court may order the defendant to be committed
20 to a hospital or other suitable facility for the purpose of the
21 examination for a period not exceeding thirty days, or such
22 longer period as the court determines to be necessary for the

1 purpose. The court may direct that one or more qualified
2 physicians or psychologists retained by the defendant be
3 permitted to witness the examination. As used in this section
4 the term "licensed psychologist" includes psychologists exempted
5 from licensure by section 465-3(a)(3).

6 (3) An examination performed under this section may employ
7 any method that is accepted by the professions of medicine or
8 psychology for the examination of those alleged to be affected
9 by a physical or mental disease, disorder, or defect; provided
10 that each examiner shall form and render diagnoses and opinions
11 upon the physical and mental condition of the defendant
12 independently from the other examiners, and the examiners, upon
13 approval of the court, may secure the services of clinical
14 psychologists and other medical or paramedical specialists to
15 assist in the examination and diagnosis.

16 (4) The report of the examination shall include the
17 following:

- 18 (a) A description of the nature of the examination;
- 19 (b) A diagnosis of the physical or mental condition of the
20 defendant;
- 21 (c) An opinion as to the defendant's capacity to understand
22 the proceedings against the defendant and to assist in

- 1 the defendant's own defense;
- 2 (d) An opinion as to the extent, if any, to which the
- 3 capacity of the defendant to appreciate the
- 4 wrongfulness of the defendant's conduct or to conform
- 5 the defendant's conduct to the requirements of law was
- 6 impaired at the time of the conduct alleged;
- 7 (e) When directed by the court, an opinion as to the
- 8 capacity of the defendant to have a particular state
- 9 of mind that is required to establish an element of
- 10 the offense charged; and
- 11 (f) Where more than one examiner is appointed, a statement
- 12 that the diagnosis and opinion rendered were arrived
- 13 at independently of any other examiner, unless there
- 14 is a showing to the court of a clear need for
- 15 communication between or among the examiners for
- 16 clarification. A description of the communication
- 17 shall be included in the report. After all reports
- 18 are submitted to the court, examiners may confer
- 19 without restriction.
- 20 (5) If the examination cannot be conducted by reason of
- 21 the unwillingness of the defendant to participate therein, the
- 22 report shall so state and shall include, if possible, an opinion

1 as to whether such unwillingness of the defendant was the result
2 of physical or mental disease, disorder, or defect.

3 (6) [~~Three~~] An original and three copies of the report of
4 the examination, including any supporting documents, shall be
5 filed with the clerk of the court, who shall cause copies to be
6 delivered to the prosecuting attorney and to counsel for the
7 defendant. The clerk of the court shall cause a copy of each
8 dispositive order concerning proceedings under this chapter and
9 section 706-607 to be delivered to the director of health, and
10 shall attach the third copy of the report, including any
11 supporting documents, to the director of health's copy of each
12 dispositive order that results from a hearing pursuant to this
13 chapter and section 706-607.

14 (7) Any examiner shall be permitted to make a separate
15 explanation reasonably serving to clarify the examiner's
16 diagnosis or opinion.

17 (8) The court shall obtain all existing medical, mental
18 health, social, police, and juvenile records, including those
19 expunged, and other pertinent records in the custody of public
20 agencies, notwithstanding any other statutes, and make such
21 records available for inspection by the examiners. If, pursuant
22 to this section, the court orders the defendant committed to a

1 hospital or other suitable facility under the control of the
2 director of health, then the county police departments shall
3 provide to the director of health and the defendant copies of
4 all police reports from cases filed against the defendant which
5 have been adjudicated by the acceptance of a plea of guilty or
6 no contest, a finding of guilt, acquittal, acquittal pursuant to
7 section 704-400, or by the entry of plea of guilty or no contest
8 made pursuant to chapter 853, so long as the disclosure to the
9 director of health and the defendant does not frustrate a
10 legitimate function of the county police departments, with the
11 exception of expunged records, records of or pertaining to any
12 adjudication or disposition rendered in the case of a juvenile,
13 or records containing data from the United States National Crime
14 Information Center. The county police departments shall
15 segregate or sanitize from the police reports information that
16 would result in the likelihood or actual identification of
17 individuals who furnished information in connection with its
18 investigation, or who were of investigatory interest. Records
19 shall not be re-disclosed except to the extent permitted by law.

20 (9) The compensation of persons making or assisting in the
21 examination, other than those retained by the nonindigent
22 defendant, who are not undertaking the examination upon

1 designation by the director of health as part of their normal
2 duties as employees of the State or a county, shall be paid by
3 the State.

4 (10) Except as provided in this section, or by court order
5 allowing disclosure of mental health examination reports to
6 persons or entities other than those identified in this section,
7 all mental health examination reports submitted to the court
8 pursuant to section 704-404 including the original report shall
9 be kept confidential and shall not be disclosed by any person.
10 The court may direct disclosure of a mental health examination
11 report or reports to persons or entities other than those
12 identified in this section upon its determination that
13 disclosure is necessary for the conduct of proceedings before it
14 and that failure to make the disclosure would be contrary to the
15 public interest. For purposes of this section "dispositive
16 orders" are defined as any orders that affect the legal status of
17 the defendant, including orders for examination, orders finding
18 defendant fit to proceed, orders finding defendant unfit to
19 proceed, orders acquitting defendant pursuant to section 704-
20 411, orders concerning discharge, conditional release and
21 modification of conditional release, after acquittal and
22 commitment pursuant to sections 704-412, 704-413, 704-414, and

1 704-415, and orders of civil commitment in lieu of prosecution
2 or sentence pursuant to section 706-607."

3 SECTION 3. Section 704-411, Hawaii Revised Statutes, is
4 amended by amending subsection (3) to read as follows:

5 "§704-411 Legal affect of acquittal on the ground of
6 physical or mental disease, disorder, or defect excluding
7 responsibility; commitment; conditional release; discharge;
8 procedure for separate post-acquittal hearing.

9 (3) When ordering a hearing pursuant to subsection (2):

- 10 (a) In nonfelony cases, the court shall appoint a
11 qualified examiner to examine and report upon the
12 physical and mental condition of the defendant. The
13 court may appoint either a psychiatrist or a licensed
14 psychologist. The examiner may be designated by the
15 director of health from within the department of
16 health. The examiner shall be appointed from a list
17 of certified examiners as determined by the department
18 of health. The court, in appropriate circumstances,
19 may appoint an additional examiner or examiners; and
20 (b) In felony cases, the court shall appoint three
21 qualified examiners to examine and report upon the
22 physical and mental condition of the defendant. In

1 each case, the court shall appoint at least one
2 psychiatrist and at least one licensed psychologist.
3 The third member may be a psychiatrist, a licensed
4 psychologist, or a qualified physician. One of the
5 three shall be a psychiatrist or licensed psychologist
6 designated by the director of health from within the
7 department of health. The three examiners shall be
8 appointed from a list of certified examiners as
9 determined by the department of health.

10 To facilitate the examination and the proceedings thereon, the
11 court may cause the defendant, if not then confined, to be
12 committed to a hospital or other suitable facility for the
13 purpose of examination for a period not exceeding thirty days or
14 such longer period as the court determines to be necessary for
15 the purpose upon written findings for good cause shown. The
16 court may direct that qualified physicians or psychologists
17 retained by the defendant be permitted to witness the
18 examination. The examination and report and the compensation of
19 persons making or assisting in the examination shall be in
20 accord with section 704-404(3), (4)(a) and (b), (6), (7), (8),
21 ~~[and]~~ (9), and (10). As used in this section, the term "licensed

1 psychologist" includes psychologists exempted from licensure by
2 section 465-3(a)(3)."

3 SECTION 4. Section 704-414, Hawaii Revised Statutes, is
4 amended to read as follows:

5 **"§704-414 Procedure upon application for discharge,
6 conditional release, or modification of conditions of release.**

7 Upon filing of an application pursuant to section 704-412 for
8 discharge or conditional release, or upon the filing of an
9 application pursuant to section 704-413 for discharge or for
10 modification of conditions of release, the court shall appoint
11 three qualified examiners in felony cases and one qualified
12 examiner in nonfelony cases to examine and report upon the
13 physical and mental condition of the defendant. In felony cases
14 the court shall appoint at least one psychiatrist and at least
15 one licensed psychologist. The third member may be a
16 psychiatrist, a licensed psychologist, or a qualified physician.
17 One of the three shall be a psychiatrist or licensed
18 psychologist designated by the director of health from within
19 the department of health. The examiners shall be appointed from
20 a list of certified examiners as determined by the department of
21 health. To facilitate the examination and the proceedings
22 thereon, the court may cause the defendant, if not then

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1 confined, to be committed to a hospital or other suitable
 2 facility for the purpose of the examination and may direct that
 3 qualified physicians or psychologists retained by the defendant
 4 be permitted to witness the examination. The examination and
 5 report and the compensation of persons making or assisting in
 6 the examination shall be in accord with section 704-404(3),
 7 (4)(a) and (b), (6), (7), (8) [~~and~~] (9), and (10)." As used in
 8 this section, the term "licensed psychologist" includes
 9 psychologists exempted from licensure by section 465-3(a)(3)."

10 SECTION 5. Statutory material to be repealed is bracketed
 11 and stricken. New statutory material is underscored.

12 SECTION 6. This Act shall take effect upon its approval.

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INTRODUCED BY: Calvin K. H. King

BY REQUEST

JAN 25 2010

Report Title:

Confidentiality of Forensic Mental Health Examination Reports

Description:

Requires courts to maintain mental health examination reports as confidential documents, subject to certain specific exceptions for limited distribution of the reports.

JUSTIFICATION SHEET

DEPARTMENT: Health

TITLE: A BILL FOR AN ACT RELATING TO
CONFIDENTIALITY OF FORENSIC MENTAL HEALTH
EXAMINATION REPORTS.

PURPOSE: Require each forensic examiner to provide the original and three copies of each report to the court that ordered the forensic examination. Require the clerk of court to attach a copy of each report to the dispositive order issued pursuant to chapter 704, and deliver the dispositive order with attached report(s) to the director of health. Other than disclosure of the reports to prosecutor, defense counsel and the director of health, the reports are confidential and shall not be disclosed by any person without an appropriate court order. A definition of "dispositive order" is provided.

MEANS: Amend sections 704-404, 704-411, and 704-414 Hawaii Revised Statutes (HRS).

JUSTIFICATION: The court may order a mental health examination of a defendant in a criminal action in various circumstances pursuant to sections 704-404 (initial report), 704-406 (report related to substantial likelihood of regaining fitness to proceed), 704-411(3) (post-acquittal report concerning dangerousness), and 704-414 (report concerning application for discharge, conditional release, or modification of conditional release), HRS. Most commonly, the court will ask for mental health examination reports concerning a defendant's mental health diagnosis, fitness to proceed with trial, criminal responsibility, and level of dangerousness. Also, the court routinely asks for mental health examination reports regarding an acquitted person's

later time, that person's readiness for legal discharge from conditional release.

In most misdemeanor cases, the court orders one examination. By statute, this examination must be completed by a designated examiner employed by the Department of Health (DOH). This examination is commonly referred to as a "one panel exam." In most felony cases, the court will ask for three examinations to be completed. The three examiners will include one state designate as well as two independent examiners, one of which must be a licensed psychiatrist and the other either a licensed psychiatrist or a licensed psychologist. These examinations are commonly referred to as "three panel examinations."

The DOH employs the state designated examiners in the Courts and Corrections Branch of the Adult Mental Health Division. The independent examiners are compensated by the Judiciary.

The courts have asked for an increasing number of mental health examinations, rising from 500 in 2005, and 900 in 2007, to more than 1000 in 2009. The courts have asked for a nearly equivalent number of one and three panel examinations each year, or about 500 of each in 2009. Each examiner files the completed examination report with the court.

Currently, the courts in all judicial circuits except for the Second Circuit file the mental health examination in the public record of the defendant's case, which is available for public review. The courts in the Second Circuit seal the examinations in a locked cabinet, and the reports are not available for review by the general public.

The examination reports contain information which, in any other context, would be considered protected health information, and

are extremely personal, private, and sensitive. Reports routinely list the name of the defendant, defendant's mental health and medical histories, histories of mental health and medical treatment, diagnoses, names and locations of friends and family members, numbers of children, employers and employment history, social security numbers, criminal history, and the nature and circumstances of the current charge. While the defendant opens the door to otherwise confidential personal history information by seeking a mental health examination, the examinations may be required over the defendant's objection in some cases, and in all cases the reports include a great deal of highly personal history information. In all other circumstances the information is protected to various degrees by state and federal confidentiality laws and regulations. The limitation of dissemination to the court, the prosecutor, the defense, DOH, and others only upon court order will limit the release of the information to those who have an immediate need for access to the information.

The DOH needs a copy of each report for two purposes, (1) treatment of the defendant committed to DOH after acquittal, or ordered to receive DOH outpatient services, and (2) quality review of the examination reports by the DOH.

Impact on the public: The general public will no longer have access to the reports of mental health examination of defendants, the results or recommendations, or the personal health information that is included in such reports.

Impact on the department and other agencies: The amendments will require the court clerks to provide a copy of every dispositive order to DOH. The required distribution of the reports upon which the dispositive orders are made will enable DOH to significantly

improve patient care and staff safety in both the hospital setting and community based facilities.

The examiners will be required to provide one more copy of each examination report than is now required.

The Judiciary will be required to attach to each dispositive order the copy or copies of the report(s) upon which the order is based. Currently, this is mandated only when the defendant is found unfit.

GENERAL FUND: None.

OTHER FUNDS: None.

PPBS PROGRAM
DESIGNATION: HTH-495.

OTHER AFFECTED
AGENCIES: Judiciary; City and County of Honolulu
Prosecutor; County Prosecutors; Department
of the Attorney General; Office of the
Public Defender.

EFFECTIVE DATE: Upon approval.