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# 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;



- 1 (c) An opinion as to the defendant's capacity to understand  
2 the proceedings against the defendant and to assist in  
3 the defendant's own defense;
- 4 (d) An opinion as to the extent, if any, to which the  
5 capacity of the defendant to appreciate the  
6 wrongfulness of the defendant's conduct or to conform  
7 the defendant's conduct to the requirements of law was  
8 impaired at the time of the conduct alleged;
- 9 (e) When directed by the court, an opinion as to the  
10 capacity of the defendant to have a particular state  
11 of mind that is required to establish an element of  
12 the offense charged; and
- 13 (f) Where more than one examiner is appointed, a statement  
14 that the diagnosis and opinion rendered were arrived  
15 at independently of any other examiner, unless there  
16 is a showing to the court of a clear need for  
17 communication between or among the examiners for  
18 clarification. A description of the communication  
19 shall be included in the report. After all reports  
20 are submitted to the court, examiners may confer  
21 without restriction.



1 (5) If the examination cannot be conducted by reason of  
2 the unwillingness of the defendant to participate therein, the  
3 report shall so state and shall include, if possible, an opinion  
4 as to whether such unwillingness of the defendant was the result  
5 of physical or mental disease, disorder, or defect.

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

17 (7) Any examiner shall be permitted to make a separate  
18 explanation reasonably serving to clarify the examiner's  
19 diagnosis or opinion.

20 (8) The court shall obtain all existing medical, mental  
21 health, social, police, and juvenile records, including those  
22 expunged, and other pertinent records in the custody of public



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



1           (9) The compensation of persons making or assisting in the  
2 examination, other than those retained by the nonindigent  
3 defendant, who are not undertaking the examination upon  
4 designation by the director of health as part of their normal  
5 duties as employees of the State or a county, shall be paid by  
6 the State.

7           (10) Except as provided in this section, physical or  
8 mental health examination reports and supporting documents  
9 submitted to the court pursuant to this section shall be kept  
10 confidential and shall not be disclosed by any person. If the  
11 physical or mental health examination report or testimony by any  
12 of the examiners is admitted into evidence in a contested  
13 hearing held pursuant to sections 704-405 and 704-410, the  
14 report shall not be deemed confidential and shall be maintained  
15 in the public record. Any criminal or civil court may direct  
16 disclosure of a confidential physical or mental health  
17 examination report submitted pursuant to this section to persons  
18 or entities other than those identified in this section upon a  
19 showing of good cause.

20           (11) For purposes of this section, "dispositive orders"  
21 means as any orders that affect the legal status of the  
22 defendant, including orders for examination, orders finding the



1 defendant fit to proceed, orders finding the defendant unfit to  
2 proceed, orders acquitting the defendant pursuant to section  
3 704-411, orders concerning discharge, conditional release, and  
4 modification of conditional release, after acquittal, and  
5 commitment pursuant to sections 704-412, 704-413, 704-414, and  
6 704-415, and order of civil commitment in lieu of prosecution or  
7 sentence pursuant to section 706-607."

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

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

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

21 (b) In felony cases, the court shall appoint three  
22 qualified examiners to examine and report upon the





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

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



1 "licensed psychologist" includes psychologists exempted from  
2 licensure by 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



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  
8 in 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.

13



**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. (SD1)

*The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.*

