

NEIL ABERCROMBIE
GOVERNOR



BRUCE A. COPPA
Comptroller

RYAN OKAHARA
Deputy Comptroller

STATE OF HAWAII
DEPARTMENT OF ACCOUNTING
AND GENERAL SERVICES
P.O. BOX 119
HONOLULU, HAWAII 96810-0119

TESTIMONY
OF
BRUCE A. COPPA, COMPTROLLER
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES
TO THE
HOUSE COMMITTEES ON
COMMERCE AND CONSUMER PROTECTION
AND
JUDICIARY
ON
February 7, 2011

H.B. 1220

RELATING TO INFORMATION PRIVACY.

Chair Herkes, Chair Keith-Agaran, and members of the Committees, thank you for the opportunity to testify on H.B. 1220.

The Department of Accounting and General Services supports H.B. 1220.

While this bill would not apply to us as we are a Government Agency we would like to comment on the language in SECTION 4.(d).(1) and 4.(d).(3).

For SECTION 4.(d).(1), the intent of providing the individual with as much information as possible is in keeping with open and transparent communication. However, we disagree that disclosing the method of the security breach is relevant to an individual. Disclosing how the breach was accomplished may inadvertently provide other perpetrators of cyber attacks leading to security breaches information they can take advantage of.

For SECTION 4.(d).(3), the intent of providing the individual with the types of activities that could result from a breach is well intentioned, but does not take into consideration that the nature of fraudulent activities is constantly and rapidly changing. Our concern would be any liability the business would be placed under if a different fraudulent activity (not listed on the notice) occurs.

Thank you for the opportunity to testify on this matter.

DEPARTMENT OF HUMAN RESOURCES
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PETER B. CARLISLE
MAYOR



NOEL T. ONO
DIRECTOR

February 7, 2011

The Honorable Robert N. Herkes, Chair
and Members of the Committee on Consumer
Protection & Commerce
The Honorable Gilbert S.C. Keith-Agaran, Chair
and Members of the Committee on Judiciary
The House of Representatives
State Capitol
Honolulu, Hawaii 96813

Dear Chairs Herkes and Keith-Agaran and Members:

Subject: House Bill No. 1220
Relating to Information Privacy

Comments

The City and County of Honolulu, Department of Human Resources offers the following comments regarding House Bill 1220, specifically the portions which seek to amend the definition of "Security breach" and add to the type of information which must be provided to a person affected by a security breach.

With respect to the amendment to the definition of "Security breach" as proposed by Section 3 of HB 1220, we suggest the Joint Committee also consider revising the third sentence in said definition as follows:

Good faith [~~acquisition~~] disclosure of personal information by an employee or agent of the business or government agency for a legitimate purpose is not a security breach; provided that the personal information is not used for a purpose other than a lawful purpose of the business or government agency and is not subject to further unauthorized disclosure.

The foregoing change provides uniformity should the revisions which are being proposed to the first and second sentences of the definition be passed into law. The addition of "government agency" to the paragraph will also make the definition of "Security breach" consistent with the rest of Hawaii Revised Statutes ("HRS") Chapter 487N since government agencies are also subject to its disclosure notification requirements.

The Honorable Robert N. Herkes, Chair
and Members of the Committee on Consumer
Protection & Commerce
The Honorable Gilbert S.C. Keith-Agaran, Chair
and Members of the Committee on Judiciary
February 7, 2011
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We further suggest the Joint Committee consider not amending the notification requirements as proposed by Section 4 of the bill. In particular, we feel inclusion of the "distribution medium and method of the security breach" in the notification is not only unnecessary but potentially ill-advised as it provides information regarding the possible vulnerability of a personal information system.

Thank you for the opportunity to testify.

Yours truly,



Noel T. Ono
Director

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Rep. Robert N. Herkes, Chair
Committee on Consumer Protection & Commerce

Rep. Gilbert S.C. Keith-Agaran, Chair
Committee on Judiciary

Testimony in Support of HB 1220 RELATING TO INFORMATION PRIVACY

Date: Monday, February 7, 2011

Time: 2:00 pm

Place: Conference Room 325

Chairs Herkes and Keith-Agaran and Members of the Committees:

I am Tom Grande, co-counsel for the University of Hawaii data breach victims. My co-counsel, Bruce Sherman, and I support this bill with one suggested amendment.

We commend the House for taking the lead on this extremely important and serious issue that affects consumers, business, and government.

Current Law

HRS Chapter 497N, the Hawaii data breach notification statute, was passed in 2006. According to James Van Dyke, a leading identify theft expert, "notification is not working. Consumers apparently do not understand that the data breach puts them at increased risk for other types of fraud. Notification may need to be more explicit about the possible types of fraud that may be perpetrated with the data exposed, and the possible steps the consumer can take for protection."¹

HB 1220 strengthens Chapter 497N by providing more detailed notification requirements, by amending the definition of "security breach" to include conduct which exposes personal information, and by conforming the definition of "identity theft" to that contained in HRS Chapter 489P.

¹ Javelin Strategy and Research, Data Breach Notifications: Victims Face Four Times Higher Risk of Fraud (October 2009) at 16 available at <http://www.javelinstrategy.com>.

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Rep. Gilbert S.C. Keith-Agaran, Chair
Page 2

Data Breaches – Cost to Consumers, Business, & Government

Victims of data breaches are four (4) times more likely to suffer an incident of identity theft than non-victims.² However, the costs of identity theft are felt far beyond the individual consumer.

220 million records were lost or stolen last year.³ This resulted in the loss of \$50 billion by consumers, business, and government. Identity theft cost consumers \$422 on average, but cost business fifteen times more, or an average of \$6,383.⁴

Identity theft has cost Hawaii consumers and business more than \$600 million since 2005.⁵

Public-Private Partnership

HB 1220 proposes a private statutory cause of action for data breach victims. We believe that allowing the private bar to enforce public policy statutes can be a cost-saving, public-private partnership.

This approach is already in place in numerous consumer and business protection statutes, which provide for private enforcement mechanisms to supplement government regulatory oversight.

We suggest, however, that the provisions of HB 1220 be amended to allow actions against the government. As drafted, the bill would give government agencies immunity from claims involving data breaches.

Thank you very much.

² Id.

³ Javelin Strategy and Research, 2010 Identity Fraud Survey Report: Consumer Version at 4 available at <http://www.javelinstrategy.com>.

⁴ Javelin Strategy and Research, Data Breach Notifications: Victims Face Four Times Higher Risk of Fraud (October 2009) at 16 available at <http://www.javelinstrategy.com>.

⁵ : Liberty Coalition Report on UH Data Breach, part 2 at 6 available at <http://www.LibertyCoalition.net>.

**Testimony before the House Of Representatives
Committees on**

**Consumer Protection & Commerce &
Judiciary**

on

H.B. 1220, Relating to Information Privacy

Monday, February 07, 2011

2:00 pm

Conference Room 325, State Capitol

**By Jonathan Keao, Director, Information Assurance
Hawaiian Electric Company, Inc.**

Chairs Herkes and Keith-Agaran, Vice Chairs Yamane and Rhoads, and members of the Committees:

My name is Jonathan Keao, and I am the Director of Information Assurance for Hawaiian Electric Company. I represent Hawaiian Electric Company, Inc. and its subsidiaries, Hawaii Electric Light Company, Inc. and Maui Electric Company, Limited (collectively "HECO").

We respectfully oppose H.B. 1220

As a company that manages large amounts of data, including personal identifying data of our customers, we take information security very seriously. We support the legislature's effort to provide strong consumer protections in this area.

However, we cannot support H.B. 1220, as currently drafted, because it would mandate the payment of threefold damages, leaving the courts and the judicial process without the ability to fully evaluate any mitigating circumstances or controls surrounding a data breach. We strongly urge the legislature to replace the word "shall" on page 4, line 15 with the word "may" and allow the courts to more properly determine the actual amount of damages to be paid, based on the circumstances before them. The results may in the end, be the same, but we feel they should not be predetermined in advance without the courts being able to fully evaluate all of the issues of the matter before them.

We therefore ask the Committee to hold H.B. 1220.

Thank you for the opportunity to share our concerns with you.

HB 1220
Relating To Information Privacy

Robert T. Tanimura, Ph.D.
Director – Public Affairs, Policy & Communications
Verizon Communications
808-595-6521

Monday, February 7, 2011

Representative Robert N. Herkes, Chair
Representative Ryan I. Yamane, Vice Chair
House Committee on Consumer Protection & Commerce

Representative Gilbert S.C. Keith-Agaran, Chair
Representative Karl Rhoads, Vice Chair
House Committee on the Judiciary

Opposition to HB 1220 Relating to Information Privacy

My name is Robert T. Tanimura and I am testifying on behalf of Verizon on HB 1220, "A Bill For An Act Relating To Information Privacy." Verizon offers the following comments on HB 1220:

While it is understandable that the Hawaii legislature would be interested in solutions to data security breaches, it must be recognized that Hawaii already has a strong security breach law and that any further legislation should be carefully considered to avoid unintended consequences or harm to Hawaii's economy.

The most problematic aspect of HB 1220 is that it would create highly unusual lawsuits for statutory damages based on a "risk of harm of identity theft", even if no harm occurs. The bill also defines damages in a vague and open-ended manner by including "actions taken to mitigate injury from future identity theft, including actual or future purchase of credit report monitoring and identity theft insurance." While it is understandable to want someone to pay to prevent any and all risk of identity theft from occurring whenever there is a security breach, such a solution would be extremely burdensome to Hawaii's businesses and ultimately to consumers. Under this provision businesses would be potentially liable for damages even in the vast majority of cases where no actual harm occurs. This contradicts a long line of court decisions that have dismissed such suits. The proposed provision also unreasonably targets businesses only, even though the largest data breaches to date were due to governmental entities such as the University of Hawaii.

HB 1220 also redefines "security breach" by eliminating the harm trigger that is currently required under Hawaii law. This would result in an overly broad definition that would be costly to businesses. For instance, the mere loss of paper records, even if there is no

appreciable risk of harm, would automatically create a requirement for a breach notification. The current law's requirement of actual harm or its reasonable likelihood is an important condition because it recognizes that not all security breaches are the same and they need to be assessed on a case-by-case basis. This important language makes the current law's coverage of paper breaches manageable (only 4 state laws apply to paper breaches and all but one have a similar harm trigger) and provides appropriate context to the breach.

HB 1220 also revises the type of notification that must be made in a manner that can be counterproductive and harmful. The requirement for disclosure of certain details of distribution medium, method of security breach, and duration of time the information was exposed, could assist hackers in covering their tracks or refining their methods for future attacks. Similarly, the requirement to disclose the types of fraudulent actions could give new ideas to criminals on how to profit off of personal information.

It must be recognized that not all security breaches are the same. Sometimes companies despite their best efforts can be victimized by a computer hacker or by a contractor losing a file or in any number of ways that we cannot anticipate. Sometimes a security breach results in harm but in the vast majority of the cases no harm results. As such, it is important that the security breach law retain flexibility to differentiate between cases where notification and lawsuits are appropriate and where they are not. Failure to keep this flexibility in the law would do nothing to reduce the threat from security breaches but would impose huge potential costs on Hawaii's businesses and government agencies.

Thank you for the opportunity to testify.

GOODSILL ANDERSON QUINN & STIFEL

A LIMITED LIABILITY LAW PARTNERSHIP LLP

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TO: Representative Robert N. Herkes
Chair, Committee on Consumer Protection & Commerce
Representative Gilbert S.C. Keith-Agaran
Chair, Committee on Judiciary
Via Email: CPCtestimony@Capitol.hawaii.gov

FROM: Mihoko E. Ito

DATE: February 5, 2011

RE: **H.B. 1220 – Relating to Information Privacy**
Hearing: Monday, February 7, 2011 at 2:00 p.m., Room 325

Dear Chairs Herkes and Keith-Agaran and Members of the Committees on Consumer Protection & Commerce and Judiciary:

I am Mihoko Ito, testifying on behalf of the Consumer Data Industry Association (CDIA). Founded in 1906, CDIA is the international trade association that represents more than 400 data companies. CDIA members represent the nation's leading institutions in credit reporting, mortgage reporting, fraud prevention, risk management, employment reporting, tenant screening and collection services.

CDIA opposes H.B. 1220, which provides a private cause of action for a victim who, as a result of an information security breach, suffers a risk of harm from identity theft. This measure also amends the type of notice that must be given to a person affected by a security breach and defines identity theft.

CDIA is concerned that the measure expands the existing law in a way that will create significant additional burdens on businesses. While we understand that this measure is intended to protect those who fall victim to a credit breach, existing protections and penalties under federal and state law already exist, and expanding the law at this time appears to be unjustified.

We respectfully request that the foregoing concerns be considered. Thank you very much for the opportunity to testify.

Presentation to the House Committee on Consumer Protection & Commerce

Monday, February 7, 2011 at 2:00 p.m.

Testimony on HB 1220 Relating to Information Privacy

TO: The Honorable Robert N. Herkes, Chair
The Honorable Ryan I. Yamane, Vice Chair
Members of the House Committee on Consumer Protection and Commerce

My name is Neal Okabayashi and I testify for the Hawaii Bankers Association. While we acknowledge and are sympathetic to the concern which is the impetus behind this bill, we respectfully ask that this committee hold this bill because it does not adequately balance the needs of those damaged by identity theft and businesses that may have to pay more than actual damages.

It is ironic that while it has been governmental entities that have been most prominent in security breach incidents, this bill provides that they would continue to be exempt from paying damage claims.

The present form of the bill has certain defects which can be corrected. The bill would provide that any "affected" person can sue for damages. The problem is that "affected" is a vague standard which may give the courts little guidance as to the issue of who may sue. Even without any statute, any damaged person can sue so it does not seem like this provision is even necessary. However, if this bill is to be adopted by this Committee, on page 4, line 12, the word "affected" should be replaced with "damaged" or "injured". On page 4, line 14, "actual" should be inserted before "damages". It is a general principle of law that persons should generally recover their actual damages but no more. Thus, on page 4, lines 14-16, the provision for treble damages should be excluded. If there is to be statutory damages, it should be no more than \$1,000.00 in line with the Truth in Lending Act. The sentence beginning on page 4, line 18 should be replaced by the following: "Such person shall obtain the benefits under the Fair and Accurate Credit Transactions Act of 2003, including obtaining free credit reports and initiating a fraud alert or active duty alert. A consumer shall place a security freeze as provided in section 489P-3, Hawaii Revised Statutes." As a matter of law, an injured person is required to mitigate damages or to lessen the damages suffered by such person. Placing a security freeze, activating a fraud alert, and obtaining free credit reports are all part of the obligation of mitigating damages and thus eliminates the need for credit report monitoring services or identity theft insurance.

I would be happy to answer any questions you may have.

CPCtestimony

From: mailinglist@capitol.hawaii.gov
Sent: Friday, February 04, 2011 4:50 PM
To: CPCtestimony
Cc: ddavalos@fhb.com
Subject: Testimony for HB1220 on 2/7/2011 2:00:00 PM
Attachments: HB 1220.doc

Testimony for CPC/JUD 2/7/2011 2:00:00 PM HB1220

Conference room: 325

Testifier position: oppose

Testifier will be present: Yes

Submitted by: Debralee Davalos

Organization: Hawaii Bankers Association

Address: 1000 Bishop Street Suite 301B Honolulu, Hawaii 96813-4203

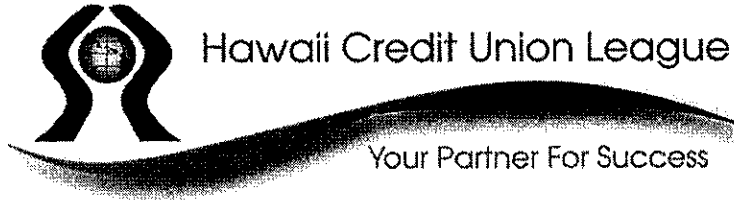
Phone: 808-525-8805

E-mail: ddavalos@fhb.com

Submitted on: 2/4/2011

Comments:

Please disregard the first testimony; the testifier position was incorrect. We "oppose" this bill.



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Testimony to the House Committee on Consumer Protection and Commerce and
House Committee on Judiciary
Monday, February 7, 2011, at 2:00 p.m.

Testimony in opposition to HB 1220, Relating to Information Privacy

To: The Honorable Robert Herkes, Chair
The Honorable Ryan Yamane, Vice-Chair
Members of the Committee on Consumer Protection and Commerce

The Honorable Gilbert Keith-Agaran, Chair
The Honorable Karl Rhoads, Vice-Chair
Members of the Committee on Judiciary

My name is Stefanie Sakamoto and I am testifying on behalf of the Hawaii Credit Union League, the local trade association for 85 Hawaii credit unions, representing approximately 810,000 credit union members across the state.

We are in opposition to HB 1220, Relating to Information Privacy. While we understand and are sympathetic to the concerns of this bill, we are in opposition because laws already exist for those who fall victim to a data breach. Credit unions in Hawaii are in full compliance with the state and federal laws that are already in place.

Thank you for the opportunity to testify.