



STATE OF HAWAII  
DEPARTMENT OF HEALTH  
P.O. Box 3378  
HONOLULU, HAWAII 96801-3378

In reply, please refer to:  
File:

**House Committee on Health**

**H.B. 1451, RELATING TO HEALTH CARE PRIVACY**

**Written Testimony of Loretta J. Fuddy, A.C.S.W., M.P.H.  
Acting Director of Health**

**February 4, 2011**

- 1 **Department's Position:** The Department opposes this bill.
- 2 **Fiscal Implications:** None.
- 3 **Purpose and Justification:** Currently, there are numerous federal and state privacy laws that protect an
- 4 individual's health care information and provide individual rights. There are federally mandated privacy
- 5 laws such as the Health Insurance Portability and Accountability Act of 1996 (45 CFR Parts 160 and
- 6 164), the Confidentiality of Alcohol and Drug Abuse Patient Records (42 CFR Part 2), and the Family
- 7 Educational Rights and Privacy Act Regulations (34 CFR Part 99). The State of Hawai'i also has
- 8 existing privacy laws that specifically address the protection of health information related to mental
- 9 health (HRS § 334-5), drug addiction and alcoholism (HRS § 334-5), HIV/AIDS (HRS § 325-101), and
- 10 developmental disabilities (HRS § 333-E(6)) to name a few. Both private and public entities are
- 11 mandated to comply with all applicable privacy laws.

12 The Department is committed to ensuring the protection of an individual's health care

13 information. It is and shall continue to remain a priority. However, this proposed bill raises several

14 serious concerns.

1 The intent of this proposed bill is unclear. If the intent is to preserve the rights of an individual  
2 to his or her health care information and to restrict how health information may be used and disclosed,  
3 most of the provisions in the proposed bill are already addressed in current laws and regulations. Some  
4 notable examples include:

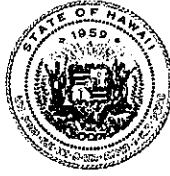
- 5 1. Section -11 of the proposed bill addresses an individual's right to access and copy his or her  
6 own health information. This right is also addressed for health information in HIPAA (45  
7 CFR §164.524), for educational records in FERPA (34 CFR §§99.10-12), for substance  
8 abuse records in 42 CFR §2.23, and for Hawai'i governmental agencies in HRS §§92F-21  
9 through 23.
- 10 2. Sections -13 and -22 of the bill speak to an individual's right to a notice of confidentiality  
11 practices and the form such notice should take. Similar language is found for health  
12 information in HIPAA (45 CFR §164.520), for educational records in FERPA (34 CFR  
13 §99.7), and for substance abuse treatment records in 42 CFR §2.22.
- 14 3. Furthermore, Part IV of this bill (EXCEPTED USES AND DISCLOSURES) addresses many  
15 of the same exceptions for use and disclosure of health information without an authorization  
16 already found in HIPAA (45 CFR §164.512), and in alcohol and substance abuse treatment  
17 records in 42 CFR §§2.51 to 2.53.

18 If the intent of this proposed bill is to provide a comprehensive "one-stop-shop" type of law for  
19 health care privacy matters, then it is problematic in its language. There are several rights and  
20 restrictions regarding the use and disclosure of health information that are not addressed in this proposed  
21 bill, but addressed in existing state and federal law. For example, HIPAA provides an individual the  
22 right to make a complaint and prescribes a method in which to do so (45 CFR §164.530(d)), as well as to  
23 obtain an accounting of how the individual's health information may have been used or disclosed  
24 without his or her knowledge (45 CFR §164.528). This bill does not provide these rights.

1           This bill also unnecessarily complicates and may increase confusion in the arena of health care  
2 privacy by adding another layer to the preemption analysis needed to determine which of the bevy of  
3 federal and state laws may apply in specific situations. This will serve to increase the probability of an  
4 incorrect preemption analysis, which will lead to implementing the incorrect provision, and shall result  
5 in non-compliance. Non-compliance may lead to less protection for health information, as well as  
6 monetary fines and other sanctions by both the federal and state government.

7           The sanctions part of this bill is of particular concern. It incorporates criminal sanctions as well  
8 as creates the ability for individuals to bring a civil action against the Department and against individual  
9 workforce members within the Department. This will expose Department employees to direct civil  
10 liability.

11           These issues lead us to oppose the bill. Thank you for the opportunity to provide testimony on  
12 this bill.



NEIL ABERCROMBIE  
GOVERNOR

BRIAN SCHATZ  
LIEUTENANT GOVERNOR

**STATE OF HAWAII**  
**OFFICE OF THE LIEUTENANT GOVERNOR**  
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CATHY L. TAKASE  
ACTING DIRECTOR

To: House Committee on Health

From: Cathy L. Takase, Acting Director

Hearing: February 4, 2011, 9:00a.m.  
State Capitol, Room 329

Re: Testimony on H.B. No. 1451  
Relating to Health Care Privacy

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Thank you for the opportunity to submit testimony on H.B. No. 1451. This bill seeks to create a state Privacy of Health Care Information law.

The Office of Information Practices (OIP) opposes this bill's designation of OIP as the responsible entity to adopt rules to implement safeguards to protect the confidentiality, security, accuracy and integrity of protected health information (§ -14(b) at p. 19, l. 21 – 1.22); to establish standards for disclosing, authorizing, and authenticating, protected health information in electronic form consistent with part IV of the proposed act (§ -41 at p. 37, l. 21 – p. 38, l. 3); and to provide advice, training, technical assistance and guidance regarding ways to prevent improper disclosure of protected health information (§ -54 at p. 42, l. 9 – 1.16). OIP does not have the resources that would be required to perform these duties.

OIP notes that the requirement that all state and county agencies as employers be subject to this law would create substantial confusion for these agencies and the need for additional resources for all agencies to ensure compliance. OIP further notes that, at present, the UIPA affords individuals rights of access to their health information held by government agencies and provides for the withholding of individual health information where disclosure would constitute

a clearly unwarranted invasion of personal privacy. Moreover, for government agencies that are HIPAA covered health care entities, HIPAA protected information is withheld under the UIPA's exception at HRS § 92F-13(4) for information protected by federal law.

Thus, the UIPA, along with HIPAA for covered health care entities, currently governs state and county agencies and provides balanced rights of access and protections against disclosure. At a minimum, however, OIP urges the committee to remove OIP as the agency responsible for rulemaking and training under the proposed law because OIP has no capacity to perform these duties.

Thank you for the opportunity to testify.

Testimony of  
Phyllis Dendle  
Director of Government Relations

Before:  
House Committee on Health  
The Honorable Ryan I. Yamane, Chair  
The Honorable Dee Morikawa, Vice Chair

February 4, 2011  
9:00am  
Conference Room 329

**HB 1451 RELATING TO HEALTH CARE PRIVACY**

Chair Yamane and committee members, thank you for this opportunity to provide testimony on HB 1451 which would create a new chapter in state law regarding the privacy of health care information.

**Kaiser Permanente Hawaii opposes this bill.**

We oppose this bill because these protections are already provided by the federal Health Insurance Portability and Accountability Act of 1996 (P.L. 104-191) also called HIPAA.

While I did not compare this measure word for word it looks to be the same law that was passed by the Hawaii legislature as Act 87 in 1999. Having served on the task force that drafted the language for the legislature's consideration, I think it is a fine piece of legislation. However at the time this was taking effect the federal government was also creating the regulations for HIPAA. The legislature in 2001 passed Act 244 which repealed Act 87 in favor of having the state comply with the federal HIPAA regulations.

I admit I have a sentimental attachment to the language in this bill but even so I ask sincerely that you hold this measure. The federal law has provided good protection for the confidential health information of Hawaii's residents since April 14, 2003 so passing this measure would be a step backward. Thank you for your consideration.

# HMSA



An Independent Licensee of the Blue Cross and Blue Shield Association

February 4, 2011

The Honorable Ryan Yamane, Chair  
The Honorable Dee Morikawa, Vice Chair  
House Committee on Health

**Re: HB 1451 – Relating to Health Care Privacy**

Dear Chair Yamane, Vice Chair Morikawa and Members of the Committee:

The Hawaii Medical Service Association (HMSA) appreciates the opportunity to testify in opposition to HB 1451 which establishes the conditions under which an individual's health information that is retained by a health care provider, health plan, employer, health care data organization, insurer, or educational institution may be released and used.

The federal Health Insurance Portability and Accountability Act of 1996 (HIPAA) already provides federal protections for personal health information held by "covered entities" (e.g., health plans, most health care providers, and health care clearinghouses). The Security Rule in HIPAA specifies a series of administrative, physical, and technical safeguards for covered entities to use to assure the confidentiality, integrity, and availability of electronic protected health information.

HIPPA requires covered entities to have in place safeguards to protect an individual's health information. Covered entities must reasonably limit uses and disclosures to the minimum necessary to accomplish their intended purpose. Covered entities must have contracts in place with their contractors and others ensuring that they use and disclose an individual's health information properly and safeguard it appropriately. And, covered entities must have procedures in place to limit who can view and access an individual's health information, as well as implement training programs for employees about how to protect the employees' health information.

Health insurers and providers who are covered entities must comply with an individual's right to:

- View and obtain a copy of the individual's health records;
- Have corrections added to the individual's health information;
- Receive a notice that tells the individual how his/her health information may be used and shared;
- Provide or deny permission for the individual's health information may be used or shared for certain purposes, such as for marketing; and
- Receive a report on when and why your health information was shared for certain purposes.

For almost 15 years, HIPPA has protected an individual's health records while allowing each individual to decide who may have access to his/her health information. This Bill will add additional administrative and financial burdens on those who retain health information, but will not add to safeguards that the public already enjoys under HIPPA. We recommend that this measure be held.

Thank you for the opportunity to testify today.

Sincerely,

A handwritten signature in black ink, appearing to read 'JD', with a long horizontal stroke extending to the right.

Jennifer Diesman  
Vice President  
Government Relations





HOUSE COMMITTEE ON HEALTH  
Rep. Ryan Yamane, Chair

Conference Room 329  
Feb. 4, 2011 at 9:00 a.m.

**Opposing HB 1451.**

The Healthcare Association of Hawaii advocates for its member organizations that span the entire spectrum of health care, including all acute care hospitals, as well as long term care facilities, home care agencies, and hospices. Thank you for this opportunity to testify in opposition to HB 1451, which creates unreasonable and unnecessary conditions regarding health care information.

The federal Health Insurance Portability and Accountability Act of 1996 (P.L. 104-191), also known as HIPAA, provides federal protections for personal health information held by health care organizations and gives patients an array of rights with respect to that information. At the same time, the Privacy Rule is balanced so that it permits the disclosure of personal health information needed for patient care and other important purposes.

The Security Rule specifies a series of administrative, physical, and technical safeguards for health care organizations to use to assure the confidentiality, integrity, and availability of electronic protected health information.

HB 1451 unnecessarily undercuts many of the provisions of HIPAA and would not result in improvements in the way personal health care information is handled or add assurances of patient privacy. Rather, it would cause confusion for patients, health care providers, and health care insurers.

For the foregoing reasons, the Healthcare Association opposes HB 1451.



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## HAWAI'I PACIFIC HEALTH

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**Friday - February 4, 2011 – 9:00am**  
**Conference Room 329**

### The House Committee on Health

To: Rep Ryan I. Yamane - Chair  
Rep Dee Morikawa - Vice Chair

From: David Fox, Information security/Privacy Officer, Hawai'i Pacific Health

**Re: Testimony in Strong Opposition to HB 1451 Relating to Health Care Privacy**

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My name is David Fox, Information Security/Privacy Officer for Hawai'i Pacific Health (HPH). Hawai'i Pacific Health is a nonprofit health care system and the state's largest health care provider, committed to providing the highest quality medical care and service to the people of Hawai'i and the Pacific Region through its four affiliated hospitals, 44 outpatient clinics and more than 2,200 physicians and clinicians. The network is anchored by its four nonprofit hospitals: Kapi'olani Medical Center for Women & Children, Kapi'olani Medical Center at Pali Momi, Straub Clinic & Hospital and Wilcox Memorial Hospital.

We are writing in strong opposition to HB 1451 which would create a new chapter entitled "Privacy of Health Care Information" in the Hawai'i Revised Statutes. It appears the intention of this bill is to provide the people of our state a greater degree of privacy of their health care information. It is our opinion this bill is a poor version of the existing Federal Privacy Rule without any actual improvements or added assurances of patient privacy. This bill will cause confusion for health plans, business associates, researchers, providers and our patients. It is full of problems and as such will result in adversely impacting many health care operations activities specifically permitted under existing federal law, including patient care (treatment).

Thank you for your time regarding this measure. We ask that you defer HB1451.



Affiliates of Hawai'i Pacific Health

TESTIMONY IN SUPPORT OF HB 1451, RELATING TO HEALTH CARE PRIVACY  
COMMITTEE ON HEALTH  
HOUSE OF REPRESENTATIVES  
FRIDAY, FEBRUARY 4, 2011, 9:00 A.M.

Mr. Chairman and members of the House Committee on Health, I am John C. McLaren. I am an attorney in private practice, and I am testifying in support of HB 1451, which I asked Representative Scott Saiki to introduce this session.

HB 1451 recognizes for a second time, important health information privacy rights that were originally Act 87 (1999) and became Hawaii Revised States (HRS) Chapter 323C, Privacy of Health Care Information. As is recited in the preamble to Act 87, this statute was based on Article I, Section 6, Right to Privacy, in the Constitution of Hawaii. This privacy right took effect on November 7, 1978 and was a recommendation of the 1978 Constitutional Convention. Hawaii is one of a few states in the nation that has a broad constitutional privacy right. There is no parallel right in the text of the original United States Constitution or in the Bill of Rights.

HRS Chapter 323C was, in my opinion, mistakenly repealed in 2001 by Act 244, in a terribly naive anticipation that federal Health Insurance Portability and Accountability Act ("HIPAA"), Public Law 104-91, 110 Stat. 1936 (1996), and the April 14, 2003 effective date of the federal HIPAA regulations in 45 Code of Federal Regulations ("CFR") Parts 160 and 164, Standards for Privacy of Individually Identifiable Health Information ("HIPAA Privacy Rule") would supercede all state laws on this subject. This federal effort did not do so because of inherent subject matter jurisdictional limitations imposed by the enabling legislation to Public Law 104-91 upon the U.S. Department of Health and Human Services.

For example, the HIPAA Privacy Rule has no effect in ensuring the privacy of medical records in any workers' compensation or automobile personal injury claims, and it has a very limited, diluted impact in most court-based personal injury litigation. It is a well established fact that the HIPAA Privacy Rule provides only a limited "floor" of privacy protection and does not invalidate greater privacy protections afforded by state law.

Stated differently, the HIPAA Privacy Rule, and in particular, 45 CFR § 164.512 (e), Disclosures and Uses for Judicial and Administrative Proceedings, provides a loophole ridden, "Swiss Cheese" form of "protection" rather than any true information privacy protection. In particular, this federal rule does not bar unauthorized, non-litigation related, collateral uses of identifiable health information such as third party information databasing.

As a result of the repeal of HRS Chapter 323C and the intended limitations of the HIPAA Privacy Rule, Hawaii has had no comprehensive health information privacy protection greater than the scope of the HIPAA Privacy Rule except in individual Circuit Court cases in which the litigants and the Court have adopted a health information privacy protective order following the Hawaii Supreme Court's landmark health information privacy protection decision in *Brende v. Hara*, 113 Hawai'i 424, 153 P.3d 1109 (2007).

Our Supreme Court was the first appellate court in the nation to recognize that informational privacy rights under state law that provided greater protection than the HIPAA Privacy Rule would not be pre-empted by the federal rule. I researched and wrote on behalf of our client, Phillip Brende, all of the appellate pleadings in *Brende*.

*Brende* was a writ of mandamus action, which an extraordinary, common law form of appeal, that my law firm was forced to file against Third Circuit Court Judge Glenn S. Hara to compel his Court to recognize that Hawaii's Constitutional Right to Privacy and Hawaii Rules of Evidence, Rule 504(d)(3), Condition as Element of Claim or Defense, which is part of HRS Chapter 626, afforded greater privacy protection from unauthorized, collateral disclosures of medical information of a personal injury litigant than the HIPAA Privacy Rule.

This mandamus action was necessary solely because HRS Chapter 323C was repealed. Section 323C-38 of this statute would have provided the basis for information privacy protection that the Supreme Court recognized in *Brende* under our constitution and rules of evidence. Section 38 on pages 33-34 of HB 1451 has identical language to the repealed statute.

The Supreme Court held in *Brende* that "health information is 'highly personal and intimate' information that is protected by the informational prong of article I, section 6. The constitutional provision protects the disclosure outside of the underlying litigation of petitioners' health information produced in discovery." 113 Hawai'i at 430, 153 P.3d at 1115. The Court also held that there was "no present legitimate need outside of the underlying litigation for petitioners' health information produced in discovery," and that "any disclosure of such information outside of the litigation would be a violation of petitioners' right to informational privacy."

The Supreme Court granted Mr. Brende's mandamus petition to revise the protective order issued by Judge Hara to add the provision that, subject to legitimate business record keeping requirements of insurance carriers and law firms, generally described in footnote 6 of the Court's opinion, "none of plaintiff's protected health and/or medical information obtained in discovery from any source [in the case] shall be disclosed or used for any purpose by anyone or by any entity outside of [the case] without the plaintiffs' explicit written consent thereto." 113 Hawai'i at 431-432, 153 P.3d at 1117 (bracketed material added for clarification).

In 2008, at the request of the Bench/Bar Judicial Conference, a committee of volunteer lawyers headed by Chuck Crumpton, and included myself, drafted form health information privacy protective orders for use in personal injury claims and litigation. These forms are posted on the Hawaii State Bar Association website at [http://www.hsba.org/forms\\_2.aspx](http://www.hsba.org/forms_2.aspx). The forms can be adapted to government administrative proceedings with a few minor language changes. Protective orders of all kinds are authorized in civil litigation by Hawaii Rules of Civil Procedure, Rule 26(c), Protective Orders. Since the publication and use of the Bench/Bar forms, disputes in civil litigation over an individual's rights to health information privacy protection have virtually vanished from the Circuit Courts.

Section 38 of HB 1451 accomplishes essentially the same privacy protection as *Brende*, but it would also extend this protection to all administrative proceedings, which would include all workers compensation claims before the Department of Labor and Industrial Relations and before the Labor and Industrial Relations Appeals Board, to all Personal Injury Protection disputes and all Medical Claim Conciliation Panel cases before the Department of Commerce and Consumer Affairs, and to all other administrative proceedings in which a party's protected health information is placed at issue.

To my knowledge, no state agency has adopted any health information privacy protections following the *Brende* decision. The Office of Information Practices has done very little in this area after I provided a copy of the *Brende* decision to then OIP Director Paul Tsukiyama by letter dated November 21, 2007. I sent a similar letter also dated November 21, 2007 to Labor Director Darwin L.D. Ching. The State's inaction protecting the privacy rights of its citizens is deplorable.

The OIP issued an Advisory Opinion on December 3, 2010 holding that workers' compensation records at the Disability Compensation Division had a significant privacy interest under HRS §§ 92F-13(1) and 92F-14. However, OIP did not cite to *Brende* or to Hawaii's constitutional right to privacy. Section 41 of HB 1415 would require OIP to adopt rules and standards for disclosing, authorizing, and authenticating protected health information.

The Labor Department continues to have posed on its website a long outdated April 11, 2003 HIPAA information sheet which states that workers' compensation claim are exempt from HIPAA privacy protection: [http://www.hawaii.gov/labor/dcd/PDF/wc/HIPAA\\_wksheet.pdf](http://www.hawaii.gov/labor/dcd/PDF/wc/HIPAA_wksheet.pdf). This information is true, but it leaves the erroneous impression that Hawaii-based workers' compensation claims have no privacy protection of any kind. Last month, I provided to current Labor Director, Dwight Takamine a copy of the *Brende* decision.

*Brende*, Hawaii's constitutional right to privacy, and HB 1451, recognize that the individual patient has a right to know about and to consent in advance to the release and uses of her or his health information and medical records. This is essentially a right of informed consent for which there should be no disagreement. The right to disseminate protected health information and medical records has never belonged to any health care provider, any insurer, any company, or to any government agency. HB 1451 would accordingly re-affirm and re-codify Hawaii's health information privacy protection policy. As is the case with the HIPAA Privacy Rule, following the enactment of HB 1415, there should be no disruption in the use of protected health information for treatment and insurance billings. I would be happy to volunteer my time after enactment of HB 1451 to assist with the implementation of this long needed privacy statute.

John C. McLaren  
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work email: JMcLaren@PPYRLaw.com

## **morikawa2 - Grant**

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**From:** mailinglist@capitol.hawaii.gov  
**Sent:** Wednesday, February 02, 2011 9:18 AM  
**To:** HLTtestimony  
**Cc:** geesey@hawaii.edu  
**Subject:** Testimony for HB1451 on 2/4/2011 9:00:00 AM

Testimony for HLT 2/4/2011 9:00:00 AM HB1451

Conference room: 329  
Testifier position: support  
Testifier will be present: No  
Submitted by: Yvonne Geesey  
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Submitted on: 2/2/2011

**Comments:**

As a nurse attorney I support restoring this statute to protect the privacy of our health information.