
A BILL FOR AN ACT

RELATING TO CRIMES.

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

1 SECTION 1. The legislature finds that many businesses,
2 associations, and organizations providing goods and services to
3 the public, conducting other activity in Hawaii, or otherwise
4 affecting residents of Hawaii, now operate nationally or
5 globally and often maintain their business records in a location
6 outside the State of Hawaii. The legislature recognizes that
7 bringing persons or organizations committing crimes in Hawaii to
8 justice is a matter of great public interest because crimes have
9 a significant effect on businesses, associations, and other
10 organizations that conduct business in Hawaii, as well as on
11 Hawaii's citizens. Crimes result in significant harm and losses
12 to persons, businesses, associations, and other organizations
13 victimized, as well as persons indirectly victimized when
14 businesses or others more directly affected by the crimes must
15 raise prices to cover crime losses.

16 The legislature further finds that the ability of law
17 enforcement and the criminal justice system to effectively
18 perform their duties to the public is often dependent upon the



1 ability of law enforcement agencies, prosecutors, and criminal
2 defense attorneys to obtain and use records relevant to crimes
3 that affect Hawaii's citizens, businesses, associations,
4 organizations, and others who provide goods or services, or
5 conduct other activity in Hawaii. In the course of fulfilling
6 their duties to the public, law enforcement agencies,
7 prosecutors, and criminal defense attorneys must frequently
8 obtain records from these entities, and be able to use the
9 records in court. The ability to obtain and use these records,
10 particularly if they are located outside the State of Hawaii,
11 has a significant impact on Hawaii citizens because it directly
12 affects the enforcement of Hawaii's criminal laws and the
13 deterrence value of criminal prosecution. To effectively combat
14 crime, Hawaii courts must have the ability to require all those
15 who possess records relevant to a criminal investigation to
16 comply with the legal process issued in connection with criminal
17 investigations or litigation, regardless of the location of such
18 records.

19 The legislature further finds that, according to the
20 Internet Crime Complaint Center, a partnership between the FBI
21 and National White Collar Crime Center, the category of internet
22 fraud receives the largest percentage of complaints - more so



1 than online bullying, harassment, and hacking. In Hawaii, local
2 law enforcement receives about 100 to 200 internet fraud
3 complaints per month. To address this growing problem, our
4 existing computer fraud statutes need to be strengthened and
5 patterned after our identify theft statutes, given that both
6 seek to prohibit the same underlying crime of theft. Our
7 existing computer fraud statutes are too weak, resulting in
8 infrequent use by prosecutors.

9 The legislature further finds that computer hacking and
10 unauthorized computer intrusions are on the rise. The internet
11 provides anonymity and makes the traceability and attribution of
12 the suspect difficult for law enforcement. Today, anyone,
13 anywhere, at any time, can engage in online criminal activity.
14 Such crimes will only increase with the rapid proliferation of
15 mobile devices like laptops, tablets, and smart phones,
16 widespread internet connectivity, and the ease of creating and
17 obtaining malware. The penalties in our existing unauthorized
18 computer access statutes are too weak to have a meaningful
19 deterrent effect.

20 The purpose of this Act is threefold. First, to establish
21 a procedure by which Hawaii courts may order the production and
22 authentication of records by persons and entities located



1 outside the State of Hawaii in all criminal cases, to provide
2 for use of those records in court, and also to require that
3 anyone in Hawaii served with criminal process from another
4 jurisdiction must comply with such criminal process as if it had
5 been issued by a Hawaii court. Second, to amend sections 708-
6 891 and 708-891.5 to include computer fraud that occurs when
7 accessing a computer system or computer network, to increase the
8 penalties for computer fraud in the first and second degrees to
9 class A and B felonies, respectively, and to create the new
10 offense of computer fraud in the third degree. Third, to
11 increase the penalties for unauthorized computer access in the
12 first, second, and third degrees to class A, B, and C felonies,
13 respectively, and raise the minimum monetary value to \$20,000
14 when unauthorized computer access in the first degree is based
15 on monetary value of the information obtained.

16 SECTION 2. The Hawaii Revised Statutes is amended by
17 adding a new chapter to be appropriately designated and to read
18 as follows:

19 **"CHAPTER**

20 **OBTAINING RECORDS BY CRIMINAL PROCESS**

21 **§ -1 Definitions.** The following terms whenever used and
22 referred to in this chapter shall have the following meanings



1 unless a different meaning is clearly apparent from the context:

2 "Adverse result" includes one or more of the following
3 possible consequences:

4 (1) Danger to the life or physical safety of an
5 individual;

6 (2) A flight from prosecution;

7 (3) The destruction of, potential loss of, or
8 tampering with evidence;

9 (4) The intimidation of potential witnesses;

10 (5) Jeopardy to an investigation or undue delay of a
11 trial.

12 "Applicant" means a law enforcement officer, prosecuting
13 attorney or deputy prosecuting attorney, attorney general or
14 deputy attorney general, or defense attorney who is seeking
15 criminal process under section 2 of this chapter.

16 "Criminal process" means a search warrant or legal process
17 issued pursuant to chapter 621, chapter 622, and chapter 803 of
18 the Hawaii Revised Statutes; the Hawaii Rules of Penal
19 Procedure; and any other legal process signed by a judge or
20 clerk of the district or circuit court and issued in a criminal
21 matter which allows the search for or commands production of
22 records that are in the actual or constructive possession of the



1 recipient, regardless of whether the recipient or the records
2 are physically located within the state.

3 "Defense attorney" means an attorney of record for a person
4 charged with a crime, when the attorney is seeking the issuance
5 of criminal process for the defense of the criminal case.

6 "Properly served" means delivery by hand or in a manner
7 reasonably allowing for proof of delivery if delivered by United
8 States mail, overnight delivery service, or facsimile to the
9 recipient addressee of criminal process.

10 "Recipient" means a person, as defined in section 701-118
11 of the Hawaii Revised Statutes, or a business, as defined in
12 section 487J-1 of the Hawaii Revised Statutes, that has
13 conducted business or engaged in transactions occurring at least
14 in part in this state upon whom criminal process issued under
15 this chapter is properly served.

16 **§ -2 Production of records.** (a) This section shall
17 apply to any criminal process allowing for search of or
18 commanding production of records that are in the actual or
19 constructive possession of a recipient who receives service
20 outside Hawaii, regardless of whether the recipient or the
21 records are physically located within the state.

22 (b) When properly served with criminal process issued under



1 this section, the recipient shall provide the applicant all
2 records sought pursuant to the criminal process. The records
3 shall be produced within twenty business days of service of the
4 criminal process, unless the process requires earlier
5 production. An applicant may consent to a recipient's request
6 for additional time to comply with the criminal process.

7 (c) Criminal process issued under this section must contain
8 the following language in bold type on the first page of the
9 document: "This [warrant, subpoena, order] is issued pursuant to
10 HRS § -2. Production is due within twenty business days of
11 service, unless a shorter time is stated herein, or the
12 applicant consents to a recipient's request for additional time
13 to comply."

14 (d) If the issuing court finds reason to suspect that
15 failure to produce records within twenty business days would
16 cause an adverse result, the criminal process may require
17 production of records within less than twenty business days.
18 The court may reasonably extend the time required for production
19 of the records upon finding that the recipient has shown good
20 cause for that extension and that an extension of time would not
21 cause an adverse result.

22 (e) When properly served with criminal process issued under



1 this section, a recipient who seeks to quash the criminal
2 process must seek relief from the issuing court, within the time
3 originally required for production of records. The court shall
4 hear and decide the motion no later than five court days after
5 the motion is filed. An applicant's consent, under subsection
6 (b) of this section, to a recipient's request for additional
7 time to comply with the criminal process does not extend the
8 date by which a recipient must seek the relief designated in
9 this section.

10 **§ -3 Authenticity of records; verification; affidavit,**
11 **declaration, or certification.** (a) Upon written request from
12 the applicant, or if ordered by the issuing court, the recipient
13 of criminal process shall verify the authenticity of records
14 that it produces by providing an affidavit or declaration that
15 complies with subsection (b) of this section. The requirements
16 of Rule 902(11) of the Hawaii Rules of Evidence regarding
17 business records as evidence may be satisfied by an affidavit or
18 declaration that complies with subsection (b) of this section,
19 without the need for testimony from the custodian of records,
20 regardless of whether the business records were produced by a
21 foreign or Hawaii state entity.

22 (b) To be admissible without testimony from the custodian



1 of records, business records must be accompanied by an affidavit
2 or declaration by its record custodian or other qualified person
3 that includes contact information for the witness completing the
4 document and attests to the following:

5 (1) The witness is the custodian of the record or
6 sets forth evidence that the witness is qualified to
7 testify about the record;

8 (2) The record was made at or near the time of the act,
9 condition, or event set forth in the record by, or
10 from information transmitted by, a person with
11 knowledge of those matters;

12 (3) The record was kept in the course of the regularly
13 conducted activity;

14 (4) The record was made by the regularly conducted
15 activity as a regular practice;

16 (5) The identity of the record and the mode of its
17 preparation; and

18 (6) Either that the record is the original or that it is a
19 duplicate that accurately reproduces the original.

20 (c) A party intending to offer a record into evidence under
21 this section must provide written notice of that intention to
22 all adverse parties, and must make the record and affidavit or



1 declaration available for inspection sufficiently in advance of
2 their offer into evidence to provide an adverse party with a
3 fair opportunity to challenge them. A motion opposing admission
4 in evidence of the record shall be made and determined by the
5 issuing court before trial and with sufficient time to allow the
6 party offering the record time, if the motion is granted, to
7 produce the custodian of the record or other qualified person at
8 trial, without creating hardship on the party or on the
9 custodian or other qualified person.

10 (d) Failure by a party to timely file a motion under
11 subsection (c) of this section shall constitute a waiver of
12 objection to admission of the evidence, but the court for good
13 cause shown may grant relief from the waiver. When the court
14 grants relief from the waiver, and thereafter determines the
15 custodian of the record shall appear, a continuance of the trial
16 may be granted to provide the proponent of the record sufficient
17 time to arrange for the necessary witness to appear.

18 (e) Nothing in this section precludes either party from
19 calling the custodian of record of the record or other witness
20 to testify regarding the record.

21 **§ -4 Service of process issued by or in another state.**

22 When a Hawaii recipient is served with process issued by or in



1 another state, and such process on its face purports to be valid
2 criminal process, the Hawaii recipient shall comply with that
3 process as if that process had been issued by a Hawaii court.

4 **§ -5 Recipients' immunity from liability.** A recipient of
5 criminal process or process under this chapter, and any other
6 person that responds to such process is immune from civil and
7 criminal liability for complying with the process, and for any
8 failure to provide notice of any disclosure to the person who is
9 the subject of or identified in the disclosure.

10 **§ -6 Issuance of criminal process.** A judge of the
11 district or circuit court may issue any criminal process to any
12 recipient at any address, within or without the state, for any
13 matter over which the court has criminal jurisdiction pursuant
14 to section 701-106 of the Hawaii Revised Statutes. This section
15 does not limit a court's authority to issue warrants or legal
16 process under other provisions of state law."

17 SECTION 3. Section 708-891, Hawaii Revised Statutes, is
18 amended to read as follows:

19 "~~[-]~~**§708-891**~~[+]~~ **Computer fraud in the first degree.** (1)

20 A person commits the offense of computer fraud in the first
21 degree if the person knowingly, and with intent to defraud,
22 accesses a computer ~~[without authorization and, by means of such~~



1 ~~conduct, obtains or exerts control over the property of~~
2 ~~another.]~~, computer system, or computer network with the intent
3 to:

4 (a) Facilitate the commission of a murder in any degree, a
5 class A felony, kidnapping, unlawful imprisonment in any degree,
6 extortion in any degree, any offense under chapter 134, criminal
7 property damage in the first or second degree, escape in any
8 degree, any offense under part VI of chapter 710, any offense
9 under section 711-1103, or any offense under chapter 842; or

10 (b) Commit the offense of theft in the first degree.

11 ~~[(2) In a prosecution for computer fraud in the first~~
12 ~~degree, it is a defense that the object of the fraud and the~~
13 ~~property obtained consists only of the use of the computer and~~
14 ~~the value of such use is not more than \$300 in any one year~~
15 ~~period.]~~

16 ~~[(3)]~~ (2) Computer fraud in the first degree is a class
17 [B] A felony."

18 SECTION 4. Section 708-891.5, Hawaii Revised Statutes, is
19 amended to read as follows:

20 "~~[+]§708-891.5[+]~~ **Computer fraud in the second degree.**

21 (1) A person commits the offense of computer fraud in the



1 second degree if the person knowingly, and with the intent to
2 defraud[~~r~~]:

3 (a) Accesses a computer, computer system, or computer
4 network with the intent to commit the offense of theft in the
5 second degree; or

6 (b) T[~~e~~]ransfers, or otherwise disposes of, to another, or
7 obtains control of, with the intent to transfer or dispose of,
8 any password or similar information through which a computer,
9 computer system, or computer network may be accessed.

10 (2) Computer fraud in the second degree is a class [C] B
11 felony."

12 SECTION 5. Chapter 708, Hawaii Revised Statutes, is
13 amended by adding a new section to be appropriately designated
14 and to read as follows:

15 **"§708- Computer fraud in the third degree. (1) A**
16 person commits the offense of computer fraud in the third degree
17 if the person knowingly, and with the intent to defraud,
18 accesses a computer, computer system, or computer network with
19 the intent to commit the offense of theft in the third or fourth
20 degree.

21 (2) Computer fraud in the third degree is a class C
22 felony."



1 SECTION 6. Section 708-895.5, Hawaii Revised Statutes, is
2 amended to read as follows:

3 "[~~f~~]**§708-895.5**[~~f~~] **Unauthorized computer access in the**
4 **first degree.** (1) A person commits the offense of unauthorized
5 computer access in the first degree if the person knowingly
6 accesses a computer, computer system, or computer network
7 without authorization and thereby obtains information, and:

- 8 (a) The offense was committed for the purpose of
9 commercial or private financial gain;
- 10 (b) The offense was committed in furtherance of any other
11 crime;
- 12 (c) The value of the information obtained exceeds
13 [~~\$5,000;~~] \$20,000; or
- 14 (d) The information has been determined by statute or rule
15 of court to require protection against unauthorized
16 disclosure.

17 (2) Unauthorized computer access in the first degree is a
18 class [~~B~~] A felony."

19 SECTION 7. Section 708-895.6, Hawaii Revised Statutes, is
20 amended by amending subsection (2) to read as follows:

21 "(2) Unauthorized computer access in the second degree is
22 a class [~~E~~] B felony."



1 SECTION 8. Section 708-895.7, Hawaii Revised Statutes, is
2 amended by amending subsection (2) to read as follows:

3 "(2) Unauthorized computer access in the third degree is a
4 [~~misdemeanor.~~] class C felony."

5 SECTION 9. This Act does not affect rights and duties that
6 matured, penalties that were incurred, and proceedings that were
7 begun before its effective date.

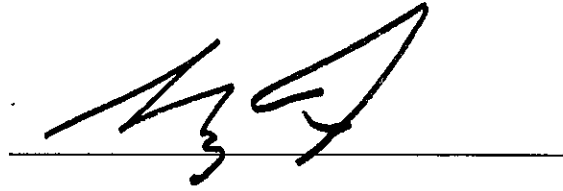
8 SECTION 10. Statutory material to be repealed is bracketed
9 and stricken. New statutory material is underscored.

10 SECTION 11. This Act shall take effect on July 1, 2012.

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INTRODUCED BY:



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JAN 20 2012



Report Title:

Crime; Records; Computer fraud; Unauthorized computer access

Description:

Creates process for obtaining out-of-state records in criminal cases. Amends computer fraud statute and penalties. Amends unauthorized computer access statute and penalties.

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