

OFFICE OF INFORMATION PRACTICES

STATE OF HAWAII
NO. 1 CAPITOL DISTRICT BUILDING
250 SOUTH HOTEL STREET, SUITE 107
HONOLULU, HAWAII 96813
TELEPHONE: 808-586-1400 FAX: 808-586-1412
EMAIL: oip@hawaii.gov

To: House Committee on Labor and Public Employment
From: Cheryl Kakazu Park, Director
Date: January 20, 2012, 10:05 a.m.
State Capitol, Room 309
Re: Testimony on H.B. No. 1356
Relating to Public Employees

Thank you for the opportunity to submit testimony on H.B. No. 1356.

This bill would eliminate the requirement that a government employee's name, job description and location, length of employment, and qualifications be automatically considered to be public information without exception. Instead, the bill would limit the information that is automatically public solely to the job titles and salary ranges of an agency's employees. Specifically, the bill would amend section 92F-12(a)(14), which sets out a list of information about government employees that is required to be public without exception, by deleting the requirement to list a government employee's name, business address, business telephone number, job description, education and training background, previous work experience, dates of first and last employment, position number, type of appointment, service computation date, occupational group or class code, department, division, branch, office, section, unit, and island of employment. The bill would also eliminate the current requirement that the exact compensation of exempt employees be disclosed.

The Office of Information Practices ("OIP") recognizes that the question of whether less information about government employees should be publicly disclosed without exception is a policy question for the Legislature to decide, but OIP is concerned that this bill would represent a radical change and would substantially increase OIP's workload in interpreting and administering the new requirements.

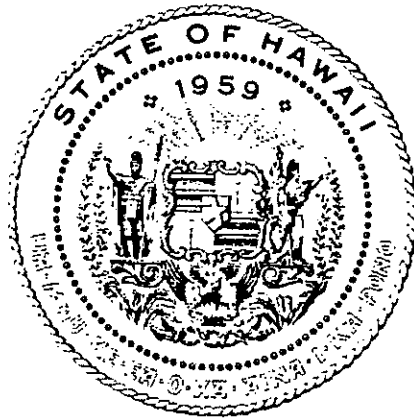
From the time of its adoption in 1988, the Uniform Information Practices Act, chapter 92F, HRS ("UIPA"), has required that certain information about government employees be considered automatically public without exception: name, compensation for exempt employees or salary range for non-exempt employees, job title, business address, business telephone number, job description, education and training background, previous work experience, and dates of first and last agency employment. Attached is an excerpt from Vol. I, Report of the Governor's Committee on Public Records and Privacy, pp106-11 (December 1987), which discusses the testimony and policy concerns considered by the group whose work formed the basis for Hawaii's original UIPA. Nearly all other states consider names and salaries of public employees to be public information.

The effect of this bill would be that even a government employee's name would no longer be automatically public, nor would information about the employee's duties and length of employment, the employee's work location, or the employee's qualifications for the job. Because of the Legislature's deliberate action to remove certain information from the list of automatically public information, the bill's adoption would potentially result in government employees' names, their work contact information, job duties, and other information from being initially withheld from the public under the UIPA's privacy exception and it may require OIP to examine a large number of such decisions on a case by case basis. Even if OIP or a court were to ultimately determine that a government employee does not have a significant privacy interest in the fact that he or she is employed by a government

agency, there would still be new questions as to whether an employee has a privacy interest in the other information about himself or herself (such as job description, qualifications, dates of service, or salary information). A host of other unanticipated questions will arise that will tax OIP's limited resources and ability to administer other aspects of the UIPA as well as the Sunshine Law.

If the Legislature nevertheless believes this is an area that needs amendment, then OIP would suggest instead a more narrowly tailored approach. One proposal would be to limit the categories of exempt employee positions for which the exact salary (as opposed to salary range) must be made public; for example, automatic disclosure could be required only for exempt employees with annual base compensation of \$100,000 or more. An additional amendment may be to allow an exemption from automatic disclosure for government employees who have demonstrated a need for confidentiality because they are seeking or have obtained a restraining order to protect them from an abuse, as in domestic violence or crime victim/witness protection cases. Another possible amendment would be to require the automatic public disclosure of job titles, compensation ranges, job descriptions, business addresses and business telephone numbers, while also making it clear in the law that the names of employees, their exact compensation, education and training background, previous work experience, and dates of first and last agency employment is not automatically disclosable, but also is not private information and may be disclosed if no other statutory exemption or confidentiality provision applies.

Thank you for the opportunity to testify.



Report of the Governor's Committee on Public Records and Privacy

Robert A. Alm, Chairman
Duane Brenneman
Andrew Chang
Dave Dezzani
Ian Lind
Jim McCoy
Stirling Morita
Justice Frank Padgett
Warren Price III

Volume I
December 1987

OFFICE OF INFORMATION PRACTICES
Department of the Attorney General
335 Merchant Street, Room 246
Honolulu, Hawaii 96813

Government Employees

Personnel Records of Public Employees
Salaries and Compensation of Public Employees
Employee Rosters
State and County Contract Hires
Temporary Hires
Personnel Hiring Process
Testing Materials
Retirement Amounts for Former State Employees
Ethics Decision When Violations Found

The Committee heard a good deal of testimony on the subject of records relating to government employees. As was often stated, these are public officials being compensated with public dollars. There is, therefore, a strong interest in ensuring that this money is well spent. There is also a need to reduce any potential for corruption and most importantly to allow for a meaningful review of actions and policies. Most government employees recognize that the "rules of the game" are different for public sector workers and as one of the Committee members noted, there is less expectation of privacy for those who work in government. See Nakano v. Matayoshi, 68 Haw. 142, 706 P.2d 816 (1985) which upheld financial disclosure requirements for certain county employees.

At the same time, it is important to focus on the areas of major concern. There are, after all, 61,750 public employees working for either the State (48,600) or county governments (13,150). And as Marcia Reynolds of the Big Island Press Club (II at 148) noted, there is a strong basis for confidentiality because of individual privacy rights. Stated another way, while individuals who accept public employment must also expect a greater degree of scrutiny, they do not by accepting public employment surrender all of their rights to privacy. And while the public wants an accountable government, the public is not well served by a situation in which government service becomes so onerous that qualified individuals will not apply.

The major issue which was raised concerns the personnel records of public employees. It is clear that under current law very little information is available from these files. In fact, the only items which appear in every case to be public are name and position.

And there is sentiment to keep it that way. Kauai Mayor Tony Kunimura (II at 144), Joan Kaaii (II at 354), Gordon Tamashiro (II at 424), and Mrs. Jennie Doss (II at 345) all favored treating these records confidentially. Mrs. Doss linked the privacy of these records to the privacy of similar records in the private sector.

As Kaaiai noted, this privacy is waivable, a point also made by Honolulu Managing Director Jeremy Harris (II at 116) and Steve Goodenow (II at 308). Thus, for example, if an employee wants certain financial information made available to a prospective lender, the employee could waive any applicable privacy rights. This waiver practice is currently provided for by all agencies.

The major sentiment was, however, for opening the records to a greater degree than under current law. Besides Harris and Goodenow, others who favored access to more information were Gerry Keir of the Honolulu Advertiser (II at 217 and I(H) at 40-44), Beverly Kever (II at 355; III at 338; and I(H) at 44-46), Terry Boland of Common Cause (II at 152 and I(H) at 46-47), Representative Rod Tam (II at 7 and I(H) at 53-54), Martha Black of the American Association of University Women (II at 147; III at 334; and I(H) at 54-55), John Simonds of the Honolulu Star-Bulletin (II at 224 and I(H) at 56-57), Marcia Reynolds (II at 148), Reverend Frank Chong (II at 313), Desmond Byrne (II at 317 and I(H) at 57-59), Jahan Byrne (II at 332 and I(H) at 47), Ah Jook Ku of the Honolulu Community Media Council (II at 221 and I(H) at 39), James Setliff (I(H) at 32), and Mrs. Pat Wilson (II at 431). Most sought the release of only certain additional records though Mrs. Wilson suggested that everything be open partially with the expectation that the "bad eggs" would go elsewhere.

It should also be noted that Goodenow, Reynolds, and Chong felt that the records of appointed and elected officials should be subject to much greater scrutiny than those of civil service employees.

There was wide variety in the types of information which it was felt should be available to the public. Briefly, the information desired and the proponents are as follows:

- * Employee Name: Harris and Kever (though most who commented undoubtedly assumed the availability of this information);
- * Job Title: Harris, Kever, and Reynolds (with the same note as the foregoing);
- * Business Address and Phone Number: Harris and Reynolds;
- * Job Descriptions: Harris and Reynolds;
- * Employment and Appointment Dates: Reynolds, Setliff, and Ku;

- * Work Experience: Keever, Reynolds, and Chong (for appointed and elected officials);
- * Training: Keever and Reynolds;
- * Background: Black, Keever, and Chong (for appointed and elected officials);
- * Qualifications: Boland;
- * Resume: Harris (if qualifications are at issue) and Reynolds (for appointed and elected officials);
- * Education: Reynolds;
- * Financial Interests and Outside Income: Boland, Setliff, and Chong (for appointed and elected officials). In this context, it may be appropriate to consider an alternative. If information about all government employees who work at a second job had to be collected, the task would be substantial. If, instead, there are particularly positions or groups of positions about which there is concern, the financial disclosure provisions of the ethics law (Chapter 84, HRS) could be amended to include that group. The material would then not be available through the personnel records but rather through the records of the Ethics Commission;
- * Behavior: Boland;
- * Discipline or dismissal where breach of public trust is involved: Goodenow;
- * Organization Affiliations: Chong (for appointed and elected officials);
- * Mental Illness History: Simonds;
- * Involvement in Family Court Matters: Simonds;
- * Welfare Receipt History: Simonds; and
- * Salaries and Compensation: Which will be discussed in the next section.

Obviously, if the full list were required to be available for every public employee, the notion of confidentiality would definitely be secondary. Focusing, however, on the basics; name, job, qualifications, and

compensation seem to be the primary concerns. And whatever the final list includes, it could be specified as public in the law so as to avoid any confusion and to make clear to all public employees what level of confidentiality they have surrendered by virtue of their job choice. Any information not specifically cited as public would be treated as confidential. Currently, that would include religious affiliation, payroll deduction information, medical reports, internal performance reports, home addresses and phone number, and examination scores.

The information which attracted the most attention was the salaries and compensation of public employees. There was strong sentiment that more information in this area should be available expressed by Representative Rod Tam (II at 7 and I(H) at 53-54), John Simonds (II at 224 and I(H) at 56-57), Beverly Keever (II at 355; III at 338; and I(H) at 44-46), Marcia Reynolds (II at 148), Desmond Byrne (II at 317 and I(H) at 57-59), Jahan Byrne (II at 332 and I(H) at 47), Ah Jook Ku (II at 221 and I(H) at 39), and James Setliff (I(H) at 32). As was expressed by a Committee member, the public has a right to know what public employees are making, at least in part, to judge whether it is worth the expense.

One way to handle this would simply be to provide that the salary or compensation paid to an employee is public. There are, however, alternatives. If the focus is the salaries of appointed or high level positions, and that appeared to be the case from much of the testimony and comment, then perhaps the formula should allow the specific salaries of most employees to be confidential while providing the information which is more important. For example, providing the actual salaries of all "exempt and/or excluded employees" would mean that the salaries of all appointed positions and all managerial positions would be public. That could be supplemented by providing the "salary ranges" for all other employees. For example, a Clerk-Typist II is in Salary Range 8 and, therefore, has under the current contract a salary of \$13,260 to \$20,040 a year depending upon seniority.

Late in the course of the Committee's work, the issue of employee rosters arose because of a collective bargaining matter. In September, the Hawaii Labor Relations Board determined that the Teamsters Union would have the opportunity to challenge the United Public Workers for the right to represent Bargaining Unit 10. When the Teamsters sought a list of employees in that unit, the Board denied the request on the grounds that it violated Chapter 92E, HRS.

The situation that resulted has some aspects of a "Catch 22," you have the right to challenge your opponent in a free election, but we will not give you a list of the voters. It would seem only fair that the two go together, they certainly do in the normal election situation.

Assuming this situation is one which should be changed in future cases, provision could be made in the records laws or a specific provision could be made in the collective bargaining law. The latter has the advantage of specifically addressing the problem without becoming involved unintentionally in other situations.

There was also interest in ensuring that information on state and county contract hires is available to the public. This information is generally assumed to be public. James Wallace (I(H) at 16-17), who raised this issue, said that he just wanted to be sure that it was public.

This is an area of potential concern since contract hires avoid the normal civil service hiring mechanisms or bidding processes and thus there is justification for monitoring the actions of public officials. At a minimum, the names, salaries, and scope of services should be available in all cases, though a strong argument can be made that these contracts should be completely open.

Many of these same concerns apply to temporary hires and again the public has a right to know how much they are making, what they are doing, and at some point why the positions are being filled on that basis.

There was also discussion of the need to preserve confidentiality in the personnel hiring process. Privacy interests seem particularly strong in this case and materials such as lists of applicants have been held confidential. Particularly sensitive in this regard are testing materials used in evaluating applicants. These material must remain confidential in order to preserve the integrity of the examinations. This was discussed by Honolulu Managing Director Jeremy Harris (II at 116), and his comments are generally applicable to all other governmental agencies. There must, however, be some access for unsuccessful applicants to obtain sufficient information to challenge a process that they feel is unfair. This is a matter of due process and is worked on with different agencies often by allowing the individual applicant to review the examination material.

There was also some discussion of the availability of the retirement amounts of former employees. According to Director of Finance Yukio Takemoto (III at 615), this material is confidential. On the other hand, "News 7 Hawaii" (II at 297) wanted to know about the amounts involved with retired elected officials. This material appears to be highly personal information involving individual finances. In addition, the formulas for determining contributions are statutory. Finally, very little, if any, discretion exists for retirement officials in handling of individual accounts. Under these circumstances, it would seem that there should be some greater reason for obtaining this information that appears in this record before such information is released. On the other hand, the argument can be made that retirement pay, like salary, should be public record for all government employees.

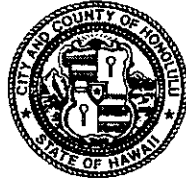
The last issue raised was the availability of ethics decisions, especially when violations are found. The current ethics process is keyed on advising employees in a confidential setting. When opinions are released, information which would identify the individual involved is removed. The goal of the process is to encourage advance consultation and to modify behavior prior to violations taking place. Advisory opinions are not, therefore, findings of violations but rather advice to employees.

Gary Kubota of the Maui Association of Editors and Reporters, and a reporter of the Maui News (II at 234 and I(H) at 1) expressed the view that more than just the "deleted opinion" (the opinion with identifying material removed) should be available. He also said that while confidentiality may protect the innocent, it also protects the guilty. He felt that the process should be more open when violations are proven.

As one of the Committee members pointed out, this is an area in which the public should be able to get more information on the actions of public officials. If changes are made in this area, however, it should probably be to the ethics laws themselves rather than to any records law. In this context, it should be noted that the ethics laws are not identical between the State and the four counties. The State Ethics law, for example, allows for the release of information when violations are found. See Section 84-32, HRS.

POLICE DEPARTMENT
CITY AND COUNTY OF HONOLULU

801 SOUTH BERETANIA STREET · HONOLULU, HAWAII 96813
TELEPHONE: (808) 529-3111 · INTERNET: www.honolulu-pd.org



PETER B. CARLISLE
MAYOR

LOUIS M. KEALOHA
CHIEF

DAVE M. KAJIHIRO
MARIE A. McCAULEY
DEPUTY CHIEFS

OUR REFERENCE JC-SEB

January 20, 2012

The Honorable Karl Rhoads, Chair
and Members
Committee on Labor and Public Employment
House of Representatives
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair Rhoads and Members:

Subject: House Bill No. 1356, Relating to Public Employees

I am Janet Crotteau, Major of the Legislative Liaison Office of the Honolulu Police Department (HPD), City and County of Honolulu.

The HPD supports House Bill No. 1356, which would amend the name and salary disclosure requirements for state and county employees.

The HPD believes in the importance of the transparency of government to support public trust in their elected and appointed officials.

However, the HPD sees no valid purpose for the release of specific public employee names. A person's identity and family history are encompassed in their name. With the wide use of the Internet today, a person's identity just by their name alone can reveal extensive information about them and their family; data that should be kept private. This information may be used for malicious purposes not only for the individual but for all those associated with that person.

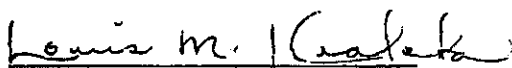
The next time you are at a computer, type your name into a search engine like Google and see what happens. You might be surprised by what is available on the Internet through only the use of your name.

The HPD supports the passage of this bill as the amendment will remove the use of a public employee's name from the statute. This will help to protect them from undue scrutiny as a result of the nature of their jobs.

Thank you for this opportunity to testify.

APPROVED:

Sincerely,


LOUIS M. KEALOHA
Chief of Police


JANET CROTTEAU, Major
Legislative Liaison Office



HB1356
LAB,JUD
Thursday, March 17, 2011
10:05 a.m.
Room 309

Disappeared News
Larry Geller
Honolulu, HI 96817

COMMITTEE ON LABOR & PUBLIC
EMPLOYMENT
Rep. Karl Rhoads, Chair
Rep. Kyle T. Yamashita, Vice Chair

COMMITTEE ON FINANCE
Reo. Macus R. Oshiro, Chair
Rep. Marilyn B. Lee, Vice-Chair

January 19, 2012

Re: HB1356—Relating to Public Employees

In Opposition

Dear Representative Rhoads, Rep. Yamashita, Rep. Oshio, Rep. Lee and members of the Committees:

There seems to be a tension between government and the citizens of Hawaii with regard to transparency of government functions. Whether it is access to consumer complaints, lobbyist reports, or in this case, public employee data, the public needs to defend its right to know or it will be constantly eroded.

Of course, there is a tension between public disclosure and the right to privacy. I would argue that there has been no harm demonstrated under current law, and there is increased harm possible should information be withheld from public view as this bill proposes.

As University of Hawaii media law professor Gerald Kato had said in a Civil Beat article, "there are sometimes good reasons for open records that trump workers' right to privacy. Nepotism and corruption are harder to spot when names are private. He said the measure threatened to "chip away at the edges" of the state's public records law."

I urge the Committees to reject this bill in the interests of good government.

Larry Geller

TO: Representative Karl Rhoads, Chair, and
Representative Kyle Yamashita, Vice Chair
House Committee on Labor & Public Employment

FROM: Sara L. Collins (scollins@lava.net)

HEARING: January 20, 2012, 10:05 AM, Conference Room 309

SUBJECT: Testimony in OPPOSITION to HB 1356 (Relating to Public Employees)

I am writing to OPPOSE HB 1356 (Relating to Public Employees). The subject bill proposes to amend Chapter 92F-12, Hawaii Revised Statutes (HRS), by removing virtually all information pertaining to public employees that is currently available. The only remaining information that would be provided to public inquiries under the Uniform Information Practices Act (UIPA) would be the job title and salary range.

These amendments are an extremely bad idea. A number of public jobs are designated to be held by individuals who must be professionally qualified or certified in their respective fields of work. For example, the State Historic Preservation Division (SHPD) of the Department of Land and Natural Resources (DLNR) receives a significant amount of Federal funding every year (approximately 40% of its annual budget). One of the requirements for receiving this money is having staff that meet the standards of the Secretary of Interior for historic preservation professionals – architects, historians, architectural historians, and archaeologists (http://www.nps.gov/history/local-law/arch_stnds_9.htm). What's more, state law at Chapter 6E-5, HRS also requires the State Historic Preservation Officer to possess similar qualifications. If HB 1356 is passed, it will no longer be possible for anyone to know or find out whether these individuals actually meet the qualifications set by Federal and State law. There are likely many other State and County agencies with positions having similar types of requirements.

While the proposed bill is perhaps well intended in trying to protect public employees from the risk of identity theft, it will have the unintended consequence of greatly increasing the likelihood of unqualified individuals being selected for or appointed to positions for which they should be qualified. As Chapter 92F-12 currently reads, none of the information permitted to be released puts any public employee at risk for identity theft. Thus, HB 1356 appears to be a solution in search of a non-existent problem. If HB 1356 is passed, it would only increase opportunities for cronyism and corruption, unchecked by public oversight.

Therefore, I respectfully ask that you vote to OPPOSE this bill, and hold it in committee.

Thank you very much for considering my views on this bill. Should you have any questions, you may reach me at the above email address.

yamashita2 ----Aulii

From: mailinglist@capitol.hawaii.gov
Sent: Thursday, January 19, 2012 8:12 AM
To: LABtestimony
Cc: steve@myplaceinparadise.com
Subject: Testimony for HB1356 on 1/20/2012 10:05:00 AM

Testimony for LAB 1/20/2012 10:05:00 AM HB1356

Conference room: 309
Testifier position: Oppose
Testifier will be present: No
Submitted by: Steve Miller
Organization: Individual
E-mail: steve@myplaceinparadise.com
Submitted on: 1/19/2012

Comments:

I oppose this bill as written. The identity theft language is obviously just an excuse. Why don't you just come out and say "We don't like having our exact salaries published." I could even let it slide if you had defined 'salary range' as rounded to the nearest thousand or within 3% or something. But as written I believe it is bad idea.
Aloha, Steve