



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SEVENTH LEGISLATURE, 2014**

ON THE FOLLOWING MEASURE:

H.B. NO. 2223, RELATING TO ADMINISTRATIVE FINDINGS RECORDS.

BEFORE THE:

HOUSE COMMITTEES ON HUMAN SERVICES AND ON HEALTH

DATE: Tuesday, February 4, 2014 **TIME:** 10:40 a.m.

LOCATION: State Capitol, Room 329

TESTIFIER(S): David M. Louie, Attorney General, or
James W. Walther, Deputy Attorney General

Chairs Carroll and Belatti and Members of the Committees:

The Attorney General appreciates the intent of this bill, but provides the following comments to point out a constitutional concern and other problems in this bill that would make its implementation difficult if it were passed in this form.

This bill purports to provide authority for the Department of Health (DOH) to access child abuse records and adult abuse records maintained by the Department of Human Services (DHS), in order for DOH to perform background checks to determine the suitability of persons who provide care to adults in various healthcare facilities. The records that the DHS maintains about child abuse and adult abuse are confidential records pursuant to section 346-10, section 346-225, and chapter 350, Hawaii Revised Statutes (HRS). The way this bill is drafted, to amend parts of chapter 346, HRS (having to do with DHS), and parts of chapter 321, HRS (having to do with DOH licensing), creates several problems.

First, section 14 of article III of the Hawaii State Constitution provides that "[e]ach law shall embrace but one subject, which shall be expressed in its title." The title of this bill, "Administrative Findings Records," does not accurately describe or reflect the subject of the bill, and would violate the Constitution.

The term "administrative findings record checks" is undefined and its use makes the bill as drafted unconstitutional. The term "administrative findings record checks" is not used in any other context by DOH or by DHS to describe the records that are ostensibly being described, and it does not accurately describe the records that contain the information this bill contemplates.

The DHS records of child abuse and adult abuse may comprise something other than "administrative findings." When an agency, for purposes of licensing, performs a background check that includes child abuse records, those records may not include "administrative findings." For instance, there may be no "administrative findings" if there is no administrative hearing pursuant to chapter 91, HRS. Additionally, there would be no "administrative findings" if the investigation of child abuse results in a family court action for abuse and neglect under chapter 587A, HRS, the child protection act. Yet in both of these examples, an investigation may result in a record that the person is the perpetrator of abuse or neglect of a child pursuant to chapter 350 or chapter 587A, HRS. Similarly for adult protective services, determinations that a vulnerable adult was abused may be made by a court, rather than in an administrative action, pursuant to part X of chapter 346, HRS.

There is a clear and direct way to identify those records by using the terms from the DHS statutory sections that establish the nature of the records. It would be more accurate and consistent to delete references to "administrative findings records" or "administrative findings record checks" from this bill, and replace them, as appropriate, with "child abuse record checks," and "adult abuse record checks," or something similar, consistent with the wording used in the DHS statutes.

Unfortunately, regardless of how the bill is corrected to accurately describe the records, making those corrections in this bill would still create a constitutional infirmity with the title, because the title "Administrative Findings Records" would not clearly relate to the subject of the bill as corrected. The substance of this bill with corrections could be constitutional if it was contained in a different bill with an appropriate title.

Second, sections 1 and 2 of the bill are unnecessary, because although the DHS child abuse and adult abuse records are confidential, the records may be disclosed by consent of the person to whom the record belongs. It is not necessary to create an affirmative duty on the part of DHS in order for DOH to have access to the records. Instead, there should be a requirement that all applicants for the DOH licensing under section 321-12.5, HRS, provide consent for DHS to release its records to the DOH for the purpose of DOH conducting a background check. Again, the types of records released should be identified in a way that is consistent with DHS practice, for clarity.

Third, section 1 of the bill at page 1, line 2, would add a section concerning child abuse records to part VIII of chapter 346, HRS. This would be misplaced, because part VIII is related to childcare licensing, and does not relate to the creation of records or reporting of child abuse. As explained above, this section is unnecessary, but if it is retained it could be placed in part I of chapter 346, HRS, or in chapter 350 HRS.

Fourth, there are several sections of chapters 346, 350, and 587A (and possibly others) that relate to the confidentiality of the child abuse and adult abuse records. This bill does not address all of the possible sections directly, and may create ambiguity as to their application, if sections 1 and 2 remain in the bill. For instance, there may be court records or other confidential material contained within the DHS records, such as the name of a person who reports abuse, that may or should still be confidential, despite the amendments made by this bill. Some of those records may or may not be necessary for the purposes for which DOH would use the records. DOH should be provided an opportunity to research this and consult with DHS as necessary to ensure that all of the possible sections are addressed appropriately.

Fifth, section 3 of the bill at page 3, lines 11-12, is unclear because it adds, without defining, the term "finding of adult or child abuse or neglect" to the definition of "disqualifying information." It is not clear that this is related to the term "administrative findings record," and it does not provide a standard by which a finding is made, or by whom. Further, this section of the bill is unclear because it does not provide a definition for either "child abuse" or "adult abuse." The bill could be clarified by defining those terms with reference to section 350-1, HRS (child abuse), and section 346-222, HRS (adult abuse).

Sixth, the bill is unclear and confusing because it attempts to amend section 321-15.2, HRS, which is entitled "Criminal history record checks," by redefining the term "disqualifying information" to include something that clearly does not relate to criminal history record checks. Ultimately it would be more accurate to amend the title of section 321-15.2, HRS, to read "Background checks" which would encompass criminal history record checks, child abuse record checks, and adult abuse record checks. Alternatively, the title of that section could be amended to read: "Criminal history record checks, child abuse record checks, and adult abuse perpetrator record checks." In general, a clearer model for this statute and the proposed changes is found in

section 346-154, HRS, which sets out the standards for the DHS child care licensing program to do background checks.

Due to the constitutional problem with the title and subject, we respectfully recommend that the measure be held. If the substance of the bill is amended with regard to our other comments, it may be possible to put the contents of the bill into a more properly titled bill, such as one relating to "background checks."



STATE OF HAWAII
DEPARTMENT OF HUMAN SERVICES
P. O. Box 339
Honolulu, Hawaii 96809-0339

February 4, 2014

MEMORANDUM

TO: The Honorable Mele Carroll, Chair
House Committee on Human Services

The Honorable Della Au Belatti, Chair
House Committee on Health

FROM: Patricia McManaman, Director

SUBJECT: **H.B. 2223 - RELATING TO ADMINISTRATIVE FINDINGS
RECORDS**

Hearing: Tuesday, February 4, 2014; 10:40 a.m.
Conference Room 329, State Capitol

PURPOSE: The purposes of H.B. 2223 are to 1) broaden the scope of “disqualifying information” for purposes of licensing sanctions to include administrative findings of adult or child abuse or neglect; 2) extend the use of “disqualifying information” to apply to Department of Health (DOH) employees or prospective employees; and 3) authorize the Department of Human Services (DHS) to release administrative findings record checks to DOH.

DEPARTMENT’S POSITION: The Department of Human Services (DHS) opposes the proposed amendments to HRS Chapter 346 as specified in Sections 1 and 2 of this bill. Sections 346-225 and 350-1.4, Hawaii Revised Statutes (HRS), already give the DHS the authority to promulgate administrative rules to

provide for the confidentiality of adult abuse and child abuse reports and records, and for the authorized disclosure of the reports and records.

Both the Child Welfare Services Branch (CWSB) and the Adult Protective and Community Services Branch (APCSB) within the Social Services Division have promulgated Hawaii Administrative Rules (HAR), Chapters 17-1601 and 17-1401.1 respectively, to allow disclosure of information regarding abuse or neglect findings with written authorization from the individual to whom the findings pertain. As proposed in this bill, the amendments in Sections 1 and 2 of this bill would allow the DOH unfettered access, without an articulated purpose to otherwise confidential DHS records.

Additionally, the DHS will amend its HAR Chapters 17-1601-6, "Disclosure to third parties without consent or court order," to specifically include the DOH for purposes of background checks to determine reputable and responsible character of all prospective applicants, operators, direct patient access employees, and adult volunteers of healthcare facilities under their purview. This would be consistent with Hawaii's present statutory and regulatory framework.

The DHS has already established a mechanism by which entities such as the Department of Health may obtain information regarding adult and child abuse findings and we believe that the proposed amendments to HRS Chapter 346 in Sections 1 and 2 and the references to HRS 346-A and 346-B in Section 3 as specified in this bill are redundant and unnecessary.

The DHS defers to the DOH regarding the other provisions in Section 3 of this bill which amends HRS Chapter 321.

Thank you for the opportunity to provide comments on this bill.



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

LATE TESTIMONY

GARY L. GILL
ACTING DIRECTOR OF HEALTH
LATE TESTIMONY

In reply, please refer to:
File:

LATE

House Committee on Human Services and House Committee on Health

HB 2223, Relating to Administrative Findings Records

**Testimony of Gary L. Gill
Acting Director of Health**

Tuesday, February 4, 2014

1 **Department's Position: Supports the intent.**

2 **Fiscal Implications:** None known or anticipated.

3 **Purpose and Justification:** The department supports the intent of this bill and understands that DHS
4 and the Office of the Attorney General have concerns regarding the bill title and other language. DOH
5 requires broader statutory authority to conduct more thorough background checks on licensees and
6 licensure applicants, direct care employees of certain health care facilities, and of certain departmental
7 employees or employment applicants who provide direct care. This bill is an attempt to provide such
8 authority.

9 The department's current statutory authority under HRS §321-15.2 is limited to criminal history
10 record checks and on findings of patient or resident abuse. This current authority is too narrow for the
11 purpose of licensing health care facilities that provide care to adults or children and does not provide
12 DOH with sufficiently broad authority to review administrative findings of abuse or neglect of any adult
13 or child whether or not they were a patient or resident in a licensed facility. This information is
14 important to ensure that the background check applicant is thoroughly vetted to safeguard vulnerable

1 residents from an abusive person whether as a care giver in or as an owner or operator of a state licensed
2 facility.

3 DOH is also in the process of drafting administrative rules on conducting background checks and
4 it was through this process that the department learned of its limited statutory authority.

5 The department will continue to work with its deputy attorney general on language to improve
6 upon the current draft. Notwithstanding, the department respectfully requests that this committee find a
7 measure with an appropriate title that could be used as a vehicle for the intent of this current draft or
8 pass this measure so that discussion can continue and, if necessary, improvements to the bill can be
9 made.

10 Thank you for the opportunity to testify in support of the intent of this bill.

LATE

kobayashi1-Joni

From: mailinglist@capitol.hawaii.gov
Sent: Tuesday, February 04, 2014 9:48 AM
To: HUS testimony
Cc: mendezj@hawaii.edu
Subject: *Submitted testimony for HB2223 on Feb 4, 2014 10:40AM*

HB2223

Submitted on: 2/4/2014

Testimony for HUS/HLT on Feb 4, 2014 10:40AM in Conference Room 329

Submitted By	Organization	Testifier Position	Present at Hearing
Javier Mendez-Alvarez	Individual	Support	No

Comments:

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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