

LATE TESTIMONY



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

ON THE FOLLOWING MEASURE:

S.B. NO. 2367, RELATING TO PRODUCTION OF RECORDS.

BEFORE THE:

SENATE COMMITTEE ON PUBLIC SAFETY, INTERGOVERNMENTAL AND MILITARY
AFFAIRS

DATE: Tuesday, January 28, 2014 TIME: 3:00 p.m.

LOCATION: State Capitol, Room 224

TESTIFIER(S): David M. Louie, Attorney General, or
Lance M. Goto, Deputy Attorney General.

Chair Espero and Members of the Committee:

The Department of the Attorney General strongly supports this bill, with one technical amendment.

The purpose of this bill is to clarify provisions of chapter 806D, Hawaii Revised Statutes (HRS), which allow for the service of process issued by another state upon a Hawaii recipient. This bill clarifies the following: (1) that the service of process may be upon a person or business, but not a government agency; (2) that the process is for the production of records; (3) that the process must be based upon a pending criminal investigation or prosecution; and (4) that the person or business being served must have conducted business or engaged in transactions occurring at least in part in the issuing state. This bill requires the process to include specified information that will assist the recipient of the process in responding appropriately to the process. For valid process, the bill requires that the issuing state have a law authorizing the production of records by out-of-state persons or businesses and a reciprocity provision. Finally, this bill also amends the definition of "recipient," to clarify that the out-of-state recipient, who receives process issued from Hawaii, must have conducted business or engaged in transactions or activities occurring at least in part in Hawaii.

The technical amendment is the addition of a new section 4 to the bill, which provides the standard Ramseyer formatting language: "Statutory material to be repealed is bracketed and stricken. New statutory material is underscored."

Act 325, Session Laws of Hawaii 2012, entitled, "Relating to the Production of Records," codified as chapter 806D, HRS, created a "criminal long arm statute" that authorizes Hawaii courts to order the production of records, including electronic records, held by entities located outside the State of Hawaii, for purposes of a criminal matter. Prior to Act 325, Hawaii law did not expressly authorize state courts to issue legal process for records held by out-of-state entities, such as financial institutions and internet service providers, web-based e-mail providers, website hosting companies, social networking providers, cellular telephone providers, and other entities. There was nothing to compel an out-of-state entity to comply with legal process issued by a Hawaii court, and it was not uncommon for out-of-state entities to refuse to honor legal process issued by Hawaii courts.

Act 325 also included a reciprocity provision, which requires an entity located in Hawaii to comply with the criminal process issued by another state. The idea behind the reciprocity provision was to make access to records a two-way street.

This bill is intended to address several concerns about the reciprocity provision, enacted in section 806D-4, Hawaii Revised Statutes (HRS), as follows:

When a Hawaii recipient is served with process issued by or in another state, and such process on its face purports to be a valid criminal process, the Hawaii recipient shall comply with that process as if that process had been issued by a Hawaii court.

The first concern is that this reciprocity provision does not appear to require the Hawaii recipient to have a connection or nexus to the issuing state that is requesting the recipient's records. This is troubling because under sections 806D-1 and 806D-2, HRS, when a Hawaii applicant requests records from an out-of-state recipient, the out-of-state recipient must have a nexus to Hawaii. The recipient of that request must have conducted business, or engaged in transactions, that occurred at least in part in Hawaii. This nexus requirement supports and justifies the authority of Hawaii courts to reach out into the other jurisdiction. The reciprocity provision, however, does not have this nexus requirement. In other words, under the present wording of section 806D-4, it appears other states may request records from Hawaii recipients even though the recipients are not engaged in business or transactions in that state.

A second concern is the use of the term, "criminal process," in the reciprocity provision of section 806D-4. The use of this term in the reciprocity provision appears to be misplaced and confusing because the term is defined in section 806D-1, HRS, as process issued pursuant to

Hawaii law or penal rules, or signed by a district or circuit court judge. The process issued in the other state could not have been issued pursuant to Hawaii law or rules, or signed by a Hawaii judge.

A third concern, raised by a state agency, is that the reciprocity provision may be interpreted as allowing someone from another state to issue process to try to compel a state agency in Hawaii to disclose protected government records.

This bill will resolve these concerns with the reciprocity provision.

In the interest of fairness and reciprocity, this bill requires that the issuing state have a law authorizing the production of records by out-of-state persons or businesses and a reciprocity provision.

Furthermore, in order to make it reasonable for a local recipient to verify the process issued from out-of-state, this bill requires that certain information be provided in the process record that is served upon the local recipient.

The Department respectfully requests the passage of this bill.