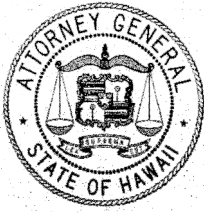


SB2367

SD1

LATE

TESTIMONY



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

ON THE FOLLOWING MEASURE:

S.B. NO. 2367, S.D. 1, RELATING TO PRODUCTION OF RECORDS.

BEFORE THE:

SENATE COMMITTEE ON JUDICIARY AND LABOR

DATE: Tuesday, February 18, 2014 **TIME:** 10:00 a.m.

LOCATION: State Capitol, Room 016

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

Chair Hee and Members of the Committee:

The Department of the Attorney General strongly supports this bill.

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.

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.

DEPARTMENT OF THE PROSECUTING ATTORNEY
CITY AND COUNTY OF HONOLULU

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KEITH M. KANESHIRO
PROSECUTING ATTORNEY

ARMINA A. CHING
FIRST DEPUTY PROSECUTING ATTORNEY



THE HONORABLE CLAYTON HEE, CHAIR
SENATE COMMITTEE ON JUDICIARY AND LABOR
Twenty-Seventh State Legislature
Regular Session of 2014
State of Hawai'i

February 18, 2014

RE: S.B. 2367; RELATING TO PRODUCTION OF RECORDS.

Chair Hee, Vice-Chair Shimabukuro and members of the Senate Committee on Judiciary and Labor, the Department of the Prosecuting Attorney of the City and County of Honolulu submits the following testimony in support of Senate Bill 2367, S.D. 1.

The purpose of S.B. 2367, S.D. 1, is to clarify the requirement for persons and businesses in Hawai'i to comply with orders for production of records issued by courts from another state, in pending criminal cases. Specifically, this narrows the requirement upon persons and businesses in Hawai'i, to be more similar to the authority that Hawai'i courts now have over persons or businesses in other states, for production of records in pending criminal cases.

In addition, to address legislators' ongoing concerns about the true "reciprocal" nature of this reciprocity provision, H.B. 2241 would also provide that persons and businesses in Hawai'i are only required to comply with these orders from other states if the other state has a similar law and requires its residents to comply with these types of orders when issued by Hawai'i courts.

Because these changes help to clarify our existing law, and truly make our this reciprocity provision a "two-way street," the Department of the Prosecuting Attorney of the City and County of Honolulu supports the passage of S.B. 2367, S.D. 1. Thank you for the opportunity to testify on this matter.

POLICE DEPARTMENT
CITY AND COUNTY OF HONOLULU

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KIRK CALDWELL
MAYOR

LOUIS M. KEALOHA
CHIEF

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MARIE A. McCAULEY
DEPUTY CHIEFS

OUR REFERENCE **TN-DK**

February 18, 2014

The Honorable Clayton Hee, Chair
and Members
Committee on Judiciary and Labor
State Senate
Hawaii State Capitol, Room 016
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair Hee and Members:

SUBJECT: Senate Bill No. 2367, SD1, Relating to Production of Records

I am Captain Jeffery Richards of the Records and Identification Division of the Honolulu Police Department (HPD), City and County of Honolulu.

The HPD supports Senate Bill No. 2367, SD1, Relating to Production of Records. This bill amends the definition of "recipient" and requires the issuing state to have a similar statute for out-of-state records and a reciprocity provision.

Thank you for the opportunity to testify.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeffrey D. Richards".

Jeffrey D. Richards, Captain
Records and Identification Division

APPROVED:

A handwritten signature in black ink, appearing to read "Louis M. Kealoha".

Louis M. Kealoha
Chief of Police