TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-EIGHTH LEGISLATURE, 2016

LATE

ON THE FOLLOWING MEASURE:
H.B. NO. 2079, RELATING TO SEARCH WARRANTS.

BEFORE THE:
HOUSE COMMITTEE ON JUDICIARY

DATE: Friday, February 19, 2016 **TIME:** 3:00 p.m.

LOCATION: State Capitol, Room 325

TESTIFIER(S): Douglas S. Chin, Attorney General, or
David Williams, Deputy Attorney General

Chair Rhoads and Members of the Committee:

The Department of the Attorney General provides comments on this bill that the purpose of the bill is already substantively accomplished by existing Hawai`i law.

This bill requires a government entity to secure a search warrant to obtain location information of an electronic device. This bill is unnecessary as section 803-47.6(d) and (e), Hawaii Revised Statutes (HRS), already requires a government entity to obtain a search warrant, or a court order based upon probable cause, the functional equivalent of a search warrant, to obtain location information of an electronic device from an electronic communication service or remote computing service provider.

By way of background, sections 803-47.5 through 803-47.9, HRS, constitute Hawaii's version of the federal Stored Communications Act (SCA), 18 U.S.C §§2701-2711. The SCA is part of the federal Electronic Communications Privacy Act (ECPA), which consists of three parts: (1) Title I relating to Wiretaps 18 U.S.C. §§2510 – 2522; (2) Title II, the Stored Communications Act, 18 U.S.C §§2701-2711; and (3) and Title III relating to Pen Registers and Trap & Trace Devices, 18 U.S.C. §§3121 – 3127. Hawai'i has adopted its own versions of each of these statutes. See generally, HRS sections 803-41 through 803-44 relating to wiretaps, HRS sections 803-44.5 through 803-44.6 relating to pen registers and trap and trace devices, and HRS sections 803-47.5 through 803-47.9 relating to government access to stored electronic communications.

Under the federal SCA, *federal* law enforcement officials can obtain location information using a court order upon a mere showing of "articulable facts." See 18 U.S.C. §2703(d).

Subsection (d) of the federal statute is the subject of much litigation in the federal courts. "Articulable facts" is a lower standard than "probable cause." The "articulable facts" standard merely requires that federal law enforcement officials "articulate" facts about their case to obtain location information. The "articulable facts" standard imposes a lower burden of proof than a showing of probable cause upon federal law enforcement officials seeking to obtain location information.

When Hawai`i enacted its version of the SCA, the Legislature replaced the "articulable facts" standard with a "probable cause" standard. See HRS section 803-47.6(e). Consequently, in order to obtain location information in Hawai`i, state and county law enforcement officers must obtain a court order that establishes "probable cause;" merely "articulating facts" is insufficient under Hawai`i law.

In 2014, the Legislature amended several subsections of section 803-47.6, Hawaii's version of the federal SCA. Specifically, it amended subsection (d)(2)(B) of section 803-47.6, clarifying that in order to obtain "transactional records, other than real-time records," law enforcement officials must obtain a court order based on probable cause. Prior to the 2014 amendment, the statute authorized law enforcement to obtain "a record or other information pertaining to a subscriber" with a court order. The 2014 amendment made clear that, in order to obtain transactional records, such as location information, law enforcement officials would need to obtain a court order and satisfy a judge that their request was based on probable cause.

This bill, however, attempts to require that law enforcement use a *search warrant* based on probable cause, rather than a *court order* based on probable cause. Section 803-47.6(d)(2)(B) and (e) already requires that law enforcement obtain judicial approval based upon probable cause to obtain transactional information, such as location information. As there is no substantive difference between a legal document that is labeled a "search warrant" and a legal document that is labeled a "court order" that must be supported by probable cause, this bill is unnecessary.

Thank you for the opportunity to testify.

DEPARTMENT OF THE PROSECUTING ATTORNEY

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THE HONORABLE KARL RHOADS, CHAIR
HOUSE COMMITTEE ON JUDICIARY
Twenty-Eighth State Legislature
Regular Session of 2016
State of Hawai`i

February 19, 2016

RE: H.B. 2079; RELATING TO SEARCH WARRANTS.

Chair Rhoads, Vice-Chair San Buenaventura, members, and members of the House Committee on Judiciary, the Department of the Prosecuting Attorney, City and County of Honolulu ("Department"), submits the following testimony in opposition to H.B. 2079. H.B. 2079 would create a new statute that requires law enforcement to obtain a search warrant to obtain the location information of an electronic device.

While the bill is likely well-intentioned, it is both duplicative and unnecessary, as Hawaii law already requires law enforcement to obtain a court order, based on a showing of probable cause, to obtain the location information of an electronic device. In addition, the language of H.B. 2079 is vague and unclear in comparison to existing statutes, which not only provide higher standards and safeguards, but explain these standards and safeguards more fully. If passed, H.B. 2079 would create a great deal of confusion for all parties involved, with no discernible benefit.

By way of background, Sections 803-47.5 through 803-47.9 of the Hawaii Revised Statutes ("HRS") constitute Hawaii's version of the federal Stored Communications Act (SCA), 18 U.S.C §2701-§2711. The SCA is part of the federal Electronic Communications Privacy Act (ECPA), which consists of three parts: (1) Title I relating to Wiretaps 18 U.S.C. §2510 – 2522; (2) Title II, the Stored Communications Act, 18 U.S.C §2701-§2711; and (3) and Title III relating to Pen Registers and Trap & Trace Devices, 18 U.S.C. §3121 – 3127. Hawaii has adopted their own versions of each of these statutes. See generally, HRS §803-41 through 803-44 relating to wiretaps, HRS §803-44.5 through 803-44.6 relating to pen registers and trap and trace devices, and HRS §803-47.5 through 803-47.9 relating to government access to stored electronic communications.

Under the federal SCA, federal law enforcement officials can obtain location information using a court order upon a mere showing of "articulable facts". See 18 U.S.C. §2703(d). Subsection (d) to the federal statute is controversial, and it has been the subject of much litigation in the federal courts. "Articulable facts" is a far lower standard than "probable cause,"

and merely requires that federal law enforcement officials "articulate" facts about their case to obtain location information. The "articulable facts" standard imposes virtually no burden of proof upon federal law enforcement officials seeking to obtain location information.

Fortunately, when Hawaii enacted its version of the SCA, Hawaii lawmakers adopted a higher burden of proof under Hawaii law, replacing the "articulable facts" standard with a "probable cause" standard. See HRS §803-47.6(e). Thus, in order to obtain location information in Hawaii, state and county law enforcement officers must obtain a court order that establishes "probable cause"; merely "articulating facts" is insufficient under Hawaii law. By adopting a higher burden of proof, the legislature, in effect, chose to provide greater protections to Hawaii residents than they receive under the corresponding federal SCA. The Department of the Prosecuting Attorney agrees with the legislature that the "probable cause" standard is the appropriate standard to meet in order to obtain location information.

Turning to H.B. 2079, in 2014, the legislature amended several subsections to HRS §803-47.6 – again, Hawaii's version of the federal SCA. Of note for purposes of H.B. 2079 was the amendment to HRS §803-47.6(d)(2)(B). The amendment to subsection (d)(2)(B) clarified that, in order to obtain "transactional records, other than real-time records," law enforcement officials must obtain a court order based on probable cause. Prior to the 2014 amendment, the statute authorized law enforcement to obtain "a record or other information pertaining to a subscriber" with a court order, but did not identify the type of records that fell within that category. The statute was vague. The 2014 amendment made it clear that, in order to obtain transactional records, such as location information, law enforcement officials would need to obtain a court order and satisfy a judge that their request was based on probable cause.

Now, two years later, H.B. 2079 attempts to require that law enforcement use a search warrant based on probable cause versus a court order based on probable cause. H.B. 2079 is unnecessary. HRS §803-47.6(d)(2)(B) and (e) already require that law enforcement obtain judicial approval to obtain transactional information, such as location information, and it already requires that law enforcement satisfy a judge that there is probable cause to support their request. In the context of location information, there is no substantive difference between a legal document that is labeled a "search warrant" and a legal document that is labeled a "court order". Both documents must be presented to a detached and neutral judge, and the judge must apply the same standard of review to both documents, which is: whether law enforcement has established probable cause to obtain the information. Accordingly, H.B. 2079 is unnecessary. The Hawaii legislature has already imposed a higher probable cause standard on Hawaii law enforcement officers, and there is no evidence that the law or the process has been abused, or that judges are disregarding their duty to require that law enforcement meet their burden of proof.

In addition, the Department of the Prosecuting Attorney has substantive concerns with H.B. 2079. For example, H.B. 2079 does not contain a definition of the term "location information". The lack of a definition leaves the bill ambiguous and difficult to apply in real-world cases. Does "location information" include information from stationary electronic devices, such as wireless routers, servers, mainframes and desktop computers? What about gaming consoles and stationary IoT-connected (Internet of Things) devices like web cameras, TV's, and appliances that can access and communicate via the Internet? Or, does "location information" apply only to mobile devices? Moreover, exactly what type of "location information" triggers the new search warrant requirement? Is it just cell site and GPS data? Or does it include data that identifies the location of a stationary device? Does it include location information gleaned from the logs of a stationary device, such as a wireless router or server?

What about IP address data? In short, without a specific and workable definition of "location information", H.B. 2079 appears problematic.

H.B. 2079 also fails to explain how a government entity would obtain location information if one of the exceptions set forth in subsection (b) of the proposed statute applied. For example, if a device is reported stolen as described in subsection (b)(1) (H.B. 2079k, page 1, line 10), how does law enforcement obtain the location information of that device? A verbal request to the provider? A written request on agency letterhead? Or, formal legal process? If so, what form of legal process? A subpoena? Moreover, is a service provider obligated to provide location information when one of the exceptions applies, or can they ignore it and demand that law enforcement provide some form of legal process? These unanswered questions are particularly troubling because H.B. 2079 imposes civil and monetary fines in the event of a violation.

In addition, we are concerned that subsection (b)(4) (H.B. 2079, page 1, line 15) may suggest that the requirements of HRS §803-42(b)(11) no longer apply during an "emergency". Subsection (b)(4) would permit law enforcement to access location information in a "life-threatening situation" without a search warrant, with no requirement on law enforcement to verify that an emergency condition exists before obtaining access. However, in 2012, the legislature imposed such a requirement on law enforcement, by amending HRS §803-42 to add subsection (b)(11). HRS §803-42(b)(11) establishes a strict protocol that governs when law enforcement can access electronic communications in an "emergency" situation without a search warrant. Specifically, HRS §803-42 (b)(11) expressly requires law enforcement to provide written verification of the existence of an actual "emergency involving danger of death or serious bodily injury". If H.B. 2079 were to pass, it would then be unclear which law governs the release of "emergency" location information – H.B. 2079 or HRS §803-42(b)(11)—and whether law enforcement would then be relieved of their "written certification" responsibility under HRS §803-42(b)(11). Again, these ambiguities are of great concern because H.B. 2079 imposes civil and monetary fines in the event of a violation.

To reiterate, H.B. 2079 is unnecessary because Hawaii law already requires that law enforcement obtain judicial approval to obtain location information, and it already requires that law enforcement satisfy a judge that their request is based on probable cause. Moreover, existing laws provide higher standards and far greater clarity regarding procedures and requirements.

For all of the foregoing reasons, the Department opposes the passage of H.B. 2079. Thank you for the opportunity to testify on this matter.

LATE

Committee:	Committee on Judiciary
Hearing Date/Time:	Friday, February 19, 2016, 3:00 p.m.
Place:	Conference Room 325
Re:	*Testimony of the ACLU of Hawai'i in Support of H.B. 2079, Relating to Search Warrants*

Dear Chair Rhoads and Members of the Committee on Judiciary:

The American Civil Liberties Union of Hawai'i ("ACLU of Hawai'i") writes in support of H.B. 2079, which clarifies that government entities must obtain a search warrant in order to obtain the location information of an electronic device.

In the digital age, the government is equipped with technology enabling it to access personal information without our knowledge or consent. Absent adequate protections in place, this new technology constitutes a serious threat to our right to privacy, which is protected under article I, section VI of the Hawai'i State Constitution. Given that most individuals carry electronic devices with them, tracking the location of a digital device is tantamount to tracking the location of the person carrying it. A person's location reveals many things about her or his life, such as one's friends, doctors, and religious beliefs. The government should not be able to remotely collect this personal information without at the very least obtaining a search warrant. The ACLU of Hawai'i supports this measure, which is a positive step to protect the people of Hawai'i against warrantless invasions of privacy.

Thank you for this opportunity to testify.

Sincerely,

Mandy Finlay
Advocacy Coordinator
ACLU of Hawai'i

The mission of the ACLU of Hawai'i is to protect the fundamental freedoms enshrined in the U.S. and State Constitutions. The ACLU of Hawai'i fulfills this through legislative, litigation, and public education programs statewide. The ACLU of Hawai'i is a non-partisan and private non-profit organization that provides its services at no cost to the public and does not accept government funds. The ACLU of Hawai'i has been serving Hawai'i for 50 years

American Civil Liberties Union of Hawai'i
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From: mailinglist@capitol.hawaii.gov
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Cc: rkailianu57@gmail.com
Subject: *Submitted testimony for HB2079 on Feb 19, 2016 15:00PM*

HB2079
Submitted on: 2/16/2016
Testimony for JUD on Feb 19, 2016 15:00PM in Conference Room 325

Submitted By	Organization	Testifier Position	Present at Hearing
Rachel L. Kailianu	Ho`omana Pono, LLC	Support	Yes

Comments:

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HB2079
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Submitted By	Organization	Testifier Position	Present at Hearing
Katarina Culina	Individual	Support	No

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HB2079
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Submitted By	Organization	Testifier Position	Present at Hearing
Kerri Marks	Individual	Support	No

Comments: strongly support the practice of upholding the Constitution #RestoreThe4th

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