



Committee: Committee on Finance
Hearing Date/Time: Tuesday, April 5, 2016, 2:31 p.m.
Place: Conference Room 308
Re: Testimony of the ACLU of Hawaii in Support of S.B. 2439, S.D.1, Relating to Law Enforcement

Dear Chair Luke and Members of the Committee on Finance:

The American Civil Liberties Union of Hawaii (“ACLU of Hawaii”) writes in support of S.B. 2439, S.D.1, making clear that individuals are generally entitled to photograph and/or videotape law enforcement officers so long as those individuals do not interfere with the officers’ actions.

The First Amendment protects an individual’s right to photograph and film anything that is plainly visible from a public space. Unfortunately, law enforcement officers in Hawaii have been known to order people to stop taking photographs or video, often arresting (or threatening to arrest) those individuals for obstruction if they fail to comply – thus violating the photographer’s First Amendment rights. Codifying First Amendment protections in the obstruction statute itself will help to remind law enforcement officers that, absent actual interference with an officer’s duties, taking photographs or videos is not a crime. As such, S.B. 2439, S.D.1 will likely lead to fewer arrests and fewer violations of citizens’ First Amendment rights.

Thank you for the opportunity to testify.

Sincerely,

Mandy Finlay
Advocacy Coordinator
ACLU of Hawaii

The mission of the ACLU of Hawaii is to protect the fundamental freedoms enshrined in the U.S. and State Constitutions. The ACLU of Hawaii fulfills this through legislative, litigation, and public education programs statewide. The ACLU of Hawaii 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 Hawaii has been serving Hawaii for 50 years.

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Before the House Committee on
FINANCE

Tuesday, April 5, 2016
2:31 PM
State Capitol, Room 308

In consideration of
SENATE BILL 2439-SD1
RELATING TO A LAW ENFORCEMENT VIDEOTAPING OF POLICE BY CITIZENS

My name is Aaron Hunger and I am a doctoral researcher at the University of Hawaii at Manoa, a former police officer in Florida and California, and a criminal justice instructor for a private college in Honolulu. I have been honored to be engaged in doctoral research involving the Honolulu Police Department, and its oversight mechanisms since 2010. Together with my teaching, I have over 24 years of police experience. Currently, I am engaged in research with the University of Hawaii at Manoa that (among other issues) seeks to understand the unique structure of the criminal justice institutions on Oahu. Based on the unique composition of local policing organizations, one of many questions being answered is what effect (if any) does the absence of critical systemic oversight mechanisms (or their dysfunctionality) produce and how often. Based on the work and research that I have been privileged to be a part of, I **support** Senate Bill 2439-SD1 (Legalizing citizens videotaping of police activities), but recommend a minor linguistic amendment. By making the following amendment, citizen's advocates can be assured that individual public officials that seek to covet illegal conduct may not use this bill as a legal justification for obstructing or destroying potential evidence.

Of particular problem is the language in Section 2 Subsections 710-1010 2(c) & Section 711-1111 1(d) of the bill, that reads: "...provided that the officer may take reasonable action to maintain safety and control, secure crime scenes and accident sites, protect the integrity and confidentiality of investigations, and protect the public safety and order."

Given how the Honolulu Police Department's officers, supervisors, and managers reacted in several cases where citizen's private video recordings proved gross policy violations and (in some instances) unwarranted violence toward the public¹, it does not seem prudent to allow officers and managers at the Honolulu Police Department the ability to dissect vague policy language in an attempt to seek the widest interpretation of their power and authority.

In this case the particular language in section2 Subsections 710-1010 2(c) & Section 711-1111 1(d) that appears vulnerable to police re-interpretation is, "...protect the integrity and confidentiality of investigations, and protect the public safety and order." Honolulu Police have (on several occasions) used their authority to "protect the integrity of a current investigation", or "protect public safety and order" as justification for attempting to seize evidence of their individual misconduct that was captured

¹ (Daysog, 2015) (Daysog, 2014) (Hawaii News Network, 2013) (Kawano, 2014 (BCND)) (Kerr, 2014) (Kerr, 2015)

on video tape. The cases of Honolulu Police Officer Robert Steiner (2014)², and Siave Seti Jr (2015) are just two of many other examples where police have used their power and authority to widely interpret search and seizure laws in an attempt to silence the public, by seizing video evidence of their unwarranted conduct through violence or intimidation.

I would recommend the following amendment to address this issue

SECTION 2. SubSection **710-1010**, Hawaii Revised Statutes, is amended by amending subsection (2) c) a person who is making a video or audio recording or taking a photograph of a law enforcement officer while the officer is in the performance **of** the officer's duties in a public place or under circumstances in which the officer has no reasonable expectation of privacy; provided that the officer may take reasonable action to maintain safety and control ***of a crime scene***, secure ***victim/witness confidentiality involving*** crime scenes and accident sites, **or** protect the integrity and confidentiality of departmentally authorized investigations, ~~and protect the public safety and order;~~

and

SECTION 2. Subsection **711-1111**, Hawaii Revised Statutes, is amended by amending subsection (1)(d) Installs or uses, or both, in any private place, without consent of the person or persons entitled to privacy therein, any means or device for observing, recording, amplifying, or broadcast In provided that this paragraph shall not prohibit a person from making a video or audio recording or taking a photograph of a law enforcement officer while the officer is in the performance of the officer's duties in a public place or under circumstances in which the officer has no reasonable expectation of privacy and the person is not interfering with the officer's ability to maintain safety and control ***of a crime scene***, secure ***victim/witness confidentiality involving*** crime scenes and accident sites, protect the integrity and confidentiality of investigations, ~~and protect the public safety and order;~~

Police departments train (nationally) that officers have no expectation of privacy when performing their duties, and are thus always trained to be aware of the media, videotaping, and their conduct when providing police services. Additionally with the introduction of body cameras, police are trained to take measures to adjust their service delivery into guarding specifically sensitive aspects of an investigation (i.e., license plate numbers, homicide victim's identity, etc.) With police filming the public, there is no reason to limit citizens counter-filming of police service performance.

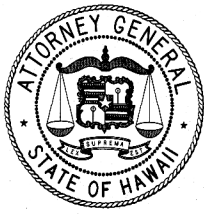
I **support** SB2439-SD1, however suggest that ambiguous language be clarified.

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² (Grube, 2014 (PHM)) (Nick, 2015 (SLG))

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

ON THE FOLLOWING MEASURE:
S.B. NO. 2439, S.D. 1, RELATING TO LAW ENFORCEMENT.

BEFORE THE:
HOUSE COMMITTEE ON FINANCE

LATE

DATE: Tuesday, April 5, 2016 **TIME:** 2:31 p.m.

LOCATION: State Capitol, Room 308

TESTIFIER(S): Douglas S. Chin, Attorney General, or
Lance M. Goto, Deputy Attorney General

Chair Luke and Members of the Committee:

The Department of the Attorney General opposes this bill.

The purpose of this bill is to establish exceptions to the offense of obstructing government operations and the offense of violation of privacy in the second degree for a person making a video or audio recording or photograph of a law enforcement officer while the officer is in the performance of duties in a public place or under circumstances in which the officer has no reasonable expectation of privacy.

In section 1 of the bill, on page 1, the bill creates an exception to the offense of Obstructing Government Operations, but also creates what appears to be an unintended consequence. The exception allows a person to commit the offense and use or threaten to use violence, force, or physical interference or obstacle to obstruct the performance of a governmental function by a public servant or the enforcement of a penal law or preservation of the peace by a law enforcement officer, so long as the person is making a video or audio recording or taking a photograph of a law enforcement officer while the officer is engaged in the performance of the officer's duties.

In section 2 of the bill, on page 3, the bill attempts to create an exception to the offense of Violation of Privacy in the Second Degree, but the exception is illusory. The existing offense prohibits a person from intentionally installing or using, in any private place, without consent of the persons entitled to privacy therein, any means or device for recording events in that place. The bill attempts to create an exception to this offense that would allow a person to make a recording or take a photograph of a law enforcement officer while that officer is engaged in the

performance of that officer's duties in a public place. The offense prohibits recording in a private place, and the exception would allow for recording in a public place. The "exception" is not really an exception to the offense.

The Department respectfully requests that this bill be held.