



Committees: Committee on Judiciary and Labor
Committee on Higher Education
Hearing Date/Time: Thursday, February 2, 2017, 1:15 p.m.
Place: Room 224
Re: Testimony of the ACLU of Hawaii with Comments regarding S.B. 429, Relating to The Uniform Employee and Student Online Privacy Protection Act

Dear Chair Keith-Agaran, Chair Kabele, and Committee Members:

The American Civil Liberties Union of Hawaii (“ACLU of Hawaii”) writes with comments regarding S.B. 429, which adopts uniform laws on protecting online accounts for students and employees, and urges the Committees to amend this bill by inserting the language of the more comprehensive Personal Online Account Privacy Act (“POAPA”), attached.

While we support the intent of the measure, the ACLU of Hawaii has concerns with the Uniform Law Commission’s Employee and Student Online Privacy Protection Act (“ULC bill”), and strongly prefers the alternative and more comprehensive reform measure, POAPA. POAPA covers more Hawaii students, creates stronger safeguards against abuse, and adds protections for Hawaii tenants.

The ULC bill does not cover most students. S.B. 429 defines educational institution as “a person that provides students at the postsecondary level an organized program of study or training which is academic, technical, trade-oriented, or preparatory for gaining employment and for which the person gives academic credit.” The term “postsecondary” refers only to the college level or above. This means that the majority of Hawaii students are left unprotected by this bill. POAPA, on the other hand, guarantees privacy in personal online accounts for all students, and not just those at the postsecondary level.

Unlike POAPA, the ULC bill leaves dangerous loopholes by allowing employers and educational institutions to view employees’ and students’ personal online account content based solely on a general allegation of misconduct. POAPA’s protections go far beyond this, requiring allegations of misconduct to point to specific content, and *only* allowing employers/educational institutions/landlords to access content that has been specifically identified.

Finally, housing has become an increasingly concerning area of online privacy, with more and more stories emerging of landlords demanding access to tenants’ social media accounts. While POAPA protects tenants against unwarranted invasions of privacy from their landlords, the ULC bill simply fails to address this issue.

For these reasons, the ACLU of Hawaii respectfully requests the Committees to amend S.B. 429 by inserting the language of the Personal Online Account Privacy Act, attached.

Chair Keith-Agaran, Chair Kahele, and Members of the Committees
February 2, 2017
Page 2 of 2

Thank you for this opportunity to testify.



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.

American Civil Liberties Union of Hawai'i
P.O. Box 3410
Honolulu, Hawai'i 96801
T: 808.522.5900
F: 808.522.5909
E: office@acluhawaii.org
www.acluhawaii.org



Personal Online Account Privacy Act

Section 1. Definitions – As used in this Act,

- (A) “Applicant” shall mean an Applicant for employment.
- (B) “Employee” shall mean an individual who provides services or labor to an Employer in return for wages or other remuneration or compensation.
- (C) “Employer” shall mean a person who is acting directly as an Employer, or acting under the authority or on behalf of an Employer, in relation to an Employee.
- (D) “Educational Institution” shall mean:
 - (1) A private or public school, institution, or school district, or any subdivision thereof, that offers participants, Students, or trainees an organized course of study or training that is academic, trade-oriented, or preparatory for gainful employment, as well as school Employees and agents acting under the authority or on behalf of an Educational Institution; or
 - (2) A state or local educational agency authorized to direct or control an entity in Section 1(D)(1).
- (E) “Personal Online Account” means any online account maintained by an Employee, Student, or Tenant, including but not limited to a social media or email account, that is protected by a login requirement. “Personal Online Account” does not include an account, or a discrete portion of an account, that was either (1) opened at an Employer’s behest, or provided by an Employer and intended to be used solely or primarily on behalf of or under the direction of the Employer, or (2) opened at a school’s behest, or provided by a school and intended to be used solely or primarily on behalf of or under the direction of the school.
- (F) “Prospective Student” shall mean an Applicant for admission to an Educational Institution.
- (G) “Prospective Tenant” shall mean a person who inquires about or applies to rent real property from a Landlord for residential purposes.
- (H) “Landlord” shall mean the owner or lawful possessor of real property who, in an exchange for rent, Leases it to another person or persons for residential purposes.
- (I) “Lease” shall mean a legally binding agreement between a Landlord and a residential Tenant or Tenants for the rental of real property.

- (J) “Specifically Identified Content” shall mean data or information on a Personal Online Account that is identified with sufficient particularity to:
 - (1) Demonstrate prior knowledge of the content’s details; and
 - (2) Distinguish the content from other data or information on the account with which it may share similar characteristics.
- (K) “Student” shall mean any full-time or part-time Student, participant, or trainee that is enrolled in a class or any other organized course of study at an Educational Institution.
- (L) “Tenant” shall mean a person who Leases real property from a Landlord, in exchange for rent, for residential purposes.

Section 2. Employers – An Employer shall not:

- (A) Require, request, or coerce an Employee or Applicant to:
 - (1) Disclose the user name and password, password, or any other means of authentication, or to provide access through the user name or password, to a Personal Online Account;
 - (2) Disclose the non-public contents of a Personal Online Account;
 - (3) Provide password or authentication information to a personal technological device for purposes of gaining access to a Personal Online Account, or to turn over an unlocked personal technological device for purposes of gaining access to a personal online account;
 - (4) Access a Personal Online Account in the presence of the Employer in a manner that enables the Employer to observe the contents of such account; or
 - (5) Change the settings that affect a third party’s ability to view the contents of a Personal Online Account;
- (B) Require or coerce an Employee or Applicant to add anyone, including the Employer, to their list of contacts associated with a Personal Online Account;
- (C) Take any action or threaten to take any action to discharge, discipline, or otherwise penalize an Employee in response to an Employee’s refusal to disclose any information specified in Section 2(A)(1)-(3) or refusal to take any action specified in Section 2(A)(4)-(5) or (B); or
- (D) Fail or refuse to hire any Applicant as a result of an Applicant’s refusal to disclose any information specified in Section 2(A)(1)-(3) or refusal to take any action specified in Section 2(A)(4)-(5) or (B).

Section 3. Educational Institutions – An Educational Institution shall not:

- (A) Require, request, or coerce a Student or Prospective Student to:

- (1) Disclose the user name and password, password, or any other means of authentication, or provide access through the user name or password, to a Personal Online Account;
 - (2) Disclose the non-public contents of a Personal Online Account;
 - (3) Provide password or authentication information to a personal technological device for purposes of gaining access to a Personal Online Account, or to turn over an unlocked personal technological device for purposes of gaining access to a personal online account;
 - (4) Access a Personal Online Account in the presence of an Educational Institution Employee or Educational Institution volunteer, including, but not limited to, a coach, teacher, or school administrator, in a manner that enables the Educational Institution Employee or Educational Institution volunteer to observe the contents of such account; or
 - (5) Change the settings that affect a third party's ability to view the contents of a Personal Online Account;
- (B) Require or coerce a Student or Prospective Student to add anyone, including a coach, teacher, school administrator, or other Educational Institution Employee or Educational Institution volunteer, to their list of contacts associated with a Personal Online Account;
- (C) Take any action or threaten to take any action to discharge, discipline, prohibit from participating in curricular or extracurricular activities, or otherwise penalize a Student in response to a Student's refusal to disclose any information specified in Section 3(A)(1)-(3) or refusal to take any action specified in Section 3(A)(4)-(5) or (B); or
- (D) Fail or refuse to admit any Prospective Student as a result of the Prospective Student's refusal to disclose any information specified in Section 3(A)(1)-(3) or refusal to take any action specified in Section 3(A)(4)-(5) or (B).

Section 4. Landlords – A Landlord shall not:

- (A) Require, request, or coerce a Tenant or Prospective Tenant to:
- (1) Disclose the user name and password, password, or any other means of authentication, or to provide access through the user name or password, to a Personal Online Account;
 - (2) Disclose the non-public contents of a Personal Online Account;
 - (3) Provide password or authentication information to a personal technological device for purposes of gaining access to a Personal Online Account, or to turn over an unlocked personal technological device for purposes of gaining access to a personal online account;

- (4) Access a Personal Online Account in the presence of the Employer in a manner that enables the Employer to observe the contents of such account; or
 - (5) Change the settings that affect a third party's ability to view the contents of a Personal Online Account;
- (B) Require or coerce a Tenant or Prospective Tenant to add anyone, including the Employer, to their list of contacts associated with a Personal Online Account;
 - (C) Take any action or threaten to take any action to evict or otherwise penalize a Tenant in response to Tenant's refusal to disclose any information specified in Section 4(A)(1)-(3) or refusal to take any action specified in Section 4(A)(4)-(5) or (B);
 - (D) Fail or refuse to rent real property to, or otherwise penalize any Prospective Tenant as a result of a Prospective Tenant's refusal to disclose any information specified in Section 4(A)(1)-(3) or refusal to take any action specified in Section 4(A)(4)-(5) or (B); or
 - (E) Include any provisions in a new or renewal Lease, executed after the date this Act takes effect, that conflict with Section 4 of this Act. Any such conflicting Lease provisions shall be deemed void and legally unenforceable.

Section 5. Limitations – Nothing in this Act shall prevent an Employer, Educational Institution, or Landlord from:

- (A) Accessing information about an Applicant, Employee, Student, Prospective Student, Tenant, or Prospective Tenant that is publicly available;
- (B) Complying with state and federal laws, rules, and regulations, and the rules of self-regulatory organizations as defined in section 3(a)(26) of the Securities and Exchange Act of 1934, 15 USC 78c(a)(26), or another statute governing self-regulatory organizations;
- (C) For an Employer, without requesting or requiring an Employee or Applicant to provide a user name and password, password, or other means of authentication that provides access to a Personal Online Account, requesting or requiring an Employee or Applicant to share Specifically Identified Content that has been reported to the Employer for the purpose of:
 - (1) Enabling an Employer to comply with its own legal and regulatory obligations;
 - (2) Investigating an allegation, based on the receipt of information regarding Specifically Identified Content, of the unauthorized transfer of an Employer's proprietary or confidential information or financial data to an Employee or Applicant's Personal Online Account; or
 - (3) Investigating an allegation, based on the receipt of information regarding Specifically Identified Content, of unlawful harassment or threats of violence in the workplace;

- (D) For an Educational Institution, without requesting or requiring a Student or Prospective Student to provide a user name and password, password, or other means of authentication that provides access to a Personal Online Account, requesting or requiring a Student or Prospective Student to share Specifically Identified Content that has been reported to the Educational Institution for the purpose of:
 - (1) Complying with its own legal obligations, subject to all legal and constitutional protections that are applicable to the Student or Prospective Student;
- (E) For a Landlord, without requesting or requiring Tenant or Prospective Tenant to provide a user name and password, password, or other means of authentication that provides access to a Personal Online Account, requesting or requiring a Tenant or Prospective Tenant to share Specifically Identified Content that has been reported to the Landlord for the purpose of:
 - (1) Enabling a Landlord to comply with its own legal and regulatory obligations; or
 - (2) Investigating an allegation, based on the receipt of information regarding Specifically Identified Content, of a Lease violation by the Tenant where such a violation presents an imminent threat of harm to the health or safety of another Tenant or occupant of the real property or of damage to the real property;
- (F) Prohibiting an Employee, Applicant, Student, or Prospective Student from using a Personal Online Account for business or Educational Institution purposes; or
- (G) Prohibiting an Employee, Applicant, Student, or Prospective Student from accessing or operating a Personal Online Account during business or school hours or while on business or school property.

Section 6. Inadvertent receipt of password –

- (A) If an Employer, Educational Institution, or Landlord inadvertently receives the user name and password, password, or other means of authentication that provides access to a Personal Online Account of an Employee, Applicant, Student, Prospective Student, Tenant, or Prospective Tenant through the use of an otherwise lawful technology that monitors the Employer's, Educational Institution's, or Landlord's network or Employer-provided, Educational Institution-provided, or Landlord-provided devices for network security or data confidentiality purposes, the Employer, Educational Institution, or Landlord:
 - (1) Is not liable for having the information;
 - (2) May not use the information to access the Personal Online Account of the Employee, Applicant, Student, Prospective Student, Tenant, or Prospective Tenant;
 - (3) May not share the information with any other person or entity; and

- (4) Must delete the information as soon as is reasonably practicable, unless the information is being retained by the Employer, Educational Institution, or Landlord in connection with the pursuit of a specific criminal complaint or civil action, or the investigation thereof.

Section 7. Enforcement –

- (A) Any Employer, Educational Institution, or Landlord, including its Employee or agents, who violates this Act shall be subject to legal action for damages and/or equitable relief, to be brought by any person claiming a violation of this Act has injured his or her person or reputation. A person so injured shall be entitled to actual damages, including mental pain and suffering endured on account of violation of the provisions of this Act, and reasonable attorneys' fees and other costs of litigation.
- (B) Any Employee or agent of an Educational Institution who violates this Act may be subject to disciplinary proceedings and punishment. For Educational Institution Employees who are represented under the terms of a collective bargaining agreement, this Act prevails except where it conflicts with the collective bargaining agreement, any memorandum of agreement or understanding signed pursuant to the collective bargaining agreement, or any recognized and established practice relative to the members of the bargaining unit.

Section 8. Admissibility – Except as proof of a violation of this Act, no data obtained, accessed, used, copied, disclosed, or retained in violation of this Act, nor any evidence derived therefrom, shall be admissible in any criminal, civil, administrative, or other proceeding.

Section 9. Severability – The provisions in this Act are severable. If any part or provision of this Act, or the application of this Act to any person, entity, or circumstance, is held invalid, the remainder of this Act, including the application of such part or provision to other persons, entities, or circumstances, shall not be affected by such holding and shall continue to have force and effect.

Section 10. Effective Date – This Act shall take effect upon passage.



LATE TESTIMONY

Tammy Cota, Executive Director
1 Blanchard Ct., Suite 101
Montpelier, VT 05602
802-279-3534
www.theinternetcoalition.com
tammy@theinternetcoalition.com

February 2, 2017

Honorable Gilbert Keith-Agaran, Chair of Senate Judiciary and Labor Committee
Honorable Kaiali'i Kahele, Chair of Senate Higher Education Committee
Hawaii State Capitol
415 South Beretania Street, Room 224
Honolulu, HI 96813

Re: Hawaii SB 429, Support for ACLU Substitute Language to Password Protection Bill

Dear Senator Keith-Agaran and Senator Kahele:

I am the executive director of the Internet Coalition (IC), a national trade association that represents members in state public policy discussions. The IC also serves as an informational resource, striving to protect and foster the Internet economy and the benefits it provides consumers.

I wish to express support for the proposed substitute model language being offered by the American Civil Liberties Union (ACLU), relating to password protection. The language the ACLU is proposing would define the rules governing employer, educational institutions, and landlords' access to employee, student, and tenants' personal online accounts. It represents a model social media privacy law, which IC members and other associations worked together to help write.

The ACLU language would prohibit employers, educational institutions, or landlords from *compelling* the individuals covered by the bill from adding them to a social media contact list, but would allow *requests* to do so. This is a valuable change in light of the way businesses communicate with employees, customers, and the general public today. Many businesses post updates and offers or specials on social media, for example, and it is reasonable that the employer would invite employees to add the employer to their list of contacts.

Second, employers, educational institutions, and landlords must be able to ensure compliance with all applicable laws and regulatory requirements, in addition to prohibitions against work-related employee misconduct. The bill, as amended, would allow for that. It would allow employers to request that an employee share specific content regarding a personal account for these limited purposes.

The ACLU model bill strikes an appropriate balance of protecting employee, student, and tenant privacy while leaving room for employer practices to protect employers' networks, systems, and proprietary information. It addresses a real – and not simply theoretical – harm, and it is imperative to enact these privacy protections now.

I thank you for addressing this important issue and urge you to support substituting SB 429 with the ACLU model bill.

Please feel free to contact me if you would like to discuss this issue further.

Sincerely,

A handwritten signature in black ink that reads "Tammy Cota".

Tammy Cota

cc: Senate Judiciary and Labor Committee members
Senate Higher Education Committee members