

OFFICE OF INFORMATION PRACTICES

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To: Senate Committee on Government Operations

From: Cheryl Kakazu Park, Director

Date: March 16, 2017, 2:50 p.m.
State Capitol, Conference Room 224

Re: Testimony on H.B. No. 1518, H.D. 1
Relating to Public Records

Thank you for the opportunity to submit testimony on this bill. The Office of Information Practices (“OIP”) **has serious concerns about the bill in its current form**, but supports the intent of this bill to provide agencies a possible avenue to seek relief from abuses of the record request and appeal processes under chapter 92F, the Uniform Information Practices Act (“UIPA”). **OIP would support the Hawaii Health Systems Corporation’s proposed amendment that would allow an agency to seek relief in court.**

The bill in its current form would authorize OIP to declare a person a “vexatious requester” and restrict the person’s exercise of UIPA rights when it finds a pattern of abuse, including at least two of six listed factors. One of the listed factors is that “[t]he requester is a natural person,” and another is that the agency properly responded to a record request from the person. In other words, any natural person who makes a record request, to which an agency responds properly under the UIPA, could potentially be declared a vexatious requester. **OIP does not believe that a person’s status as a natural person, or an agency’s fulfillment of its UIPA obligations, in any way suggest a possible abuse of process**

under the UIPA. The factors as currently set out are far too over-inclusive and are not tailored to behavior that might represent an abuse of the UIPA's processes.

Even if those factors were removed, leaving only four factors, OIP remains concerned **that a determination as to whether someone had abused the UIPA's request and appeal processes would itself be a lengthy and time-consuming one for OIP, the agency, and the requester, especially as the remaining factors are relatively subjective ones, and the bill sets out a two-stage appeal process to the ombudsman and then to court even after an OIP determination has been made. Thus, OIP also questions whether the process proposed by this bill would even be effective in providing relief** to an agency swamped by requests and appeals that the agency believed were an abuse of the UIPA's processes, since the agency could be tied up in defending the designation of the person as a "vexatious requester" for most or all of the period during which it had been granted temporary relief from its UIPA obligations to that person.

Nevertheless, OIP recognizes that there can be real problems in very limited cases where individuals abuse the UIPA's process as a personal vendetta and seek to punish an agency rather than act out of a legitimate desire to access information in government records, and the UIPA currently does not give OIP any discretion to grant any form of relief to an agency in such a situation. The UIPA likewise does not give OIP any discretion to decline to hear an appeal from a person, no matter whether the appeal appears frivolous and no matter how many appeals that person may have previously filed, so long as the appeal is based on a denial of access to government records. **Although OIP does not support this bill in its current form, which is neither fair to requesters nor practicable for agencies, OIP would support the amendment proposed**

Senate Committee on Government Operations
March 16, 2017
Page 3 of 3

by the Hawaii Health Systems Corporation in its testimony, which would allow an agency to seek relief in court from a requester with a clear pattern of requests that are manifestly excessive or made in bad faith.

Thank you for considering the amendment and OIP's testimony.



UNIVERSITY OF HAWAII SYSTEM

Legislative Testimony

Written Only
Testimony Presented Before the
Senate Committee on Government Operations
March 16, 2017 at 2:50 p.m.
By
Carrie K. S. Okinaga
Vice-President for Legal Affairs and University General Counsel
University of Hawai'i System

HB 1518 HD1 – RELATING TO PUBLIC RECORDS

Chair Kim, Vice-Chair Ruderman, and Committee Members:

Thank you for the opportunity to submit testimony ***in support*** of this measure.

The University of Hawai'i ("University") supports this bill. HB 1518 HD1 finds a proper balance between the public's right to government records and the government's time and resources responding to such requests.

We would also like to suggest that HB 1518 HD1 allow the Office of Information Practices ("OIP") to disclose the identity of vexatious records requesters to government agencies and further allow government agencies to decline production of records to such persons unless otherwise directed by OIP.

We believe that these additions to HB 1518 HD1 will promote the implementation and enforcement of this measure.



DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT & TOURISM

DAVID Y. IGE
GOVERNOR

LUIS P. SALAVERIA
DIRECTOR

MARY ALICE EVANS
DEPUTY DIRECTOR

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Statement of
LUIS P. SALAVERIA
Director
Department of Business, Economic Development and Tourism
before the
SENATE COMMITTEE ON GOVERNMENT OPERATIONS
Thursday, March 16, 2017
2:50 PM
State Capitol, Conference Room 224

in consideration of
HB1518, HD1
RELATING TO PUBLIC RECORDS.

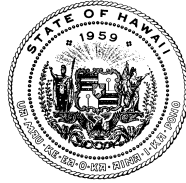
Chair Kim, Vice Chair Ruderman and Members of the Senate Committee on Government Operations. The Department of Business, Economic Development and Tourism (DBEDT) **supports** HB1518, HD1, Relating to Public Records.

This measure allows Office of Information Practices, under certain conditions, to declare a person a vexatious records requester and to restrict the person's rights under the Uniform Information Practices Act; it also establishes processes to appeal the declaration of a person as a vexatious records requester.

Chapter 92F, HRS currently has no mechanisms in place for review of an agency's belief that a requester is abusing the public records request process defined by the statute. We believe that in the interest of ensuring an efficient and fair process regarding records requests, some means of resolving baseless and frivolous requests for information should be instituted.

DBEDT finds this measure provides sufficient set of guidelines as one means of balancing the playing field when it comes to administrative disputes of records requests.

Thank you for the opportunity to testify in support of HB1518, HD1.



STATE OF HAWAII
DEPARTMENT OF HEALTH
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**Testimony in SUPPORT of H.B. 1518, HD1
RELATING TO PUBLIC RECORDS.**

SENATOR DONNA MERCADO KIM, CHAIR
SENATE COMMITTEE ON GOVERNMENT OPERATIONS
Hearing Date: March 16, 2017 Room Number: 224

1 **Fiscal Implications:** None

2 **Department Testimony:** The Department appreciates and SUPPORTS H.B. 1518, HD1 with
3 amendments as proposed by the Hawaii Health Systems Corporation (HHSC) . This measure
4 establishes a process by which a state agency may request the Office of Information Practices
5 (OIP) to declare a person a vexatious public records requester.

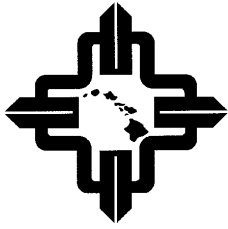
6 Thankfully these events are rare. However, the Department has experienced interactions
7 with extremely difficult persons. Several years ago, the Department encountered Birthers. The
8 experience resulted in Act 100, SLH 2010. Act 100 exempted disclosure of government records
9 in response to duplicate requests from a single requestor and provided that the agency to which
10 the request was made satisfied specified requirements.

11 Act 100 sunsetted on July 1, 2014. And as included in HHSC's testimony, the
12 Department recently encountered another similar series of requests.

13 This bill and the amendments proposed by HHSC would provide relief to a state agency in the
14 same way Act 100 did. For this reason, the Department SUPPORTS the passage of H.B. 1518, HD1.

15 Thank you for the opportunity to testify in SUPPORT of H.B. 1518, HD1.

16 **Offered Amendments:** None



HAWAII HEALTH SYSTEMS
C O R P O R A T I O N

"Quality Healthcare For All"

Senate Committee on Government Operations
Senator Donna Mercado Kim, Chair
Senator Russell E. Ruderman, Vice Chair

March 16, 2017
Conference Room 224
2:50 p.m.
Hawaii State Capitol

Testimony supporting House Bill 1518, House Draft 1 Relating to Public Records. Provides that upon request from a public agency, OIP may under certain conditions declare a person a vexatious records requester and restrict the person's rights under the Uniform Information Practices Act. Establishes processes to appeal the declaration of a person as a vexatious records requester. Repeals on June 30, 2020.

Linda Rosen, M.D., M.P.H.
Chief Executive Officer
Hawaii Health Systems Corporation

Hawaii Health Systems Corporation ("HHSC") strongly supports the purpose and the intent of the Uniform Information Practices Act ("UIPA"). Indeed, the public should have the right to scrutinize the records of government agencies, including HHSC. Notwithstanding the fact that we are a healthcare organization and subject to strict privacy regulations, there is no doubt that HHSC is obligated to be transparent within the confines of these regulations and consistent with chapter 92F, Hawaii Revised Statutes ("HRS").

HHSC strongly supports the intent of this HB1518, HD1 and recommends the bill be amended by restating it in its entirety as set forth below. The amended wording takes into account the legitimate concerns of public interest advocates as skillfully set forth in the testimony submitted by The Civil Beat Law Center for the Public Interest.

HHSC supports the proposed amended version of the bill, because it has firsthand experience dealing with the few members of the public who have used 92F, HRS, to abuse and harass its employees. As just one example of HHSC's experience, I have attached the 21 page Memorandum of Opinion of the Office of Information Practices ("OIP") dated May 3, 2016 (the "Opinion") and three separate email strings from the three-month period November 2016 through January 2017, **all of which stem from the same event that occurred in February 2013.** I have no desire to single out any

individual member of the public and so have taken the time to redact the identity of the requesters from the materials. I have not redacted any of the names of individuals who are employed by the State of Hawaii.

The second paragraph of the Opinion notes that it is based “solely upon the facts presented in Requesters’ emails to OIP” and then proceeds to identify 30 pieces of correspondence (many with attachments) to and from the requesters to various agencies and individuals including OIP, 5 different HHSC employees, Representative Lowen, Senator Green, the University of Hawaii, and a private entity.

After having reviewed the testimony submitted by the various stakeholders, HHSC strongly supports amending HB1518, HD1 (as set forth below) by requiring a governmental agency to seek judicial relief when it believes that it has fully complied with chapter 92F, HRS, but continues to be harassed by the requesters despite the agency’s compliance.

Currently, section 92F-15, HRS, provides the requester with the ability to seek expedited judicial enforcement if he or she is aggrieved by a denial of access to a government record. HHSC respectfully recommends amending this section to provide government agencies with the right to seek an expedited judicial determination that a requester is abusing the process established by chapter 92F. Amended in this manner, the onus will be on the agency to prove that it has responded to the request in compliance with the law. The time necessary to seek judicial review and the need to submit supporting evidence will certainly restrain agencies from using this provision as a tool to “blithely take[] away the public’s right of public access.” Civil Beat Testimony at 1.

Proposed Amended Version.

SECTION 1. The legislature believes that most requests for public records pursuant to the uniform information practices act, chapter 92F, Hawaii Revised Statutes, are made in good faith, even if a request is repeated in an attempt to obtain a more expeditious response from an agency. Very occasionally, however, extreme situations arise when a small number of requesters make records requests with the intent to harass an agency, or make the same request over and over again, even if a legitimate response has already been provided.

Accordingly, the purpose of this Act is to establish a process by which a state agency may bring an action in the circuit court requesting that the court declare that a person is abusing his or her right scrutinize public records if the agency demonstrates that the person has established a clear pattern of conduct that amounts to an abuse of a process established by the uniform information practices act, chapter 92F, Hawaii Revised Statutes.

SECTION 2. Chapter 92F, Hawaii Revised Statutes, is amended by adding a new subsection to part II to be appropriately designated and to read as follows:

"§92F-15(g) (g) An agency may seek a declaratory judgment in the circuit court for a determination that a requester is a vexatious records requester.

- (1) The agency shall have the burden of proof to establish that the requester has a clear pattern of making records requests that are manifestly excessive or in bad faith and interfere with an agency's responsibilities.
- (2) Upon finding that a person is a vexatious records requester, the court may grant further relief whenever necessary or proper, after reasonable notice and hearing, against the requester whose rights have been adjudicated by the judgment.

Thank you for the opportunity to present this testimony.

THE CIVIL BEAT
LAW CENTER FOR THE PUBLIC INTEREST

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Senate Committee on Government Operations
Honorable Donna Mercado Kim, Chair
Honorable Russell E. Ruderman, Vice Chair

RE: Testimony Opposing H.B. 1518 H.D. 1, Relating to Public Records
Hearing: March 16, 2017 at 2:50 p.m.

Dear Chair and Members of the Committee:

My name is Brian Black. I am the Executive Director of the Civil Beat Law Center for the Public Interest, a nonprofit organization whose primary mission concerns solutions that promote governmental transparency. Thank you for the opportunity to submit testimony **opposing H.B. 1518 because its strips citizens of the fundamental right to access public records without adequate due process.** The Law Center appreciates the intent to assist government officials who may be struggling with “vexatious” requesters, if any, who are intent on harassing the agencies. But this bill too blithely takes away the public’s right of public access.

Written testimony before the House Judiciary Committee shows the dangers of this bill. Testifiers referenced *without specifics* purported vexatious requests that “inundated” the University of Hawai`i and the Department of Agriculture – “making it impossible for staff to keep up with their workload.” To the contrary, available information concerning the last three fiscal years shows that UH received only 42 non-routine record requests (*i.e.*, requests for something other than student transcripts) out of nearly 18,000 such requests processed by all State agencies; the various divisions of the Department of Agriculture processed 220 non-routine record requests during the same three-year period.¹ These are not departments heavily taxed by record requesters, much less “vexatious” requesters.

And applying the “vexatious” label to frequent requesters to those departments would seem *politically motivated to silence the news media and community advocates*, not protect agency efficiency. The most frequent requesters to UH over the past three fiscal years were all reporters (9 requests from Ferd Lewis, 5 from Rick Daysog, and 3 from Alia

¹ Source: data.hawaii.gov (OIP Master UIPA Record Request Year-End Logs for FY 2014, FY 2015 and FY 2016). Testifiers also referenced the Department of Health. DOH, however, received thousands of requests – mostly through its Solid & Hazardous Waste Branch – that skew any further analysis of its data. The vast majority of that Branch’s requests appear to be due diligence inquiries related to specific real property parcels – *i.e.*, nothing vexatious.

Wong).² The top requesters to the Department of Agriculture were Gary Hooser (23 requests), while a member of the Kauaʻi County Council, primarily to the Pesticides Branch and Agribusiness Development Corporation, and Cathy Goeggel (18 requests), President of Animal Rights Hawaiʻi, primarily to the Animal Quarantine Branch.³ **It is abhorrent to the principles of informed citizenry in our democracy that any of these frequent requesters would be stripped of their right to access public records.**

The Uniform Information Practices Act provides a right of public access to government records because the Legislature recognized that “Government agencies exist to aid the people in the formation and conduct of public policy. Opening up the government processes to public scrutiny and participation is the only viable and reasonable method of protecting the public’s interest.” HRS § 92F-2. Taking away that right is not something that should be done lightly or easily. Below are the Law Center’s most serious concerns.

1. ***Courts, not the Office of Information Practices (OIP), should decide whether to take away a requester’s rights.*** Under H.B. 1518 H.D. 1, courts ultimately decide whether a requester is “vexatious”, so it does not make sense to make the requester wait in limbo for years of OIP, Office of the Ombudsman, and finally judicial review.

And OIP has better things to do. OIP has a backlog of requests for opinions that is *measured in years*. When issued, however, those opinions significantly advance the public’s understanding of how our public records and open meetings laws operate. OIP is understaffed and underfunded even for its existing staff. This bill would further distract OIP from its primary mission to the public’s detriment. The Office should not be burdened with this added responsibility.

2. ***The bill’s many factors are overly complicated and confusing.*** The scope of prohibited conduct that puts a requester at risk of being declared vexatious should be simple and clear.
3. ***UIPA does not need multiple definitions of “agency.”*** HRS § 92F-3 already defines “agency” for purposes of the UIPA. Subsection (h) is unnecessary.

Thank you again for the opportunity to testify.

² Source: UIPA Record Request Logs maintained by UH.

³ Source: UIPA Record Request Logs maintained by the Department of Agriculture.



March 16, 2017

2:50 PM

Conference Room 224

To: Senate Committee on Government Operations

Sen. Donna Mercado Kim, Chair

Sen. Russell E. Ruderman, Vice Chair

From: Grassroot Institute of Hawaii

Joe Kent, Vice-President of Research

RE: HB1518 – Relating to Public Records

Comments Only

Dear Chair and Committee Members:

The Grassroot Institute of Hawaii would like to offer its comments on HB1518, which allows public agencies to have individuals meeting certain criteria declared “vexatious records requesters,” which would then limit that person’s rights under the Uniform Information Practices Act.

As an organization that champions transparent and accountable government, the Grassroot Institute has grave concerns about this bill and its probable effects. While we understand that certain repeated requests may indeed be vexing to the state employees charged with responding, we cannot agree that the balance of rights and responsibilities in this case should favor the agency’s desire to avoid dealing with them.

As written, the bill leaves it largely to the judgment of the agency and the OIP as to whether a requester is “vexatious” enough to qualify for that label. What an agency might call “requests for substantially similar records that have already been provided,” a reporter or researcher might call, “attempts to refine a request for an agency that has been obstructionist or careless in its responses.”

Moreover, those most likely to earn the label of frequent or “vexatious” requesters are those who make the greatest use of the UIPA in the public interest, namely journalists, researchers, and community advocates. Thus, the bill creates a method by which the state is able to censor its critics, possibly for political purposes.

When it comes to sunshine and transparency, the bias should be toward greater openness, not laws that will allow the state to avoid certain requests. It may be possible to craft a finely-tuned bill that addresses agencies substantially burdened by a requester. At a minimum, such a bill would require due process and the agreement of a court that the requester is unreasonable. However, as it stands, HB1518 paints with too broad a brush and poses a threat to the right of public access.

Thank you for your consideration of our comments.

Sincerely,
Joe Kent
Vice President of Research
Grassroot Institute of Hawaii