

**TESTIMONY OF THE  
COMMISSION TO PROMOTE UNIFORM LEGISLATION**

**ON H.B. NO. 2173  
RELATING TO ONLINE ACCOUNT PRIVACY.**

**BEFORE THE HOUSE COMMITTEE ON LABOR & PUBLIC  
EMPLOYMENT**

**DATE:** Tuesday, February 6, 2018 at 10:30 a.m.  
Conference Room 309, State Capitol

**PERSON(S) TESTIFYING:** KEN TAKAYAMA or PETER HAMASAKI  
Commission to Promote Uniform Legislation

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Chair Johanson and Members of the House Committee on Labor and Public Employment.

My name is Peter Hamasaki, and I am a member of the state Commission to Promote Uniform Legislation. Thank you for this opportunity to testify on House Bill No. 2173, Relating to Online Account Privacy. The members of our state commission are Hawaii's representatives on the national Uniform Law Commission, or ULC. The ULC is a nonprofit organization that is made up of volunteer attorneys appointed by their states, and its mission is to develop and draft model legislation for states in areas in which uniformity is practical and desirable.

The state Commission to Promote Uniform Legislation submits the following comments.

1. This bill proposes safeguards for employees' and student's online accounts that are protected by login requirements.

2. As such, this bill is substantively similar to H.B. No. 2289, Relating to the Uniform Employee and Student Online Privacy Protection Act, which we believe is a superior proposal, and which has also been referred to this Committee.

3. Both measures:

(a) Prohibit employers and school administrators from requiring or coercing employees or students to disclose login information or the contents of accounts;

(b) Prohibit taking or threatening adverse action against an employee or student for failing to comply with an unlawful directive.

(c) Recognize that there are some instances where employers and educational institutions have a strong and justifiable interest in having the act's prohibitions lifted. Both measures contain important, narrowly tailored exceptions. For example, an employer may need to access content in an employee's account in order to comply with a court order. This act would not prohibit this. The act contains other exceptions to its protections.

4. While the concepts of both measures are very much alike, the respective measures are structured differently. H.B. No. 2173 collapses the concepts applicable to schools and those applicable to employers into a single section. By comparison, UESOPPA (H.B. No. 2289) addresses schools and employers in separate sections. We believe that this divided structure in UESOPPA may present the contents in a more straightforward manner, thereby helping to improve comprehension. We believe this will benefit prospective complainants, especially those who are unsophisticated, who are attempting to work with the statute, as most are likely to fall into one category or the other (i.e., either students or employees).

5. Most importantly, however, there is a distinct difference when it comes to enforcement of the law proposed in these respective measures. Both give

persons alleging violations of the statute a private right of action for injunctive relief, actual damages, and reasonable attorney's fees.

But H.B. No. 2289 (UESOPPA) also allows the Attorney General to bring a civil action for injunctive relief as well as a civil penalty of up to \$1000 for each violation, but not exceeding \$100,000, for all violations caused by the same event. We believe that allowing civil actions to be brought by the state Attorney General enhances the enforcement mechanisms in the act and provides more meaningful protections.

6. The chapter being created by H.B. No. 2173 contains a section entitled "§ -6 Admissibility that provides:

No data obtained, accessed, used, copied, disclosed, or retained in violation of this chapter, nor any evidence derived therefrom, shall be admissible in any criminal, civil, administrative, or other proceeding, except as proof of a violation of this chapter.

This provision, however, well intended it may be appears to be dangerously broad with many unintended consequences in other areas of law. Some of the questions raised are as follows:

- (a) What is "evidence derived therefrom" and how do you determine that;
- (b) The "or other proceeding" provision is extremely broad;
- (c) Does the "as proof of a violation of this chapter" exception mean that such evidence could not be admissible in any proceeding as proof that the chapter was NOT violated? and
- (d) Even more broadly, does this provision mean that, every time such data or "any evidence derived therefrom" (whatever that may mean) is marked as an intended trial exhibit, the court and parties have to have, in essence, a mini-trial to determine whether it was "obtained, accessed, used, copied, disclosed or retained in violation of this chapter"?

We believe it more appropriate to rely on the evolution of the rules of evidence and constitutional search and seizure law to keep the issues raised by this measure in proper perspective.

For the foregoing reasons we believe that H.B. No. 2289, Relating to the Uniform Employee and Student Online Privacy Protection Act, is a superior proposal to this measure and recommend its passage in place of this bill.

Thank you very much for this opportunity to testify.



STATE OF HAWAII  
DEPARTMENT OF EDUCATION  
P.O. BOX 2360  
HONOLULU, HAWAII 96804

**Date:** 02/06/2018  
**Time:** 10:30 AM  
**Location:** 309  
**Committee:** House Labor & Public  
Employment

**Department:** Education

**Person Testifying:** Dr. Christina M. Kishimoto, Superintendent of Education

**Title of Bill:** HB 2173 RELATING TO ONLINE ACCOUNT PRIVACY.

**Purpose of Bill:** Prohibits employers and educational institutions from requiring employees, students, and prospective employees and students to provide protected personal online account information. Authorizes private civil actions against violators.

**Department's Position:**

Chair Johanson, Vice Chair Holt, and members of the Committee on Labor & Public Employment,

The Department of Education supports HB2173 which is in line with protecting the employee and student online accounts, while ensuring that employers and educational institutions are able to address non-compliance with laws and regulations that directly impact the employer or educational institution.

Thank you for the opportunity to provide this testimony.

The Hawaii State Department of Education seeks to advance the goals of the Strategic Plan which is focused on student success, staff success, and successful systems of support. This is achieved through targeted work around three impact strategies: school design, student voice, and teacher collaboration. Detailed information is available at [www.hawaiipublicschools.org](http://www.hawaiipublicschools.org).



# UNIVERSITY OF HAWAII SYSTEM

## Legislative Testimony

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Testimony Presented Before the  
House Committee on Labor & Public Employment  
February 6, 2018 at 10:30 a.m.

By

Donald O. Straney, Vice President for Academic Planning and Policy  
University of Hawai'i System

### HB 2173 – RELATING TO ONLINE ACCOUNT PRIVACY

Chair Johanson, Vice Chair Holt, and members of the committee:

Thank you for the opportunity to present testimony regarding HB 2713 – Relating to Online Account Privacy that prohibits employers and educational institutions from requiring employees, students, and prospective employees and students to provide protected personal online account information, and authorizes private civil actions against violators.

The University of Hawai'i supports the intent of this bill in protecting employee and student privacy, and requests the following amendments:

- Page 2, line 13, should be revised to read:
  - “An agent, excluding independent contractors, or a designee of the educational institution.”
- Page 3, lines 11-13, should be revised to read:
  - “The term includes an agent, excluding independent contractors, or designee of an employer, but does not include the United States or any federal branch, department, or agency thereof.”
- Page 6, line 17, should be revised to read:
  - “Require, [~~request,~~] or coerce ...”

The purpose of the bill is to prevent coercion of employees and students. As written, this bill would subject the University (and all employers and educational institutions) to potential liability for an innocent “request” for login information, no matter the intent. Therefore, if a student or employee is leaving school/work for an extended vacation or emergency medical situation, and a caring adviser or supervisor instinctively requests login information for a covered account to assist the person with monitoring email or coursework assignments, that would be expressly prohibited under this bill and would subject the University to liability and individual employees or agents of the educational institution to discipline.

- Page 6, line 20, to page 7, line 6, would be clearer if revised to read as follows:
  - “(B) Disclose the content of or provide access to a protected personal online account; provided that an employer or educational institution may request that

an employee or student [to] add or not remove any person, including the employer or educational institution, to[,] or [not remove any person] from[,] the set of persons to which the employee or student grants access to the content;”

- Page 8, line 8, should be revised to read as follows, consistent with our prior comment regarding the language on page 6, line 17, of the bill:
  - “... requirement [~~request,~~] or coercive action....”
- Page 8, between lines 15 and 16: add the following:
  - “This subsection shall not prohibit an employer or educational institution from taking or threatening to take adverse action against an employee or student for failure or refusal to comply with requirements or requests made pursuant to section \_\_-4.”
- Page 9, line 2, should be revised to read as follows:
  - “...court of competent jurisdiction, court or administrative agency subpoena, or rule of a self- ....”
- Page 9, line 7, should be revised to read as follows:
  - “(3) Requiring or requesting, based on specific [facts] allegations about ...”
- Page 9, lines 17-19, would be clearer if the word “which” is added:
  - “... provided that the employee or student has reasonable notice, which is documented, of the prohibition and the prohibition was not ...”
- Page 10, lines 7-10, would be clearer if amended to read as follows:
  - “A threat to the employer’s or educational institution’s information technology [~~]~~ or communications technology systems, or property; or”
- Page 10, lines 11-13 should be revised to read:
  - “ (iii) Disclosure of the employer’s or educational institution’s nonpublic ~~financial~~ information, information in which the ...”
- Page 12, lines 8-9, should be revised to read:
  - “(4) If the employer or educational institution retains the login information for use in an anticipated or ongoing civil action or an ongoing investigation...”
- Page 13, line 15, effective date, “...upon its approval.”
  - If HB 2173 is enacted, the University would need time to effect policies and training to ensure compliance with this act. We would respectfully request an effective date of 2021 to afford time for necessary consultations and implementation of said policies and training.

Thank you for your consideration on this bill and based on the foregoing, the University can support HB 2173 with the suggested amendments.



# Chamber of Commerce HAWAII

*The Voice of Business*

**Testimony to the House Committee on Labor & Public Employment  
Tuesday, February 6, 2018 at 10:30 A.M.  
Conference Room 309, State Capitol**

**LATE**

**RE: HOUSE BILL 2173 RELATING TO ONLINE ACCOUNT PRIVACY**

Chair Johanon, Vice Chair Holt, and Members of the Committee:

The Chamber of Commerce Hawaii ("The Chamber") would like to **express concerns regarding** HB 2173, which prohibits employers and educational institutions from requiring employees, students, and prospective employees and students to provide personal online account information. It also authorizes private civil actions against violators.

The Chamber is Hawaii's leading statewide business advocacy organization, representing 2,000+ businesses. Approximately 80% of our members are small businesses with less than 20 employees. As the "Voice of Business" in Hawaii, the organization works on behalf of members and the entire business community to improve the state's economic climate and to foster positive action on issues of common concern.

While we understand the reasoning behind the proposed bill, we have also seen instances where unnecessary laws create unintended consequences. The Chamber hasn't seen any empirical evidence that private employers routinely request access to applicant and employee personal social media.

There are legitimate exceptions at times to request and receive access to employees' personal social media pages. For example, law enforcement agencies have a public safety need to know who their representatives or potential employees are affiliating themselves with. And, private companies may need to be able to investigate inter-office harassment claims that may stem from social media conversations. So, in terms of best practices, maybe a broad exception for workplace investigations to provide content in a personal account that is relevant to that investigation.

Thank you for the opportunity to testify.

**LATE**





Hawai'i

LATE

LATE

Committee: House Committee on Labor & Public Employment  
Hearing Date/Time: Tuesday, February 6, 2018, 10:30 a.m.  
Place: Conference Room 429  
Re: Testimony of the ACLU of Hawai'i with Comments on H.B. 2173,  
Relating to Online Account Privacy

Dear Chair Johanson, Vice Chair Holt, and Committee Members:

The American Civil Liberties Union of Hawai'i ("ACLU of Hawai'i") testifies **with comments** on H.B. 2173, which seeks to prohibit employers and institutions of post-secondary educations from demanding access to the social media accounts, such as Facebook, Snapchat, and Instagram, of both current and prospective employees and students.

Social media has become one of the most important platforms for free and self expression of the 21<sup>st</sup> century. Unfortunately, social media's own popularity has attracted the interest of others in seeing, and sometimes monitoring, what we post. This interest is not limited to acquaintances, friends, and family. Increasingly, job applicants and employees are being forced to provide employers with access to their social media accounts and students are being forced to do the same by their schools, sometimes as a condition of participating on sports teams, extra-curricular activity, or potentially, admissions.

Meaningful social media privacy must by necessity include the right to control who has access to the content of one's online accounts. Indeed, allowing access to our social media lives to those with the leverage to demand access inevitably leads to discrimination, self-censorship, and the chilling of the free expression of ideas.

While the ACLU of Hawai'i strongly supports the intent behind H.B. 2173, we have several concerns about the scope and limits of the protections afforded to social media users.

First, H.B. 2173 leaves most Hawai'i students vulnerable to unwarranted invasions of privacy by their educational institutions. The bill only applies to "postsecondary" students, which refers to the college level or above. Second, in what appears to be a big loophole, the bill does not prevent employers or educational institutions from requiring or coercing an employee or student to add anyone, including the employer or educational institution, to their list of contacts associated with a social media account. In fact, H.B. 2173, Section 3(1)(B) appears to allow as much. Third, H.B. 2173 would allow employers and educational institutions to access the entire content of an employee or student personal social media account based on, potentially, unsubstantiated allegations of misconduct tenuously linked to the account. Students and employees in Hawai'i deserve better.

For the reasons articulated above, we believe H.B. 2173 requires extensive amendments to address these and other issues, which we will be happy to work with your committee to address.

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](mailto:office@acluhawaii.org)  
[www.acluhawaii.org](http://www.acluhawaii.org)

Thank you for the opportunity to testify.

Sincerely,



Mateo Caballero  
Legal Director  
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.*



**LATE**

**LATE**

P.O. Box 253, Kunia, Hawai'i 96759  
Phone: (808) 848-2074; Fax: (808) 848-1921  
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February 6, 2018

HEARING BEFORE THE  
HOUSE COMMITTEE ON LABOR AND PUBLIC EMPLOYMENT

**TESTIMONY ON HB 2115**  
RELATING TO AGRICULTURE

Room 309  
10:30 am

Aloha Chair Johanson, Vice Chair Holt, and Members of the Committee:

I am Randy Cabral, President of the Hawaii Farm Bureau (HFB). Organized since 1948, the HFB is comprised of 1,900 farm family members statewide, and serves as Hawaii's voice of agriculture to protect, advocate and advance the social, economic and educational interests of our diverse agricultural community.

**The Hawaii Farm Bureau supports HB 2115**, which appropriates funds to the department of labor and industrial relations for the K-12 agriculture workforce development pipeline initiative.

Hawaii's commercial farmers' average age is over 60 years. To maintain and expand production levels, it's clear that we need a new generation of farmers and ranchers equipped to assume the task of growing crops and livestock. This is critical to achieving Hawaii's goal of increased self-sufficiency and sustainability.

DLIR, under Director Takamine's and HDOA Chair Kokubun's leadership, undertook a series of facilitated meetings with farmers, ranchers, educators and a diverse group of stakeholders across the state between 2007 and 2011. Its report was published. This report: Hawaii Agriculture Skill Panel Report, made a number of recommendations, of which several common themes emerged. #1 of those themes is 'Increasing youth education and training'.

In 2013, the Hawaii State Legislature saw fit to establish the Agriculture Workforce Advisory Board via HB 749 of that year. This Board convenes, in part, to execute the recommendations of Hawaii Agriculture Skill Panel Report. This board established a program by which educators and school administrators can be exposed and incentivized to adopt existing broad-based agricultural curriculums. This is an important step toward the future of agriculture in Hawaii. The activities enabled by passage of this legislation will

continue to implement strategies yielding favorable outcomes for the state's economy, particularly the agricultural sector.

We ask for your support to continue funding the operations of the K-12 Agriculture Workforce Development Pipeline Initiative. Thank you for this opportunity to provide comments on this measure.

Thank you for this opportunity to provide our opinion on this important matter.

**LATE**

**HB-2173**

Submitted on: 2/6/2018 8:57:24 AM  
Testimony for LAB on 2/6/2018 10:30:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Morgan Bonnet		Support	No

Comments:

**LATE**

Dear Committee Members,

Please vote yes to HB2173.

As an employee, if I was being forced to give any login information, I would refuse. But not everybody would have the force to do it. Many people can't afford to loose their job and would accept to do it by fear of retaliation and so on. Also, giving too many personal information to an employer or supervisor could lead to stalking or blackmailing.

Naively, I assumed that there already were laws enacted for that. Sure, anybody with a good lawyer could sue and make a case, but not everybody can afford one. Having a legal framework greatly help potential victims and having employers aware of an existing law would greatly reduce that kind of behaviors.

Mahalo,

Morgan

**LATE**