



**WRITTEN TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
THIRTY-FIRST LEGISLATURE, 2021**

ON THE FOLLOWING MEASURE:

H.B. NO. 796, H.D. 1, RELATING TO CORRECTIONAL FACILITY AND COMMUNITY CORRECTIONAL CENTER DEATHS.

BEFORE THE:

HOUSE COMMITTEE ON JUDICIARY AND HAWAIIAN AFFAIRS

DATE: Tuesday, February 16, 2021 **TIME:** 2:00 p.m.

LOCATION: State Capitol, Via Videoconference

TESTIFIER(S): **WRITTEN TESTIMONY ONLY.**
(For more information, contact Lisa M. Itomura,
Deputy Attorney General, at 587-2978)

Chair Nakashima and Members of the Committee:

The Department of the Attorney General submits the following comments on this bill.

This bill amends section 353C-8.5, Hawaii Revised Statutes (HRS), which requires the director of the Department of Public Safety (PSD) to inform the Governor within 48 hours of the death or injury causing the death of any PSD employee occurring on the grounds of a correctional facility or community correctional center and the death of any inmate in a state or private correctional facility. The Governor must then inform the Legislature of the death. The bill amends section 353C-8.5, HRS, to require PSD to also report the deaths of PSD employees while on duty at a correctional facility or community correctional center, and the deaths of inmates incarcerated at community correctional centers. PSD must also inform the Governor of the location where the death or injury leading to death occurred and the race of the decedent. The bill also requires the Director of PSD to specify the state or federal law relied upon if information in the death report is withheld, and upon receiving the report from the medical examiner, to make a copy of the death report mandated in section 353C-8.5(a) "public and readily available" to the family of the decedent and the press.

Although the medical examiner has the authority under section 841-9, HRS, to provide certified copies of autopsy reports to members of the public upon payment of a

fee, it also has the discretion to withhold the report if it is connected to an ongoing law enforcement investigation or prosecution. See OIP Op.Ltr. No. 91-32, pp. 7, 12-13. We recommend that this bill be amended to create a similar exception allowing the Director to withhold information if disclosure would frustrate an ongoing law enforcement investigation or prosecution, or other legitimate government function.

The Hawaii State Constitution also grants deceased inmates and their families privacy rights protected under article I, section 6, which states:

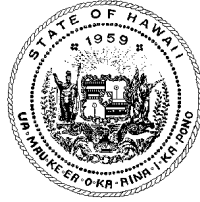
The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right.

An inmate's privacy rights also survive his or her death. These rights include "reputational interests and family-related privacy interests." See, e.g., OIP Op. Ltr. No. 03-19, pp. 12-14. Therefore, in the absence of consent from the decedent's family or authorized representative, information contained in the death reports can only be released if the agency (here PSD) balances the passage of time since death against the sensitivity of the information involved to determine the strength of the person's privacy right. PSD must then balance the privacy interest against the public interest in disclosure, and only if the public interest outweighs the privacy interest can the information be disclosed. OIP Op. Ltr. No. 03-19, p. 14.

It is unclear from this bill, however, what compelling public interests are served by making the death reports covered by section 353C-8.5 "readily available" to the press. To address this constitutional concern, we recommend amending the bill to identify expressly the compelling public interests served by the public release of the death reports.

Thank you for the opportunity to provide these comments.

DAVID Y. IGE
GOVERNOR



STATE OF HAWAII
DEPARTMENT OF PUBLIC SAFETY
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MAX N. OTANI
DIRECTOR

Maria C. Cook
Deputy Director
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Tommy Johnson
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Corrections

Jordan Lowe
Deputy Director
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No. _____

TESTIMONY ON HOUSE BILL 796, HOUSE DRAFT 1
RELATING TO CORRECTIONAL FACILITY AND COMMUNITY
CORRECTIONAL CENTER DEATHS.

by
Max N. Otani, Director

House Committee on Judiciary & Hawaiian Affairs
Representative Mark M. Nakashima, Chair
Representative Scot Z. Matayoshi, Vice Chair

Tuesday, February 16, 2021; 2:00 p.m.
State Capitol, Via Video Conference

Chair Nakashima, Vice Chair Matayoshi, and Members of the Committee:

House Bill (HB) 796, House Draft (HD) 1 amends Section 353C-8.5, Hawaii Revised Statutes (HRS), relating to the required reporting by the Department of Public Safety (PSD) when employees and inmates die at correctional facilities and community correctional centers, by requiring the release of information of the decedent's race, in addition to: 1) the name of the decedent; 2) the gender and age of the decedent; 3) whether the decedent was an inmate or an employee; 4) the location where the death or injury leading to the death occurred; 5) the date and time of the death; 6) the cause of death; and 7) any indication of sexual assault leading to the death, in the report provided to the Governor within 48 hours of the death.

HB 796, HD 1 further amends the existing statute to remove the discretion of the director of public safety to withhold disclosure of the decedent's name or any information unless the information is protected from disclosure by state or federal laws and requires PSD to cite the state or federal law prohibiting such disclosure. Moreover, the measure requires the public release of the initial report

to the Governor to not only the family of the decedent, but to be made readily available to the news media upon receipt of the report of the Medical Examiner.

The Department finds this measure to constitute a serious infringement upon the decedent's and the decedent's family's right to privacy. PSD has relied upon the advice of the Department of the Attorney General, which most recently advised that the information released should be limited to: 1) gender; 2) age range; 3) date of death; and 4) the facility or the location of the death. In written testimony on HB 796, before the House Committee on Corrections, Military, and Veterans (CMV), the Attorney General described the following protections to privacy rights to include HIPAA, the federal Health Information Portability and Accountability Act, and Article I, Section 6 of the Hawaii Constitution, requiring the Legislature to implement individuals' right to privacy, unless there can be shown a compelling state interest to infringe upon that right. As written, this bill is in direct contravention to the federal HIPAA law and has not demonstrated the state's compelling interest in publicly disclosing such private information.

For these reasons, PSD strongly opposes this measure and respectfully requests the deferral of HB 796, HD 1.

Thank you for the opportunity to present testimony on this measure.

STATE OF HAWAII

OFFICE OF THE PUBLIC DEFENDER

Testimony of the Office of the Public Defender,
State of Hawai'i to the House Committee on
Corrections, Military, & Veterans

February 10, 2021

H.B. No. 796: RELATING TO CORRECTIONAL FACILITY AND
COMMUNITY CORRECTIONAL CENTER DEATHS

Chair Ohno, Vice Chair Ganaden, and Members of the Committee:

The Office of the Public Defender (“OPD”) respectfully **supports** H.B. No. 796, which seeks to update reporting requirements by the Department of Public Safety (“PSD”) when employees and incarcerated people die at correctional facilities and community correctional centers.

The legislature passed Act 234 in 2019 to address the lack of reliable information about deaths which occurred at the State’s correctional facilities and community centers. The purpose of the law was to increase transparency and collect data by requiring the director of PSD to provide reports to the Governor and Legislature within 48 hours of a death at one of its facilities.

Despite the passage of this bill, there is still a lack of transparency and PSD is still withholding information surrounding deaths that occur at state correctional facilities and community centers. The 2019 law requires that the director’s report include, *inter alia*, the name, gender, age, and cause of death of the decedent. The 2019 report that PSD provided to the legislature, however, was almost entirely void of this required information.¹

¹ Associated Press. “New Hawaii Law Shows Information Withheld In Prison Deaths.” 6 Jan. 2020, <https://apnews.com/article/a94e376098741e76c821333f87c55fdc> (all details such as the deceased inmates’ names, ages and genders were redacted).

As recently as February 5, 2021, the Star Advertiser reported that 5 Halawa Correctional Facility inmates with coronavirus died in January.² No other information required under Act 234 was provided.

Not disclosing this information not only undermines public trust and accountability but precludes advocates and policymakers from identifying problematic practices and policies within the department that may be putting the health and safety of people in its care and custody at risk. For instance, the reporting of 68 deaths at the Hampton Roads Regional Jail in Virginia sparked a federal investigation that found, “The jail’s practice of subjecting prisoners with serious mental illness to prolonged periods of restrictive housing ... shows deliberate indifference to their health and safety.”³

For these reasons, the OPD supports the proposed amendments in H.B. No. 796 which makes it clear that disclosure of such information is not discretionary and if such information is claimed to be protected that the director cites the law it is relying upon to withhold disclosure. The OPD also supports requiring race and ancestry of the decedent to be included and making a copy of the report public and readily available to the family of the decedent and the press.

A jurisdiction to look to as a model is Nevada. The Nevada Department of Corrections posts the offender’s identification number, location and time of death, age of death, date of death, gender, admission date, county of commitment, ethnicity and a press release with a photo of the deceased and other information.⁴

Providing this information not only provides much needed answers to grieving families and loved ones but comprehensive data can help identify problems and find solutions to improve our system and keep us all safer.

Thank you for the opportunity to provide testimony in this matter.

² Star Advertiser, “5 Halawa Correctional Facilities Inmates with Coronavirus Died in January, State Officials Say.” 5, Feb. 2021, <https://www.staradvertiser.com/2021/02/05/breaking-news/5-halawa-correctional-facility-inmates-with-coronavirus-died-in-january-state-officials-say/>.

³ United States Department of Justice Civil Rights Division at 27, <https://www.justice.gov/opa/press-release/file/1121221/download>.

⁴ State of Nevada Department of Corrections, https://doc.nv.gov/About/Statistics/Inmate_Mortality_Statistica/2020_Inmate_Deaths/.

Statement Before The
HOUSE COMMITTEE ON JUDICIARY & HAWAIIAN AFFAIRS

Tuesday, February 16, 2021

2:00 PM

Via Video Conference, Conference Room 325

in consideration of

HB 796, HD1**RELATING TO CORRECTIONAL FACILITY AND COMMUNITY CORRECTIONAL CENTER DEATHS.**

Chair NAKASHIMA, Vice Chair MATAYOSHI, and Members of the Judiciary & Hawaiian Affairs Committee

Common Cause Hawaii supports HB 796, HD1, which (1) updates reporting requirements by the department of public safety when employees and inmates die at correctional facilities and community correctional centers, (2) requires race of the decedent to be included in the report, (3) requires the report to cite to any authority relied upon by the department of public safety in determining that information is protected by state or federal law, and (4) makes a copy of the report required by this section public and readily available to the family and press upon the director's receipt of the medical examiner's report.

Common Cause Hawaii is a nonprofit, nonpartisan, grassroots organization dedicated to reforming government and strengthening democracy through improving transparency and accountability.

People incarcerated in our society often are overlooked and lack a voice. Common Cause Hawaii supports HB 796, HD1, as it will increase transparency, accountability, and accessibility of information to the public and for the families who have lost someone while incarcerated. We must have the facts and data to ensure the soundness of our public safety system.

Thank you for the opportunity to testify in support of HB 796, HD1. If you have further questions of me, please contact me at sma@commoncause.org.

Very respectfully yours,

Sandy Ma
Executive Director, Common Cause Hawaii

COMMUNITY ALLIANCE ON PRISONS

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COMMITTEE ON JUDICIARY AND HAWAIIAN AFFAIRS

Representative Mark Nakashima, Chair

Representative Scott Matayoshi, Vice Chair

Tuesday, February 16, 2021

2:00 PM

STRONG SUPPORT FOR HB 796 - PSD DEATHS

Aloha Chair Nakashima, Vice Chair Matayoshi, and Members of the Committee!

My name is Kat Brady and I am the Coordinator of Community Alliance on Prisons, a community initiative promoting smart justice policies in Hawai`i for more than two decades. This testimony is respectfully offered on behalf of the more than 4,100 Hawai`i individuals living behind bars or under the “care and custody” of the Department of Public Safety on any given day. We are always mindful that 1,000 of Hawai`i’s imprisoned people are serving their sentences abroad thousands of miles away from their loved ones, their homes and, for the disproportionate number of incarcerated Kanaka Maoli, far, far from their ancestral lands.

Community Alliance on Prisons strongly supports this bill. We have been working with families over the decades who have lost their loved ones who were incarcerated. Act 234 was passed in 2019 because there was little to no reporting on the deaths of people in state custody. This bill reaffirms and strengthens Act 234. This bill seeks to reaffirm and strengthen the existing law.

I have represented Community Alliance on Prisons as the Prisoner Advocate on the UH Institutional Review Board for 20 years where HIPAA is often discussed. HIPAA is about protecting **medical privacy**. The reporting in this bill is about releasing the race of a person who died while in the care and custody of PSD and other non-medical information. There is no disclosure of private health information, which is protected by HIPAA for 50 years. <https://www.hhs.gov/hipaa/for-professionals/security/lawsregulations/index.html>

If Attorney General Connor’s assertion that releasing non-medical information were correct, why would the following states publish the deaths in their facilities on their websites?

- Arizona Department of Corrections, Rehabilitation & Reentry
<https://corrections.az.gov/inmate-death-notifications>
- Nevada Department of Corrections
https://doc.nv.gov/About/Statistics/Inmate_Mortality_Statistica/2020_Inmate_Deaths/
- Montana Department of Corrections
<https://cor.mt.gov/Publications/Deaths-in-Custody>

Why did Hawai`i stop reporting this information? Why then is the public, whose hard-earned tax dollars fund these public institutions, not notified of deaths? Why is this information hidden from the public now, when it used to be reported? What changed?

Newspapers report the arrests, convictions, and the names of people who escape, so it is puzzling that the department, who used to report the names of people who died while in their 'care and custody,' is now saying that they need to protect the privacy of the people who die in their jails and prisons.

This bill is not about releasing medical information; it is about notifying the public when and where a death of a person in the state's care and custody occurs.

The Legislature must demand transparency, accountability and access to information about deaths in taxpayer-funded public institutions.

Community Alliance on Prisons implores the committee to ensure that deaths, suicides, and other incidents are reported to the public. We pay for the safety and security of those who live and work in our correctional facilities – they are our friends and family.

In the spirit of accountability and transparency, we humbly ask that you pass this measure.

Mahalo for this opportunity to testify.

*"It is not only what we do, but also what we do not do,
for which we are accountable."*

Moliere

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House Committee on Judiciary & Hawaiian Affairs
Honorable Mark M. Nakashima, Chair
Honorable Scot Z. Matayoshi, Vice Chair

**RE: Testimony Commenting on H.B. 796 H.D. 1, Relating to
Correctional Facility and Community Correctional Center Deaths**

Hearing: February 16, 2021 at 2:00 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 government transparency. Thank you for the opportunity to submit testimony commenting on H.B. 796 H.D. 1. **Delaying access to these reports until the medical examiner's report is less transparent than existing law.**

Under existing law, from these reports, the public can *promptly* learn – at a minimum – that an unnamed inmate died in the custody of the Department of Public Safety. However, if the reports are public, as under H.D. 1, only “[u]pon the receipt of the report from the medical examiner,” public knowledge of an inmate’s death will be delayed weeks if not months. That limitation on public access should be removed or this bill will be worse than existing law.

Moreover, in case it is not clear, the Legislature decides the extent to which these reports and the information in them are public. Neither HIPAA nor any rights of privacy constrain the Legislature’s authority to make these reports public.

HIPAA – even assuming that it applies here – does not override state laws that require public access to information about death reports. 45 C.F.R. § 160.203(c) (HIPAA standards do not preempt a state law that “provides for the reporting of disease or injury, child abuse, birth, or death, or for the conduct of public health surveillance, investigation, or intervention”). HIPAA also does not stop disclosure of information when “required by law and the use or disclosure complies with and is limited to the relevant requirements of such law.” 45 C.F.R. § 164.512(a). As the Department of Health and Human Services explained when promulgating HIPAA:

Thus, if a state FOIA law designates death records and autopsy reports as public information that must be disclosed, a covered entity may disclose it without an authorization under the rule. To the extent that such information is required to be disclosed by FOIA or other law, such disclosures are permitted under the final rule.

65 Fed. Reg. 82,597 (Dec. 28, 2000).

And death-related information – to the limited extent that it is reported by the Department of Public Safety in these reports – is not protected from disclosure by the constitutional right of privacy or the public records law. For example, the Office of Information Practices has long held, and recently reaffirmed, that autopsy reports and related death records must be publicly accessible. OIP U Memo. 21-02 (autopsy reports are public); OIP Op. F15-01 (death-related toxicology reports are public); OIP Op. 91-32 (autopsy reports are public).

Thank you again for the opportunity to provide comments on H.B. 796 H.D. 1.

HB-796-HD-1

Submitted on: 2/15/2021 11:00:11 AM

Testimony for JHA on 2/16/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Raelyn Reyno Yeomans	Individual	Support	No

Comments:

Strong support!

HB-796-HD-1

Submitted on: 2/15/2021 12:05:32 PM

Testimony for JHA on 2/16/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Barbara Polk	Individual	Support	No

Comments:

I strongly support HB 796, regarding the reporting of deaths among employees and inmates of correctional facilities. There is no constitutional reason for not reporting them, since this is done in states throughout the country. DPS, has, until now, not been very transparent about anything under its jurisdiction. Although we could wish they would take the initiative themselves, they have not. The public supports and pays for our correctional facilities, and deserves to know when people die in their custody.

Barbara Polk

HB-796-HD-1

Submitted on: 2/15/2021 12:54:00 PM

Testimony for JHA on 2/16/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Carolyn Eaton	Individual	Support	No

Comments:

Aloha, my name is Carolyn Eaton. I am an Oahu voter living in Makiki. I'm in strong support of HB 796 and urge you support it despite the radical changes existing in HD 1. Compassion should be a very high priority in our State's standards and practices of reporting deaths of inmates. Transparency and accountability are not current priorities either, and this bill could be the tool for bringing DPS into the post-Espinda era, the era of humane treatment of persons sentenced to incarceration in Hawai'i courts.

Please deliberate on the merits of the original bill and support its changes to death reporting practices.

Mahalo,

Carolyn Eaton, 1310 Heulu St., #602, Honolulu, HI 96822

HB-796-HD-1

Submitted on: 2/15/2021 4:32:34 PM

Testimony for JHA on 2/16/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Catherine Fly	Individual	Support	No

Comments:

I am submitting my testimony in support of HB796 HD1. I believe that the information surrounding the deaths of incarcerated individuals should be made public, as are the identifying information of those who have been arrested (their name, charges, etc.). I believe that there should be transparency with the public regarding the circumstances which lead to incarcerated individuals' deaths while in custody of a publicly funded facility and system. Families have the right to know this information.

HB-796-HD-1

Submitted on: 2/15/2021 11:47:51 PM

Testimony for JHA on 2/16/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Carrie Ann Shirota	Individual	Support	No

Comments:

Please pass this bill to ensure transparency and accountability regarding deaths within our jails and prisons.