

OFFICE OF INFORMATION PRACTICES

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HONOLULU, HAWAII 96813
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EMAIL: oip@hawaii.gov

To: House Committee on Government Reform

From: Cheryl Kakazu Park, Director

Date: March 16, 2022, 9:00 a.m.
State Capitol, Conference Room 309 and Via Videoconference

Re: Testimony on S.B. No. 3252, S.D. 2
Relating to Public Records

Thank you for the opportunity to submit testimony on this bill, which would change the current minimum charge for copying government records to a maximum charge, set a statutory cap to the search, review, and segregation fees that the Office of Information Practices (OIP) is required to set by administrative rule for government record requests under chapter 92F, HRS, the Uniform Information Practices Act (UIPA), and set statutory standards and requirements for the public interest waiver OIP is also required to set by rule. OIP offers comments explaining the effect these changes would have, particularly the unintended effects that may result, but does not take a position on whether these changes should be made.

Before addressing the bill's specific proposals, OIP would like to share the results of FY 2020 State and county reports found on the [UIPA Record Request Log Records page](#) at oip.hawaii.gov. These summaries of FY 2020 record requests show that **overall, the typical record request was granted in whole or in part and completed in less than 8 to 9 work days from the date of the request; that 88.3% (1,968) of requesters to State agencies and 83% (1,746)**

of requesters to county agencies paid nothing for their completed requests; and that most payments were made by for-profit entities. Only 260 (11.7%) of State requesters paid any amount, with 106 paying less than \$5, 120 paying \$5 to \$49.99, and only 34 paid more than \$50; of the 34, at least 24 requesters were identified as representatives of law firms, media, commercial, or other for-profit or non-profit entities. For the County requesters, 357 requesters paid any amount, with 194 paying less than \$5, 104 paying between \$5 to 49.99, and only 59 paying more than \$50; of the 59, at least 30 requesters were identified as representatives of law firms, media, commercial, or other for-profit or non-profit entities.

The FY 2020 reports were consistent with prior years' data showing that **most fees and costs are being paid by for-profit entities, and not by individual requesters.** Additionally, the data showed that **relatively few complex record requests have resulted in 5 to 9 times longer processing times and constituted almost half of the gross fees and costs incurred by agencies, but which were not fully recovered from requesters.** Specifically, complex record requests comprised only 7% (178) of all State requests (2,364), but took nearly 9 times longer to process and accounted for 48% of the gross fees and costs incurred by State agencies, and 30% of the total amount recovered for completed requests. For the counties, complex record requests comprised 16% (403) of all requests (2,225), but took about 5 times longer to process and accounted for 48.5% of gross fees and costs incurred by the counties, and 36% of the total amount recovered for all completed county requests.

Comments on Proposed Bill

The proposed statutory cap for the search, review, and segregation fees agencies may charge (as authorized by OIP's rules) for staff time spent in

responding to a record request is higher than the rate currently allowed by OIP's rules. However, the current charges adopted in 1999 were intended to be close to the average salary rate for employees likely to be responsible for search, review, and segregation under the UIPA, and were based on a 1996 survey of state and county salaries. In other words, **the current fees are already 26 years out of date and do not reflect current salaries for the government employees doing the work. An update to OIP's rules currently under Attorney General review would address that by raising fees to account for a quarter century of inflation, but the bill's proposed cap would not allow the rates to be raised enough to reflect average current salaries, and over time, the statutorily capped rates would represent a smaller and smaller share of the average salary cost of the employee time spent responding to UIPA requests.** In effect, this would change the statutory authorization for search, review, and segregation fees from a way for agencies to mostly recoup the salary cost of employee time spent on larger requests (most UIPA requests are smaller and are already fee-free thanks to an automatic waiver of fees for the first 1.5 to 3 hours of employee time), to an increasingly nominal charge with the agencies bearing the lion's share of the cost of even the largest record requests.

This bill would also change the standard for a public interest waiver of fees under the UIPA. That standard is currently set by rule at \$60, double the automatic waiver for all requesters and representing 3-6 hours of staff time. Thus, for larger requests that meet the public interest standard agencies are still allowed to charge for search, review, and segregation time beyond what is covered by the waiver. **This bill would make public interest waiver a complete waiver of all fees, no matter how large the request might be.** At the same time, the bill

would change the standards for what qualifies as a public interest request to be in one way narrower and in another way broader.

The standards for a public interest waiver are currently that (1) the record pertains to the operation or activities of an agency (without considering its relative public importance), (2) it is not readily available in the public domain, and (3) the requester has the primary intention and actual ability to widely disseminate the information to the public. This bill would narrow the first of those, requiring the record to “contribute significantly to public understanding” of agency operations or activities, but would remove the remaining two: **the proposed waiver would apply to information already widely available to the public, and would apply to a requester with no intention or ability to publicly share the information. It would, however, add a requirement that the request not be “primarily in the commercial interest.” This requirement is one that OIP specifically considered, and rejected, in adopting its current rule regarding public interest waivers, so as to not exclude news media representatives.** As OIP’s Impact Statement on the then-draft rules stated, “news media representatives will almost always have commercial interests. Therefore, to exclude news media representatives from a fee waiver because of those commercial interests is counterproductive to supporting the public interest in a free flow of information held by the government. Consequently, the proposed rule does not require an agency to determine that the disclosure of information is not primarily in the commercial interest of the requester.”

OIP believes the change in standard for what qualifies as a public interest request would thus exclude news media representatives and be indifferent as to whether a request would actually increase the general public’s access to information about the operation of government.

At the same time, it would apply to a much narrower category of information, requiring the requester to establish that the information would “contribute significantly to public understanding” of agency operations rather than simply being about agency operations. It seems likely that this new standard would apply to a different pool of requests than the current standard, but it is not clear whether it will end up representing an increase or a decrease in requests meeting that standard. Either way, **OIP is concerned that the complete waiver of all fees for those requests that qualify could be burdensome for agencies and result in a larger number of complex record requests, as there would be no incentive for the requester to narrow such a request to avoid requiring an inordinate amount of agency staff time that could detract from the agency’s other work.**

Overall, the potential unintended consequences of the proposed fee caps and waivers this bill may be to:

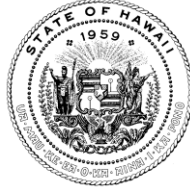
- encourage the filing of more complex record requests;
- eliminate the current fee waiver for media representatives;
- slow the processing of all record requests as well as of the agency’s work unrelated to record requests;
- increase the agencies’ need for more funding to recruit, train and hire additional personnel;
- reduce government efficiency as well as government transparency due to delays in processing record requests and increased costs to legitimate media representatives, resulting in less news coverage; and
- require ongoing legislative amendments to the UIPA to address unintended consequences and matters previously

handled by administrative rules, including the possibility of providing for longer agency response deadlines.

As to the proposed amendment of section 92-21, HRS, authorizing agencies to charge copy fees for government records, this statute is not part of the UIPA but OIP is frequently asked about its application to UIPA requests. The statute currently sets a minimum copy charge of \$.05/page, but does not prohibit agencies from charging more. Since OIP's rules allow an agency to charge "other lawful fees" in addition to the search, review, and segregation fees set out by the rules, OIP has generally advised that the minimum copy charge is a lawful fee for the purpose of the rules, and if an agency has adopted administrative rules setting a higher per-page charge, that higher charge is also a lawful fee. **This proposal would cap copy charges at \$.25/page and waive all copy fees for public interest requests, and thus would primarily affect those agencies that have adopted administrative rules setting a higher per-page charge.**

In summary, this bill would have the effect of shifting more and more of the cost of providing public access to government records onto the government agencies that respond to record requests and may have the unintended consequences of slowing response times, increasing government and media costs, decreasing media coverage and government transparency, and requiring ongoing legislative changes. Since balancing the public's versus the government's share of the cost of providing public access to government records is a policy question best determined by the Legislature, OIP has set out the potential effect these changes would have but does not take a position on whether these changes should be made.

Thank you for considering OIP's testimony.



DAVID Y. IGE
GOVERNOR

JOSH GREEN
LT. GOVERNOR

**STATE OF HAWAII
OFFICE OF THE DIRECTOR
PARTMENT OF COMMERCE AND CONSUMER AFF**

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CATHERINE P. AWAKUNI COLÓN
DIRECTOR

JO ANN M. UCHIDA TAKEUCHI
DEPUTY DIRECTOR

Testimony of the Department of Commerce and Consumer Affairs

**Before the
House Committee on Government Reform
Wednesday, March 16, 2022
9:00 a.m.
Via Videoconference**

**On the following measure:
S.B. 3252, S.D. 2, RELATING TO PUBLIC RECORDS**

WRITTEN ONLY

Chair McKelvey and Members of the Committee:

My name is Ahlani Quiogue, and I am the Licensing Administrator of the Department of Commerce and Consumer Affairs' (Department) Professional Vocational Licensing (PVL) Division. The Department has concerns with this bill and offers comments.

The purpose of this bill are to: (1) impose a cap on the charged costs for the reproduction of certain government records; (2) waive reproduction costs for the first one hundred pages if disclosure is in the public's interest; (3) waive the cost of duplication of government records in an electronic format; (4) impose a cap on charged costs for searching, reviewing, and segregating records; and (5) provide a waiver of fees when the public interest is served.

While the Department appreciates the intent of this measure to provide greater public access and transparency, it has strong concerns about several proposed amendments to Hawaii Revised Statutes (HRS) section 92-21, and the ramifications of the proposed changes upon the Department's operational functionality. In order to protect the privacy interests of individuals whose information is included in the requested records, staff must engage in search, review, and segregation of the records. The time consuming and labor-intensive nature of these tasks are demonstrated by the definitions of "search", "review", and "segregation" in Hawaii Administrative Rules (HAR) section 2-71-2. Should search, review, and segregation (SRS) fees for duplication of digital records or production of records in service of the public interest be waived, it would likely be very costly to government agencies, as requests requiring extensive searches and the production of a voluminous number of records are very likely to be tailored as coming from individuals and organizations seeking records to serve the public interest.

While proponents of fee reductions or fee waivers may argue that SRS fees discourage requesters or deny access to government records, the fees are not proven to be unreasonable. Due to budgetary constraints, an agency should be permitted to charge reasonable fees for services rendered, particularly when there is no limit to the number of services which may be requested. In HAR section 2-71-1, the Office of Information Practices expressly stated that SRS fees "are not intended to obstruct public access to disclosable records but rather are intended to allow agencies to recover some costs in providing access to disclosable records upon request." A staff person who searches, reviews, and segregates a government record is providing a necessary service and the agency is incurring costs in providing this service.

Thank you for the opportunity to testify on this bill.

DAVID Y. IGE
GOVERNOR



THOMAS WILLIAMS
EXECUTIVE DIRECTOR

KANOE MARGOL
DEPUTY EXECUTIVE DIRECTOR

STATE OF HAWAII
EMPLOYEES' RETIREMENT SYSTEM

TESTIMONY BY THOMAS WILLIAMS
EXECUTIVE DIRECTOR, EMPLOYEES' RETIREMENT SYSTEM
STATE OF HAWAII

TO THE HOUSE COMMITTEE ON GOVERNMENT REFORM

ON

SENATE BILL NO. 3252 S.D. 2

March 16, 2022

9:00 A.M.

Conference Room 309 and via Videoconference

RELATING TO PUBLIC RECORDS

Chair McKelvey, Vice Chair Wildberger, and Members of the Committee,

S.B. 3252 S.D.1 proposes to impose a cap on charged costs for reproduction of government records, waive reproduction costs for the first 100 pages if disclosure is in the public interest, waive the cost of duplication in an electronic format, impose a cap on charges for searching, reviewing and segregating records, and provide a waiver of fees when the public interest is served.

While the ERS supports the intent of the bill, the ERS has some concerns and offers the following comments:

The capping or waiving of fees typically results in an (expense) recovery level that is too low to cover actual expense incurred in gathering, copying and disseminating the materials. From a historical perspective, the cap has a tendency to become outdated over time, thereby invisibly increasing the level of cost subsidy by the agency. The ERS notes that the research and gathering of information more often requires the time and effort of its highly compensated professional staff, such as investment officers and program specialists, as well as its clerical staff. The bill's proposed cap would not allow the rates to be raised enough to reflect actual average current salaries, and overtime.



Employees' Retirement System
of the State of Hawaii

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The statutorily capped rates would represent a smaller and smaller share of the average salary cost of the employee time spent responding to UIPA requests.

There have been an increasing number of public requests for records, a number that is likely to increase even more if records become available at no cost to the requestor. Notably, the majority of requests to the ERS, often complex and related to investment activity, do not come from the public within our state but from outside individuals and enterprises who have commercial interests in gathering and distributing such information but express a public purpose for doing so.

The complete waiver of all fees for those requests that qualify would prove burdensome for the ERS and result in a larger number of complex record requests, as there would be no incentive for the requester to limit the number or narrow such requests. Such an increase in requests would require an inordinate amount of the ERS's staff time that would detract from the ERS's other work.

As to the proposed waiver of fees if information is "in the public interest," the bill does not provide a standard for determining when a request is "in the public interest." Nor does the bill specify who would make the determination.

The ERS shares and incorporates the concerns expressed in Office of Information Practices' (OIP) testimony, including the failure of current fees to reflect current salaries, changes in standard for a public interest waiver of fees under the UIPA, and ambiguity in the bill about the cost of producing documents in electronic format.

The OIP's list of potential unintended consequences applies to the ERS. In particular, the proposed fee caps and waivers are likely to:

- shift more and more of the cost of providing public access to government records onto the ERS;
- encourage the filing of numerous and more complex record requests;
- slow the processing of all record requests, as well as slow the ERS's work unrelated to record requests;
- increase the ERS's need for funding to recruit, train and hire additional staff;
- reduce government efficiency as well as government transparency due to delays in processing record requests.

Thank you for this opportunity to provide testimony.

DAVID Y. IGE
GOVERNOR OF HAWAII



**STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES**

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

**Testimony of
SUZANNE CASE
Chairperson**

**Before the House Committee on
GOVERNMENT REFORM**

**Wednesday, March 16, 2022
9:00 AM**

State Capitol, Conference Room 309 and Via Videoconference

**In consideration of
SENATE BILL 3252, SENATE DRAFT 2
RELATING TO PUBLIC RECORDS**

Senate Bill 3252, Senate Draft 2 proposes to impose a cap on the amount an agency can charge for the reproduction of certain government records and on costs charged for searching, reviewing and segregating records. It also proposes to waive certain reproduction costs, and waives all fees for search, review and segregation of records when the public interest is served. The **Department of Land and Natural Resources (Department)** offers the following comments.

With regard to the waiver of fees for reproduction of documents, the Department supports waiving copying charges for the first 100 pages for public interest requests. Currently, there is no public interest waiver for the reproduction of documents. However, the Department currently charges 50 cents per copy to recoup cost for staff time, paper, and wear and tear on the copy machine. The bill proposes to cap charges at 25 cents, half of the current charges. The Department would prefer to not have a cap on maximum costs so we can continue to recoup our costs to copy documents, including the copying of electronic files.

The Department is concerned that the waiver of all fees for searching, reviewing or segregating documents requested in the public interest will increase the amount of time staff spend performing this function.

Public interest request tends to be very broad, which means that they are time consuming and have no clear boundaries on what the requestor is seeking. The current practice is for the Department to estimate costs for broad requests and provide this information to the requestor. This tends to incentivize requestors to more narrowly focus their requests, while still allowing them to request the information they need. Without a fee for these broad requests, staff time searching, reviewing and segregating documents will increase, as well as costs for copying more

SUZANNE D. CASE
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

ROBERT K. MASUDA
FIRST DEPUTY

M. KALEO MANUEL
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

documents. The Department requests that the bill be amended to limit the fee waiver to 100 pages. Alternatively, the Legislature could consider providing funds to pay for additional staff to address broader requests as well as potentially more requests made in the public interest.

Thank you for this opportunity to comment on this measure.

DAVID Y. IGE
GOVERNOR



CRAIG K. HIRAI
DIRECTOR

GLORIA CHANG
DEPUTY DIRECTOR

EMPLOYEES' RETIREMENT SYSTEM
HAWAII EMPLOYER-UNION HEALTH BENEFITS TRUST FUND
OFFICE OF THE PUBLIC DEFENDER

STATE OF HAWAII
DEPARTMENT OF BUDGET AND FINANCE
P.O. BOX 150
HONOLULU, HAWAII 96810-0150

ADMINISTRATIVE AND RESEARCH OFFICE
BUDGET, PROGRAM PLANNING AND
MANAGEMENT DIVISION
FINANCIAL ADMINISTRATION DIVISION
OFFICE OF FEDERAL AWARDS MANAGEMENT (OFAM)

WRITTEN ONLY
TESTIMONY BY CRAIG K. HIRAI
DIRECTOR, DEPARTMENT OF BUDGET AND FINANCE
TO THE HOUSE COMMITTEE ON GOVERNMENT REFORM
ON
SENATE BILL NO. 3252, S.D. 2

March 16, 2022
9:00 a.m.
Room 309 and Videoconference

RELATING TO PUBLIC RECORDS

The Department of Budget and Finance (B&F) offers comments on Senate Bill (S.B.) No. 3252, S.D. 2.

S.B. No. 3252, S.D. 2, imposes a cap on the charged costs for the reproduction of certain government records; waives reproduction costs for the first 100 pages if disclosure is in the public's interest; waives the cost of duplication of government records in an electronic format; imposes a cap on charged costs for searching, reviewing, and segregating records; and provides for waiver of fees when the public interest is served.

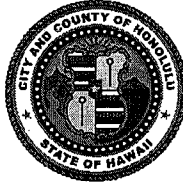
While B&F appreciates the intent of this measure, B&F notes that it is not clear how a department would implement this measure's standards and provisions.

Thank you for your consideration of our comments.

DEPARTMENT OF DESIGN AND CONSTRUCTION
CITY AND COUNTY OF HONOLULU

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RICK BLANGIARDI
MAYOR



ALEX KOZLOV, P.E.
DIRECTOR

HAKU MILLES, P.E.
DEPUTY DIRECTOR

March 14, 2022

The Honorable Angus L.K. McKelvey, Chair
The Honorable Tina Wildberger, Vice-Chair
and Members of the Committee on Government Reform
The House
State Capitol, Conference Room 309
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair McKelvey, Vice-Chair Wildberger, and Members:

SUBJECT: Senate Bill No. 3252 SD2
Relating to Public Records

The Department of Design and Construction (DDC) respectfully **opposes** Senate Bill No. 3252 SD2. The purpose of the bill is to:

- (1) Impose a cap on the charged costs for the reproduction of certain government records;
- (2) Waive reproduction costs for the first one hundred pages if a record's disclosure is in the public interest;
- (3) Waive the cost of duplication of government records in an electronic format;
- (4) Impose a cap on costs charged for searching for, reviewing, and segregating records; and
- (5) Provide for a waiver of fees when the public interest is served by a record's disclosure.

The existing fees for processing government record requests are much less than the costs incurred. Additionally, the staff resources expended to search, review, segregate, and redact when needed, the requested records detract from DDC's primary responsibility of efficiently executing capital improvement projects for the City and County of Honolulu within budgeted timelines. DDC does not have additional personnel to respond to Freedom of Information Act requests, so the requests are researched and prepared by existing personnel in addition to their regular duties.

The Honorable Angus L.K. McKelvey, Chair
and Members of the Committee on Government Reform
March 14, 2022
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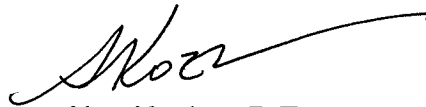
This bill would be expected to increase the frequency and scope of requests and the resources required to respond to those requests. DDC shares the concerns of the Office of Information Practices' (OIP) testimony, including concern that the bill would:

- Shift more and more of the cost of providing public access to government records onto DDC;
- Encourage the filing of more complex record requests;
- Slow the processing of all record requests, as well as slow DDC's work unrelated to record requests;
- Reduce DDC's efficiency as well as transparency due to delays in processing record requests.

Based on the above considerations, DDC respectfully **opposes** Senate Bill No. 3252 SD2.

Thank you for the opportunity to express our opposition to this bill.

Sincerely,

A handwritten signature in black ink, appearing to read 'Kozlov', with a long, sweeping horizontal stroke extending to the right.

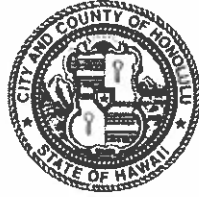
Alex Kozlov, P.E.
Director

POLICE DEPARTMENT
CITY AND COUNTY OF HONOLULU

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LATE

RICK BLANGIARDI
MAYOR



RADE A. VANIC
INTERIM CHIEF

OUR REFERENCE **JAT-DNK**

March 16, 2022

The Honorable Angus L.K. McKelvey, Chair
and Members
Committee on Government Reform
House of Representatives
Hawaii State Capitol
415 South Beretania Street, Room 309
Honolulu, Hawaii 96813

Dear Chair McKelvey and Members:

SUBJECT: Senate Bill No. 3252, S.D. 2, Relating to Public Records

I am Joseph A. Trinidad, Major of the Records and Identification Division of the Honolulu Police Department (HPD), City and County of Honolulu.

The HPD supports the intent, with reservations of Senate Bill No. 3252, S.D. 2, to promote access to government records and agency transparency.

Requests from public interest groups for information that "is likely to contribute significantly to public understanding of the operations or activities of the government" tend to be larger, complex requests. Such requests require more staffing hours, more research time, and more review time. Removing fees entirely could result in an increase in the number of records requests and work assignments.

The HPD shares the concern raised by the Office of Information Practices (OIP) that a complete waiver of fees for those requests that qualify as in the public interest could be burdensome for agencies and result in a larger number of complex records request.

The HPD also supports the testimony submitted by the OIP in that the proposed waiver would apply to information already widely available to the public and would apply to the requester with no intention or ability to publicly share the information, thus resulting in redundant or unnecessary expenditures of departmental resources.

The HPD continually strives to respond to government record requests while at the same time meeting the department's operational needs in order to ensure that the general public is served by the department in a timely manner.

The Honorable Angus L.K. McKelvey, Chair
and Members
Committee on Government Reform
March 16, 2022
Page 2

The HPD submits this testimony in its role as an integral part of the law enforcement community and thanks you for the opportunity to testify.

Sincerely,



Joseph A. Trinidad, Major
Records and Identification Division

APPROVED:



Rade K. Vanic
Interim Chief of Police



HOUSE COMMITTEE ON GOVERNMENT REFORM
Wednesday, March 16, 2022, 9 am, State Capitol Room 309 & Videoconference
SB 3252, SD2

Relating to Public Records

TESTIMONY

Douglas Meller, Legislative Committee, League of Women Voters of Hawaii

Chair McKelvey and Committee Members:

The League of Women Voters of Hawaii supports SB 3252, SD2. However, we would appreciate clarification of the circumstances under which an agency can charge more for an electronic copy than for a paper copy of a government record.

Thank you for the opportunity to submit testimony.



March 16, 2022

Rep. Angus McKelvey
House Government Reform Committee
State Capitol
Honolulu, HI 96813

Re: SB 3252 SD 2

We support this bill.

SB 3252 SD2 would encourage public understanding of government agencies, primarily through news media, public research organizations and nonprofit organizations seeking information from government records. These disclosures would be in the public interest because researchers, reporters and nonprofit employees would be informing the public about the operations of government.

Waiving records costs when disclosure is in the public interest and capping other costs would encourage public education about government. The proposal would also discourage attempts by agencies to use high fees to frustrate news media looking to shine a light on agency operations.

Reporters have long found that the high cost of records release is a deterrent to delving into government operations. It has been noted that reporters, for the most part, work for commercial operations. But when reporters are seeking information, they are not doing so to make money, they are trying to find out information that would inform and educate the public.

While we understand the worries stated by government agencies, we note that the salaries of employees to handle such requests are already paid for by taxes we all pay. We do not believe that this measure would make a big dent in agencies' budgets.

Thank you,

Stirling Morita
President
Hawaii Chapter of the Society of Professional Journalists



March 16, 2022

9 a.m.

VIA VIDEOCONFERENCE

Conference Room 309

To: House Committee on Government Reform

Rep. Angus L.K. McKelvey, Chair

Rep. Tina Wildberger, Vice Chair

From: Grassroot Institute of Hawaii

Joe Kent, Executive Vice President

RE: SB3252 SD2 — RELATING TO PUBLIC RECORDS

Comments Only

Dear Chair and Committee Members:

The Grassroot Institute of Hawaii would like to commend the Legislature for considering this bill, [SB3252 SD2](#), which touches on a significant problem encountered in open-records requests: the use of high search and reproduction costs as a method to discourage the pursuit of a Uniform Information Practices Act request.

Specifically, the bill would impose a cap on fees for reproduction of public records as well as on the searching, reviewing and segregating of such records.

In addition, the bill provides for a waiver of the first 100 pages of reproduction costs, if disclosure is in the public interest; waives costs for duplication of records in electronic format; and provides for a waiver of fees when the public interest is served.

As an educational research organization and public watchdog group, the Grassroot Institute of Hawaii often uses open-records requests to shine the light of transparency on the inner workings of government. Our UIPA requests run the gamut, from requests for records of budget and financial documents to requests for details of the plans for the Honolulu rail project.

In the course of our work, we have seen that some government agencies are more forthcoming than others, and that there are varying interpretations of the public-interest-fee waiver. Thus, some agencies will waive all costs associated with the search — as the statute clearly intended — while others will use the waiver as a “discount” of sorts, reducing but not waiving the search and reproduction fees.

On occasion, an agency will quote such a high fee requirement that accessing the requested records becomes an impossibility for the average person — or even a researcher or journalist.

For example, in 2021, the Grassroot Institute requested three years of administrative forfeiture records from the Office of the Attorney General. As this was to be part of a report on asset forfeiture in Hawaii, we requested a waiver in the public interest. The Attorney General’s Office quoted a total cost of \$2,190 — only \$10 of which related to reproducing records — which included a \$60 “fee waiver” because the request was in the public interest.

On another occasion, we requested communications between the governor’s office and certain agencies regarding the COVID-19 emergency — a nearly identical request to one filed by The Associated Press. The office quoted a total cost of \$342,876 for the request, which included a \$60 “fee waiver” because the request was in the public interest.

One might suggest that this request was too broad, in which case, it would have been more in keeping with the intent of the open-records law to discuss a way to narrow the request, as other agencies often do, rather than producing a cost quote intended to avoid any disclosure at all.

By including a clarification that waivers in the public interest are intended to apply to the search, review and segregation fees in their entirety, this bill would go a long way toward ending the use of high costs as a way to dodge record requests.

We do have one concern: the increase in the search, review and segregation costs, which are currently set at \$2.50 per 15-minute increment of searching time and \$5 per 15-minute increment of review and segregation time.

We urge you to cap those costs at the current rate rather than increasing them to \$5 and \$7.50, respectively.

We understand the desire to discourage nuisance requests or the abuse of the open-records law, but agencies should not be able to avoid disclosure of public records through the use of high fees. There are other avenues available to help address an overbroad request or “fishing

expeditions,” such as a dialogue about reducing the scope of a request, delayed fulfillment of the request, and guidance from the state Office of Information Practices, among others.

In summary, SB3252 SD1 has the potential to improve transparency and open government in our state by strengthening the public interest element of the law.

Thank you for the opportunity to submit our comments.

Sincerely,

Joe Kent
Executive Vice President
Grassroot Institute of Hawaii

THE CIVIL BEAT
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House Committee on Government Reform
Honorable Angus L.K. McKelvey, Chair
Honorable Tina Wildberger, Vice Chair

RE: Testimony Supporting S.B. 3252 S.D. 2, Relating to Public Records
Hearing: March 16, 2022 at 9:00 a.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 **supporting** S.B. 3252 S.D. 2.

State and county agencies maintain records for the people of Hawai'i. Excessive fees for record requests are an obstacle to any general policy of open government. The high cost of records discourages the public from asking questions about government operations. And it reinforces the public perception and the reality of social inequity between the elite and wealthy who know what is happening in Hawai'i because they have free access to information or can pay for it and those members of the public who do not have and cannot afford such access.

When someone requests access to the people's records *for the purpose of educating the general public about operations and activities of our government*, cost should not be an obstacle. An individual's public record request educates one person, but a public interest request typically educates thousands of people in Hawai'i. News media and public interest organizations spend hundreds of hours investigating, synthesizing, and publishing information about government operations. When the cost is too much, the general public is left in the dark.

For example, reporters and watchdog activists have written articles *sourced from public records* on the State's pension burdens, the deficiencies in DHHL's or DLNR's revocable permit systems, the discipline or exoneration of law enforcement officers for the death or assault of a citizen, the delays at DCCA in disciplining physicians, and even the cost of public records. Public discussion of these concerns about government operations – informed by access to government records – has led to reform in every instance.

Based on the Law Center's regular studies of data regarding UIPA requests to State and county agencies, requests made by public interest organizations – which would be impacted by this proposal – account for a very small number of requests annually. Typical of most years, in FY 2021, such public interest requests accounted for less than

5% of all requests. Thus, this proposal will not significantly impact the government fisc, but the corollary benefit of giving the people of Hawai`i greater access to understand their government is immeasurable.

In a random sampling of states, including Hawai`i, a March 2020 survey of public records laws found that Hawai`i agencies charged more than twice any other state in the survey. A. Jay Wagner, *Probing the People's Right to Know: A 10-State Audit of Freedom of Information Laws*, at 12. Many jurisdictions have clear statutory language that public interest requests will not be obstructed by government fees. For public interest requests, government agencies are not denying access to that single person; they are denying access to the thousands of people who would have received that information when the public interest requester disseminated it to the general public.

In addition, the proposed amendments regarding copying costs will address recurring problems where, for example, agencies attempt to charge per page fees for Excel spreadsheets that are thousands of pages when printed, but cost nothing to e-mail to the requester.

In prior testimony, absent excessive fee estimates to dissuade requesters from seeking information, agencies claim that public interest requesters will make exceptionally broad requests that will be burdensome and costly for agencies. That concern is unfounded. Requesters want *timely* access to information. If a requester makes a broad and burdensome request for voluminous records, an agency is authorized by existing law to disclose records on a month-to-month basis as its other duties permit; the deadlines for disclosure do not apply. Agencies rarely are willing to discuss ways to reduce fee estimates, so quoting tens of thousands of dollars in fees becomes an effective and complete block on public access. If agencies are required to disclose records in the public interest – it is only a matter of time – both the requester and the agency have incentives to discuss meaningful ways to narrow a request.

Also, regarding “commercial interest” as raised in agency testimony, the phrase is “*primarily* in the commercial interest”. Only OIP has ever said that news media are acting primarily in the commercial interest. In contrast, as the Senate Judiciary committee report summarized, the Freedom of Information Act standard that is adopted in this bill allows for public interest waivers for the news media. The U.S. Department of Justice explained “primarily in the commercial interest”:

For example, although newsgathering organizations usually have a commercial interest in obtaining information, the traditional process of newsgathering and dissemination by established news media organizations, as a rule, should not be considered to be “primarily” in their commercial interest; because of their established role in providing information to the general public, it ordinarily can be presumed that, if a

significant public interest has been identified, that will be the interest “primarily” served by disclosure to such organizations.

U.S. Dep’t of Justice, New Fee Waiver Policy Guidance (Jan. 1, 1987), *available at* <https://www.justice.gov/oip/blog/foia-update-new-fee-waiver-policy-guidance>.

Lastly, OIP’s data showing that nearly all fees are paid by for-profit requesters is not surprising. Only for-profit requesters can afford the fees. Public interest requesters typically abandon requests when the agency quotes an exorbitant fee estimate.

Thank you again for the opportunity to testify in support of S.B. 3252 S.D. 2.

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March 14, 2022

Aloha, Rep. Angus L.K. McKelvey, Chair; Rep. Tina Wildberger, Vice Chair; and members of the Committee on Government Reform:

I am writing to express my **support** of SB3252 SD2 Relating to Public Records.

Hawaii's public records law is a critical part of ensuring a transparent and accountable government. However, as a reporter and as an independent journalist, I have often been stymied by onerous costs quoted by government agencies to compile the requested information.

While time and effort are certainly required, there is always the concern that the amounts requested are intended more as a roadblock to public affairs reporting. Especially as most requested information is stored electronically and can usually be retrieved with relatively limited effort.

Some latitude must certainly be afforded for complex or time-consuming requests, for which this bill provides.

For future consideration, I would strongly recommend that all materials provided in response to any public records request be **published via a public portal or web page**. This will reduce duplicative requests, and further ensure that the information is available to everyone, not just the requestor.

Thank you very much for the opportunity to testify on this matter.



Ryan Kawailani Ozawa

SB-3252-SD-2

Submitted on: 3/14/2022 1:43:38 PM

Testimony for GVR on 3/16/2022 9:00:00 AM

Submitted By	Organization	Testifier Position	Testify
lynne matusow	Individual	Support	Written Testimony Only

Comments:

I support SB3252 but find it wanting. I object to the use of defective effective dates and find that they do not serve to encourage future discussion, they are a cop out, and often end in the defeat of a bill during conference committee. The effective date should be changed to effective upon approval, not some date 28 years in the future when a good number of us will be dead.

That said, I urge you to take this important step forward in making government more transparent by making access to public records less expensive.