

TESTIMONY BY:

JADE T. BUTAY
DIRECTOR

Deputy Directors
ROSS M. HIGASHI
EDUARDO P. MANGALLAN
PATRICK H. MCCAIN
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STATE OF HAWAII
DEPARTMENT OF TRANSPORTATION
869 PUNCHBOWL STREET
HONOLULU, HAWAII 96813-5097

February 11, 2022
9:30 A.M.
State Capitol, Teleconference

S.B. 3252
RELATING TO PUBLIC RECORDS

Senate Committee on Judiciary

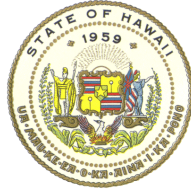
The Department of Transportation (DOT) **supports** the intent, with reservations on this bill that aims to enhance transparency and government accountability related to public information requests through reduction or removal of perceived barriers to those who choose to engage in the State's public records request process.

The DOT concurs with and shares concerns advanced by comments from the Office of Information Practices (OIP) in testimony related to this measure; in particular, the possibility of several unintended consequences of the bill as currently drafted. The bill defines a public interest request to be one that would exclusively "contribute significantly to public understanding" of agency operations or activities, but drops the additional current requirements to relate only to information not already widely available to the public, and a primary intent and ability of the requester to widely disseminate the information to the public. The bill also excludes the consideration of a public interest request for any that are "primarily in the commercial interest" which could effectively exclude media organizations that have superior and well-developed abilities to widely disseminate information of interest to the public. This bill additionally makes a public interest waiver a complete waiver of all fees, no matter how large the request might be, even if the information is already publicly available through other means, or would not be shared for the benefit the wider public, but would be costly for an agency to fulfill.

This measure includes language stating that copy charges shall not be charged "for producing documents . . . in electronic format[,]" but that copy charges shall "represent the reasonable direct costs of making the copies" including operator salary and cost of machinery. It is not clear whether this language would prohibit duplication charges where someone has requested electronic format copies of documents that exist only in non-electronic format. DOT concurs with the OIP suggestions that alternative language should be considered to clarify an allowance in this case, that agencies would be permitted to charge copy fees for making electronic copies of non-electronic records.

Thank you for the 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 Senate Committee on
JUDICIARY**

Friday, February 11, 2022

9:30 AM

Via Videoconference

**In consideration of
SENATE BILL 3252
RELATING TO PUBLIC RECORDS**

Senate Bill 3252 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 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 currently charges 50 cents per copy to recoup cost for staff time, paper, and wear and tear on the copy machine. 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. However, 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.

The Department has two concerns with the waiver of all fees for searching, reviewing or segregating documents requested in the public interest. The first is that most of the requests received by the Department are made in the public interest. Department staff have no consistent way of ensuring a public interest request is actually in the public interest, and therefore generally accept the request as is. So, the proposed waiver would apply to most of the Department's requests for information filed under the freedom of information act.

The second is that those requests tend 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 request and provide this information to the requestor. This tends to incentivize requestors to more narrowly focus their requests. Without a

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

fee for these broad requests, staff time searching, reviewing and segregating documents will increase, as well as costs for copying more documents. The Department suggests that either there is no fee waiver at all, or that there is a maximum waiver limit of 100 pages for public interest requests. 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.

The Legislature may also want to consider defining the public interest in ways not limited to commercial interests. As the Office of Information Practices has pointed out, news media, while commercial, also serve the public interest. Private law firms may be doing pro-bono work that is in the public interest.

Thank you for this opportunity to comment on this measure.

OFFICE OF INFORMATION PRACTICES

STATE OF HAWAII
NO. 1 CAPITOL DISTRICT BUILDING
250 SOUTH HOTEL STREET, SUITE 107
HONOLULU, HAWAII 96813
TELEPHONE: 808-586-1400 FAX: 808-586-1412
EMAIL: oip@hawaii.gov

To: Senate Committee on Judiciary

From: Cheryl Kakazu Park, Director

Date: February 11, 2022, 9:30 a.m.
State Capitol, Via Videoconference

Re: Testimony on S.B. No. 3252
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. **OIP does, however, recommend an amendment to clarify how agencies may charge for electronic copies of non-electronic records, and suggests language to do so.**

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.**

The proposed amendment also includes language stating that copy charges shall not be charged "for producing documents . . . in electronic format[,]" but that copy charges shall "represent the reasonable direct costs of making the copies" including operator salary and cost of machinery. It is not clear whether the amended language would prohibit copy charges where someone has requested electronic format copies of documents that exist only in non-electronic format. Most typically that would be PDF versions of paper records, though the same question would arise for a digital copy of an analog audio or video recording. In such a situation the cost to the agency is much the same as the cost of making paper copies of paper records, as an operator must still go to the copy machine and run the

records through it, selecting the option to create a scan instead of a paper copy. On the one hand the copies provided would in fact be in electronic format so copy charges would be contrary to the requirement not to charge for copies in electronic format; on the other hand, a copy charge of zero would obviously fail to represent the reasonable direct costs of making the copies as the proposal also requires copy charges to do. **OIP recommends that this bill be amended to clarify whether agencies are or are not allowed to charge copy fees representing their reasonable direct costs of making electronic copies of non-electronic records. Because the cost to the agency is similar to the cost of making physical copies, OIP more specifically recommends allowing agencies to charge copy fees for making electronic copies of non-electronic records, which can be done by changing the sentence at bill page 4 lines 5-7 to instead read “Reproduction costs shall not be charged for producing electronic copies of records the agency maintains in electronic format.”**

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.

Statement Before The
SENATE COMMITTEE ON JUDICIARY

Friday, February 11, 2022

9:30 AM

Via Videoconference

in consideration of
SB 3252**RELATING TO PUBLIC RECORDS.**

Chair RHOADS, Vice Chair KEOHOKALOLE, and Members of the Senate Judiciary Committee

Common Cause Hawaii supports SB 3252, which (1) imposes a cap on the charged costs for the reproduction of certain government records, (2) waives reproduction costs for the first one hundred pages if disclosure is in the public's interest, (3) 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 (4) provides for a waiver of fees when the public interest is served.

Common Cause Hawaii is a nonprofit, nonpartisan, grassroots organization dedicated to upholding the core values of our representative democracy through increasing civic engagement and breaking down the barriers to participating in our government.

Common Cause Hawaii has received complaints from the public as to the exorbitant costs charged by agencies for producing documents in electronic format, chilling public engagement. SB 3252 will waive the cost of duplication of government records in an electronic format and will impose a cap on charged costs for searching, reviewing, and segregating records. Further, SB 3252 will waive fees when the public interest is served.

For these reasons, Common Cause Hawaii supports SB 3252. It will hopefully increase government accountability and transparency and reduce the public's barriers and burden to participating in our government.

Thank you for the opportunity to testify in support of SB 3252. If you have any questions of me, please contact me at sma@commoncause.org.

Very respectfully yours,

Sandy Ma
Executive Director, Common Cause Hawaii

THE CIVIL BEAT
LAW CENTER FOR THE PUBLIC INTEREST

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Honolulu, HI 96813

Office: (808) 531-4000
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info@civilbeatlawcenter.org

Senate Committee on Judiciary
Honorable Karl Rhoads, Chair
Honorable Jarrett Keohokalole, Vice Chair

RE: Testimony Supporting S.B. 3252, Relating to Public Records
Hearing: February 11, 2022 at 9:30 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.

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.

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

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 SENATE COMMITTEE ON JUDICIARY
ON
SENATE BILL NO. 3252

February 11, 2022
9:30 a.m.
Via Videoconference

RELATING TO PUBLIC RECORDS

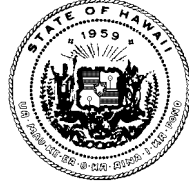
The Department of Budget and Finance (B&F) offers comments on Senate Bill (S.B.) No. 3252.

S.B. No. 3252 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.

DAVID Y. IGE
GOVERNOR



CATHY BETTS
DIRECTOR

JOSEPH CAMPOS II
DEPUTY DIRECTOR

STATE OF HAWAII
DEPARTMENT OF HUMAN SERVICES

P. O. Box 339
Honolulu, Hawaii 96809-0339

February 9, 2022

TO: The Honorable Senator Karl Rhoads, Chair
Senate Committee on Judiciary

FROM: Cathy Betts, Director

SUBJECT: **SB 3252 – RELATING TO PUBLIC RECORDS.**

Hearing: Friday, February 11, 2022, 9:30 a.m.
Via Videoconference, State Capitol

POSITION: The Department of Human Services (DHS) appreciates the intent of the measure and provides the following comments. DHS defers to the Office of Information Practices.

PURPOSE: The purpose of the measure is to impose a cap on the charged costs for the reproduction of certain government records; waive reproduction costs for the first one hundred pages if disclosure is in the public's interest; waive the cost of duplication of government records in an electronic format; impose a cap on charged costs for searching, reviewing, and segregating records; and provides for a waiver of fees when the public interest is served.

DHS supports the intent of this measure to maintain government accountability and transparency. DHS strives to respond to all government record requests per the time frame while balancing operational demands to ensure that individuals and families are also timely served by the department. Unfortunately, programs do not have dedicated staff or resources to respond to records requests; time spent on responses interrupts the completion of regular duties.

Complex record requests often require significant coordination of program resources and staff time. This proposed measure to impose limitations on costs and fee waivers may have unintended consequences, such as encouraging the filing of more complex record requests that impact the critical program work unrelated to the records requests.

Thank you for the opportunity to testify on this bill.



SENATE COMMITTEE ON JUDICIARY
Friday, February 11, 2022, 9:30 am, Videoconference
SB 3252
Relating to Public Records

TESTIMONY

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

Chair Rhoads and Committee Members:

The League of Women Voters of Hawaii strongly supports SB 3252.

Thank you for the opportunity to submit testimony.



All Hawaii News * P.O. Box 612 * Hilo, HI 96721 * www.allhawaiinews.com

Feb. 8, 2022

The Honorable Senator Karl Rhoads, chairman
Senate Committee on Judiciary

From: Nancy Cook Lauer, publisher, All Hawaii News
www.allhawaiinews.com nclauer@gmail.com 808.781.7945

In **STRONG SUPPORT** of SB 3252, Relating to Public Records

All Hawaii News, a state government and political news aggregate blog covering Hawaii since 2008, supports SB 3252, capping charges for reproducing, searching, reviewing, and segregating public records and waiving costs under certain conditions.

Access to the public's public records shouldn't depend on how much money you make. A member of the public with less ability to pay shouldn't be treated differently than a wealthier one.

Public records belong to the people, not the government. The people already pay the taxes that support the workers who process the public records requests, the computers and software where the records reside and buildings that contain them.

Mahalo nui for considering SB 3252.

Nancy Cook Lauer



Big Island Press Club

Since 1967, protecting the public's right to know

Big Island Press Club
P.O. Box 1920
Hilo, Hawaii 96721

CONTACT:
info@bigislandpressclub.org

February 8, 2022

To: House Committee on Judiciary
House Committee on Ways and Means

From: Michael Phillips, Vice President, Big Island Press Club

In SUPPORT of HB 3252 Relating to Public Records

The Big Island Press Club, Hawaii's oldest press club, is in support of HB 3252 relating to Public Records.

Since 1967, the Big Island Press Club has been protecting the public's right to know. Serving as a watchdog for openness and credibility for Hawaii Island, we believe government agencies exist to aid the people in the formation and conduct of public policy. The best way for the people to do this is with fast, efficient access to government records. We also believe that the media serves a tremendous role for relaying important information from the government to the people it represents.

With that said, we wholeheartedly support HB 3252.

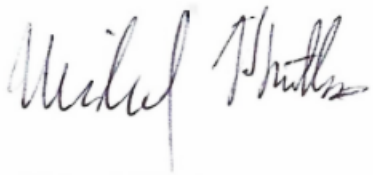
As the Bill reads, the House Judiciary Committee's report, House Standing Committee Report No. 342-88, stated that "It is the intent of your Committee that

such charges for search, compilation, and segregation shall not be a vehicle to prohibit access to public records. It is the further intent of your Committee that the Office of Information Practices move aggressively against any agency that uses such charges to chill the exercise of first amendment rights. Your Committee also added new language to allow waiver of these charges when such action serves the public interest.”

There is no better way for a government to connect to its people than to transfer records and files at minimal cost, especially when modern technology allows for the timely, cost-effective transmittal of such. And when the media serves as a vehicle for public trust, it makes sense that the government would waive fees for searching, reviewing, and segregating records for the Press for distribution to the public as a vehicle for public interest.

I thank you for the opportunity to testify in wholehearted support of SB 3252 relating to Public Records; please don't "chill the exercise of first amendment rights.”

Signed,

A handwritten signature in black ink, appearing to read "Michael Phillips". The signature is written in a cursive, flowing style.

Michael Phillips
Vice President, Big Island Press Club



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 SENATE COMMITTEE ON JUDICIARY

ON

SENATE BILL NO. 3252

**February 11, 2022
9:30 A.M.
Via Videoconference**

RELATING TO PUBLIC RECORDS

Chair Rhoads, Vice Chair Keohokalole, and Members of the Committee,

S.B. 3252 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 is typically set at a 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 to the agency. The ERS notes that the research and gathering of information 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



Employees' Retirement System
of the State of Hawaii

reflect average current salaries, and overtime, 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 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 but express a public purpose.

The complete waiver of all fees for those requests that qualify could be burdensome for the ERS and result in a larger number of complex record requests, as there would be no incentive for the requester to narrow such a request. Such an increase in requests would require an inordinate amount of the ERS's staff time that could 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's (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 in this bill may:

- shift more and more of the cost of providing public access to government records onto the ERS;
- encourage the filing of 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 more 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.



February 11, 2022

9:30 a.m.

VIA VIDEOCONFERENCE

Conference Room 308

To: Senate Committee on Judiciary

Senator Karl Rhoads, Chair

Senator Jarrett Keohokalole, Vice Chair

From: Grassroot Institute of Hawaii

Joe Kent, Executive Vice President

RE: SB3252 — RELATING TO PUBLIC RECORDS

Comments Only

Dear Chair and Committee Members:

The Grassroot Institute of Hawaii would like to offer its comments on [SB3252](#), which 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.

We commend the Legislature for considering this bill, 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 UIPA request.

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 3 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 could go a long way to 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 that is accomplished through the bill's explanation of what qualifies as "public interest."

In summary, SB3252 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

SB-3252

Submitted on: 2/7/2022 6:28:27 PM

Testimony for JDC on 2/11/2022 9:30:00 AM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
Cathy Goeggel	Individual	Support	No

Comments:

ARH supports SB3252 wholeheartedly. In the over 45 years of our existence, our all volunteer NGO 501(C)(3) has had difficulty not only in accessing public information from government agencies, but also have been presented with exorbitant fees, especially from the Hawai'i DoA.

Please advance this bill. Mahalo!

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@hawaii A row of small, black social media icons including Instagram, Twitter, YouTube, LinkedIn, Facebook, and others.

Email: hawaii@hey.com

February 7, 2022

Aloha, Karl Rhoads, Chair; Senator Jarrett Keohokalole, Vice Chair; and members of the Committee on Judiciary:

I am writing to express my **support** of SB3252 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.

One practice which I would strongly recommend is for all materials provided because of any public records request be **published via a public portal or web page**. This will reduce duplicative requests, and further ensure 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