



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
KA 'OIHANA O KA LOIO KUHINA
THIRTY-THIRD LEGISLATURE, 2025**

ON THE FOLLOWING MEASURE:

S.B. NO. 284, RELATING TO INTERCEPTION OF WIRE, ORAL, OR ELECTRONIC COMMUNICATION.

BEFORE THE:

SENATE COMMITTEE ON JUDICIARY

DATE: Thursday, February 20, 2025 **TIME:** 9:45 a.m.

LOCATION: State Capitol, Room 016

TESTIFIER(S): Anne E. Lopez, Attorney General, or
Kory W. Young, Deputy Attorney General

Chair Rhoads and Members of the Committee:

The Department of the Attorney General (Department) provides the following comments and suggested amendments.

The purpose of the bill is to amend section 803-46, Hawaii Revised Statutes (HRS), to remove the requirement that applications for orders authorizing the interception of a wire, oral, or electronic communication (applications) be accompanied by a recommendation from the Department for approval or disapproval whenever those applications are submitted to a designated judge.

Removing the requirement that applications be accompanied by a Department recommendation for approval or disapproval would expedite the application process. In cases involving imminent danger of death or injury, allowing prosecutors to go directly before a judge to seek an order authorizing the interception of a wire, oral, or electronic communication without requiring a memorandum from the Department would save valuable time that could ultimately end up saving lives.

The bill, however, seeks to eliminate the review of applications and the issuing of Department recommendations for approval or disapproval in their entirety. Eliminating the Department from the application process would likely make review of these applications more difficult for the judges, and result in the granting of orders based on legally deficient applications.

IMMEDIATE ACTION TO AVOID DEATH OR INJURY

The Department recommends that the bill be amended to waive review of applications by the Department only in cases where the prosecutor swears or affirms to the judge that immediate action is required in order to avoid death or injury, and the judge, after reviewing the facts and circumstances provided in the application, agrees that immediate action is warranted. The bill should also be amended to require that the judge's order granting the application contain an express finding that immediate action was necessary to avoid death or injury. The Department recommends that the bill be amended to add to part IV of chapter 803, HRS, a new section to read as follows:

§803-_____ Emergency applications and orders. (a) If an order authorizing or approving the interception of a wire, oral, or electronic communication is immediately necessary to prevent death or injury, an emergency application for an emergency order authorizing or approving the interception of a wire, oral, or electronic communication may be submitted to a designated judge without a written memorandum recommending approval or disapproval by the department of the attorney general, provided that:

- (1) The emergency application attest that the interception of a wire, oral, or electronic communication is immediately necessary to prevent death or injury;
- (2) The emergency application identify the person or persons who are in danger of death or injury, if the identity of the person or persons is known;
- (3) The emergency application shall meet all other requirements for an application for an order authorizing or approving the interception of a wire, oral, or electronic communication as set forth in this part;
- (4) The emergency order authorizing or approving the interception of a wire, oral, or electronic communication contain a finding that the order needed to be granted immediately to prevent death or injury; and
- (5) The emergency order state that the interception shall terminate when the danger of death or injury has abated, a follow-up application for an order authorizing or approving the interception of a wire, oral, or electronic communication has been denied, or forty-eight hours have passed since the granting of the emergency order if no follow-up order has been granted.

(b) If an emergency order authorizing or approving the interception of a wire, oral, or electronic communication is granted, a follow-up application for a follow-up order authorizing or approving the interception of a wire, oral, or electronic communication shall be submitted to a designated judge within forty-eight hours of the granting of the emergency order. The follow-up application shall:

- (1) Meet all of the requirements for an application for an order authorizing or approving the interception of a wire, oral, or electronic communication set forth in this part; and
- (2) Be accompanied by a written memorandum recommending approval or disapproval by the department of the attorney general.
- (c) The interception of any wire, oral, or electronic communication authorized or approved by an emergency order shall immediately terminate if:
 - (1) The danger of death or injury has abated;
 - (2) A follow-up application is denied; or
 - (3) A follow-up order authorizing or approving the interception of a wire, oral, or electronic communication is not granted within forty-eight hours after the granting of the emergency order.
- (d) In the event a follow-up application for an order authorizing or approving the interception of a wire, oral, or electronic communication is denied, or in any other case where a follow-up order is not granted by a designated judge within forty-eight hours after the granting of an emergency order, the contents of any wire, oral, or electronic communication intercepted shall be treated as having been obtained in violation of this chapter. An application for a follow-up order and the granting of a follow-up order may occur after the interception has terminated, provided the follow-up order is granted within forty-eight hours of the granting of the emergency order.
- (e) Except as specifically provided by this section, all emergency applications for an order authorizing or approving the interception of a wire, oral, or electronic communication, emergency orders authorizing or approving the interception of a wire, oral, or electronic communication, follow-up applications for an order authorizing or approving the interception of a wire, oral, or electronic communication, and follow-up orders authorizing or approving the interception of a wire, oral, or electronic communication shall be subject to the requirements set forth in this part.

Allowing law enforcement to submit emergency applications would also be consistent with section 803-42(b)(11)(E), HRS, which authorizes persons or entities providing electronic communications services to the public to divulge the contents of communications to law enforcement agencies and public safety agencies under certain circumstances if "an emergency involving danger of death or serious bodily injury to any person requires disclosure without delay of communications relating to the emergency .

..."

Similar exceptions exist in the federal statutes regulating the interception of wire, oral, or electronic communications. Title 18 United States Code section 2518(7) provides for federal and state law enforcement to begin intercepting wire, oral, and electronic communications under certain circumstances, prior to obtaining a judge's order. Section 2518(7) states:

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General, the Deputy Attorney General, the Associate Attorney General, or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that--

(a) an emergency situation exists that involves--

- (i)** immediate danger of death or serious physical injury to any person,
- (ii)** conspiratorial activities threatening the national security interest, or
- (iii)** conspiratorial activities characteristic of organized crime,

that requires a wire, oral, or electronic communication to be intercepted before an order authorizing such interception can, with due diligence, be obtained, and

(b) there are grounds upon which an order could be entered under this chapter to authorize such interception, may intercept such wire, oral, or electronic communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire, oral, or electronic communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

This demonstrates that it can be necessary for law enforcement to act swiftly in emergency situations, without the usual procedures for review.

Similar to the federal statute, if a follow-up application is not submitted within forty-eight hours, or, if the follow-up application is denied by the judge, the emergency

interception of a wire, oral, or electronic communication would cease immediately and any communications shall be treated as having been obtained in violation of chapter 803, HRS. In this way, emergency situations could be more swiftly addressed, while the safeguards protecting the privacy interests of our community could also be maintained.

DEPARTMENT REVIEW UNDER NORMAL CIRCUMSTANCES

In 2006, Hawaii's electronic eavesdropping laws were updated, including the creation of a surveillance review unit within the Department and the amendment of section 803-46, HRS, to require that applications for orders authorizing or approving wire, oral, or electronic communications be accompanied by a recommendation from the Department for approval or disapproval. Section 28-141, HRS, states:

Surveillance review unit. There is established in the department of the attorney general a surveillance review unit, which shall be responsible for reviewing all applications for interception of wire, oral, or electronic communications under chapter 803 prior to their submittal to a designated judge, regardless of whether submitted by county or state investigative or law enforcement officers. A surveillance review unit deputy attorney general shall review the application in a timely manner to ensure it meets the requirements of part IV of chapter 803 and applicable law and recommend any necessary additions or changes to the application. Thereafter, the surveillance review unit deputy attorney general shall prepare a written memorandum recommending approval or disapproval of the application, which shall be submitted to the district court judge or designated judge with the application. The attorney general shall establish standards and procedures for the timely review of these applications to ensure continuity and conformity with applicable law.

Pursuant to section 28-141, HRS, the Department established a surveillance review unit (SRU), within the Criminal Justice Division, that reviews applications on behalf of the Department and issues recommendations for approval or disapproval to the designated judge. The SRU is set up to review applications on short notice, and to work after business hours with prosecutors so that applications are reviewed and recommendations for approval or disapproval are issued with all due speed.

The review of a legally sufficient application and the issuing of a recommendation for approval can usually be completed in approximately one to two hours or less (depending on the length of the application). If the application is NOT legally sufficient, the SRU will suggest additions or changes that need to be made to the application and

work with the prosecutors to bring the application into compliance with the requirements of sections 803-44 and 803-46, HRS, and the relevant federal statutes. Delays in the application process are usually caused by the prosecutors needing to add more information to the application, to comply with section 803-46, HRS.

If the prosecutors decide not to make the additions or changes to the application suggested by the SRU, the prosecutors can submit the application to the judge with a memorandum by the SRU recommending disapproval. The recommendation for disapproval will contain a brief synopsis of the reason(s) why the SRU believes the application is legally deficient, to make it easier for the judge to evaluate the application.

If the prosecutors make all changes and additions to the application as suggested by the SRU, the SRU will issue a memorandum recommending approval.

While most district court judges may be familiar with the requirements for reviewing a standard search warrant, most judges will never have had the opportunity to review an application for an order authorizing the interception of a wire, oral, or electronic communication. Over the past eight years, all the county police departments and all the county prosecutors' offices in the State of Hawaii have COMBINED to submit an average of less than one application per year for review by a designated judge. While district court judges are capable of reviewing these applications without the recommendation of the SRU, the SRU recommendation provides additional perspective and consistency when evaluating these applications, especially if a judge is not otherwise familiar with the requirements of the state and federal electronic eavesdropping statutes.

The SRU's review of applications over the past eight years have found numerous legal deficiencies in the applications and in the application procedures used by county prosecutors offices. The SRU was able to determine that one county's application procedure violated section 803-44, HRS, making all their applications legally unsound (until their procedure was corrected). In another case, the SRU determined that the telephone number for which the application was requesting authorization to intercept was incorrect. In other cases, the applications have simply failed to address various

requirements of section 803-46, HRS (usually by failing to fully address the requirements of section 803-46(a)(2)(B) or (4)), HRS.

Because of the invasive nature of these investigatory tools, the Legislature has made it clear that it intends to ensure that the use of electronic eavesdropping techniques by law enforcement is closely monitored. Section 803-47, HRS, requiring the Department and the county prosecutors' offices to submit annual reports to the Legislature regarding the use of these techniques, illustrates this point. Requiring that the SRU review all applications and provide recommendations for approval or disapproval is another safeguard against abuse, which should only be removed in emergency situations when such a delay could result in death or injury.

The Department thanks the Committee for the opportunity to provide comments on the bill.

**DEPARTMENT OF THE PROSECUTING ATTORNEY
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**THE HONORABLE KARL RHOADS, CHAIR
SENATE COMMITTEE ON JUDICIARY
Thirty-Third State Legislature
Regular Session of 2025
State of Hawai'i**

February 19, 2025

RE: S.B. 284; RELATING TO INTERCEPTION OF WIRE, ORAL, OR ELECTRONIC COMMUNICATION.

Chair Rhoads, Vice Chair Gabbard, and members of the Senate Committee on Judiciary, the Department of the Prosecuting Attorney for the City and County of Honolulu submits the following testimony in **support** of S.B. 284. This bill is part of the Department's 2025 legislative package, and we thank you for hearing it.

S.B. 284 removes the requirement that a written memorandum from a deputy attorney general accompany an application for authorization to intercept wire, oral, or electronic communications. Both state¹ and federal² law still mandate that the county prosecutor personally approve any wiretap application. And judicial authorization is still required. None of the other statutory restrictions on intercepts have been amended.

This bill will permit police to respond in a timely and lawful manner to emergencies requiring wiretapping. In particular, it will allow investigators to obtain live location data from phones, subject to prosecutorial review and judicial authorization. Improper wiretaps remain punishable as a Class C felony.³

The state wiretap bill was likely modeled on its federal counterpart,⁴ which requires direct approval for wiretap authorization from the Attorney General or senior officials at Main Justice. But the United States Department of Justice is a single agency with a direct supervisory channel. By contrast, county prosecutors are independent agencies exercising delegated powers

¹ HRS § 803-44 (authorizing delegation to a deputy only in event of prosecuting attorney's absence or incapacity).

² See 18 U.S.C. § 2516(2).

³ HRS § 803-42(a). See also 18 U.S.C. § 2511 (federal penalties).

⁴ See 18 U.S.C. § 2516(1). See also 18 U.S.C. § 2518.

from the state Attorney General. In Hawai'i, county prosecutors are very familiar with the procedures for obtaining warrants in criminal investigations.

We agree that live interception of electronic communications is an extraordinary measure should be used sparingly, subject to a full and complete statement of known facts and only with judicial authorization. But the current requirement for a written memorandum does not offer greater privacy protection. Nor does it enhance accountability. In emergencies, the police will simply act without a court order. Our office would prefer efficient lawful orders.

The Department strongly urges this Committee to pass S.B. 284.

Thank you for the opportunity to testify.

SB-284

Submitted on: 2/14/2025 8:49:30 PM

Testimony for JDC on 2/20/2025 9:45:00 AM

Submitted By	Organization	Testifier Position	Testify
Michael EKM Olderr	Individual	Oppose	Written Testimony Only

Comments:

I strongly oppose this bill. The amount of information gathered and collected by police has already gone beyond our right to privacy. In our age of digital information, with so much information being sold or stolen already, I don't think it is wise or sane to make it easier for police to violate someone's privacy. This bill would give officers more power to abuse and exploit the denizens they are sworn to protect. Judges already hand warrants out like a grandmother on Halloween; why do you insist on making it easier for a person's rights to be legally taken away? The reserves of this bill should be implemented so that only approval from an AG could a warrant even be considered to go before a judge. I strongly recommend that this bill dies in committee.