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No. _

TESTIMONY ON HOUSE BILL 232
RELATING TO PUBLIC SAFETY

By
Clayton A. Frank, Director
Department of Public Safety

House Committee on Public Safety
Representative Faye P. Hanohano, Chair
Representative Henry J.C. Aquino, Vice Chair

Thursday, February 5, 2009; 9:15AM
State Capitol, Conference Room 309

Representative Hanohano, Representative Aquino, and Members of the Committee:

The Department of Public Safety (PSD) opposes House Bill 232. The measure is an unnecessary and inequitable procedure that will discourage any contractor from bidding with PSD. Further, this measure only applies to PSD, and if the intent is to implement this process as a legal requirement, it should apply to all State contracts.

This measure requires a private corrections contractor who contracts to house Hawaii state inmates to submit to procedures required of state agencies under HRS §92F simply because they contract with PSD. However, any other type of contractor is not held to the same standard, either those contracting with PSD or with any other State agency. Further, any document or record that is material to the state's interest regarding a correctional contract can be requested by the Legislature. The department will supply the documents after obtaining them from the contractor pursuant to existing contracting terms. The same applies for any private entity contracting with other State agencies.

There are over 2,000 State inmates currently in mainland contract prisons simply because there is not adequate space in the State to safely and securely house these inmates. While there are a number of companies that contract to operate private prisons, there are few private contractors, if any, that would bid on PSD contracts if they are required to release information in the same way State agencies are. Implementing this requirement would discourage any contractor from bidding, effectively forcing the State to return inmates to existing State facilities; which would create a situation that would clearly violate the constitutional rights of inmates. In that, the overall effect of this measure would greatly increase costs for the State, either by paying much more for a contractor to perform these tasks, or by paying the adverse judgments upon the return of all Hawaii inmates due to a lack of contractors housing them, this measure is unnecessary and inequitable.

PSD opposes this measure based on the premises that this procedure applies only to a very specific type of contractor, and that under the current circumstances, the same results can be achieved by a simple request from the Legislature under HRS §92F. This bill is repetitive and inequitable, and will have an unnecessary chilling effect on any bidding process pursued by PSD.

PSD recommends House Bill 232 be held by your committee. Thank you for the opportunity to testify on this matter.

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: House Committee on Public Safety

From: Paul T. Tsukiyama, Director

Date: February 5, 2009, 9:15 a.m.
State Capitol, Room 309

Re: Testimony on H.B. No. 232
Relating to Public Safety

Thank you for the opportunity to submit testimony on H.B. No. 232.

The Office of Information Practices ("OIP") supports the intent of this bill, which would require nongovernmental entities contracting with the State to incarcerate state prisoners to release information about prison operations in the same way that a state agency operating such a facility would be required to under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes.

It is often uncertain whether a nongovernmental entity performing a government function is subject to accountability laws such as the UIPA, and OIP welcomes legislative action to clarify the issue. This bill would make clear that although a private prison operator housing state prisoners is not itself a state agency, it must respond to UIPA requests in the same way as an agency.

OIP notes that the provision addressing the remedy available to a person requesting records from a private prison operator in the event a request is denied

contains superfluous and confusing language. Specifically, at page 3, lines 16-20, the qualification “provided that these remedies shall not be available for information is entitled to protection pursuant to section 92F-13 or for information that is a trade secret as provided in section 482B-2” is superfluous because in such a case the record requester would not be entitled to the records under the UIPA to begin with. Additionally, since the purpose of an appeal of a denial is generally to determine whether a record was, in fact, entitled to protection under section 92F-13, the qualification is confusing since it seems to contradict the first part of the provision, i.e. that a requester has a right to appeal a denial as provided for in the UIPA.

The issues of the enforceability of the measure against private entities located out of state and the administrative burden that would be placed on such entities are beyond OIP’s jurisdiction, so OIP defers to PSD on those issues.

Thank you for the opportunity to testify.



Via E-mail: PBSTestimony@Capitol.hawaii.gov
Committee: Committee on Public Safety
Hearing Date/Time: Thursday, February 5, 2009, 9:15 a.m.
Place: Room 309
Re: Testimony of the ACLU of Hawaii in Support of HB 232, Relating to Public Safety

Dear Chair Hanohano and Members of the Committee on Public Safety:

The American Civil Liberties Union of Hawaii ("ACLU of Hawaii") writes in strong support of HB 232, which seeks to require privately owned prisons or out-of-state detention facilities holding prisoners under a contract with the State to follow state freedom of information laws pursuant to Chapter 92F, Hawaii Revised Statutes.

In these difficult economic times, it is important that private prisons are carefully scrutinized to determine whether they are a wise use of our limited funds. The ACLU of Hawaii's experience with private prisons has been consistently negative, in that we continue to receive hundreds of requests for assistance from Hawaii inmates in CCA facilities. We have particular concerns about the private prisons on the mainland, because our requests for information on these prisons' policies and procedures are frequently denied (on the basis that the Corrections Corporation of America's policies and procedures are "proprietary"). These private prisons are in dire need of the layer of accountability and transparency that this bill will add.

Requiring private prisons to follow state freedom of information laws will help to ensure that private prisons are held accountable for their actions. It will increase transparency in what is otherwise an extraordinarily secretive system and ultimately ensure that Hawaii inmates' health, safety and rehabilitative needs are met. Further, it will help to determine whether the millions of dollars paid to private prisons to house Hawaii's inmates is the most effective use of that money.

The mission of the ACLU of Hawaii is to protect the fundamental freedoms enshrined in the U.S. and State Constitutions. The ACLU of Hawaii fulfills this through legislative, litigation, and public education programs statewide. The ACLU of Hawaii is a non-partisan and private non-profit organization that provides its services at no cost to the public and does not accept government funds. The ACLU of Hawaii has been serving Hawaii for over 40 years.

American Civil Liberties Union of Hawai'i
P.O. Box 3410
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Hon. Rep. Hanohano, Chair, PBS Committee
and Members Thereof
February 5, 2009
Page 2 of 2

Thank you for this opportunity to testify.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. M. Gluck', written in a cursive style.

Daniel M. Gluck
Senior Staff Attorney
ACLU of Hawaii

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TO: COMMITTEE ON PUBLIC SAFETY

Rep. Faye Hanohano, Chair
Rep. Henry Aquino, Vice Chair
Thursday, February 5, 2009
9:15 AM
Room 309, Hawaii State Capitol

RE: Testimony in Support of HB 232 – Freedom of Information Act

FROM: Atty Daphne Barbee-Wooten
1188 Bishop Street, Suite 1909, Honolulu, Hawaii 96813, (808) 533-0275

Dear Representative Hanohano:

My name is attorney Daphne Barbee-Wooten and I represent inmates who have been transferred to Saguaro Correction Facility. A recent case has ruled that out-of-state prisons must comply with the Freedom of Information Act. See enclosed summary.

I represent an inmate at Saguaro Correctional Facility that was placed in the hole for having contraband in his legal mail, i.e., grievances about the prison and case law which I sent him. When I questioned the warden at Saguaro the definition of contraband, I was not given any rules and brushed off. The State of Hawaii Attorney General has not sought any clarification and indeed supports Saguaro's position. With the Freedom of Information Act, the rules, regulations, and definitions would have to be given to attorneys who represent clients. Furthermore, grievance decisions and grievance appeal requests would also be given to attorneys and clients upon request. According to one of my clients, many of the grievances have disappeared and decisions have not been rendered. This Bill will make the prisons accountable and ensure it does not turn into a dark hole with rules that can be made up or ignored arbitrarily by guards and wardens.

Please pass this Bill. If a prison facility has nothing to hide, it should not be afraid of following the Freedom of Information.

Dated: Honolulu, Hawaii

2-4-09

D Barbee-Wooten

Daphne Barbee-Wooten
Attorney at Law

Prison Legal News Prevails in Tennessee Public Records Suit Against CCA

In 2002, the Tennessee Supreme Court ruled that a private company which performed services that were “functionally equivalent” to those provided by a public agency had to comply with the state’s Public Records Act, T.C.A. § 10-7-501, *et seq.* See: *Memphis Publishing Company v. Cherokee Children & Family Services, Inc.*, 87 S.W.3d 67 (Tenn. 2002).

This ruling was not tested against the nation’s largest private prison company, Nashville-based Corrections Corp. of America (CCA), until CCA officials refused to produce public records requested by *PLN* associate editor Alex Friedmann in April 2007.

PLN had asked for records related to successful litigation against CCA, including verdicts, settlements and judgments, as well as “reports, audits, investigations or other similar documents which found ... that CCA did not comply with one or more terms of its contracts” with government agencies.

After CCA declined to produce the requested records, *PLN* filed suit in Davidson County Chancery Court on May 19, 2008, seeking to force CCA to comply with the state’s Public Records Act pursuant to the ruling in *Cherokee*. “Public agencies cannot contract away the public’s ability to review records that otherwise would be publicly accessible under the state’s open records law. The public’s right to know is not delegable to private corporations,” said *PLN* editor Paul Wright.

Chancellor Claudia Bonnyman ruled in *PLN*’s favor on July 29, 2008 following an evidentiary hearing. The court found that CCA’s operation of prisons and jails on behalf of government agencies meant the company performed a “functionally equivalent” public service within the meaning of *Cherokee*, and thus had to comply with public records requests.

The court rejected CCA’s argument that it did not receive “funding” from the state but merely received contractual payments for services rendered. The court also rejected CCA’s position that the firm only received about 10 percent of its income from public agencies in Tennessee. As *PLN*’s attorney pointed out, almost all of CCA’s income was derived from government sources through taxpayer funds, including 100% of its operations

in Tennessee. The records that *PLN* had requested related solely to the company’s Tennessee facilities.

With several limited exceptions, Chancellor Bonnyman held that CCA must produce the requested records – including verdicts, settlements and damage awards in lawsuits filed against the company that were not sealed by court order. “CCA has fought tooth and nail to prevent the media and members

of the public from obtaining information about the company’s operations, and it has been successful until now. We will not be able to see what they’ve been hiding said Friedmann. CCA has stated it will appeal the ruling.

PLN was well represented by Anne Clarke of the Memphis law firm of Borck and Kramer, P.C. See: *Friedmann v. CC*. Chancery Court of Davidson County Tennessee, Case No. 08-1105-I. ■

NY DOC’s Former 60% Prisoner Phone Call Kickback Scheme Did Not Violate Prisoners’ Families’ Constitutional Rights

In December, 2007, the New York State Supreme Court (this is a trial level court) held that the New York Department of Corrections’ (NYDOC) policy of contracting for prisoner collect telephone calls, which resulted in a 60% kickback to NYDOC from the telephone company, did not violate the constitutional rights of the recipients of those calls. While any recovery of past alleged overcharges was thus blunted, future rates have been contained by a progressive new New York state law (Corrections Law § 623, 12007, ch. 240, § 2), effective April 1, 2008, that bars NYDOC from gouging prisoners’ families with charges that exceed the reasonable cost of establishing and administering its telephone system. This ruling comes after the case had been remanded to the trial court by the state Court of Appeals, the highest court, which had reversed a prior dismissal of the case. See: *Walton v. NY DOCS*, 863 N.E.2d 1001 (NY 2007).

Ivey Walton and other friends and relatives of prisoners in NYDOC, supported by the Office of the Public Defender and New York State Defenders Association, sued NYDOC seeking relief from alleged abusive overcharging by NYDOC’s prisoner telephone contractor MCI Worldcom Communications, Inc. (MCI) for calls from prisoners. NYDOC’s contract, which had been awarded to the bidder offering NYDOC the biggest kickback, provided for MCI to pay NYDOC a “commission” of 57.5% to 60%. The plaintiffs sued under a variety of constitutional theories, several of which survived dismissal, but none of

which were ultimately successful.

Plaintiffs’ claim that the contract violated the power to tax was rejected when the court held that the commission paid by MCI to NYDOC did not legally amount to a tax.

The next claim, that offering or a single telephone provider violated the plaintiffs’ substantive due process right was denied when the court determined that there were insufficient facts to sustain an infringement on the plaintiffs’ rights either freedom of speech or association.

Plaintiffs’ equal protection claim that they were being charged a higher rate than MCI charged other customers was denied when the court ruled that plaintiffs, as recipients of prisoner calls, were not similarly situated to members of the public at large.

Finally, plaintiffs’ claim of violation of their Constitutional free speech and association rights failed because while the Constitution has been found to provide guarantees of prisoners and non-prisoner to communicate, it offers no guarantee regarding the expense for that provision.

Accordingly, the court dismissed all constitutional claims regarding prisoner overcharges, while noting the April 1, 2008 launch of the new statutory limitation on costs that may be passed on to recipients of prisoner telephone calls. The plaintiff represented by the Center for Constitutional Rights, has filed an appeal.

Walton v. New York State Department of Correctional Services, NY Supreme Court, County of Albany, Index No. 04-ST4340. ■

COMMITTEE ON PUBLIC SAFETY

Rep. Faye P. Hanohano, Chair
Rep. Henry J.C. Aquino, Vice Chair
Thursday, February 5, 2009
Room 309 at 9:15am

SUPPORT: HB 232 Relating to Public Safety
Freedom Of Information Act Applicable To Out-of-State Entities Housing Prisoners

Aloha Chair Hanohano, Vice Chair Aquino and Members of the Committee:

My name is Carrie Ann Shirota, and I am writing in strong support of SB 232. I am an attorney on the island of Maui and have previously worked as a Public Defender, Civil Rights Enforcement Attorney, and staff member of a reentry program on Maui. I am also an active member of Community Alliance on Prisons. These experiences have shaped my advocacy efforts to promote accountability and transparency within our correctional system.

Presently, our FOIA laws do not apply to private prisons operated by Corrections Corporation of America or State correctional agencies that confine Hawai'i prisoners under the Interstate Compact Act. This legislation would require private prisons and out of state correctional agencies that incarcerate Hawaii prisoners to release information about the operation of the prison in accordance with the Freedom of Information Act under chapter 92F, Hawaii Revised Statutes.

As of December 31, 2007, PSD was responsible for a total of 5,995 inmates. Of the total number, 2,080 prison inmates were housed on the mainland in contracted facilities. With the increasing number of Hawai'i prisoners in private out-of-state facilities, and small but steady number of prisoners transferred under the Interstate Compact Act, it is important that these privately owned and operated facilities be held to the same standards and have the same responsibilities as the state government to promptly process requests for information and release information concerning prisoners and detainees under the FOIA laws.

Each of us has kuleana to ensure that the Department of Public Safety and any entity that PSD contracts with to house Hawai'i prisoners, operates safe and humane prisons that adheres to federal and state constitutional requirements. In addition, our community has a vested interest in ensuring that prisons both at home and on the American continent provides rehabilitation opportunities proven effective in helping individuals acquire the training and support to become law-abiding, contributing members of their `ohana and our community. This legislation would help to achieve the twin objections of accountability and transparency by requiring private prisons and out of state prisons where our people are housed to adhere to the freedom of information standards under chapter 92F, Hawaii Revised Statutes.

Mahalo for this opportunity to submit testimony in support of SB 232.

Sincerely,

Carrie Ann Shirota, Esq.
Wailuku, Hawai'i
(808) 269-3858

From: Marilyn Brown [marilyn@hawaii.edu]
Sent: Tuesday, February 03, 2009 6:11 PM
To: PBStestimony
Subject: HB232 Strong Support

Committee on Public Safety
Rep. Faye Hanohano, Chair
Rep. Henry Aquino, Vice Chair

Hearing: Thursday, 2/5/09 (9:15 a.m.) Room 309

Re: HB232 - [http://www.capitol.hawaii.gov/session2009/bills/HB232 .pdf](http://www.capitol.hawaii.gov/session2009/bills/HB232.pdf)

Strong Support Urged

Dear Reps. Hanohano and Aquino:

With the Obama Administration, a new era in government has begun, one characterized by openness and accountability. Currently, there is very little information on private prisons and how they are dealing with approximately 2,000 of our citizens behind bars. HB 232 promotes accountability and transparency.

As a criminologist and citizen concerned with justice issues and accountability, I fervently urge the Committee to support this bill.

Respectfully,

Marilyn Brown

COMMITTEE ON PUBLIC SAFETY

Representative Faye Hanohano, Chair
Representative Henry Aquino, Vice Chair
Thursday, February 5, 2009

9:15 AM

Room 309

PBSTestimony@capitol.hawaii.gov

**HB232 – Hawaii Freedom of Information Act Applies to Private/Out-of-State Prisons
STRONG SUPPORT**

Chair Hanohano, Vice Chair Aquino, and Members of the Committee:

Thank you for the opportunity to express my strong support for HB232. I believe that, given the reputation of the private prisons, especially CCA, and the numerous human rights abuses that have occurred, it is imperative for the state as well as the public to have access to information about what is going on in the out-of-state prisons.

The State especially needs to know about prison conditions and the treatment of Hawaii inmates in order to mitigate the State's liabilities, thereby saving Hawaii taxpayer dollars from being paid in claims against the State.

Please support HB232 to increase accountability and transparency in out-of-state prisons and improve conditions for Hawaii inmates.

Thank you.

Diana Bethel
1441 Victoria St.
Honolulu, Hawaii 96822



the Drug Policy Forum

LATE TESTIMONY

February 5, 2009

To: Representative Faye Hanohano Chair
Representative Henry J.C. Aquino, Vice Chair
And Members of the Committee on Public Safety

From: Jeanne Ohta, Executive Director

RE: HB232 Relating to Public Safety
Hearing: February 5, 2009, 9:15 a.m., Room 309

Position: Support

I am Jeanne Ohta, Executive Director of the Drug Policy Forum of Hawai'i. Thank you for this opportunity to testify in support of HB 232 which requires privately owned prisons and out-of-state detention facilities holding prisoners under a contract with the state to follow state freedom of information act laws pursuant to Chapter 92 (f), Hawai'i Revised Statutes.

There should be no question that a multi-facility, \$50 million contract should be transparent and have accountability. There currently appears to be little to no accountability on the part of contract prisons and access to information is extremely limited. Since more than 2,000 individuals from Hawai'i are the responsibility of mainland prisons, an open information process is good practice, whether the facility is government owned or not. These prisons are serving a governmental function and are paid with taxpayer funds; and as such, should follow the state freedom of information laws.

When incidents happen in private prisons, the public should have access to information about them. The public has an interest in seeing that the contracted prisons fulfill their obligations under their contracts and that those entrusted to them are treated humanely and according to the specifications of the contract.

In the interest of accountability and transparency and public access to information pertaining to privately owned prison facilities, I urge you to pass HB 232. Thank you for this opportunity to testify.

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