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STATE OF HAWAII
KA MOKU'ĀINA O HAWAI'I
DEPARTMENT OF HUMAN SERVICES
KA 'OIHANA MĀLAMA LAWELAWE KANAKA
Office of the Director
P. O. Box 339
Honolulu, Hawaii 96809-0339

April 5, 2023

TO: The Honorable Senator Donovan M. Dela Cruz, Chair
Senate Committee on Ways and Means

The Honorable Senator Karl Rhoads, Chair
Senate Committee on Judiciary

FROM: Cathy Betts, Director

SUBJECT: [HB 719 HD1 SD1](#) – RELATING TO PUBLIC RECORDS.

Hearing: April 6, 2023, 10:45 a.m.
Conference Room 211 & Via Videoconference, State Capitol

DEPARTMENT'S POSITION: The Department of Human Services (DHS) appreciates the measure's intent, provides comments, and defers to the other impacted Departments.

However, the Department respectfully opposes the deletion of "labor cost for search and actual time for reproducing" (page 2, lines 17-18) and requests an amendment to preserve the current language.

PURPOSE: The bill imposes a cap on charges for the reproduction of certain government records. Waives reproduction costs charged for the first one hundred pages if the disclosure serves the public interest. Waives the cost of duplication of government records provided to requestors in an electronic format. Imposes a cap on charges for searching for, reviewing, and segregating records. Provides for a waiver of fees when the public interest is served by a record's disclosure. Appropriates funds for positions in the Office of Information Practices. Effective 6/30/3000. (SD1).

The HD1 amended the measure:

- (1) Changing the appropriation to an unspecified amount;
- (2) Changing the effective date to June 30, 3000, to encourage further discussion; and
- (3) Making technical, nonsubstantive amendments for the purposes of clarity, consistency, and style.

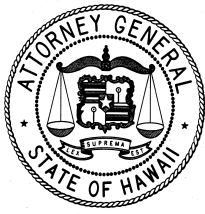
The SD1 amended the measure by:

- (1) Deleting the legislative findings;
- (2) Waiving reproduction costs charged for the first one hundred pages if the disclosure serves the public interest, will likely contribute significantly to the public understanding of the government's operations or activities, and is not primarily in the commercial interest; and
- (3) Making technical, nonsubstantive amendments for the purposes of clarity and consistency.

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, the Department and its programs do not have dedicated staff or resources to respond to records requests, and time spent on responses interrupts the completion of regular duties.

Regarding reproduction costs, DHS respectfully opposes the deletion of "labor cost for search and actual time for reproducing" (page 2, lines 17-18) and requests an amendment to preserve the current language. Complex record requests often require significant coordination of program resources and staff time. Importantly, we do not assume electronic records are easier to sort or duplicate than paper records. 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 provide comments on this measure.



**WRITTEN TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
KA 'OIHANA O KA LOIO KUHINA
THIRTY-SECOND LEGISLATURE, 2023**

LATE

ON THE FOLLOWING MEASURE:

H.B. NO. 719, H.D. 1, S.D. 1, RELATING TO PUBLIC RECORDS.

BEFORE THE:

SENATE COMMITTEES ON WAYS AND MEANS AND ON JUDICIARY

DATE: Thursday, April 6, 2023

TIME: 10:45 a.m.

LOCATION: State Capitol, Room 211

TESTIFIER(S): **WRITTEN TESTIMONY ONLY.**

(For more information, contact Dave Day,
Special Assistant to the Attorney General, at 586-1284)

Chairs Dela Cruz and Rhoads and Members of the Committees:

The Department of the Attorney General supports a proposed version for Senate Draft 2 that is attached to this testimony.

Proposed Senate Draft 2, among other things, imposes a cap on charges for the reproduction of certain documents, provides for a waiver of fees in certain circumstances when the public interest is served by a record's disclosure, and allows agencies to withhold certain deliberative documents before a decision is made.

The Department of the Attorney General believes this bill strikes a balance between disclosure of public documents while protecting important government interests.

Thank you for the opportunity to submit this testimony.

PROPOSED H.B. NO. 719
H.D. 1
S.D. 2

A BILL FOR AN ACT

RELATING TO PUBLIC RECORDS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The legislature finds that public records laws
2 are a critical mechanism to maintain government accountability
3 and transparency and support citizen involvement in government
4 decision-making. The real-world consequences of restricting
5 access to that information can range from serious to routine
6 but, in all cases, result in a less informed citizenry.

7 The legislature finds that this Act adopts the Freedom of
8 Information Act standard to define waivers of fees for search,
9 reviewing, or segregating disclosable records when in the public
10 interest. The federal standard provides a waiver in limited
11 circumstances based on careful examination of various factors,
12 including the subject matter of the request and identity of the
13 requester. Case law under the Freedom of Information Act will
14 provide guidance for interpreting the standard.

15 Accordingly, the purpose of this Act is to:

- 1 (1) Impose a cap on charges for the reproduction of
2 certain government records;
- 3 (2) Waive the cost of duplication of government records
4 provided to requestors in an electronic format;
- 5 (3) Allow agencies to withhold certain deliberative
6 documents before a decision is made;
- 7 (4) Provide for a waiver of fees in certain circumstances
8 when the public interest is served by a record's
9 disclosure; and
- 10 (5) Appropriate funds for two permanent positions within
11 the office of information practices.

12 SECTION 2. Section 92F-3, Hawaii Revised Statutes, is
13 amended by amending the definition of "government record" to
14 read as follows:

15 "Government record" means information maintained by an
16 agency in written, auditory, visual, electronic, or other
17 physical form.

18 "Government record" does not include truly preliminary
19 records, such as personal notes and rough drafts of memorandum,
20 that have not been circulated."

21 SECTION 3. Section 92-21, Hawaii Revised Statutes, is
22 amended to read as follows:

1 **"§92-21 Copies of records; other costs and fees.** Except
2 as otherwise provided by law, a copy of any government record,
3 including any map, plan, diagram, photograph, photostat, or
4 geographic information system digital data file, ~~[which]~~ that is
5 open to the inspection of the public, shall be furnished to any
6 person applying for the same by the public officer having charge
7 or control thereof upon the payment of the reasonable cost of
8 reproducing ~~[such]~~ the copy. Except as provided in section 91-
9 2.5, the cost of reproducing any government record, except maps,
10 photographs, geographic information system digital data, audio
11 recordings, digital or electronic records, and other types of
12 physical records, shall not ~~[be less than 5]~~ exceed 25 cents per
13 page, sheet, or fraction thereof~~[. The]~~; provided that the cost
14 of reproducing maps, photographs, geographic information system
15 digital data, audio recordings, digital or electronic records,
16 and other types of physical records shall be in accordance with
17 rules adopted by the agency having charge or control of that
18 data. Reproduction costs shall not be charged for producing
19 documents provided to requesters in an electronic format;
20 provided that the agency maintains those documents in an
21 electronic format; provided further that requesters shall be
22 charged for the agency's provision of documents requested in an
23 electronic format that are not maintained by the agency in an

1 electronic format and must be manually faxed or converted into
2 an electronic format. [~~Such~~] The reproduction cost shall
3 [~~include but shall not be limited to labor cost for search and~~
4 ~~actual time for reproducing, material cost, including~~
5 ~~electricity cost, equipment cost, including rental cost, cost~~
6 ~~for certification, and other related costs.~~] represent the
7 reasonable direct cost of making the copies and be limited to
8 the salary of the operator of the reproduction machinery as well
9 as the cost of the machinery. All fees [~~shall be paid~~
10 ~~in~~] received or collected by the public officer [~~receiving or~~
11 ~~collecting the same to~~] shall be deposited with the state
12 director of finance, the county director of finance, or [~~to~~] the
13 agency or department by which the officer is employed, as
14 government realizations; provided that fees collected by the
15 public utilities commission pursuant to this section shall be
16 deposited in the public utilities commission special fund
17 established under section 269-33."

18 SECTION 4. Section 92F-13, Hawaii Revised Statutes, is
19 amended to read as follows:

20 **"92F-13 Government records; exceptions to general rule.**

21 This part shall not require disclosure of:

- 1 (1) Government records which, if disclosed, would
2 constitute a clearly unwarranted invasion of personal
3 privacy;
- 4 (2) Government records pertaining to the prosecution or
5 defense of any judicial or quasi-judicial action to
6 which the State or any county is or may be a party, to
7 the extent that such records would not be
8 discoverable;
- 9 (3) Government records that, by their nature, must be
10 confidential in order for the government to avoid the
11 frustration of a legitimate government function;
- 12 (4) Government records which, pursuant to state or federal
13 law including an order of any state or federal court,
14 are protected from disclosure; [~~and~~]
- 15 (5) Inchoate and draft working papers of legislative
16 committees including budget worksheets and unfiled
17 committee reports; work product; records or
18 transcripts of an investigating committee of the
19 legislature which are closed by rules adopted pursuant
20 to section 21-4 and the personal files of members of
21 the legislature[~~-~~]; and
- 22 (6) Inter-agency or intra-agency deliberative and pre-
23 decisional government records, other than purely

1 factual information that is readily segregable,
2 concerning an agency decision about a government
3 action up until the final decision to which the
4 government records relate has been made or until
5 deliberation of the matter has been abandoned;
6 provided that there shall be a rebuttable presumption
7 that a matter has been abandoned if three years have
8 elapsed after a request for records; provided further
9 that once disclosure is required, the name, title, and
10 other information that would directly identify a
11 public official or employee may be withheld if that
12 person lacks discretionary authority, did not make the
13 decision, and is not under investigation for or
14 engaged in wrongdoing or criminal conduct related to
15 the decision. This paragraph does not apply to board
16 packets as defined by section 92-7.5."

17 SECTION 5. Section 92F-42, Hawaii Revised Statutes, is
18 amended to read as follows:

19 **"§92F-42 Powers and duties of the office of information**
20 **practices.** The director of the office of information practices:

- 21 (1) Shall, upon request, review and rule on an agency
22 denial of access to information or records, or an
23 agency's granting of access; provided that any review

1 by the office of information practices shall not be a
2 contested case under chapter 91 and shall be optional
3 and without prejudice to rights of judicial
4 enforcement available under this chapter;

5 (2) Upon request by an agency, shall provide and make
6 public advisory guidelines, opinions, or other
7 information concerning that agency's functions and
8 responsibilities;

9 (3) Upon request by any person, may provide advisory
10 opinions or other information regarding that person's
11 rights and the functions and responsibilities of
12 agencies under this chapter;

13 (4) May conduct inquiries regarding compliance by an
14 agency and investigate possible violations by any
15 agency;

16 (5) May examine the records of any agency for the purpose
17 of paragraphs (4) and [~~18~~] (15) and seek to enforce
18 that power in the courts of this State;

19 (6) May recommend disciplinary action to appropriate
20 officers of an agency;

21 (7) Shall report annually to the governor and [the state]
22 legislature on the activities and findings of the

1 office of information practices, including
2 recommendations for legislative changes;

3 (8) Shall receive complaints from and actively solicit the
4 comments of the public regarding the implementation of
5 this chapter;

6 (9) Shall review the official acts, records, policies, and
7 procedures of each agency;

8 (10) Shall assist agencies in complying with the provisions
9 of this chapter;

10 (11) Shall inform the public of the following rights of an
11 individual and the procedures for exercising them:

12 (A) The right of access to records pertaining to the
13 individual;

14 (B) The right to obtain a copy of records pertaining
15 to the individual;

16 (C) The right to know the purposes for which records
17 pertaining to the individual are kept;

18 (D) The right to be informed of the uses and
19 disclosures of records pertaining to the
20 individual;

21 (E) The right to correct or amend records pertaining
22 to the individual; and

1 (F) The individual's right to place a statement in a
2 record pertaining to that individual;

3 (12) Shall adopt rules that set forth ~~[an]~~ an:

4 (A) An administrative appeals structure
5 ~~[which]~~ that provides for:

6 ~~[(A)]~~ (i) Agency procedures for processing records
7 requests;

8 ~~[(B)]~~ (ii) A direct appeal from the division
9 maintaining the record; and

10 ~~[(C)]~~ (iii) Time limits for action by agencies;

11 ~~[(13) Shall adopt rules that set forth the]~~

12 (B) The fees and other charges that may be imposed
13 for searching, reviewing, or segregating
14 disclosable records~~[, as well as to provide for a~~
15 ~~waiver of fees when the public interest would be~~
16 ~~served;]~~. The rules shall:

17 (i) Set forth fees not exceeding \$5 per fifteen
18 minutes or fraction thereof for the search
19 for the record;

20 (ii) Set forth fees not exceeding \$7.50 per
21 fifteen minutes or fraction thereof for the
22 review and segregation of the record; and

1 (iii) Provide for a waiver of fees when the public
2 interest would be served by the record's
3 disclosure; provided that the waiver shall
4 require that the search for or review or
5 segregation of records be provided at no
6 charge to the requester if disclosure of the
7 record is in the public interest because the
8 disclosure is likely to contribute
9 significantly to public understanding of the
10 operations or activities of the government
11 and is not primarily in the commercial
12 interest of the requester. Factors to be
13 considered when determining if the
14 disclosure would serve the public interest
15 include, but are not limited to: (a) the
16 subject of the request; (b) the informative
17 value of the information to be disclosed;
18 (c) the contribution to an understanding of
19 the subject by the general public likely to
20 result from disclosure; (d) the significance
21 of the contribution to public understanding;
22 (e) the existence and magnitude of a

commercial interest; and (f) the primary
interest in disclosure; and

~~[(14) Shall adopt rules which set forth uniform]~~

(C) Uniform standards for [the]:

(i) The records collection practices of
agencies; and

~~[(15) Shall adopt rules that set forth uniform standards for~~
~~disclosure]~~

(ii) Disclosure of records for research purposes;

~~[(16)]~~ (13) Shall have standing to appear in cases where the
provisions of this chapter or part I of chapter
92 are called into question;

~~[(17)]~~ (14) Shall adopt, amend, or repeal rules pursuant to
chapter 91 necessary for the purposes of this
chapter; and

~~[(18)]~~ (15) Shall take action to oversee compliance with
part I of chapter 92 by all state and county
boards including:

(A) Receiving and resolving complaints;

(B) Advising all government boards and the public
about compliance with chapter 92; and

(C) Reporting each year to the legislature on all
complaints received pursuant to section 92-1.5."

1 SECTION 6. There is appropriated out of the general
2 revenues of the State of Hawaii the sum of \$ or so
3 much thereof as may be necessary for fiscal year 2023-2024 and
4 the same sum or so much thereof as may be necessary for fiscal
5 year 2024-2025 for two full-time equivalent (2.0 FTE) permanent
6 positions to be placed within the office of information
7 practices.

8 The sums appropriated shall be expended by the office of
9 information practices for the purposes of this Act.

10 SECTION 7. Section 4 does not affect rights and duties
11 that matured, penalties that were incurred, and proceedings that
12 were begun before its effective date.

13 SECTION 8. The sections and provisions of this Act are not
14 severable from any other section or provision. To the extent
15 that any part of this Act shall be deemed invalid for any
16 reason, the entirety of the Act, and every section and provision
17 therein, shall be deemed invalid.

18 SECTION 9. Statutory material to be repealed is bracketed
19 and stricken. New statutory material is underscored.

20 SECTION 10. This Act shall take effect on approval;
21 provided that Section 4 shall be repealed on June 30, 2028, and
22 section 92F-13, Hawaii Revised Statutes, shall be reenacted in

1 the form in which it read on the day before the effective date
2 of this Act.

JOSH GREEN, M.D.
GOVERNOR | KE KIA'ĀINA

SYLVIA LUKE
LIEUTENANT GOVERNOR | KA HOPE KIA'ĀINA



STATE OF HAWAII | KA MOKU'ĀINA 'O HAWAII'
DEPARTMENT OF LAND AND NATURAL RESOURCES
KA 'OIHANA KUMUWAIWAI 'ĀINA

P.O. BOX 621
HONOLULU, HAWAII 96809

Testimony of
DAWN N. S. CHANG
Chairperson

Before the Senate Committees on
WAYS AND MEANS
and
JUDICIARY

Thursday, April 6, 2023
10:45 AM

State Capitol, Conference Room 211 and Via Videoconference

In consideration of
HOUSE BILL 719, HOUSE DRAFT 1, SENATE DRAFT 1
RELATING TO PUBLIC RECORDS

House Bill 719, House Draft 1, Senate Draft 1 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 to ensure government transparency. The bill also proposes to waive all fees for search, review and segregation of records when the public interest is served. **The Department of Land and Natural Resources (Department) offers comments and requests one amendment.**

This bill proposes to amend Paragraph (13) of Section 92F-42, Hawaii Revised Statutes (HRS), by explicitly directing OIP to promulgate rules that: (A) limit the charge for searching for records to \$5 per fifteen minutes or fraction thereof; (B) limits the charge for review and segregation to \$7.50 per fifteen minutes; and (C) provides a waiver of fees when the public interest is served. The Department is concerned that the waiver of fees in the public interest will encourage "fishing expeditions" for people who are looking for something they can catch that matches their goals. The Commission To Improve Standards Of Conduct has cited to concerns that departments use fees as a way to chill requests for information. In the Department's experience, this is not true. Most of the requests that the Department receives are fulfilled at very little to no charge. The Department has no problem with requests that are focused and clear. However, fishing expeditions pose special challenges and costs, which can result in staff spending days pulling records and interrupt pressing projects and timely customer service. These types of requests should be limited to ensure staff can do their work. It is untrue that these types of requests can be clarified, or that providing a schedule over time to address the requests lessens the work or time required of the agency staff. Staff would still be doing the fishing searches for one person or organization, in lieu of their regular work that benefits many and the general public.

DAWN N.S. CHANG
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE
MANAGEMENT

LAURA H.E. KAAKUA
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

The Department would like to provide an example:

Last year, the Department's State Historic Preservation Division (SHPD) received a request for everything to do with Section 6E-42, HRS, reviews, the burial council, and any external communications for the entire county of Kaua'i. SHPD estimated that it would cost in excess of \$50,000 in staff time, research, segregation, scanning, and production. More importantly, SHPD does not have the staff to do that amount of work, so they asked for a more specific request. The requestor declined. So, SHPD noted how much the request would cost, and again asked for a more specific request. The requestor has not responded. Responding to these types of time-consuming requests further delay SHPD's ability to timely review and process historic preservation documents as well as deal with the backlog of work.

In providing this example, SHPD notes that most of the requests they receive are clear and concise and can be fulfilled in a reasonable amount of time, and normally for free. However, staff does not have time, even on a monthly basis, to respond to the type of fishing requests described above.

These broad requests are not uncommon and are usually construed to be in the public interest. The Department strives to respond to information requests in a timely manner as they come in, but it only takes one or two broad requests to quickly overwhelm the system at huge costs to the taxpayer and at a loss to those with legitimate requests. The Department suggests SECTION 3 (12) (B) (iii) be amended as follows:

Provide for a waiver of fees when the public interest would be served by the record's disclosure; provided that the waiver shall require that the search for or review or segregation of records be provided at no charge to the requester if disclosure of the record is in the public interest [~~because the disclosure is likely to contribute 15 significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest~~]; and

Waivers shall be capped annually at \$1,000.

Given that most requests are below \$200 per instance, a \$1,000 cap provides an adequate amount of waiver funding to address multiple requests of anyone seeking for information in the public interest, while balancing the need of government staff to do their own work.

Even with the Department's proposed amendments we expect special hardship on the Department's Bureau of Conveyance (Bureau). Therefore, the Department respectfully asks that should this bill move forward, that it be amended to exempt the Bureau. The Bureau respectfully notes that the intent of the bill addresses accessing government records that are not readily accessible by the public as a rule. The mission of the Bureau is for the timely recording and accessibility to documents it records by all who may come into its office or access them online. The Bureau's documents are submitted by individuals and business, primarily for their land dealings or Uniform Commercial Code filings. Government documents that get recorded are of a similar nature. All of those records are readily accessible by anyone through already established, convenient procedures and fees. Converting paper to electronic documents is expensive and requires constant maintenance and upkeep. The Bureau converted almost all of its paper documents to electronic form and charges fees that take into account the cost of conversion and

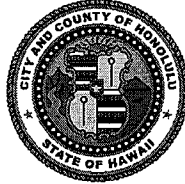
implementation as well as for the staff to keep the system running and maintained. It would not be often that the Bureau's public records will offer the additional government accountability and transparency or enable a more informed citizenry for participation in government decision making.

Mahalo for the opportunity to provide comments and suggest amendments to this measure.

DEPARTMENT OF DESIGN AND CONSTRUCTION
CITY AND COUNTY OF HONOLULU

650 SOUTH KING STREET, 11TH FLOOR
HONOLULU, HAWAII 96813
Phone: (808) 768-8480 • Fax: (808) 768-4567
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RICK BLANGIARDI
MAYOR



HAKU MILLES, P.E.
DIRECTOR
BRYAN GALLAGHER, P.E.
DEPUTY DIRECTOR

April 5, 2023

The Honorable Donovan M. Dela Cruz, Chair
The Honorable Gilbert S.C. Keith-Agaran, Vice-Chair
and Members of the Committee on Ways and Means

The Honorable Karl Rhoads, Chair
The Honorable Mike Gabbard, Vice-Chair
and Members of the Committee on Judiciary
The Senate
State Capitol, Conference Room 211 & Videoconference
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chairs Dela Cruz and Rhoads, Vice-Chairs Keith-Agaran and Gabbard, and
Members:

SUBJECT: House Bill No. 719 HD1 SD1
Relating to Public Records

The Department of Design and Construction (DDC) respectfully **opposes** House
Bill No. 719 HD1 SD1. The purpose of the bill is to:

- (1) Impose a cap on charges for the reproduction of certain government records;
- (2) Waives reproduction costs charged for the first one hundred pages if the disclosure serves the public interest.
- (3) Waive the cost of duplication of government records provided to requestors in an electronic format;
- (4) Impose a cap on charges for searching for, reviewing, and segregating records;
- (5) Provide for a waiver of fees when the public interest is served by a record's disclosure; and
- (6) Appropriate funds for two permanent positions within the office of information practices.

The Honorable Donovan M. Dela Cruz, Chair and The Honorable Karl Rhoads, Chair
and Members of the Committee on Ways and Means and Members of the Committee
on Judiciary
April 5, 2023
Page 2

DDC is not opposed to responding to record requests, but to the capping and waiving of charges for these requests. 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.

This bill would be expected to increase the frequency and scope of requests and the resources required to respond to those requests. In addition, DDC is concerned that the bill would:

- 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 Uniform Information Practices Act (UIPA) to address unintended consequences and matters previously handled by administrative rules, including the possibility of providing for longer agency response deadlines.

Based on the above considerations, DDC respectfully **opposes** House Bill No. 719 HD1 SD1.

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

Sincerely,



H Haku Milles, P.E., LEED AP
Director

HB-719-SD-1

Submitted on: 4/4/2023 5:31:25 PM

Testimony for WAM on 4/6/2023 10:45:00 AM

Submitted By	Organization	Testifier Position	Testify
Cathy Goeggel	Testifying for Animal Rights Hawai'i	Support	Written Testimony Only

Comments:

We are in strong support of HB719. A vital part of open government and transparency is making information available to the tax paying and voting public with out charging exorbitant fees.

Mahalo



SENATE COMMITTEE ON WAYS AND MEANS

SENATE COMMITTEE ON JUDICIARY

Thursday, April 6, 2023, 10:45 am, State Capitol Room 211 & Videoconference

HB 719, HD1, SD1

Relating to Public Records

TESTIMONY

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

Chair Dela Cruz, Chair Rhoads, and Committee Members:

The League of Women Voters of Hawaii strongly supports HB 719, SD1. UIPA fees should be waived for all reasonable UIPA requests by the news media and public interest groups.

Thank you for the opportunity to submit testimony.

THE CIVIL BEAT
LAW CENTER FOR THE PUBLIC INTEREST

700 Bishop Street, Suite 1701
Honolulu, HI 96813

Office: (808) 531-4000
Fax: (808) 380-3580
info@civilbeatlawcenter.org

Senate Committee on Ways and Means
Honorable Donovan M. Dela Cruz, Chair
Honorable Gilbert S.C. Keith-Agaran, Vice Chair

Senate Committee on Judiciary
Honorable Karl Rhoads, Chair
Honorable Mike Gabbard, Vice Chair

RE: Testimony Supporting H.B. 719 S.D. 1, Relating to Public Records
Hearing: April 6, 2023 at 10:45 a.m.

Dear Chairs and Members of the Committees:

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 **strongly supporting** H.B. 719 S.D. 1.

If the Legislature wishes to include some form of the deliberative process privilege in this bill to move it forward, the Law Center supports the attached compromise proposal. The more substantive changes in the attached proposal as compared to H.B. 719 S.D. 1 are:

- Adds a preamble to expressly reference the federal FOIA as a guide for the public interest waiver
- Removes the language about 100 free pages for copying
- Adds a limited variant of the deliberative process privilege that, critically, will sunset in June 2028 unless renewed
- Adds non-exhaustive factors that agencies may consider as part of the public interest analysis for waiver of fees.

Thank you again for the opportunity to testify in support of H.B. 719 S.D. 1.

A BILL FOR AN ACT

RELATING TO PUBLIC RECORDS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The legislature finds that public records laws
2 are a critical mechanism to maintain government accountability
3 and transparency and support citizen involvement in government
4 decision-making. The real-world consequences of restricting
5 access to that information can range from serious to routine
6 but, in all cases, result in a less informed citizenry.

7 The legislature finds that this Act adopts the Freedom of
8 Information Act standard to define waivers of fees for search,
9 reviewing, or segregating disclosable records when in the public
10 interest. The federal standard provides a waiver in limited
11 circumstances based on careful examination of various factors,
12 including the subject matter of the request and identity of the
13 requester. Case law under the Freedom of Information Act will
14 provide guidance for interpreting the standard.

15 Accordingly, the purpose of this Act is to:

16 (1) Impose a cap on charges for the reproduction of
17 certain government records;

- 1 (2) Waive the cost of duplication of government records
2 provided to requestors in an electronic format;
- 3 (3) Allow agencies to withhold certain deliberative
4 documents before a decision is made;
- 5 (4) Provide for a waiver of fees in certain circumstances
6 when the public interest is served by a record's
7 disclosure; and
- 8 (5) Appropriate funds for two permanent positions within
9 the office of information practices.

10 SECTION 2. Section 92F-3, Hawaii Revised Statutes, is
11 amended by amending the definition of "government record" to
12 read as follows:

13 "Government record" means information maintained by an
14 agency in written, auditory, visual, electronic, or other
15 physical form.

16 "Government record" does not include truly preliminary
17 records, such as personal notes and rough drafts of memorandum,
18 that have not been circulated."

19
20 SECTION 3. Section 92-21, Hawaii Revised Statutes, is
21 amended to read as follows:

22 **"§92-21 Copies of records; other costs and fees.** Except
23 as otherwise provided by law, a copy of any government record,

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1 including any map, plan, diagram, photograph, photostat, or
2 geographic information system digital data file, ~~[which]~~ that is
3 open to the inspection of the public, shall be furnished to any
4 person applying for the same by the public officer having charge
5 or control thereof upon the payment of the reasonable cost of
6 reproducing ~~[such]~~ the copy. Except as provided in section 91-
7 2.5, the cost of reproducing any government record, except maps,
8 photographs, geographic information system digital data, audio
9 recordings, digital or electronic records, and other types of
10 physical records, shall not ~~[be less than 5]~~ exceed 25 cents per
11 page, sheet, or fraction thereof~~[.];~~ provided that ~~[¶]~~the cost
12 of reproducing maps, photographs, geographic information system
13 digital data, audio recordings, digital or electronic records,
14 and other types of physical records shall be in accordance with
15 rules adopted by the agency having charge or control of that
16 data. Reproduction costs shall not be charged for producing
17 documents provided to requesters in an electronic format;
18 provided that the agency maintains those documents in an
19 electronic format; provided further that requesters shall be
20 charged for the agency's provision of documents requested in an
21 electronic format that are not maintained by the agency in an
22 electronic format and must be manually faxed or converted into

1 an electronic format. [~~Such~~] The reproduction cost shall
2 [~~include but shall not be limited to labor cost for search and~~
3 ~~actual time for reproducing, material cost, including~~
4 ~~electricity cost, equipment cost, including rental cost, cost~~
5 ~~for certification, and other related costs.~~] represent the
6 reasonable direct cost of making the copies and be limited to
7 the salary of the operator of the reproduction machinery as well
8 as the cost of the machinery. All fees [~~shall be paid~~
9 ~~in~~] received or collected by the public officer [~~receiving or~~
10 ~~collecting the same to~~] shall be deposited with the state
11 director of finance, the county director of finance, or [~~to~~] the
12 agency or department by which the officer is employed, as
13 government realizations; provided that fees collected by the
14 public utilities commission pursuant to this section shall be
15 deposited in the public utilities commission special fund
16 established under section 269-33."

17 SECTION 4. Section 92F-13, Hawaii Revised Statutes, is
18 amended to read as follows:

19 **"92F-13 Government records; exceptions to general rule.**

20 This part shall not require disclosure of:

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- 1 (1) Government records which, if disclosed, would
2 constitute a clearly unwarranted invasion of personal
3 privacy;
- 4 (2) Government records pertaining to the prosecution or
5 defense of any judicial or quasi-judicial action to
6 which the State or any county is or may be a party, to
7 the extent that such records would not be
8 discoverable;
- 9 (3) Government records that, by their nature, must be
10 confidential in order for the government to avoid the
11 frustration of a legitimate government function;
- 12 (4) Government records which, pursuant to state or federal
13 law including an order of any state or federal court,
14 are protected from disclosure; [~~and~~]
- 15 (5) Inchoate and draft working papers of legislative
16 committees including budget worksheets and unfiled
17 committee reports; work product; records or
18 transcripts of an investigating committee of the
19 legislature which are closed by rules adopted pursuant
20 to section 21-4 and the personal files of members of
21 the legislature[~~-~~]; and

1 (6) Inter-agency or intra-agency deliberative and pre-
2 decisional government records, other than purely
3 factual information that is readily segregable,
4 concerning an agency decision about a government
5 action up until the final decision to which the
6 government records relate has been made or until
7 deliberation of the matter has been abandoned;
8 provided that there shall be a rebuttable presumption
9 that a matter has been abandoned if three years have
10 elapsed after a request for records; provided further
11 that once disclosure is required, the name, title, and
12 other information that would directly identify a
13 public official or employee may be withheld if that
14 person lacks discretionary authority, did not make the
15 decision, and is not under investigation for or
16 engaged in wrongdoing or criminal conduct related to
17 the decision. This paragraph does not apply to board
18 packets as defined by section 92-7.5"

19
20 SECTION 5. Section 92F-42, Hawaii Revised Statutes, is
21 amended to read as follows:

1 "§92F-42 Powers and duties of the office of information
2 **practices.** The director of the office of information practices:
3 (1) Shall, upon request, review and rule on an agency
4 denial of access to information or records, or an
5 agency's granting of access; provided that any review
6 by the office of information practices shall not be a
7 contested case under chapter 91 and shall be optional
8 and without prejudice to rights of judicial
9 enforcement available under this chapter;
10 (2) Upon request by an agency, shall provide and make
11 public advisory guidelines, opinions, or other
12 information concerning that agency's functions and
13 responsibilities;
14 (3) Upon request by any person, may provide advisory
15 opinions or other information regarding that person's
16 rights and the functions and responsibilities of
17 agencies under this chapter;
18 (4) May conduct inquiries regarding compliance by an
19 agency and investigate possible violations by any
20 agency;

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- 1 (5) May examine the records of any agency for the purpose
2 of paragraphs (4) and [~~18~~] (15) and seek to enforce
3 that power in the courts of this State;
- 4 (6) May recommend disciplinary action to appropriate
5 officers of an agency;
- 6 (7) Shall report annually to the governor and [the state]
7 legislature on the activities and findings of the
8 office of information practices, including
9 recommendations for legislative changes;
- 10 (8) Shall receive complaints from and actively solicit the
11 comments of the public regarding the implementation of
12 this chapter;
- 13 (9) Shall review the official acts, records, policies, and
14 procedures of each agency;
- 15 (10) Shall assist agencies in complying with the provisions
16 of this chapter;
- 17 (11) Shall inform the public of the following rights of an
18 individual and the procedures for exercising them:
 - 19 (A) The right of access to records pertaining to the
20 individual;
 - 21 (B) The right to obtain a copy of records pertaining
22 to the individual;

- 1 (C) The right to know the purposes for which records
2 pertaining to the individual are kept;
- 3 (D) The right to be informed of the uses and
4 disclosures of records pertaining to the
5 individual;
- 6 (E) The right to correct or amend records pertaining
7 to the individual; and
- 8 (F) The individual's right to place a statement in a
9 record pertaining to that individual;
- 10 (12) Shall adopt rules that set forth ~~[an]~~ an:
- 11 (A) An administrative appeals structure
12 ~~[which]~~ that provides for:
- 13 ~~[(A)]~~ (i) Agency procedures for processing records
14 requests;
- 15 ~~[(B)]~~ (ii) A direct appeal from the division
16 maintaining the record; and
- 17 ~~[(C)]~~ (iii) Time limits for action by agencies;
- 18 ~~[(13) Shall adopt rules that set forth the]~~
- 19 (B) The fees and other charges that may be imposed
20 for searching, reviewing, or segregating
21 disclosable records~~[, as well as to provide for a~~

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1 ~~waiver of fees when the public interest would be~~
2 ~~served;].~~ The rules shall:

3 (i) Set forth fees not exceeding \$5 per fifteen
4 minutes or fraction thereof for the search
5 for the record;

6 (ii) Set forth fees not exceeding \$7.50 per
7 fifteen minutes or fraction thereof for the
8 review and segregation of the record; and

9 (iii) Provide for a waiver of fees when the public
10 interest would be served by the record's
11 disclosure; provided that the waiver shall
12 require that the search for or review or
13 segregation of records be provided at no
14 charge to the requester if disclosure of the
15 record is in the public interest because the
16 disclosure is likely to contribute
17 significantly to public understanding of the
18 operations or activities of the government
19 and is not primarily in the commercial
20 interest of the requester. Factors to be
21 considered when determining if the
22 disclosure would serve the public interest

1 include, but are not limited to: (a) the
2 subject of the request; (b) the informative
3 value of the information to be disclosed;
4 (c) the contribution to an understanding of
5 the subject by the general public likely to
6 result from disclosure; (d) the significance
7 of the contribution to public understanding;
8 (e) the existence and magnitude of a
9 commercial interest; and (f) the primary
10 interest in disclosure; and

11 ~~[(14) Shall adopt rules which set forth uniform]~~

12 (C) Uniform standards for [the]:

13 (i) The records collection practices of
14 agencies; and

15 ~~[(15) Shall adopt rules that set forth uniform standards for~~
16 ~~disclosure]~~

17 (ii) Disclosure of records for research purposes;

18 ~~[(16)]~~ (13) Shall have standing to appear in cases where the
19 provisions of this chapter or part I of chapter
20 92 are called into question;

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1 ~~[(17)]~~ (14) Shall adopt, amend, or repeal rules pursuant to
2 chapter 91 necessary for the purposes of this
3 chapter; and

4 ~~[(18)]~~ (15) Shall take action to oversee compliance with
5 part I of chapter 92 by all state and county
6 boards including:

7 (A) Receiving and resolving complaints;

8 (B) Advising all government boards and the public
9 about compliance with chapter 92; and

10 (C) Reporting each year to the legislature on all
11 complaints received pursuant to section 92-1.5."

12 SECTION 6. There is appropriated out of the general
13 revenues of the State of Hawaii the sum of \$ or so
14 much thereof as may be necessary for fiscal year 2023-2024 and
15 the same sum or so much thereof as may be necessary for fiscal
16 year 2024-2025 for two full-time equivalent (2.0 FTE) permanent
17 positions to be placed within the office of information
18 practices.

19 The sums appropriated shall be expended by the office of
20 information practices for the purposes of this Act.

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1 SECTION 6. Section 4 does not affect rights and duties
2 that matured, penalties that were incurred, and proceedings that
3 were begun before its effective date.

4 SECTION 7. The sections and provisions of this Act are not
5 severable from any other section or provision. To the extent
6 that any part of this Act shall be deemed invalid for any
7 reason, the entirety of the Act, and every section and provision
8 therein, shall be deemed invalid.

9 SECTION 8. Statutory material to be repealed is bracketed
10 and stricken. New statutory material is underscored.

11 SECTION 9. This Act shall take effect on approval;
12 provided that Section 4 shall be repealed on June 30, 2028, and
13 section 92F-13, Hawaii Revised Statutes, shall be reenacted in
14 the form in which it read on the day before the effective date
15 of this Act.

____.B. NO.____

Report Title:

Description:

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.

P.O. Box 37158, Honolulu, HI 96837-0158

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COMMITTEE ON WAYS AND MEANS

Senator Donovan Dela Cruz, Chair

Senator Gilbert Keith-Agaran, Vice Chair

COMMITTEE ON JUDICIARY

Senator Karl Rhoads, Chair

Senator Mike Gabbard, Vice Chair

Thursday, April 6, 2023

10:45 AM

Room 211 and Videoconference

STRONG SUPPORT FOR HB 710 HD1 SD1 - PUBLIC RECORDS

Aloha Chairs DelaCruz and Rhoads, Vice Chairs Keith Agaran and Gabbard and Members of the Committees!

My name is Kat Brady and I am the Coordinator of Community Alliance on Prisons, a community initiative promoting smart justice policies in Hawai`i for more than two decades. This testimony is respectfully offered on behalf of the 4,012 Hawai`i individuals living behind bars¹ and under the "care and custody" of the Department of Public Safety/Corrections and Rehabilitation on any given day. We are always mindful that 914 - 25.4% of the male imprisoned population² - of Hawai`i's imprisoned people are serving their sentences abroad -- thousands of miles away from their loved ones, their homes and, for the disproportionate number of incarcerated Kanaka Maoli, far, far from their ancestral lands.

Community Alliance on Prisons appreciates this opportunity to testify in strong support of HB 719 HD1 SD1 that imposes a cap on charges for the reproduction of certain government records; waives reproduction costs charged for the first one hundred pages if the disclosure serves the public interest; waives the cost of duplication of government records provided to requestors in an electronic format. Imposes a cap on charges for searching for, reviewing, and segregating records; provides for a waiver of fees when the public interest is served by a record's disclosure and appropriates funds for positions in the Office of Information Practices.

State and county agencies maintain government records for and by the people of Hawai`i through our tax dollars. Excessive fees for record requests are an obstacle to any general policy of open government. The high cost of records

¹ Department of Public Safety, End of Month Population Report, March 27, 2023.

https://dps.hawaii.gov/wp-content/uploads/2023/03/Pop-Reports-Weekly-2023-03-27_George-King.pdf

² Why are 25.4% of Hawai`i's male prison population sent thousands of miles from home when the following prisons in Hawai`i have room here: Halawa is at 76.9%; Halawa Special Needs Facility is at 62.1%; Kulani is at 47%; Waiawa is at 50.6% of operational capacity?

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.

The Legislature unanimously adopted a similar bill in 2022. After Governor Ige's veto, the Commission to Improve Standards of Conduct further refined the proposal with extensive input from government agencies and the public. The Commission's proposal as introduced in H.B. 719 addresses any legitimate agency concerns and upholds the fundamental principle that the public deserves to know what its government is doing.

This proposal is one of three critically necessary public records changes identified by 30 entities in a coalition letter by media outlets and community organizations to Governor Green. The Governor has embraced the proposal. E.g., Patti Epler, *Let the Sunshine In: The Winds of Change May Be Starting to Blow in an Otherwise 'Dark Time'*, Honolulu Civil Beat (Jan. 31, 2023).

This bill has an appropriately limited scope. It only applies when someone requests access to the people's records for the purpose of educating the general public about operations and activities of our government. In those limited circumstances, 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 agency charges too much, the general public is left in the dark.

"Open access to public records is a cornerstone of American democracy. Such access is central to electing and monitoring public officials, evaluating government operations, and protecting against secret government activities. Open access recognizes that citizens have a right to obtain data that their tax dollars have been spent to create or collect. The value of this essential infrastructure, however, extends far beyond government. Its benefits are so numerous and diverse that they impact virtually every facet of American life, to the extent that we frequently take the benefits for granted."³

Examples of the Essential Role of Open Public Records

There have been numerous efforts over the last two years to document the essential role that public records play in the U.S. Many of these efforts have been lead by the members of the Individual Reference Services Group ("IRSG").⁴

³ Fred H. Cate and Richard J. Varn, *The Public Record: Information Privacy and Access -A New Framework for Finding the Balance* (1999).

⁴ Information on the IRSG can be found at <http://www.irsg.org>

"The Public Record: Information Privacy and Access" lists the following "essential roles" played by open public records:

1. Access to public record information provides an important foundation for U.S. capital markets, the most vibrant in the world. The ability to grant credit speedily and appropriately depends on ready access to information about consumers collected in part from the public record. As a result, even major financial decisions are often made in a matter of minutes or hours, instead of weeks or months, as in the case in most other countries. Finally, public records have helped democratize finance in America, meaning that many economic opportunities are based on what you have done and can do instead of who you are and who you know.

2. This country's open public record system significantly reduces the cost of credit because the information that credit decisions depend upon, drawn in part from the public record, is assembled routinely and efficiently, rather than being recreated for each credit decision. As a result, American consumers save \$100 billion a year because of the efficient and liquidity that information makes possible.

3. Journalists rely on the public record every day to gather information and inform the public about crimes, judicial decisions, legislative proposals, government fraud, waste, and abuse, and countless other issues.⁵

4. Law enforcement relies on public record information to prevent, detect, and solve crimes. In 1998, the FBI alone made more than 53,000 inquiries to "commercial on-line databases to obtain a wide variety of "public source information." According to Director Louis Freeh, "Information from these inquiries assisted in the arrests of 393 fugitives wanted by the FBI, the identification of more than \$37 million in seizable assets, the locating of 1,966 individuals wanted by law enforcement, and the locating of 3,209 witnesses wanted for questioning."

Community Alliance on Prisons urges the committee to support a vibrant democracy by passing this bill capping the cost of access to public records that we have paid for with our tax dollars. An informed community is an asset to government.

Mahalo nui for scheduling this important bill and allowing CAP to present this testimony!

⁵ The European Union's Green Paper reached a similar conclusion. Indeed, the "lack of transparency" (as it is called in Europe) of public records is seen as one of the main reasons for the wholesale resignation of the European Union Commission due to the fraud found to have been involved at the highest levels of government.



April 6, 2023

10:45 a.m.

VIA VIDEOCONFERENCE

Conference Room 211

To: Senate Committee on Ways and Means

Sen. Donovan M. Dela Cruz, Chair

Sen. Gilbert S.C. Keith-Agaran, Vice Chair

Senate Committee on Judiciary

Sen. Karl Rhoads, Chair

Sen. Mike Gabbard, Vice Chair

From: Grassroot Institute of Hawaii

Joe Kent, Executive Vice President

RE: HB719 HD1 SD1 — 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, [HB719 HD1 SD1](#), 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 Uniform Information Practices Act requests.

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 costs for duplication of records in electronic format, waives reproduction costs for the first hundred pages if disclosure serves the public interest; 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 state Office of the Attorney General. As this was part of an effort to research and report on asset forfeiture in Hawaii, we requested a waiver in the public interest. The AG’s Office quoted a total cost of \$2,190. This included a \$60 “fee waiver” because the request was in the public interest; only \$10 was related to reproducing records.

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 for the agency to discuss with us a way to narrow the request, as other agencies often do, rather than producing a cost quote intended to avoid any disclosure at all.

All of which is to say, HB719 should be praised for proposing public interest waivers and caps on reproduction and search fees. This would be a laudable addition to the law that would go a long way toward addressing the use of fees as an obstruction to open-records requests.

It is often through sky-high search and review costs that agencies are able to discourage open-records requests, and this proposed waiver is the most important element of the current bill.

We do have one concern regarding the fees set forth by this bill: the increase in the search, review and segregation costs, which are currently [set](#) by the state Office of Information

Practices 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.

Alternatively, we suggest that the Legislature remain silent on the search and review costs, leaving them to OIP to determine via rule, rather than setting the cost via legislative action.

We understand the desire to discourage nuisance requests or 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.

A note about the deliberative process exception

It has been suggested that this committee is considering amending this bill to include an exception to Hawaii’s open records law for “deliberative and pre-decisional” government inter- and intra-agency records concerning an agency decision about a government action.

We maintain that a deliberative-process exception would frustrate the intent of the state’s transparency laws, which by making government deliberations and actions available to the public are meant to ensure accountability and discourage corruption.

Based on our experience, we can attest to the fact that this exception would give agencies leeway to withhold nearly anything under the claim of “deliberative process.” Moreover, it would encourage agencies to conduct key government functions in a way that could shield them from disclosure.

Though the Legislature or OIP may try to delineate what documents can be deemed “predecisional” and therefore withheld under the exception, the inherent conflict between the public interest in disclosure and the agency’s desire to withhold, as well as the ambiguity of the “deliberative process,” will guarantee challenges and disputes.

Much of the work done by government agencies is deliberative in nature and an agency that is determined to obstruct records requests is incentivized to categorize large numbers of documents as “predecisional.”

A particularly secretive agency could even organize its activities in such a way as to classify more and more of its records as deliberative in nature.

From the point of view of a government watchdog organization, the deliberative exemption guarantees that requests to certain agencies will turn into endless battles over what, if anything, must be disclosed to the public.

Moreover, this exception is not necessary. It has not existed in Hawaii law for many years and there is no evidence that the lack of such an exception has frustrated the ability of government agencies to carry out decision-making processes.

If government agencies are concerned about privacy or disclosures that obstruct their ability to carry out their duties, there already are exceptions in the law that would address such issues. There is nothing remarkable about the deliberative process in itself that warrants special treatment.

Given the need to restore public trust in Hawaii’s government, we believe that more transparency, not less, is the best route forward.

It is our belief that an exception for government records related to decision-making runs counter to the spirit of Hawaii’s Uniform Information Practices Act. Its statement of purpose and rules of construction very clearly include disclosure of agency deliberations and the decision-making process.

[HRS Ch. 92F-2](#) states: “Therefore the legislature declares that it is the policy of this State that the formation and conduct of public policy — the **discussions, deliberations, decisions**, and action of government agencies — shall be conducted as openly as possible.” (emphasis added)

To stay true to the intent of the law means that any exception should be biased toward timely disclosure, not secrecy.

It may be possible to reduce the potential negative impact of a deliberative process exception through wording that limits its application and length. However, that would not eliminate the problems highlighted above.

If the Legislature must introduce a deliberative process exception, we believe it should be of very limited duration and include a sunset clause that does not allow for automatic extension.

In summary, the cost cap and waivers in HB719 have the potential to improve transparency and open government in our state by strengthening the public interest element of the law. We urge you not to dilute their impact through the creation of a new way to avoid disclosure and openness.

Thank you for the opportunity to submit our comments.

Sincerely,

Joe Kent
Executive Vice President
Grassroot Institute of Hawaii



Hawai'i

Committees: Ways and Means and Judiciary
Hearing Date/Time: Thursday, April, 2023 at 10:45 a.m.
Place: Via Videoconference / State Capitol Conference Room 211

Support: H.B. 719 H.D. 1, S.D. 1 Relating to Public Records with Amendments

Dear Chairs Dela Cruz and Rhoads, and Committee Members:

The ACLU of Hawai'i is a non-partisan, non-profit organization dedicated to preserving the principles of our constitutional democracy, including open and accountable government. We strongly support **H.B. 719, H.D. 1, S.D. 1 Relating to Public Records** that imposes a cap on the costs charged for the reproduction of certain government records and provides a waiver of fees when the public interest is served by a record's disclosure.

The proposed measure, which is similar to a bill unanimously adopted by the Legislature last year, *balances legitimate agency concerns and recognizes the fundamental principle of the public's right to access public records in a free society*.

The charging of excessive fees is a complaint that the ACLU of Hawai'i often hears from public records requesters. This complaint is consistent with the Office of Information Practice's own data showing that nearly all fees for public records are paid for by for-profit requesters.

The right to access public records means little if agencies can put them beyond the financial reach of most requesters. Fulfilling requests like this should be part of a public body's core mission, not a money-making venture. Consequently, the cap on costs will reduce the likelihood of public interest requesters abandoning their requests when the agency quotes a fee estimate beyond what is affordable.

This measure also proposes to waive fees when the public interest is served by a record's disclosure. As noted in a letter from the Office of Information Practices to the ACLU of Hawai'i dated November 30, 2011, the "public interest is inherently served by the 'free flow of information through the news media channels which broadly transmit or disseminate information to the public'" and that "the criteria for this waiver was intended

to be broad enough to encompass requesters such as non-profit organizations, public interest media groups, community newsletters, etc., so long as the requester can show ‘the primary intention and the actual ability to widely disseminate information from the government to the general public at large.’¹

Suggested Amendments

1. Expressly reference the federal Freedom of Information Act as a guide for the public interest waiver
2. Remove the language about 100 free pages for copying

Please support this measure to promote transparency and the public’s right to know. A healthy, vital democracy requires no less.

Thank you for the opportunity submit testimony in support of **H.B. 719 H.D. 1, S.D. 1 Relating to Public Records.**

Sincerely,

Carrie Ann Shiota

Policy Director
ACLU of Hawai‘i

The mission of the ACLU of Hawai‘i is to protect the fundamental freedoms enshrined in the U.S. and State Constitutions. The ACLU of Hawai‘i fulfills this through legislative, litigation, and public education programs statewide. The ACLU of Hawai‘i 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 Hawai‘i has been serving Hawai‘i for over 50 years.

¹ https://www.acluhi.org/sites/default/files/field_documents/11-30-11-letter-from-oip-to-aclu-re-fee-waivers-in-public-interest.pdf



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Page 1 of 2

Committee: Senate Committee on Ways and Means
Senate Committee on Judiciary
Bill Number: HB 719, HD1, SD1 Relating to Public Records
Hearing Date and Time: April 6, 2023 at 10:45am (Room 211)
Re: Testimony of Holomua Collaborative in support

Aloha Chair Dela Cruz, Vice Chair Keith-Agaran, Chair Rhoads, Vice-Chair Gabbard, and members of the committees:

We write in support of HB 719, HD1, SD1, Relating to Public Records. The purpose of HB 719, HD1, SD1 as currently drafted is to impose a cap on charges for the reproduction of certain government records; waive reproduction costs charged for the first one hundred pages if the disclosure serves the public interest; waive the cost of duplication of government records provided to requestors in an electronic format; impose a cap on charges for searching for, reviewing, and segregating records; provide for a waiver of fees when the public interest is served by a record's disclosure; and appropriate funds for positions in the Office of Information Practices.

We have reviewed a compromise proposal that the Civil Beat Law Center attached to its testimony, which would incorporate a form of the deliberate process privilege and provide further detail on the public interest waiver, among other things. As noted in the Law Center's testimony, the substantive changes in that proposal include:

- Adding a preamble to expressly reference the federal Freedom of Information Act as a guide for the public interest waiver;
- Removing the wording about 100 free pages for copying;
- Adding a limited variant of the deliberative process privilege that, critically, will sunset in June 2028 unless renewed; and
- Adding non-exhaustive factors that agencies may consider as part of the public interest analysis for waiver of fees.

We support this bill moving forward with those proposed amendments.

As further background, we note that when the Commission to Improve Standards of Conduct (the "Commission") recommended this bill, they were building upon a previous bill (SB 3252) that was unanimously passed by the State Legislature last year. The only reason that bill is not currently law is because it was vetoed by Governor Ige. Since then, the Commission has addressed the concerns that were raised in his veto message, with the chair and vice chair of the Commission noting their attempts to strike a proper balance, including specific references to federal statutes to assist with interpretation.¹

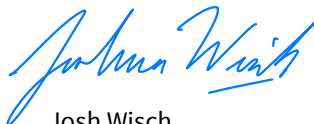
¹ The Civil Beat Editorial Board Interview: The Standards Commission's Dan Foley and Robert Harris, December 4, 2022 (<https://www.civilbeat.org/2022/12/the-civil-beat-editorial-board-interview-the-standards-commissions-dan-foley-and-robert-harris/>).

It's important to note the limited scope of HB 719. A key feature of the bill is the waiver of fees. Critically, this waiver of fees applies only “when the public interest would be served by the record’s disclosure.” This limitation is crucial because organizations making public interests requests are a fraction of all the requests made statewide. Indeed, public interest requests are roughly 5% of requests each year.² In other words, 95% of records requests made of government agencies simply will not be impacted by this bill.

In addition, entities that make public interest requests are typically motivated to work with government agencies to adjust or narrow their requests to receive the information they need in a timely fashion. Whether it is the Sierra Club requesting information about Red Hill or the Star-Advertiser asking for information about the progress of the rail line, it is not in these organizations’ interests to ask—and stubbornly stick by—overbroad and burdensome requests. It is often *because* they are making requests in the public interest that they are interested in partnering with the agencies to make the requests as easy as possible to answer.

As part of Holomua’s mission, we aim to build cross-sector collaborative support to work alongside our appointed and elected government leaders and partners to co-create viable, sustainable solutions that benefit all working families in Hawai‘i. We believe policies that help improve government functions, and public confidence in government, further that goal. We appreciate the opportunity to testify.

Sincerely,



Josh Wisch
President & Executive Director

² “Public Records Are Our Records,” The Civil Beat Law Center for the Public Interest (<https://www.civilbeatlawcenter.org/sb3252/>).

HB-719-SD-1

Submitted on: 4/4/2023 9:15:30 PM

Testimony for WAM on 4/6/2023 10:45:00 AM

Submitted By	Organization	Testifier Position	Testify
Margaret Murchie	Individual	Support	Written Testimony Only

Comments:

This is an important bill for transparency and easier access to documents. Please support it.

HB-719-SD-1

Submitted on: 4/4/2023 9:35:01 PM

Testimony for WAM on 4/6/2023 10:45:00 AM

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

Comments:

I am in full support. For too long the public has been unable to access public record without paying an exhorbitant fee. This will level the playing field and is warranted.

I agree with most of the recommendations of the Commisison to Improve Standard of Conduct, especially as they will improve trust in government.

HB-719-SD-1

Submitted on: 4/5/2023 7:40:34 AM

Testimony for WAM on 4/6/2023 10:45:00 AM

Submitted By	Organization	Testifier Position	Testify
Ryan Kawailani Ozawa	Testifying for Hawaii Bulletin	Support	Written Testimony Only

Comments:

In line with past testimony that I've submitted on this measure, I would like to again express my **support** of H.B. 719 SD1. I also support the addition of language to create a deliberative process privilege that sunsets in 2026 unless renewed, per the Civil Beat Law Center for the Public Interest.

PETER L. FRITZ

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Senate Committee on Ways and Means
Honorable Donovan M. Dela Cruz, Chair
Honorable Gilbert S.C. Keith-Agaran, Vice Chair

Senate Committee on Judiciary
Honorable Karl Rhoads, Chair
Honorable Mike Gabbard, Vice Chair

RE: Testimony Opposing Inclusion of a Deliberative Process Privilege in H.B. 719 S.D. 1
Hearing: April 6, 2023 at 10:45 a.m.

Dear Chairs and Members of the Committees:

I have experience requesting documents and am aware of how some agencies misuse exemptions to delay a response to a citizen's request. Should the legislature decide to amend this bill to include some form of the deliberative process privilege, I would be opposed any draft that does not include safeguards against an agency's overbroad exclusion of documents.

Case law for the federal FOIA discusses the creation of an index of documents that are being withheld by the agency. A safeguard can be incorporated into Chapter 92F by adding a new paragraph to §92F-12 (b) to read:

- (7) An index of the documents that are being withheld and the justification for the withholding of the document.

Creating an index is not burdensome because any agency that did a diligent review of the request and segregated documents to be withheld would know the justification for the segregation and withholding of a document. An index would promote transparency.

I support the provisions in HB 719 SD1 relating to the cost of producing documents.

Thank you for the opportunity to testify.

LATE

HB-719-SD-1

Submitted on: 4/5/2023 1:20:42 PM

Testimony for WAM on 4/6/2023 10:45:00 AM

Submitted By	Organization	Testifier Position	Testify
Marcia Kemble	Individual	Support	Written Testimony Only

Comments:

Please pass HB 719! The public needs to be able to access public/government information without having to pay excessive fees, especially in the digital age!

HB-719-SD-1

Submitted on: 4/5/2023 1:54:48 PM

Testimony for WAM on 4/6/2023 10:45:00 AM

Submitted By	Organization	Testifier Position	Testify
Julie Reyes Oda	Individual	Support	Written Testimony Only

Comments:

I support this bill.

HB-719-SD-1

Submitted on: 4/5/2023 10:10:54 PM

Testimony for WAM on 4/6/2023 10:45:00 AM

LATE

Submitted By	Organization	Testifier Position	Testify
Gerard Silva	Individual	Oppose	Written Testimony Only

Comments:

There should be no Charges. The Tax payers have already payed for this Services. If they want to Charge Fees then we Shoud stop paying Taxes and Fees!!!!

LATE

HB-719-SD-1

Submitted on: 4/6/2023 6:55:05 AM

Testimony for WAM on 4/6/2023 10:45:00 AM

Submitted By	Organization	Testifier Position	Testify
Hunter Heavilin	Individual	Support	Written Testimony Only

Comments:

As an individual who has requested yet been unable to pay the high fees for government records before, I know how difficult it can be to afford the cost of accessing public documents. Therefore, I strongly support this bill that imposes a cap on charges for certain government records and waives the cost of duplication of government records provided in an electronic format. This is an important step in ensuring that the public has access to government records without being financially burdened.

By making government records more accessible and affordable, HB719 will help promote transparency, accountability, and trust in government institutions, benefiting both the public and government officials alike. This recognizes that access to public records is not only important for individuals but also for the greater good. Therefore, I urge the passage of this bill and the appropriation of funds for positions in the office of information practices.