



## *The Judiciary, State of Hawai‘i*

### **Testimony to the Senate Committee on Judiciary**

Senator Karl Rhoads, Chair

Senator Glenn Wakai, Vice Chair

Wednesday, February 20, 2019 10:00 AM

State Capitol, Conference Room 016

### **WRITTEN TESTIMONY ONLY**

by

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**Bill No. and Title:** Senate Bill No. 1453, Relating to the Uniform Information Practices Act.

**Purpose:** Includes the nonadministrative functions of the courts of the State within the definition of "agency" under the Uniform Information Practices Act (Modified), (UIPA), chapter 92F, Hawai‘i Revised Statutes (HRS).

### **Judiciary's Position:**

The Judiciary respectfully, but strongly, opposes this bill that seeks to repeal the exemption for records of “the nonadministrative functions of the courts of this State” from the UIPA.

The Judiciary fully supports measures that promote public interest and scrutiny and the stated purpose of UIPA, set forth in HRS § 92F-2 (“Opening up the government processes to public scrutiny and participation is the only viable and reasonable method of protecting the public’s interest.”). However, UIPA requirements governing records relating to the Judiciary's administrative functions are, and should remain, separate and distinct from Hawai‘i Supreme Court-promulgated rules applicable to records of the nonadministrative functions of the courts, i.e., court records and documents. This delineation has existed for the past 30 years, since the UIPA was first enacted, and there appears no reason to doubt that this is, and remains, a viable distinction given the inherent authority and constitutionally-endowed rulemaking authority of the Hawai‘i Supreme Court.



Thus, for the reasons set forth below, the Judiciary opposes this bill.

**The Reasons that the Legislature Exempted the Nonadministrative Functions of the Judiciary From the UIPA Upon Its Enactment Remain Valid Today**

Since the inception of the UIPA, the nonadministrative functions of the Judiciary were excluded from being part of an “agency” subject to the UIPA. Haw. Rev. Stat. Section 92F-3 (2012). Administrative functions have been deemed to exclude matters involved in the adoption of rules of court that directly control the conduct of litigation or that set the parameters of the adjudicative process and regulate interactions between litigants and the courts. Thus, matters such as judicial assignments and scheduling constitute administrative functions subject to UIPA. By contrast, nonadministrative records of the court – the subject of this bill – are those records that are provided to or developed by the court incident to the adjudication of legal matters before the court.

In distinguishing between administrative and nonadministrative functions of the court, the Hawai‘i Legislature, in drafting the UIPA, was guided by the recommendations of the Governor’s Committee of Public Records and Privacy. (*See* S. Stand. Comm. Rep. No. 2580, 14<sup>th</sup> Leg., 1988 Reg. Sess. Haw. S.J. 1093, 1095 (1988).) The Governor’s Committee Reports details a comprehensive discussion of the reasons for exclusion of Judiciary records. The Report states that “the application of . . . [the UIPA] to the Judiciary should effect (sic) primarily administrative records.” Governor’s Committee Report, Volume 1, 94-5 (1987). The primary reason for excluding records of the Judiciary was the recognition that UIPA confers a right to correct and amend factual errors, misrepresentations and misleading entries contained in personal records. The Governor’s Committee noted that:

In the context of a judicial case, the record is established through a series of proceedings and filings. The total record provides the views of all parties, and once all appeals are exhausted, the record is complete. The notion of correcting the record through an additional process simply does not apply in specific judicial proceedings.

Governor’s Committee Report, Vol. 1, 95 (1987).

As the Office of Information Practices (OIP) noted in OIP Op. Ltr. No. 02-10, pg. 6: “[B]y excluding the Judiciary’s non-administrative records from the UIPA, conflict with judicial procedures is avoided. It is essential for appeals courts to not be required to correct adjudicative records, because appeals courts “cannot consider matters outside the record which could not have been considered by the trial court at the time its judgment was rendered.” (Case citation omitted.)



## **The Hawai‘i Court Records Rules Effectively Balance Open Government with Individuals’ Privacy Interests**

The Hawai‘i State Constitution confers upon the Supreme Court the power to “promulgate rules and regulations in all civil and criminal cases for all courts relating to process, practice, procedure and appeals, which shall have the force and effect of law.” (Hawai‘i Constitution, Article VI, Section 7). Pursuant to that constitutional authority, the Supreme Court promulgated the Hawai‘i Court Records Rules in 2010.

The Hawai‘i Court Records Rules grant the public access to court records while also protecting the privacy interests of the people whose information may be subject to disclosure. Rule 10 of the Hawai‘i Court Records Rules, provides:

Except as otherwise provided by statute, rule, or order, court and ADLRO (Administrative Driver’s License Revocation Office) records shall be accessible during regular business hours, subject to priority use by the court, court staff, ADLRO and ADLRO staff. Closed and archived records shall be accessible within a reasonable time after a request is made. . . .

The Hawai‘i Court Records Rules were promulgated after years of discussion and consultation with and training for litigants, judges, and court users. Because the Rules presented a departure from past practice, the implementation date of the Rules was postponed twice to ensure that all stakeholders understood how the rules would be applied to court records.

The Rules also provide needed guidance to Hawai‘i Judiciary staff. Requests to inspect or obtain court records are made pursuant to these rules. Unless these rules are rescinded, the inclusion of nonadministrative court functions under the UIPA will undoubtedly create confusion for court users and court staff alike, as both the UIPA and the Hawai‘i Court Records Rules conceivably would simultaneously control access to court records.

## **UIPA Disclosure Exceptions Could Make Access to Court Records More Restrictive**

The Hawai‘i Court Records Rules provide relatively few possibilities for deeming a court document confidential. Rule 9 specifies precisely which information is not provided under the Hawai‘i Court Records Rules and that information is generally limited to financial account information and personal information (e.g., social security numbers, dates of birth (except for traffic citations), names of minor children, bank or investment account numbers, medical and health records, and social service reports. (See Rule 2.19, Hawai‘i Court Records Rules)



Again, the Judiciary agrees that to the greatest extent possible, court documents (and proceedings) must be open to the public. However, through court rules, the Judiciary is presently achieving this goal. There is a real possibility for confusion to abound if nonadministrative functions of the court are subject to the UIPA. For example, in 1993, OIP opined that records containing a bar examinee's scores, answers and corrected answers are records relating to the nonadministrative functions of the Hawai'i Supreme Court and that access to those records is thus governed by court rule and not UIPA. If this bill is enacted, would such records now be governed by UIPA? And, if so, what would be the result?

This bill would, at best, create confusion as to competing rules and statutes, and at worst, undermine and limit the availability of nonadministrative court records to the public.

### **Requiring Disclosure of Draft Appellate Opinions and Correspondence Relating to Court Opinions Strikes at the Core of the Adjudicative Process**

The Hawai'i Supreme Court, like other courts, invites the public to its court proceedings. In fact, it has set up a Courts in the Community Program to enable the public to better see and understand our judicial process at work. The Hawai'i Judiciary has also ensured that court records are as accessible as possible to the public through online court records programs such as Ho'ohiki and E-kokua.

Another aspect of our appellate courts' routine work is disseminating among justices and their staff, pre-decisional drafts and correspondence, developed and communicated for the purpose of final decision-making. This procedure is essential to the adjudicatory process. If nonadministrative court documents become subject to the UIPA, these drafts and written communications between justices, law clerks and other staff could be subject to disclosure. This could create a chilling effect that would substantially inhibit the flow of communication, and could adversely impact the very decision-making process that is imperative to well-conceived and appropriately vetted court opinions. Impeding that fundamental process would undermine the adjudicatory process that lays at the core of our judicial system.

### **Exempting the Judiciary's Nonadministrative Records from the UIPA is Consistent with Federal Law and Other States' Freedom of Information Laws**

The federal Freedom of Information Act (FOIA), which establishes the public's right to access federal agency records, excludes "the courts of the United States" from the definition of "agency." 5 U.S.C 551(1)(B).

Further, other states' laws also distinguish between a judiciary's administrative functions and its nonadministrative functions, and establish separate access requirements for each. For



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instance, Arkansas, California, Florida, Georgia, Louisiana, Michigan, Nevada, and New York exclude court records from their respective freedom of information laws.

**Conclusion:**

The Hawai'i State Judiciary both appreciates and shares the Legislature's goal as articulated in HRS § 92F-2 (2012): "Opening up the government processes to public scrutiny and participation is the only viable and reasonable method of protecting the public's interest."

To this end, the Judiciary has embarked on numerous projects and programs designed to ensure that precise goal. However, court records accessibility is best left to court rules. Those rules must, and do, establish both a manageable process and an appropriate balance of individuals' privacy rights with the goal of transparency.

If modifications are needed to court rules, the Judiciary is open and receptive to considering them. We are not, however, aware of any discontent with, or confusion arising from, the present court rules. Moreover, we have concerns that opening the UIPA to include the records of the nonadministrative functions of the state courts will be confusing to the public, inconsistent with the very goals that both the Legislature and the Judiciary have worked so hard to achieve.

For the reasons set forth above, the Judiciary respectfully opposes this bill. Thank you for the opportunity to testify in its opposition.