

THE CIVIL BEAT
LAW CENTER FOR THE PUBLIC INTEREST

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Senate Committee on Health
Honorable Jarrett Keohokalole, Chair
Honorable Rosalyn H. Baker, Vice Chair

RE: Testimony Supporting S.B. 134, Relating to Emergency Powers
Hearing: February 10, 2021 at 1:00 p.m.

Dear Chair and Members of the Committee:

My name is Brian Black. I am the Executive Director of the Civil Beat Law Center for the Public Interest, a nonprofit organization whose primary mission concerns solutions that promote government transparency. Thank you for the opportunity to submit testimony **supporting** S.B. 134.

The public records law serves a fundamental role even in emergencies. In crisis, we must reaffirm, not abandon our most basic democratic principles. When government boldly declares that it will hide information and conceal decision-making, rumor, innuendo, and special interests thrive, while democracy withers.

Suspension of the public records law for emergencies is unnecessary because the rules that govern record requests already provide flexibility for agencies to address other priorities.¹ The two week deadline for an initial response may be extended two more weeks for an agency “to avoid an unreasonable interference with its other statutory duties and functions” or for a “natural disaster or other situation beyond the agency’s control.” HAR §§ 2-71-13(c), -15(a). And if response would be burdensome within that extended period, disclosure may occur in monthly batches to accommodate other priorities. *Id.* § 2-71-15(b).

Thank you again for the opportunity to testify in **support** of S.B. 134.

¹ Hawai`i agencies do not consistently respond in compliance with the administrative deadlines in any event. For example, a recent national audit of various states found that only a third of agencies contacted in Hawai`i responded within the administrative deadlines. A. Jay Wagner (Marquette University), *Probing the People’s Right to Know: A 10-State Audit of Freedom of Information Laws* (Mar. 2020).

SB-134

Submitted on: 2/9/2021 10:44:37 PM

Testimony for HTH on 2/10/2021 1:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Susan Pcola_Davis	Individual	Support	No

Comments:

I support this bill in order to stop the overreach of the Governor and/or Mayors during this pandemic. The inability to gain access to public records is unconstitutional. I did request records early on, no response just ignored. Of course I was asking the Department of Health for records regarding COVID cases and the location as opposed to Zip Codes which was an exercise in futility. The public laughs at the appearance of transparency but preventing access to the actual data. Lack of trust from the public has grown exponentially since March 2020. Shame on you!

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To: Senate Committee on Health

From: Cheryl Kakazu Park, Director

Date: February 10, 2021, 1:00 p.m.
Via Videoconference

Re: Testimony on S.B. No. 134
Relating to Emergency Powers

Thank you for the opportunity to submit testimony on this bill, which would prohibit the Governor or a Mayor from suspending requests for public records or vital statistics during a declared state of emergency. The Office of Information Practices (OIP) takes no position on this bill because it is a policy decision for the Legislature to determine what limit, if any, is appropriate for the Governor's use of emergency powers. However, to assist the Legislature in making this decision, OIP offers comments regarding the effect that the two and a half month suspension of the Uniform Information Practices Act (Modified), chapter 92F, HRS (UIPA), and subsequent long-term suspension of only the deadlines under the UIPA, have had and will have upon record requesters and OIP's own work.

On March 16, 2020, the UIPA was temporarily suspended in its entirety and the Sunshine Law, part I of chapter 92, HRS, was partially suspended by the Supplementary Proclamation of Governor Ige. The March 16 Supplementary Proclamation was extended until May 31, 2020, by the Governor's Sixth Supplementary Proclamation dated April 25, 2020. Because the UIPA was suspended in its entirety, OIP's powers and duties found in part IV of chapter 92F,

HRS, were also suspended during that time, including OIP's power to accept and issue determinations on UIPA appeals.

On May 5, 2020, with the Governor's Seventh Supplementary Proclamation for COVID-19 (see Exhibit H on pages 73-75), OIP's powers and duties found in part IV of the UIPA were restored, except that the UIPA and OIP's rules "are suspended to the extent they contain any deadlines for agencies, including deadlines for the OIP, relating to requests for government records and/or complaints to OIP." The partial suspensions of the Sunshine Law and UIPA were continued in subsequent proclamations, the latest being the Governor's Seventeenth Supplementary Proclamation (SP17) at Exhibit F, dated December 16, 2020, which continued the modified suspension through February 14, 2021.

Effect Upon UIPA Cases

During the two and a half months the UIPA was fully suspended, OIP could not accept UIPA appeals, even on record requests made and denied prior to March 16, but instead had to inform would-be appellants to wait and ask again after the suspension was lifted. OIP likewise was unable to issue opinions during the time its powers were suspended. However, OIP did continue to work on appeal files and prepare opinions for later issuance, and OIP continued to advise agencies and the public primarily through correspondence and email due to the COVID-19 restrictions in effect at that time.

With the substantial restoration of its powers and duties last May, OIP was able to open certain new cases and issue opinions again. However, OIP still could not accept appeals based on causes of action dependent on alleged violations of the portions of the UIPA that were suspended and therefore not in effect, such as an agency's failure to respond to or denial of a record request made while the UIPA was fully suspended, or an agency's failure to make a timely response to a record

request made while the UIPA's deadlines were suspended. Moreover, because for almost a year agencies have not been required, and still are not required, to follow the deadlines for responses to OIP's inquiries, OIP has been unable to compel agencies to provide the substantive response required by OIP's appeal rules and necessary for OIP to resolve the appeal. Although agencies are theoretically required to provide this response, the suspension of deadlines has made it optional to actually provide the response that OIP needs before it can resolve a case.

Many agencies have nonetheless continued to respond to newly opened appeals even without the spur of an enforceable deadline, but other agencies have not responded – they have not declined to respond, but simply have not responded. OIP cannot make a substantive determination on whether records were properly withheld without the agency's response. OIP also cannot determine that an agency's failure to respond was a failure to meet its UIPA burden to justify its denial of access when, due to the suspension of deadlines, the agency has not yet missed any response deadline even after six months or more. For older files opened before the emergency orders were in effect, too, if OIP finds in the course of working on the file that the agency's response was incomplete or needs to be supplemented, OIP cannot set any deadline for the agency to do so and thus if the agency does not choose to respond to OIP's request, OIP's resolution of the file is necessarily delayed until after the laws and deadlines are fully reinstated.

The suspension of the UIPA and, subsequently, agency deadlines under the UIPA has certainly not been the only or even the biggest challenge to OIP's ability to do its work over the last year, with the result that OIP's success in fiscal year 2019-2020 towards eliminating its backlog is now being rapidly reversed. Unfortunately, fiscal year 2020-2021 budget restrictions and three recent vacancies, in combination with OIP's inability to enforce any agency deadlines, portend a

return to the situation in which requesters may wait for many years before appeals can be resolved. It took over a decade since the 2008 recession for OIP to reduce its formal case backlog to an acceptable level, but only the first six months of fiscal year 2021 and the unusual loss during that time of three of its 8.5 personnel, for OIP's backlog to grow by over 40 percent. The specific effect of the suspension of deadlines has been that many of OIP's appeal files, no matter how high a priority, simply cannot be resolved without the agency's voluntary cooperation until the suspension of UIPA deadlines is lifted.

With regard to the effect the suspension of deadlines has had on record requesters, OIP's observation has been that as with appeals, many agencies have been continuing to respond to UIPA requests in a timely manner, but others have simply not responded and apparently do not intend to do so as long as the suspension of deadlines remains in effect. Since last May, agencies have been required to at least acknowledge receipt of a UIPA request but again, there is no deadline to do so, and OIP has spent much time responding to inquiries from people whose UIPA requests have gone unacknowledged as well as unanswered. Some unanswered UIPA requests of particularly high public interest have been reported on in the media, while many other unanswered requests are of interest only to the requester. The UIPA's purpose, however, is to give the public access to government records regardless of whether the request is of high public interest or specifically of interest mainly just to the requester, and for many requesters the UIPA has not been fulfilling that purpose over the past year.

OIP is also concerned as to what will happen when the suspension of deadlines is finally lifted and those agencies that have postponed responding during the suspension have nine months' worth or more of UIPA requests due all at once, in addition to any outstanding responses to UIPA appeals or other inquiries. It

would be unfair for agencies to be given further extensions of their time to respond after having already delayed for months, and OIP has warned agencies to not expect any extensions. Nevertheless, OIP anticipates a flood of new complaints as the agencies that have postponed all or the most difficult of their UIPA requests are unable to timely respond to them and miss deadlines, and the requesters who have already waited for months turn to OIP for assistance in getting a response.

In addition, the suspension for agency deadlines has extended so long that for some requesters, even though the agency's (suspended) response deadline has not yet run so the request is not yet ripe for appeal, the requester's time to appeal a denial of access to OIP (a year from the agency's denial, which for a non-response normally means just over a year from the request date) would be close to running out in typical circumstances.

Effect Upon Sunshine Law Cases

In addition to suspending all or portions of the UIPA, the Governor's emergency orders suspended portions of the Sunshine Law. Although this bill does not currently address the suspension of the Sunshine Law's provisions, OIP will briefly address the effect of the suspension orders on such cases.

Because the Sunshine Law requires at least one in-person meeting location, boards could not hold meetings to conduct necessary business while stay at home orders or COVID-19 testing and transportation restrictions were in place. In order to pivot to the use of fully remote meetings using interactive conference technology (ICT) without threatening public health and safety during the COVID-19 pandemic, it was necessary to suspend certain portions of the Sunshine Law through the Governor's emergency orders.

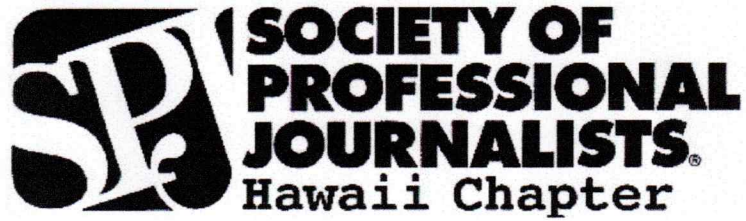
Boards' use of ICT to conduct remote technologies has led to an expansion of public access and participation. In order to continue this and other public benefits,

OIP supports various bills introduced this year that would amend the Sunshine Law to allow remote meetings to continue once the Governor's orders suspending the Sunshine Law are no longer in effect: Administration bills SB 1034 and HB 880; SB 661; HB 503; and HB 677. Notably, however, these bills all require at least one in-person meeting location. If the COVID-19 pandemic continues or other emergency arises that would threaten public health and safety if in-person meetings are held or make such meetings impracticable to be held, then it will still be necessary to have the Governor issue an emergency order suspending the Sunshine Law's in-person meeting requirement or to have a Mayor issue a stay at home order or other requirement that would adversely impact the Sunshine Law's in-person meeting requirement.

Conclusion

In conclusion, OIP's position is that any limitation on the Governor's power to suspend the UIPA in whole or in part is a policy call for the Legislature to make, as OIP recognizes that the Legislature must balance the intent of the emergency powers statute allowing the Governor to suspend the UIPA and other laws with the intent of the UIPA itself, and determine how best to serve both purposes. As discussed in this testimony, OIP has seen a definite impact to record requesters and OIP's own operations over the nearly 11 months the UIPA has been first fully and then partially suspended and anticipates further problems when the suspensions are eventually lifted.

Thank you for considering OIP's testimony.



Feb. 10, 2021

Sen. Jarrett Keohokalole
Senate Health Committee
State Capitol
Honolulu, HI 96813

Re: Senate Bill 134

Chairman Keohokalole and Committee Members:

We support this bill.

The governor or mayors should not be allowed to have powers to withhold public records from the public. Important information is needed by the public even in times of emergency.

Government records rules already allow for time delays and flexibility on records requests for a variety of reasons including natural disasters and interference with duties and functions.

Thank you for your attention,

Stirling Morita
President
Hawaii Chapter SPJ



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8 February 2021

Senate Committee on Health

From: Nancy Cook Lauer, publisher, All Hawaii News

www.allhawaiinews.com nclauer@gmail.com 808.781.7945

In STRONG SUPPORT of SB 134, Relating to Emergency Powers

All Hawaii News, a state government and political news aggregate blog covering Hawaii since 2008, supports SB 134, Relating to Emergency Powers and allowing the public access to their public records during declared emergencies.

My own experience attempting to access public records even when there wasn't a declared emergency shows that the administration doesn't drop everything and respond when the public seeks records that rightfully belong to them. In one case, it took four years from the initial request to a state agency providing the records—and only then because an appeal to the Office of Information Practices got them moving.

The administration has proven it won't neglect or postpone other important work when requests for public information come in. Therefore, it's unnecessary for them to have the power to unilaterally slam the door on access to public records during declared emergencies.

Public records belong to the people, not the government. The hunger for fact-based information is never stronger than during an emergency, and when that information is hard to come by, people often resort to rumors and speculation. One would think that's the last thing the government would want in a declared emergency.

Mahalo nui for your work creating and promoting this bill. That enhances government transparency.



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SENATE COMMITTEE ON HEALTH
Wednesday, February 10, 2021, 1 pm, Videoconference
SB 134
Relating to Emergency Powers

TESTIMONY

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

Chair Keohokalole and Committee Members:

The League of Women Voters of Hawaii strongly supports SB 134. Regardless of whether there is an “emergency”, neither the Governor nor any Mayor should be authorized to suspend the public’s statutory right to see public records.

Thank you for the opportunity to submit testimony.

LATE



Big Island Press Club

Since 1967, protecting the public's right to know

Big Island Press Club
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Hilo, Hawaii 96721

CONTACT:
info@bigislandpressclub.org

7 February 2021
Senate Committee on Health
From: John Burnett, Immediate Past President, Big Island Press Club

In **STRONG SUPPORT** of SB 134, Relating to Emergency Powers

The Big Island Press Club, Hawaii's oldest press club, is in strong support of SB 134, Relating to Emergency Powers.

The people of Hawaii face a grim anniversary on March 16 – a year ago on that date marks the denial of access to their records by a governmental proclamation suspending Chapter 92F, HRS, the Uniform Information Practices Act. SB 134 would help keep public records in the hands of the public.

Yes, “their” records. Public records belong to the people, not the government. The hunger for fact-based information is never higher than during an emergency, and when that information is hard to come by, people often resort to rumors and speculation. One would think that’s the last thing the government would want in a declared emergency.

The Legislature, in all its wisdom, penned this enabling language when it crafted Hawaii’s vaunted Uniform Information Practices Act: “In a democracy, the people are vested with the ultimate decision-making power. Government agencies exist to aid the people in the formation and conduct of public policy. Opening up the government processes to public scrutiny and participation is the only viable and reasonable method of protecting the public’s interest. 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.”

The ability of one branch of government to unilaterally slam the door on access by the public to their own public records is something that should be taken seriously.

I thank you for the opportunity to testify in wholehearted support of SB 134 Relating to Emergency Powers.

LATE

SB-134

Submitted on: 2/9/2021 3:41:16 PM

Testimony for HTH on 2/10/2021 1:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
ROBERT DUERR	Individual	Support	No

Comments:

As a member of the Press, having access to records is always important. It is even more important in a time of emergency or crisis. Section 13 (a)(2) of Act 111 Session Laws of 2014 which deals with the Governor's emergency powers. After years of effort, the Big Island Press Club working with Senator Lorraine Inouye and others had Act 111 amended to provide journalists access to information. The Governor and his agents should follow the law and be transparent in dealings with the public and the press.