

SB 728

Measure Title: RELATING TO INFORMATION PRIVACY.

Report Title: Identity Theft; Cause of Action

Description: Provides a private cause of action for a victim who, as a result of an information security breach, suffers a risk of harm from identity theft. Amends the type of notice that must be given to a person affected by a security breach. Defines identity theft.

Companion: HB1220

Package: None

Current Referral: EDT/CPN, JDL

DEPARTMENT OF HUMAN RESOURCES
CITY AND COUNTY OF HONOLULU
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PETER B. CARLISLE
MAYOR



NOEL T. ONO
DIRECTOR

February 8, 2011

The Honorable Rosalyn H. Baker, Chair
and Members of the Committee on Commerce
and Consumer Protection
The Honorable Carol Fukunaga, Chair
and Members of the Committee on Economic
Development and Technology
The Senate
State Capitol
Honolulu, Hawaii 96813

Dear Chairs Baker and Fukunaga and Members:

Subject: Senate Bill No. 728, Relating to Information Privacy

The City and County of Honolulu, Department of Human Resources offers the following comments regarding Senate Bill 728, specifically the portions which seek to amend the definition of "Security breach" and add to the type of information which must be provided to a person affected by a security breach.

With respect to the amendment to the definition of "Security breach" as proposed by Section 3 of SB 728, we suggest the Joint Committee also consider revising the third sentence in said definition as follows:

Good faith ~~[acquisition]~~ disclosure of personal information by an employee or agent of the business or government agency for a legitimate purpose is not a security breach; provided that the personal information is not used for a purpose other than a lawful purpose of the business or government agency and is not subject to further unauthorized disclosure.

The foregoing change provides uniformity should the revisions which are being proposed to the first and second sentences of the definition be passed into law. The addition of "government agency" to the paragraph will also make the definition of "Security breach" consistent with the rest of Hawaii Revised Statutes ("HRS") Chapter 487N since government agencies are also subject to its disclosure notification requirements.

The Honorable Rosalyn H. Baker, Chair
and Members of the Committee on Commerce and
Consumer Protection

The Honorable Carol Fukunaga, Chair
and Members of the Committee on Economic
Development and Technology

The Senate

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February 8, 2011

We further suggest the Joint Committee consider not amending the notification requirements as proposed by Section 4 of the bill. In particular, we feel inclusion of the "distribution medium and method of the security breach" in the notification is not only unnecessary but potentially ill-advised as it provides information regarding the possible vulnerability of a personal information system.

Thank you for the opportunity to testify.

Yours truly,



Noel T. Ono
Director

Testimony before the Senate Committees on

**Commerce and Consumer Protection &
Economic Development and Technology**

**on
S.B. 728, Relating to Information Privacy**

**Tuesday, February 08, 2011
8:30 a.m.
Conference Room 229, State Capitol**

By Jonathan Keao, Director
Hawaiian Electric Company, Inc.

Chair Baker, Vice Chair Taniguchi, Chair Fukunaga, Vice Chair Wakai, and members of the Committees:

My name is Jonathan Keao, and I am the Director of Information Assurance for Hawaiian Electric Company. I represent Hawaiian Electric Company, Inc. and its subsidiaries, Hawaii Electric Light Company, Inc. and Maui Electric Company, Limited (collectively "HECO").

We respectfully oppose S.B. 728

As a company that manages large amounts of data, including personal identifying data of our customers, we take information security very seriously. We support the legislature's effort to provide strong consumer protections in this area.

However, we cannot support SB 728, as currently drafted, because it would mandate the payment of threefold damages, leaving the courts and the judicial process without the ability to fully evaluate any mitigating circumstances or controls surrounding a data breach. We strongly urge the legislature to replace the word "shall" on page 4, line 15 with the word "may" and allow the courts to more properly determine the actual amount of damages to be paid, based on the circumstances before them. The results may in the end, be the same, but we feel they should not be predetermined in advance without the courts being able to fully evaluate all of the issues of the matter before them.

We therefore ask the Committee to hold SB 728.

Thank you for the opportunity to share our concerns with you.

Presentation to the Senate Committee on Commerce and Consumer Protection
Presentation to the Senate Committee on Economic Development and Technology

Tuesday, February 8, 2011, at 8:30 a.m.

Testimony on Senate Bill 728 Relating to Information Privacy

TO: The Honorable Rosalyn H. Baker, Chair
The Honorable Brian T. Taniguchi, Vice Chair
Members of the Senate Committee on Commerce and Consumer Protection

TO: The Honorable Carol Fukunaga, Chair
The Honorable Glenn Wakai, Vice Chair
Members of the Senate Committee on Economic Development and Technology

My name is Neal Okabayashi and I testify for the Hawaii Bankers Association. While we acknowledge and are sympathetic to concerns on identity theft, we respectfully ask that this committee hold this bill because it does not adequately balance the needs of those damaged by identity theft and businesses that may have to pay more than actual damages.

It is ironic that while it has been governmental entities that have been most prominent in security breach incidents, they would continue to be exempt from paying damage claims.

HBA is most concerned about provisions reducing the standard for filing a lawsuit. Presently, anyone damaged by identity theft may file a lawsuit to recover damages. Under this bill, a person who may suffer harm can sue for damages (instead of the traditional standard of someone who did suffer harm) without any requirement to prove damages because statutory damages are awarded.

The provision for treble damages for what is not an unfair or deceptive trade act or practice nor an intentional act is inappropriate in the circumstances.

The bill should also require that a person use the federal and state remedies. For example, under Section 489P-3, a person can freeze his or her credit report which means credit monitoring service or identity theft insurance is not necessary. Under the Fair and Accurate Credit Transactions Act of 2003, a person can obtain free credit reports and initiating a fraud alert or active duty alert.

I would be happy to answer any questions you may have.



Property Casualty Insurers
Association of America

Shaping the Future of American Insurance

1415 L Street, Suite 670, Sacramento, CA 95814-3972

To: The Honorable Rosalyn Baker, Chair
Senate Commerce & Consumer Protection Committee

The Honorable Carol Fukunaga, Chair
Senate Economic Development & Technology Committee

From: Samuel Sorich, Vice President

Re: **SB 728 – Relating to Information Privacy**
PCI Position: OPPOSE

Date: Tuesday, February 8, 2011
8:30 a.m., Conference Room 229

Aloha Chair Baker, Chair Fukunaga and Members of the Committees:

The Property Casualty Insurers Association of American (PCI) is opposed to SB 728 because the bill is unreasonable, unfair and unclear.

Current law allows an injured party to recover actual damages from a business that violates any provision of chapter of the Revised Statutes that addresses the security breach of personal information. SB 728 would repeal this reasonable approach to liability with new provisions that would require a court to award money to a person even though the person has no proof that he or she has sustained any damage. This radical fracture in the connection between liability and actual damages is fundamentally unfair. The inequity in SB 728 exacerbated by the bill's retroactive application.

In addition to imposing extreme, new liabilities, SB 728 would expand the security breach notice that business must provide. A provision proposed in the bill would require the notice to include a "statement of the individual's legal rights." This requirement is unclear. It gives a business no guidance on the scope of legal rights that must be addressed in the notice.

PCI respectfully requests that the Committees vote to hold SB 728 for the remainder of the session.

GOODSILL ANDERSON QUINN & STIFEL

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TO: Senator Rosalyn Baker
Chair, Committee on Commerce and Consumer Protection
Senator Carol Fukunaga
Chair, Committee on Economic Development and Technology
Via Email: CPNTestimony@Capitol.hawaii.gov

FROM: Mihoko E. Ito

DATE: February 7, 2011

RE: **S.B. 728 – Relating to Information Privacy**
Hearing: Tuesday, February 8, 2011 at 8:30 a.m., Room 229

Dear Chairs Baker and Fukunaga and Members of the Committees on Commerce and Consumer Protection and Economic Development and Technology:

I am Mihoko Ito, testifying on behalf of the Consumer Data Industry Association (CDIA). Founded in 1906, CDIA is the international trade association that represents more than 400 data companies. CDIA members represent the nation's leading institutions in credit reporting, mortgage reporting, fraud prevention, risk management, employment reporting, tenant screening and collection services.

CDIA opposes S.B. 728, which provides a private cause of action for a victim who, as a result of an information security breach, suffers a risk of harm from identity theft. This measure also amends the type of notice that must be given to a person affected by a security breach and defines identity theft.

CDIA is concerned that the measure expands the existing law in a way that will create significant additional burdens on businesses. While we understand that this measure is intended to protect those who fall victim to a credit breach, existing protections and penalties under federal and state law already exist, and expanding the law at this time appears to be unjustified.

We respectfully request that the foregoing concerns be considered. Thank you very much for the opportunity to testify.

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Senator Roslyn H. Baker, Chair
Committee on Commerce & Consumer Protection

Senator Carol Fukunaga, Chair
Committee on Economic Development & Technology

Testimony in Support of SB 728 RELATING TO INFORMATION PRIVACY

Date: Tuesday, February 8, 2011

Time: 8:30 a.m.

Place: Conference Room 229

Chairs Baker and Fukunaga and Members of the Committees:

I am Tom Grande, co-counsel for the UH data breach victims. My co-counsel, Bruce Sherman, and I support this bill with one suggested amendment.

We commend the Senate for taking the lead on this extremely important and serious issue that affects consumers, business, and government.

Current Law

HRS Chapter 497N, the Hawaii data breach notification statute, was passed in 2006. According to James Van Dyke, a leading identify theft expert, "Notification is not working. Consumers apparently do not understand that the data breach puts them at increased risk for other types of fraud. Notification may need to be more explicit about the possible types of fraud that may be perpetrated with the data exposed, and the possible steps the consumer can take for protection."¹

SB 728 strengthens Chapter 497N by providing more detailed notification requirements by amending the definition of "security breach" to include conduct which exposes personal information and by conforming the definition of "identity theft" to that contained in HRS Chapter 489P.

¹ Javelin Strategy and Research, Data Breach Notifications: Victims Face Four Times Higher Risk of Fraud (October 2009) at 16 available at <http://www.javelinstrategy.com>.

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Senator Roslyn H. Baker, Chair

Senator Carol Fukunaga, Chair

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Data Breaches – Cost to Consumers, Business, & Government

Victims of data breaches are four (4) times more likely to suffer an incident of identity theft than non-victims.² However, the costs of identity theft are felt far beyond the individual consumer.

220 million records were lost or stolen last year.³ This resulted in the loss of \$50 billion by consumers, business and government. Identity theft cost consumers \$422 on average, but cost business fifteen times more, or an average of \$6,383.⁴

Identity theft has cost Hawaii consumers and business more than \$600 million since 2005.⁵

Public-Private Partnership

SB 728 proposes a private statutory cause of action for data breach victims. We believe that allowing the private bar to enforce public policy statutes can be a cost-saving, public-private partnership.

This approach is already in place in numerous consumer and business protection statutes, which provide for private enforcement mechanisms to supplement government regulatory oversight.

We suggest however that the provisions of SB 728 be amended to allow actions against the government. As drafted, the bill would give government agencies immunity from claims involving data breaches.

Thank you very much.

² Id.

³ Javelin Strategy and Research, 2010 Identity Fraud Survey Report: Consumer Version at 4 available at <http://www.javelinstrategy.com>.

⁴ Javelin Strategy and Research, Data Breach Notifications: Victims Face Four Times Higher Risk of Fraud (October 2009) at 16 available at <http://www.javelinstrategy.com>.

⁵ : Liberty Coalition Report on UH Data Breach, part 2 at 6 available at <http://www.LibertyCoalition.net>.