



Office of the Public Defender State of Hawai'i

Testimony of the Office of the Public Defender, State of Hawai'i to the Senate Committee on Judiciary

March 13, 2019

H.B. No. 507, H.D. 1: RELATING TO SEARCH WARRANTS

Hearing: Friday, March 15, 2019, 9:00 a.m.

Chair Rhoads, Vice Chair Wakai and Members of the Committee:

The Office of the Public Defender opposes H.B. No. 507, H.D. 1.

This measure would allow a judge or a magistrate to grant the issuance of a search warrant based upon a sworn oral statement communicated in person or by telephone.

Before a search warrant is issued, the judge must be satisfied that the search is reasonable and that there is probable cause. The judge determines whether probable cause exists based on the contents of the application for the warrant submitted by the law enforcement officer. Therefore, it is critical that the contents/information included in the application must be complete and accurate. Moreover, the contents/information must be properly and accurately communicated to the judge.

To ensure that the information in the application is complete and accurate and to also ensure that the judge accurately received and understood the information, the application must be in written form. The judge, with document in hand, will only then be able to properly review, study, and analyze the application, which are often lengthy and detailed. The judge will not be able to do so if the application is communicated orally. Moreover, an oral statement by the law enforcement officer is also subject to be misheard or misunderstood by the judge.

Finally, it is unlikely that a law enforcement officer would be able to provide the necessary information to a judge "off the top of his/her head." More likely, the officer will have prepared a statement (written or typed) prior to contacting the judge, so that the officer is able to read the information to the judge.

Therefore, the issuance of a search warrant should continue to only be based upon a sworn written statement.

Thank you for the opportunity to comment on H.B. 507, H.D. 1.

OFFICE OF INFORMATION PRACTICES

STATE OF HAWAII
NO. 1 CAPITOL DISTRICT BUILDING
250 SOUTH HOTEL STREET, SUITE 107
HONOLULU, HAWAII 96813
TELEPHONE: 808-586-1400 FAX: 808-586-1412
EMAIL: oip@hawaii.gov

To: Senate Committee on Judiciary

From: Cheryl Kakazu Park, Director

Date: March 15, 2019, 9:00 a.m.
State Capitol, Conference Room 016

Re: Testimony on H.B. No. 1354, H.D. 2
Relating to the Office of Information Practices Budget

Thank you for the opportunity to submit testimony on this bill, which the state Office of Information Practices (“OIP”) **supports**.

This bill provides \$91,200 in general funds for FY2019-2020 and \$85,000 for FY 2020-2021, which would be in addition to OIP’s base budget previously authorized by the Senate in H.B. 2, H.D. 1, S.D. 1.

OIP appreciates the Legislature’s additional appropriation last session of \$100,000 for salary parity for its employees, which has tremendously helped morale and employee retention. This amount, however, was less than half of what OIP had initially requested of the Governor in 2017. H.B. 1354 originally included an additional \$100,000 in general funds for OIP for the upcoming fiscal biennium to help OIP reach salary parity, along with \$6,200 in general funds to replace old and slow computers.

The same reasons that OIP gave last year for seeking salary parity funds apply to this year’s request in H.B. 1354. As the attached budget chart shows, **OIP has been underfunded for decades**. See attached Figures 2 and 3 of

OIP's budget history from OIP's FY 2018 Annual Report. OIP was created in June 1988 to administer the Uniform Information Practices Act (UIPA). At its height in FY 1994, OIP had 15 authorized positions and an allocated budget of \$827,537, which is the inflation-adjusted equivalent of \$1,403,003 today. Five years later, in FY 1999, OIP was given the additional responsibility of administering the Sunshine Law, which essentially doubled its work, but OIP's positions and budget had already started to precipitously decline. Thanks to last session's legislative appropriation and collective bargaining allocation, OIP currently has a budget of \$699,837 for this fiscal year and 8.5 FTE positions. **Nevertheless, OIP's current budget is still \$127,700 less in non-inflation adjusted dollars and \$703,166 less than what it had on an inflation-adjusted basis 25 years ago. In short, OIP has been doing more than double the work with half the resources that it had 25 years ago.**

While other agencies have received large or steady pay increases along the way, **last year's additional appropriation was OIP's first big boost in decades.** Other than collective bargaining allocations that were sometimes insufficient to match the pay increases provided to other units, **OIP did not receive additional funding in prior years when other agencies received large or steady pay increases**, such as in FY 2016 when the Attorney General's Office received a \$1.94M for pay increases and the Honolulu Corporation Counsel's office received 5% pay increases. This year, the Honolulu Corporation Council's and Prosecutor's offices received 4% pay increases on July 1, 2018. State salary levels are also expected to increase once the 2018 State Commission on Salaries presents its recommendations to the Legislature this March. As the attached Good Government Comparison Chart from last year shows, **OIP has the least funding and personnel of all state good government agencies.** (Campaign Spending

Commission has more on a per capita basis.) **Thus, despite the \$100,000 increase from last session, OIP's salaries still remain substantially below those of comparable government employees, even though OIP's employees' have extensive experience and expertise regarding two essential open government laws providing public access and government accountability by all state and county agencies.**

OIP is already living on the edge with its lean workforce of five staff attorneys (one of whom is half-time), 2.5 FTE administrative personnel, and one director, each of whom is crucial to OIP's operations. If any one of its employees leaves OIP or goes on extended sick, vacation, or family leave, OIP would lose 13% of its workforce and institutional memory that, in the case of one attorney, goes back as far as 1988.

The general public and all state, county, and independent agencies (including UH, OHA, and HTA), as well as all branches of government—Executive (including the Governor, Lt. Governor, and all mayors), Legislative (including the Legislature and county Councils), and Judicial (excluding only the courts' nonadministrative, *i.e.*, judicial, functions)—rely upon OIP's neutral and uniform advice, training, and dispute resolution services regarding Hawaii's open records and open meetings laws. OIP's attorneys and personnel, therefore, have highly transferable knowledge and skills. **To keep OIP's personnel and their unparalleled institutional memory at the single, statewide agency that provides uniform and neutral advice and services throughout Hawaii, OIP respectfully requests that its additional budget appropriation be passed out of this committee.**

Please note, however, that **the additional funding requested in this bill is only sufficient to help retain OIP's existing employees and**

continue its current level of work. For OIP to do more work faster, it will need additional personnel and funding. The extent of the additional resources required will depend upon what is expected of OIP.

OIP is already at its maximum capacity with its existing personnel and resources and expeditiously resolves most of the requests for assistance that it receives each year. **In FY 2018, OIP resolved over 95% (1,074 of 1,127) of all FY 2018 formal and informal requests for assistance in the same year they were filed, and nearly 84% (945 of 1,127) within the same day they were filed.** See attached Figure 1 of OIP's Service Overview from OIP's 2018 Annual Report.

Although the backlog of formal cases is directly related to the number of new cases filed each year and OIP has no control over cases filed with it, OIP has substantially reduced its backlog to 99 pending formal cases as of January 31, 2019, which is a 24% reduction from the end of FY 2018 (131 pending cases) and a 34% reduction from one year ago (151 pending cases).

Not only has OIP substantially reduced its formal case backlog, **OIP has also kept down the age of the its oldest cases that are not pending in litigation.** OIP ended FY 2018 with its oldest case being one that was filed in FY 2015, only because a litigation involving the same issue is still pending in court and OIP will resolve any issues remaining after the litigation concludes; the rest were filed in FY 2016 or later. This is a considerable improvement since FY 2011 when OIP's oldest outstanding case was 12 years old. It took years for OIP to bring down the age of its oldest cases to where it is now, and barring another huge increase in new formal case filings (as OIP experienced in FY 2017) and with its current level of

resources, OIP hopes to be able to resolve appeals within one year of filing before FY 2023.

OIP's formal cases consist of different types of complaints, requests for assistance, and inquiries submitted by requesters to OIP, with "appeals" being one category of submittal. "Appeals" to OIP are opened when a record requester challenges an agency's denial of a request for records under the UIPA or a person seeks to determine if a board is subject to or has complied with the Sunshine Law. This category of cases typically requires the most time and work by OIP to resolve and often result in written opinions. "Requests for Opinions" (RFO) are also labor intensive as they involve the same sort of issues as appeals, but are opened when there is no live case or controversy and a requester seeks an advisory opinion. If a requester seeks reconsideration of an OIP decision, then a RECON file is opened and may result in either a dismissal or a new opinion. In contrast, "Requests for Assistance" (RFA) do not require written opinions and are opened when requesters have not received a response to a record request from an agency, and they typically are resolved within the same fiscal year. Other types of formal cases are for "Correspondence" and "UIPA" record requests made to OIP, which also do not require written opinions by OIP, although some of the Correspondence may be written advice equivalent to other states' "opinions."

OIP already takes steps to "triage" its formal cases and appeals to give priority to those that may be readily resolved without an opinion, are of great public importance, or for other compelling circumstances.

Unless circumstances change, the remaining cases are resolved on a first in, first out basis to be fair to those who have been waiting longer. As of January 31, 2019, OIP has closed 129 formal cases, of which 39 were appeals; 33 of the appeals closed were for cases filed before FY 19 and 6 were filed in FY 19. **Without the 97 older**

appeals that were pending at the start of this fiscal year, OIP would have resolved more appeals (39) than have been filed as of January 30 in FY 2019 (25).

Requesters who do not wish to wait their turn always have the option to go directly to the circuit court, which is supposed to provide an expedited review process. Even the courts, however, can take years to resolve an appeal from a denial of a record request. In fact, OIP's oldest appeal filed in FY 2015 is on hold, along with four newer ones, awaiting the court's decisions on UIPA or Sunshine Law issues raised in pending court litigation that potentially affect appeals pending before OIP.

Focusing narrowly on appeals ignores all the other work that OIP does for many, many more requesters in the same year, if not the same day, and which often prevent the escalation of disputes into more appeals. Eighty-four percent of the total requests each year are typically resolved within the same day through OIP's Attorney of the Day (AOD) service, whereby a staff attorney provides informal advice and guidance to the requester. See attached Figure 1 of the OIP Service Overview from OIP's 2018 Annual Report. The AOD service resolves many issues before they become problems and turn into appeals, and it is a much used and appreciated service provided by OIP. **Oftentimes, OIP will provide written advice in emails or letters in response to AOD inquiries, which would be considered "opinions" in other states.**

In addition to responding to formal and informal requests for assistance, **OIP has many other duties,** including training, tracking lawsuits,¹

¹ While OIP tracks the status of lawsuits, it has used its limited resources to focus on its other work instead of actively intervening in litigation. In the recently decided case of Peer News LLC v. City and County of Honolulu, 143 Haw. 472 (December 21, 2018), OIP was not a party and

keeping agencies and the public informed of open government issues, rulemaking, initiating special projects on its own, and preparing annual reports, including two summarizing all State and County UIPA Record Request Logs. OIP also spends considerable time during legislative sessions reviewing all bills and resolutions, analyzing and monitoring those that impact OIP or the laws that we administer, and preparing testimony as appropriate, so that legislators will be able to make informed decisions about proposed legislation. This session, OIP has tracked at least 168 proposals and testified 51 times.

For OIP to resolve appeals faster without neglecting its other duties, it will need funding and authorization for additional personnel positions, equipment and training, as well as time to hire and train them. If, as has been proposed in other legislation, a time to resolve appeals were to be statutorily imposed, then OIP would also need a dedicated source of funding to ensure that it will be appropriated sufficient funding and personnel to do the work that will probably increase over time. A statute remains on the books forever, but adequate funding does not. **From OIP's experience with decades of underfunding, it knows that it could be starved of necessary resources to timely do its work if it does not have a dedicated source of funding to hire, equip, train, and retain sufficient personnel. Rather than an unfunded mandate, OIP would need a dedicated source of statutorily required appropriations to provide a reliable stream of funding and personnel that can fulfill statutorily imposed deadlines**

had not rendered an opinion being directly appealed by the parties, as the plaintiff-appellant exercised its right to appeal the defendants-appellees' denial of a record request directly to the courts without involving OIP. The Attorney General's office intervened in that case and OIP did not have the resources to do so

Even without a statutorily mandated time limit to resolve appeals, there have been numerous legislative bills and resolutions seeking to have OIP do more work faster, or try new methods to resolve appeals faster, or prepare different types of reports for each outstanding appeal, but they do not take into account factors that are beyond OIP's control (such as litigation over issues underlying an appeal pending before OIP or significant increases in the number of new formal cases filed each year) and have not provided OIP with additional resources. H.B. 1354, H.D. 2 could be the vehicle to provide OIP with much needed additional resources.

OIP's original request was simply for an additional \$100,000 and \$6,200, as this bill originally proposed, to retain its existing staff and to replace aged computers in order to keep up with its current level and pace of work. But to meet the Legislature's expectations and proposals to have OIP more quickly reduce its backlog of appeals, OIP will also need one to three new positions, each at a cost of \$115,000 in general funds, for salary, equipment, and training, as well as the time to hire and train the new employees before productivity improvements can be realized

Mahalo for considering OIP's testimony.

Highlights of Fiscal Year 2018

Budget and Personnel



OIP's budget allocation is the net amount that it was authorized to use of the legislatively appropriated amount, including any collective bargaining adjustments, minus administratively imposed budget restrictions. In FY 2018, OIP's total allocation was \$584,019, up 1.4% from \$575,984 in FY 2017.

OIP's allocation for personnel costs in FY 2018 was \$561,695. The allocation for operational costs was \$22,324. See **Figure 3** on page 17.

As in the prior year, OIP had a total of 8.5 FTE approved positions in FY 2018.

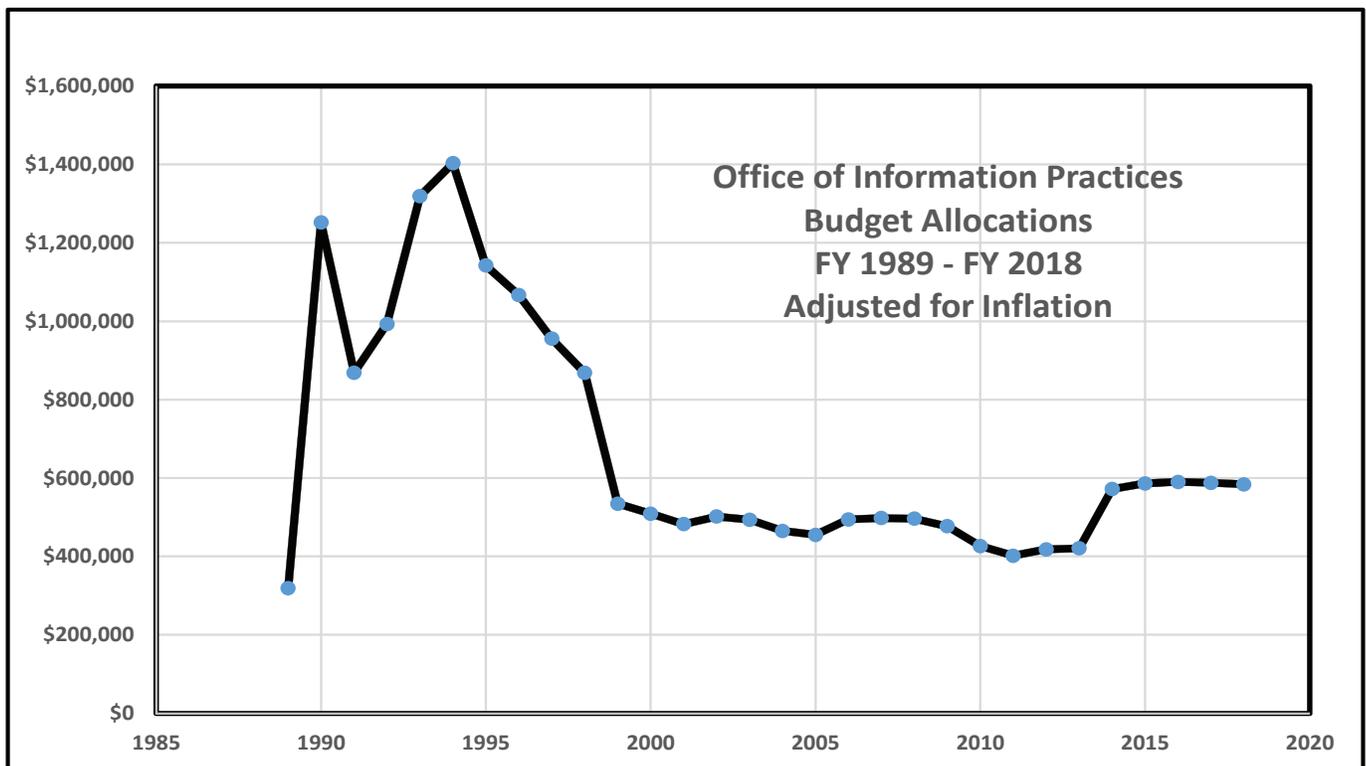


Figure 2



Office of Information Practices
Budget FY 1989 to FY 2018

Fiscal Year	Operational Expense Allocation	Personnel Allocation	Total Allocation	Allocations Adjusted for Inflation**	Approved Positions
FY 19	22,324	677,513	699,837	699,837	8.5
FY 18	22,324	561,695	584,019	584,019	8.5
FY 17	22,324	553,660	575,984	587,909	8.5
FY 16	31,592	532,449	564,041	590,112	8.5
FY 15	45,228	507,762	552,990*	586,494	8.5
FY 14	88,862	450,895	539,757*	571,948	8.5
FY 13	18,606	372,327	390,933	420,789	7.5
FY 12	30,197	352,085	382,282	418,040	7.5
FY 11	42,704	314,454	357,158	401,991	7.5
FY 10	19,208	353,742	372,950	426,615	7.5
FY 09	27,443	379,117	406,560	477,272	7.5
FY 08	45,220	377,487	422,707	496,376	7.5
FY 07	32,686	374,008	406,694	498,014	7.5
FY 06	52,592	342,894	395,486	494,341	7
FY 05	40,966	309,249	350,215	455,200	7
FY 04	39,039	308,664	347,703	465,356	7
FY 03	38,179	323,823	362,002	493,826	8
FY 02	38,179	320,278	358,457	501,692	8
FY 01	38,179	302,735	340,914	482,588	8
FY 00	37,991	308,736	346,727	509,136	8
FY 99	45,768	308,736	354,504	534,813	8
FY 98	119,214	446,856	566,070	868,255	8
FY 97	154,424	458,882	613,306	955,489	11
FY 96	171,524	492,882	664,406	1,066,608	12
FY 95	171,524	520,020	692,544	1,142,107	15
FY 94	249,024	578,513	827,537	1,403,003	15
FY 93	248,934	510,060	758,994	1,319,281	15
FY 92	167,964	385,338	553,302	993,086	10
FY 91	169,685	302,080	471,765	879,759	10
FY 90	417,057	226,575	643,632	1,252,238	10
FY 89	70,000	86,000	156,000	319,300	4

Sunshine →
Law added
to OIP's
duties



*Total allocation for FY 2014 and 2015 includes the additional appropriation through Act 263, SLH 2013, to assist with open data and open government matters.

**Adjusted for inflation, using U.S. Bureau of Labor Statistics CPI Inflation Calculator.

Figure 3



STATE GOOD GOVERNMENT AGENCIES COMPARISON CHART (Based on 2018 data)

Agency	Jurisdiction	FY 2018-19 Total State Gen. Funds Appropriation	Personnel Services	Authorized FTE Positions
OIP HRS 92F-3, -41, -42; 92-1.5, -2, -10	HRS State, counties (including Mayors, Councils, and departments), independent agencies (UH, OHA), and including Executive branch (Gov, Lt. Gov. and agencies), Legislature, and Judiciary (except courts' nonadministrative functions), for UIPA (open records) ; also all Sunshine Law boards of state, county, and independent entities			
OIP Budget		\$576,855	\$563,855	8.5 (includes 6 attorneys)
Auditor Constit. Art. VII, Sec. 10; HRS 23-1, -2, -3, -8	State and its political subdivisions, except Legislature			
Auditor Budget		\$3,007,127	\$2,630,927	37 (26 actual)
Ombudsman HRS 96-1, -2, -3	Administrative acts of agencies, except Legislature, Judiciary, federal govt. , multistate govt'l entity, Gov. and personal staff, Lt. Gov. and personal staff, mayors, councils			
Ombudsman Budget		\$1,330,834	\$1,256,599	14.0
LRB Director HRS 23G-1, -2	Serves Legislature			
LRB Budget		\$3,459,738 excl. dues	\$2,917,394 incl. session staff & OT	38.0
State Ethics Exec Dir. 84-2, -3, - 35	HRS State only: all nominated, appointed, or elected officer, employee, and candidate to elected office, but excluding justices and judges			
State Ethics Budget		\$1,112,093	\$944,402	11.0
State Campaign Spending Commission Executive Director HRS 11-314(12)	Candidates			
State CSC Budget		\$505,585	\$443,962	5.0
Chief Election Officer 11-1, -1.6,	HRS Elections			
Elections Budget		\$3,071,898, not inclu. fed. funds	\$2,234,383	27.44, inclu. 9.44 temp.

Executive Summary



OIP's mission statement is "ensuring open government while protecting individual privacy." More specifically, OIP seeks to promote government transparency while respecting people's privacy rights by fairly and reasonably administering the UIPA, which provides open access to government records, and the Sunshine Law, which provides open access to public meetings.

Additionally, following the enactment of Act 263, SLH 2013 (see HRS § 27-44) (Open Data Law), OIP was charged with assisting the State Office of Information Management and Technology (now known as the Office of Enterprise Technology Services, or ETS) to implement Hawaii's Open Data policy, which seeks to increase public awareness and electronic access to non-confidential and non-proprietary data and information available from state agencies; to enhance government transparency and accountability; to encourage public engagement; and to stimulate innovation with the development of new analyses or applications based on the public data made openly available by the State.

Besides providing relevant background information, this annual report details OIP's performance for fiscal year 2018, which began on July 1, 2017, and ended on June 30, 2018.

	2013	2014	2015	2016	2017	2018
Total Requests for OIP's Services	1,227	1,313	1,307	1,162	1,234	1,127
Informal Requests (AODs)	1,050	1,109	1,074	964	956	945
Formal Requests Opened	177	204	233	198	278	182
Formal Requests Resolved	142	195	142	208	241	201
Live Training	16	19	11	11	9	6
Training Materials Added/Revised	19	23	16	12	6	9
Legislation Monitored	134	181	101	175	108	93
Lawsuits Monitored	7	17	39	44	40	38
Public Communications	30	35	33	30	30	25
Rules Adopted	0	1	0	0	0	0
Special Projects	14	14	15	8	2	0

Figure 1

Justin F. Kollar
Prosecuting Attorney

Jennifer S. Winn
First Deputy



Rebecca A. Vogt Like
Second Deputy

Diana Gausepohl-White
Victim/Witness Program Director

OFFICE OF THE PROSECUTING ATTORNEY

County of Kaua'i, State of Hawai'i

3990 Ka'ana Street, Suite 210, Lihu'e, Hawai'i 96766
808-241-1888 ~ FAX 808-241-1758
Victim/Witness Program 808-241-1898 or 800-668-5734

**THE HONORABLE KARL RHOADS, CHAIR
SENATE COMMITTEE ON JUDICIARY
The Thirtieth Legislature
Regular Session of 2019
State of Hawai'i**

February 12, 2019

RE: H.B. 507 H.D. 1 : RELATING TO SEARCH WARRANTS.

Chair Rhoads, Vice-Chair Wakai, and members of the Senate Committee on Judiciary, the Office of the Prosecuting Attorney of the County of Kaua'i is in strong support of this measure.

This bill clarifies and expressly authorizes that search warrants may be issued based upon oral statements or electronic communications.

Allowing for the use of electronic communications will bring Hawai'i's law regarding search warrants into the 21st century and align Hawai'i law with many other jurisdictions nationwide that allow law enforcement officers to obtain search warrants via electronic means.

Current procedure allows for only written or telephonic warrants, which can be time-consuming and inconvenient for Judges, who spend much of their time on the bench processing cases, as well as investigators, who must take time to visit the courthouse, wait for a Judge to become available, and then meet face-to-face.

We note that in HB 1773 HD 1 SD 1 from the 2018 session, there were additional requirements imposed, including a finding by the judge that an exigency exists to issue an electronic warrant, as well as a requirement that each electronic warrant be reviewed and e-signed by a Prosecutor. There is no basis under the law or any precedent for either of those requirements. There is nothing about an electronically-issued warrant that is special enough to

warrant a finding of exigency. Warrants should issue based on probable cause alone. It should be noted that ANY warrant being served between 10 p.m. and 6 a.m. already requires a special finding by the Judge that time is of the essence. Adding a new requirement would be duplicative and cumulative. Moreover, although Prosecutors often review search warrants prior to their presentation to a Judge, there is no requirement that such a review take place. Adding a mandatory review for electronically-issued warrants is a distinction that again, lacks any reasonable basis.

We strongly support H.B. 507 in its CURRENT form and urge you to PASS the Bill.

Thank you for this opportunity to testify on this bill.

POLICE DEPARTMENT
CITY AND COUNTY OF HONOLULU

801 SOUTH BERETANIA STREET · HONOLULU, HAWAII 96813
TELEPHONE: (808) 529-3111 · INTERNET: www.honolulu.police.org



KIRK CALDWELL
MAYOR

SUSAN BALLARD
CHIEF

JOHN D. McCARTHY
JONATHAN GREMS
DEPUTY CHIEFS

OUR REFERENCE BM-GR

March 15, 2019

The Honorable Karl Rhoads, Chair
and Members
Committee on Judiciary
State Senate
Hawaii State Capitol
415 South Beretania Street, Room 016
Honolulu, Hawaii 96813

Dear Chair Rhoads and Members:

SUBJECT: House Bill No. 507, H.D. 1, Relating to Search Warrants

I am Benjamin Moszkowicz, Acting Major of the Traffic Division of the Honolulu Police Department (HPD), City and County of Honolulu.

The HPD supports the passage of House Bill No. 507, H.D. 1, Relating to Search Warrants.

Recent court rulings have established certain criteria in which search warrants are an absolute requirement in order to obtain evidence in criminal cases. Given the increased necessity and the limited time constraints to obtain search warrants, it is essential that we utilize the technology available to make the process as expeditious as possible while continuing to ensure that everyone's civil rights are protected. In most major jurisdictions, search warrants obtained utilizing oral or electronic means are well established as an option available to law enforcement. The passage of this bill would provide Hawaii law enforcement with a necessary tool to meet the requirements placed upon law enforcement.

The HPD urges you to pass House Bill No. 507, H.D. 1, Relating to Search Warrants.

Thank you for the opportunity to testify.

APPROVED:

Sincerely,

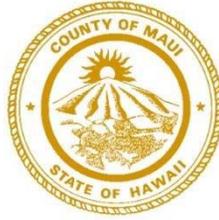

Susan Ballard
Chief of Police


Benjamin Moszkowicz, Acting Major
Traffic Division

MICHAEL P. VICTORINO
Mayor

DONALD S. GUZMAN
Acting Prosecuting Attorney

ROBERT D. RIVERA
First Deputy Prosecuting Attorney



DEPARTMENT OF THE PROSECUTING ATTORNEY
COUNTY OF MAUI
150 SOUTH HIGH STREET
WAILUKU, MAUI, HAWAII 96793
PHONE (808) 270-7777 • FAX (808) 270-7625

March 13, 2019

TESTIMONY ON
H.B. 507, H.D. 1 - RELATING TO SEARCH WARRANTS.
Hearing Date: 3/15/2019, 9:00 a.m.

The Honorable Karl Rhoads, Chair
The Honorable Glenn Wakai, Vice Chair
and Members of the Senate Committee on Judiciary

The Department of the Prosecuting Attorney, County of Maui **STRONGLY SUPPORTS** H.B. 507, H.D. 1, Relating to Search Warrants. Relevantly, this bill authorizes judges to issue search warrants based on sworn statements communicated electronically. "[W]ell over a majority of States allow police officers or prosecutors to apply for search warrants remotely through various means, including telephonic or radio communication, electronic communication, such as e-mail, and video conferencing." State v. Niceloti-Velazquez, 139 Hawai'i 203, 205, 386 P.3d 487, 489 (App. 2016) (quoting the United States Supreme Court in Missouri v. McNeely, 569 U.S. 141, 154 (2013)).

Electronic search warrants provide for a timely and efficient method of obtaining evidence, that complies with the Fourth Amendment. Timeliness is especially crucial to law enforcement investigations when an impaired driver has crashed a vehicle, resulting in injuries or death to others. Blood alcohol levels in an impaired driver's body dissipate by the second, and thus every second that passes in an investigation means evidence is potentially destroyed. Electronic search warrants will reduce the time needed for a judge to review an application and issue a warrant upon probable cause, while maintaining all traditional safeguards under our Constitution. See McNeely, 569 U.S. at 155 ("[T]echnological developments [can] enable police officers to secure warrants

more quickly, and do so without undermining the neutral magistrate judge's essential role as a check on police discretion . . .”).

Thank you for the opportunity to provide testimony.

DEPARTMENT OF THE PROSECUTING ATTORNEY
CITY AND COUNTY OF HONOLULU

ALII PLACE
1060 RICHARDS STREET • HONOLULU, HAWAII 96813
PHONE: (808) 547-7400 • FAX: (808) 547-7515



DWIGHT K. NADAMOTO
ACTING PROSECUTING ATTORNEY

ACTING FIRST DEPUTY
PROSECUTING ATTORNEY

LATE

THE HONORABLE KARL RHOADS, CHAIR
SENATE COMMITTEE ON JUDICIARY
Thirtieth State Legislature
Regular Session of 2019
State of Hawai'i

March 15 2019

RE: H.B. 507, H.D. 1; RELATING TO SEARCH WARRANTS.

Chair Rhoads, Vice Chair Wakai, and members of the Senate Committee on Judiciary, the Department of the Prosecuting Attorney of the City and County of Honolulu ("Department") submits the following testimony in strong support of H.B. 507, H.D. 1. This bill is part of the Department's 2019 legislative package.

The purpose of H.B. 507, H.D. 1, is to expressly authorize judges to issue search warrants based on sworn oral statements or sworn statements communicated electronically.

While Rule 41(h) of the Hawaii Rules of Penal Procedure authorizes a judge to issue a search warrant based on a sworn oral statement, corresponding sections of the Hawaii Revised Statutes (HRS) are currently unclear on this authorization. For example, HRS Section 803-34 mandates that a "warrant shall be *in writing*"; HRS Section 803-31 states that a "search warrant is an order *in writing*"; and HRS Section 803-33 requires that a search warrant be supported by an affidavit. An "affidavit" is a written statement made or taken under oath before an officer of the court or a notary public. Because of this discrepancy, the Department strongly believes that the statutes need to be updated and amended to expressly provide for warrants based on sworn oral statements.

Because Rule 41(h) already provides for sworn oral statements, H.B. 507, H.D. 1, would be consistent with the clear desire of the bench and bar that judges *should have* the authority to issue a search warrant based on sworn oral statements. Typically, before a new proposal is incorporated into the Hawaii Rules of Penal Procedure, the proposal is considered by the Permanent Committee on the Hawaii Rules of Penal Procedure, which is comprised of judges from around the State, as well as prosecutors, defense attorneys, and public defenders. Before the Supreme Court decides whether to adopt a proposal and incorporate it into the rules of penal procedure, the public is typically also invited to provide input. The fact that Rule 41(h) has

already been promulgated reflects a determination by learned judges and attorneys that such a procedure is appropriate, lawful, and consistent with the Hawaii State Constitution.

The reason why Rule 41(h)—and thus H.B. 507, H.D. 1—is needed, is that law enforcement occasionally encounters scenarios when it is not possible to obtain a written warrant supported by a written affidavit before relevant evidence becomes unavailable. For example, in a vehicular homicide case involving alcohol, it is not possible to generate a written warrant and affidavit, locate a judge for approval, and serve the same written warrant, all before the suspect’s level of alcohol dissipates and that evidence is gone forever. There simply is not enough time to prepare a traditional written warrant and affidavit. H.B. 507, H.D. 1, addresses that scenario (and others) by allowing warrants to be based on *sworn* oral statements, requiring that the statement be made “under penalty of perjury”. In addition, both Rule 41(h) and H.B. 507 require that all communications between the applicant and the judge be recorded, and that a transcript of the recording be prepared and filed with the court, to ensure a permanent record. These procedures provide for transparency and subsequent review by counsel and appellate courts.

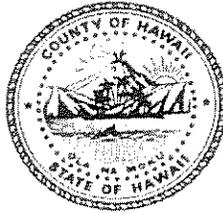
Regarding warrants based on sworn statements communicated electronically, the procedure set forth in H.B. 507, H.D. 1, is consistent with the procedure described in Rule 41(h), as well as the court’s new e-filing and e-signature procedures, and provides for the same degree of transparency and accountability as Rule 41(h). This would enable law enforcement and our courts to make use of currently available technology—streamlining this particular procedure while maintaining safeguards—and essentially make the process more efficient.

We understand that the Committee previously collaborated on a prior version of this bill in 2018, under H.B. 1773, H.D. 1, S.D. 1, and would recommend using that language, but respectfully ask the Committee to remove the provision that would require a prosecutor to review the search warrant before a judge reviews it (page 4, lines 11-17). Because that has never been a requirement for search warrants, even under the traditional method (in writing), and really has no bearing on whether the standard of proof is met, we believe that that step is unnecessary, and would only add an extra layer of bureaucracy and unnecessary delay.

Based on the foregoing, the Department of the Prosecuting Attorney of the City and County of Honolulu strongly supports the passage of H.B. 507, H.D. 1. Thank you for the opportunity to testify on this matter.

MITCHELL D. ROTH
PROSECUTING ATTORNEY

DALE A. ROSS
FIRST DEPUTY
PROSECUTING ATTORNEY



655 KĪLAUEA AVENUE
HILO, HAWAII 96720
PH: (808) 961-0466
FAX: (808) 961-8908
(808) 934-3403
(808) 934-3503

WEST HAWAII UNIT
81-980 HALEKĪI ST, SUITE 150
KEALAKEKUA, HAWAII 96750
PH: (808) 322-2552
FAX: (808) 322-6584

OFFICE OF THE PROSECUTING ATTORNEY

TESTIMONY IN SUPPORT OF HOUSE BILL 507, HD 1

A BILL FOR AN ACT RELATING TO SEARCH WARRANTS

COMMITTEE ON JUDICIARY
Senator Karl Rhoads, Chair
Senator Glenn Wakai, Vice Chair

Friday, March 15, 2019, 9:00 a.m.
State Capitol, Conference Room 016

LATE

Honorable Chair Rhoads, Honorable Vice Chair Wakai, and Members of the Committee on Judiciary, the Office of the Prosecuting Attorney, County of Hawai'i submits the following testimony in STRONG SUPPORT of House Bill 507, HD 1.

This bill clarifies and expressly authorizes that search warrants may be issued based upon oral statements or electronic communications.

Current procedure allows for only written or telephonic warrants, which can be time-consuming and inconvenient for Judges, who spend much of their time on the bench processing cases, as well as investigators, who must take time to visit the courthouse, wait for a Judge to become available, and then meet face-to-face. This bill authorizes that search warrant may be issued based upon oral statements or electronic communications.

The Office of the Prosecuting Attorney, County of Hawai'i, strongly supports the passage of House Bill 507, HD 1. Thank you for the opportunity to testify on this matter.



Mothers Against Drunk Driving HAWAII
745 Fort Street, Suite 303
Honolulu, HI 96813
Phone (808) 532-6232
Fax (808) 532-6004
hi.state@madd.org



March 15, 2019

To: Senator Karl Rhoads, Chair — Senate Committee on Judiciary; Senator Glenn Wakai, Vice Chair, and members of the Committee

From: Arkie Koehl and Carol McNamee, Public Policy Committee - MADD Hawaii

Re: House Bill 507, HD 1 – Relating to Search Warrants

I am Arkie Koehl, offering testimony on behalf of the Hawaii Chapter of Mothers Against Drunk Driving in support of House Bill 507, HD1, relating to Search Warrants.

MADD is in support of the section on electronic warrants because of its importance to law enforcement in the realm of impaired driving. It is now common practice in communities across the country to use electronic warrants for the purpose of obtaining blood samples from drivers who have been stopped on suspicion of driving under the influence of alcohol or other drugs and who have refused to be tested.

Hawaii has seen a substantial increase in refusals over recent years in part because of the Supreme Court opinion which resulted in the decriminalization of refusal. Evidently the word has gotten around that now refusal is the “smart” choice in trying to circumvent the sanctions of the administrative drivers’ license revocation system and the judicial system as well. This is very troubling to MADD because studies have shown that drivers who refuse to be tested are in a high risk category meaning they are more likely to become repeat offenders and to cause traffic crashes.

MADD’s 2018 Report to the Nation on the status of the “*Campaign to Eliminate Drunk Driving*” stated that “34 states give law enforcement the ability to expedite the warrant process for suspected drunk drivers who refuse.” One of the three recommendations in the state report for Hawaii was to expedite our warrant process to help reduce the number of alcohol related crashes and fatalities.

This bill will be a significant help to law enforcement officers who are trying to keep our roads safe from impaired drivers. We encourage this committee to pass HB 507, HD1.

Thank you for this opportunity to testify.