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March 29, 2017

The Honorable Breene Harimoto
Senator, District 16
The Twenty-Ninth State Legislature
State Capitol, Room 215
Honolulu, Hawai'i 96813

Re: Request for Advice on Public Testimony

Dear Senator Harimoto:

This letter responds to your request for legal advice concerning public testimony submitted on bills heard in committee hearings held during the legislative session. You have asked the following questions and our short answers appear below:

1. Can the Senate withhold from senators and the public duly submitted testimonies for noticed public hearings and decision-making meetings where written testimonies are allowed? If so, can only selected testimonies be withheld from senators and the public while other testimonies are made available?

Answer: No. As explained below, based on the constitutional rights to petition government and to free speech, a person has a constitutionally protected right to submit testimony for legislative hearings. Assuming testimony is submitted in accordance with the Senate's rules, the Senate is not authorized by the constitutions, statute or Senate rules to withhold, edit or redact the content of the testimony or to delay its distribution without infringing on those constitutional rights and should not do so unless the right to petition government is outweighed by some other overriding right. We do not see an overriding interest in the specific case described herein to warrant censorship of the testimony.

2. Is the Senate responsible or liable for the content of written testimonies received from the public when making such testimonies available to senators and the public?

Answer: No. The testimony under consideration relates to health/treatment/medical issues. The Senate is not a covered entity under HIPAA¹ and is not required to comply with its privacy requirements. Further, while the Senate should, out of concern for public health and safety, refrain from disseminating or publishing (via the legislature's website) testimony that endangers public safety or incites illegal or violent activity, the Senate is not responsible for the content of testimony submitted by the public. Claims against the legislature and/or legislators arising out of testimony submitted would likely be barred by sovereign immunity or absolute legislative immunity.

3. Under what circumstances is the Senate allowed or required to redact information in written testimonies received prior to making such testimonies available to senators and the public? If the Senate is allowed or required to redact certain information in testimonies, then must the Senate review every testimony submitted? Can the Senate review testimonies on a selective basis?

Answer: The public has a constitutionally protected right to free speech and a right to petition the government. We know of no authority that allows or requires the Senate to redact or edit written testimony submitted by the public.

I. Factual Background

During a recent Senate hearing, a member of the public testified about her experience at A Place for Women, a limited service pregnancy center in Waipio. During her testimony, she disclosed certain personal health information about herself. Subsequently, prior to a Ways and Means committee hearing, a representative from A Place for Women submitted written testimony to refute the testimony previously submitted by the individual and included "information from an opinion exit survey following the aforementioned individual's visit to the pregnancy center."

¹ HIPAA refers to the Health Insurance Portability and Accountability Act of 1996.

The representative from A Place for Women said that her testimony was submitted in advance of the committee deadline but that it was not posted or distributed to committee members prior to the hearing. Later, at a meeting at the Senate president's office, she was told that her testimony was withheld "due to a potential violation of the HIPAA Privacy Rule." Other testimony related to this issue that was submitted in advance of the committee deadline was not posted until 5 days after the Ways and Means hearing.

II. The Constitutional Rights that Apply

A. The Public's Right to Petition the Government and Freely Express Its Opinions and Ideas

The Petition Clause, which is part of the First Amendment of the United States Constitution, provides that:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Article I, Section 4 of the Hawai'i Constitution provides that:

No law shall be enacted respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press or the right of the people peaceably to assemble and to petition the government for a redress of grievances.

Both our federal and state constitutions protect the individual's right to free speech and the right to petition government.

To further protect these rights, in 2002 the Hawai'i Legislature enacted Act 187, entitled the "Citizen Participation In Government Act," which is codified at Hawaii Revised Statutes chapter 634F. In Act 187 the Legislature recognized "[c]itizen participation in government as an inalienable right essential to the survival of democracy" and that "[c]ommunication, testimony, claims, and arguments provided by citizens to their government are essential to wise government decisions and public policy, the public health, safety, and welfare, effective law enforcement, the efficient operation of government programs, the credibility and trust afforded government, and the continuation of America's republican form of government through representative

democracy." Act 187 is intended to "[p]rotect and encourage citizen participation in government to the maximum extent permitted by law" by protecting "any oral or written testimony submitted or provided to a governmental body during the course of a governmental proceeding," such as testifying before a legislative committee, and providing an expedited review and dismissal of lawsuits that are determined to lack substantial justification or are interposed for delay or harassment and that are solely based on the party's public participation before a governmental body.

B. The Legislature's Right to Set Its Procedural Rules

Article III, section 12 of the Hawai'i Constitution provides, in relevant

part, that "[e]ach house shall choose its own officers, determine the rules of its proceedings and keep a journal." Accordingly, the Senate and the House are authorized to adopt rules for their proceedings which include the hearings held on the various bills under consideration. The Senate's constitutional authority over the legislative process is vast and while the Senate and House may adopt rules for proceedings (for example, deadlines for submitting testimony or the number of copies of testimony to be submitted), neither the constitution, statute nor the Rules of the Senate authorize the Senate to alter or amend the content of any public testimony or to delay its distribution or publication on the internet. However, as explained below, because legislators are absolutely immune from lawsuits challenging their actions when acting in their legislative capacity, the ability to compel legislators to accept and post unredacted testimonies through a judicial order is unlikely.

III. Claims Against the Legislature and Legislators are Barred by Sovereign Immunity and Legislative Immunity

Whether an individual can sue for the posting of objectionable testimonies or whether the public or another branch of government can force the Legislature to receive and post testimonies without redaction is another aspect of this issue that must be addressed. The Legislature is protected by the sovereign immunity of the State and legislators enjoy absolute legislative immunity for their actions while engaging in legislative activities.

The Legislature is a co-equal branch of government with the Judiciary and the Executive branches and its authority over its legislative process is absolute. When the Legislature is engaged in legislative activity it enjoys the sovereign immunity of the state and its legislators enjoy absolute legislative immunity for its actions. See Greer v. Baker, 137 Hawai'i 249 (2016) (holding that Senator Baker is entitled to raise the defense of absolute

legislative immunity). The word "absolute" means "complete" or "outright." See *Websters Encyclopedic Unabridged Dictionary of the English Language 5* (1989). Similarly, those acting as an arm of the legislature, share the same immunity under the doctrine of absolute quasi-legislative immunity. See *Seibel v. Kemble*, 63 Haw. 516 (1981).

Given the immunity that the Legislature and legislators enjoy, it is doubtful that an individual can successfully bring an action against the Legislature for the posting of testimonies the individual finds objectionable. It is similarly doubtful that an action can be brought to compel the Legislature to stop redacting testimonies or posting them late.

IV. The Senate is Not a Covered Entity Under HIPAA

In the situation you describe, it is unclear what information from the opinion exit survey was included in the testimony submitted by the representative from A Place for Women. Based on your description, it appears that the testimony may have included certain protected health information that the Legislature would be required to withhold if it were a covered entity. The Senate is not a covered entity under HIPAA² and it is not subject to the restrictions on the disclosure of protected health information. Further, its testimony policy³ clearly puts the duty and responsibility on the testifier not to submit information the testifier does not want disclosed. If A Place for Women is a HIPAA covered entity and it disclosed protected health information in its testimony without first obtaining the requisite consent, it may be subject to liability, but HIPAA does not obligate the Senate to redact or withhold that testimony or delay its disclosure until after a hearing.⁴

² Covered entities include health plans, health care clearinghouses and health care providers that transmit any health information in electronic form in connection with certain specified transactions. See 45 C.F.R. § 160.103.

³ The Senate Testimony Policy provides that: "All testimony received by the Hawai'i Senate is posted on the Hawai'i Legislature's website, which is accessible to the public. Please do not include private information that you do not want disclosed to the public."

⁴ In the factual circumstances you describe, there is no mention of a request for copies of testimony or other government records. As a result, we do not believe the Uniform Information Practices Act (Modified) (Hawaii Revised Statutes chapter 92F) applies here. However, even if chapter 92F did apply, we believe that the individual privacy interest is outweighed by the constitutional interests.

V. CONCLUSION

Based on the Petition Clause of the United States Constitution and article I, section 4 of the Hawai'i Constitution, individuals have a constitutionally protected right to submit testimony for legislative hearings. Assuming the testimony is submitted in accordance with the applicable procedural rules prior to a legislative hearing, the Senate is not authorized by the constitutions, statutes or Senate rules to withhold, edit, or redact the content of the testimony submitted or to delay its distribution without violating the testifier's constitutional right of free speech. The Senate is not a covered entity under HIPAA and is not required to comply with HIPAA's privacy requirements. However, while the right to submit testimonies and have them posted are protected by the constitutions, enforcing those rights by a court order might be difficult given the immunities that the Legislature and legislators enjoy.

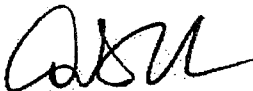
If you have further questions concerning these matters, please contact me.

Very truly yours,



Robyn B. Chun
Deputy Attorney General

Approved:



Douglas S. Chin
Attorney General