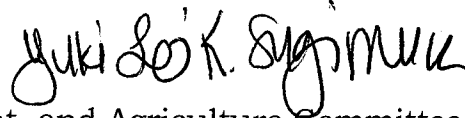


August 23, 2017

MEMO TO: PEA-3(1) File

F R O M: Yuki Lei K. Sugimura, Chair
Policy, Economic Development, and Agriculture Committee



SUBJECT: **TRANSMITTAL OF INFORMATIONAL DOCUMENT RELATING TO
2018 HAWAII STATE ASSOCIATION OF COUNTIES
LEGISLATIVE PACKAGE** (PEA-3(1))

The attached informational document pertains to Item PEA-3(1) on the Committee's agenda.

pea:ltr:003(1)amc02

Attachment

DAVID Y. IGE
GOVERNOR



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(808) 586-1500

July 20, 2017

The Honorable Gilbert S.C. Keith-Agaran
State Senator
State Capitol, Room 203
415 South Beretania Street
Honolulu, Hawai'i 96813

Dear Senator Keith-Agaran:

We write in response to your request for legal advice regarding section 281-53.5, Hawaii Revised Statutes (HRS), and how it impacts Maui nonprofit applications for liquor licenses for fundraising events. In your letter, you expressed concern about the Maui County Liquor Commission (MCLC) conducting criminal history record checks of the nonprofit applicants.

Hawaii Revised Statutes section 281-53.5 provides as follows:

- (a) The respective county liquor commissions may request a criminal history record check of an applicant for a liquor license in accordance with section 846-2.7. The criminal history record check, at a minimum, shall require the applicant to disclose whether:
- (1) The applicant has been convicted in any jurisdiction of a crime that would tend to indicate the applicant may be unsuited for obtaining a liquor license; and
 - (2) The judgment of conviction has not been vacated.
- For the purpose of this section, the criminal history disclosure made by the applicant may be verified by the liquor commission by means of information obtained through the Hawaii criminal justice data center. The applicant shall provide the Hawaii criminal justice data center with personal identifying information which shall include but not be limited to the applicant's name, social security number, date of birth, and gender. This information shall be secured only for the purpose of

conducting the criminal history record check authorized by this section.

(b) The applicant **shall** submit to the liquor commission:

(1) A statement signed under penalty of law as to whether the applicant has ever been convicted of a crime other than a minor traffic violation;

(2) Written consent to request and obtain criminal history record information for verification; and

(3) Permission to be fingerprinted.

(c) The liquor commission **shall** obtain criminal history record information through the Hawaii criminal justice data center on the applicant. The information obtained shall be used exclusively for the stated purpose for which it was obtained and shall be subject to applicable federal laws and regulations currently or hereafter in effect. (Emphases added.)

We note that section 281-53.5 contains the words "may" and "shall" and, thereby, may suggest an ambiguity as to whether a county liquor commission has discretion to request a criminal history records check of an applicant. However, in applying the following principles of statutory construction we believe that a county liquor commission has discretion to request a criminal history records check. In construing statutes, the foremost obligation is to ascertain and give effect to the intention of the legislature, which is obtained primarily from the language contained in the statutes themselves. *State v. Haugen*, 104 Hawai'i 71 85 P.3d 178 (2004). No sentence, clause or word of a statute may be construed as surplusage if a construction can be legitimately found which will give force to and preserve all the words of the statute. *State v. Taylor*, 49 Haw. 624 (1967). Where the words "shall" and "may" are used in close juxtaposition in a statute, each word carries its ordinary meaning. *Pele Defense Fund v. Puna Geothermal Venture*, 8 Haw. App. 203, 797 P.2d 69 (1990). In *Puna* the court determined that where a statute uses the words "shall" and "may" throughout, we are to give the word "may" its ordinary meaning.

The Honorable Gilbert S. C. Keith-Agaran
July 20, 2017
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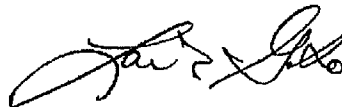
Applying these principles of statutory construction, we advise that the MCLC has discretion to request a criminal history records check. Section 281-53.5 provides that the respective county liquor commissions **may** request a criminal history record check of an applicant for a liquor license. The term, "may" is permissive and therefore the MCLC has the authority to implement that discretion through rule-making. We read the mandatory provisions of HRS § 281-53.5 (b) to be mandatory submissions to be furnished at the time of application and (c) to mean that if a criminal history record check is conducted, it must be done through the Hawaii Criminal Justice Data Center.

The MCLC has exercised its discretion to conduct the checks by adopting administrative rules. We understand however that the MCLC has recently approved a change to its administrative rule and removed the requirement that all nonprofit board members submit to the criminal history background checks. The MCLC has limited this requirement to the executive director and a nonprofit officer.

In conclusion, we advise that while section 281-53.5, HRS, does not mandate a criminal history record check, the MCLC, by rule, has the discretion to make that a requirement. Administrative rules, like statutes, have the force and effect of law. *See State v. Kotis*, 91 Hawai'i 319 (1999). Through its rulemaking authority, however, the MCLC has limited the criminal history record check requirement to the executive director of a nonprofit organization and a nonprofit officer.


I hope this response adequately addresses your question.

Sincerely,



Lance M. Goto
Deputy Attorney General

APPROVED:



Douglas S. Chin
Attorney General