



CITY COUNCIL
 CITY AND COUNTY OF HONOLULU
 530 SOUTH KING STREET, ROOM 202
 HONOLULU, HAWAII 96813-3065
 TELEPHONE: (808) 768-5010 • FAX: (808) 768-5011

Duke Bainum

Councilmember, District V
Chair, Public Infrastructure Committee
 Phone: (808) 768-5005 / Facsimile: (808) 768-5011
 Email: dbainum@honolulu.gov
 Web: www.honolulu.gov/council/d5

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March 23, 2009

TO: Councilmember Gary Okino
 Chair, Transportation and Planning Committee

FROM: Councilmember Duke Bainum *DB*

SUBJECT: Requested Amendment to Bill 4, CD-1 (2009)

As a follow-up to the public testimony at the March 18th Council meeting, relating the Bill 4 (2009), I would like to request that your committee consider amending Bill 4 to include an exemption for “amateur radio operators using two-way radios and who are licensed by the Federal Communication Commission.” I found the testifiers comment very compelling and in order to accommodate their service to the community I would support this exemption from the ban on the operation of mobile electronic devices while operating a motor vehicle. I leave it to your discretion as to whether this exemption should only apply in times of emergency.

On this same topic, I received the attached letter from Guy Archer indicating that the there may be a preemption issue related to regulating radio operators licensed by the FCC. I would like to request that your committee look into this as it could impact any actions we might take.

An additional concern arose at the hearing in that I believe the Prosecutor testified that a person would be “operating a motor vehicle” simply by sitting on the side of the road with the engine running. If this is indeed included in the definition of “operating a motor vehicle” I would like to urge the committee to refine this definition to exclude cars that are pulled over to the side of the road and not actively “driving.”

Thank you for your attention to this, and if you have any questions related to this request please give me a call.

Attachment: Letter from Guy Archer

2499 Kapiolani Blvd
Suite 3405
Honolulu, HI 96826
March 19, 2009

Councilman Duke Bainum
Honolulu City Council
Honolulu Hale
Honolulu, HI 96813

Re: Bill No. 4 (2009) Relating to the Use of Electronic Devices

Dear Councilman Bainum:

I have an FCC General license to operate HAM transceivers, am a board member of Emergency Amateur Radio Club Honolulu, and since 1974 a licensed Hawaii attorney. The Amateur Radio Service has ably served this nation in times of emergency such as hurricanes.

In reviewing proposed Bill 4 (2009) prohibiting the use of certain electronic devices while operating a motor vehicle, I am concerned with paragraph (b):

The use of a mobile electronic device for the sole purpose of communicating with emergency responders while in the performance of their official duties shall be an affirmative defense to this ordinance.

As you undoubtedly know, amateur HAM radio operators are licensed by the Federal Communications Commission (FCC) to operate transceivers on various radio bands including VHF, UHF, and high frequency. In the United States, the FCC is the agency responsible for nongovernmental and nonmilitary stations. Title 47 C.F.R. governs telecommunications; and Part 97 thereof governs the Amateur Radio Service. The foregoing federal law and FCC regulations evidence intent by the federal government to occupy this area of the law. Federal law appears to preempt state and municipal government with respect to regulating radio operators licensed by the FCC.

Instead of an "affirmative defense," Bill No. 4 should grant an exemption for FCC licensed radio operators. I recommend consultation with your Corporation Counsel regarding the federal preemption issue.

Very truly yours,


Guy Archer