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## HAWAII STATE ETHICS COMMISSION

State of Hawaii · Bishop Square, 1001 Bishop Street, ASB Tower 970 · Honolulu, Hawaii 96813  
*50<sup>th</sup> ANNIVERSARY 1968-2018*

Committee: Committee on Ways and Means  
Bill Number: S.B. 2735 SD1, Relating to the Independence of the Office of Information Practices  
Hearing Date/Time: February 14, 2018, 10:00 a.m.  
Re: Testimony of the Hawaii State Ethics Commission **SUPPORTING THE INTENT** of S.B. 2735 SD1

Dear Chair Dela Cruz and Committee Members:

The Hawaii State Ethics Commission (“Commission”) supports the intent of S.B. 2735 SD1 as it relates to additional resources for the Office of Information Practices (“OIP”).

The Commission frequently consults with OIP on matters relating to the Sunshine Law and the Uniform Information Practices Act, and consistently receives timely, high-quality guidance on matters affecting the Commission’s operations. To that end, the Commission supports legislation that would provide OIP with additional resources to fulfill its important mission.

Thank you for your continuing support of the Commission’s work and for considering the Commission’s testimony on S.B. 2735 SD1.

Very truly yours,

Daniel Gluck  
Executive Director and General Counsel

# 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 Ways and Means

From: Cheryl Kakazu Park, Director

Date: February 14, 2018, 10:00 a.m.  
State Capitol, Conference Room 211

Re: Testimony on S.B. No. 2735, S.D. 1  
Relating to the Independence of the Office of Information Practices

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Thank you for considering this bill, which the Office of Information Practices (“OIP”) strongly supports.

OIP is the single statewide agency that administers two important government accountability and transparency laws providing the public with access to information: the Uniform Information Practices Act (UIPA) regarding open records and the Sunshine Law regarding open meetings. As a neutral third party, OIP provides uniform advice, training, and dispute resolution to the general public and **to all state and county agencies, including the state attorney general, county corporation counsels, the Judiciary, the Legislature, all Executive Branch agencies, and independent entities** such as the University of Hawaii and the Office of Hawaiian Affairs. At times, OIP’s decisions may conflict with the positions taken by the attorneys for government agencies, including the Governor’s office, which is why it was separated from the Attorney General’s office in 1998 and is now placed, for administrative purposes only, within the Department of Accounting and General Services (DAGS).

While OIP is an independent agency, its Director is currently appointed solely at the Governor's discretion under section 92F-41(b), HRS. Once appointed, the Director may employ any other personnel that are necessary, including attorneys and staff. HRS § 92F-41(d).

Although he has never sought to influence OIP's decisions, Governor Ige recognizes the potential for OIP's independence to be compromised by undue political pressure that could be exerted upon the Director and consequently, upon the staff. **To protect OIP's independence and neutrality and to promote the public's trust in government, the Governor is willing to give up a significant portion of his currently unfettered power to appoint, discharge, and compensate the OIP Director. This bill was initiated by the Administration, in order to remove the potential perception of undue political influence over this important statewide agency that protects the public's right to government transparency and accountability.** Besides removing the potential for undue political influence over OIP's decisions, **the bill would also promote stability for OIP and help to retain its institutional memory and staff**, whose concerns about job security will be allayed.

The bill proposes to do so by authorizing the Governor to continue to nominate the OIP Director, but **making the appointment subject to the advice and consent of the Senate. The bill also grants the OIP Director the same protections of a fixed term, good cause for removal, and statutorily set compensation afforded to other heads of good government agencies**, so that OIP can make decisions that may be politically unpopular, without fear that jobs will be placed in jeopardy. The bill would **set the Director's term to at six years, which is the same as the statutorily set terms of the State Ombudsman and the Legislative Reference Bureau's (LRB) Director, and two years less than**

**the State Auditor's 8-year term under the State Constitution.** The Governor could remove the OIP Director, but only for cause after due notice and public hearing, which is similar to the removal provisions for the Auditor, Ombudsman, and LRB Director who require "cause" or "neglect of duty, misconduct or disability," and after 2/3 vote of the Legislature (which is also the appointing authority) in joint session for removal.

Like the statutorily set compensation for other good government officials (including the State Ethics Commission's Executive Director), the original bill proposed compensation for the OIP Director that would have been at the same level as the Director of the Department of Health (DOH), as established by the Commission on Salaries. Perhaps because this was not adequately explained by OIP earlier, **S.D. 1 amended the bill to provide a lower salary for the OIP Director**, which is pegged to the level for Tier One deputy directors.

**OIP, however, has broader jurisdiction than comparable good government agencies**, as referenced above and outlined in the attached Good Government Agencies Comparison Chart. Moreover, unlike other good government agencies, **OIP's substantive work must be performed by licensed attorneys, so its Director should also be a licensed attorney to oversee OIP's legal work.** As OIP must compete with state, county, and independent agencies to recruit and retain its attorneys, **the lower salary level in S.D. 1 would effectively limit the salary levels for OIP's staff attorneys and make it more difficult to recruit and retain attorneys.** Consequently, OIP respectfully requests that this Committee return to the bill's original language that would have pegged the Director's salary to be the same as that for the other good government directors, which is based on the DOH Director's salary as set by the Commission on Salaries.

In conclusion, **this bill is not about any individual, but is about protecting the independence and integrity of an important open government agency that ensures the public's right to accountability and transparency in government.** Because this bill will significantly help to remove the potential for political control over OIP and treat the OIP Director similarly to other open government agency heads, **OIP respectfully urges the passage of Senate Bill 2735, and amend it to provide for the same compensation as the other good government directors.** Thank you for considering OIP's testimony.

## GOOD GOVERNMENT AGENCIES COMPARISON CHART

Office/HRS/Constit.	Jurisdiction	Term	How Appointed	How Removed	Salary
<b>OIP Director</b> HRS 92F-3, -41, -42; HRS 92-1.5, -2, -10	State, counties (including Mayors and Councils), 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	At will	Governor's discretion	Governor's discretion	Governor's discretion
<b>Auditor</b> Constit. Art. VII, Sec. 10; HRS 23-1, -2, -3, -8	State and its political subdivisions, except Legislature	8 yrs	Legis. by maj vote of each house in jt session	2/3 vote in jt session, for cause May be removed by 2/3 vote in jt session "at any time for cause"	Same as DOH Director Cannot be diminished during term
<b>Ombudsman</b> 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	6 yrs	Legis. by maj vote of each house in jt session	2/3 vote in jt session Legis. may remove "but only for neglect of duty, misconduct, or disability"	Same as DOH Director Cannot be diminished during term

<b>LRB Director</b> HRS 23G-1, -2	Serves Legislature	6 yrs	Legis. by maj vote of each house in jt session	2/3 vote in jt session Legis. may remove "but only for neglect of duty, misconduct, or disability"	Same as DOH Director Cannot be diminished during term
<b>State Ethics Exec Dir.</b> HRS 84-2, -3, - 35	State only: all nominated, appointed, or elected officer, employee, and candidate to elected office, but excluding justices and judges	At will	State Ethics Commission's discretion	May be removed "at pleasure" as Commission "deems necessary for the performance of its functions"	Same as DOH Director
<b>State Campaign Spending Commission Executive Director</b> HRS 11-314(12)	Candidates	At will	Campaign Spending Commission's discretion	Campaign Spending Commission's discretion	Campaign Spending Commission's discretion
<b>Chief Election Officer</b> HRS 11-1, -1.6,	Elections	At will	Elections Commission's discretion	Elections Commission's discretion	Not to exceed 87% of DHRD Director's salary

THE CIVIL BEAT  
LAW CENTER FOR THE PUBLIC INTEREST

700 Bishop Street, Suite 1701  
Honolulu, HI 96813

Office: (808) 531-4000  
Fax: (808) 380-3580  
info@civilbeatlawcenter.org

Senate Committee on Ways & Means  
Honorable Donovan M. Dela Cruz, Chair  
Honorable Gilbert S.C. Keith-Agaran, Vice Chair

**RE: Testimony Opposing S.B. 2735 SD 1, Relating to  
the Independence of the Office of Information Practices**

Hearing: February 14, 2018 at 10:00 a.m.

Dear Chair and Members of the Committee:

My name is Brian Black. I am the Executive Director of the Civil Beat Law Center for the Public Interest, a nonprofit organization whose primary mission concerns solutions that promote governmental transparency. Thank you for the opportunity to submit testimony **opposing S.B. 2735 SD 1 as currently drafted** because it fails to balance the OIP director's independence with the need for public oversight of the agency.

As the designated agency to interpret Hawaii's public records and open meetings laws, OIP better serves the public if it is neutral. It undermines public confidence in these transparency laws if OIP is perceived as tailoring its decisions to satisfy the Governor for purposes of job security. An OIP director's tenure thus should not be subject to the Governor's whim.

But *removal "for cause after due notice and public hearing" is the wrong standard*. If Hawaii's elected representatives agree that the OIP director is not performing his or her role as intended, the director should be removed. **The State should not waste resources on a prolonged investigation and contested case proceeding.**

Moreover, there are no metrics for a Governor to assess whether "cause" exists for removal. The OIP director's duties are not objectively measured.<sup>1</sup> Absent proof of a crime or disability, a Governor may have difficulty proving "cause" in a contested case

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<sup>1</sup> For example, in light of present concerns about lengthy delays at OIP, several bills are currently pending to translate the legislative intent for OIP as an "expeditious" forum for resolution of public access complaints into an objective six-month deadline. *See, e.g., S.B. 3092 & Stand. Comm. Rep. No. 2249; see also Civil Beat Law Center, A National Comparison: OIP Delays Are Staggering* (Feb. 2018) (finding that, despite the highest staffing per capita, OIP has the worst delays in the country among its peer agencies); Civil Beat Law Center, *Breaking Down Hawaii's Broken System for Resolving Public Access Disputes* at 4-6 (Feb. 2017) (explaining that OIP currently is taking longer to issue, and issuing fewer, decisions than prior years despite a downward trend in newly filed complaints).



proceeding. But such difficulty of proof does not advance the State policy of public access and government accountability. OIP provides a *public* service. Thus, the OIP director should not be so far removed from *public oversight* as to have a virtually guaranteed six-year tenure even if the public perceives the director as underperforming.

**The OIP director should be removable by the Governor with the advice and consent of the Senate.** Such a process ensures that the OIP director will not be removed from office at the mere whim of the Governor. And, through the normal legislative process, both the director and the public will have an opportunity to be heard regarding the proposed removal. This public process balances the independence of the OIP director with the need for public trust that the office is performing as intended.

Thank you again for the opportunity to testify.



Feb. 14, 2018

Sen. Donovan Dela Cruz  
Senate Ways and Means Committee  
State Capitol  
Honolulu, HI, 96813

Re: Senate Bill 2735

Chairman Dela Cruz and Committee Members:

We are opposed to this measure.

It would make it extremely difficult to remove a do-nothing or incompetent director of the Office of Information Practices by setting up an impossible-to-accomplish hearing process.

This bill is troublesome, and we ask that you file this bill.

Thank you,

Stirling Morita  
President, Hawaii Chapter of the Society of Professional Journalists