

LATE

OFFICE OF INFORMATION PRACTICES

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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.

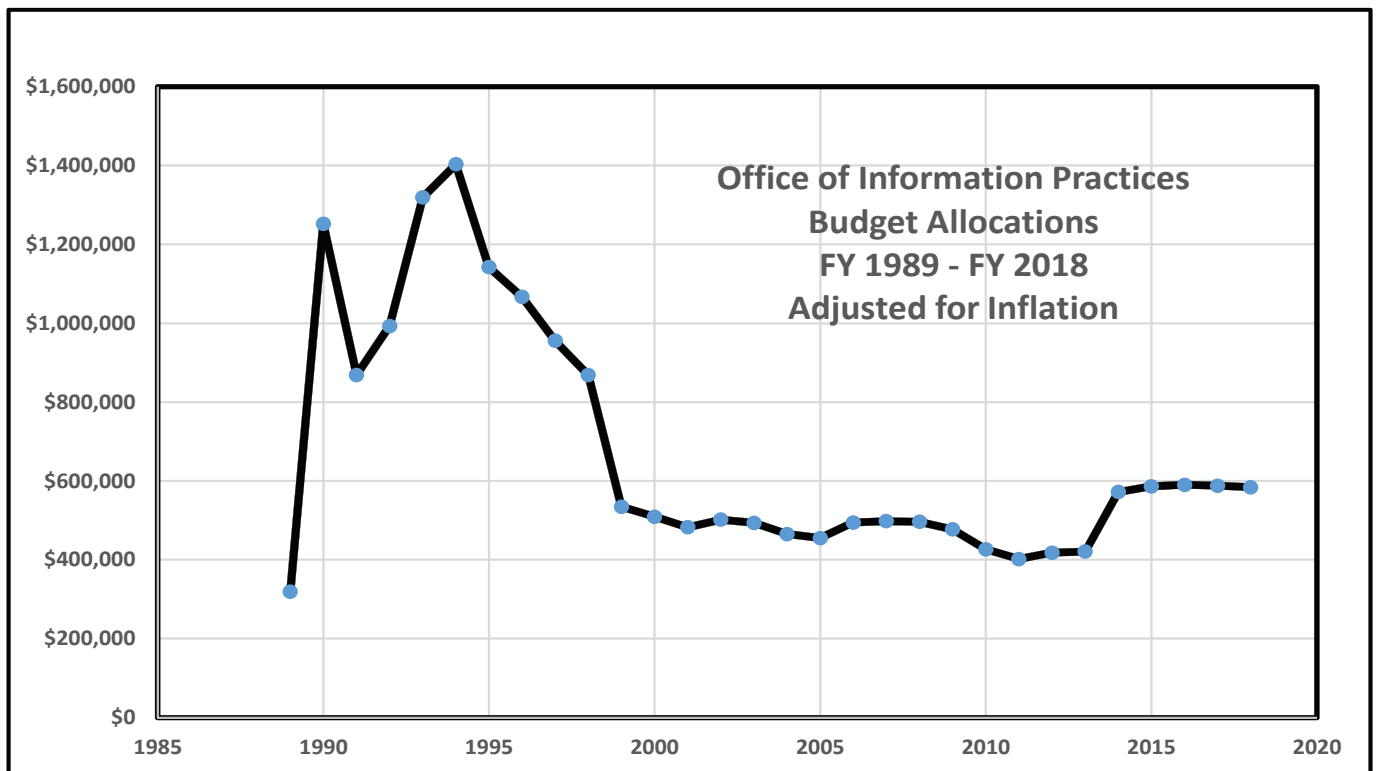


Figure 2



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
FY19	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.

	<u>2013</u>	<u>2014</u>	<u>2015</u>	<u>2016</u>	<u>2017</u>	<u>2018</u>
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