

OFFICE OF INFORMATION PRACTICES

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To: Senate Committee on Government Operations

From: Cheryl Kakazu Park, Director

Date: January 31, 2019, 2:45 p.m.
State Capitol, Conference Room 225

Re: Testimony on S.B. No. 1057
Relating to Open Government

Thank you for the opportunity to submit testimony on this bill. The Office of Information Practices (“OIP”) supports the intent of this bill for faster resolution of OIP’s formal cases, but **requires long-term, dedicated funding to retain OIP’s existing personnel and to hire, train, and equip additional personnel to carry out the statutory requirements being imposed by the proposal, as well as sufficient time to train new personnel. OIP opposes setting a statutory deadline without providing the necessary long-term, dedicated funding and training time for additional personnel.**

OIP questions the need for this bill for the following reasons.

First, OIP is already expeditiously resolving 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.

Second, OIP already has its own goal to resolve all formal cases within 12 months of filing, if they are not in litigation or filed by requesters who have had two or more cases resolved by OIP in the preceding 12 months. (See Year 5 Action Plan on page 13 of the [OIP's 2018 Annual Report](#) posted on the Reports page at oip.hawaii.gov.) OIP hopes to achieve this goal by FY 2023, depending on whether it has the funding to retain its existing personnel, hire and train additional personnel and does not experience a substantial increase in the number and complexity of new cases filed with OIP each year.

Third, OIP cannot accomplish this bill's more ambitious goals without substantial additional funding and positions to reverse decades of underfunding OIP. (See Figures 2 and 3 of attached excerpt from [OIP's 2018 Annual Report](#), pages 16 and 17.) OIP was created 31 years ago in 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. (See Figure 3 in the attached excerpt from [OIP's 2018 Annual Report](#).) In 1998, OIP was given the additional responsibility of administering the Sunshine Law, which essentially doubled its work, but OIP's personnel were slashed in FY 1999 to only 8 positions and its budget was cut to \$354,505. In FY 2010-11, OIP personnel were subject to furloughs and supplemental leave without pay. It was not until FY 2014 that OIP was authorized an additional attorney position. **Currently, OIP has 8.5 FTE authorized positions and a legislative appropriation for FY 2019 of \$699,837, which is about half the positions, \$127,700 less in unadjusted dollars, and less than 50% of what it had on an inflation-adjusted basis in FY 1994. In short, OIP has been doing double the work with half the resources that it had 25 years ago.**

Fourth, OIP's backlog is directly related to new formal cases filings, which is beyond OIP's control. Figure 4 in [OIP's 2018 Annual Report](#) on page 19 (attached) shows the number of formal cases that were new, closed, and outstanding from FY 2011 through FY 2017. Please note how **the red dotted line representing the formal case backlog closely tracks the blue dotted line of new case filings.** The blue dotted line shows the number of new formal cases that were filed each year, which has substantially increased since FY 2011, with extraordinary spikes in FY 2015 and FY 2017 that tracked spikes in the red line of pending cases. Between FY 2011 to FY 2017, OIP saw a 168% increase in new cases filed annually. Fortunately, OIP received a respite in repeat requester cases in FY 2018, so its new case filings have gone down to more normal levels. **This year, however, OIP fears another spike in new appeals as requesters are being urged to make more record requests due to the recent Hawaii Supreme Court decision in Peer News LLC v. City and County of Honolulu, No. SCAP-16-0000114, 2018 WL 6715464 (Haw. Dec. 21, 2018) (Peer News), which overturned nearly three decades of OIP opinions recognizing the deliberative process privilege under the frustration exception to disclosure under HRS § 92F-13 (3).**

Fifth, to resolve cases faster, OIP needs more attorneys. OIP was able to resolve more formal cases after it was authorized an additional attorney position in FY 2014. Although OIP's case resolution numbers decreased in FY 2017 and 2018 when it was drafting new administrative rules and providing informational briefings to the public, OIP still resolved 42% more cases in FY 2018 (201 cases) than it did in FY 2013 (142 cases) before the addition of another attorney.

Sixth, OIP has significantly reduced its case backlog so far this year. While OIP had a spike in new formal cases in FY 2017, those filings decreased by 35% in FY 2018 and since returned to more normal levels, which has allowed OIP to reduce its formal case backlog. OIP ended FY 2018 with 131 pending cases, which included 54 filed in FY 2018. In December 2017, OIP's backlog stood at 147 pending cases. **For this FY 2019, OIP's formal case backlog as of December 2018 was 100 cases, a 47% decrease from a year ago.** OIP will never have zero cases outstanding.

Seventh, but for the existing backlog, OIP is timely resolving more new cases than what this bill proposes. If the 182 new cases filed in FY 2018 had been evenly distributed throughout the year and resolved on a "first in-first out" basis, there would have been over 15 cases filed each month for a total of 91 cases per six-month period, and OIP should have been left with 91 pending cases at the end of FY 2018. Not counting the 72 pre-FY 2018 cases that it resolved, **OIP actually resolved 129 of the 182 new cases that were filed FY 2018 (70.8%) and ended the year with only 53 pending formal cases from FY 2018, instead of the 91 that it theoretically should have had pending.**

Eighth, not only has OIP substantially reduced its formal case backlog, it has kept down the age of 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 it is still pending in court litigation; 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.

Ninth, most of the "backlog" consists of appeals and requests for opinions, which are typically resolved in opinions that necessarily take much longer to resolve than other cases. With the 2012 amendments to the

UIPA and adoption of new administrative rules for appeals to OIP, OIP is well aware that its decisions may have precedential value and could be appealed to the courts. Some of what OIP called its opinions in the past were not held to the higher standards that OIP has now, which makes comparisons to years prior to 2012 difficult. As far as comparisons to other states, OIP has found that other states' open records decisions are not generally comparable to the formal and memorandum opinions OIP issues for its formal cases; instead, other states' decisions are often very brief and more comparable to OIP's correspondence and emails providing informal advice as part of the Attorney of the Day (AOD) service, which OIP does not classify as opinions. OIP's formal and memorandum opinions now undergo careful investigation, research, drafting, and review to be able to pass judicial scrutiny and not require OIP to intervene in appeals to the courts, and thus take much more time to resolve than other types of services that OIP provides.

Tenth, to focus only on opinions and formal cases ignores all the other work that OIP must do and its timeliness in resolving 95% of cases in the same year that they were filed. (See Figure 1 in [OIP's 2018 Annual Report](#) on page 6.) Formal cases actually constituted only 16% of the 1,127 total requests for OIP's services received in FY 2018, and of this number, **nearly 71% (129 of 182 cases) of formal cases were resolved in the same year that they were filed.** Moreover, OIP received 945 informal requests for services in FY 2018, which constitute 84% of total requests for services; although OIP considers these requests informal, the level of analysis and advice OIP offers through these requests is comparable to the "formal" advisory opinions offered by states such as New York. OIP's informal requests are typically resolved by OIP the same day through the Attorney of the Day (AOD) service, which helps to educate people and to proactively prevent or quickly resolve disputes. **In summary, in FY 2018, OIP**

resolved over 95% (1,074 of 1,127) of total formal and informal requests in the same year they were filed, and about 84% (945 of 1,127) the same day they were filed.

The formal and informal requests for OIP's services come from state, county and independent agencies, the media, organizations, and the general public, and do not include OIP's other work, such as creating and revising **training materials; conducting **live training**; monitoring and testifying on **legislation**; monitoring **lawsuits** regarding the UIPA, Sunshine Law, or OIP; keeping the public, boards, and agencies informed via **communications** like What's New emails and media interviews; drafting and explaining new **administrative rules**; and initiating **special projects** on its own. (See Figure 1 on page 6 in from [OIP's 2018 Annual Report](#).)** FY 2018 was an especially busy year for OIP because of the tremendous work required to revise OIP's administrative rules. Even before formal rulemaking procedures were required, OIP explained its draft rules statewide in person, online, and on televised informational briefings to obtain public and agency input, and is still waiting for the Attorney General's office to complete its legal review before OIP can make revisions and go through the formal rulemaking process. After the hearing and if new rules are adopted, OIP must create new training materials, including a revised UIPA Record Request Log, and intends to conduct statewide training to educate the state and county government agencies about the new rules.

Eleventh, OIP cannot do its work without its experienced and dedicated staff who help provide neutral and free dispute resolution to all state, county, and independent agencies and boards, as well as the general public, and **OIP's first priority is to provide salary parity to retain its existing staff.** As the single statewide agency administering the UIPA and Sunshine Law,

OIP provides uniform advice and training to other government and private sector attorneys, government employees, board volunteers and the general public. OIP's Director and attorneys have been licensed to practice law, on average, for over 24 years, and have 4 to 24 years of experience at OIP itself. OIP's administrative staff also have special expertise, and one has been with OIP for over 22 years. OIP's personnel provide institutional memory dating back to when OIP, through the UIPA, was being created by the Legislature in 1988.

Despite the Legislature's generosity last session in authorizing an additional \$100,000 to increase the pay for OIP's employees, OIP's salaries still remain far below that of comparable government attorneys and administrative staff, which threatens OIP's ability to retain its valued employees and institutional memory. OIP provides assistance to all state, county and independent agencies in the Executive, Legislative, and Judicial branches, as well as to the general public, with only 8.5 FTE positions, comprised of one Director, five attorneys, and 2.5 FTE administrative staff. Over the past few years, OIP has lost five attorneys and staff in large part due to its substandard salaries in comparison to those at other government agencies that would gladly hire OIP's experts.

Consequently, again this session, **the Governor has submitted a biennial budget request for \$100,000 for AGS 105 to help provide salary parity for OIP's personnel, which we hope that this Committee will strongly support.** Without these additional funds, OIP risks losing experienced personnel and institutional memory, which would erode its ability to resolve cases in a timely manner. **Additionally, the Governor's budget request for AGS 105 for FY 2020 also includes \$6,200 for new computers to replace OIP's aged**

equipment. The Governor's budget does not include a request for additional OIP personnel.

Twelfth, OIP would need even more personnel, equipment, and additional funding over and above this year's budget request to fulfill the bill's mandate. And even with additional funding, there needs to be a dedicated source of funding to ensure that OIP will continue to have the resources it needs to fulfill the proposed statutory mandate for the coming decades. As OIP has already learned from decades of underfunding, without a dedicated funding source, appropriations could be reduced and necessary increases may not be made in future years, despite the ravages of inflation or increases in the number, complexity, or frivolousness of new case filings.

Finally, the July 1, 2019 effective date of this bill is unrealistic. Even if OIP received new appropriations and a long-term, dedicated funding source, **it still need to hire and train additional personnel to be able to meet the much shorter six-month case resolution deadline proposed by this bill,** With new employees, OIP's productivity may initially decrease, because experienced employees will have less time to work on their own cases while training inexperienced employees. **Consequently, if the bill moves forward, the effective date for the mandate should be delayed three years, while the appropriations and personnel authorizations should remain effective July 1, 2019.**

If additional resources are not provided and this bill is passed, then there are potential unintended consequences and suggestions for changes to consider:

1. **OIP's training and many other functions may have to be curtailed, which could have the net effect of lowering agency compliance with the open government laws and increasing the number of new cases filed due to more disputes.**

2. Without additional personnel resources or the time to train them, **the quality of OIP's opinions may be vastly lowered to conclusory "you win, you lose" decisions lacking factual or legal reasoning, which could be more readily challenged in the courts and ultimately lead to greater strain on judicial resources, longer delays, and greater expense and less certainty for complainants.**

3. If the standard for written opinions is lowered, then **OIP's Attorney of the Day written and oral advice should be considered and counted as informal opinions, similar to other states, in meeting the new six-month goal.**

4. For OIP to resolve its cases faster, **additional resources should be provided to other government agencies, so that they can timely respond to OIP's investigations.**

5. Like Massachusetts, **OIP may have to reject the filing of complaints and close a file without any decision if complete information is not submitted at the time of filing.**

6. Like Minnesota, **OIP may have to deny additional opportunities to supplement requests for appeal once they have been filed.**

7. To be able to resolve cases quickly for Hawaii's citizens, legislative action would be needed to **eliminate or restrict cases that are filed by nonresidents.**

8. Like many other states, OIP will need to **control frivolous appeals or multiple requests made by repeat requesters, so that** a few people cannot monopolize OIP's services and delay resolution of cases filed by others.

9. OIP may have to **start charging for its opinions**. Minnesota charges \$200 if requesters want an opinion, and its opinions may be only two pages long.

10. Because OIP has no control over the time that a court would take to resolve a case in litigation, OIP will need new rules allowing it to **dismiss appeals that are affected by pending litigation**, rather than putting them on hold until the litigation is concluded to address any remaining issues within its jurisdiction.

In conclusion, a statutory mandate will not produce faster resolution of UIPA and Sunshine Law disputes unless OIP is provided with the additional personnel, equipment, dedicated funding, and time needed to retain experienced employees, preserve OIP's institutional memory, and train new employees to be able to resolve disputes within six months of filing. **Whether or not this bill is passed, what OIP really needs first is to retain its institutional memory and existing staff as proposed in the Governor's budget for AGS 105, which requests general funds of \$100,000 for salary parity and \$6,200 for computer equipment.**

Thank you for considering OIP's concerns.

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.

	2013	2014	2015	2016	2017	2018
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

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.

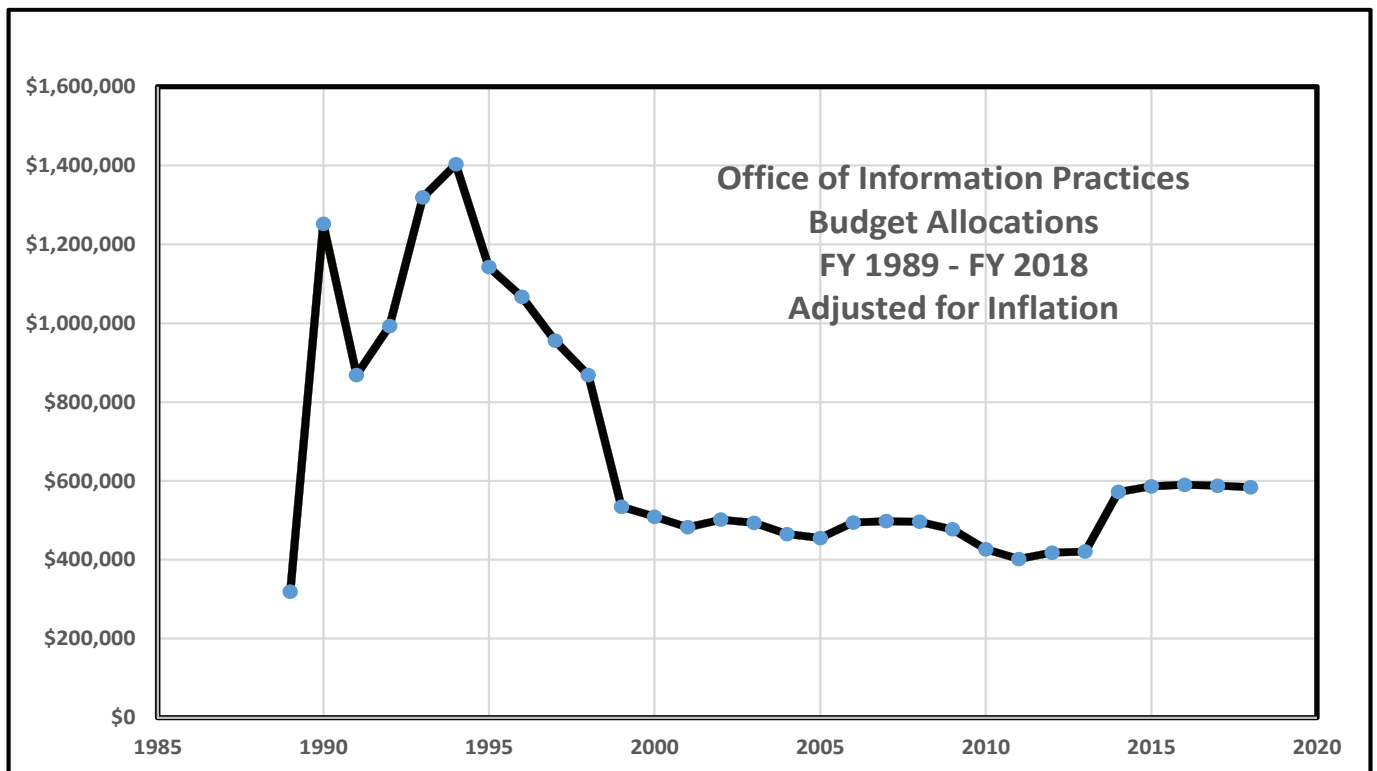


Figure 2



**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
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

*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



As **Figure 4** below shows, the number of new cases filed each year (represented by the blue dotted line) trends with the backlog, or number of outstanding cases at the end of the year (represented by the red dashed line). Thus, with the decrease in the number of new cases filed, there was a decrease in the number of outstanding cases. OIP resolved 192 cases in FY 2018, which is less than prior years, because it spent substantial time working on new administrative rules as well as training materials for extensive Sunshine Law revisions that took effect on July 1, 2018. OIP was still able to resolve its oldest cases, so that none of the cases outstanding at the end of FY 2018 were filed before FY 2016, except for one from FY 2015 that is in litigation and beyond OIP’s control. Moreover, OIP resolved

129, or nearly 71%, of the formal cases filed in FY 2018 in the same year. When the 945 AOD cases are counted, OIP resolved 95% (1,074) of total requests for OIP’s assistance in the same year that they were requested, and about 84% (945) on the same day.

What follows is a description of the different types of formal and informal requests for OIP’s assistance. OIP’s other duties, most of them statutorily mandated, are discussed in later sections of this report.

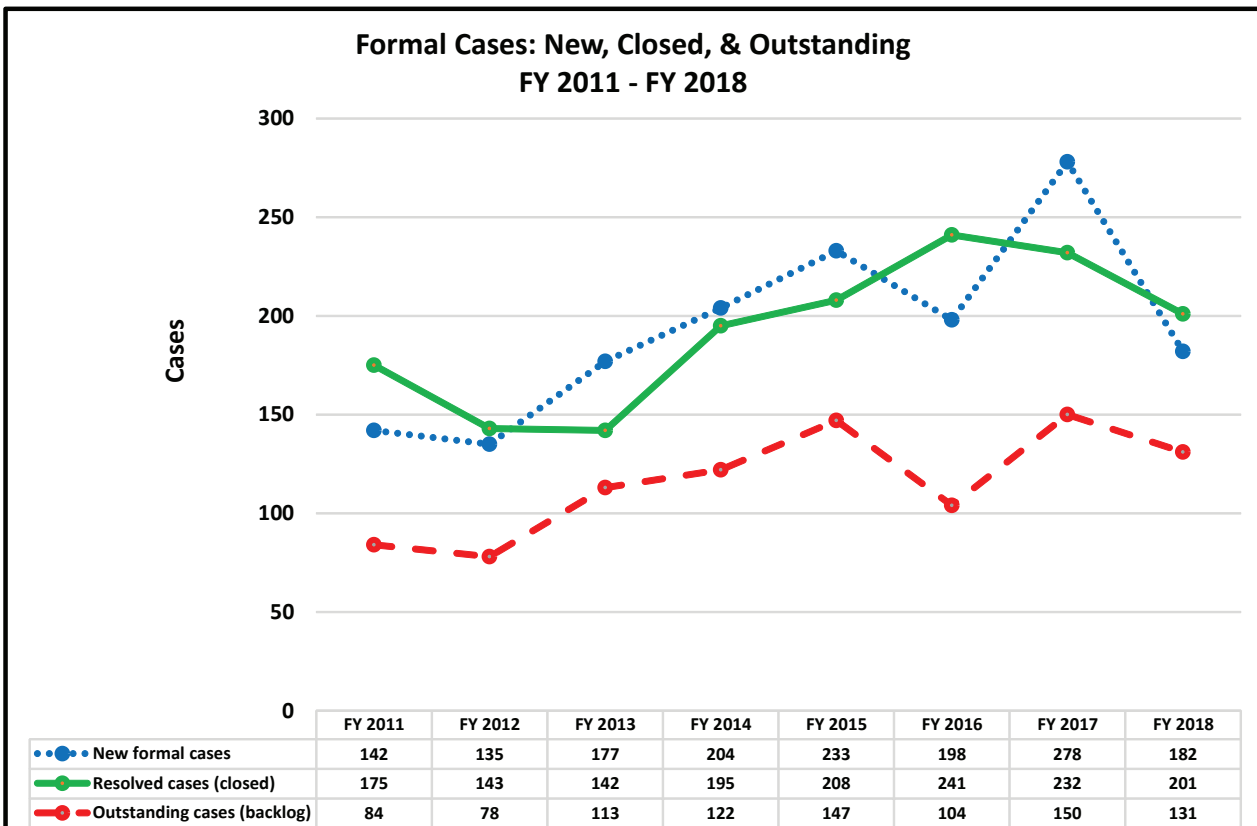


Figure 4

THE CIVIL BEAT
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Senate Committee on Government Operations
Honorable Laura H. Thielen, Chair
Honorable Lorraine R. Inouye, Vice Chair

RE: Testimony in Support of S.B. 1057, Relating to Open Government
Hearing: January 31, 2019 at 2:45 p.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 **supporting S.B. 1057**.

S.B. 1057 amends HRS § 92F-42 to require the Office of Information Practices (OIP) to resolve all public complaints regarding access to public records or open meetings within six months. This bill reinforces the legislative intent that OIP's review be "*expeditious, informal, and at no cost to the public.*"

OIP is not resolving complaints in an expeditious manner. Reviewing data from OIP, the Law Center discovered two years ago that time taken to resolve complaints has quadrupled in recent years, fewer complaints on average are being resolved each year, and OIP's backlog is trending upward despite a downward trend in new filings. Last year's analysis revealed that *only three of the 46 OIP decisions from 2015-2017 were issued in less than 2 years*. The Law Center's two prior reports, as well as OIP's responses, are posted at www.civilbeatlawcenter.org/resources.

The preliminary analysis for 2018 indicates that OIP's backlog has decreased to 83 pending matters as of January 1, 2019 (from 115 matters in January 2018). But, last year, OIP received the fewest new appeals in more than 15 years. As of January 1, OIP had twenty-eight appeals pending more than 2 years (7 more than 3 years); twenty-nine appeals more than a year; and twelve appeals more than six months.

When we advise members of the public regarding options for resolving UIPA or Sunshine disputes, the Law Center must explain that an appeal to OIP will take at least a year, but closer to two years or more. Some give up. Others who move forward with OIP often complain later that the information they sought is no longer useful when OIP orders disclosure. Timely access is critical.

A six-month deadline is critical to provide the intended "expeditious" review of complaints. Thank you again for the opportunity to testify in **support** of S.B. 1057.



Jan. 31, 2019

Sen. Laura Thielen
Senate Government Operations Committee
State Capitol
Honolulu, HI.

Re: Senate Bill 1057

Sen. Thielen and Committee Members:

We agree with this bill. Time delays with the Office of Information Practices are crippling discussions on important issues and frustrating publication or airing of news media stories.

The delays of about a year were never intended when the office was created. OIP was envisioned as a way to facilitate participation in the government process, not frustrate it.

We hope you will pass this bill.

Thank you for your time and attention,

Stirling Morita
President
Hawaii Chapter SPJ

SB-1057

Submitted on: 1/28/2019 10:13:40 PM

Testimony for GVO on 1/31/2019 2:45:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
lynne matusow	Individual	Support	No

Comments:

For too long the Office of Information Practices has taken what seems forever to resolve public complaints. Often, by the time they render a decision, it is too late. This bill is a perfect first step in giving the OIP the respect it deserves, and makes it easier for transparency in government. I speak in strong support of this bill and pray it becomes law.

lynne matusow

SB-1057

Submitted on: 1/30/2019 2:36:12 PM

Testimony for GVO on 1/31/2019 2:45:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Melodie Aduja	Testifying for O`ahu County Committee on Legislative Priorities of the Democratic Party of Hawai`i	Support	No

Comments: