

# S.B. NO. 1038

JAN 27 2021

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## A BILL FOR AN ACT

RELATING TO THE OFFICE OF INFORMATION PRACTICES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1       SECTION 1. Section 92F-42, Hawaii Revised Statutes, is  
2 amended to read as follows:

3       "**§92F-42 Powers and duties of the office of information**  
4 **practices.** The director of the office of information practices:

5       (1) Shall, upon request, review and either rule or provide  
6 guidance on an agency denial of access to information  
7 or records, or an agency's granting of access;  
8 provided that any review by the office of information  
9 practices shall not be a contested case under chapter  
10 91 and shall be optional and without prejudice to  
11 rights of judicial enforcement available under this  
12 chapter;

13       (2) Upon request by an agency, shall provide and make  
14 public advisory guidelines, opinions, or other  
15 information concerning that agency's functions and  
16 responsibilities;

- (3) Upon request by any person, may provide advisory opinions or other information regarding that person's rights and the functions and responsibilities of agencies under this chapter;
- (4) May conduct inquiries regarding compliance by an agency and investigate possible violations by any agency;
- (5) May examine the records of any agency for the purpose of paragraphs (4) and (18) and seek to enforce that power in the courts of this State;
- (6) May recommend disciplinary action to appropriate officers of an agency;
- (7) Shall report annually to the governor and the state legislature on the activities and findings of the office of information practices, including recommendations for legislative changes;
- (8) Shall receive complaints from and actively solicit the comments of the public regarding the implementation of this chapter;
- (9) Shall review the official acts, records, policies, and procedures of each agency;
- (10) Shall assist agencies in complying with the provisions of this chapter;

1       (11)   Shall inform the public of the following rights of an  
2           individual and the procedures for exercising them:

3           (A)   The right of access to records pertaining to the  
4           individual;

5           (B)   The right to obtain a copy of records pertaining  
6           to the individual;

7           (C)   The right to know the purposes for which records  
8           pertaining to the individual are kept;

9           (D)   The right to be informed of the uses and  
10          disclosures of records pertaining to the  
11          individual;

12          (E)   The right to correct or amend records pertaining  
13          to the individual; and

14          (F)   The individual's right to place a statement in a  
15          record pertaining to that individual;

16       (12)   Shall adopt rules that set forth an administrative  
17           appeals structure which provides for:

18          (A)   Agency procedures for processing records  
19          requests;

20          (B)   A direct appeal from the division maintaining the  
21          record; and

22          (C)   Time limits for action by agencies;

- 1       (13) Shall adopt rules that set forth the fees and other  
2           charges that may be imposed for searching, reviewing,  
3           or segregating disclosable records, as well as to  
4           provide for a waiver of such fees when the public  
5           interest would be served;
- 6       (14) Shall adopt rules which set forth uniform standards  
7           for the records collection practices of agencies;
- 8       (15) Shall adopt rules that set forth uniform standards for  
9           disclosure of records for research purposes;
- 10      (16) Shall have standing to appear in cases where the  
11           provisions of this chapter or part I of chapter 92 are  
12           called into question;
- 13      (17) Shall adopt, amend, or repeal rules pursuant to  
14           chapter 91 necessary for the purposes of this chapter;  
15           and
- 16      (18) Shall take action to oversee compliance with part I of  
17           chapter 92 by all state and county boards including:
- 18           (A) Receiving and resolving complaints~~[+]~~, either by  
19               determining whether a violation occurred or  
20               providing guidance;
- 21           (B) Advising all government boards and the public  
22           about compliance with chapter 92; and

1 (C) Reporting each year to the legislature on all  
2 complaints received pursuant to section 92-1.5."

3 SECTION 2. Statutory material to be repealed is bracketed  
4 and stricken. New statutory material is underscored.

5 SECTION 3. This Act shall take effect upon its approval.

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INTRODUCED BY: 

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BY REQUEST

**Report Title:**

Uniform Information Practices Act; Sunshine Law; Office of Information Practices

**Description:**

Requires the Office of Information Practices to resolve open meeting and open record complaints through either a legal determination on whether a violation occurred or guidance on the relevant legal requirements.

*The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.*

JUSTIFICATION SHEET

DEPARTMENT: Department of Accounting and General Services, Office of Information Practices.

TITLE: A BILL FOR AN ACT RELATING TO THE OFFICE OF INFORMATION PRACTICES.

PURPOSE: For complaints to the Office of Information Practices (OIP) under the Uniform Information Practices Act or the Sunshine Law, allows resolution by providing informal guidance or making a legal determination.

MEANS: Amend section 92F-42, Hawaii Revised Statutes.

JUSTIFICATION: In recent legislative sessions, legislators and the public have inquired into the feasibility of OIP resolving some appeals in a less time-consuming way by offering relevant guidance instead of writing a full legal opinion as required under current law. In the 2019 legislative session, these inquiries ultimately led to the adoption of House Resolution No. 104, requesting OIP to conduct an experiment by offering quick, informal guidance on some appeals to see whether that would be sufficient to resolve the requester's concerns, while processing other appeals in its normal manner. OIP conducted the experiment as requested, concluding that offering guidance in the form of inclinations was sufficient to close some appeals. In the majority of appeals, however, no time was saved as the requester insisted on an opinion even after receiving OIP's inclination. Although agencies are often amenable to accepting OIP's inclinations in lieu of an adverse formal opinion, in some instances an agency would not proceed to disclose records or otherwise act without an opinion that it was required to follow absent a successful appeal to the court, particularly where a third party's

privacy issues or important government policy are implicated.

Rather than leaving it to the requester or agency to determine how a case should be resolved, it would have been far more effective if OIP had the statutory discretion to decide whether to provide an opinion or informal guidance. Opinions are important and necessary in some appeals, notably in those where OIP's formal determination is needed to require an agency to disclose records or take other specific action, or an important unsettled legal issue must be decided. In many other appeals, OIP believes informal guidance would be more suitable, less time-consuming, and more efficient in reaching the same result sooner. Current law, however, does not give OIP such discretion and requires OIP to make a full legal determination unless the requester agrees that the matter has been resolved by OIP's guidance.

OIP's success in fiscal year 2019-2020 towards eliminating its backlog is now being rapidly reversed. Unfortunately, fiscal year 2020-2021 budget restrictions and three recent vacancies, together with OIP's lack of statutory discretion in determining how it can resolve appeals, portend a return to the situation in which requesters may wait for many years before appeals can be resolved. It took over a decade since the 2008 recession for OIP to reduce its formal case backlog to an acceptable level, but only the first five months of fiscal year 2020-2021 and the unusual loss during that time of three of its 8.5 personnel, for OIP's backlog to grow by over 40 percent.

Exacerbating the situation is the anticipated retirement in 2021 of one of OIP's three remaining staff attorneys. Even if new attorneys are hired, it will take substantial time to train them, which will detract from the time that the experienced



attorneys will have to do their own work as well as their many other OIP duties, such as training boards if the Sunshine Law is amended to allow for remote meetings.

Additionally, when the Governor's emergency orders partially suspending the UIPA and Sunshine Law are eventually lifted and agency responses to the requests made while deadlines were suspended come due all at once, OIP may be faced with an onslaught of new appeals challenging agency delays in responding to record requests and alleged Sunshine Law violations.

Under the current and anticipated circumstances, OIP's backlog and the time that the public must wait for case resolution will inevitably continue to grow. Therefore, this proposal is essential to giving OIP much needed flexibility to handle its overwhelming caseload and to improve its efficiency within the constraints of its diminishing resources.

The proposal would not prevent any member of the public from making a complaint to OIP under the Uniform Information Practices Act or the Sunshine Law, and it would leave in place the requirement for OIP to review each such complaint. The change resulting from this proposal would simply be that OIP would now have the flexibility to resolve a complaint either by making a full legal determination or by offering guidance on the law's requirements, as appropriate based on the specifics of the complaint and OIP's staffing level.

Whether OIP issues an opinion or informal guidance, the requester always has the right to go to court for relief and need not exhaust administrative remedies or wait for an OIP opinion to do so.

Impact on the public: This bill would continue to allow members of the public to

make Uniform Information Practices Act and Sunshine Law complaints to the OIP, but OIP would have the option to resolve a complaint by the issuance of guidance to the requester and the board or agency, or by the issuance of a determination or ruling in the form of an opinion. This bill would give OIP the discretion to spend more of its limited time and resources on cases of broad public interest and less on cases involving repeat requesters needing informal guidance on their matters of personal concern. This bill does not affect the requester's right go to court, with or without an OIP opinion or informal guidance. It may, however, free OIP to more timely resolve cases with the same result in the form of an informal guidance rather than as an opinion.

Impact on the department and other agencies:

This bill would mean that an agency that is the subject of a Uniform Information Practices Act or Sunshine Law complaint might receive more timely guidance on relevant laws, which it may find preferable to a formal decision as to whether a violation has occurred. Because an agency is only required to disclose records under the UIPA based on a requester's appeal to OIP when "a decision is made by" OIP and "the decision is to disclose," this bill would not require an agency to disclose records based on OIP's guidance nor would it require courts to treat guidance as precedent. On the other hand, an agency may be reluctant to act without an OIP opinion, especially if it is concerned about a legal challenge by a third party if documents are disclosed or an important public policy is at stake. In appropriate cases, OIP would still issue a formal decision that could be judicially appealed and enforced. But for the majority of the cases, OIP expects that it can issue informal guidance on a more timely basis.

GENERAL FUND: None.

OTHER FUNDS: None.

PPBS PROGRAM  
DESIGNATION: None.

OTHER AFFECTED  
AGENCIES: All state and county government agencies.

EFFECTIVE DATE: Upon approval.