From: OIP
To: Standards of Conduct
Subject: OIP Testimony for Commission to Improve Standards of Conduct Meeting Today!
Date: Wednesday, October 5, 2022 12:01:42 PM
Attachments: 10.05.22 OIP testimony to Commission to Improve Standards of Conduct.pdf
OIP testimony on SB3172-SD1-HD1.pdf
Veto Message SB3172.pdf
OIP testimony on SB3252-SD2-HD1.pdf
Veto Message SB3252.pdf
Importance: High

Attached please find OIP's testimony and 4 attachments for today's hearing at 2:00pm by the Commission to Improve Standards of Conduct.

Office of Information Practices
State of Hawaii
No. 1 Capitol District Building
250 S. Hotel Street, #107
Honolulu, HI 96813
Ph: (808) 586-1400
Facsimile: (808) 586-1412
Email: oip@hawaii.gov
Website: http://oip.hawaii.gov

STATE OF HAWAII
OFFICE OF INFORMATION PRACTICES

DAVID Y. IGE
GOVERNOR

CHERYL KAKAZU PARK
DIRECTOR

NO. 1 CAPITOL DISTRICT BUILDING
250 SOUTH HOTEL STREET, SUITE 107
HONOLULU, HAWAI'I 96813
Telephone: (808) 586-1400 FAX: (808) 586-1412
E-MAIL: oip@hawaii.gov
www.oip.hawaii.gov

To: Commission to Improve Standards of Conduct

From: Office of Information Practices

Re: Testimony for October 5, 2022

Date: October 5, 2022

The State Office of Information Practices (OIP) apologizes for this late testimony, but only learned of this hearing yesterday while we were engaged in our own public meeting and work on Senate Concurrent Resolution 192 regarding the treatment of deliberative and pre-decisional records as requested by both chambers of the Legislature. The SCR 192 work has taken a substantial amount of OIP's time, so unfortunately, we have not been following your Commission's activities after OIP's Director Cheryl Kakazu Park did a presentation for you on July 27, 2022.

As Ms. Park stated, OIP's laws do not set the standards of conduct that your Commission is charged with reviewing under HR 9. The Uniform Information Practices Act (UIPA, Chapter 92F, HRS) and the Sunshine Law (Part I of Chapter 92, HRS) instead set out procedures and standards allowing for public access to government records and public meetings. Because they have many interrelated parts and must balance various considerations, proposed statutory amendments should be carefully reviewed by OIP as well as the many competing interest groups affected by them, which include state, county, and independent agencies and boards of varying sizes and staffing, as well as the general public.

At your July 27 recorded hearing at 1:09:45, Ms. Park expressed some of OIP's concerns regarding SB 3252, which would have established a new public interest waiver standard based on the federal Freedom of Information Act (FOIA) that would contradict and confuse the current public interest waiver of fees recognized by OIP under Hawaii's UIPA. The substance of SB 3252 is now being considered by this Commission in your draft bill Relating to Public Records, so the same concerns apply here as well as the concerns previously expressed by OIP and many others in the extensive testimony to the Legislature on SB 3252. (See OIP's attached testimony on SB 3252, SD 2, HD 1.) On the other hand, OIP appreciates the Commission's support for a legislative appropriation of $185,000 for fiscal biennium 2023-2025 and two full-time equivalent

(2.0 FTE) permanent positions for OIP, which is contained in your draft bill. Since SB 3252 was vetoed, OIP did not receive this much needed funding and positions and is still struggling to meet the growing demands for its services and assistance.

As for this Commission's draft bill Relating to Recordings of Public Meetings, OIP and others had expressed a number of concerns and suggested amendments in testimony on SB 3172, upon which the draft bill is based. (See attached OIP testimony on SB 3172, SD 1, HD 1.)

Governor David Ige's veto messages for both bills (see attached veto messages) recognized some of the concerns raised, which this Commission's draft bills have not addressed.

OIP believes that much more work is needed on both draft bills and therefore opposes their inclusion in this Commission's recommendations to the Legislature, although we would gratefully support a general statement for additional funding and positions for OIP. Thank you for considering OIP's belated testimony.

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: House Committee on Judiciary & Hawaiian Affairs

From: Cheryl Kakazu Park, Director

Date: April 4, 2022, 2:00 p.m.
State Capitol, Conference Room 325 and Via Videoconference

Re: Testimony on S.B. No. 3172, S.D. 1, H.D. 1
Relating to Public Agency Meetings

Thank you for the opportunity to submit testimony on this bill, which would amend the Sunshine Law, part I of chapter 92, to (1) eliminate the option for boards to keep recorded minutes in the form of a recording accompanied by a written summary and instead require written minutes for every meeting, and (2) require a board that records its meeting for any reason to keep the recording indefinitely. The Office of Information Practices **(OIP) has concerns about the unintended consequences of this proposal and recommends an amendment** if this Committee wishes to simply return to the Sunshine Law's pre-2017 minutes requirement of full written minutes of every meeting.

Current Law

For many years, the Sunshine Law required detailed written minutes for all meetings. But the law was changed in 2017 to allow boards to use recordings of its meetings with a written summary, in lieu of keeping detailed written minutes. Thus, **section 92-9, HRS, currently gives a board two separate options for how to keep its minutes: (1)** it can keep traditional "**written minutes,**" or **(2)** it can keep **"recorded minutes" consisting of an audio or video recording of**

the meeting and a written summary of key meeting information plus time stamps for each agenda item, motion, and vote.

While there are common elements in written minutes and recorded minutes with written summaries (such as the meeting date, time, and place, members present or absent, and a record of votes), there are notable differences. **Written minutes** are required to include the "substance of all matters proposed, discussed, or decided" and any other information a member requests to be included in the minutes, which does not require a transcript, but does require at least a **detailed paraphrase of the discussion** that includes which members spoke and the gist of what they said. **Recorded minutes,** on the other hand, are not required to include this detailed paraphrase of the discussion because the recording shows exactly what occurred at the meeting, but the accompanying **written summary must instead have the time stamps** (which written minutes do not) pointing to where in the recording to find the discussion of each agenda item as well as each motion and vote.

A board is <u>not</u> required to keep a recording of a meeting as a general rule (with the exception of a recording of a remote online meeting, which must be posted online until replaced by the meeting minutes). Currently, some boards will use an oral or video recording of their meeting to help prepare the full written minutes and will subsequently delete or tape over that recording to take a new recording of another meeting. On the other hand, other boards prefer to use the recording of the meeting, especially long ones, as their recorded minutes so as to not have to paraphrase discussions and prepare detailed written minutes, but they must provide a written summary with timestamps showing where discussions and actions took place in the recording. Thus, a board that records its meeting can currently choose to either (1) use the recording to do traditional <u>written minutes</u>, in

which case it is under no obligation to keep or post the recording; or (2) use the recording as the basis for recorded minutes, in which case it must post the recording and the written summary online.

Proposed Changes

This bill would eliminate the option of "recorded minutes" accompanied by a written summary. Instead, if a board records the meeting, even if it was only a voice recording for temporary use in preparing written minutes with the intent to tape over or discard the recordings afterward, they would now be required to keep the recording indefinitely. A board that does not record its meetings would be unaffected by this bill as it could continue to prepare written minutes and not make or keep recordings of its meetings.

Because boards would now be required to post detailed written minutes of all meetings, this bill thus (1) removes the incentive for boards to record meetings, because they can no longer use the recording with a less detailed written summary as their "recorded minutes;" and (2) creates a potential disincentive for boards to record meetings, since doing so triggers a requirement to keep the recording indefinitely. Indeed, if this Committee adopts the suggestion made by the Government Reform Committee to require a board **to include time stamps in its detailed written minutes whenever it has recorded a meeting, that extra work would provide yet another disincentive to record meetings.**

The bill poses **additional challenges**. If detailed written minutes are required and recorded minutes with a summary can no longer be used, **boards may have trouble timely posting their minutes**, as indicated by the testimony of the Board of Land and Natural Resources. Additionally, if boards are required to keep

for an indefinite period a recording of a meeting if one is made, some boards will need increased storage capacity to do so and **may prefer not to post the recordings online in any case since doing so would require addressing Americans with Disability Act (ADA) requirements, turning an analog tape recording into a digital file or resolving other technical challenges, and could create capacity issues on their servers,** as indicated by the Department of Commerce and Consumer Affairs. Although the State Archives has indicated in other bills that it has the capacity to retain all State board recordings, each agency would still have to comply with ADA requirements to post recordings on their own websites and will need technical support and sufficient capacity on their own servers to do so. Please keep in mind, too, that the **Sunshine Law also applies to county governments and boards of varying sizes that may have little or no administrative or technical support and will be charged by the State Archives to retain their recordings.**

If a recording is made and must be kept in addition to the written minutes, **boards may face increased legal challenges as to whether their minutes accurately reflect what occurred** at the meeting, **which could delay their ability to act, require additional meetings, or cast doubt on the finality of their actions for many years.** Because a suit to void any final action may be taken 90 days after the "final" action of the board, it could be years after the meeting that the accuracy of its minutes could be challenged in an attempt to void the board's final action.

OIP notes that the purpose clause suggests this measure stems from a belief that recordings of minutes are too challenging for some members of the public to use, even with the availability of timestamps indicating when in the recording discussion began for each agenda item, vote, or motion. It is a policy question for

the Legislature to decide whether recorded minutes do not serve the public as well as traditional written minutes such that the Sunshine Law should be amended to return to traditional written minutes. **If the Legislature would simply like to return to traditional written minutes without also creating a potential disincentive for boards to record meetings, OIP has appended to its testimony language to amend subsections 92-9(a) and (b)** to provide the same minutes format requirements that applied prior to the 2017 amendment, while retaining the requirement to post minutes online that was also added at that time. **This amendment would eliminate the option of recorded minutes and require traditional written minutes for all meetings without also creating a new requirement to retain any recording made of the meeting, if that is the Committee's intent.**

If, however, the Committee wants to require a board that records a meeting to keep the recording indefinitely, then additional amendments should be considered. With respect to the bill's requirement that one version of a recording, if made, must be maintained, **this Committee should determine:**

- how long recordings must be kept;
- where to keep recordings – at the State Archives, even for county recordings?;
- whether an audio recording of a meeting must be kept, even if it was intended to be temporarily used by staff only for the purpose of creating written minutes;
- whether additional appropriations will be made to boards for increased costs of complying with the bill's new requirements; and

- whether the written minutes can be challenged years later as being inaccurate as compared to the recording, in an attempt to void the final action of the board.

Thank you for considering OIP's testimony and attached proposal.

EXECUTIVE CHAMBERS
HONOLULU

DAVID Y. IGE
GOVERNOR

July 12, 2022

The Honorable Ronald D. Kouchi,
President
and Members of the Senate
Thirty-First State Legislature
State Capitol, Room 409
Honolulu, Hawai'i 96813

The Honorable Scott K. Saiki,
Speaker and Members of the
House of Representatives
Thirty-First State Legislature
State Capitol, Room 431
Honolulu, Hawai'i 96813

Dear President Kouchi, Speaker Saiki, and Members of the Legislature:

I am transmitting herewith SB3172 SD1 HD2 CD1, without my approval and with the statement of objections relating to the measure.

SB3172 SD1 HD2 CD1 RELATING TO PUBLIC AGENCY MEETINGS.

Sincerely,

David Y. Ige

DAVID Y. IGE
Governor, State of Hawai'i

EXECUTIVE CHAMBERS

HONOLULU

July 12, 2022

STATEMENT OF OBJECTIONS TO SENATE BILL NO. 3172

Honorable Members
Thirty-First Legislature
State of Hawai'i

Pursuant to Section 16 of Article III of the Constitution of the State of Hawai'i, I am returning herewith, without my approval, Senate Bill No. 3172, entitled "A Bill for an Act Relating to Public Agency Meetings."

The purposes of this bill are to (1) require any electronic audio or visual recording of a board meeting to be maintained indefinitely as a public record on the board's website or an appropriate State or county website, even if written minutes of the meeting are posted; (2) require that the written minutes contain time stamps linked to the recording, if the meeting was recorded; and (3) repeal the option for boards to provide recordings with accompanying written summaries with time stamps in lieu of written minutes.

This bill is objectionable because it ultimately reduces public access to timely information regarding board actions by eliminating the incentive, under current law, for boards to record their meetings. Under current law, if a board records its meeting, it has the option to post the recording together with a document summarizing the meeting discussions and containing time-stamps for each discussion item, or the board can prepare and post written minutes. If the board records the meeting to aid in the preparation of written minutes, the board is not required to retain the recording once the written minutes are posted.

Recordings consume considerable data storage space and most boards share a limited amount of data storage space on their department's website. This bill would require a board to maintain the recordings indefinitely, make the recordings publicly available on the board's website, and would also require the board to prepare and post written minutes containing time stamps linked to the recordings. The new

requirements under this bill would discourage rather than incentivize boards to record their meetings. The unintended result of this bill would be delays in posting of written minutes, particularly for boards with a small staff or for boards with no staff and only volunteers.

Finally, this bill is an unfunded mandate as it will result in increased personnel costs to comply with the new requirements, increased data storage and website configuration expenses to store all the recordings indefinitely, and the potential for increased litigation expenses relating to the indefinite period of the recording retention requirement as well as accessibility claims under the Americans with Disabilities Act about the format of the recordings posted on State websites. These anticipated increased agency costs were not funded in this bill.

For the foregoing reasons, I am returning Senate Bill No. 3172 without my approval.

Respectfully,

DAVID Y. IGE
Governor of Hawai'i

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: House Committee on Finance

From: Cheryl Kakazu Park, Director

Date: April 5, 2022, 1:30 p.m.
State Capitol, Conference Room 308 and Via Videoconference

Re: Testimony on S.B. No. 3252, S.D. 2, H.D. 1
Relating to Public Records

Thank you for the opportunity to submit testimony on this bill, which would change the current minimum charge for copying government records to a maximum charge under section 92-21, Hawaii Revised Statutes (HRS). It would also amend chapter 92F, HRS, the Uniform Information Practices Act (UIPA), to set a statutory cap to the search, review, and segregation fees that the Office of Information Practices (OIP) is required to set by administrative rule for government record requests and it would also establish new statutory standards and requirements for the public interest waiver that OIP has allowed. **OIP offers comments explaining the substantial effects these changes would have**, particularly the unintended effects that may result, **and suggests amendments** to the bill.

OIP does not administer section 92-21, but will briefly explain how this bill would amend that section.

OIP's Current Rules and Results

The UIPA requires OIP to adopt rule setting forth fees that an agency may charge for processing record requests. The fees are not intended to obstruct

access to disclosable records, but are intended to allow agencies to recover some costs in providing access upon request. When the UIPA was first adopted in 1988, HSCR 342-88 (1988) had this discussion of fees (referring to the HD 1):

> **Your Committee amended this subparagraph to permit reasonable charges for the cost of record search, review and segregation of non-disclosable information from the record prior to disclosure. The new language also requires that rates shall be set by rules promulgated by the Office of Information Practices.** It is the intent of your Committee that such charges for search, compilation, and segregation shall not be a vehicle to prohibit access to public records. It is the further intent of your Committee that the Office of Information Practices move aggressively against any agency that uses such charges to chill the exercise of first amendment rights. Your Committee also added new language to allow waiver of these charges when such action serves the public interest.

(Emphasis added.) Thus, as the legislative history of this bill recognized, the original intent of the UIPA was to have fees and waivers set by OIP rules that were not intended to obstruct access to disclosable records or chill the exercise of first amendment rights, but are intended to allow agencies to recover some costs in providing access upon request.

Based on employee salaries at the time, OIP's administrative rules adopted in 1999 allow agencies to charge fees of $2.50 per 15 minutes (i.e., $10/hour) for search time and $5.00 per 15 minutes (i.e., $20/hour) for review and segregation time. There is a fee waiver of $30, which is doubled to $60 for requests that are widely disseminated in the public interest. Costs are governed by agency rules and HRS section 92-12, not OIP.

Since 2014, OIP has been tracking the results of UIPA record requests, including fees and costs incurred, chargeable, and paid, through the UIPA Record Request Log that all State and county agencies are supposed to submit to OIP. OIP would like to share key results of FY 2021 State and county reports, which OIP

summarized in reports that are posted on the UIPA Record Request Log Records page at oip.hawaii.gov. **Overall, the data shows that the typical record request to State and county agencies was granted in whole or in part, and was completed in less than 8 work days from the date of the request; 90% (1,708) of requesters to State agencies and 84% (1,610) of requesters to county agencies paid nothing for their completed requests; and no requester paid $1,000 or more in fees and costs.**

The FY 2021 reports were consistent with the prior years' data showing that **most fees and costs are being paid by for-profit entities, and not by individual requesters. Additionally, the data showed that complex record requests constitute 6-16% of all requests but have resulted in processing times that were 2-3 times longer in FY 2021 and 5 to 9 times longer in FY 2020 compared to typical record requests, thus accounting for a disproportionately high percentage of the gross fees and costs incurred by agencies, but which were only partially paid by requesters.**

Based on the data, it appears that the bill's premise does not reflect the experience of 84-90% of all requesters who are getting their record requests free and on time. Therefore, **the purpose section should be amended to provide for a more balanced perspective and recognize OIP's rule-making efforts** as described below.

OIP's Draft Rules

In 2017, OIP drafted new rules that were intended to address increased costs to agencies, while keeping record requests free for most individual record requests. Due to inflation of employee salaries over the decades, the draft rules proposed an increase in fees to $7.50 per 15 minutes (i.e., $30/hour) for search and $15 per 15 minutes (i.e., $60/hour) for review and segregation, and

substantially increased the fee waiver to $400 per year per requester to keep record requests free for most requesters. OIP provided the draft rules for initial public comment and a survey in 2017 and made some changes based on the comments received. Draft rules were then submitted to the Attorney General's office for review in 2018, where they remain pending. The draft rules, explanatory materials, and survey results are posted on OIP's Rules page at https://oip.hawaii.gov/laws-rules-opinions/rules/.

OIP notes that its draft rules also proposed a new tool for agencies to address, in rare instances, requesters whose cumulative requests are sufficiently large and frequent that the requests create a manifestly excessive interference with an agency's ability to perform its primary functions. Currently, an agency can respond to a single large request incrementally and spend a reasonable amount of search, review, and segregation time on it to produce a new response increment every month.

If the issue is not a single large request but instead a very large number of requests from one individual, the current incremental disclosure rule does not apply, so agency resources have been overwhelmed and regular work interrupted. While rare, it has happened to many agencies in the past, including a former Governor, that an individual has made numerous, unreasonable requests that excessively interfered with agencies' ability to perform their primary functions. It is also possible more than one requester to coordinate various smaller requests to stay under the current fee waivers and to have their requests responded to more quickly because the incremental disclosure rules would not apply, even though the various requests essentially amount to one voluminous, complex request that would interfere with the agency's regular work. To prevent abuse and allow agencies to respond in a

reasonable manner, OIP's draft rules would allow an agency to combine the requests together to respond to them incrementally, rather than being obligated to treat each one as separate requests that must be responded all at once under the UIPA's shorter timeline.

Since the statutorily set fee cap for digital record requests proposed by this bill would exacerbate the challenges agencies face in dealing with large requests and frequent requesters, as many agencies noted in their testimony for this bill, **OIP would recommend this Committee also add a statutory authorization for agencies to combine requests together to respond to incrementally when needed to prevent manifestly excessive interference with agency functions.**

Comments on Bill's Proposals

The bill proposes a statutory cap that agencies can charge of $5 per 15 minutes for search (i.e., $20/hour) and $7.50 per 15 minutes (i.e., $30/hour) for review and segregation of digital records. These rates, however, are not much higher than the current charges that were based on a 1996 survey of state and county salaries of employees likely to be responsible for search, review, and segregation under the UIPA. **With the current fees already 26 years out of date, the bill's cap would not accurately reflect current salaries for the government employees doing the work, who are not only clerical workers but also include supervisory, executive, professional employees, and attorneys.**

Although the bill proposes to limit the capped fees only to search, review, and segregation of "digital records," **the fact that records are increasingly retained in digital form might save search time, but this does not reduce the time that experienced agency staff, program specialists,**

supervisors, executives, professionals, and attorneys must spend to carefully review and redact confidential, personal, or proprietary information before disclosing the record. Further, having different fees for time spent on digital records versus time spent on all other records would create an additional challenge for agencies in providing the required notice to a requester of estimated fees to fulfill a request, as agencies would now have separately to estimate how much time was expected to be spent working on digital records and how much on non-digital records.

The bill's proposed cap on fees, together with the complete waiver of all fees for requests made in the "public interest" and "not primarily in the commercial interest," would encourage requesters to make more numerous and complex record requests requiring extensive agency time and effort. As the Log data shows, most of the complex requests are currently being made by for-profit companies or non-profit organizations, not individual requesters. Because the UIPA does not limit its rights only to Hawaii residents, **the fee caps and waivers also apply to nonresident individuals and business who pay no taxes** to support the salaries of our State and county employees whose regular work may be deferred to fulfill what could be voluminous and complex record requests. Moreover, **nothing in the bill would allow agencies relief from repeated, frivolous, or excessive requests that unreasonably interfere with agency operations or are intended to harass the agency.**

The proposed fee waiver differs significantly from what OIP currently allows as it would not be limited to information that is not readily available in the public domain, and the requester does not need to have the primary intention and actual ability to widely disseminate the information to the public.

Does this mean that the bill's proposed fee waiver would allow any student or individual claiming a public interest to essentially have an agency do the research and work for free, even though it is already readily available on the agency's website, or even when the requester has no intent or ability to widely disseminate the information to the public? Additionally, the bill would add a requirement that the request not be "primarily in the commercial interest," which is something that OIP specifically considered, and rejected, in adopting its current rule regarding public interest waivers, so as to not exclude news media representatives. **Would the bill allow only a nonprofit news organization to qualify for the fee waiver, but not apply to for-profit news organizations or independent free-lance reporters? The new waiver language proposed in the bill will probably result in new legal challenges that will take time to resolve.**

The fee waiver change would not necessarily increase the general public's access to information about the operation of government, and it would apply to a narrower category of information. The bill would require the requester to establish that the information would "contribute significantly to public understanding" of agency operations rather than simply being about agency operations. It seems likely that this new standard would apply to a different pool of requests than the current standard, but it is not clear whether it will end up representing an increase or a decrease in requests meeting that standard. Either way, **OIP is concerned that the complete waiver of all fees for those requests that qualify as being in the public interest could be burdensome for agencies and result in a larger number of complex record requests, as there would be no incentive for the requester to narrow such a request to avoid requiring an inordinate amount of agency staff time that could**

detract from the agency's other work. As agencies receive more and larger record requests, **the public will suffer** as the agencies' own work will be delayed and adversely impacted while agency personnel work to fulfill complex record requests **and agencies will require additional appropriations and personnel.**

Overall, the potential unintended consequences of the proposed fee caps and waivers this bill may be to:

- **encourage the filing of more complex and voluminous record requests;**
- **encourage the filing of more numerous record requests that are not subject to the current incremental disclosure rules;**
- **eliminate the fee waiver for for-profit or free-lance media representatives, but waive fees only for non-profit media representatives who are not acting primarily in the commercial interest;**
- **slow the processing of all UIPA record requests as well as of the agency's work unrelated to record requests;**
- **reduce government efficiency as well as government transparency due to delays in processing record requests as agencies resolve more complex requests;**
- **increase the agencies' need for more funding to recruit, train and hire additional personnel; and**
- **require ongoing legislative amendments to the UIPA to increase fee caps and to address unintended consequences and matters previously handled by administrative rules,**

including the possibility of providing for longer agency response deadlines.

As noted in the previous section, **this Committee could reduce existing problems and ameliorate some of the unintended adverse consequences of this bill by removing the fee caps and waiver requirements and instead adding a statutory authorization** for agencies to combine requests together to respond to incrementally when needed to prevent manifestly excessive interference with agency functions. To do so, **bill section 3 could be** amended to instead propose a new section in part II of the UIPA that would **allow agencies to consolidate digital record requests from an individual whose requests and other actions have been causing manifestly excessive interference with the agency's functions**, as follows:

> When an agency reasonably determines that a requester's requests and other actions under this chapter are causing or have caused manifestly excessive interference with the agency's discharge of its other lawful responsibilities, it may consolidate all requests for digital government records from the requester, including any requests made in the future, and respond to such consolidated requests on an incremental basis as set forth in rules adopted by the office of information practices; provided that within 10 working days of receiving each new request the agency shall acknowledge it and advise the requester of its consolidation with the requester's other outstanding requests."

Rather than trying to address all unintended consequences and other thorny details in an inflexible statute during the limited time remaining this session, the Legislature may want to allow OIP to continue

to address them through the rulemaking process over the next year when additional comments can be received from the public and affected agencies.

Copying Charges Under HRS Section 92-21

As to the proposed amendment of section 92-21, HRS, authorizing agencies to charge copy fees for government records, this statute is not part of the UIPA but OIP is frequently asked about its application to UIPA requests. The statute currently sets a minimum copy charge of $.05/page, but does not prohibit agencies from charging more. Since OIP's rules allow an agency to charge "other lawful fees" in addition to the search, review, and segregation fees set out by the rules, OIP has generally advised that the minimum copy charge is a lawful fee for the purpose of the rules, and if an agency has adopted administrative rules setting a higher per-page charge, that higher charge is also a lawful fee. **This proposal would cap copy charges at $.25/page and waive all copy fees for public interest requests, and thus would primarily affect those agencies that have adopted administrative rules setting a higher per-page charge.**

Need for Additional Appropriations and Later Effective Date

In summary, this bill would have the effect of shifting more and more of the cost of providing public access to government records onto the government agencies that respond to record requests and may have the unintended consequences of slowing response times, increasing government and media costs, decreasing media coverage and government transparency, and requiring ongoing legislative changes. OIP notes that the Government Reform Committee requested the Committee on Finance to consider appropriating funds in this bill to establish ten full-time equivalent staff positions in the Hawaii State Archives. **If this Committee decides as a policy matter to shift the costs to government, then it should similarly consider funding additional positions for all state**

and county agencies to hire full-time UIPA officers and staff to fulfill their responsibilities that will likely expand under the bill.

In any event, and whether or not amendments are made by this bill, OIP will need two new positions and appropriations to finish its administrative rules for UIPA record requests, which require more work and public hearings before they can be adopted. **Rulemaking is a time-intensive process** that will involve all OIP attorneys and staff to do, which will detract from its other work. Even after the rules are revised, OIP would likely see an increase in the inquiries and disputes that arise from any changes, which will add to OIP's growing backlog. OIP's backlog has already doubled over the past two years due to the loss of almost half its small staff and the delays in receiving appropriations and administrative approvals to fill the vacancies. Although it was recently able to fill its last vacancy, OIP is still training four new staffmembers hired over the past year. Additionally, OIP is now facing increased numbers of formal and informal requests for assistance and would like to digitize its records, which would then limit her ability to work on backlogged appeals, training, and other matters. Thus, **OIP will require additional appropriations and positions for one staff attorney, one legal assistant, equipment, and operating expenses (including rule publication costs) in the total amount of $185,000.**

Finally, OIP requests that it be given sufficient time to fill the new positions, obtain the Attorney General's review of the rules, and complete the rulemaking hearings and process, so the effective date of the bill should be no earlier than January 1, 2024.

Thank you for considering OIP's testimony.

EXECUTIVE CHAMBERS
HONOLULU

DAVID Y. IGE
GOVERNOR

July 12, 2022

The Honorable Ronald D. Kouchi,
President
and Members of the Senate
Thirty-First State Legislature
State Capitol, Room 409
Honolulu, Hawai'i 96813

The Honorable Scott K. Saiki,
Speaker and Members of the
House of Representatives
Thirty-First State Legislature
State Capitol, Room 431
Honolulu, Hawai'i 96813

Dear President Kouchi, Speaker Saiki, and Members of the Legislature:

I am transmitting herewith SB3252 SD2 HD2 CD1, without my approval and with the statement of objections relating to the measure.

SB3252 SD2 HD2 CD1 RELATING TO PUBLIC RECORDS.

Sincerely,

David Y. Ige

DAVID Y. IGE
Governor, State of Hawai'i

EXECUTIVE CHAMBERS

HONOLULU

July 12, 2022

STATEMENT OF OBJECTIONS TO SENATE BILL NO. 3252

Honorable Members
Thirty-First Legislature
State of Hawai'i

Pursuant to Section 16 of Article III of the Constitution of the State of Hawai'i, I am returning herewith, without my approval, Senate Bill No. 3252, entitled "A Bill for an Act Relating to Public Records."

The purpose of this bill is to impose a cap on the costs charged for copying certain government records; waive duplication costs for requesters seeking government records in electronic format; and set a cap on search, review, and segregation fees, which are to be set forth through administrative rules adopted by the Office of Information Practices (OIP), with a waiver of search, review, and segregation fees for requests for government records when the public interest is served by the disclosure of the record(s).

This bill is objectionable because it will have a significant adverse impact upon government agency operations. The full waiver of search, review and segregation fees for virtually all records requests acts as a disincentive for records requesters to narrow the scope of their requests, thus resulting in the consequential increase in overbroad requests. Agencies, the majority of whom do not have dedicated personnel responding to records requests, will be vulnerable to UIPA lawsuits, which will increase costs to government agencies through awards of attorneys' fees and costs to plaintiffs filing those lawsuits. As a result, agencies may be forced to prioritize responding to records requests over the agencies' primary functions. Eleven government agencies testified with concerns or in opposition to this bill due to the adverse effects of the waiver of search/review and segregation fees upon agencies .

For the foregoing reasons, I am returning Senate Bill No. 3252 without my approval.

Respectfully,

DAVID Y. IGE
Governor of Hawai'i