

OFFICE OF INFORMATION PRACTICES

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To: House Committee on Judiciary & Hawaiian Affairs

From: Cheryl Kakazu Park, Director

Date: March 1, 2022, 2:00 p.m.
State Capitol, Conference Room 325 and Via Videoconference

Re: Testimony on H.B. No. 2037, H.D. 1
Relating to the Office of Information Practices

Thank you for the opportunity to submit testimony on this bill, which would require the Office of Information Practices (OIP) 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. **OIP supports this bill.**

Currently, OIP issues opinions in response to both requests for a ruling under subsections 92F-42(1) and -18(A) and to requests for an advisory opinion under subsections 92F-42(2) and (3). Although all opinions involve a legal determination of the issues presented by the request, OIP further classifies “formal opinions” as those involving novel legal questions or otherwise of high public interest, which OIP publishes in full on its website and treats as precedent. OIP also writes “informal or memorandum opinions,” which apply existing legal precedents from formal opinions to facts that are not of particularly high public interest, but the informal opinions are still binding on the parties to that dispute. Summaries of informal opinions are published on OIP’s website (a full copy is available upon request), which is what OIP would also do for written guidance if this bill passes.

House Resolution No. 104, SLH 2019 Results

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 making a “legal determination” in the form of a full written opinion as required under current law. Some of the opponents to earlier House and Senate versions of this bill have argued in past sessions that OIP should not spend so much time writing full-blown opinions and had urged the Legislature to have OIP issue short decisions to be able to more quickly reduce its backlog.

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 written guidance in the form of inclinations was sufficient to close some appeals. Although requesters sometimes abandon or voluntarily agree to dismiss an appeal, OIP’s experiment found that in the majority of appeals, no time was saved as the requester insisted on a full opinion even after receiving OIP's written 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 written guidance. Opinions are important and necessary in some appeals, notably in those where OIP's formal ruling is needed to require an agency to disclose records or take other specific action, or an important unsettled legal issue must be decided. Additionally, OIP's rulings are supposed to be given great deference by the courts, as they are subject to the "palpably erroneous" standard of review when appealed by agencies to the courts.

In many other appeals, however, OIP believes written guidance would be more suitable, less time-consuming, and more efficient in reaching the same result sooner. When a member of the public appeals an OIP opinion upholding an agency action to the courts, the "de novo" standard of review applies and the courts need not defer to the OIP opinion, so written guidance would serve as well as an OIP ruling in favor of an agency. Sometimes, written guidance from OIP, rather than an opinion, is all that is needed to prod agencies to release records. Other times, requesters may raise numerous, minor factual and legal issues that must be addressed by OIP in an opinion, even if they have no public interest, are time consuming, do not change the result of a case, and could have been addressed in written guidance if that had been an option. The lengthy process and time that OIP spends on writing opinions in these types of cases would be better spent on writing opinions that truly affect the public interest, involve a novel legal issue, or are needed so they can be enforced by the courts against an agency.

Existing Law Does NOT Give OIP Discretion to Reduce its Backlog and Resolve Appeals to OIP Faster and More Efficiently by Providing Written Guidance Instead of Opinions

Contrary to the statements of opponents of this bill, current law does not give OIP such discretion to provide guidance instead of opinions in appeals. HRS section 92F-42(1) (which this bill proposes to amend)

states that OIP “[s]hall, upon request, review and rule” (emphasis added), which means that OIP must issue rulings in the form of opinions upon request. **Note, too, that this section only refers to the cases that OIP categorizes as “appeals”** where an agency has either denial or granted access to government records, and it does not apply to requests for advisory opinions, correspondence, training, or other sorts of advice that OIP may provide. While opponents of this bill cite to other statutory provisions in HRS section 92F-42(2) and (3) giving OIP the discretion to rule on providing advisory opinions, guidelines, or other types of informal advice, the particular provision being addressed by this bill uses the mandatory language of “shall” rather than “may” to require OIP to issue rulings in the form of opinions.

Because OIP currently lacks statutory discretion to determine the best way to handle its appeals, all appeals that requesters insist on having legally determined by an opinion remain backlogged as OIP attempts to resolve the oldest appeals first. It costs nothing for a requester to insist upon an OIP opinion, so there may be times when an individual requester may have a personal vendetta or motive to penalize or tie up the resources an agency defending against a potentially adverse opinion by OIP, even if the case affects only one individual and is not one of great public interest. Because OIP’s opinions are subject to review on appeal to the courts, OIP has a careful and lengthy writing and review process before any of its opinions are issued. **With appeals to OIP requiring time-consuming opinions to be written and given the resource constraints upon OIP, the backlog is growing and appeals that may be of greater interest to the public at large must wait their turn as OIP works through appeals filed earlier.**

OIP had great success in fiscal year 2019-2020 towards eliminating its backlog when it had a full complement of experienced staff, but that success has

now been rapidly reversed. Due to the start of COVID-19 and fiscal year 2020-2021 budget restrictions and recent vacancies, together with OIP's lack of statutory discretion in determining how it can resolve appeals, OIP's backlog is growing and requesters may again have to 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 (67 pending at end of FY 2020), but the unusual loss during the past two years of four of 8.5 FTE personnel has resulted in OIP's backlog growing by over 80 percent today. Moreover, approximately 80% of OIP's backlog consists of appeals, which currently require opinions unless the requester agrees to written guidance or a dismissal.

While OIP has finally been allowed to fill all vacated positions, OIP's two experienced attorneys have needed substantial time to train the new attorneys, which detracts from the time available for the experienced attorneys to work on their own cases consisting mainly of appeals. Additionally, OIP has been experiencing a substantial increase in new cases as well as Attorney of the Day inquiries, which add to its workload.

Under the circumstances, OIP's backlog and the time that the public must wait for case resolution has grown and will continue to grow until OIP's new hires have had time to learn the job and reach full productivity. **Therefore, in light of OIP's constraints, this bill is better way to utilize OIP's resources and will give OIP additional flexibility to handle its growing caseload, improve its efficiency, and reduce the wait time for appeals to be resolved.**

This Bill Will Provide OIP With Much Needed Flexibility to More Efficiently and Expeditiously Resolve Appeals Without Adversely Affecting the Public Interest

The bill 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. **And whether OIP issues an opinion or written guidance, a 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.

The bill also would not require an agency to disclose records based on OIP's informal guidance without a written “opinion,” nor would it require courts to treat written “guidance” as precedent; thus, OIP would still issue a written opinion when a binding decision is needed to obtain an agency’s compliance. The change resulting from this bill would simply be that OIP would be given the flexibility to resolve a complaint either by writing an opinion or by more quickly offering written guidance on the law's requirements, whichever is appropriate based on the specifics of the complaint. Please note that the bill’s change would not take effect immediately, as OIP would also have to revise its administrative rules to reflect the statutory change.

Suggested Amendments

To clarify the different types of written products the statute as amended would require OIP to provide upon request, OIP recommends amendments. Currently, sections 92F-15, -27, and -42 refer to a “ruling” or “opinion.” This bill would also add the term “guidance” to subsections 92F-42(1) and -42(18). A new bill section 1 should add definitions to section 92F-3, HRS, for “guidance,” an “opinion,” and a “ruling.” HRS subsections 92F-42(1) and (18) should also be amended to refer to a “ruling” in either UIPA or Sunshine Law cases, to take advantage of the new definition of a “ruling” and to be consistent with each other. **OIP has attached a proposed S.D. 2 version of the substantive portion of this bill with OIP’s proposed amendments.**

H.B. 2037, Proposed SD2

SECTION I. Section 92F-3, Hawaii Revised Statutes, is amended by adding three new definitions to be appropriately inserted and to read as follows:

““Guidance” means a written discussion of the major legal and factual issues raised by an inquiry, including the most likely resolution of a complaint made in the inquiry, if applicable, but does not rise to the level of an opinion.”

“Opinion” means a written discussion of legal and factual issues raised by an inquiry including the findings and conclusions reached by the director of the office of information practices regarding those issues, regardless of whether the inquiry alleges violations of this chapter or of part 1 of chapter 92 or otherwise raises disputed issues of law or fact, or the inquiry seeks an advisory legal interpretation of this chapter or part 1 of chapter 92.”

“Ruling” means a written opinion providing firm and final legal determination of all disputed issues raised by an inquiry alleging violations of this chapter or of part 1 of chapter 92.””

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

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

- (1) Shall, upon request, review and ~~[rule]~~ provide either a ruling or guidance in writing on an agency denial of access to information or records, or an agency's granting of access; provided that any review by the office of information practices shall not be a contested case under chapter 91 and shall be optional and without prejudice to rights of judicial enforcement available under this chapter;
- (2) Upon request by an agency, shall provide and make public advisory guidelines, opinions, or other information concerning that agency's functions and 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;
- (11) Shall inform the public of the following rights of an individual and the procedures for exercising them:
 - (A) The right of access to records pertaining to the individual;
 - (B) The right to obtain a copy of records pertaining to the individual;
 - (C) The right to know the purposes for which records pertaining to the individual are kept;
 - (D) The right to be informed of the uses and disclosures of records pertaining to the individual;
 - (E) The right to correct or amend records pertaining to the individual; and
 - (F) The individual's right to place a statement in a record pertaining to that individual;

- (12) Shall adopt rules that set forth an administrative appeals structure which provides for:
 - (A) Agency procedures for processing records requests;
 - (B) A direct appeal from the division maintaining the record; and
 - (C) Time limits for action by agencies;
- (13) Shall adopt rules that set forth the fees and other charges that may be imposed for searching, reviewing, or segregating disclosable records, as well as to provide for a waiver of such fees when the public interest would be served;
- (14) Shall adopt rules which set forth uniform standards for the records collection practices of agencies;
- (15) Shall adopt rules that set forth uniform standards for disclosure of records for research purposes;
- (16) Shall have standing to appear in cases where the provisions of this chapter or part I of chapter 92 are called into question;
- (17) Shall adopt, amend, or repeal rules pursuant to chapter 91 necessary for the purposes of this chapter; and
- (18) Shall take action to oversee compliance with part I of chapter 92 by all state and county boards including:
 - (A) Receiving and resolving complaints~~[;]~~, either by providing a ruling or guidance in writing on whether a violation occurred;
 - (B) Advising all government boards and the public about compliance with chapter 92; and
 - (C) Reporting each year to the legislature on all complaints received pursuant to section 92-1.5.



HOUSE COMMITTEE ON JUDICIARY & HAWAIIAN AFFAIRS
Tuesday, March 1, 2022, 2 pm, State Capitol Room 325 & Videoconference
HB 2037, HD1

Relating to the Office of Information Practices

TESTIMONY

Douglas Meller, Legislative Committee, League of Women Voters of Hawaii

Chair Nakashima and Committee Members:

The League of Women Voters of Hawaii opposes HB 2037.

Existing law is adequate and does not require amendment. §92F-42(1), Hawaii Revised Statutes, currently requires OIP to issue formal enforceable rulings to resolve disputes concerning public access to government records. §92F-42(2) and §92F-42(3), Hawaii Revised Statutes, currently authorize OIP to issue guidance and advisory opinions.

At best this bill is not necessary to authorize OIP to issue guidance and advisory opinions. At worst this bill gives OIP discretion to refuse to issue formal enforceable rulings.

Thank you for the opportunity to submit testimony.

THE CIVIL BEAT
LAW CENTER FOR THE PUBLIC INTEREST

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House Committee on Judiciary & Hawaiian Affairs
Honorable Mark M. Nakashima, Chair
Honorable Scot Z. Matayoshi, Vice Chair

**RE: Testimony Opposing H.B. 2037 H.D. 1,
Relating to the Office of Information Practices**
Hearing: March 1, 2022 at 2:00 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 **opposing H.B. 2037 H.D. 1**.

The Legislature created OIP primarily as an alternative to litigation for members of the public to resolve disputes with agencies regarding access to government records in a manner that was “expeditious, informal, and at no cost to the public.” H. Stand. Comm. Rep. No. 1288, in 1988 House Journal at 1319. **Under this bill, the public would be in the dark for years with no idea whether OIP will in fact actually decide the dispute or just “provide guidance”**. This bill eviscerates OIP’s core purpose, leaving the public with expensive lawsuits as the only guaranteed option for determining whether an agency violated the law.

Moreover, this bill is unnecessary because OIP already has the authority to issue guidance and advisory opinions:

OIP “[u]pon request by an agency, shall provide and make public advisory guidelines, opinions, or other information concerning that agency’s functions and responsibilities.” HRS § 92F-42(2).

OIP “[u]pon 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.” HRS § 92F-42(3).

As the Law Center reported in 2017, there are a lot of things that OIP can do to fix its backlog. <https://www.civilbeatlawcenter.org/resources/>. This bill is not one of them.

Thank you again for the opportunity to testify **opposing H.B. 2037 H.D. 1**.

Statement Before The
HOUSE COMMITTEE ON JUDICIARY & HAWAIIAN AFFAIRS

Tuesday, March 1, 2022

2:00 PM

Via Videoconference, Conference Room 325

in consideration of

HB 2037, HD1

RELATING TO THE OFFICE OF INFORMATION PRACTICES.

Chair NAKASHIMA, Vice Chair MATAYOSHI, and Members of the House Judiciary & Hawaiian Affairs Committee

Common Cause Hawaii provides comments on HB 2037, HD1, which requires the Office of Information Practices (OIP) 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.

Common Cause Hawaii is a nonprofit, nonpartisan, grassroots organization dedicated to reforming government and strengthening our representative democracy through transparency and accountability reforms.

Unfortunately, HB 2037, HD1 does not appear to improve either transparency or accountability. Under the current statutory framework, OIP already has the authority to provide and make public advisory guidelines, opinions, or other information, if requested by an agency. Hawaii Revised Statutes (HRS) § 92F-42(2). If requested by a person, OIP has the authority to provide advisory opinions or other information. HRS § 92F-42(3).

It is unclear how HB 2037, HD1 will assist with resolving the issue of OIP's backlog by conferring authority upon OIP that it already has.

Thank you for the opportunity to provide comments on HB 2037, HD1. If you have further questions of me, please contact me at sma@commoncause.org.

Very respectfully yours,

Sandy Ma
Executive Director, Common Cause Hawaii



March 1, 2022

Rep. Mark Nakashima
House Judiciary and Hawaiian Affairs Committee
State Capitol
Honolulu, HI 96813

Chair Nakashima and Committee Members:

Re: HB 2037 HD1

We ask you to shelve this bill.

The Office of Information Practices was established to help the public gain access to information without having to go to the courts.

OIP already provides guidance on requests and advisory opinions, but we fear that giving the option to make decisions would actually add to the request backlog by tacking on another time-consuming duty. We could see another level of work to determine whether to make a decision or issue guidance.

Thank you for your time and attention,

Stirling Morita
President
Hawaii Chapter of the Society of Professional Journalists

HB-2037-HD-1

Submitted on: 2/28/2022 1:05:34 PM

Testimony for JHA on 3/1/2022 2:00:00 PM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
Ilima DeCosta	Individual	Oppose	No

Comments:

Aloha Chair and members of the committee,

HB 2037 proposes to change the way that the public accesses government information and places the government in charge of deciding whether not requested information should be released.

There is supposed to be a check and balance - between the executive, the legislative and the judicial - and HB 2037 would effectively remove one of those checks, allowing the executive or legislative branch to operate outside of the public purview.

At a time when public confidence in elected officials and state government appears to be at a low point, it seems myopic for the legislature to propose such an action.

If our elected and appointed officials have nothing to hide, then they don't need HB 2037.

The water lines to the Capitol's reflecting pools have been cut, so there's no water to be found...is it also time to "drain the swamp" inside the Hawaii state capitol?

Mahalo for this opportunity to testify in opposition to HB 2037 or any efforts to limit the right of the people of Hawaii to know how their government is operating and why decisions are made.