

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: Senate Committee on Government Operations

From: Cheryl Kakazu Park, Director

Date: February 15, 2022, 3:10 p.m.
State Capitol, Via Videoconference

Re: Testimony on S.B. No. 2336
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 and offers a proposed amendment to clarify that guidance issued in lieu of a legal determination must be “written” guidance.**

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. 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 an 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 formal opinions are supposed to be given great deference by the courts, as they are subject to the "palpably erroneous" standard of review by the courts. In many other appeals, however, OIP believes informal written guidance would be more suitable, less time-consuming, and more efficient in reaching the same result sooner.

Contrary to the statements of opponents of this bill, current law does not give OIP such discretion to provide informal 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 guidance 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 guidance, 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 the palpably erroneous standard of review by the courts, OIP has a careful and lengthy writing and review process before any of its opinions are issued. **With appeals requiring time-consuming opinions to be written and 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 (121 pending at end of January 2022). 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 been able to fill three vacated positions and is about to fill its last staff attorney vacancy, OIP's two remaining 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.

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 essential to giving OIP additional flexibility to handle its growing caseload, improve its efficiency, and reduce the wait time for appeals to be resolved.**

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 informal 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. 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 informal 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.

Finally, OIP notes that informal guidance offered in lieu of a written opinion should in all cases be in writing, but the bill as introduced refers only to providing guidance. **OIP would be open to an amendment clarifying that written guidance is required; specifically, on bill page 1 lines 5-6 replace “provide guidance” with “provide written guidance[,]” and on bill page 5 line 3 replace “providing guidance” with “providing written guidance[.]”**

Thank you for considering OIP's testimony and proposed amendment.



SENATE COMMITTEE ON GOVERNMENT OPERATIONS

Tuesday, February 15, 2022, 3:10 pm, Videoconference

SB 2336

Relating to the Office of Information Practices

TESTIMONY

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

Chair Moriwaki and Committee Members:

The League of Women Voters of Hawaii opposes SB 2336.

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.

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.

Thank you for the opportunity to submit testimony.

THE CIVIL BEAT
LAW CENTER FOR THE PUBLIC INTEREST

700 Bishop Street, Suite 1701
Honolulu, HI 96813

Office: (808) 531-4000
Fax: (808) 380-3580
info@civilbeatlawcenter.org

Senate Committee on Government Operations
Honorable Sharon Y. Moriwaki, Chair
Honorable Donovan M. Dela Cruz, Vice Chair

RE: Testimony Opposing S.B. 2336, Relating to the Office of Information Practices
Hearing: February 15, 2022 at 3:10 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 S.B. 2336**.

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 S.B. 2336**.



Feb. 15, 2022

Sen. Sharon Y. Moriwaki
Senate Committee on Government Operations
State Capitol
Honolulu, HI 96813

Chair Moriwaki and Committee Members:

Re: SB 2336

We ask you to kill 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 provides guidance on requests, but we fear that giving the option to make decisions would actually add to the request backlog by adding another layer of bureaucracy.

Thank you for your time and attention,

Stirling Morita
President
Hawaii Chapter of the Society of Professional Journalists

Statement Before The
SENATE COMMITTEE ON GOVERNMENT OPERATIONS

Tuesday, February 15, 2022

3:10 PM

Via Video Conference

in consideration of
SB 2336

RELATING TO THE OFFICE OF INFORMATION PRACTICES.

Chair MORIWAKI, Vice Chair DELA CRUZ, and Members of the Senate Government Operations Reform Committee

Common Cause Hawaii provides comments on SB 2336, 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, SB 2336 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 SB 2336 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 SB 2336. If you have further questions of me, please contact me at sma@commoncause.org.

Very respectfully yours,

Sandy Ma
Executive Director, Common Cause Hawaii

SB-2336

Submitted on: 2/12/2022 12:10:27 PM

Testimony for GVO on 2/15/2022 3:10:00 PM

| Submitted By | Organization | Testifier Position | Remote Testimony Requested |
|---------------------|---------------------|---------------------------|-----------------------------------|
| lynne matusow | Individual | Support | No |

Comments:

this bill must be amended to include a timeline. oftentimes complaints languish at the Office of Information practices for a year or more. That is no help to the public.

secondly, practice in the city and county of honolulu is that sunshine law complaints against neighborhood boards first be adjudicated by the neighborhood commission, which is a volunteer group with no expertise in the matter. this group at times has violated the law. this bill should be amended to clearly state that all complaints against neighborhood boards be filed directly with the OIP for resolution, not with any intermediary city agency.