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: March 15, 2022, 3:00 p.m.
State Capitol, Conference Room 016 and Via Videoconference

Re: Testimony on H.B. No. 2037, H.D. 2
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.** In recent correspondence, the League of Women Voters (LWV) suggested amendments to OIP that would narrow the circumstances in which OIP can provide written guidance in lieu of an opinion. **OIP is amenable to the LWV's proposal and recommends amendments to incorporate it.**

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 that OIP 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.

Agencies are sometimes amenable to accepting OIP's inclinations in lieu of an adverse formal opinion, and in those instances when an agency has disclosed the disputed records based on OIP's advice, OIP already has the power to

dismiss the case either with the requester's agreement or because a further decision would be moot. When an agency will not disclose records or otherwise act without an opinion, closing the case based on guidance would be inappropriate because an opinion is necessary to actually resolve the dispute. When OIP's inclination is to uphold the agency's denial, however, a requester's insistence on receiving a full opinion does not change the eventual result but does increase the time spent by OIP staff on that case. In some instances, requesters may raise numerous, minor factual and legal issues that currently must be addressed by OIP in an opinion, even if they have no public interest, are time consuming, and do not change the result of a case. **Rather than leaving it to the requester 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 some 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. 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. **Even the Civil Beat Law Center agreed, after examining the results of OIP's experimental program, that "[w]hen the outcome is obvious to an experienced OIP staff attorney after receiving the agency's response, there is no reason to devote significant resources to an exhaustively sourced decision."** *See* attached report Success: Preliminary Inclinations at OIP Make a Difference (Action Recommended) from https://ln4.sync.com/dl/122410e20/naqysii7-7sbmvdpz-y8pgtx87-ut7deqdj/view/doc/10260076150004.

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 provide advisory opinions or guidelines or other types of informal advice for requests that do not present an immediate dispute, 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.**

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 "ruling" or "opinion," nor would it require courts to treat written "guidance" as precedent, terms

that have been defined in the bill. Thus, OIP would still issue a written ruling in the form of an 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.

As noted above, the LWV suggested to OIP amending this bill to narrow the circumstances in which OIP can provide written guidance in lieu of an opinion to Uniform Information Practices Act (UIPA) appeals where OIP's guidance upholds an agency's denial, and **OIP is amenable to the proposal. OIP recommends the attached proposed S.D. 1, which would:**

(1) amend subsections 92F-42(a)(1) and (18) to incorporate the LWV proposal;

(2) move the definition of "guidance" from section 92F-42 to the UIPA's definitions section where "opinion" and "ruling" are also defined;

(3) set an effective date of January 1, 2023, to allow OIP time to make conforming amendments to its administrative rules; and

(4) remove the sunset provision in bill section 4 as it would cause undue delay, confusion, and uncertainty about how to resolve pending cases if the new process is repealed on June 30, 2027.

Thank you for considering OIP's testimony.

SECTION 1. 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 part I 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 I 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 part I of chapter 92."

SECTION 2. 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~~] issue a ruling 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 92 and shall be optional and without prejudice to rights of judicial enforcement available under this chapter; provided further that if the office of information practices issues written guidance to a complainant concluding that an agency denial of access most likely will be upheld, including reasons for that decision, and informing the complainant of the right to bring a judicial action under section 92F-15(a), then no

further action is required by the office of information practices;

(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 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[~~:~~] by issuing a ruling on whether a violation occurred; provided that if the office of information practices issues written guidance to a complainant concluding that a board most likely did not violate part I of chapter 92, and including reasons for that decision, and informing the complainant of the right to bring a judicial action under section 92-12(c), then no further action is required by the office of information practices;

(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.

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

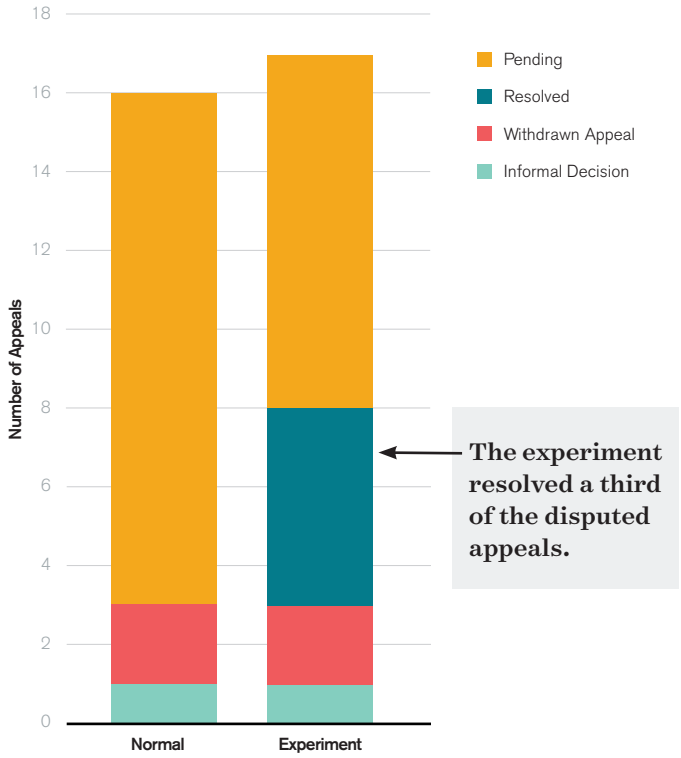
SECTION 4. This Act shall take effect on January 1, 2023.

SUCCESS: PRELIMINARY INCLINATIONS AT OIP MAKE A DIFFERENCE (ACTION RECOMMENDED)

Last year, the Legislature passed a resolution asking that OIP conduct an experiment concerning its appeals of public access disputes toward the objective of providing more expeditious disposition. H.R. 104 (2019). The Legislature requested that OIP issue preliminary inclinations in a random sampling of appeals. As reflected below, the Legislature correctly observed, "experiments generally provide useful information."

COMPARING THE EXPERIMENT TO THE NORMAL APPEALS

OIP conducted its experiment from July 1–October 31, 2019. It enrolled every other newly filed appeal in the experiment. The preliminary inclinations had a significant impact on timely resolutions to OIP appeals.[1]



[1] *H.R. 104 asked OIP to report to the 2020 Legislature its recommendations and findings, including a comparison of the outcomes and staff time requirements between the experiment and normal appeals. OIP's report is available at https://oip.hawaii.gov/wp-content/uploads/2020/02/Report-to-Legislature-re-HR-104-Pilot-Program.pdf.*

RECOMMENDATION

In light of the experiment's success, OIP should continue a modified version of the preliminary inclination experiment. Instead of a random sampling, OIP should target appeals if the agency's response clearly failed to meet the burden of proof or if the applicable law and facts are clear. Absent a significant change in circumstances, that preliminary inclination should become a final decision after 20 business days. This experiment would be an expanded and more proactive version of OIP's current case assessment method.

AREAS FOR TARGETED ENFORCEMENT

Review of OIP's remaining preliminary inclinations also revealed specific areas of concern that could be addressed through more proactive enforcement action.

- Some agencies use the OIP backlog to delay public access.
  - By law, agencies have the burden to come forward with evidence to prove that denial of access is justified. HRS § 92F-15(c).
  - In two still pending experiment appeals, agencies did not submit evidence, and OIP's preliminary inclination found that the agency could not meet its burden without evidence.
  - But instead of requiring disclosure, OIP informed the requester that final resolution "could take a year or longer to complete because of OIP's backlog of cases."
  - By submitting a facially inadequate justification for nondisclosure with OIP, these agencies are able to delay public access for at least a year and likely longer.
- Some appeals are not complicated.
  - Most of these resolved experiment appeals concerned straight-forward application of known law to uncomplicated facts.
  - Four still pending experiment appeals also concern the application of clear legal principles to uncomplicated facts.
  - Most, but not all, of these appeals would be resolved against the public.
  - Delays in final resolution do greater harm to the public than a denial of access based on well-established precedent.
  - When the outcome is obvious to an experienced OIP staff attorney after receiving the agency's response, there is no reason to devote significant resources to an exhaustively sourced decision.

LEAGUE OF WOMEN VOTERS® OF HAWAII

SENATE COMMITTEE ON GOVERNMENT OPERATIONS
Tuesday, March 15, 2022, 3 pm, State Capitol Room 016 & Videoconference
HB 2037, HD2, OIP Proposed SD1
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 SUPPORTS proposed OIP amendments to HB 2037, HD2.

Under HB 2037, HD2 the OIP would have discretion not to issue a ruling when either an agency or the public disputes OIP guidance concerning disclosure of a government record. The League's position is that when the OIP provides guidance in response to a public appeal, and an agency does not disclose a government record as recommended by OIP guidance, then the OIP should ALWAYS prepare an enforceable ruling. Proposed OIP amendments address our concerns. We appreciate the OIP's responsiveness and request that Senate GVR incorporate proposed OIP amendments in HB 2027, HD2, SD1.

Thank you for the opportunity to submit testimony.

League of Women Voters of Hawaii
P.O. Box 235026 ♦ Honolulu, HI 96823
Voicemail 808.377.6727 ♦ my.lwv.org/hawaii ♦ voters@lwvhi.org

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 H.B. 2037 H.D. 2,
Relating to the Office of Information Practices
Hearing: March 15, 2022 at 3:00 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. 2.**

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. 2.

SOCIETY OF PROFESSIONAL JOURNALISTS
Hawaii Chapter

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-2
Submitted on: 3/12/2022 12:40:04 PM
Testimony for GVO on 3/15/2022 3:00:00 PM

Submitted By	Organization	Testifier Position	Testify
lynne matusow	Individual	Support	Written Testimony Only

Comments:

I support HB2037, but find it wanting. First, I object to the use of defective effective dates and find that they do not serve to encourage future discussion, they are a cop out, and often end in the defeat of a bill during conference committee. The effective date should be changed to effective upon approval from the listed one which is 90 years in the future, a date none of us will be around.

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.

Second, 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, a group which itself 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 or state agency.