

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 Government Reform

From: Cheryl Kakazu Park, Director

Date: February 11, 2022, 9:30 a.m.
State Capitol, Conference Room 309 and Via Videoconference

Re: Testimony on H.B. No. 2037
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. In the majority of appeals,

however, 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 determination 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, OIP believes informal written guidance would be more suitable, less time-consuming, and more efficient in reaching the same result sooner. Current law, however, does not give OIP such discretion and requires OIP to make a full legal determination unless the requester agrees that the matter has been resolved by OIP's written guidance.

OIP's success in fiscal year 2019-2020 towards eliminating its backlog is now being 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 now 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 legal determinations 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, **this bill is essential to giving OIP additional flexibility to handle its growing caseload and to improve its efficiency within the constraints of its resources.**

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 written guidance without an actual legal determination, nor would it require courts to treat written guidance as precedent; thus, OIP would still need to issue a written determination 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 making a full legal determination or by offering written guidance on the law's requirements, as appropriate based on the specifics of the complaint and OIP's staffing level. 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 full legal determination should in all cases be written guidance, 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.

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

House Committee on Government Reform
Honorable Angus L.K. McKelvey, Chair
Honorable Tina Wildberger, Vice Chair

RE: Testimony Opposing H.B. 2037, Relating to the Office of Information Practices
Hearing: February 11, 2022 at 9:30 a.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**.

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**.

Statement Before The
Friday, February 11, 2022
9:30 AM
Via Videoconference, Conference Room 309

in consideration of
HB 2037

RELATING TO THE OFFICE OF INFORMATION PRACTICES.

Chair McKELVEY, Vice Chair WILDBERGER, and Members of the House Government Reform Committee

Common Cause Hawaii provides comments on HB 2037, 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 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 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. If you have further questions of me, please contact me at sma@commoncause.org.

Very respectfully yours,

Sandy Ma
Executive Director, Common Cause Hawaii



HOUSE COMMITTEE ON GOVERNMENT REFORM

Friday, February 11, 2022, 9:30 am, State Capitol Room 309 & Videoconference

HB 2037

Relating to the Office of Information Practices

TESTIMONY

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

Chair McKelvey and Committee Members:

The League of Women Voters of Hawaii opposes HB 2037.

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.

HB-2037

Submitted on: 2/9/2022 12:12:56 PM

Testimony for GVR on 2/11/2022 9:30:00 AM

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, and group which 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.