

OFFICE OF INFORMATION PRACTICES

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To: House Committee on Judiciary & Hawaiian Affairs

From: Cheryl Kakazu Park, Director

Date: February 15, 2023, 2:00 p.m.
State Capitol, Conference Room 325

Re: Testimony on H.B. No. 1157
Relating to the Office of Information Practices

Thank you for the opportunity to submit testimony on this bill, which would allow the state Office of Information Practices (OIP) to issue written guidance in place of an opinion only where OIP concludes that an agency has complied with the Uniform Information Practices Act (UIPA) (Chapter 92F, HRS) or Sunshine Law (Part I of Chapter 92, HRS). It would also appropriate \$185,000 for two full-time equivalent (2.0 FTE) permanent positions, including one attorney and one legal assistant. **OIP supports this bill, but prefers the version set out in unamended SB 719.**

A slightly different version of this bill was presented to the Working Group (WG) created by SCR 192 last session, which was asked to develop an exception under the UIPA for deliberative and predecisional matters (introduced this session as SB 720 and HB 1158). That proposal **used the substantive wording from a proposal that had been supported last year by OIP and the League of Women Voters (LWV) to amend HB 2037, SD 1, and** was attached as Exhibit K to the [SCR 192 WG's final report](#) presented to the Legislature. Some members of the WG were sympathetic to OIP's need for additional resources to meet its increasing workload, but wanted to limit the WG's bill package to only the question directly asked of them and encouraged OIP to pursue the proposal on its own.

This bill (HB 1157) substantially follows the language of that proposal to the SCR 192 WG and provides additional funding and positions for OIP and non-monetary assistance. SB 719, which more exactly follows the language of the proposal, is re-scheduled to be heard by the Senate Judiciary Committee on February 16, 2023. The LWV's testimony (see attached) on SB 719

indicates the LWV's continued support for the proposal to **amend the UIPA so that when OIP concludes in written guidance that agencies or boards have complied with the UIPA or Sunshine Law, an opinion is not needed to obtain agency compliance and OIP would have the discretion not to issue an opinion.** HB 1157 has technical differences from SB 719: it splits the newly added definitions between the UIPA's definitions section, 92F-3, HRS, and the section setting out OIP's powers and duties, section 92F-42, HRS, rather than placing them all in the definitions section as SB 719 does; and it consolidates and renumbers existing subsections of section 92F-42, which SB 719 does not. **To avoid the risk of confusion** over where in the UIPA to look for definitions and which provision was intended to be referenced in an existing court or OIP opinion citing a subsection of section 92F-42, **OIP prefers the version set out in the unamended SB 719**; nonetheless, the substantive effect of both proposals is the same.

The following background explains the need for 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 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 and efficient 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 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 and other versions of this measure, current law does not give OIP 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 informal Attorney of the Day advice or to requests for advisory opinions, correspondence, training, or other sorts of advice that OIP may provide. While opponents of other versions of this bill have cited 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, an appeal that a requester insists on having legally determined by an opinion, even when advised that the requester is unlikely to prevail, remains 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, 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.

Because the bill allows issuance of guidance in lieu of an opinion only in situations where OIP's guidance concludes that the agency or board's position most likely will be upheld, it 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. But when an agency has complied with the law, then an opinion is not needed to obtain an agency's compliance.** The change resulting from this bill would simply be that **when OIP expects to uphold an agency's or board's position, OIP would be given the flexibility to resolve the 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.

This Bill Also Provides OIP With Additional Positions and Funding That OIP Needs For Its Increasing Workload.

OIP appreciates the \$185,000 in annual funding for OIP in this bill. **OIP's personnel are already severely strained with their current workload**, which has seen a doubling of requests for its Attorney of the Day services over the past year, an extensive overhaul of its training materials, and interim legislative work, as OIP continues to work on its backlog of appeals that increased with the loss of

half its experienced personnel during the past two years of the COVID pandemic. **OIP today is doing over twice as much work with half the people and funding that it had 29 years ago.** In FY 1994, when it administered the only UIPA, OIP had 15 positions and an allocation of \$827,537, which would be \$1,591,384 today if adjusted for inflation. In FY 2022, when it administered both the UIPA and Sunshine Law and saw a doubling of its informal inquiries from the prior year, OIP had only 8.5 positions and an allocation of \$752,721. **Whether or not this bill passes, OIP will need the additional staff and funding to fulfill its increasing workload, including updates to its rules.**

In summary, OIP supports this measure, but for technical reasons prefers the version of it set out in SB 719. Thank you for considering OIP's testimony.

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House Committee on Judiciary & Hawaiian Affairs
Honorable David A. Tarnas, Chair
Honorable Gregg Takayama, Vice Chair

RE: Testimony Opposing H.B. 1157, Relating to the Office of Information Practices
Hearing: February 15, 2023 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 government transparency. Thank you for the opportunity to submit testimony **opposing the added OIP staff positions in H.B. 1157.**

Last week, this Committee approved the addition of two OIP staff positions in H.B. 719. Those staff positions are justified by the additional work required of OIP by that bill.

The amendments in H.B. 1157, however, require less work from OIP. It will no longer be issuing opinions in certain matters. Any number of formal disputes will be left unresolved with OIP only providing guidance. That outcome does not appear to serve the Legislature's original purpose in creating OIP as an alternative to lawsuits about public records. But OIP certainly should not get more staff for doing less work.

Thank you again for the opportunity to testify **opposing the added OIP staff positions in H.B. 1157.**



HOUSE COMMITTEE ON JUDICIARY & HAWAIIAN AFFAIRS
Wednesday, February 15, 2023, 2 pm, State Capitol Room 325 & Videoconference
HB 1157

Relating to the Office of Information Practices

TESTIMONY

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

Chair Tarnas, Vice Chair Takayama, and Committee Members:

The League of Women Voters of Hawaii supports HB 1157.

We are hopeful that the appropriate use of non-binding guidance can expedite resolution of public UIPA and Sunshine appeals. And we strongly support funding for additional OIP staff to reduce the backlog of unresolved appeals.

The League's position is that if the OIP prepares guidance to expedite resolution of a public UIPA or Sunshine appeal, and the affected agency or board does not comply with OIP guidance, then the OIP should ALWAYS prepare an enforceable ruling. However, the League believes OIP should have discretion not to issue an enforceable ruling when the affected agency or board complies with OIP guidance or when OIP guidance does not support a public appeal.

Thank you for the opportunity to submit testimony.



Feb. 15, 2023

David Tarnas
House Judiciary Committee
State Capitol
Honolulu, HI 96813

Re: House Bill 1157

Chairman Tarnas and Committee Members:

We ask you to hold this bill and compare the duties of the Office of Information Practices in this bill and in HB719. We think there will more OIP effort with added positions in HB719 than in this bill.

It appears that a bunch of work would no longer be done by the agency and could also get hung up under HB 1157 rather than resolved.

We ask you to hold this measure.

Thank you,

Stirling Morita
President
Hawaii Chapter SPJ

HB-1157

Submitted on: 2/14/2023 10:38:06 AM

Testimony for JHA on 2/15/2023 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Juanita Kawamoto Brown	Individual	Support	In Person

Comments:

HB-1157

Submitted on: 2/13/2023 2:37:30 PM

Testimony for JHA on 2/15/2023 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Andrew Crossland	Individual	Oppose	Written Testimony Only

Comments:

I oppose thsi Bill.

HB-1157

Submitted on: 2/13/2023 2:55:14 PM

Testimony for JHA on 2/15/2023 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Corinne Solomon	Individual	Oppose	Written Testimony Only

Comments:

I STRONGLY OPPOSE HB1157

This bill gives the Office of Information Practices the option to give guidance on records request denial appeals instead of giving an opinion. There is ALREADY another bill that excuses the OIP from making rulings as well. These bills are ways to pass the buck back to the citizen, who will need to get their own lawyer because the OIP won't do their job.

This bill from the OIP also throws in that they are understaffed and need more employees.

Sure, I hope you get more employees, but don't put that into a bill that works against the citizens of Hawaii and only benefits the OIP.

HB-1157

Submitted on: 2/13/2023 3:28:41 PM

Testimony for JHA on 2/15/2023 2:00:00 PM

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

Comments:

I support this bill. The OIP has been understaffed for years. Sometimes it takes several eternities to get responses. However, years ago under Gov. Abercrombie, the OIP decided not to hear complaints against neighborhood boards, abrogating its responsibility to the volunteer members of the Neighborhood Commission, who are clueless in this matter. I urge you to amend this bill to require the OIP to resume issuing guidance, opinions, etc. on complaints filed against neighborhood boards.

HB-1157

Submitted on: 2/14/2023 12:27:50 PM

Testimony for JHA on 2/15/2023 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Keikilani Ho	Individual	Oppose	Written Testimony Only

Comments:

This bill, just like SB 719 shows just how transparent the government is. This bill shows how the Hawaii government works against the very people who put them in office. Do your jobs. Citizens should not have to pay out of pocket for an attorney to fight request denials.

HB-1157

Submitted on: 2/14/2023 1:13:18 PM

Testimony for JHA on 2/15/2023 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Scott Shedko	Individual	Oppose	Written Testimony Only

Comments:

Honorable Chair Tarnas, Vice-Chair Takayama, and Committee Members,

I strongly oppose HB1157. This allows the Office of Information to simply write that they believe their denial will be upheld, and then no further action is required. The government should not be able to so easily and permanently dismiss requests or complaints from those they are supposed to serve. This is putting an undue burden on citizens seeking information, in a hopefully transparent government, in a sunshine law state.

PLEASE vote NO on HB1157!

Mahalo for reading my testimony!

Aloha