

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. 884, Relating to the Office of Information Practices
Hearing: February 9, 2021 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** H.B. 884.

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 while OIP goes through its backlog 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. 884.

HB-884

Submitted on: 2/6/2021 4:04:03 PM

Testimony for JHA on 2/9/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
lynne matusow	Individual	Support	No

Comments:

in full support.



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HOUSE COMMITTEE ON JUDICIARY & HAWAIIAN AFFAIRS
Tuesday, February 9, 2021, 2 pm, State Capitol Room 325
HB 884
Relating to the Office of Information Practices

TESTIMONY

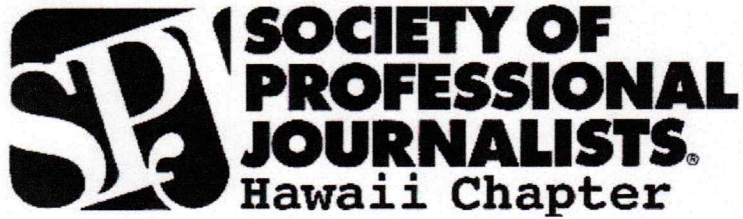
Douglas Meller, Legislative Committee, League of Women Voters of Hawaii

Chair Nakashima and Committee Members:

The League of Women Voters of Hawaii supports the intent of HB 884. The League would prefer that the Legislature provide the OIP with funding and positions to resolve the “backlog” of unresolved public complaints concerning agency denial of public access to information or records. Otherwise, there will continue to be a “backlog” of unresolved public complaints.

Assuming that the OIP will continue to be underfunded, results from the OIP’s experiment with non-binding guidance suggest one strategy that the OIP could take to minimize the “backlog” of unresolved public complaints. In simple terms, the OIP could give highest priority to “easy” complaints, which the OIP can quickly resolve with non-binding guidance or short formal rulings, and not give priority to the “oldest” unresolved complaints in the “backlog” queue, regardless of how complex and time consuming. The League believes this is the intent of HB 884.

Thank you for the opportunity to submit testimony.



Feb. 9, 2021

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

Re: House Bill 884

Chairman Nakashima and Committee Members:

We ask you to defer this bill, which allows the Office of Information Practices to provide "guidance" in a provision already specifying that OIP rule on a request for public records. Providing guidance is something already permitted in the law.

We are not certain what this bill would do, but it appears to be watering down OIP's purpose of deciding disputes over public records and avoiding shackling the public and government with extra costs.

This measure does not appear to be the answer to anything because OIP already can provide guidance in public records requests.

Thank you for your attention,

Stirling Morita
President
Hawaii Chapter SPJ

LATE

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To: House Committee on Judiciary & Hawaiian Affairs

From: Cheryl Kakazu Park, Director

Date: February 9, 2021, 2:00 p.m.
Via Videoconference

Re: Testimony on H.B. No. 884
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 writing a full legal 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. 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. Unfortunately, fiscal year 2020-2021 budget restrictions and three recent vacancies, together with OIP's lack of statutory discretion in determining how it can resolve appeals, portend a return to the situation in which requesters may 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, but only the first six months of fiscal year 2021 and the unusual loss during that time of three of its 8.5 personnel, for OIP's backlog to grow by over 40 percent.

Exacerbating the situation is the anticipated retirement in 2021 of one of OIP's three remaining staff attorneys. Even if new attorneys are hired, it will take substantial time to train them, which will detract from the time that the experienced attorneys will have to do their own work as well as their many other OIP duties, such as training boards if the Sunshine Law is amended to allow for remote meetings. Additionally, when the Governor's emergency orders partially suspending the UIPA and Sunshine Law are eventually lifted and agency responses to the requests made while deadlines were suspended come due all at once, OIP may be faced with an onslaught of new appeals challenging agency delays in responding to record requests and alleged Sunshine Law violations.

Under the current and anticipated circumstances, OIP's backlog and the time that the public must wait for case resolution will inevitably continue to grow. Therefore, this bill is essential to giving OIP much needed flexibility to handle its overwhelming caseload and to improve its efficiency within the constraints of its diminishing 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 now have 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.

OIP notes that although the intent of this bill is that the informal guidance offered in lieu of a full legal determination would in all cases be written guidance, 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 4 line 20 replace “providing guidance” with “providing written guidance[,]”**

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