

# OFFICE OF INFORMATION PRACTICES

STATE OF HAWAII  
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To: Senate Committee on Government Operations

From: Cheryl Kakazu Park, Director

Date: February 9, 2023, 3:00 p.m.  
State Capitol, Conference Room 225

Re: Testimony on S.B. No. 1253  
Relating to the Office of Information Practices

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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 with amendments to align it with the version of this measure that the League of Women Voters is willing to support as indicated in its testimony. Because another version of this measure, S.B. 719, includes both the language preferred by the League of Women Voters and an appropriation for OIP, OIP recommends amending the bill by replacing its contents with that version.**

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/nagysii7-7sbmvdpy8pgtx87-ut7deqj/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 previous 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 requests for advisory opinions, correspondence, training, or other sorts of advice that OIP may provide. While opponents of previous 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, 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.

The 2022 amendment proposed by the League of Women Voters would narrow the circumstances in which OIP can provide written guidance in lieu of an opinion to Uniform Information Practices Act (UIPA) to appeals where OIP's guidance upholds an agency's denial. OIP supports amending this bill to align to that standard, and also recommends adding an appropriation for OIP that is found in other versions of this measure. Thus, **OIP recommends that the contents of this bill be replaced with the contents of S.B. 719, which would:**

(1) amend subsections 92F-42(a)(1) and (18) to allow OIP to issue written guidance in place of an opinion only where OIP's conclusion is that an agency's denial of access under the UIPA or action challenged under the Sunshine Law will most likely be upheld;

(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 July 1, 2023; and

(4) add an appropriation in bill section 4 for \$185,000 for two full-time equivalent (2.0 FTE) permanent positions, including one attorney and one legal assistant.

A copy of S.B. 719 is attached.

Thank you for considering OIP's testimony.



Feb. 9, 2023

Angus McKelvey  
Senate Government Operations Committee  
State Capitol  
Honolulu, HI 96813

Re: Senate Bill 1253

We believe this bill is not needed.

The Office of Information Practices already can issue informal guidance on records requests.

If OIP is given the power of making legal determinations in such cases, it will make its long backlog of cases even longer by adding extra functions and actions to its procedures.

The Legislature intended that OIP be an alternative to lawsuits in records disputes, but if the waiting list grows so long, more lawsuits are likely to happen.

We urge the committee to make OIP focus on its specified duties and issue informal guidance opinions as they are empowered to do. This would lessen the OIP backlog.

We ask that you shelve this bill.

Thank you,

Stirling Morita  
President  
Hawaii Chapter SPJ

THE CIVIL BEAT  
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Senate Committee on Government Operations  
Honorable Angus L.K. McKelvey, Chair  
Honorable Mike Gabbard, Vice Chair

**RE: Testimony Opposing S.B. 1253, Relating to the Office of Information Practices**  
Hearing: February 9, 2023 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 government transparency. Thank you for the opportunity to submit testimony **opposing** S.B. 1253.

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** S.B. 1253.



SENATE COMMITTEE ON GOVERNMENT OPERATIONS  
Thursday, February 9, 2023, 3 pm, State Capitol Room 225 & Videoconference  
SB 1253

Relating to the Office of Information Practices

**TESTIMONY**

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

Chair McKelvey, Vice Chair Gabbard, and Committee Members:

The League of Women Voters of Hawaii opposes SB 1253. However, if SB 1253 were amended to use the wording proposed by HB 2037, SD 1 during the 2022 legislative session, the League would support SB 1253, SD 1.

SB 1253 would give OIP 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 if 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, when agencies or boards comply with OIP guidance, the League has no objection to OIP having discretion not to issue a ruling.

Thank you for the opportunity to submit testimony.



**TESTIMONY OF THE  
COMMISSION TO PROMOTE UNIFORM LEGISLATION  
ON S.B. 1253**

**RELATING TO THE OFFICE OF INFORMATION PRACTICES**

**BEFORE THE SENATE HOUSE COMMITTEE ON GOVERNMENT  
OPERATIONS**

**DATE:** Wednesday, February 9, 2023, at 3:00 p.m.

**PERSON TESTIFYING:** BLAKE OSHIRO  
Commission to Promote Uniform Legislation

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Chair McKelvey, Vice-Chair Gabbard, Members of the Senate Committee on Government Operations:

My name is Blake Oshiro, and I am a member of the State of Hawai'i Commission to Promote Uniform Legislation. Thank you for this opportunity to submit this testimony with comments to Senate Bill No. 1253. Our review is limited to whether the amendments affect "uniformity" and we do not directly address the substantive changes.

The Uniform Law Commission promotes the principal of uniformity by drafting and proposing specific statutes in areas of the law where uniformity between the states is desirable.

Hawaii's Haw. Rev. Stat. Ch 92F was adopted in 1988, and is referred to as the Uniform Information Practices Act (UIPA). This bill amends that law and the authority of the Office of Information Practices (OIP) to render advise and determinations.

After reviewing this bill, we find that these proposed amendments, if enacted, would not harm uniformity.

Thank you very much for this opportunity to testify on this measure.

**SB-1253**

Submitted on: 2/8/2023 1:11:16 PM

Testimony for GVO on 2/9/2023 3:00:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Testify</b>
Corinne Solomon	Individual	Oppose	Remotely Via Zoom

Comments:

I OPPOSE SB1253

Adding the verbiage "provide guidance" passes the buck from the OIP making a ruling to giving guidance to the citizen who requested the record and had to file an appeal to the OIP to rule if the denial was legal.

OIP is staffed by attorneys. They have the legal knowledge to make rulings.

If the OIP won't make a ruling, then the records requestor will need to hire their own lawyer to appeal access to the record.

How does this help the public?

This only helps the OIP.

**SB-1253**

Submitted on: 2/3/2023 11:00:45 AM

Testimony for GVO on 2/9/2023 3:00:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Testify</b>
Andrew Crossland	Individual	Support	Written Testimony Only

Comments:

I support this Bill.

**SB-1253**

Submitted on: 2/7/2023 9:31:37 PM

Testimony for GVO on 2/9/2023 3:00:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Testify</b>
Vivek Pathela	Individual	Support	Written Testimony Only

Comments:

Support

**LATE**

**SB-1253**

Submitted on: 2/8/2023 10:58:34 PM

Testimony for GVO on 2/9/2023 3:00:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Testify</b>
jaerick medeiros-garcia	Individual	Oppose	Written Testimony Only

Comments:

I oppose SB1253 , only seems like more Corruption.