

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 Judiciary

From: Cheryl Kakazu Park, Director

Date: February 14, 2023, 9:40 a.m.
State Capitol, Conference Room 016

Re: Testimony on S.B. No. 719
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.**

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). This bill 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 this bill on its own.

This bill provides additional funding and positions for OIP and non-monetary assistance **using 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.** A similar bill, SB 1253, without an appropriation was heard last week by the Senate Government Operations Committee on February 9, 2023, and the LWV's testimony (see attached) on SB 1253 indicates the LWV's continued support for the language from the proposed amendment to HB 2037, HD 1 that is being used in this bill 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.

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-y8pctx87-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 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 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, 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

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\$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.**

Thank you for considering OIP's testimony.



SENATE COMMITTEE ON JUDICIARY
Tuesday, February 14, 2023, 9:40 am, State Capitol Room 016 & Videoconference
SB 719
Relating to the Office of Information Practices
TESTIMONY
Douglas Meller, Legislative Committee, League of Women Voters of Hawaii

Chair Rhoads, Vice Chair Gabbard, and Committee Members:

The League of Women Voters of Hawaii supports SB 719.

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.

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 Judiciary
Honorable Karl Rhoads, Chair
Honorable Mike Gabbard, Vice Chair

RE: Testimony Opposing S.B. 719, Relating to the Office of Information Practices
Hearing: February 14, 2023 at 9:40 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 government transparency. Thank you for the opportunity to submit testimony **opposing the added OIP staff positions in S.B. 719.**

Last week, the Senate Committee on Government Operations approved the addition of two OIP staff positions in S.B. 991. Those staff positions are justified by the additional work required of OIP by that bill.

The amendments in S.B. 719, 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 S.B. 719.**



Feb. 14, 2023

Karl Rhoads
Senate Judiciary Committee
State Capitol
Honolulu, HI 96813

Re: Senate Bill 719

Chairman Rhoads and Committee Members:

We fail to see how this bill will empower the Office of Information Practices to plow through records requests and reduce its case backlog compared to another that is headed to your committee.

We ask you to hold off on this bill so you can review it in conjunction with SB991 from the Senate Government Operations Committee.

Thank you,

Stirling Morita
President
Hawaii Chapter SPJ

TESTIMONY

State Senate Committee on Judiciary RELATING TO THE OFFICE OF INFORMATION PRACTICES

Tuesday, February 14, 2023, 9:40 am
State Capitol Conference Room 016 and via Videoconference

Chair Rhoads, Vice-Chair Gabbard and Committee Members

Respectfully submitted in STRONG OPPOSITION by Mrs. Jamie Detwiler, President, Hawaii Federation of Republican Women for the following reasons:

1. The proposed amendments thwart transparency in government. Section 92F—3, Hawaii Revised Statutes through proposed amendments by adding three new definitions.
2. This bill gives the Office of Information Practices (OIP) the option to give “guidance” on records request denial appeals instead of making an opinion.
3. SB 719 proposed amendment states, ""Guidance" means a written discussion of the major legal and factual issues raised by an inquiry.

Guidance – a discussion has the propensity to subjective interpretation. Who makes the determination as to whether or not the decision does not rise to the level of an opinion?

Opinion – is objective based on the current statute and case history.

4. SB719 states, 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 OIP.

If SB719 passes and a complainant decides to appeal the decision, the burden is placed on the complainant to hire a lawyer. Furthermore, the OIP does not promote open and transparent government as stated on their website. They promote roadblocks to transparency.

5. It appears that the OIP is advocating for the protection of government agencies and non-elected bureaucrats rather than “ensuring open government while protecting individual privacy” which is their mission statement.

Once again, I strongly OPPOSE SB719. Please vote NO.

Thank you for the opportunity to testify.

SB-719

Submitted on: 2/10/2023 7:52:56 PM

Testimony for JDC on 2/14/2023 9:40:00 AM

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

Comments:

I oppose this Bill.

SB-719

Submitted on: 2/12/2023 4:03:13 PM

Testimony for JDC on 2/14/2023 9:40:00 AM

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

Comments:

Please accept this as testimony in full support. The OIP has been understaffed for years. People wait for months, even years, to get responses. It has also abrogated its responsibility to opine on Sunshine Law violations for the Neighborhood Boards, delegating that authority to the Neighborhood Commisison, made of up nine volunteers who do not comprehend the statute. Would be that you could in this bill require the OIP to revert back to its old policy of commenting on complaints about violations by the neighborhood boards.

OIP needs all the help it can get.

Thank you for the opportunity to testify.

SB-719

Submitted on: 2/12/2023 4:55:38 PM

Testimony for JDC on 2/14/2023 9:40:00 AM

| Submitted By | Organization | Testifier Position | Testify |
|---------------------|---------------------|---------------------------|---------------------------|
| tania victorine | Individual | Oppose | Written Testimony Only |

Comments:

I OPPOSE. The office of information practices should not be giving opinions and guidance on records request appeals for denials.

Short staffed? OK- don't put it in a bill to pass the buck so citizens need to hire lawyers to fight a denial.

SB-719

Submitted on: 2/12/2023 6:53:44 PM

Testimony for JDC on 2/14/2023 9:40:00 AM

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

Comments:

I STRONGLY OPPOSE HB719.

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.

SB-719

Submitted on: 2/12/2023 11:55:25 PM

Testimony for JDC on 2/14/2023 9:40:00 AM

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

Comments:

I oppose this bill!

SB-719

Submitted on: 2/13/2023 8:31:58 AM

Testimony for JDC on 2/14/2023 9:40:00 AM

| Submitted By | Organization | Testifier Position | Testify |
|---------------------|---------------------|---------------------------|---------------------------|
| julie schaus | Individual | Oppose | Written Testimony Only |

Comments:

I oppose SB 719

no to "guidance" and "opinions". we want rulings.