

OFFICE OF INFORMATION PRACTICES

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To: House Committee on Judiciary

From: Cheryl Kakazu Park, Director

Date: April 3, 2019, 2:00 p.m.
State Capitol, Conference Room 325

Re: Testimony on H.C.R No. 111 and H.R. No. 104
Requesting That the Office of Information Practices Conduct an
Alternative Appeal Resolution Pilot Project

Thank you for the opportunity to submit testimony on this resolution, which requests that the Office of Information Practices (OIP) prepare short, informal, nonenforceable guidance for randomly selected appeals, and report back to the Legislature regarding the effects. **The Office of Information Practices (OIP) is willing to experiment with this or other methods of alternative appeal resolution that would help it to resolve appeals faster, and thus supports this measure.**

Appeals are just one type of formal case that OIP works on, and they are the sole focus of these resolutions. Currently, the OIP attorney assigned to each appeal file does a preliminary assessment of the file once the agency's response has come in, both for "triage" to determine if the appeal may be quickly resolved by mediation or a straightforward decision relying on clearly applicable precedent, and to determine whether there are follow-up responses that should be obtained from the agency or the requester even if the file is not suitable for quick resolution. OIP provides the agency's response to the person who submitted the appeal upon

request. In those files the assigned attorney believes are suitable for mediation, the assigned attorney will typically contact the agency and the requester to share OIP's inclination and seek to work out an agreement; however, OIP does not normally provide a written preliminary inclination as part of the process. In cases selected for mediation, if the parties do not reach agreement on all the issues, OIP will provide an enforceable written determination at a future time, with the unsuccessfully mediated cases going back in line with all other appeals, to be resolved generally on a first-come, first-served basis. Between the cases OIP is able to resolve without an opinion and those it resolves with an opinion, **OIP's current process has been gaining ground against its backlog of pending appeal files**, helped by a lower number of new appeal files over the last year. Thus, as of February 28, 2019, OIP had closed 35 of the 97 appeals that it had pending on July 1, 2018, and had closed 6 of the 29 new appeals filed after July 1, 2018.

The process proposed by this resolution would be a significant departure from the way OIP currently selects cases for mediation, as it would entail taking a random selection of incoming appeal files, regardless of how voluminous the records or how complex the issues involved, and quickly issuing short, informal guidance with the hope that the parties involved will accept and follow that guidance in lieu of waiting what may be a year or more for a binding full opinion. It may be challenging to implement insofar as it may require quickly assessing and offering guidance on files involving hundreds of pages of withheld records to review. In such cases, however, OIP believes it will be able to follow the proposed process by offering guidance based on just a representative sampling of voluminous records. While the proposal will also likely take more time to process a case with complex or novel legal issues and would thus reduce the number of "easy" cases that could have otherwise be processed during that time, OIP might ultimately save time by doing a

less detailed inclination rather than a thoroughly researched and explained opinion. When any party does not wish to accept OIP's nonbinding guidance, the proposal will allow OIP to provide a full and enforceable opinion at a later time, as determined by OIP's usual policies.

Because the proposed experiment involves a random sample of cases processed in a way that is significantly different from what OIP does currently, OIP believes its results will be very illuminating. **The process proposed by this measure may turn out to decrease the amount of time required on average to resolve an appeal, it may turn out to have no significant effect, or it may turn out to increase the amount of time required on average to resolve an appeal as compared to OIP's current process.** If it turns out that offering early guidance even in the cases involving voluminous records or complex issues improves the average time required to resolve files overall, that will be important to know and OIP could adopt the practice going forward. If, on the other hand, it turns out that doing so is less time-efficient than OIP's current practice of seeking to mediate only selected cases, then OIP will at least have the knowledge that its current selective mediation actually is a more efficient approach than the proposed approach.

To properly assess the effects of the proposed approach without skewing the results from a different methodology, however, OIP will not be able to continue its own current form of selective mediation efforts. Notably, the Senate Committee on Government Operations has passed out SCR 107 and SR 81, which request that OIP experiment with an approach more closely akin to what it is currently doing, so while OIP is willing to undertake either pilot project, the **results would be skewed if both the Senate and House adopted different methodologies for OIP to follow.**

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If the House chooses to adopt the methodology provided in these resolutions, then OIP would also be amenable to the amendment proposed by the League of Women Voters to have the pilot project run for a year and a half instead of just half a year, with OIP reporting preliminary results to the 2020 Legislature and a final report to the 2021 Legislature.

Thank you for considering OIP's comments.

THE CIVIL BEAT
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House Committee on Judiciary
Honorable Chris Lee, Chair
Honorable Joy A. San Buenaventura, Vice Chair

RE: Testimony in Support of H.C.R. 111
Hearing: April 3, 2019 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 governmental transparency. Thank you for the opportunity to submit testimony **supporting H.C.R. 111**.

Please note that the Senate has moved forward alternative resolutions to this version (S.C.R. 107 / S.R. 81) that the Law Center would prefer. We would ask that the Committee amend H.C.R. 111 to follow S.C.R. 107. The Senate version is preferable because it requires a more timely, transparent, and concrete process.

- *Timely:* The Senate version requires a preliminary inclination within six weeks of an appeal, rather than two weeks of the agency's "final response" – which response is frequently delayed because agencies fail to respond, the Office of Information Practices (OIP) grants extensions, or OIP asks for additional information because the agency's response is deficient.
- *Transparent:* The Senate version requires OIP to provide the requester with a copy of the agency's response to the appeal – which the requester does not receive in the ordinary course under OIP's rules – and requires OIP to post its preliminary inclinations on the Internet so that the public can monitor the proposed process.
- *Concrete:* The Senate version requires OIP to process at least 10 appeals using the proposed methodology during the five-month period between July 1 and December 1, 2019. In testimony, OIP contemplated applying a "random" method of 1 in every 5 appeals, but based on last year's filings, that would result in only a sample size of 4 appeals.¹

¹ Random sampling is unnecessary. OIP should be using its judgment to expedite appeals. The Law Center has no basis to conclude that OIP would unfairly discriminate against certain requesters or otherwise abuse the proposed process in a manner that would require random sampling.

The Committee also might consider amending the resolution to request a longer timeframe for the experiment with interim reporting in OIP's annual reports to the Legislature. Following a different process for six months will provide little meaningful comparison to OIP's current process that typically takes 2-3 years.

Nevertheless, even if the Committee does not amend this resolution, any effort that encourages OIP to re-examine its internal processes and seek out more efficient methods for resolving complaints would be greatly appreciated. H.C.R. 111 requests that OIP experiment with a random sample of public complaints in the search for a way to reduce the time needed to resolve those complaints. This bill reinforces the legislative intent that OIP's review be "*expeditious, informal, and at no cost to the public.*"

OIP is not resolving complaints in an expeditious manner. Reviewing data from OIP, the Law Center discovered in 2017 that time taken to resolve complaints has quadrupled in recent years, fewer complaints on average are being resolved each year, and OIP's backlog is trending upward despite a downward trend in new filings. Successive reports have not shown improvement. The Law Center's three years of reports are posted at www.civilbeatlawcenter.org/resources.

When we advise members of the public regarding options for resolving UIPA or Sunshine disputes, the Law Center must explain that an appeal to OIP will take at least a year, but closer to two years or more. Some give up. Others who move forward with OIP often complain later that the information they sought is no longer useful when OIP orders disclosure. Timely access is critical.

Thank you again for the opportunity to testify in **support** of H.C.R. 111.



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HOUSE COMMITTEE ON JUDICIARY
Wednesday, April 3, 2019, 2 PM Hearing in State Capitol Room 325

HOUSE CONCURRENT RESOLUTION 111 AND HOUSE RESOLUTION 104
REQUESTING THAT THE OFFICE OF INFORMATION PRACTICES CONDUCT AN ALTERNATIVE APPEAL
RESOLUTION PILOT PROJECT.

TESTIMONY

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

Chair Lee and Committee Members:

The League of Women Voters of Hawaii supports HCR 106 and HR104. An appropriately sized randomly chosen sample would allow the OIP to determine whether the experimental approach is useful for "easy" cases (with obvious precedents) and also to determine whether the experimental approach is useful for "other" cases. To allow sufficient time for the proposed experiment to generate statistically significant data, we suggest amending these resolutions to request the OIP to report preliminary findings to the 2020 Legislature and to submit a final report to the 2021 Legislature.

Thank you for the opportunity to submit testimony.

HCR-111

Submitted on: 4/2/2019 10:59:08 AM

Testimony for JUD on 4/3/2019 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Melodie Aduja	O`ahu County Democrats Legislative Priorities Committee	Support	No

Comments: