DEPT. COMM. NO. 350

STATE OF HAWAII
OFFICE OF INFORMATION PRACTICES
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CHERYL KAKAZU PARK
DIRECTOR

January 9, 2020

The Honorable Ronald D. Kouchi,
President
and Members of the Senate
Thirtieth State Legislature
State Capitol, Room 409
Honolulu, Hawaii 96813

The Honorable Scott K. Saiki, Speaker
and Members of the House of
Representatives
Thirtieth State Legislature
State Capitol, Room 431
Honolulu, Hawaii 96813

Dear President Kouchi, Speaker Saiki, and Members of the Legislature:

For your information and consideration, I am transmitting a copy of Office of Information Practice's Report on H.R. No. 104, Regular Session of 2019, Requesting that the Office of Information Practices Conduct an Alternative Appeal Resolution Pilot Project.

Pursuant to Section 93-16, HRS, I am also informing you that the report may be viewed electronically at: http://ags.hawaii.gov/reports/legislative-reports/.

Sincerely,

Cheryl Kakazu Park

CHERYL KAKAZU PARK
Director

Enclosure

OFFICE OF INFORMATION PRACTICES

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To: Chief Clerk, House of Representatives
Chief Clerk, Senate

From: Cheryl Kakazu Park, Director

Date: January 8, 2020

Re: Report on H.R. No. 104, Regular Session of 2019
Requesting that the Office of Information Practices Conduct an Alternative Appeal Resolution Pilot Project

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In H.R. 104, Regular Session of 2019, the Hawaii House of Representatives requested that the Office of Information Practices (OIP) conduct an alternative appeal resolution pilot program and prepare "short, informal, unenforceable guidance" within two weeks of receiving the agency's final response for the files randomly assigned to the alternative appeal resolution track. In response to H.R. 104, OIP ran a pilot program in the first five months of fiscal year 2020.

For the purpose of this pilot program, OIP focused on the two types of files that can result in issuance of an OIP opinion: appeal files, in which there is an actual dispute under the UIPA or the Sunshine Law, and files opened in response to a request for an opinion, in which one party, typically an agency, seeks an advisory opinion from OIP under the UIPA or the Sunshine Law. While OIP also provides general advice, training, and various other forms of assistance, appeals and requests for an opinion are the only two types of files through which OIP issues

opinions. OIP's Annual Report details all the different forms of assistance OIP provides, gives statistical information on the number of such requests received by OIP, and summarizes OIP's opinions and other work done throughout the year.

To meet the intent of H.R. 104, OIP randomly split its incoming files into two pools: one to be included in the pilot program under which OIP would issue guidance setting out its inclinations once the parties' submissions were complete, and another that would be processed according to OIP's usual procedures (which do not include issuing early guidance). From July 1 through November 30, 2019, OIP assigned the first new file to be opened to the experimental track, and thereafter assigned each new file alternately to the regular track and to the experimental track. This resulted in 17 files being assigned to the experimental pool and 17 assigned to the regular pool. The mix of experimental files was similar to the mix of regular files in terms of complexity of issues, type of issues, and assigned attorneys.

As of the date of this preliminary report, 15 experimental files have reached the point where OIP can definitively state whether they closed as a result of the early guidance, and two are not yet at that point either because the parties' submissions are not yet complete or OIP's deadline for the parties to respond to guidance has not yet run. Of the remaining 15 files, two were dismissed for other reasons prior to guidance being issued (for both the experimental and regular files, the typical reason for an early dismissal is the agency's decision to disclose the requested records or the board reaching an understanding with the requester on the disputed Sunshine Law issue), and OIP issued a memorandum opinion on one file, as it was a simple issue and as such was suitable to be expedited. That leaves 12 files where guidance was issued and the guidance process is now complete. Of those

twelve, four were dismissed as a result of OIP's guidance, but OIP's guidance did not resolve the dispute for the remaining eight files and thus OIP expects to ultimately write an opinion in accordance with its usual procedures.

Of the 17 files on the regular track, which OIP has not issued guidance for, two were dismissed, a memorandum opinion was issued for one as it was a simple issue suitable to be expedited, and the remaining 14 are still pending and OIP expects to ultimately write an opinion in accordance with its usual procedures.

OIP estimates that it has spent approximately triple the time on each experimental file that it has spent on each regular file to date, most of which is attributable to time spent preparing guidance regarding OIP's inclinations as required by the pilot program. Thus, at this point the experimental files have required significantly more time than the regular track ones and distracted from OIP's ability to close the older files that OIP's attorneys would otherwise be working on under OIP's general "first in – first out" policy. The additional time required for the experimental files is, of course, a downside to the experimental process. It is possible, though, that the additional time spent in issuing guidance for the experimental files that did not close will, in the long run, mean that those files require less time to write an opinion than the regular track files. OIP will continue to track both sets of files and will issue updated reports on this pilot program until all files in both tracks have closed, to better assess whether the experimental files end up requiring more or less time overall when all files have been completed.

OIP has found both pros and cons to the experimental process, as compared to OIP's existing process. The pros include:

- The extra time spent focusing on the experimental files soon after opening has made it apparent at an early stage when OIP needs additional information from either party before the file is ready for an opinion, which allows OIP to seek that information while the issue is still fresh in both parties' minds.
- For Sunshine Law files, even when the parties do not agree to dismiss the file based on OIP's guidance, the prompt issuance of such guidance gives the board an opportunity to seek to mitigate any potential violations while they are still fresh, and gives the complainant an indication of whether there likely was a violation while still within the 90-day statute of limitations for going to court to seek to void a board's action.

The cons include:

- The extra time spent focusing on the experimental files comes out of the time that would otherwise be spent working on resolving older files, and thus delays the resolution of OIP's oldest pending files.
- A strict deadline for providing guidance creates additional administrative work to track guidance deadlines to avoid missing any while addressing other pending work and emergent issues coming before OIP.
- The parties that have declined to accept OIP's initial inclination and instead asked for an opinion have not provided OIP with any additional evidence, arguments, or clarification of their position in response to OIP's initial inclination, so OIP is likely to end up writing

the same basic analysis twice, first as guidance and then as an opinion, which is an inefficient way to operate.

OIP's preliminary assessment of the pilot program is that issuing guidance setting out OIP's inclinations is effective in some circumstances, but not universally effective. Specifically, issuing guidance appears most effective in files that are not too complex, do not raise novel legal issues, and where the parties do not have a history of bad relations. Even in files that are unlikely to be resolved by such guidance, OIP notes that the resulting early focus on ensuring that an appeal or request for opinion file has been fully addressed by both parties and is not missing necessary information is beneficial, as it allows OIP to obtain supplementary information while an issue is still fresh. However, while issuing early guidance is one way to achieve this benefit, there are also less time-consuming ways to do so.

OIP therefore does not plan to make the issuance of such guidance a universal practice at this time. Instead, OIP will carefully assess each file once the parties' submissions appear to be complete, and (after obtaining any additional information from the parties that may be required) issue early guidance in those UIPA files where the issues are relatively simple and the parties do not have a history of bad relations, and in those Sunshine Law appeals where guidance would allow the parties to timely act to address an apparent violation even if the guidance itself is not likely to resolve the dispute. OIP will reassess this conclusion annually when doing updates to this report.

Thank you for the opportunity to report regarding the pilot program requested by H.R. 104.