

Office of Information Practices' Response to the Civil Beat Law Center Report

February 8, 2017

The state Office of Information Practices (OIP) has reviewed the Civil Beat Law Center's attached report entitled "Breaking Down Hawaii's Broken System for Resolving Public Access Disputes" (Report).¹ Based on OIP's readily available data and the first-hand knowledge and practical experience of its personnel whose work experience collectively covers OIP's creation by the Legislature and entire existence since 1988, OIP provides the following response.²

SUMMARY

OIP agrees with the Report's finding that its staff attorneys are underpaid and **appreciates the support for OIP's salary parity.** However, OIP agrees with little else in the report.

OIP disagrees with most of the remainder of the Report's conclusions and recommendations because they are based on inaccurate assumptions, metrics that excluded a number of relevant factors, its writer's particular perspective as an advocate and legal advisor for a media outlet, and a lack of understanding of how and why OIP has actually conducted its business over time.

¹ For over a year, OIP provided information in response to numerous requests from the Report's author, Mr. R. Brian Black, for OIP's records, but had no knowledge about the Report and was not otherwise consulted in its preparation. OIP first learned of the Report on January 31, 2017. OIP expressed its serious concerns about the Report's methodology to Mr. Black on February 3, 2017, prior to its publication.

² OIP currently has five staff attorneys, and all work full-time except for one who works half-time. OIP's longest-serving staff attorney, Lorna Aratani, had been the Committee Clerk to the House Judiciary Committee during its consideration and ultimate adoption of the UIPA by the Hawaii State Legislature in 1988, and was the first attorney hired by the first OIP Director in December 1988. Except for five years from 1999 to 2004, Ms. Aratani has been employed by OIP for 22 years to date. OIP's second most senior staff attorney, Jennifer Brooks, has been employed by OIP for nearly 16 years, since March 2001. OIP's third most senior staff attorney, Carlotta Amerino, was first employed by OIP in September 1996, left in 2004, and returned to OIP in October 2011, and has a total of 12 years of experience at OIP. The two newest staff attorneys, Donald Amano and Liza Onuma, joined OIP in 2014. OIP is fortunate to have such strong institutional memory and employees with actual knowledge of OIP's operations under all six Directors. The Director since April 2011 is Cheryl Kakazu Park, J.D., M.B.A.

To provide administrative support, OIP has one secretary, who has been with the office for nearly 10 years; one administrative assistant, who has been with the office for 1.5 years; and one Records Report Management Specialist, who has nearly 21 years of service with OIP.

To summarize its key points of disagreement, OIP contests the Report's conclusion that "OIP's backlog is trending upward despite a downward trend in new filings." As explained in detail, *infra*, OIP's data shows that its backlog correlates directly with the number of new formal cases filed each year and has been ameliorated by OIP's increasing productivity in resolving more cases since FY 2013.

Second, the Report is highly critical of OIP's "first in, first out" guideline that generally gives preference to the resolution of older cases before newer cases. OIP believes that its "first in, first out" guideline fairly allows those standing in line the longest to get their appeals resolved first, while still allowing a few requesters to "cut in line" in matters of significant public interest or other good cause.

Third, the Report recommends that the Attorney of the Day (AOD) service be suspended while OIP focuses on resolving its backlog. OIP considers its popular AOD service to be its "express line" to quickly and informally help the public with simple questions, help agencies comply with the law, and prevent small issues from turning into bigger problems that would otherwise further increase its backlog of formal cases.

And, although OIP's decisions may disappoint people with differing perspectives, it is unfair to question OIP's neutrality on that basis. It is also unfair to look at only one of OIP's many duties and conclude that the public access system is "broken." OIP hopes its response to the Report (Response) will help the public and government agencies understand that OIP must juggle many variables in its attempts to provide accurate and timely legal advice and decisions to all who seek its services.

ANALYSIS

What OIP agrees with:

OIP agrees with the Report that its staff attorneys are underpaid and appreciates the Report's support for **OIP's salary parity**. OIP also appreciates that **the Report "is not a criticism of the current OIP director"** and seeks to "re-evaluate OIP's institutional methods, not its leadership."³ OIP further agrees with the Report that **not all OIP administrations are comparable** as they have operated under different policies, legal requirements, and circumstances. Finally, **OIP agrees that "access delayed is access denied," which is why it has worked hard since 2011 to reduce the age of the oldest pending cases from 12 years to 2 years** at the end of FY 2016, has **resolved increasing numbers of formal cases** since 2013, and has **prevented many actual and potential disputes from escalating to appeals through increased training and faster, informal dispute prevention and resolution methods**, such as the AOD service.

³ Report page 6. Likewise, OIP's disagreements with the Report should not be taken as a personal attack upon its author, but viewed as a necessary response to inaccuracies that could mislead the public and must be corrected for proper accountability.

What OIP disagrees with:

OIP disagrees with the Report's title and thesis that Hawaii's public access dispute resolution system is "broken." Rather, OIP believes that the Report's analysis is based on flawed methodology, inaccurate assumptions, its particular perspective as an advocate for a media outlet,⁴ and a lack of understanding of how and why OIP has actually conducted its business over time. Consequently, OIP cannot agree with many of the Report's conclusions and recommendations.⁵

The Report views government agencies as its adversaries and makes unwarranted attacks upon OIP's impartiality.⁶ **OIP is the neutral and independent agency that is statutorily mandated to administer and decide disputes Hawaii's Uniform Information Practices Act (Modified), chapter 92F, HRS (UIPA), or Sunshine Law, Part I of chapter 92, HRS, and all of OIP's employees are dedicated to performing their duties in a fair and impartial manner.** In addition, OIP's Impartiality Policy, which is the first duty listed in OIP's Internal Case Management Policies (November 1, 2015), states in relevant part that "OIP shall act as an

⁴ In responding to this Report, OIP notes that Mr. Black is not a government auditor or similarly neutral figure whose mission is to investigate agency operations and provide recommendations for improvement from a neutral perspective. He instead represents the perspective of his primary client, the online news service known as Civil Beat, which first published the Report. Thus, while OIP is always interested in getting feedback from the public, the media, and government personnel about their experiences with OIP and the laws it administers, OIP recognizes that those ideas and experiences will not always point in the same direction since the general public, media outlets, and government agencies have different interests and concerns.

⁵ To make OIP's proceedings more adversarial would contradict the less formal dispute resolution methods intended by the UIPA. HRS section 92F-42(1), which requires OIP to review and rule on an agency's denial or granting of access to records, directs that this review "shall not be a contested case under chapter 91 [HRS]."

⁶ See, e.g., page 9, statements such as, "OIP improperly encourages agencies to disregard the statutory duty to balance public and privacy interests" and "OIP's Attorney of the Day service favors government agencies[.]" Regarding the balance between public and privacy interests, OIP notes that the UIPA requires that its policy of openness be "tempered by a recognition of the right of the people to privacy, as reflected in . . . the constitution of the state of Hawaii." In accordance with this statement of policy, OIP advises agencies to avoid disclosing information that may fall under the UIPA's privacy exception before a proper legal analysis can be done, because once such information is disclosed, a subsequent appeal cannot "unring the bell" or "undisclose" someone's personal information. While Mr. Black's main client, Civil Beat, is naturally more concerned with the UIPA's policy of conducting government business as openly as possible, OIP's advice must also consider the UIPA's statutory implementation of Hawaii's constitutional privacy right. OIP does not doubt that Mr. Black's client often feels that this and other advice and decisions by OIP are biased toward government. OIP is likewise aware that government agencies often feel that OIP's advice and decisions are biased toward the public. OIP considers this an expected result of its role as a neutral.

impartial and neutral third party while exercising its statutorily authorized duties and obligations.”

The Report’s faulty metrics:

OIP questions the validity of **the Report, which is based its adversarial perspective and uses flawed methodology and assumptions:**

- The Report’s “Average Days to Decision by Director,” calculated using only those decisions opened and concluded within a single director’s term, intentionally did nothing to control for the difference in term lengths across directors, and thus measured the length of each listed director’s term as much as anything else.⁷ **This metric necessarily shows that longer terms results in longer average days to decision.** Perhaps to avoid highlighting this effect, the report excluded the term of OIP’s last long-term director in listing directors’ terms for the purpose of comparison.
- Even if the report had corrected for differing term lengths by using a fixed length of time (such as fiscal bienniums) that could be compared across different directors, measuring time to decision for only the fraction of OIP’s caseload opened and closed within a single two-year term would still be a flawed metric to show the office’s actual productivity. Without also looking at what percentage of cases filed in a term were actually resolved within that term (and thus included in the average), not to mention the percentage of previously pending cases resolved during the same period, it would do nothing to show the office’s success in resolving its more complicated or difficult cases. By itself, such a statistic would still fail to account for directors’ different priorities in resolving backlogs. **Essentially, the Report’s “Average Days to Decision by Director” metric merely proves that it takes longer to get to newly filed cases when older, more difficult cases have priority under a “first in, first out” policy.**

⁷ Basing the “average of days to decision” on only those decisions opened and closed within a single term will necessarily show a shorter average for a shorter term. For instance, for a two-year term, all the cases taking two years or more to resolve will be excluded, and even most of the cases taking a year and a half will be excluded from the average because they opened or closed outside the term. By contrast, for a six-year term, most of the cases taking a year and a half or two years to resolve would be counted into the average, as well as about half the three year resolutions, and so on, resulting in a longer average length simply from not excluding all of the longer-to-resolve cases. This mathematical flaw could have been corrected by looking at the average days to decision over time periods of equal length, for instance, cases opened and closed within a single fiscal biennium, which could still be correlated to who was director at the time.

- **The Report’s chosen metric penalizes OIP’s current “first in, first out” guideline,** which gives priority to resolving older cases over newly filed ones while still allowing for the expedited resolution of newer cases that involve matters of significant public importance or for other good cause. **Indeed, the Report’s metric appears designed to encourage getting easy decisions turned out quickly, while ignoring the backlog of cases from preceding directors’ terms and leaving difficult-to-resolve cases for a future director,** as such an approach would result in a lower average number of days to decision under the chosen methodology. This approach however, unfairly penalizes requesters and agencies involved in complex cases by making them wait even longer while “easy” cases are disposed of.
- **The Report’s “Average Decisions per Year by Director” is misleading because, as with the “Average Days to Decision,” it also excludes the results of a long-term OIP director and is based on the flawed assumptions that all decisions throughout the years were written in the same manner and had the same legal effect.** To the contrary, there have been **important changes in the law and the adoption of new rules, which have substantially changed the legal effect and writing of OIP’s formal and informal opinions since 2012.** (See discussion starting on page 7, *infra*).
- **By looking only at what it defined on page 3 as “major matters,”⁸ the Report failed to consider the other informal ways that OIP has been able to resolve disputes and prevent appeals from even being filed and added to OIP’s backlog.** OIP considers its Attorney of the Day (AOD) service and the resolution of Requests for Assistancess (RFA) and Correspondence (CORR)⁹ to be critical means of providing timely responses to the general public and government agencies and they often prevent small problems from turning into bigger disputes and more time-consuming Appeals, but the Report excluded these cases from its definition of “major matters.”

⁸ The Report referred to “major matters” as OIP cases coded as Requests for Opinions (RFO), UIPA Appeals (Appeals), and Sunshine Law Investigations (INVES). The code “INVES” is no longer used by OIP. Requests for Sunshine Law decisions are coded “S APPEAL.”

⁹ This category includes advisory letters that under prior directors would often have been categorized as an opinion.

While OIP agrees that the number of pending formal cases¹⁰ has grown over time, **the Report ignores significant underlying factors contributing to OIP's current backlog, such as:**

- **the number and difficulty of the old cases pending in 2011**, which OIP has since been working to resolve so that people do not have to wait 12 years for case resolution;
- **the lower priority that previous directors may have placed upon resolving older, more difficult cases in favor of newly filed cases;**¹¹
- **other variables affecting why cases opened prior to a director's term continued to languish**, such as a statutorily imposed reduction in force in 1998, and mandated furloughs between October 2009 and June 2011;
- **the impact of key 2012 legislation and OIP's new appeals rules to give OIP's current opinions legally binding effect but also to provide an avenue for judicial review, and the resulting need for both formal and informal opinions to speak for themselves in the event of judicial review;**
- **the impact of OIP's many other statutorily mandated duties upon OIP's workload and time to resolve disputes;** and
- **the 39% increase in formal cases filed since 2011.**¹²

OIP's "first in, first out" guideline:

To help staff attorneys prioritize, multi-task, and manage their heavy caseloads, OIP has internal guidelines¹³ applicable to formal cases, so that newly filed cases are promptly processed and resolved if possible. The "first in, first out" guideline states that **"[i]f all responses and information have been received from the parties and the case is ready to be worked on, then attorneys should endeavor to complete older cases before newer cases."**¹⁴

¹⁰ OIP defines formal cases as files coded as being Appeals, RFO, RFA, CORR, UIPA, and RECON. See discussion of OIP's data, starting at page 12 *infra*.

¹¹ Other directors were faced with different circumstances, had different case management priorities, and did not always have written internal guidelines. For example, OIP's first director had to get all aspects of the office up and running; the second director devoted significant time to the statutorily mandated adoption of OIP administrative rules; OIP was also a party to the so-called "SHOPO" litigation under the first two directors; and the third director "embarked on an aggressive effort to significantly reduce the number of pending matters." OIP Annual Report 2003, page 5. OIP's Annual Reports are available on the Reports page of OIP's website at <http://oip.hawaii.gov/reports/>.

¹² See Charts and discussion, *infra*.

¹³ OIP's Internal Case Management Policies (November 1, 2015).

¹⁴ This guideline is identical to one found in OIP's earlier version of its Internal Case (continued on next page)

The guidelines allow a newer case to be taken out of order if there is “an important impending deadline affecting the agency involved, OIP, or a significant number of members of the public,” the cases has “widespread and significant impact on the agency, public, or OIP,” or for other good cause.

A primary reason for adoption of these guidelines is because when Park became director in 2011, there were cases pending since 1999 that had languished and remained unresolved, typically because they were the most difficult, time consuming cases. **Access delayed is access denied, so by instituting the “first in, first out” guideline giving priority to the oldest cases whenever practicable, the parties who had waited the longest were finally able to get resolution of their disputes. Since 2011, OIP has reduced the age of its backlogged cases from 12 years to 2 years.**

At the same time, however, the case management guidelines encourage attorneys to process newer cases in a timely manner and resolve them if possible. Thus, **in FY 2016, nearly 77% of the formal cases filed that year were resolved that same year. All of the informal AOD inquiries, which are subject to a different case management policy, are responded to typically within 24 hours.**

The Report’s metrics penalized directors who followed the “first in, first out” preference for resolving the oldest cases in the backlog first. The Report contends that since OIP’s internal case management policies are not published in its administrative rules, people do not know the standards to meet for expedited review and that “the Law Center is not aware of any appeals where OIP has provided expedited review.” **The lack of published rules for OIP’s internal management procedures, however, has not stopped people from requesting expedited review, which OIP has granted on multiple occasions when warranted.**¹⁵ But as

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Management Policies effective August 1, 2012, which was provided to Mr. Black in response to his record request of August 19, 2016, for the “document sufficient to identify when OIP instituted its policy to generally handle substantive matters (e.g., appeals, requests for opinion) on a first come, first served basis. I am not concerned about the type of the document; I am just interested in finding out when that policy started.”

¹⁵ Examples where OIP has expedited review are as follows:

U Memo 12-3: concluding that the Mayor’s Public Schedule is a public record disclosable under the UIPA.

S MEMO 13-1: concluding that the newly created Hawaii Health Connector is not a state agency subject to the Sunshine Law and the UIPA.

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CBLC is aware, **OIP denied the persistent requests of a Civil Beat contributor to move up his appeal before the pending case of a member of a competing news organization and other requesters** because OIP did not agree that his case warranted expedited review. **OIP believes that most people will agree with it that “cutting in line” is not fair.**

Why OIP’s opinions are different now:

Prior to 2012, OIP did not have rules governing appeals to it when agencies denied record requests. OIP gingerly sidestepped its lack of rules by considering its opinions to be merely “advisory” to avoid being challenged by agencies on the basis that they had not been issued under duly adopted rules. For 16 years, no agency judicially challenged OIP’s opinions as the UIPA provided no right for agencies to appeal them to the courts.¹⁶ But following a more

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U Memo 13-3: concluding that the Fact Finders’ Report produced for the UH regarding a canceled concert deal was excessively redacted under Part II of the UIPA.

OIP Op. Ltr. No. 14-02: concluding that a Sunshine Law Board’s minutes must include a summary of oral, but not written, testimony.

S Memo 14-6: concluding that the Board of Land and Natural Resources violated the Sunshine Law by having a briefing at which public testimony was not accepted.

S Memo 14-7: consolidating four similar requests from media and legislative requesters to conclude that the UH Board of Regents did not violate the Sunshine Law when it discussed, in an executive meeting, the future of the outgoing UH President and that the meeting agenda was sufficiently descriptive to meet the Sunshine Law’s notice requirement.

S Memo 15-1: interpreting a newly enacted amendment to the Sunshine Law’s agenda requirements when proposed administrative rules are listed on the Lt. Governor’s website.

OIP Op. Ltr. No. F15-02: consolidating seven appeals and concluding that OHA trustees had violated the Sunshine Law by impermissibly engaging in serial communications before jointly signing a letter rescinding one that had been sent by its Executive Director, and by refusing to hear public testimony on a matter that was to be discussed in an executive session closed to the public.

Additionally, matters are sometimes expedited and closed without an opinion, as in U Appeal 16-05, which was closed in two months because the agency voluntarily disclosed an investigative report after receiving OIP’s help in redacting personal information protected under Part III of the UIPA.

¹⁶ The first court case against OIP was a declaratory judgment action in Olelo: The Corp. for Comm’ty Tel. v. Office of Info. Practices, 116 Haw. 337, 173 P.3d 484 (Haw. 2007) (Olelo), to determine the threshold issue of whether a public broadcasting station was an “agency” subject to the UIPA. OIP agreed that such an action was not barred by the UIPA because it concerned a threshold issue, and the Supreme Court ultimately held that Olelo was not an “agency” under the UIPA.

aggressive posture by OIP, the County of Kauai challenged an OIP decision in 2005, contending that the Sunshine Law gave it a right to appeal an OIP advice letter. The Hawaii Intermediate Court of Appeals agreed and in a 2009 opinion¹⁷ recognized the right of government agencies to judicially challenge OIP's decisions by suing OIP.

During the 2012 legislative session,¹⁸ OIP successfully proposed and obtained statutory changes, which granted agencies a strictly limited right to judicially appeal in exchange for a high standard of judicial review that gave deference to OIP's decisions regarding the UIPA and Sunshine Law.¹⁹ By the end of the year, OIP drafted, held a public hearing, and adopted administrative rules governing appeals to OIP from denials of record requests by agencies.²⁰

With the new law and rules in place, OIP changed how it writes its opinions. While the Report criticizes OIP's current informal decisions as being "unnecessarily long" and recommends that they be resolved "with the bare minimum analysis" (see Report at page 13), it fails to grasp that informal decisions are subject to judicial review like formal decisions²¹ and that all decisions must speak for themselves without the need for OIP to intervene and explain them in potential appeals to the court (which would further increase the backlog).

¹⁷ Cnty. Of Kaua'i v. Office of Info. Practices, 120 Haw. 34, 200 P.3d 403 (App. 2009), *aff'd*, No. 29059, 2009 Haw. LEXIS 264 (Oct. 26, 2009).

¹⁸ While 2012 was a particularly busy legislative session, time is necessarily taken away from OIP's formal cases during every session. Even if OIP has not proposed legislation, there are always bills that warrant OIP testimony.

¹⁹ Act 176, Session Laws of Hawaii 2012. For a detailed description of the law and OIP's administrative rules that were adopted in 2012, see the law review article by Cheryl Kakazu Park and Jennifer Z. Brooks, 2013 Law and Administrative Rules Governing Appeal Procedures of Hawaii's Office of Information Practices, 36 Univ. of Hawai'i Law Review 271 (Winter 2014), which is available on the UIPA training page of OIP's website at oip.hawaii.gov or with this link: <http://oip.hawaii.gov/wp-content/uploads/2014/04/Park-Brooks-law-review-article-winter-2014.pdf>. Note that the only other time that OIP adopted administrative rules was in 1999 during Director Gray's term.

²⁰ OIP's appeal rules can be found on OIP's Rules page of its website at [http://files.hawaii.gov/oip/FILED%20Appeals%20Rules%20HAR Chapter%202-73.pdf](http://files.hawaii.gov/oip/FILED%20Appeals%20Rules%20HAR%20Chapter%202-73.pdf).

²¹ OIP's formal and informal opinions are provided to the parties and can be challenged in the circuit court by the agencies within 30 days of the decision. HRS § 92F-43; H.A.R. § 2-73-30. OIP's formal opinions are usually reserved for cases involving novel or controversial legal issues or those requiring complex legal analysis, and they can be cited as legal precedent, so the full text of formal opinions are posted on OIP's website. OIP's informal opinions only apply to the parties in that particular case and can cite to prior precedents established in formal opinions. Because informal opinions have no precedential value, only their case summaries, not the full text, are posted on OIP's website. Upon request, however, OIP will provide a copy of the full text of an informal opinion.

In addition, there are times when the public or an agency asks OIP for a legal opinion that cannot be written as a formal opinion because it does not meet the criteria in section 2-73-11, H.A.R. Such requests are opened with the RFO code and must be responded to in an informal opinion, and, at times, require lengthy legal analysis.

The Report's criticism of the opinion process also dismisses the parties' desire to understand the factual findings and legal reasoning behind OIP's decisions, especially if they have patiently waited a long time for such resolution. There is a strong public benefit to having OIP, as the agency responsible for administering the UIPA and Sunshine Law, consistently interpret these laws and provide well-reasoned opinions that will not only withstand judicial scrutiny, but will typically discourage parties from appealing them to the courts and adding to the Judiciary's own substantial backlog of cases.

It takes time to write opinions to resolve appeals. OIP must gather the facts and opposing parties' positions; do legal research; analyze the statutes, case law, and OIP's prior precedents; and write and go through multiple internal reviews before issuing legal decisions that can withstand judicial scrutiny. Unsurprisingly, taking the time to write good decisions will lower the average number of decisions issued.

Moreover, as will be explained in the next section, by excluding RFA and CORR cases, the Report's metrics also excluded what would have been considered "opinions" under prior directors.

Ways that disputes may be resolved without opinions:

While the Report criticizes OIP for a growing backlog, it does not consider how OIP's informal resolution of disputes without formal or informal opinions helps to keep the backlog from growing. First, the Report made presumptions about "administrative closures" of cases based on Mr. Black's review of OIP records for files closed without issuance of opinions, but the Report failed to consider the amount of effort that OIP staff may have put in to mediate the issues that is not reflected in the documents in the files.

In addition, where an agency has not responded to a UIPA request for records, OIP will open an RFA (request for assistance) file. If the agency responds with a redacted record or denial, then the matter may proceed to an Appeal if the requester desires, but few RFAs turn into Appeals. Even then, many Appeals are resolved without opinions, because of OIP's informal mediation and the subsequent voluntary cooperation of agencies. So, while the documents may show that an appeal was dismissed because the requester asked that the appeal be closed, or because the requester "abandoned" the appeal, in some cases the requester genuinely no longer needs or wants an opinion because, through discussions with OIP, the agency supplemented or even changed its initial position denying access and provided records to the requester.

OIP frequently receives inquiries for which simple correspondence will suffice, so it will open a CORR file. On occasion, OIP is able with a CORR to resolve matters that would otherwise have escalated to an Appeal or RFO. Rather than waiting for an opinion, an agency or requester may be satisfied with a shorter, more general analysis presented on OIP's letterhead, which is normally coded as a CORR file. Notably, such letters could, in the past, have been considered opinions; however, in recognition of the desirability of resolving matters quickly and less formally when appropriate, OIP now classifies those as correspondence.

An example of such correspondence with shorter analysis was provided to CBLC.²² CBLC was informed of requesters' option to receive correspondence without legal analysis. Nevertheless, in criticizing OIP's informal opinions as being "unnecessarily long" and recommending that OIP provide decisions with the "bare minimum analysis" on page 13, the Report failed to inform readers of OIP's current practice of providing such advice through correspondence and did not include those decisions in the Report's measurement of decisions issued since FY 2012.

Why OIP's AOD service is important:

Again, rather than adding to the number of appeals that require opinions and thereby adding to the backlog, OIP tries hard to resolve disputes early and prevent or correct violations informally through its Attorney of the Day (AOD) service. Like the "express line" at a supermarket, the AOD service allows people to quickly get answers to their questions without having to wait in the longer lines for formal cases. The vast majority of all inquiries to OIP come in through this service, which allows anyone to receive general, nonbinding advice from an OIP staff attorney usually within 24 hours. Through AOD calls, OIP is often alerted to trends and problems, and can provide informal advice to prevent or correct them. The AOD service is also a free and quick way for members of the public to get the advice that they need on UIPA record requests or Sunshine Law questions, without having to engage their own lawyers. Examples of AOD inquiries and OIP's informal responses are provided each year in OIP's Annual Report.²³

The Report, however, recommends that OIP suspends this service to concentrate on reducing its Appeal backlog. The Report claims that "OIP's Attorney of the Day service favors government agencies, creating more disputes about public records and distracting from OIP's

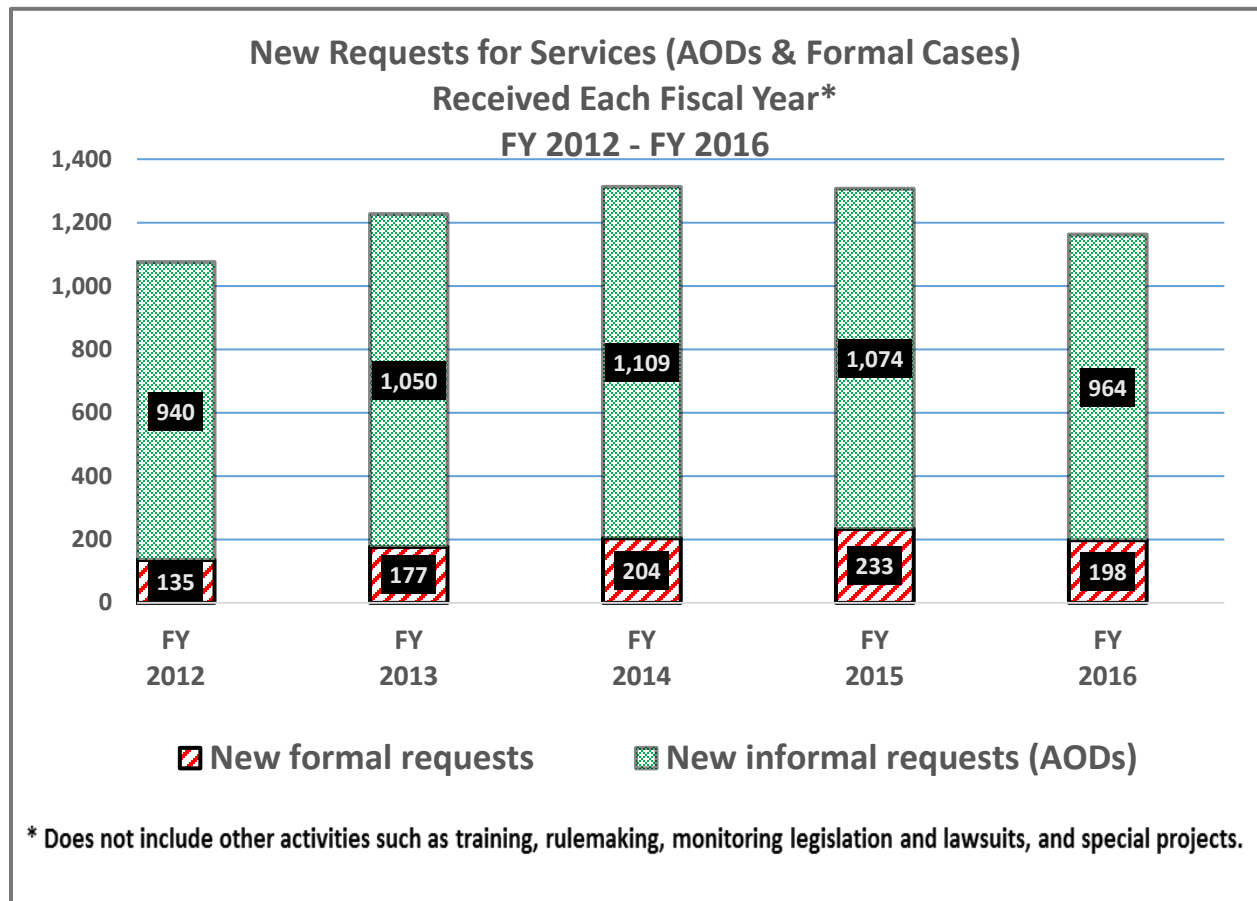
²² In response to Mr. Black's record request, on April 12, 2016, OIP provided a copy of a June 30, 2015 letter from OIP to the City and County of Honolulu's Ethics Director answering his questions concerning e-mails sent on Commission members' personal e-mail accounts that were not maintained by the Commission itself.

²³ AOD examples from the FY 2016 report can be found at pages 36 to 39 at <https://oip.hawaii.gov/wp-content/uploads/2015/03/ANNUAL-REPORT-2016-pdf-accessible.pdf>.

primary function to resolve disputes.”²⁴ It goes on to falsely allege that the AOD service “has evolved into a means for government agencies – and only agencies – to obtain expedited legal advice regarding public record disputes. . . . *That is the job of the attorney general or respective corporation counsel.*”²⁵

As shown in Chart 1 below, in FY 2016, OIP responded to 964 AOD inquiries, typically within the same day when the inquiry was received. Seventy percent (675) of the inquiries came from government agencies seeking guidance on how to comply with the UIPA and Sunshine Law. **Thirty percent (289) of AOD inquiries came from members of the public, including 211 private individuals and 42 news media representatives. Clearly, therefore, it is not only agencies that seek OIP’s expedited AOD advice.** And even if only one out of five of those AOD inquiries was submitted to OIP as a formal inquiry if the AOD service was suspended, that would still represent nearly two hundred cases and would approximately double the number of new formal cases coming in to OIP every year.

CHART 1



²⁴ Report page 10. OIP objects to this and other unwarranted attacks upon OIP’s impartiality and neutrality found throughout the Report.

²⁵ Report page 10 (footnote omitted, italics in original).

The Report failed to take into account that **private individuals, news media representatives, businesses, public interest groups, and the other nongovernmental persons who use the AOD service do not have access to advice from the Attorney General’s or Corporation Counsels’ offices, so OIP’s attorneys help to level the playing field by providing free advice to the general public. Private individuals often call OIP needing basic advice** on how to obtain government records and what to do if their request has been denied, or to check whether something a board did was likely allowed by the Sunshine Law, **while media representatives often ask more nuanced questions concerning current news events. Government employees often have easier access to OIP’s Attorney of the Day** than to the single government attorney who may be assigned to cover multiple agencies or boards, **so they routinely use the AOD service to help them comply with the laws**, such as how to prepare a Sunshine Law meeting agenda. **Even when they are attorneys themselves (government or private), they may not be experts in UIPA and Sunshine Law matters or may be trying to resolve conflicting views within their own agencies and thus rely on OIP’s attorneys to advise them and provide uniform and consistent advice from OIP, the neutral agency administering both laws.**

The AOD service helps OIP prevent or quickly correct violations. Through AOD inquiries, OIP is frequently alerted to inadequate Sunshine Law notices and has advised boards to cancel improperly noticed meetings as well as on how to prepare a sufficiently descriptive agenda. OIP has even had boards calling during their meetings for advice, such as whether they can conduct a closed executive session. AOD callers may also seek UIPA-related advice. **Because of the AOD service, OIP has been able to quickly and informally inform people of their rights and responsibilities, avert or resolve disputes, and avoid having small issues escalate to appeals. It would be folly for OIP to suspend its AOD service and leave people without anywhere to go for free and quick advice.**

What OIP’s data shows:

The Report points out that “access delayed is access denied,” but it failed to acknowledge that since 2011, **OIP has reduced the age of its pending cases from 12 years to 2 years.** In FY 2011, OIP still had a case that had been filed in 1999; by the end of FY 2016, the oldest cases were filed in FY 2014. **OIP’s goal is to resolve all formal cases within 12 months of filing.**²⁶

Again, because OIP agrees with the Report that **not all OIP administrations are comparable** as they have operated under different policies, legal requirements, circumstances,

²⁶ See OIP’s Annual Report 2016, Year 5 Action Plan, at page 13. The caveat to this goal is that the cases are in litigation (over which OIP has no control) or filed by requesters who have had two or more cases resolved by OIP in the preceding 12 months (in order to fairly serve all persons, and not just repeat requesters).

and for different lengths of time, OIP will not divert resources from its backlog reduction goals in order to study past directors' results. OIP has tracked its case management progress by simply measuring **formal case resolution since 2011.**²⁷ **Chart 2 (on the next page) shows how many of these types of cases are newly filed with OIP each year, as well as how many are carried over from prior years as pending cases, i.e., backlog.** As shown, in FY 2011, OIP started with a backlog of 84 cases, and 135 new formal cases were filed. OIP ended FY 2011 with 78 outstanding cases that were carried over to FY 2012, and 177 new formal cases were resolved in FY 2012. The numbers of new formal cases increased an average of 20% each year from FY 2013 through FY 2015, until they finally decreased 15% in FY 2016.

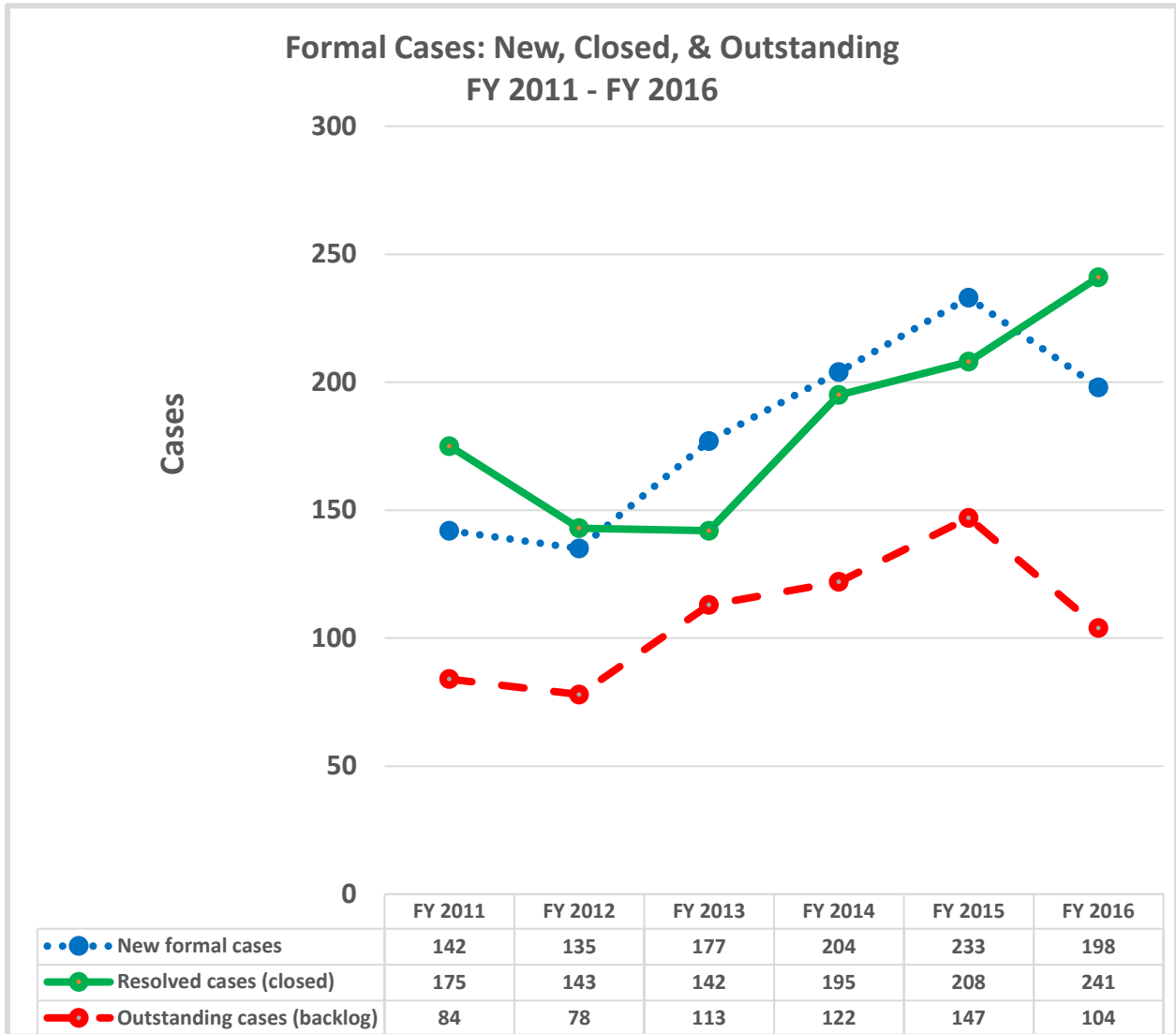
OIP had 7.5 FTE authorized positions in FY 2012 and 2013, and did not get an additional attorney position until FY 2014. In the meantime, **given the increasing numbers of new cases that were filed, the backlog grew each year until FY 2016, when it dropped to 104 cases outstanding at the end of the year. This 41% decrease in the backlog was directly related to the 15% drop in new cases, as well as OIP's increased productivity,** as demonstrated in Chart 2.

The **number of new formal cases filed each year is plotted in the chart as a blue dotted line,** and shows the increasing numbers of new cases filed from FY 2012 through FY 2015, with a sharp decline in FY 2016. The **green solid line shows the number of cases resolved by OIP each year,** and shows a steady increase since FY 2013. The **red dashed line at the bottom of the graph shows the number of outstanding cases that are pending at the end of each fiscal year** (i.e., the backlog) and largely tracks to the blue dotted line's number of new cases filed each year, with the gap between the blue and red lines growing larger (i.e., backlog getting smaller) due to the green line's increases in productivity. **The gap between the blue and red lines is the largest during FY 2015-16 when OIP achieved a 41% decrease in its backlog, thanks to the lower number of new cases filed that year as well as OIP's increased productivity in resolving more cases, whether new or old.**²⁸

²⁷ This analysis excludes OIP's other duties, which include training, rulemaking, monitoring legislation and lawsuits, and special projects.

²⁸ Unfortunately, OIP anticipates that its backlog will substantially increase this year due to the more than 60% increase in new formal cases filed to date. From July 2016 through January 2017, OIP has opened 185 new formal cases, as compared to only 113 new cases over the same months in the last fiscal year.

CHART 2



Contrary to the Report’s claim on page 6 that “OIP’s backlog is trending upward despite a downward trend in new filings,” this chart shows that OIP’s backlog is the direct result of the increasing number of new cases filed each year, and has been ameliorated by OIP’s increasing productivity. But rather than giving credit to OIP for its increased productivity or recommending additional personnel to help with its increasing caseload, the Report recommends that OIP eliminate its AOD service, which would result in increased numbers of new formal cases requiring more time and effort on OIP’s part to resolve, thereby further increasing the backlog.

OIP’s other duties:

The Report narrowly focuses on OIP’s duty to “review and rule on an agency denial of access to information or records, or an agency’s granting of records” (page 2) under the UIPA. Yet, **training, rulemaking, legislation, litigation monitoring, reporting, maintaining the Records**

Report Management System, implementing the state’s Open Data policy - all of these duties take attorney time away from case resolution, but are statutorily mandated and are in addition to OIP’s general administrative and dispute resolution responsibilities. Although OIP’s efforts in these areas, particularly training, also help to avert disputes, the Report totally dismisses them.

The Report totally dismisses OIP’s important role in preventing violations and appeals from arising in the first place by proactively training and advising (1) agencies on how to comply with the law²⁹ and (2) the general public about their rights and responsibilities.³⁰ The Report says nothing of OIP’s duties to maintain the **Records Report System** (HRS § 92F-18(b)), or its administrative duties, which include **rules, annual reports, and recommendations for legislative changes.** (HRS § 92F-42(7), -(12) to -(15), -(17)). And, because plaintiffs are required to notify OIP when filing a civil action relating to the UIPA (HRS § 92F-15.3), **OIP monitors UIPA litigation as well as Sunshine Law cases,** and is currently monitoring 36 cases in which the UIPA or Sunshine Law is in dispute.

In addition to these duties under the UIPA and Sunshine Law, OIP is statutorily charged with assisting the Office of Enterprise Technology with implementing the state’s **Open Data** policy, which is found at HRS section 27-44. OIP is also a member of the **Access Hawaii Committee.** (See HRS § 92G-3.) To promote open data and agency compliance with the UIPA, **OIP created the UIPA Record Request Log** in 2012.³¹ The Log provides OIP and the public with

²⁹ HRS section 92F-42(2) states that 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[.]” Additionally, HRS section 92F-42(10) states that OIP “[s]hall assist agencies in complying with the provisions of this chapter[.]”

³⁰ HRS section 92F-42(3) states that OIP, “[u]pon request by any person, may provide advisory opinions or other information regarding that person’s rights and functions and responsibilities of agencies under this chapter[.]” Moreover, HRS section 92F-42(11) states that OIP

[s]hall inform the public of the following rights of the individual and the procedures for exercising them:

- (A) The right of access to records pertaining to the individual;
- (B) The right to obtain a copy of records pertaining to the individual;
- (C) The right to know the purposes for which records pertaining to the individual are kept;
- (D) The right to be informed of the uses and disclosures of records pertaining to the individual;
- (E) The right to correct or amend records pertaining to the individual; and
- (F) The individual’s right to place a statement in a record pertaining to that individual[.]

³¹ Besides the Log form, OIP developed detailed instructions and training materials to educate agency personnel on how to timely and properly fulfill UIPA record requests by entering the Log data.

easily accessible information and accountability as to how many UIPA record requests are being made, how they are being resolved, how long they take to be completed, and how much they are costing the government and requesters. **OIP prepares annual reports summarizing the Log data received from all state and county agencies.**³² **OIP plans to use the Log's empirical data to develop new personal records rules and update its rules for processing government record requests, which were adopted in 1999.**

OIP relies heavily upon its **website** to efficiently provide free and ready access to its laws, rules, opinions, reports, training materials, forms, and other communications. In FY 2013, **OIP updated its website and has subsequently been posting materials that are accessible for disabled individuals.** Since 2011, OIP has developed **extensive new online training materials to educate not only the agencies in their responsibilities, but also the general public as to their rights.** OIP has also developed **continuing legal education programs** aimed at educating the government attorneys, so that they can properly advise their government clients on how to comply with the UIPA and Sunshine Law.

Now, during the legislative session, **OIP is extremely busy reviewing, monitoring, and testifying on bills that relate to the UIPA or Sunshine Law.** So far this session, OIP has identified 101 bills that it will be following, and has already presented testimony on many of them.

Effective July 1, 2016, OIP completed the yearlong process to **effect its administrative transfer** from the Office of the Lt. Governor to the Department of Accounting and General Services (DAGS). OIP is still integrating DAGS' policies and procedures, and has been developing its own new **Record Retention Policy.**

How many total employees does OIP have?

OIP has a total of only nine employees³³ to fulfill all these duties and to provide uniform and consistent advice under the UIPA and Sunshine Law to the general public and to

These materials can be found on the UIPA training page of OIP's website at <http://oip.hawaii.gov/laws-rules-opinions/uipa/uipa-record-request-log/>.

³² OIP's reports can be found on the Reports page of OIP's website at <http://oip.hawaii.gov/uipa-record-request-log-reports/>. OIP is currently in the process of preparing its state and county reports for Log results from FY 2016.

³³ OIP is authorized 8.5 full-time equivalent (FTE) positions, consisting of one Director, five Attorneys, one Secretary, one Administrative Assistant, and one Records Report Management Specialist. Because one of its five attorneys works half-time, it actually operates with 8.0 FTE positions.

the employees of 271³⁴ state, county, and independent agencies and boards of the Executive, Legislative, and Judicial branches of government.

In closing, OIP's Director would like to express her sincere appreciation for the expertise and experience of her staff, who provide OIP with 29 years of invaluable institutional memory, and to thank them for their hard work and dedication in fairly, reasonably, and neutrally undertaking all the duties necessary to administer the UIPA and Sunshine Law in a manner that promotes the public's interest in government transparency while protecting the individual's privacy interest.

³⁴ This number is based on the number of agencies that submitted UIPA Record Request Logs to OIP in FY 2016.

Breaking Down Hawaii's Broken System for Resolving Public Access Disputes

In August 2013, the Civil Beat Law Center for the Public Interest was created with the primary mission to advocate for open government in Hawai'i. As part of that mission, the Law Center proactively evaluates how the public obtains access to government records, Sunshine meetings, and courtrooms in the State. For areas of concern, the Law Center seeks collaborative solutions with government officials whenever possible. This report explores one area of concern: the backlog of matters at the State of Hawai'i Office of Information Practices (OIP) that delays resolution of public access disputes for 1–2 years.¹

OIP enforces the State public records and open meetings laws.² Community frustration with OIP was one factor that contributed to the Law Center's formation. Media outlets thought OIP did not provide sufficient guidance and took too long to decide issues, creating rather than removing obstacles to public access. The Law Center began to study the issue, but the most glaring difficulty contributing to delays was OIP's limited budget.

Over time, as the Law Center increased its contact with the community, members of the public expressed more frustration concerning the delays at OIP. Some expressed the view that the delays had gotten worse over the last 10 years. A common criticism was that agencies used the OIP backlog to delay access for at least a year or more without any penalty. Members of the public without the resources to litigate were at the mercy of these delay tactics.

¹ OIP's oldest currently pending dispute awaiting resolution is from September 2013.

² Access to State and county public records is governed by the Uniform Information Practices Act (Modified), Hawai'i Revised Statutes (HRS) ch. 92F (UIPA). Open meetings of State and county boards and commissions are governed by the Sunshine Law, HRS ch. 92.

This anecdotal frustration led the Law Center to explore whether the time to decision at OIP has increased noticeably, causing more complaints. In 2016, the Law Center requested, and OIP provided, OIP's database for tracking assigned external matters. The database included all OIP matters from its creation in 1988 to present.

Over the last year, the Law Center has examined the data and found some merit to the concerns about increasing delays at OIP. The Law Center found that, examining the OIP administrations over the last 10 years, the average time to decision for major matters has almost quintupled. The number of matters decided per year has dropped to its lowest level since the creation of the Office, leading to a measurable increase in OIP's backlog of pending matters.

The Hawai'i Legislature created OIP "to provide a place where the public can get assistance on records questions at no cost and within a reasonable amount of time." Conf. Comm. Rep. No. 112-88, in 1988 House Journal at 818. "The Office, therefore, will become an optional avenue of recourse which will increasingly prove its value to the citizens of this State as the law is implemented." *Id.* at 819. OIP's primary mission is to "review and rule on an agency denial of access to information or records, or an agency's granting of access." HRS § 92F-42(1).

Based on the findings from OIP's data, the Law Center offers recommendations to achieve the Legislature's intent that OIP provide a place for the public to receive timely resolution of public access disputes. Although it is impossible to identify a single cause for the delays in OIP's resolution of public access disputes, the Law Center has observed potential contributing factors. The same guiding principle motivates all these recommendations: *Access delayed is access denied.*³

Summary of Recommendations

- **Increased funding for staff attorneys.** To attract and retain quality lawyers, OIP needs additional budget support. (*Recommendation 1*)
- **Provide requesters more information about denials and appeals.** If requesters understand why information is withheld, disputes will be eliminated or at least more focused, simplifying OIP's decision-making process. (*Recommendations 2 & 7*)
- **Remain neutral.** OIP procedures and informal guidance favor government agencies, encouraging agencies to resist disclosure more frequently. (*Recommendations 3, 4, & 5*)
- **Actively control workflow to prioritize appeals.** OIP should enforce deadlines for submission of position statements, analyze appeals early, and aim to resolve disputes within 6 months of full briefing. Non-essential OIP services should be minimized if there is a significant backlog. (*Recommendations 6, 7, 8, & 9*)

³ The Hawai'i Supreme Court has held: "We interpret 'denial of access'...to include not only denials, but any agency response that has the net effect...significantly to impair the requester's ability to obtain the records or significantly to increase the amount of time he [or she] must wait to obtain them." *State of Hawai'i Organization of Police Officers v. Soc'y of Prof'l Journalists—Univ. of Hawai'i*, 83 Hawai'i 378, 392-93, 927 P.2d 386, 400-01 (1996).

Source: Dataset of OIP matters (excluding internal OIP assignments) from 1988 to 2017 obtained through a UIPA request on January 21, 2016, with additional information requested on August 5 and 19 and an update requested on December 29, 2016.

Methodology: OIP has used various codes over the years to identify the matters that it handles. Several categories of matters concern issues outside OIP's control (e.g., legislation or litigation monitoring) and other categories are short-term assignments not intended to resolve substantive access disputes (e.g., training or admin). The analysis thus focused on the assignments expected to require substantive legal review—requests for opinion.

The specific codes used for identifying requests for opinion were variations of the following root codes: RFO, Appeal, and Inves. This analysis does not include requests for assistance (RFA)—which merely involve OIP asking an agency to respond to a requester who “has received no response or a response that is incomplete under the standards set by chapter 2-71, HAR.”⁴ OIP Internal Management of Cases at 8 (Aug. 1, 2012). The analysis also does not include correspondence (CORR) matters—“an inquiry that does not require any substantive action on OIP's part.” OIP Internal Management of Cases at 7. Lastly, matters where OIP is responding to a request for public records (UIPA) are not included. Completing RFA, CORR, and UIPA matters does not reflect resolution of a substantive dispute between a requester and an agency. Because of these exclusions, however, the statistics presented here are not comparable to the information on the backlog of “Formal Requests” in OIP's annual reports. OIP 2016 Annual Report fig. 4 at 18.

A column was added to OIP's dataset to calculate the days from when OIP entered the matter in its system until the date it marked the matter completed (DTENTRY1, COMPL_DT1).⁵

The remaining major matters were arranged according to the responsible OIP director. Public reports of a director's departure were used to identify the relevant tenure. Interim periods between directors were included in the tenure of the successor director, so start dates will not coincide with a director's initial appointment date. The following dates were used:

<u>Kathleen Callaghan</u>	<i>Inception–May 8, 1995⁶</i>
<u>Moya Davenport Gray</u>	<i>May 9, 1995–February 13, 2003</i>
<u>Les Kondo</u>	<i>February 14, 2003–July 2, 2007</i>
<u>Paul Tsukiyama</u>	<i>July 3, 2007–November 6, 2009</i>
<u>Cathy Takase</u>	<i>November 7, 2009–April 4, 2011</i>
<u>Cheryl Kakazu Park</u>	<i>April 5, 2011–Present⁷</i>

⁴ While a valuable public service to address agencies that refuse to comply with regulatory requirements, OIP will not address substantive legal issues in RFA matters, even if years have passed. E.g., September 30, 2016 Letter from OIP to Burt Lum (instructing requester to appeal a new request, rather than resolving legal issue in an RFA matter pending for two years).

⁵ OIP also tracks the date of the document initiating the matter (DOC_DT1), which in some instances may have been weeks before entry into the OIP system. On the assumption that the entry date better approximates when OIP received and began to process the request, this analysis used the DTENTRY1 field.

⁶ Source: Department of Human Resources Development.

⁷ For purposes of the current director's tenure, calculations were run based on the date that the dataset was last updated—January 11, 2017.

The days to decision for the major matters under each director then were averaged.⁸ The analysis focused on those matters within the control of each director; thus, the analysis averaged the days to decision for only those matters that were both entered into the system and completed during a specific director's tenure. This averaging process excluded the resolution of backlogged matters from a prior director's administration.

The analysis also summarized the number of decisions by each director. First, the summary calculates the number of resolved matters initiated during the director's tenure. Second, the summary includes the number of backlogged matters resolved during the director's tenure. Finally, the analysis determines the ratio of decisions per year for each director based on their individual tenure.

Findings

- **Not all OIP administrations are comparable.** When it was first created, OIP had a budgeted staff of 10 full-time equivalent (FTE) positions. See, e.g., OIP 2016 Annual Report fig. 3 at 17. That staff grew to 15 FTE positions for fiscal years 1993 to 1995 before a series of budget cuts in fiscal years 1996 to 1998. The lowest level of staffing occurred in fiscal years 2004 to 2006 with only 7 approved FTE positions. The current staffing, since fiscal year 2014, is 8.5 FTE positions.

Another distinguishing feature between OIP administrations is the scope of its mission. In 1998, the Legislature significantly expanded OIP responsibilities

by adding oversight of the Sunshine Law (open meetings). 1998 Haw. Sess. Laws Act 137 (effective July 1, 1998). Before that statutory amendment, the Department of the Attorney General addressed Sunshine disputes.

For purposes of this report, based on comparable staffing and responsibilities, the analysis focuses primarily on the last four OIP administrations, starting with Director Kondo's tenure from 2003.⁹

- **Time to decision for major matters has more than quadrupled.** This analysis only considers the major matters initiated and resolved during a director's tenure. Limiting the analysis (and thus excluding backlogged matters from before the director's tenure) focuses on the practices of the specific director.¹⁰

Average Days to Decision by Director

Kondo	Tsukiyama	Takase	Park
89	96	90	464

- **The average number of major matters resolved per year is at its lowest point.**

Average Decisions per Year by Director¹¹

Kondo	Tsukiyama	Takase	Park
102	59	71	56

⁸ Although this analysis refers to the completion of a major OIP matter as a "decision", not all major matters are resolved by a formal opinion or informal decision. For example, OIP completed five cases in June 2015 when the requester voluntarily withdrew the appeals, rather than wait for written decisions, and in April 2016, OIP administratively closed eight cases for a single requester because of its "heavy workload." July 6, 2015 Letter from Glenn Shiroma to OIP; March 23, 2016 Letter from OIP to Dan Purcell. The OIP dataset tracks only completion, not the manner in which a matter is completed.

⁹ The issues raised here, however, are not unique to the current OIP administration. Similar concerns were raised about Director Gray in 1996 when the time to decision (using a different methodology) almost tripled in a single year. E.g., Ian Lind & Gordon Y.K. Pang, *The Cutting of the OIP*, Star-Bulletin (Sept. 3, 2006).

¹⁰ Including backlogged matters also provides a poor metric because older matters are less likely to be resolved on the merits; OIP may administratively close an old matter, rather than resolve the legal issues involved. Although in 2003 OIP described such administrative closure as an "extreme measure" to address the Office's backlog, it does not appear that OIP has stopped the practice as originally anticipated. See Nov. 12, 2003 Letter from Leslie H. Kondo to Jay Scharf.

¹¹ Despite the severe reduction in staff and the expansion of responsibility during her tenure, Director Gray had an average of 58 decisions per year. Director Callaghan had an average of 85 decisions per year.

This analysis focuses on the pace at which substantive matters are resolved at OIP, irrespective of whether OIP issues a formal opinion, an informal decision, or administrative closure of the case. Other commenters have previously noted the severe decline in formal opinions issued by OIP. E.g., Rick Daysog, Residents Often Kept in the Dark, Honolulu Advertiser (Mar. 16, 2009). The decline in formal opinions raises additional concerns because formal OIP opinions may be cited as precedent in litigation. HRS § 92F-15(b).

Formal Opinions	Year	Director
22	2003	Kondo
19	2004	Kondo
18	2005	Kondo
7	2006	Kondo
11	2007	Kondo/Tsukiyama
2	2008	Tsukiyama
3	2009	Tsukiyama/Takase
5	2010	Takase
1	2011	Takase/Park
1	2012	Park
1	2013	Park
4	2014	Park
3	2015	Park
6	2016	Park

Without a steadily growing body of precedent, OIP makes it more difficult for requesters to rebuff government agencies that seek to distinguish the legal principles in older OIP opinions as applied to new cases.¹² Also, by heavily relying on informal decisions, OIP places requesters at a disadvantage compared to government agencies. Government attorneys can build up repositories of informal decisions by representing various agencies before OIP and thus cherry-pick favorable decisions. But requesters do not have ready access to the hundreds of informal decisions because OIP only publishes brief summaries of those decisions (and only since 2009).

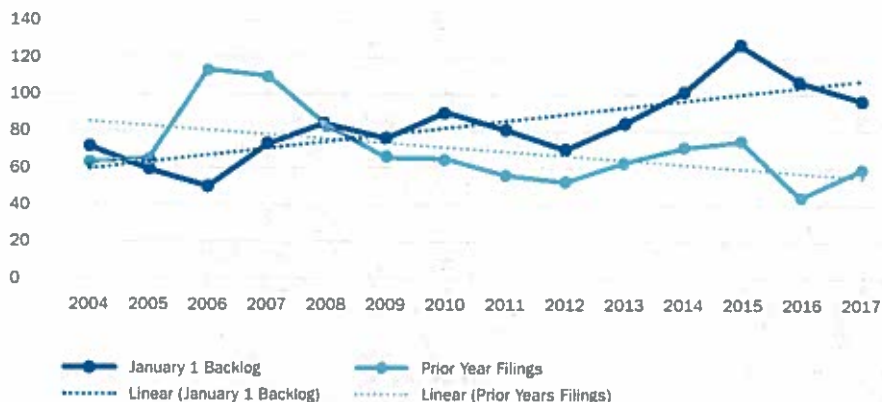
In response to prior criticisms about the lack of formal opinions, successive OIP directors have argued that fewer formal opinions is justified because formal opinions should only address novel legal situations.¹³ E.g., Ian Lind, OIP Director Replies Regarding Lack of Opinions (June 27, 2012); see also OIP Internal Management of Cases at 5 (formal opinions concern novel issues or issues requiring complex analysis). Rather than continue that debate, this analysis looks at a director's annual average for all major matters decided (formally or otherwise).

¹² Accord Civil Justice Improvements Committee, Conference of Chief Justices, Call to Action: Achieving Civil Justice for All at 11 (2016) (“Reductions in the proportion of civil cases resolved through formal adjudication threaten to erode a publicly accessible body of precedents governing civil cases. Diminished common law will leave future litigants without clear standards for negotiating civil transactions, settling cases, or conforming their conduct to clear legal rules.”).

¹³ In its recent Annual Report, OIP also revealed another factor that likely contributes significantly to the dearth of formal opinions. When a formal opinion is forthcoming, OIP contacts the agency to encourage cooperation. OIP 2016 Annual Report at 8. After OIP has delayed a matter a year or more, agencies frequently have no interest in maintaining secrecy of the particular records at issue in the original request and no desire to have the legal issues resolved for future requests. Thus, matters get resolved without any precedent or public education on the underlying legal issues.

• OIP's backlog is trending upward despite a downward trend in new filings.

Backlog/New Filing Trends



While the number of newly filed major matters is trending down, OIP's backlog continues to trend upward. It could be argued that the backlog is increasing because the public access issues presented to OIP have become more difficult over time, requiring additional research and consideration. While plausible, the argument appears to be inconsistent with the fact that OIP is issuing fewer formal opinions. As noted, OIP has explained the dearth of formal opinions by the lack of novel public access issues raised in new matters.

Observations and Recommendations

Although these Findings identify current shortcomings at OIP, this report is not a criticism of the current OIP director. Unknown or unmeasurable factors—not accounted for in this analysis—may be contributing to this crisis in public access. And other factors have existed longer than the present administration. Blaming the director thus is not constructive. These findings underscore the acute need to re-evaluate OIP's institutional methods, not its leadership.

In evaluating possible recommendations, the Law Center considered recent work in civil justice reform. The goal of this report parallels the objective of civil justice reform to provide “a civil legal process that can fairly and promptly resolve disputes for everyone—rich or poor, individuals or businesses, in matters large or small.” Civil Justice Improvements Committee, Conference of Chief Justices, Call to Action: Achieving Civil Justice for All at 2 (2016) [Call to Action].¹⁴ Nationally, civil litigation has suffered a loss in public confidence comparable to the complaints being voiced about OIP: “Small, uncomplicated matters that make up the overwhelming majority of cases can take years to resolve. Fearing the process is futile, many give up on pursuing justice altogether.”¹⁵ *Id.*

¹⁴ The Conference of Chief Justices strongly endorsed this committee report at its 2016 annual meeting. Conference of Chief Justices, Resolution 8: In Support of the Call to Action and Recommendations of the Civil Justice Improvements Committee to Improve Civil Justice in State Courts (adopted July 27, 2016).

¹⁵ As a basis for comparison concerning the magnitude of delays, the Conference of Chief Justices expressed concern because “[a]pproximately three-quarters of cases were disposed in just over one year (372 days), and half were disposed in just under four months (113 days).” Under current practices, disposition of matters at OIP is over two years in three-quarters of cases (795 days) and approximately 15 months in half of the matters (451 days).

In light of the Findings, the Law Center considered areas where OIP rules, procedures, or practices may be contributing to delays in access. The following observations and recommendations target potential contributing factors. Again, the goal is to bring OIP closer to its intended purpose and primary function as an office that provides the public with timely resolution of disputes regarding access to government information.

The recommendations seek to achieve that goal by ensuring that:

- OIP directs proportionate resources to each matter to achieve a fair outcome;
- Requesters can make informed decisions about whether to appeal a denial of access;
- Appeal procedures apply uniformly and efficiently to provide notice and meaningful opportunity for all parties to be heard;
- Cases are resolved fairly and timely; and
- OIP practices are not perceived as antiquated or favoring government agencies.

These observations are based on the Law Center's experiences advising the public and various media outlets in matters before OIP, as well as a sampling of older records that the Law Center obtained from OIP through UIPA requests. These observations do not represent every interaction with OIP, but none are based solely on one unique requester or situation.

1. OIP staff attorneys are underpaid. In testimony during the 2016 legislative session, OIP noted that median salaries for deputy attorneys general were 24% less than the median at the Honolulu Department of the Corporation Counsel—and that OIP staff attorneys are paid less than comparable deputy attorneys general.¹⁶ OIP's ability to recruit and retain hard-working, competent lawyers to perform its core functions is directly correlated to its ability to offer competitive salaries for attorneys interested in government service. Without a strong and consistent cadre of attorneys, OIP will always struggle to accomplish its mission.¹⁷

And this need will not diminish if OIP successfully begins to reduce its backlog. To the contrary, the Law Center would anticipate that reducing the backlog would lead to a measurable increase in new matters filed with OIP, adding to OIP's workload and requiring sustained effort to keep the backlog down. Many members of the public and media outlets have given up on OIP because of the 1–2 year delays. If OIP starts deciding matters within a reasonable time, more people will use the Office for disputes.¹⁸

Recommendation: Budget OIP staff attorneys on the same pay scale as attorneys in the Department of the Attorney General.

¹⁶ OIP Testimony on H.B. 1700, HD 1 before the Senate Committee on Ways and Means on April 5, 2016.

¹⁷ When OIP loses staff attorneys to other government agencies or private practice, it has a demonstrable impact delaying resolution of OIP matters. For example, nine of the thirteen major matters that took OIP more than 10 years to complete were transferred two or more times to new staff attorneys before resolution.

¹⁸ OIP's history supports this expectation. From 2003 to 2006, OIP cut its backlog by more than half, and by January 1, 2006, it had no matters pending longer than seven months. At the same time, the annual number of new filings requesting OIP opinions nearly doubled.

2. Record request procedures encourage unnecessary appeals to OIP. The Law Center has observed that when agencies or others make the effort to explain why records have been withheld, the explanation often resolves concerns about access. But current procedures for processing public record requests do not provide the public with substantive justifications to help them understand why records are not public. Instead agencies will summarily reference vague standards that have unclear application to the requested records, leaving the requester frustrated, confused, and believing that the agency has something to hide.

OIP sets the standard for what government agencies must provide as an initial justification for nondisclosure of records. HAR § 2-71-14(b) (An agency “shall state...(2) The specific legal authorities under which the request for access is denied under section 92F-13, HRS, or other laws.”). OIP’s form Notice to Requester requires a statutory citation and an “agency justification”. As the justification, agencies often merely restate the statutory exception without more (e.g., citing HRS § 92F-13(3),¹⁹ then stating “frustration of a legitimate government function” as the justification). OIP has never addressed whether this standard agency practice satisfies the regulatory requirement.²⁰

The five statutory exceptions, however, cover a range of possible justifications for nondisclosure. Merely referencing the “frustration” exception, for example, could involve legal doctrines related to, among others, law enforcement records, examination test questions, government deliberations, or security. Referencing the exception for confidentiality statutes or court orders raises the natural question as to what statute or order is implicated by the request. Under the current agency practice to simply restate the statutory exemption, requesters are left in the dark, guessing why records were withheld. The only way that a requester can find out the basis for the denial of access is forcing the agency to justify itself to OIP.²¹

Requiring agencies to provide more robust justifications for denials will satisfy many requesters without the need for OIP intervention. Better justifications also contribute to the spirit of transparency required by the UIPA.

Agencies would need to be more thoughtful in denying access, rather than simply citing a vague statute. And requesters will be more respectful of the agency’s decision—even if they disagree—when that decision reflects the careful consideration required by law.

Recommendation: Require that an agency explain with its notice to the requester why access is denied to specific information. The explanation should briefly identify the legal doctrine that justifies withholding and outline how that legal doctrine applies to the particular information withheld. To the extent that an agency is relying on a statute, judicial decision or order, or OIP opinion for guidance, that information should be expressly referenced in the notice to requester.

This recommendation may be accomplished through OIP guidance and enforcement. For example, agencies would benefit if OIP provided examples of model justifications with the expected level of detail for a Notice to Requester.²² Also, OIP should revise its Notice to Requester form to provide agencies more space for the substantive justification; the small space currently available encourages agencies to provide little to no explanation.

¹⁹ HRS § 92F-13(3) permits agencies to withhold “Government records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function.”

²⁰ OIP’s Guide to Hawaii’s Uniform Information Practices Act states that an agency must provide “a brief explanation of why the agency cited that exception,” but it is not clear whether OIP considers a restatement of the statutory exemption sufficient.

²¹ A requester could sue the agency in court. But without knowing the substantive basis for the agency’s denial, a requester may be incurring hefty filing fees only to find out that the agency had a good reason for denying access.

²² For example, a short model justification (instead of “frustration of a legitimate government function”) might be:

The information identifies the location of infrastructure that is not readily observable, that has been the target of thefts, and that could be used to compromise the operation of energy facilities critical to the entire State.

This example is based on the discussion in OIP Opinion 07-05.

3. OIP Improperly encourages agencies to disregard the statutory duty to balance public and privacy interests. When a record request implicates a significant privacy interest of a person other than the requester, the UIPA requires agencies to balance that individual's privacy interest against the public interest in disclosure of the particular records involved. HRS § 92F-14(a). In a March 2016 training session for government attorneys, however, OIP advised agencies to deny all requests that implicate privacy interests (even if there is a public interest) unless there is an OIP opinion or court decision that directly addresses the type of record involved. The Law Center has seen a noticeable increase in aggressive agency denials of access on privacy grounds.²³ Each of these unjustified denials means a delay for years under the OIP backlog, if the requester even appeals in the first place knowing the delay involved.

OIP should not be training agencies against complying with statutory duties under the UIPA. Agencies have a duty to balance privacy and public interests. A primary motivating impetus for the Legislature in adopting the UIPA in 1988 was to break the overemphasis on privacy that had traditionally held up disclosure of public records.²⁴ OIP unnecessarily and improperly increases its workload by telling agencies to ignore the statutory duty to balance the public interest in disclosure of government records.

Recommendation: Stop advising agencies—through training or other guidance—to ignore the statutory duty to balance the public interest in disclosure of records.

4. OIP's Attorney of the Day service favors government agencies, creating more disputes about public records and distracting from OIP's primary function to resolve disputes.²⁵ OIP admits that "[Attorney of the Day] inquiries have been taking an increasing amount of the staff attorneys' time." OIP 2016 Annual Report at 8. But OIP's Attorney of the Day service has evolved into a means for government agencies—and only agencies—to obtain expedited legal advice regarding public record disputes.²⁶ *That is the job of the attorney general or respective corporation counsel.*

In one recent example, the City's corporation counsel outlined the City's interpretation of the UIPA as applied to a set of records and asked for confirmation of its redactions from OIP. In a five-page letter, OIP responded after three business days telling the City to withhold more information than it had planned to redact in the first instance.²⁷ March 23, 2016 Letter from OIP to City & County of Honolulu. OIP did not seek the requester's position on the dispute, but relied instead solely on the City's presentation before issuing a formal written response. In the end, OIP diverted resources from addressing its backlog in order to foment more disputes over public access by encouraging an agency to be more secretive than it originally planned.

²³ Combined with the fact that OIP rarely publishes opinions in the first place and the cost of litigating issues in court, OIP's advice creates a perpetual cycle of secrecy.

²⁴ E.g., H. Stand. Comm. Rep. No. 342-88, in 1988 House Journal at 969-70 (noting "almost uniform criticism" of the pre-UIPA law and that conflicts in the law operated "to give primacy to personal privacy interests" despite the clear intent of the public records law); S. Stand. Comm. Rep. No. 2580, in 1988 Senate Journal at 1094 (noting the narrowing of the right of privacy from prior law in light of the "compelling state interest in open and accessible government").

²⁵ OIP's policy on Internal Management of Cases provides: "To expeditiously resolve most inquiries and complaints from agencies or the general public, OIP attorneys may provide informal and general advice concerning the UIPA or Sunshine Law through the Attorney of the Day (AOD) process. AOD advice will generally be provided within the same day that the inquiry or complaint was made." OIP Internal Management of Cases at 7.

²⁶ According to OIP 70% of the 964 informal requests it received in 2016 were from government agencies. OIP 2016 Annual Report at 7-8.

²⁷ In prior administrations, OIP explained that agencies should not expect detailed responses to a preliminary consultation. E.g., OIP Op. No. 10-04 at 3 n.2 (explaining that agencies may seek "general guidance" from OIP before responding to a records request, but it does not extend the time for the agency's response).

Recommendation: Limit the Attorney of the Day service to a resource for general reference to principles and OIP opinions relevant to stated circumstances (similar to a librarian providing research assistance); OIP should not be providing fact-specific advice to agencies based on a one-sided presentation of the issues.

Further, OIP should consider suspending the Attorney of the Day service until it has significantly reduced its backlog. The backlog reflects real disputes about public access that are sitting for years without resolution and that often will be decided publicly in a way that educates agencies and the public equally about how the UIPA will be applied. Resolution of the Attorney of the Day inquiries helps only the requesting agency deal with pending requests that may never be disputed. Given the choice between informal and unenforceable guidance about a request within a few days (but no final decision for years) and a final enforceable decision within a few months, the latter option is the better solution.

5. OIP appeal procedures favor government agencies, frustrating State policy and making OIP's job more difficult. Although OIP describes itself as a neutral third party between the requester and agency, its procedures are structured to give preference to agencies. For example, when an agency requests an opinion, OIP does not notify or seek input from the record requester, leaving OIP with only a one-sided presentation of information. And when a requester initiates an appeal, the requester does not receive a meaningful opportunity to respond to the agency's responses because OIP will not provide a copy of the agency's responses unless the requester makes a UIPA request to OIP. OIP also will hold substantive ex parte conversations and rely on those conversations to uphold denial of access;²⁸ moreover, OIP staff do not always take notes of those ex parte conversations, creating gaps in the record that make it difficult to understand the basis for OIP's decisions. When OIP issues a decision, requesters often are surprised to learn that the agency had numerous previously undisclosed submissions to or conversations with OIP.

More adversarial proceedings also will tend to highlight and clarify the issues in dispute, simplifying the decision-making process.²⁹ The requester provides an essential voice for the public in the process—an advocate for access that otherwise does not exist. OIP considers itself neutral, and agencies have no obligation to highlight adverse facts, standards, or case law. As federal courts have observed in the context of Freedom of Information Act cases, “[i]t is simply unreasonable to expect a trial judge to do as thorough a job of illumination and characterization as would a party interested in the case.”³⁰ The public cannot expect OIP to be any better than judges at deciding issues of public access without at least hearing the requester's position.³¹

²⁸ In the comparable context of Freedom of Information Act cases, courts permit agencies to make one-sided presentations of evidence in extremely limited circumstances and only after the agency has provided as much detail as possible publicly to justify its claimed exemptions. E.g., *Lion Raisins Inc. v. U.S. Dep't of Agric.*, 354 F.3d 1072, 1084 (9th Cir. 2004).

²⁹ “[E]mpirical research shows that fact-pleading standards and robust mandatory disclosures induce litigants to identify key issues in dispute more promptly and help inform litigants about the merits of their respective claims and defenses.” Call to Action at 13.

³⁰ *Wiener v. FBI*, 943 F.2d 972, 977 (9th Cir. 1991).

³¹ Affording requesters a fair opportunity to be heard in OIP appeals also would contribute to greater acceptance and satisfaction with the appeals process, regardless the particular outcome.

Lastly, OIP gives agencies a chance to cooperate when an adverse formal opinion may be forthcoming. OIP 2016 Annual Report at 8 (“[W]here a formal opinion may be forthcoming, OIP often obtains the agencies’ cooperation and may sometimes resolve a case without a formal opinion because the agencies do not want to risk having an adverse decision rendered by OIP...”). Such last-minute *ex parte* efforts to solicit cooperation give agencies the opportunity to delay disclosure for years while OIP works on an opinion, but still avoid any permanent resolution to the issues raised in an appeal.

Recommendation: OIP proceedings should provide timely notice and opportunity for all interested parties to participate fully. OIP proceedings are not contested case hearings. HRS § 92F-42(1). But some of the protections offered in a quasi-judicial proceeding are basic principles of fairness. Both sides should know what information has been presented and be given an opportunity to respond, including on efforts to resolve matters informally.³² Because the resolution of OIP appeals defines public access in Hawai‘i, everyone is better served when interested parties are kept informed and can provide differing perspectives on a matter.³³

6. OIP’s lack of procedural rigor invites extended delays. OIP starts an appeal when a requester complains about denial of access by sending notice of the appeal to the agency. HAR § 2-73-13. By rule, HAR § 2-73-14, the agency has 10 business days to respond, but in practice, agencies often miss that deadline without any excuse or penalty.³⁴ OIP also has no defined procedure for accepting submissions after the initial agency response. E.g., HAR § 2-73-15 (describing various procedures for obtaining additional input, but providing no deadlines or other standards). And it is not uncommon for agencies to submit supplemental filings—with no notice to the requester—a year or more after the issues were initially briefed.

As already noted, the lack of procedural rigor makes it difficult for requesters to understand and follow OIP proceedings. But delays in the agency’s initial response are particularly egregious because the agency has the burden to prove that denying public access is justified. HRS § 92F-15(c). The appeal process thus does not meaningfully start until the agency provides its justification in the initial response. The process cannot move forward if OIP is waiting for the agency justification and will not penalize the agency for untimely filings.

Recommendation: Enforce the existing procedural deadlines and promulgate rules that more strictly control the submission of statements. Because most situations will follow a normal path, OIP should have deadlines for the initial agency response, the requester’s rebuttal, and the agency’s reply. Any further submissions should be only with OIP’s permission and for good cause if the submission (and any response by a set deadline) will not unduly delay a decision. While OIP may be less rigorous now because its backlog is measured in years, the goal should be months—which is achievable only with a stricter protocol for obtaining the positions of both sides.³⁵

³² OIP has, and should continue to have, the authority to review the records in dispute in camera (i.e., without disclosing the records to the record requester). HAR § 2-73-15(c). But it would be exceptionally rare that an agency would require confidentiality for why it denied access to public records. It is antithetical to open government that an agency would keep secret both the records at issue and its justification for the secrecy of those records.

³³ Moreover, without informed advocacy from the interested requester, decisions will naturally favor the agency’s position because the agency is making a one-sided presentation of information. To the contrary, the UIPA provides that “it is the policy of this State that the formation and conduct of public policy—the discussions, deliberations, decisions, and actions of government agencies—shall be conducted as openly as possible” and that “[a]ll government records are open to public inspection unless access is restricted or closed by law.” HRS §§ 92F-2 & -11(a). While OIP enforces that State policy, the appeals process must recognize the requester’s role as the advocate for public disclosure.

³⁴ Commenting on the need for judicial enforcement of procedural deadlines and rules, the Call to Action report remarked that “whenever it is customary to ignore compliance with rules ‘designed to secure the just, speedy, and inexpensive determination of every action and proceeding,’ cost and delay in civil litigation will continue.” Call to Action at 17 (footnote omitted).

³⁵ The Conference of Chief Justices recommended that monitoring compliance with procedural deadlines be handled by administrative staff, so that judicial staff can focus on the substantive disputes. Call to Action at 12. Similarly, if OIP promulgates and strictly enforces submission deadlines, it should not require time from staff attorneys. But see OIP Internal Management of Cases at 11 (requiring staff attorneys to obtain agency responses to appeals).

7. OIP's strong adherence to a first in, first out policy delays matters of significant public importance, making it a powerful stall tactic for agencies seeking to withhold records. In 2003, OIP closed a matter from 1991— involving access to investigation files of the DCCA Regulated Industries Complaints Office (RICO)—without issuing a decision because a judgment in related litigation was entered in 1994; although access to RICO files was a recurring inquiry, OIP did not finally address the question until a 2009 formal opinion, eighteen years after that first inquiry. In 2012, OIP closed a matter from 2006— involving a request by Professor Randy Roth, co-author of the 1997 “Broken Trust” statement and a related 2006 book, for files of the Attorney General’s 1997–2000 investigation of the Kamehameha Schools Bishop Estate—because the Attorney General deemed the request abandoned.³⁶ In 2015, a requester appealed an issue that had been addressed in a prior informal OIP opinion, and the agency offered little justification (making arguments that OIP had already rejected in the informal opinion); that request remains pending 18 months later.

These matters illustrate a spectrum of detrimental impacts on the public that arise from a virtually inflexible deference to first in, first out policy. Cases are backlogged for so long that the underlying disputes become moot, but the larger recurring issues of significant public importance do not.³⁷ Deadlines, such as the publication of Professor Roth’s book, expire without resolution. Or simple matters that could be resolved with minimal effort are left to sit for years.

OIP’s internal policy on management of cases sets a general policy “to complete older cases before newer cases.” It contemplates that newer cases may be taken out of order according to the Director’s discretion if there is an impending deadline or significant impact to the case. OIP Internal Management of Cases at 11. Nothing in OIP’s public rules for appeals, however, explains that cases may be considered for expedited review, the standards for such review, or the information that the public must submit to justify such review. And despite OIP’s internal policy, through its involvement in numerous appeals concerning matters of significant impact or with impending deadlines, the Law Center is not aware of any appeals where OIP has provided expedited review.

Recommendation: Apply a published priority system to triage fully briefed matters and provide requesters and agencies an opportunity during briefing to justify higher priority.³⁸ OIP cannot expect to know all the reasons that a matter may deserve expedited review. If everyone knows the standards, the parties can explain why a case should be expedited. After briefing of the issues, OIP then would assess whether the case should be prioritized. Simple matters that would be resolved squarely by reference to existing opinions with little further analysis should be high priority. Cases with a critical deadline or involving recurring or significant matters of public interest should be expedited over normal matters.³⁹

³⁶ This matter further reflects the problem when OIP communicates solely with the agency on agency-initiated inquiries. While the Attorney General may have considered the request abandoned, there is no record that OIP asked Professor Roth whether he wanted the issue resolved.

³⁷ It is further troubling that OIP would decline to address recurring issues that become moot. Definitive guidance in the 1990s on the issue of RICO investigative files would have avoided decades of uncertainty and multiple appeals. More than 10 substantive OIP matters before the 2009 formal opinion concerned some aspect of access to RICO investigative files; no appeals since 2009 appear to focus on such access.

³⁸ Call to Action at 12 (“cases should be ‘right-sized’ and triaged into appropriate pathways at filing”) & Recommendations 2-6 at 18-27 (describing proposed triage process).

³⁹ E.g., U.S. Dep’t of Justice, Ensuring Timely Determination on Requests for Expedited Processing (Jan. 21, 2015).

8. OIP should seek to resolve matters within less than a year. OIP has a goal to resolve matters within a year of filing. OIP 2016 Annual Report at 13. In comparison, in 2011, the Conference of Chief Justices approved model standards that aimed for 75% of general civil trial matters (and 98% of summary civil proceedings) to be resolved in 6 months; the model standards sought for 98% of all civil matters—which are uniformly more complex than OIP matters because of discovery, fact disputes, and possible trials—to be resolved within 18 months.⁴⁰ Hawai'i state courts also have case processing goals to resolve circuit court cases within a year and less complex district court cases within 6 months.⁴¹

For further comparison, the Federal Judiciary maintains a more complex docket of cases, and each judge has fewer resources than OIP's 4.5 full-time equivalent attorneys. The Administrative Office of the United States Courts periodically publishes the number of motions that each judge has pending for more than six months. In the March 2016 report, only one judge in Hawai'i had motions pending more than six months and that was because the court gave the parties an opportunity to submit supplemental briefs. March 2016 Civil Justice Reform Act Report, Table 8W at 1670-79.

Recommendation: Aim to resolve any major substantive matter within six months after full briefing. Resolving fully briefed matters within six months is an achievable goal. For example, on January 1, 2006, OIP had no backlog of matters pending more than 7 months—allowing a month for briefing (the same methodology used by the federal courts). As of January 1, 2017, OIP has 63 matters pending more than 7 months. One year is the same goal that the Hawai'i Judiciary has for complete resolution of an entire case (including discovery and trial) in circuit court, so we should not expect OIP matters to take that long.

9. OIP informal decisions are unnecessarily long. OIP informal decisions typically are more than 5 pages long, reciting at length the facts and repeating well-settled legal standards before providing approximately a paragraph or two of analysis uniquely relevant to the matter. The apparent effort, and consequent delays, to prepare these lengthy informal decisions is indistinguishable from that required for the formal opinions. There is no public benefit to issuing informal decisions, if it does not significantly shorten the time to decision.

For example, the Open Records Division of the Texas Attorney General issues 1–2 page informal memoranda that typically identify the issue, the most directly relevant precedent, and the resolution. Although brief, these decisions provide timely and reasoned resolution to disputes. Parties are not sidetracked for years waiting for a decision.

Recommendation: Focus informal decisions on resolution with the bare minimum analysis. During the triage process discussed above, OIP should identify those cases that will be decided by informal opinion. By earlier identification, staff attorneys can draft shorter and more direct decisions that minimize delays for the parties.

⁴⁰ National Center for State Courts, Model Time Standards for State Trial Courts at 3; Call to Action at 21 (recommending 6–8 months to resolve “streamlined” cases, comparable to nearly all OIP matters—“Limited need for discovery”; “Few witnesses”; “Minimal documentary evidence”; and “Anticipated trial length of one to two days”).

⁴¹ National Center for State Courts, Hawai'i (last visited Dec. 2016); January 13, 2017 E-mail from the Hawai'i State Judiciary to R. Brian Black (confirming that the Hawai'i cases processing standards on the National Center for State Courts website are accurate).