OIP'S RESPONSE TO A STAGGERINGLY MISLEADING REPORT

February 12, 2018

Last year, the Hawaii Office of Information Practices (OIP)[1] responded to a report by the Civil Beat Law Center (CBLC) entitled, "Breaking Down Hawaii's Broken System for Resolving Public Access Disputes."[2] **OIP criticized last year's report for being based on flawed methodology, inaccurate assumptions, 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.**

This year, the **same criticism applies to a second report** by CBLC entitled, "A National Comparison: Delays at OIP Are Staggering" (Report), which contained the same flawed methodology, inaccurate assumptions, bias, and lack of understanding. The second Report, which was presented as a *fait accompli* to OIP a mere week before its release, compared the number of formal and informal opinions and length of time that OIP takes to decide them versus other states' statistics and concludes that OIP is the worst of all states. **What was truly staggering about the second Report was its misleading use of statistics and blatant omission of relevant facts to support its predetermined conclusion** that OIP should be statutorily mandated to resolve its complaints in six months from the date of filing without any additional personnel or funding. Please consider the following 15 points.

1. The typical "opinions" and decisions by other states cited in the Report are <u>not comparable to OIP's opinions</u>. The states cited by the Report with fast response times produce "opinions" that are usually only one to two pages long and do not contain the detailed factual and legal analyses provided in OIP's formal and memorandum opinions. Those other states' opinions are more comparable to the informal advice that OIP provides in response to Attorney of the Day (AOD) inquiries, which will be discussed further.

2. The Report did not explain that **the reason that OIP must write more detailed opinions is because Hawaii's <u>courts must defer to OIP's opinions</u> that are judicially appealed, <u>and these opinions are subject to a high standard of review by the courts</u>. CBLC itself has argued to the courts that OIP's opinions are entitled to deference.**[3] Through Act

---

[1] OIP is an independent Hawaii state agency charged with administering Hawaii's Sunshine Law, Part I of chapter 92, Hawaii Revised Statutes (HRS) and Uniform Information Practices Act, Modified, chapter 92F, HRS (UIPA). OIP is a neutral body and is statutorily required by sections 92-1.5 and 92F-42, HRS, to assist both Hawaii government agencies and the public.

[2] The Office of Information Practices' Response to the Civil Beat Law Center Report (February 8, 2017) can be found on the Annual Reports page at oip.hawaii.gov, where you will also find OIP's FY 2017 Annual Report that provided much of the information for this response.

[3] Peer News LLC dba Civil Beat v. City & County of Honolulu, 138 Haw. 53, 58, 376 P.3d 1, 6(2016) (noting that "[i]n its [motion for summary judgment], Civil Beat argued that OIP's analysis [in Op. Ltr. No. 97-01] was correct based on a plain reading of the UIPA, and that even if the UIPA is

176, 2012 Haw. Sess. Laws, the Legislature amended the UIPA and Sunshine Law to allow agencies to appeal from OIP's opinions, but made clear that "[o]pinions and ruling of the office of information practices shall be admissible in an action brought under this part and shall be considered as precedent unless found to be palpably erroneous."[4] OIP may, but is not required to, intervene in appeals of its rulings. **Thus, to avoid OIP's previous experiences when it has been tied up in appellate litigation over the validity of its rulings,[5] OIP is careful now to draft opinions so that they may "speak for themselves" if challenged in court and not require OIP's intervention.** As a prime example of how the new law is working, the Circuit Court of the First Circuit ruled on May 1, 2017 that OIP Op. No. F15-02 was not palpably erroneous and denied a motion for summary judgment filed by the Office of Hawaiian Affairs (OHA), which has been fighting since December 2014 to overturn OIP's Sunshine Law opinion. While OIP is defended by the state Attorney General's office, OIP was not required to join as a party in the OHA appeal, and thus **OIP itself has not had to provide legal assistance and has continued with its regular work over the years as the case continues to wind its way through the courts.[6]**

---

ambiguous, OIP's conclusion is entitled to deference.") Robert Brian Black, the Executive Director then and now of the Civil Beat Law Center, represented Peer News LLC dba Civil Beat in that case.

[4] HRS § 92-12(d) (2012); *see also* HRS §§ 92F-43(c), 92F-15, 92-27. For a detailed explanation of the statutory changes enacted by Act 176 and OIP's appeal rules implementing those changes, *see* 2013 Law and Administrative Rules Governing Appeal Procedures of Hawaii's Office of Information Practice, 36 University of Hawai'i Law Review 271 (Winter 2014).

[5] In the earlier appeal from OIP decisions, the County of Kauai sued OIP in June 2005 in a case involving both Sunshine Law and UIPA issues after OIP ordered the disclosure of minutes from an executive session that it contended had been improperly closed to the public. The case was litigated and on appeal for four years, requiring the appointment of special counsel to represent OIP and the support of two OIP Directors and two OIP attorneys to assist in the litigation and brief writing. Despite OIP's vigorous and time-consuming defense, the Intermediate Court of Appeals ruled against OIP in a June 2009 opinion that was subsequently affirmed by the Hawaii Supreme Court in October 2009. County of Kauai v. Office of Information Practices, 120 Haw. 34, 200 P.3d 403., 2009 Haw. App. Lexis 35 (2009) (affirmed by the Hawaii Supreme Court without an opinion on October 26., 2009). Because the Kauai decision placed a cloud over OIP's authority, OIP sought and successfully obtained legislative clarification in Act 176 of the rights, procedures, and standard of review for agencies to judicially appeal from OIP rulings.

[6] Since enactment of Act 176, the Hawaii Supreme Court has applied the palpably erroneous standard of review in Kanahele v. Maui County Council, 130 Haw. 228, 307 P.3d 1174 (2013) (involving the propriety of meeting continuances and distribution of memos among board members under the Sunshine Law), and favorably cited to seven OIP opinions. OIP was not involved in that case, which began in the Circuit Court on March 2008 and concluded over five years later with the Hawaii Supreme Court's opinion filed in August 2013.

In Peer News LLC dba Civil Beat v. City & County of Honolulu, 138 Haw. 53, 58, 376 P.3d 1, 6 (2016), the Hawaii Supreme Court applied a *de novo* standard of review to interpret a statute. Under this

3. If fast, informal advice comparable to other states' "opinions" is desired, then **people are already getting answers the same day from OIP through the AOD service, which responds to 77% of all requests for OIP's assistance**. **Through this same day service, OIP often prevents or resolves UIPA and Sunshine Law disputes, either by a simple email or through verbal advice.** For example, if OIP is made aware of a meeting notice that is untimely or insufficient under the Sunshine Law, it will orally notify the board and is usually successful in having the meeting postponed and/or the notice revised, without having to provide any written correspondence or escalate the matter to a formal appeal. As another example, if OIP receives an AOD inquiry as to whether an agency must disclose requested information, it may provide informal verbal or written advice as to the agency's responsibilities, which may then result in the agency's voluntary disclosure of the requested record. **The AOD service is well used by members of public, who have no attorney to turn to, as well as government employees, who often find OIP more accessible and knowledgeable than their agency attorneys.** Although OIP has no statistics on the number of verbal advice it gave that averted or resolved potential disputes, **OIP followed up within a day or so with 121 email responses to AOD inquiries in FY 2017. The Report, however, failed to include the AOD written and verbal case resolution numbers, as that data would have dramatically changed the Report's predetermined conclusion.**

4. Requests for OIP's services that cannot be informally resolved through the same day AOD service are opened as formal cases, which comprised 23% or 278 of the total 1,234 requests for services in FY 2017. OIP had an average of 23 formal cases filed each month last year, or 139 for a six-month period. **OIP ended FY 2017 with only 85 pending of the 278 formal cases that were filed in FY 2017**, which is quite an accomplishment considering that 48 were filed in the last two months of the year. In summary, for FY 2017, **OIP resolved 93% of 1,234 formal and informal cases in the same year they were filed, of which 77% were typically resolved the same day through the AOD service.**

5. Contrary to the Report's claims**, the number of new formal cases filed by OIP has substantially increased in five of the last seven years, for an average increase of nearly 17% per year**, as shown in the attached Chart 1 of "Formal Cases: New, Closed, & Outstanding FY 2011 – FY 2017." Although OIP had a brief respite in FY 2016 when the number of new formal cases filed went down to 198 from 233 the year before, OIP saw a 40.4% increase in new cases (+80 cases) in FY 2017, when a record 278 formal cases were filed.

6. The Report failed to point out OIP's increased productivity for all but two years since FY 2011. *See* Chart 1. Even with the 40.4% increase in new cases, OIP was able to resolve 232 formal cases in FY 2017, just 9 cases shy of the record 241 cases that it resolved in

---

standard for statutory review, the Court concluded that a 1997 opinion by OIP in Op. Ltr. No. 97-01 was palpably erroneous in determining that a 1996 opinion by the Court had eliminated the primary intent of a statute that was effective at the time of the Court's opinion but was not the subject of that decision since the case had been filed to challenge an earlier version of that statute. The Court favorably discussed another OIP opinion, Op. Ltr. No. 98-02, which had not and could not be challenged by a third-party intervenor. Peer News, 138 Haw. at 75, 376 P.3d at 23.

FY 2016. OIP's increased productivity was assisted by the addition of a new attorney position in FY 2014, even though the productivity of experienced attorneys decreases during training when they are supervising and mentoring new attorneys and have less time to work on their own cases.

7. The Report also failed to point out that despite OIP's increased productivity, the backlog of formal cases tracks the number of new formal cases filed each year, over which OIP has no control. *See* Chart 1. As shown in Chart 1, the red dashed line representing OIP's outstanding cases closely tracks the blue dotted line showing the number of new cases filed each year. Except for a slight drop in FY 2012 and a substantial drop in FY 2016, both the red dashed line and blue dotted line have shown almost parallel progressions higher. The gap between them began widening from FY 2013 as OIP's productivity (shown as the solid green line) began increasing with the addition of one attorney, so that the red dotted line for outstanding cases did not rise as fast as the blue dotted line for new case filings. But even with OIP's increased productivity, **new case filings increased an average of 20% annually for the three years from FY 2013 to 2015, dropped 15% in FY 2016, and increased 40.4% in FY 2017. While the 15% decrease in new case filings in FY 2016 allowed OIP to lower its backlog to 104 outstanding cases, the 40.4% increase in new case filings in FY 2017 led to a 44% increase in OIP's backlog, particularly as OIP received 48 new cases in the last two months alone.**

8. The Report further failed to point out that OIP has been steadily reducing the age of the backlog, which consists mostly of appeals and requests for opinions and had been the repository for the more difficult cases that were left unresolved by prior OIP administrations due to increased case filings, budget cuts, furloughs, and different priorities over the decades of severe underfunding of OIP. This is why the oldest case pending in FY 2011 had been filed 12 years earlier. Since 2011, **OIP has substantially brought down the age of pending cases.** As of the end of FY 2017, OIP's oldest case was filed in FY 2015. Unless there is good cause otherwise, **OIP gives priority to resolving the older cases first,** so not surprisingly, as the Report points out on page 4, "[n]one of OIP's formal decisions from 2015 to 2017 were decided in less than two years."

9. The Report omits readily available data showing how OIP has historically been underfunded and not given the resources needed to perform its duties. Instead, the Report blithely claims that OIP does not need any additional resources to resolve appeals within six months of filing. The fact is that **OIP has been doing double the work with half the resources that it had 24 years ago.** OIP was created 29 years ago in 1988 to administer the UIPA. At its height in FY 1994, OIP had 15 authorized positions and an allocated budget of $827,537, which is the inflation-adjusted equivalent of $1,374,543 today. *See* Figure 3 in OIP's FY 2017 Annual Report. Five years later, in FY 1999, OIP was given the additional responsibility of administering the Sunshine Law, which essentially doubled its work, but OIP had been slashed to only 8 positions and its budget was cut to $354,505, which is the inflation-adjusted equivalent of $523,064 today. In FY 2010-11, OIP personnel were subject to furloughs and supplemental leave without pay. It was not until FY 2014 that OIP was authorized an additional attorney position. Currently, OIP has 8.5 FTE authorized positions and a legislative appropriation of $576,855, which is **$304,473 less in unadjusted dollars and only 42% of what it had on an inflation-adjusted basis in FY 1994, and 40% less in authorized positions.**

10. <u>The Report focuses on only a small percentage of OIP's work while ignoring all the other important duties that OIP performs</u>. Requests for OIP's services come from state, county and independent agencies, the media, organizations, and the general public, and the formal cases and AODs do not include OIP's other work, such as creating and revising **training materials**; conducting **live training**; monitoring and testifying on **legislation**; monitoring **lawsuits** regarding the UIPA, Sunshine Law, or OIP; keeping the public, boards, and agencies informed via **communications** like *What's New* emails and media interviews; drafting and explaining new **administrative rules**; and initiating **special projects** on its own. (*See* Figure 1 on page 6 of OIP's FY 17 Annual Report.) FY 2018 is proving to be an especially challenging year for OIP because of the tremendous work required to revise OIP's administrative rules to fall within the numbering system for the Department of Accounting and General Services (to which it is now administratively attached) and to develop new and revised administrative rules for personal record requests, manifestly excessive interference with agency duties, and other UIPA procedures and fees. OIP has already held in person, online, and on television statewide informational briefings on draft rules to obtain public and agency input, and is waiting for the Attorney General's office to complete its legal review before OIP can make revisions, publish a hearing notice, and hold a public hearing on the proposed rules. After the hearing and if new rules are adopted, OIP must create new training materials, including a revised UIPA Record Request Log, and intends to conduct statewide training to educate the state and county government agencies about the new rules. **If a six-month mandate goes into effect, OIP may not be able to perform these other duties, which are equally important and apply to everyone, not just a relatively small number of appeals.**

11. <u>The Report omits discussion of the rules and statutes from other states that allow them to not accept new cases, to limit repetitive case filings, to more readily dismiss cases, to charge for opinions, or to penalize people filing frivolous appeals, which is how other states can meet shorter case resolution deadlines.</u> Unlike other states or the CBLC, OIP must "take all comers" and cannot reject appeals that require the writing of opinions. Even the other types of formal cases require time and attention by OIP, and filings by repeat requesters detract from OIP's ability to work on opinions for other people.[7] Other states with shorter case

[7] Notably, in FY 2017, one-third of the 278 new formal cases were filed by one couple (42 cases) and three individuals (25, 13, and 9 cases each).

resolution deadlines mentioned in the Report, such as Connecticut[8] and Iowa,[9] have various means to control frivolous appeals or multiple requests made by repeat requesters, so that a few people cannot monopolize services and delay resolution of cases filed by others. Other states also have means to expedite, limit, and dismiss cases. For example, Massachusetts[10] will reject a complaint and close a file without any decision if complete information is not submitted at the time of filing. Unlike OIP, Massachusetts and Minnesota will dismiss appeals that are affected by pending litigation. [11] Minnesota[12] will also deny additional opportunities to supplement requests for appeal once they are filed and also charges requesters $200 for Sunshine Law opinions. Indiana may reject complaints that are misleading, confusing, illegible, or contain superfluous exposition.[13] As permitted by the U.S. Supreme Court, Hawaii could even amend the UIPA to grant its rights to only Hawaii residents.[14] **These and other changes to Hawaii's**

[8] Connecticut has statutory provisions automatically denying certain appeals not decided by its Freedom of Information Commission within 60 days and allowing the Commission to impose a civil penalty of not less than $20 or more than $1,000 for frivolous appeals taken "without reasonable grounds and solely for the purpose of harassing the agency from which the appeal has been taken[.]" Connecticut's Commission may also obtain an injunction prohibiting a "person from bringing any further appeal to the commission which would perpetuate an injustice or would constitute an abuse of the commission's administrative process." If an appeal is brought after such injunction has been ordered, the "agency may seek further injunctive and equitable relief, damages, attorney's fees and costs, as the court may order." The Connecticut Freedom of Information Act may be viewed at http://www.ct.gov/foi/cwp/view.asp?a=4161&Q=488540&foiNav=|.

[9] Iowa's administrative rules allow its board to "[d]ismiss the complaint, following a review of the allegations on their face, having determined that the complaint is outside the board's jurisdiction, appears legally insufficient, is frivolous, is without merit, involves harmless error, or relates to a specific incident that has previously been disposed of on its merits by the board or a court." Iowa Admin. Code 497—2.1(2); https://www.legis.iowa.gov/docs/aco/agency/497.pdf.

[10] *See* page 3 in "A Guide to the Massachusetts Public Records Law." www.sec.state.ma.us/pre/prepdf/guide.pdf.

[11] *See* page 70 in "A Guide to the Massachusetts Public Records Law" at http://www.sec.state.ma.us/pre/prepdf/guide.pdf. and "Requesting a Data Practices Advisory Opinion" at https://mn.gov/admin/data-practices/opinions/request/data/.

[12] *See* "Requesting a Data Practices Advisory Opinion" at https://mn.gov/admin/data-practices/opinions/request/data/; and "Requesting an Open Meeting Law Advisory Opinion" at https://mn.gov/admin/data-practices/opinions/request/meetings/.

[13] Indiana Code 5-14-5-11 gives the Public Access Counselor broad discretion to "determine the form of a formal complaint filed." Citing to this law, the instructions for filing a complaint state that formal complaints and requests for informal inquiries may be rejected "for being misleading, confusing, illegible or for containing superfluous exposition." http://iga.in.gov/legislative/laws/2017/ic/titles/005#5-14-5-11; http://www.in.gov/pac/files/Instructions_for_Filing_a_Formal_Complaint.pdf.

[14] McBurney v. Young, 569 U.S. 221, 133 S.Ct. 1709, 185 L.Ed.2d 758 (2013) (upholding Virginia's Freedom of Information Act granting access to public records to only Virginia citizens).

statutes and rules would need to be considered to enable OIP to meet a statutorily mandated six-month case resolution deadline.

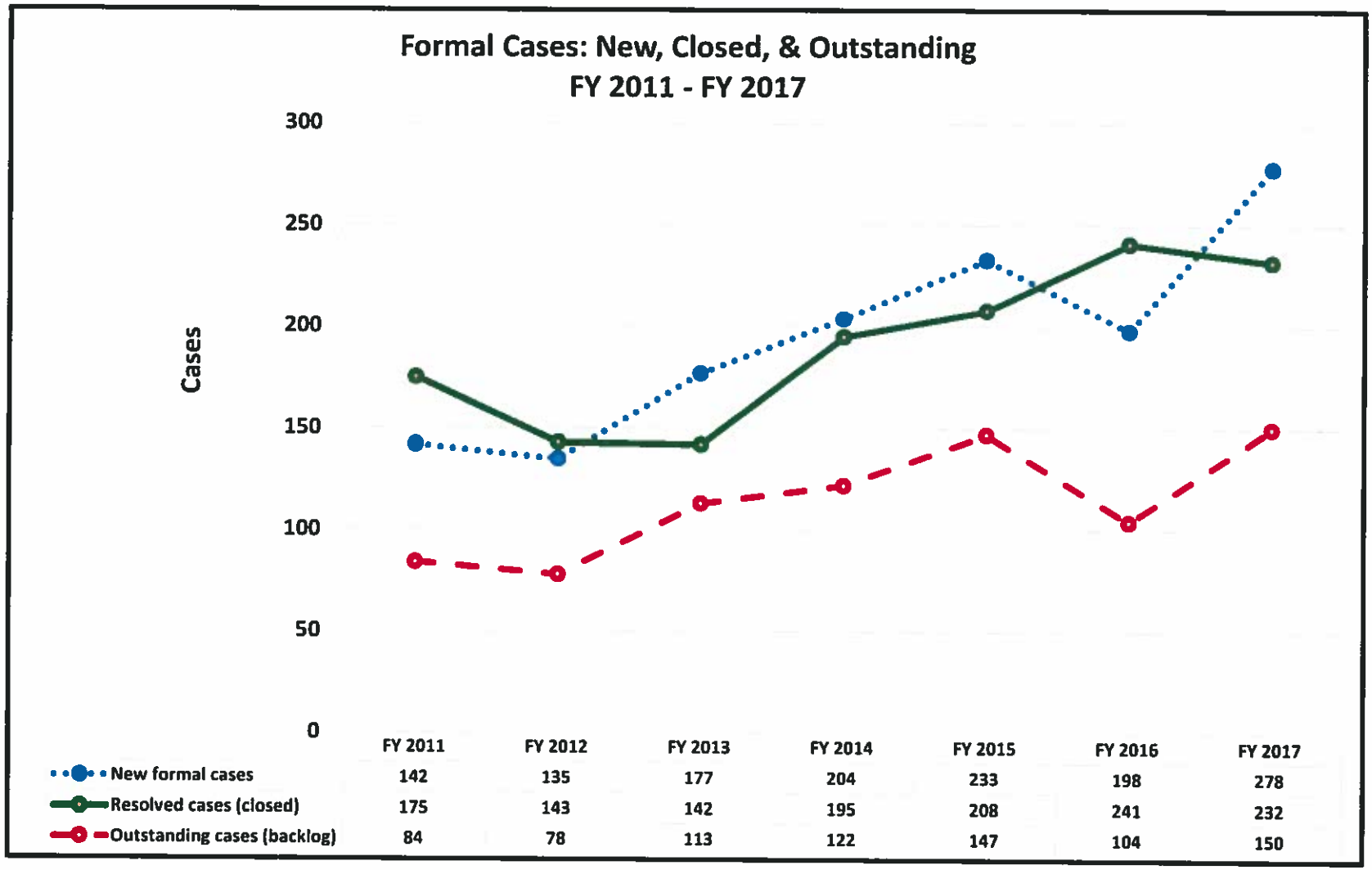
12. Contrary to the Report's assertion that no funding is necessary to meet a much shorter six-month deadline, **OIP would need even more personnel, equipment, and additional funding over and above its $115,000 supplemental budget request for FY 2018**, which is needed to help retain OIP's existing employees and provide salary parity with other state and county positions. **And even with additional funding, OIP would need a dedicated source of funding to ensure it will continue to have the resources it needs to fulfill the proposed statutory mandate for the coming decades.** Without a dedicated funding source, appropriations could be reduced and necessary increases may not be made in future years, despite the ravages of inflation or increases in the number, complexity, or frivolousness of new case filings, as OIP well knows and has experienced.

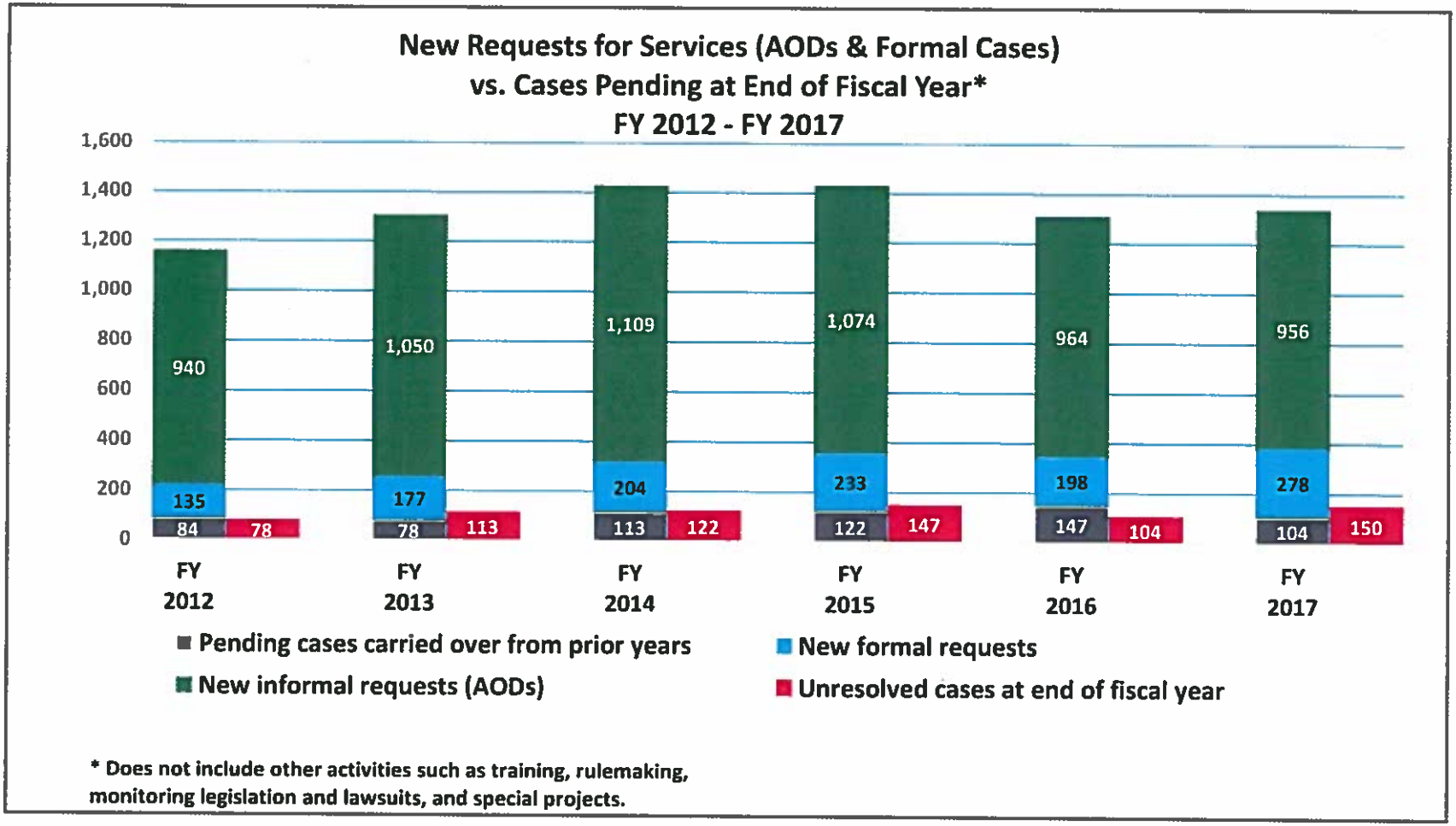
13. OIP already has its own goal to resolve formal cases within 12 months of filing, if they are not in litigation or filed by requesters who have had two or more cases resolved by OIP in the preceding 12 months. **OIP would need money and positions appropriated and authorized immediately, and additional time to hire, train, and equip the new employees needed** to meet a shorter six-month deadline. Note that with new employees, OIP's productivity may initially decrease, because experienced employees will have less time to work on their own cases while training inexperienced employees. Thus, while the effective date for any **appropriations and personnel authorizations must be effective by July 1, 2018,** a new statutory mandate should not go into effect earlier than **three years for OIP to be reasonably able to implement it.**

14. Most importantly, if additional resources are not provided and a six-month mandate is passed, **the public will suffer from a weakened OIP.** The curtailing of OIP's training and many other functions could have the **net effect of lowering agency compliance** with the open government laws **and increasing the number of new cases filed due to more disputes, while leaving the public with nowhere to turn for neutral, expert advice. During the legislative session, there may not be another credible neutral party like OIP that is willing and able to find common ground and bring together various stakeholders** from various government agencies and the general public to propose solutions acceptable to the Legislature, as OIP did with Act 165, 2017 Haw. Sess. Laws.[15] Without additional personnel or the time to train them, **the quality of OIP's opinions may be vastly lowered** to simple, conclusory "you win, you lose" decisions lacking factual or legal reasoning, **which could be more readily challenged in the courts, lead to greater strain on judicial resources, longer delays, and greater expense and less certainty for complainants. If the courts no longer deferred to OIP's shortened opinions, the agencies may be more willing to challenge OIP's opinions and may not feel it necessary to voluntarily comply with OIP's informal advice** given through AODs, correspondence, and training materials. OIP and members of the public would not have the time, money, or desire to challenge agencies in court.

[15] This law updates the Sunshine Law in several key areas: it requires board packets to be open for public inspection, revises how meeting notices are to be filed, provides a new option for the recordation of meeting minutes and requires their publication online, and makes other changes.

15. Last but not least, **CBLC's motives are suspect.** With all of these unintended consequences, the glaring omissions of relevant information and the misleading use of statistics in this Report, the big question is "Why?" Why is CBLC continuing to attack OIP, rather than helping it get the resources it clearly needs to perform its duties? The answer may be gleaned from CBLC's reports. In last year's report, CBLC recommended the elimination of the AOD service; this year's Report fails to recognize or account for the cases resolved informally by the AOD same day service to prevent disputes from arising or escalating to formal complaints. Without OIP's primary means of providing fast, free, informal, and neutral advice, members of the public would suffer the most as they do not have alternative access to governmental attorneys that assist agencies and boards. **Without OIP to provide this service, would there be more clients for a "public interest" law firm to choose from?**


Formal Cases: New, Closed, & Outstanding
FY 2011 - FY 2017
Cases
300
250
200
150
100
50
0
FY 2011 FY 2012 FY 2013 FY 2014 FY 2015 FY 2016 FY 2017
New formal cases 142 135 177 204 233 198 278
Resolved cases (closed) 175 143 142 195 208 241 232
Outstanding cases (backlog) 84 78 113 122 147 104 150



* Does not include other activities such as training, rulemaking, monitoring legislation and lawsuits, and special projects.