

Notes of August 30, 2022 Zoom Meeting

*(Doug, Brian, Duane and Carrie in attendance; Kaliko and Lance not able to attend)*

Meeting called in advance of September 12, 2022 meeting to discuss two remaining issues:

(1) "Reach[ing] a 'rough' consensus on how best to achieve timely resolution of disputes concerning public disclosure of pre-decisional government records." This is one of the stated objectives of the group.

(2) Proposal 9 in the Meller / Okinaga proposals dated August 5, 2022: "Agencies should constantly strive to improve themselves, and internal management audits and after-action reviews conducted by an agency should be protected from mandatory disclosure."

Any decisions to be made regarding these two issues will be made by the larger group at the September 12 meeting.

1. Timely Resolution of Disputes

Re the first issue, concerns were expressed by different members regarding the length of time required to obtain a formal OIP opinion (at times up to three years), as well as the amount of time being spent by agencies (including their attorneys) in assisting clients with responding to and litigating over open records requests. There is no dispute that OIP staff have a great deal of work and responsibility, and the lack of an "OIP Commission" or a like policy board and the sheer volume of prior OIP opinions were noted as potential reasons for OIP staff to require significant amounts of time to draft lengthy opinions. Aside from advocating for increasing OIP staffing, possible solutions fell into three rough categories:

a. Development and Use of Checklists and Quick Guides

Through discussion, members realized that greater clarification from OIP on certain topics might eliminate a fair amount of requester – agency disputes and/or "attorney of the day"-type inquiries to OIP. Possible areas benefitting from updates and/or greater clarification are: large volume of record requests given the digital nature of production, outdated rules regarding costs, the specificity required to utilize the frustration of legitimate government function exception in [HRS § 92F-13\(3\)](#), disciplinary records contained in personnel files, and other categories of record requests frequently made and around which OIP could offer general "starting place" guidance.

This OIP guidance could take the form of checklists for use by requesting parties and agency personnel. The Hawaii State Ethics Commission has issued useful ["Quick Guides"](#) that might be a good format to follow, understanding that (a) only largely resolved issues could / should be the subject of these guides, and (b) they would be a starting place but OIP would and could still be a resource for more detailed inquiry.

b. Structural Solutions Requiring Legislation

Members also discussed the ways other states have approached open records administration, and because of the difference in frameworks, cross-state comparisons may be of limited use. That said, some ideas that have been advanced by other states, proposed in the past to the Hawaii legislature, and/or generated by the members based on dispute resolution processes in other areas, are as follows:

- Creation of an OIP commission to provide additional policy support to staff
- Limit the timeframe for opinions to issue, e.g., six months
- Creation of a volunteer pool, like CAAP arbitrators and Lemon Law panelists, except non-attorneys are welcome, from which parties could request a volunteer “hear” the dispute and make decisions which could then be appealed to OIP

Members are very aware that these solutions would probably require legislation, in addition to assessment of the adequacy of OIP staffing.

c. Further Development of Existing Initiative

Finally, members discussed an ongoing OIP initiative regarding issuing inclinations to determine whether such inclinations encouraged resolution of disputes. Although the pandemic and staff shortages precluded OIP from drawing firm conclusions from this pilot project, initial indications were apparently positive, and members would encourage OIP to further develop and pursue this initiative.

2. After-Action Reviews

Re the second issue, members discussed the general desirability of encouraging constant improvement, resulting when agencies initiate review of actions taken and update policies and practices. Externally forced reviews are sometimes helpful, but resulting recommendations are generally not as well-received as when organizations initiate review on their own. Also, when people fear embarrassing coverage or liability, they are less likely to participate in after-action reviews.

Members discussed the deliberative process (DP) exception as currently being contemplated, including redaction of personally identifiable information for those employees without discretionary authority or not making “the decision”, and not under investigation for or engaged in wrongdoing or criminal conduct.” Members could not agree on specific language that would incent initiation of such internal reviews, but members did agree that after-action reviews will be covered by the DP exception, and as described above, will provide some protection for some employees such that participation in after-action reviews will hopefully be increased once initiated.