

OFFICE OF INFORMATION PRACTICES

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

In H.R. 104, Regular Session of 2019, the Hawai‘i House of Representatives requested that the Office of Information Practices (OIP) conduct an alternative appeal resolution pilot program and prepare “short, informal, unenforceable guidance” within two weeks of receiving the agency’s final response for the files randomly assigned to the alternative appeal resolution track. In response to H.R. 104, OIP ran a pilot program in the first five months of fiscal year 2020, and reported on its initial findings before the 2020 legislative session. A copy of the initial report is available under the OIP Reports tab at oip.hawaii.gov. OIP closed the last cases from the pilot program in fiscal year 2023 and is now making a final report on the effectiveness of providing written guidance soon after an appeal file opens.

I. The Pilot Program and Early Conclusions

For the purpose of this pilot program, OIP focused on the two types of files that can result in issuance of an OIP opinion: **appeal** files, in which there is an actual dispute under the Uniform Information Practices Act (Modified), chapter

92F, HRS (UIPA) or the Sunshine Law at part I of chapter 92, HRS, and files opened in response to a **request for an opinion**, in which one party, typically an agency, seeks an advisory opinion from OIP under the UIPA or the Sunshine Law. While OIP also provides general advice, training, and various other forms of assistance, appeals and requests for an opinion are the only two types of files through which OIP issues opinions. OIP's Annual Report details all the different forms of assistance OIP provides, gives statistical information on the number of such requests received by OIP, and summarizes OIP's opinions and other work done throughout the year. OIP's annual reports dating back to 2000 are available under the OIP Reports tab at oip.hawaii.gov.

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

In OIP's initial report, OIP estimated that it had spent approximately triple the time on each ET file that it had spent on each RT file to date, most of which was attributable to time spent preparing guidance regarding OIP's inclinations as required by the pilot program. Only two ET files had closed as a result of the early guidance, and the extra time spent preparing guidance for ET files distracted from OIP's ability to close the older files that OIP's attorneys would

otherwise be working on under OIP's general "first in – first out" policy. However, OIP believed that the additional time spent in issuing guidance for the ET files that did not close might, in the long run, mean that the opinions issued for those files required less time to write than for the RT files, which if true could mean that the ET files ultimately took less time to complete than the RT files. OIP continued to track both sets of files so it could do a final assessment of whether the ET files required less time than the RT files overall once all files from the pilot program period were completed.

Apart from the time required, OIP initially found both pros and cons to the experimental process. The pros included:

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

The cons included:

- The extra time spent focusing on the ET files comes out of the time that would otherwise be spent working on resolving older files, and thus delays the resolution of OIP's oldest pending files.

- A strict deadline for providing guidance creates additional administrative work to track guidance deadlines to avoid missing any while addressing other pending work and emergent issues coming before OIP.
- In almost all cases the parties that declined to accept OIP's initial inclination and instead asked for an opinion did not provide OIP with any additional evidence, arguments, or clarification of their position in response to OIP's initial inclination, so the time spent writing guidance did not meaningfully advance the state of the appeal.

II. Final Results and Conclusions

To avoid an outlier effect, OIP excluded the ET and RT file with the highest total hours from its calculated average for each track. The remaining 16 RT files took an average of 15.66 hours each to complete, with four opinions written (five opinions total for the RT including the highest hours file), while the 16 remaining ET files took an average of 16.9 hours to complete, with five opinions written (six opinions total for the ET including the highest hours file). Thus, the **ET files required more time to complete, on average, than the RT files.**

The ET files (16.9 hours/file) included the writing of one more opinion than the RT files (15.66 hours/file), which partly explains why the ET files took more time than the RT files. However, another reason the ET files required more time than the RT files was the time spent writing guidance for ET files that did not ultimately change the outcome of the file: the **ET files did not end up with fewer opinions needing to be written than the RT files**, despite the early issuance of guidance. Further, for two of the six ET files in which an opinion was ultimately written, the opinion differed at least in part from OIP's initial

inclinations, which suggests that quick guidance, while sometimes helpful, is not a substitute for a thorough review of the facts and issues raised in an appeal.

Early guidance also does not appear to change the likelihood that a requester abandons an appeal file or withdraws the opinion request (which then closes without an opinion). During the pilot program period, two individuals opened multiple appeals, with at least one appeal per individual assigned to each track, for a total of five. Both individuals quickly lost interest in all their appeals and all the appeals closed based on abandonment, but because guidance had been written as required for the ET track soon after the ET files opened, the ET files took an average of 12.5 hours each to complete, 8.4 hours of which was spent writing guidance. By contrast, the RT files for those individuals took an average of 3.1 hours each to complete. (All totals include only time spent by the assigned attorney, not additional time spent by other attorneys in the office in reviewing guidance letters before issuance.)

OIP's final assessment of the pilot program is that issuing guidance setting out OIP's inclinations results in more time being required on average to complete a file, and does not reduce the number of opinions that must be written. Early written guidance is effective in some circumstances to either resolve or clarify the issues, but is ineffective for most appeals. Specifically, issuing guidance appears most effective in files that are not too complex, do not raise novel legal issues, and where the parties do not have a history of bad relations. An early focus on ensuring that an appeal or request for opinion file has been fully addressed by both parties and is not missing necessary information is beneficial, as it allows OIP to obtain supplementary information while an issue is still fresh. However, while issuing early guidance is one way to achieve this benefit, there are also less time-consuming ways to do so.

Since the pilot program, OIP taken measures to ensure that the assigned attorney assesses each new appeal file once the parties' submissions appear to be complete, which better allows OIP to obtain any additional information from the parties that may be required. In appropriate instances, OIP may reach out to the parties in an effort to mediate the dispute, and may issue early guidance where it appears likely to be helpful either to resolve the appeal or to refine a party's arguments. However, OIP will not issue early guidance as a routine feature of its appeal files.

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