

2013 Law and Administrative Rules Governing Appeal Procedures of Hawaii's Office of Information Practices

Cheryl Kakazu Park and Jennifer Z. Brooks¹

I. INTRODUCTION

January 1, 2013 ushered in a new law and new administrative rules governing appeals from decisions of and complaints made to Hawaii's Office of Information Practices ("OIP"). This article provides a detailed explanation of the new law and rules, including the legislative history concerning agencies' right to appeal from OIP's decisions regarding Hawaii's open records and open meetings laws. As the Legislature originally intended, the new law and rules enable OIP to continue providing a free and relatively simple dispute resolution process as an alternative to judicial action or contested case proceedings.

By way of background, twenty-five years earlier in 1988, Hawai'i became the first state to establish a centralized office to provide uniform

¹ The author, Cheryl Kakazu Park, J.D., M.B.A., was appointed on April 1, 2011, by Governor Neil Abercrombie as the Director of the Office of Information Practices ("OIP"). A graduate of the William S. Richardson School of Law where she was a member of its Law Review, Ms. Park also earned her Masters of Business Administration from the University of Hawai'i at Manoa, and is licensed to practice law in Hawai'i and Nevada. After clerking for Chief Judge James S. Burns of the Hawai'i Intermediate Court of Appeals, Ms. Park entered private practice and became a partner at the Honolulu law firm of Watanabe, Ing, & Kawashima. She left the firm in 1992 to live in Europe and subsequently moved to Reno, Nevada, where she worked in the business world with American Express Financial Advisors and Wells Fargo Insurance, as well as in the legal world as a staff attorney for the Nevada Supreme Court. After nearly 19 years of living abroad and on the continent, Ms. Park returned to Hawai'i, where she was born and raised.

Co-author Jennifer Brooks has been a staff attorney at OIP since 2000. Prior to joining OIP, Ms. Brooks spent two sessions as a staff attorney for the Hawai'i Senate Judiciary Committee, and before that she was in private practice with the law firm of Damon Key Leong Kupchak Hastert. Ms. Brooks earned her law degree from the Marshall-Wythe School of Law at the College of William and Mary.

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Certain assertions and opinions in this article are derived from the author Cheryl Kakazu Park's experience and knowledge gained from her position as Director of OIP. These shall hereinafter be cited as "Statements by Cheryl Kakazu Park, Director, Office of Info. Practices."

legal interpretation of and training on the state's open records law, the Uniform Information Practices Act (Modified) ("UIPA").² In 1998, OIP was given the additional responsibility of administering the state's "Sunshine Law," or open meetings law.³ Despite being administered by the same agency and oftentimes being involved in the same cases, each of these open government laws had different provisions for appeal of an OIP decision, and judicial interpretations of these laws resulted in consequences that were inconsistent with the original legislative intent behind the open government laws.

When the Sunshine Law was enacted in 1975,⁴ OIP did not exist, nor was any agency charged with accepting Sunshine Law complaints from the general public,⁵ and thus the law was written to allow "any person"⁶ to sue for judicial enforcement.⁷ When OIP was created in 1988 to implement and interpret the UIPA, the UIPA provided only for judicial appeal of an OIP decision by "a person aggrieved by a denial of access to a government record"⁸ and contained no right for agencies to appeal an OIP decision.⁹

When OIP was given the additional responsibility of administering the Sunshine Law in 1998, that law's existing provision allowing "any person"

² See 1 STATE OF HAWAII, REPORT OF THE GOVERNOR'S COMMITTEE ON PUBLIC RECORDS AND PRIVACY 39, 42 (1987) (discussing the optional provision creating an Office of Information Practices found in the Uniform Information Practices Code approved by the National Conference of Commissioners on Uniform State Laws, and noting that no state had yet adopted the Uniform Information Practices Code). Notably, although the federal Freedom of Information Act ("FOIA") was enacted in 1966, it was not until 1978 that the Office of Information Law and Policy, later renamed the Office of Information Policy ("federal OIP"), was established within the Justice Department to oversee agency compliance with FOIA, and it was not until 2007 that a federal FOIA ombudsman was created within the National Archives and Records Administration to mediate and facilitate FOIA disputes and review FOIA compliance and policy. See Mark H. Grunewald, *Freedom of Information Act Dispute Resolution*, 40 ADMIN. L. REV. 1, 46-50 (1988); Melissa Davenport & Margaret B. Kwoka, *Good but Not Great: Improving Access to Public Records Under the D.C. Freedom of Information Act*, 13 D.C. L. REV. 359, 373 (2010).

³ HAW. REV. STAT. § 92-1.5 (2012). See also *Sunshine Law*, STATE OF HAWAII OFFICE OF INFO. PRACTICES, <http://oip.hawaii.gov/laws-rules-opinions/sunshine-law/> (last visited Sept. 29, 2013).

⁴ Act of June 2, 1975, No. 166, 1975 Haw. Sess. Laws 364 (codified at HAW. REV. STAT. §§ 92-1 to -13 (2012)).

⁵ See Act of June 9, 1988, No. 262, § -41, 1988 Haw. Sess. Laws 474 (codified at HAW. REV. STAT. § 92-1.5 (2012)) (creating OIP and providing that OIP shall receive complaints from the public).

⁶ HAW. REV. STAT. § 92-12(c) (2012).

⁷ *Id.*

⁸ *Id.* § 92F-15(a).

⁹ See Act of June 9, 1988, No. 262, 1988 Haw. Sess. Laws 474 (codified at HAW. REV. STAT. § 92-1.5 (2012)).

to go to court to resolve a Sunshine Law dispute was left untouched.¹⁰ Despite clear legislative intent that OIP decisions mandating the disclosure of records under the UIPA could not be appealed by agencies,¹¹ Hawaii's courts, in 2009, allowed an appeal of a UIPA decision by the County of Kaua'i.¹² Finding a "plainly irreconcilable conflict"¹³ between the two laws, the Intermediate Court of Appeals interpreted them to give effect to the "plain language" of the Sunshine Law allowing "any person," including an agency, to appeal the UIPA decision.¹⁴

By disregarding the Legislature's deliberate omission of an agency appeals process under the UIPA and allowing an agency to judicially challenge OIP's determination,¹⁵ the practical effect of the 2009 appellate decision was to eliminate OIP's authority as the *last word* when mandating an agency's release of records. Rather than enforcing the UIPA's intent to prevent appeals by agencies, the court's decision essentially allowed agency appeals based on the appellate provisions for a different statute that is implicated by the contested government record. As a result, depending on the type of government record withheld by an agency, appellate jurisdiction could conceivably be rationalized under the Sunshine Law, procurement law,¹⁶ land use or planning law,¹⁷ declaratory judgment law,¹⁸ or any number of laws that allow for judicial review of an agency's action. Rather than test the limits of this judicial interpretation and risk being embroiled in further time-consuming and expensive appeals, OIP began issuing only "advisory" opinions for the three years following the 2009 court decision and avoided issuing mandates that could be challenged by agencies.¹⁹

¹⁰ See Act 137, S.B. 2983, 19th Leg., Reg. Sess. (Haw. 1998) (amending the Sunshine Law to give OIP the responsibility of administering the Sunshine Law, but not amending the provision allowing "any person" to resolve disputes in court).

¹¹ E.g., S. REP. NO. 17, 15th Leg., Reg. Sess. (1989) (Conference Comm.), reprinted in 1989 HAW. SEN. J. 763, 764 ("Your Committee wishes to emphasize that while a person has a right to bring a civil action in circuit court to appeal a denial of access to a government record, a government agency dissatisfied with an administrative ruling by the OIP does not have the right to bring an action in circuit court to contest the OIP ruling. The legislative intent for expediency and uniformity in providing access to government records would be frustrated by agencies suing each other.").

¹² Cnty. of Kaua'i v. Office of Info. Practices, 120 Haw. 34, 43-44, 200 P.3d 403, 412-13 (App. 2009), *aff'd*, No. 29059, 2009 Haw. LEXIS 264 (Oct. 26, 2009) [hereinafter *Cnty. of Kaua'i*].

¹³ *Id.* at 43, 200 P.3d at 412.

¹⁴ *Id.* at 43-44, 200 P.3d at 412-13.

¹⁵ *Id.*

¹⁶ E.g., HAW. REV. STAT. § 103D-711(a)-(c) (2012).

¹⁷ E.g., *id.* § 205-6(e).

¹⁸ E.g., *id.* § 632-1.

¹⁹ Press Release, State of Hawaii Office of Info. Practices, The Raw Truth (July 19,

In an effort to clear the confusion created by the 2009 case and to avoid further litigation over jurisdictional issues, OIP sought legislative clarification of agencies' appeal rights regarding OIP decisions during the 2012 legislative session.²⁰ OIP's proposal, Senate Bill 2858, was introduced as a measure supported by Governor Neil Abercrombie and his administration,²¹ and was signed into law as Act 176.²² While some opponents have criticized the bill for not simply stating that agencies cannot appeal an OIP decision,²³ as was originally intended by the UIPA, the stark reality is that clear legislative intent to the contrary did not prevent the courts from allowing judicial review of OIP's actions in 2009 and was not likely to prevent court review again in the future. Moreover, disallowing appeals under the UIPA while allowing appeals under the Sunshine Law, as some critics had urged,²⁴ would not result in a uniform appellate process and would create much confusion when both laws are implicated in the same case. Further, OIP realized that given the desire for checks and balances within our democracy, the bill's opponents' attempt to grant absolute power to OIP would undoubtedly have been counterbalanced by the Legislature with complicated procedural safeguards, which would have destroyed OIP's ability to provide the free and relatively simple dispute resolution process the Legislature intended it to provide²⁵ as an alternative to judicial action or contested case proceedings. Finally, the bill's

2011), available at <http://oip.hawaii.gov/whats-new/whats-new-press-release-july-19-2011-the-raw-truth/> [hereinafter Press Release, The Raw Truth].

²⁰ See OIP's Justification Sheet attached to its original proposed Bill, S.B. 2858, 26th Leg., Reg. Sess. (Haw. 2012), available at http://www.capitol.hawaii.gov/session2012/Bills/SB2858_.pdf [hereinafter Justification Sheet].

²¹ See, e.g., Beverly Keever, *Freedom of Information At Stake in Legislature*, CIVIL BEAT (Apr. 26, 2012), <http://www.civilbeat.com/posts/2012/04/26/15662-freedom-of-information-at-stake-in-legislature/>.

²² Act of June 28, 2012, No. 176, 2012 Haw. Sess. Laws 615 (codified at HAW. REV. STAT. §§ 92 to 92F (2012)).

²³ See Keever, *supra* note 21.

²⁴ *Id.*

²⁵ An appeal to OIP of a record access denial "shall not be a contested case under chapter 91 . . ." HAW. REV. STAT. § 92F-42(1) (2012); see also H.R.REP. NO. 1288, 15th Leg., Reg. Sess. (1989) (Standing Comm.), reprinted in 1989 HAW. HOUSE J. 1319, 1319, wherein the House Committee on Judiciary stated in part:

This provision is necessary to comply with the legislative intent behind Chapter 92F, that review by [OIP] be expeditious, informal, and at no cost to the public. The review is optional in nature and anyone aggrieved by a denial of access to a government record, under either part II or III of Chapter 92F, may appeal immediately to court for a full evidentiary hearing. An explicit statutory exemption from the contested case will serve to avoid future challenges to the administrative procedures of the [OIP] for failure to have contested case hearings.

Id.

opponents failed to recognize that the government's fiscal constraints made it improbable that an increase in OIP's power and duties would be accompanied by an increase in the funding and personnel needed to implement such changes.²⁶ The likely end result of the opponents' position would have been that OIP would no longer be able to operate as a free, informal, and timely alternative to court actions, as originally intended by the Legislature.

Instead, the new law remains true to the UIPA provision exempting OIP from Chapter 91 contested case procedures²⁷ and the UIPA's original legislative intent that OIP would be "a place where the public can get assistance on records questions at no cost and within a reasonable amount of time."²⁸ The new law eliminates the problems described earlier and provides a clear and simple process allowing agencies to timely seek expedited judicial review of OIP's decisions, without requiring either OIP or the public to be unwilling parties to the appeal.

The new law also restores most of OIP's authority by setting a high standard of judicial review. This standard requires the courts to defer to OIP's decisions mandating disclosure of records under the UIPA unless OIP's factual and legal determinations are found to be "palpably erroneous,"²⁹ a deferential standard of review that was subsequently applied by the Hawai'i Supreme Court in a Sunshine Law decision.³⁰ Moreover, agencies can no longer simply ignore OIP's decisions mandating disclosure, as they must now timely appeal within thirty days or be unable to challenge the decision if an enforcement action is filed by members of the public.³¹ Thus, members of the public now have a faster and easier means to obtain judicial enforcement where an agency ignores an OIP decision requiring the

²⁶ For example, in fiscal year 1995, OIP had fifteen approved positions, the highest number of staff in its history. STATE OF HAWAII OFFICE OF INFO. PRACTICES, OIP ANNUAL REPORT 2012 11 (2012), <http://files.hawaii.gov/oip/reports/annualreport2012.pdf> [hereinafter OIP ANNUAL REPORT 2012]. In 1998, its work doubled when administration of the state's Sunshine Law, Part I of HRS Chapter 92, was transferred to OIP from the Department of the Attorney General. See *supra* note 3 and accompanying text; *infra* note 43 and accompanying text. Nevertheless, the number of OIP's approved positions in fiscal years 1998-2003 was reduced to eight, then to seven in fiscal years 2004-2006, and has been at 7.5 since fiscal year 2007. OIP ANNUAL REPORT 2012, *supra*. When adjusted for inflation, OIP's total budget allocation was reduced from a high of \$1,292,530 in fiscal year 1994 to \$803,635 in fiscal year 1998 and \$382,282 in fiscal year 2012. *Id.*

²⁷ HAW. REV. STAT. § 92F-42(1).

²⁸ H.R.REP. NO. 112-88, 14th Leg., Reg. Sess. (1988) (Conference Comm.), *reprinted in* 1988 HAW. HOUSE J. 817, 818.

²⁹ HAW. REV. STAT. § 92F-43(c) (2012).

³⁰ *Kanahele v. Maui Cnty. Council*, 130 Haw. 228, 244, 307 P.3d 1174, 1190 (2013).

³¹ HAW. REV. STAT. § 92F-43(a).

disclosure of records. In addition, as prevailing parties, those members of the public will be entitled under existing law to recover reasonable attorney fees and costs.³² And for OIP, the new law enables the office to continue to expeditiously and informally resolve open government disputes, while also fulfilling its many responsibilities to provide training and advice to government agencies and the general public.³³

OIP's new administrative rules regarding appeals to OIP are consistent with the new law allowing agency appeals to the courts and retain the informal nature of OIP proceedings. OIP's rules went into effect on December 31, 2012.³⁴

This article will describe in greater detail the new agency appeals process and OIP's administrative rules. Part II explains the history of Hawaii's open government laws, the establishment of OIP, the original legislative intent concerning agencies' right to appeal under the UIPA, and the 2009 court case that led to the need for legislative clarification. Part III describes the 2012 legislative solution and details the new laws' provisions, while Part IV explains the new rules regarding appeals to OIP. Part V concludes the article.

II. HISTORY OF THE SUNSHINE LAW, UIPA, OIP, AND THE RIGHT TO APPEAL AN OIP DECISION

Enacted in 1975, Hawaii's Sunshine Law³⁵ governs the manner in which all state and county boards³⁶ must generally conduct their business at public

³² *Id.* § 92F-15(d).

³³ As an example of its training and advisory duties, OIP responded to over 937 inquires in fiscal year 2012, usually within the same day, under OIP's "attorney of the day" service. See Press Release, State of Hawaii Office of Info. Practices, OIP Reduces Case Backlog (July 19, 2012), available at <http://oip.hawaii.gov/whats-new/oip-reduces-case-backlog/>. OIP also provides various training materials and courses, *Training Materials Index*, STATE OF HAWAII OFFICE OF INFO. PRACTICES, <http://oip.hawaii.gov/training/> (last visited Sept. 29, 2013), and conducted twenty-five workshops and training sessions in fiscal year 2012 to educate people about Hawaii's open government laws. OIP ANNUAL REPORT 2012, *supra* note 26, at 46. Moreover, OIP is closely involved in Governor Neil Abercrombie's efforts to modernize the state's aged technological resources and make government more open and accessible, and is working with other agencies to post government data electronically at data.hawaii.gov, a centralized state website. See Press Release, State of Hawaii Office of Info. Practices, The State of Hawaii's Plan to Modernize its Medieval Tech Systems (Jan. 8, 2013), <http://oimt.hawaii.gov/the-state-of-hawaiis-plan-to-modernize-its-medieval-tech-systems/>.

³⁴ HAW. CODE R. §§ 2-73-1 to -20 (LexisNexis 2013).

³⁵ HAW. REV. STAT. §§ 92-1 to -13 (2012).

³⁶ See *id.* § 92-2(1) (defining "Board" in the Sunshine Law as "any agency, board, commission, authority, or committee of the State or its political subdivisions which is

meetings and requires, with few exceptions:³⁷ public notice of meetings;³⁸ public access to the board's discussions, deliberations, and decisions;³⁹ the opportunity for public testimony;⁴⁰ and written minutes of public meetings.⁴¹ The intent of the law is to protect the people's right to know and to open up governmental processes to public scrutiny and participation by requiring state and county boards to conduct their business as openly as possible.⁴²

When it was originally enacted, the Sunshine Law was administered by the state Attorney General's office.⁴³ OIP did not exist at that time, and it was not until 1998 that administration of the Sunshine Law was transferred to OIP.⁴⁴

OIP was created in 1988,⁴⁵ with the enactment of the UIPA,⁴⁶ to ensure public access to government records, while balancing the right to privacy embodied in the Hawai'i constitution.⁴⁷ The conference committee report in 1988 described OIP as being:

intended to serve initially as the agency which will coordinate and ensure implementation of the new records law. In the long run, however, the Office is intended to provide a place where the public can get assistance on records questions at no cost and within a reasonable amount of time.

Provisions have been made in the bill to assure that the Office does not

created by constitution, statute, rule, or executive order, to have supervision, control, jurisdiction or advisory power over specific matters and which is required to conduct meetings and to take official actions"); *see also* Office of Info. Practices, Sunshine Law Application to Vision Teams and Neighborhood Board Members' Attendance at Vision Team Meetings, Op. Letter. No. 01-01, at *3 (Apr. 9, 2001), *available at* <http://files.hawaii.gov/oip/opinionletters/opinion%2001-01.pdf> (concluding that neighborhood Vision Teams are "boards" subject to the Sunshine Law).

³⁷ *See* HAW. REV. STAT. § 92-5 (2012) (allowing closed meetings in special circumstances); *see also id.* § 92-2.5 (authorizing eight "permitted interactions" that allow discussions between board members outside of a meeting in specific circumstances).

³⁸ *Id.* § 92-7.

³⁹ *Id.* § 92-3.

⁴⁰ *Id.*

⁴¹ *Id.* § 92-9.

⁴² *Id.* § 92-1.

⁴³ *See* Fair Notice of Meeting Agenda Required—Copies of Minutes Required, 30 Haw. Op. Att'y. Gen. 85-2 (1985) (on file with the Hawai'i Attorney General's Library) (demonstrating that in 1985, the Attorney General administered the Sunshine Law).

⁴⁴ Act of June 24, 1998, No. 137, 1998 Haw. Sess. Laws 514.

⁴⁵ *Openline July 1998*, STATE OF HAWAII OFFICE OF INFO. PRACTICES (July 1, 1998), <http://oip.hawaii.gov/newsletter/openline-july-1998/>.

⁴⁶ HAW. REV. STAT. § 92F-1 et. seq. (2012).

⁴⁷ *Id.* § 92F-2; *see also* HAW. CONST. art. I, § 6 ("The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right.").

become a roadblock to access by ensuring that a direct right of appeal to the courts will exist at all times. 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.⁴⁸

The UIPA originally did not provide a right for an agency to appeal, and it only allowed members of the public to appeal directly to the courts when an agency refused access to government records.⁴⁹ With respect to judicial

⁴⁸ H.R.REP. NO. 112-88, 14th Leg., Reg. Sess. (1988) (Conference Comm.), *reprinted in* 1988 HAW. HOUSE J. 817, 818-19. In addition:

The bill will provide clear recognition of both its primary goal of ensuring access to government records and the constitutional right of privacy which must clearly be considered in every appropriate case. The recognition of both factors is not intended to diminish the vitality of either but is simply intended as full notice of the competing consideration involved in these cases.

Id. at 817.

Before the UIPA's enactment, there were obvious conflicts between different statutes that had been written at different times for different purposes and without regard for each other: HRS Chapter 92 had set forth a broad public right of access to records while HRS Chapter 92E protected the privacy of individuals about whom information is kept and allowed that information to be corrected. VOL. I REPORT OF THE GOVERNOR'S COMMITTEE ON PUBLIC RECORDS AND PRIVACY 1-2 (Dec. 1987). At the recommendation of the committee appointed by then Governor John Waihe'e to review the existing law, solicit public comments, review alternatives and report on its work, *id.* at 3, the Legislature enacted the UIPA based on the model code, with modifications, recommended by the National Conference of Commissioners on Uniform State Laws. H.R.REP. NO. 112-88, 14th Leg., Reg. Sess. (1988) (Standing Comm.), *reprinted in* 1988 HAW. HOUSE J. 817, 817. As enacted, the UIPA combined both the public records law and the privacy law into a new chapter, HRS Chapter 92F, and created OIP to administer the new law.

⁴⁹ See Act of June 9, 1988, No. 262, § 15, 1988 Haw. Sess. Laws 473, 477 (codified at HAW. REV. STAT. § 92F-15 (2012)), which provides:

- (a) A person aggrieved by a denial of access to a government record may bring an action against the agency at any time to compel disclosure.
- (b) In an action to compel disclosure the circuit court shall hear the matter *de novo*. Opinions and rulings of the office of information practices shall be admissible. The circuit court may examine the government record at issue, *in camera*, to assist in determining whether it, or any part of it, may be withheld.
- (c) The agency has the burden of proof to establish justification for nondisclosure.
- (d) If the complainant prevails in an action brought under this section, the court shall assess against the agency reasonable attorney's fees and all other expenses reasonably incurred in the litigation.
- (e) The circuit court in the judicial circuit in which the request for the record is made, where the requested record is maintained, or where the agency's headquarters are located shall have jurisdiction over an action brought under this section.
- (f) Except as to cases the circuit court considers of greater importance, proceedings before the court, as authorized by this section, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

enforcement, the conference committee report noted the following:

The bill will provide for immediate access to the courts when an agency refuses to release records. Section -15 provides for a de novo hearing, in camera review, attorneys fees and expenses, liberal venue provisions, and expedited review by the courts, and places the burden of proof on the agencies.

In this regard, the intent of the Legislature is that exhaustion of administrative remedies shall not be required in any appeal of a refusal to disclose records. Any internal or administrative appeals structure which is established would be optional and an aggrieved party may proceed directly to court if the party chooses to do so.

There is also a need to provide a remedy for those whose records are inappropriately disclosed. While this bill does not address this issue, except as to personal records, it is a subject for immediate attention at future sessions.⁵⁰

In 1989, the law was amended to add to Hawai‘i Revised Statutes (“HRS”) section 92F-15(a), a two-year time period after agency denial for a member of the public to bring an action against the agency.⁵¹ When the law was amended in 1989, the conference committee report noted as follows:

Your Committee wishes to emphasize that while a person has a right to bring a civil action in circuit court to appeal a denial of access to a government record, a government agency dissatisfied with an administrative ruling by the OIP does not have the right to bring an action in circuit court to contest the OIP ruling. The legislative intent for expediency and uniformity in providing access to government records would be frustrated by agencies suing each other.⁵²

Despite the lack of a statutory appeals process and the clear legislative intent to prohibit agencies from challenging OIP’s decisions mandating the disclosure of records, the courts allowed an agency to challenge such an OIP opinion in *County of Kaua‘i v. Office of Information Practices*.⁵³ In this first case brought directly against OIP to challenge a decision mandating disclosure of records, Kaua‘i County sought to judicially overturn an OIP decision requiring executive committee minutes to be

Id.

⁵⁰ H.R.REP. NO. 112-88, 14th Leg., Reg. Sess. (1988) (Conference Comm.), *reprinted in* 1988 HAW. HOUSE J. 817, 818.

⁵¹ Act of June 7, 1989, No. 192, § 3, 1989 Haw. Sess. Laws 366, 367.

⁵² H.R.REP. NO. 167, 15th Leg., Reg. Sess. (1989) (Conference Comm.), *reprinted in* 1989 HAW. HOUSE J. 843, 843.

⁵³ 120 Haw. 34, 43-44, 200 P.3d 403, 412-13 (App. 2009), *aff’d*, No. 29059, 2009 Haw. LEXIS 264 (Oct. 26, 2009).

disclosed under the UIPA.⁵⁴

The case arose from a Sunshine Law complaint brought following the Kaua'i County Council's closed executive session meeting to discuss allegedly unethical activity of the Kaua'i Police Department.⁵⁵ In response, OIP opined on April 14, 2005 that, except for a limited portion of the discussion exempted by the attorney-client privilege, the matters considered by the Council during its executive session did not meet the Sunshine Law's limited exceptions for convening closed meetings.⁵⁶ The County requested reconsideration of OIP's decision and OIP's director responded that he was disinclined to reconsider. When the County made another request to argue its position and provided OIP with materials upon the condition that OIP make a "commitment of confidentiality" regarding them, OIP explained in a letter, dated June 17, 2005, that it would not agree to the condition in order to review the materials for reconsideration.⁵⁷

In the meantime, the complainant and another person made a request under the UIPA to obtain copies of the board's executive committee minutes. On June 8, 2005, OIP demanded that the County release the executive session minutes to the requesters by the next day, but allowed the County to withhold from disclosure a portion of one page that was protected by the attorney-client privilege, pursuant to HRS section 92-5.⁵⁸

On June 17, 2005, the County filed a complaint for declaratory relief against OIP in the circuit court, alleging that the court had jurisdiction pursuant to HRS sections 92-12 (Sunshine Law), 92F-13 (UIPA), 603-21.5 (declaratory judgments), and 632-1 (declaratory judgments).⁵⁹ OIP unsuccessfully sought to first dismiss the complaint and then to obtain summary judgment, arguing, among other things, that HRS section 92F-15.5(b) did not give the County any right to appeal an OIP decision mandating disclosure of a record and cited the UIPA's legislative history.⁶⁰ After the circuit court ordered the executive session minutes to be withheld pursuant to the Sunshine Law's exception for the attorney-client privilege,⁶¹

⁵⁴ *Id.* at 38, 200 P.3d at 407.

⁵⁵ *Id.* at 36, 200 P.3d at 405.

⁵⁶ *Id.* at 37-38, 200 P.3d at 406-07.

⁵⁷ *Id.* at 38, 200 P.3d at 407.

⁵⁸ *Id.* The UIPA allows a closed meeting in order "[to] investigate proceedings regarding criminal misconduct[.]" HAW. REV. STAT. § 92-5(a)(5) (2012).

⁵⁹ *Cnty. of Kaua'i*, 120 Haw. at 38, 200 P.3d at 407.

⁶⁰ *Id.* at 38-39, 200 P.3d at 407-08.

⁶¹ *Id.* at 36, 200 P.3d at 405. The court specifically cited a statute that allows closed meetings "[t]o consult with the board's attorney on questions and issues pertaining to the board's powers, duties, privileges, immunities, and liabilities. . . ." HAW. REV. STAT. § 92-5(a)(4) (2012).

OIP appealed to the Intermediate Court of Appeals (“ICA”).⁶²

On appeal to the ICA, OIP again vigorously argued that the County had no standing to contest OIP’s determination mandating disclosure of the executive session minutes and was required by the UIPA to disclose the record.⁶³ The ICA, however, rejected this argument. The ICA reasoned that the UIPA and Sunshine Law should be interpreted *in pari materia* so as to construe them with reference to each other, while favoring the more specific law over a general statute covering the same subject matter in the event of a plainly irreconcilable conflict between the laws.⁶⁴ The ICA then concluded that the “plain language” of the Sunshine Law granting “any person,” including the County, the unrestricted right to bring suit in the circuit court controlled over the more general UIPA, which did not address agency appeal rights.⁶⁵ Ultimately, the ICA held that the circuit court did not err in requiring that the executive session minutes be kept from disclosure because they were protected by the attorney-client privilege under the Sunshine Law.⁶⁶

The practical effect of the 2009 ICA decision was to make irrelevant the UIPA’s deliberate omission of an agency’s right to appeal OIP’s decisions and to eliminate OIP’s authority as the *last word* when mandating an agency’s release of records. By ignoring the UIPA’s intentional omission of an agency’s appeal right, the court essentially allowed agencies to appeal based on the type of record that OIP was requiring agencies to disclose. Because many UIPA cases typically seek the release of records created under the Sunshine Law, the court’s reasoning in *County of Kaua’i* conceivably could have analogously rationalized agency appeals when the underlying record involved the interpretation of any number of laws allowing for an appellate procedure, such as the procurement law⁶⁷ or land use or planning law.⁶⁸ Moreover, while the court did not reach these issues, the declaratory judgment law⁶⁹ or the interpretation of the state or federal Constitutions, provide even stronger bases for appellate review of UIPA cases.

Thus, for the three years following the 2009 court decision, OIP issued only advisory opinions and carefully avoided rendering determinations mandating disclosure of records under the UIPA, to avoid becoming

⁶² *Cnty. of Kaua’i*, 120 Haw. at 35, 200 P.3d at 404.

⁶³ *Id.* at 43, 200 P.3d at 412.

⁶⁴ *Id.*

⁶⁵ *Id.* at 43-44, 200 P.3d at 412-13.

⁶⁶ *Id.* at 46, 200 P.3d at 415.

⁶⁷ *E.g.*, HAW. REV. STAT. § 103D-711 (2012).

⁶⁸ *E.g.*, *id.* § 205-6.

⁶⁹ *E.g.*, *id.* § 632-1.

embroiled in another agency appeal that would have tied up OIP's limited resources, increased its case backlog, and potentially resulted in further erosion of its authority through judicial rulings on the standard of review and other appellate issues.⁷⁰ Finally, in 2012, OIP sought and succeeded in obtaining legislative clarification of the agency appeals process and restoration of most of its authority.⁷¹

III. THE 2012 LEGISLATIVE SOLUTION: S.B. 2858

This part will begin with a brief summary of S.B. 2858's⁷² legislative history before discussing in detail its major provisions.

A. Legislative History

Before the start of the 2012 legislative session, OIP worked hard to develop a reasonably balanced appeals proposal, to obtain the support of Governor Abercrombie and his administration, and to explain the proposal to various agencies,⁷³ community organizations,⁷⁴ the general public,⁷⁵ and legislators. OIP submitted its legislative proposal to the Governor in September 2011; after review by the Attorney General's office and the

⁷⁰ See Press Release, The Raw Truth, *supra* note 19.

⁷¹ See *infra* Part III.

⁷² S.B. 2858, 26th Leg., Reg. Sess. (Haw. 2012).

⁷³ OIP provided drafts of its proposal to agencies in all branches of government, including the Governor's Office, Lieutenant Governor's Office, Attorney General's Office, Department of Budget and Finance, Office of Information Management and Technology, Hawai'i Tourism Authority, Boards and Commissions Office, Judiciary, and the Mayors and Councils of all four counties. Statements by Cheryl Kakazu Park, Director, Office of Info. Practices.

⁷⁴ OIP Director Cheryl Kakazu Park and staff attorney Jennifer Brooks explained OIP's legislative proposal at a meeting arranged on November 9, 2011, by Senator Les Ihara, Jr., with representatives of various community organizations, the media, and other agencies, including the Campaign Spending Commission, State Ethics Commission, Common Cause, League of Women Voters, Life of the Land, Americans for Democratic Action, Kanu Hawaii, AARP, Voter Owned Hawaii, Phocused Hawaii, and the Sierra Club. *Id.*

⁷⁵ From January through May 2012, OIP sent out eighteen What's New press releases, e-mails, and articles on its website to explain its legislative proposal and the progress of S.B. 2858 in the Legislature. See *Posts Made in 2012*, STATE OF HAWAII OFFICE OF INFO. PRACTICES, <http://oip.hawaii.gov/2012/page/5/?cat=4> (last visited Oct. 2, 2013). OIP's director also participated in two radio interviews with Beth Ann Koslovich of Hawaii Public Radio on February 23, 2012, and April 6, 2012, to discuss OIP's legislative proposals. *OIP Interview on Hawaii Public Radio*, STATE OF HAWAII OFFICE OF INFO. PRACTICES (Feb. 27, 2012), <http://oip.hawaii.gov/whats-new/oip-interview-on-hawaii-public-radio/>; *HPR Interview Regarding OIP's Bills*, STATE OF HAWAII OFFICE OF INFO. PRACTICES (Apr. 10, 2012), <http://oip.hawaii.gov/whats-new/hpr-interview-regarding-oips-bills/>.

Department of Budget and Finance and a meeting with the Governor and his staff, OIP's unamended proposal was approved by the Governor to be included in his administration's package.

The proposal was introduced in January 2012 as Senate Bill 2858, and referred to the Senate Judiciary and Labor Committee ("JDL") chaired by Senator Clayton Hee.⁷⁶ Following the JDL hearing and an amendment to set a thirty day time limit for agency appeals, S.B. 2858, S.D. 1 was passed by the Senate.⁷⁷

In the House, the bill was referred first to the Judiciary Committee ("JUD") chaired by Representative Gilbert Keith-Agaran, which amended the bill to prohibit an agency challenge to an OIP decision if the agency failed to timely appeal.⁷⁸ The bill was then referred to the Finance Committee ("FIN") chaired by Representative Marcus Oshiro, which inserted a July 1, 2030 effective date to ensure that it would go into conference.⁷⁹ Following the House Committee hearings and amendments, S.B. 2858, S.D. 1, H.D. 2 was passed by the House of Representatives.⁸⁰

The differences between the Senate and House drafts were ultimately resolved in a conference committee chaired by Senator Hee for the Senate and Representatives Keith-Agaran and Sharon Har as co-chairs for the House.⁸¹ The bill passed final reading of both the House and Senate on

⁷⁶ S.B. 2858 Status Archive, HAWAII STATE LEGISLATURE, http://www.capitol.hawaii.gov/Archives/measure_indiv_Archives.aspx?billtype=SB&billnumber=2858&year=2012 (last visited Oct. 2, 2013) [hereinafter S.B. 2858 Status Archive]. An identical bill was introduced in the House of Representatives as House Bill 2596 and was first referred to the House Judiciary Committee ("JUD") chaired by Representative Gilbert Keith-Agaran, with a subsequent referral to the Finance Committee ("FIN") chaired by Representative Marcus Oshiro. See H.B. 2596 Status Archive, HAWAII STATE LEGISLATURE, http://www.capitol.hawaii.gov/Archives/measure_indiv_Archives.aspx?billtype=HB&billnumber=2596&year=2012; H.B. 2596, 26th Leg., Reg. Sess. (Haw. 2012). After hearing H.B. 2596 on February 10, 2012, the House Judiciary Committee decided to defer further action on the bill in favor of working with the Senate companion bill, S.B. 2858, which, at that point, had been amended and unanimously reported out of the Senate Judiciary and Labor Committee on February 7, 2012. *OIP Bills Advancing*, STATE OF HAWAII OFFICE OF INFO. PRACTICES (Feb. 15, 2012), <http://oip.hawaii.gov/whats-new/oip-bills-advancing/>; *OIP's Bills' Status*, STATE OF HAWAII OFFICE OF INFO. PRACTICES (Feb. 7, 2012), <http://oip.hawaii.gov/whats-new/oips-bills-status/>.

⁷⁷ See S. REP. NO. 2457, 26th Leg., Reg. Sess. (2012) (Standing Comm.), reprinted in 2012 HAW. SEN. J. 1319, 1319.

⁷⁸ H.R. REP. NO. 1216-12, 26th Leg., Reg. Sess. (2012) (Standing Comm.), reprinted in 2012 HAW. HOUSE J. 1404, 1404.

⁷⁹ H.R. REP. NO. 1591-12, 26th Leg., Reg. Sess. (2012) (Standing Comm.), reprinted in 2012 HAW. HOUSE J. 1529, 1529.

⁸⁰ S.B. 2858, S.D.1, H.D.2, 26th Leg., Reg. Sess. (Haw. 2012).

⁸¹ S. REP. NO. 2457, 26th Leg., Reg. Sess. (2012) (Standing Comm.), reprinted in 2012 HAW. SEN. J. 1319, 1319.

May 1, 2012.⁸² It was signed by Governor Neil Abercrombie on June 28, 2012, as Act 176, SLH 2012, and went into effect on January 1, 2013.⁸³

The final version of S.B. 2858⁸⁴ added a couple of important provisions, but otherwise differed little in substance from the original proposal. The major provisions of the final bill are briefly summarized below.

First, S.B. 2858 added a new section to Part IV of HRS Chapter 92F and amended other parts of the UIPA and the Sunshine Law to create a uniform process for an agency to obtain judicial review of OIP's decisions, without requiring OIP or a member of the public affected by OIP's decision to participate as parties in an appeal by an agency, unless they wish to exercise their right to intervene.⁸⁵

Second, S.B. 2858 applied a "palpably erroneous" standard of judicial review in agency appeals and clarified that de novo review of an OIP opinion only applies where a requester appeals to the court after OIP upholds the agency's denial of access.⁸⁶ In other actions under the Sunshine Law or UIPA, OIP's opinions are admissible and are precedential, unless determined to be "palpably erroneous."⁸⁷

Third, S.B. 2858 limited the record on appeal to what was presented to OIP, except in "extraordinary circumstances."⁸⁸

Fourth, S.B. 2858 required an agency to appeal within thirty days of the date of the decision and if the agency fails to do so, prohibits the agency from challenging an OIP decision requiring disclosure of records under the UIPA.⁸⁹

Finally, S.B. 2858 added miscellaneous provisions for the purposes of clarity.⁹⁰ These new provisions are discussed in detail as follows.

⁸² S.B. 2858 Status Archive, *supra* note 76.

⁸³ Act of June 28, 2012, No. 176, 2012 Haw. Sess. Laws 615 (codified at HAW. REV. STAT. § 92 to 92F (2012)).

⁸⁴ Unless specifically identified otherwise, "S.B. 2858" will refer to the final version of the bill, S.B. 2858, S.D. 1, H.D. 2, C.D. 1, 26th Leg., Reg. Sess. (Haw. 2012). Full copies of the bill in its various drafts are available at the legislative website. S.B. 2858 Status Archive, *supra* note 76.

⁸⁵ Act of June 28, 2012, No. 176, 2012 Haw. Sess. Laws 615 (codified at HAW. REV. STAT. § 92-92F (2012)).

⁸⁶ *Id.* §§ 4(b), 5(b).

⁸⁷ *Id.* § 1(c).

⁸⁸ *Id.*

⁸⁹ *Id.* § 1(a).

⁹⁰ *See, e.g., id.* § 3(d) ("Opinions and rulings of the [OIP] shall be admissible in an action brought under this part and shall be considered as precedent unless found to be palpably erroneous.").

B. Discussion of S.B. 2858's Provisions

1. Under the new law allowing an agency to seek judicial review of OIP's UIPA and Sunshine Law decisions, OIP and the requester may intervene, but are not necessary parties to the appeal

By adding section 92F-43 to the HRS, S.B. 2858 granted agencies the right to seek judicial review of an OIP decision made under the UIPA or Sunshine Law, but specifically “provided that the office of information practices and the person who requested the decision shall not be required to participate in the proceeding”⁹¹ As explained in the Justification Sheet prepared by OIP and attached to S.B. 2858 as introduced, “the proposed bill seeks to create a uniform procedure applicable to both the UIPA and the Sunshine Law that would strictly define and limit agencies’ right to appeal OIP opinions without requiring OIP’s appearance in the appeal.”⁹²

The Justification Sheet also noted that “[t]his bill will not force members

⁹¹ HAW. REV. STAT. § 92F-43(b) (2012). The original bill stated, “provided that neither the office of information practices nor the person who requested the decision shall be required to participate in the proceeding[.]” S.B. 2858, 26th Leg., Reg. Sess. (Haw. 2012).

⁹² See Justification Sheet, *supra* note 20. Although the Report Title and Description on the page preceding the Justification Sheet contains a disclaimer stating that “[t]he summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent,” the Justification Sheet itself, written on different pages, is a separate document. *Id.* In the case of S.B. 2858, the Justification Sheet should be considered especially strong evidence of legislative intent because the final version of the bill did not delete major provisions or substantively alter the original proposal, and instead added a couple of key provisions. Compare the original bill, S.B. 2858, 26th Leg., Reg. Sess. (Haw. 2012), with the final bill, S.B. 2858, S.D.1, H.D.2, C.D.1, 26th Leg., Reg. Sess. (Haw. 2012). Moreover, since the original bill and Justification Sheet were prepared by OIP, OIP’s legislative testimony and website articles concerning S.B. 2858 should be accorded persuasive weight and credibility in determining legislative intent. See 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 48:5 (7th ed. 2007) (noting that messages from the executive or members of the executive branch to the legislature urging passage of certain legislation may be used as an aid to statutory interpretation); see also *id.* § 48:12 (stating that “[c]ommentaries of persons intimately involved with drafting of legislation are entitled to weight in interpretation of a statute[.]” particularly where the drafter’s views were “clearly and prominently communicated to the legislature when the bill was being considered for enactment”). Finally, great weight and credence should be accorded to the comments on the final bill made by the Senate and House Judiciary chairs in their respective chamber’s Journal, which closely track each other’s comments, the information provided in S.B. 2858’s Justification Sheet, and OIP’s testimony. See *id.* § 48:14 (stating that floor statements by the member in charge of a standing committee that reported out a bill “may be taken as the opinion of the committee about the meaning of the bill” and thus are generally accorded the “same weight as formal committee reports”).

of the public to go to court to defend an agency's appeal of an OIP opinion. Members of the public will remain entitled to de novo review when challenging an opinion from OIP upholding an agency's denial of access to a record."⁹³ Elsewhere, the Justification Sheet noted that this bill would give agencies the right to challenge an OIP opinion without requiring OIP's involvement in the appeal and stated as follows:

Just as a judge is not required to appear on appeal to defend his or her decision, this bill will relieve OIP of the need to go to court to defend its prior opinions. The proposed appeal process will not require either OIP or the requester to participate in the judicial review proceeding. The deferential review standard provided for, together with the general limitation of confining the court's review to the record before OIP, will allow a court to render its decision essentially on the pleadings.⁹⁴

Although the bill requires agencies to give OIP and the requester notice of the appeal and unambiguously grants them the right to intervene in an agency appeal, agencies have not been made necessary parties to the action.⁹⁵ The Justification Sheet made clear that the appeal would be "against the decision itself, rather than against either OIP or the member of the public who originally requested the opinion."⁹⁶ Therefore, an agency cannot win its appeal simply by default if OIP or the requester fails to appear in the action.⁹⁷

Like the Justification Sheet⁹⁸ and OIP's testimony,⁹⁹ both the Senate and House Judiciary committee chairs agreed in their comments on the final bill that the new law "does not require OIP or the person who requested the decision to appear in court as parties to the appeal."¹⁰⁰

⁹³ Justification Sheet, *supra* note 20.

⁹⁴ *Id.*

⁹⁵ The new section 92F-43(b) states that:

The agency shall give notice of the complaint to the office of information practices and the person who requested the decision for which the agency seeks judicial review by serving a copy of the complaint on each The office of information practices or the person who requested the decision may intervene in the proceeding.

HAW. REV. STAT. § 92F-43(b) (2012). With minor differences, the same language was found in the original S.B. 2858. See S.B. 2858, 26th Leg., Reg. Sess. (Haw. 2012).

⁹⁶ Justification Sheet, *supra* note 20.

⁹⁷ See *A Bill for an Act Relating to Open Gov't: Hearing on S.B. 2858 Before the H. Comm. on Finance*, 26th Leg., Reg. Sess. 3 (Haw. 2012) (testimony of Cheryl Kakazu Park, Director, Office of Information Practices), available at http://www.capitol.hawaii.gov/session2012/Testimony/SB2858_HD1_TESTIMONY_FIN_03-30-12_3_.pdf [hereinafter Park Testimony].

⁹⁸ See Justification Sheet, *supra* note 20.

⁹⁹ See Park Testimony, *supra* note 97, at 3.

¹⁰⁰ H.R.REP. NO. 105-12, 26th Leg., Reg. Sess. (2012) (Conference Comm.), reprinted in

Some opponents of the bill argued that the agencies should not be granted the right to appeal because, when the Legislature adopted the UIPA, it had intentionally omitted such a right, and the opponents sought to reinforce the original legislative intent to make OIP's UIPA decisions absolutely unreviewable by the courts with respect to agency challenges.¹⁰¹ While agreeing that it was the original legislative intent to not allow agency appeals, OIP did not agree that the opponents' proposal would have a realistic chance of succeeding without resulting in more adverse, unintended consequences.¹⁰² OIP had already seen how its reliance on the UIPA's legislative intent could not prevent judicial appeals by agencies and believed that it would be extremely unlikely that a total ban on appeals would be upheld by the courts in all circumstances, including when constitutional rights were being asserted or challenged.¹⁰³ OIP also wanted to ensure a uniform appellate process for OIP decisions, as UIPA cases may also involve Sunshine Law issues, and OIP did not want appellate rights and procedures to depend on which law was being invoked.¹⁰⁴ More importantly, OIP believed that the opponents' proposal seeking absolute power for OIP would have undoubtedly been counterbalanced by the Legislature with severe limitations similar to judicial or contested case procedures,¹⁰⁵ which would only serve to contradict the original design of OIP to be "a place where the public can get assistance on records questions at no cost and within a reasonable amount of time"¹⁰⁶ and could have resulted in the repeal of OIP's express exemption from contested case proceedings.¹⁰⁷ Finally, OIP recognized that given the state's severe fiscal

2012 HAW. HOUSE J., 823, 825 (written remarks of Rep. Gilbert S. C. Keith-Agaran, House Judiciary Chair).

¹⁰¹ *A Bill for an Act Relating to Open Gov't: Hearing on S.B. 2858 Before the H. Comm. on Finance*, 26th Leg., Gen. Sess. (Haw. 2012) (testimony submitted by Beverly Ann Deepe Keever, Professor Emerita, University of Hawai'i), available at http://www.capitol.hawaii.gov/session2012/Testimony/SB2858_HD1_TESTIMONY_FIN_03-30-12_3_.pdf.

¹⁰² *See OIP's Bills are Passed*, STATE OF HAWAII OFFICE OF INFO. PRACTICES (May 1, 2012), <https://oip.hawaii.gov/whats-new/oips-bills-are-passed/> [hereinafter *OIP's Bills are Passed*].

¹⁰³ *See id.* *See also supra* Part II (discussing the ICA's holding in *Cnty. of Kaua'i*, 120 Haw. 34, 200 P.3d 403 (App. 2009), *aff'd*, No. 29059, 2009 Haw. LEXIS 264 (Oct. 26, 2009)).

¹⁰⁴ *See A Bill for an Act Relating to Open Gov't: Hearing on S.B. 2858 Before the H. Comm. on Finance*, 26th Leg., Reg. Sess. 3 (Haw. 2012) (testimony of Cheryl Kakazu Park, Director, Office of Information Practices), available at http://www.capitol.hawaii.gov/session2012/Testimony/SB2858_HD1_TESTIMONY_FIN_03-30-12_3_.pdf.

¹⁰⁵ *See OIP's Bills Are Passed*, *supra* note 102.

¹⁰⁶ H.R.REP. NO. 112-88, 14th Leg., Reg. Sess. (1988) (Conference Comm.), reprinted in 1988 HAW. HOUSE J. 817, 818.

¹⁰⁷ *See* HAW. REV. STAT. § 92F-42(1) (2012) ("any review by [OIP] shall not be a

constraints, a significant expansion of OIP's staffing and resources was highly unlikely, so that the office would not be able to resolve disputes expeditiously and effectively if required to operate under contested case procedures while still performing its numerous other advisory and training duties.¹⁰⁸

For OIP, having absolute power was less important than remaining a "free, expeditious, and simple alternative body to the courts" that could easily resolve disputes between the public and agencies without burdening the parties or OIP with expensive and complicated contested case proceedings.¹⁰⁹ Thus, OIP was willing to recognize a new right to appeal by agencies, in exchange for strict limitations on that right and a strong standard of review requiring the courts' deference to OIP's factual and legal determinations under the UIPA and Sunshine Law.

2. Palpably erroneous standard of judicial review applies to agency appeals and de novo standard is limited to appeals by requesters

A highly deferential "palpably erroneous" standard of judicial review for agency appeals is mandated in S.B. 2858.¹¹⁰ The new section 92F-43 states unambiguously that "[t]he circuit court shall uphold a decision of the office of information practices, unless the circuit court concludes that the decision was palpably erroneous."¹¹¹ The UIPA was also amended at HRS section 92F-15(b) to state that "[o]pinions and rulings of the office of information practices shall be admissible and shall be considered as precedent unless found to be palpably erroneous[.]"¹¹² Additionally, the Sunshine Law was amended to state that "[o]pinions and rulings 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."¹¹³

The Justification Sheet distinguished the palpably erroneous standard applied by the ICA for review of OIP's Sunshine Law decisions in *Right to*

contested case under chapter 91 . . .").

¹⁰⁸ *OIP's Bills Are Passed*, *supra* note 102.

¹⁰⁹ *Id.*

¹¹⁰ S.B. 2858, 26th Leg., Reg. Sess. (Haw. 2012).

¹¹¹ HAW. REV. STAT. § 92F-43(c) (2012). The final bill substantively tracked the original proposal, which provided that "[t]he circuit court shall uphold a decision of the office of information practices unless it concludes that the decision was palpably erroneous." S.B. 2858, 26th Leg., Reg. Sess. (Haw. 2012).

¹¹² HAW. REV. STAT. § 92F-15(b) (2012). The further proviso distinguishing the "palpably erroneous" standard in agency appeals from the *de novo* standard applicable to requesters' appeals is discussed *infra* notes 120-124 and accompanying text.

¹¹³ *Id.* § 92-12(d).

*Know Committee v. City Council*¹¹⁴ from the abuse of discretion standard addressed in *Olelo v. Office of Information Practices*¹¹⁵ by the Hawai'i Supreme Court in dicta.¹¹⁶ As the Justification Sheet explained, the palpably erroneous standard requires:

deference to OIP's statutory interpretations of provisions of the Sunshine Law or UIPA, in addition to OIP's factual determinations or mixed determinations of fact and law, whereas the abuse of discretion standard would require deference only as to factual or mixed factual and legal determinations. The "palpably erroneous" standard will give greater clarity to the agencies and members of the public who seek OIP's opinion on how Sunshine Law or UIPA provisions apply or are interpreted in particular situations, because the OIP opinions thus obtained will carry greater precedential weight.¹¹⁷

The Legislature ultimately adopted S.B. 2858 with its palpably erroneous standard,¹¹⁸ which requires the courts to defer to OIP's legal, factual, and mixed factual and legal determinations.

In contrast to the new agency's right to appeal created by S.B. 2858, previously existing law allows members of the public to directly appeal to the court when an agency refuses to disclose a record¹¹⁹ and requires that "[i]n an action to compel disclosure, the circuit court shall hear the matter de novo[.]"¹²⁰ To avoid confusion as to the effect of the palpably erroneous standard applicable to agency appeals under the new judicial review process, S.B. 2858 clearly distinguished it from the de novo standard applicable to requester's appeals. As the Justification Sheet explained,

the bill would further clarify that de novo review only applies in a requester's (not an agency's) appeal to court after an OIP decision upholding the agency's denial of access, and the de novo standard does not apply to other OIP decisions that may be considered by the court in the course of that appeal.¹²¹

¹¹⁴ 117 Haw. 1, 13, 175 P.3d 111, 123 (App. 2007).

¹¹⁵ 116 Haw. 337, 346, 173 P.3d 484, 493 (2007).

¹¹⁶ Justification Sheet, *supra* note 20.

¹¹⁷ *Id.*

¹¹⁸ Act of June 28, 2012, No. 176, 2012 Haw. Sess. Laws 615 (codified at HAW. REV. STAT. §§ 92 to 92F (2012)).

¹¹⁹ HAW. REV. STAT. § 92F-27(a) (2012) ("An individual may bring a civil action against an agency in a circuit court of the State whenever an agency fails to comply with any provision of this part, and after appropriate administrative remedies under sections 92F-23, 92F-24, and 92F-25 have been exhausted."). Sections 92F-23 to 92F-25 refer to the procedures to gain access to and correct personal records, as distinguished from other general public records. *See id.* §§ 92F-23 to -25.

¹²⁰ HAW. REV. STAT. § 92F-15(b).

¹²¹ Justification Sheet, *supra* note 20. The final bill made grammatical, nonsubstantive

Thus, the new law now clearly limits de novo review to “an action to compel disclosure brought by an aggrieved person after the office of information practices upheld the agency’s denial of access to the person as provided in section 92F-15.5(b)”¹²²

Additionally, in considering the precedential value of OIP’s prior opinions, a new subsection (b) in HRS section 92F-27 specifically requires that OIP’s opinions and rulings “shall be admissible and shall be considered as precedent unless found to be palpably erroneous”¹²³ The new law distinguishes OIP’s prior case precedents, which are subject to the palpably erroneous standard, from the actual opinion or ruling challenged in an appeal by a member of the public, which is subject to the de novo standard, as the law further clarifies that “the opinion or ruling upholding the agency’s denial of access to the aggrieved person shall be reviewed de novo.”¹²⁴

During the legislative hearings, S.B. 2858 was opposed by representatives of three of Hawaii’s four counties, who generally argued that the bill gave OIP too much power and attacked the “palpably erroneous” standard of review.¹²⁵ Two Maui council members opposed the bill, arguing that OIP is an Oahu-based State agency and not a court and that “OIP’s opinion should not be given the weight provided by this bill[]”¹²⁶ as it “would have the effect of making the Sunshine Law even more burdensome than it already is.”¹²⁷ One Maui councilmember added

changes to this language. See Act of June 28, 2012, No. 176, 2012 Haw. Sess. Laws 615 (codified at HAW. REV. STAT. §§ 92-92F (2012)).

¹²² HAW. REV. STAT. § 92F-15(b). Notably, the final language of S.B. 2858 was the same as the original proposal, except that a proviso was added to eliminate an agency’s right to challenge an OIP decision if the agency failed to appeal within the specified time period. Cf. S.B. 2858, 26th Leg., Reg. Sess. (Haw. 2012).

¹²³ HAW. REV. STAT. § 92F-27(b).

¹²⁴ *Id.*

¹²⁵ See *A Bill for an Act Relating to Open Gov’t: Hearing on S.B. 2858 Before the H. Comm. on Judiciary*, 26th Leg., Reg. Sess. (Haw. 2012) (written statements of Danny A. Mateo, Council Chair, City Council, County of Maui; Alfred B. Castillo, Jr., County Attorney, Office of the County Attorney, County of Kauai; and Douglas S. Chin, Managing Director, Office of the Mayor, City and County of Honolulu), available at http://www.capitol.hawaii.gov/session2012/Testimony/SB2858_SD1_TESTIMONY_JUD_03-16-12_.pdf. The County of Hawai’i did not submit any testimony in support of or in opposition to S.B. 2858.

¹²⁶ *A Bill for an Act Relating to Open Gov’t: Hearing on S.B. 2858 Before the H. Comm. on Judiciary*, 26th Leg., Reg. Sess. (Haw. 2012) (written statement of Danny A. Mateo, Council Chair, City Council, County of Maui; and concurring written statement of Joseph Pontanilla, Vice Chair, City Council, County of Maui), available at http://www.capitol.hawaii.gov/session2012/testimony/sb2858_testimony_jdl_02-02-12.pdf.

¹²⁷ *Id.*

that the bill “would establish OIP as a ‘judge and jury’ . . . [with] the authority to render opinions of law and to adjudicate challenges to these opinions.”¹²⁸ The Kaua‘i County Attorney opposed establishing OIP’s opinions and rulings as precedent and contended that the palpably erroneous standard is vague and potentially ambiguous in application.¹²⁹ Similarly, the Honolulu Mayor’s Office opposed the bill because it allegedly

would give OIP’s opinion undue weight and deference in agency appeals. It creates a new review standard whereby the Court would have to uphold an OIP opinion unless the agency can demonstrate that it was “palpably erroneous.” This is in contrast to the abuse of discretion standard that is used to review actions of all other agencies as required under HRS section 91-14(g).¹³⁰

The Legislature, however, rejected these attempts to dilute the standard of review and weaken OIP’s authority to determine issues regarding the UIPA and Sunshine Law. In accord with the Justification Sheet and OIP’s testimony, Representative Keith-Agaran, with similar comments by Senator Hee, commented on the final bill as follows:

While the bill now gives agencies the right to judicially challenge OIP’s decisions, it also sets a strong standard of review that would accord a presumption of validity and require the courts’ deference to OIP’s factual and legal determinations concerning the administration and interpretation of the UIPA and Sunshine Law, unless such determinations are “palpably erroneous” and result in a definite and firm conviction that a mistake has been made. *See, e.g., Right to Know Committee v. City Council*, 117 Haw. 1, 175 P.3d 111 (2007); *Aio v. Hamada*, 66 Haw. 401, 664 P.2d 727 (1983). The bill further clarifies that the de novo standard of review referenced in HRS Sec. 92F-15(b) applies only to judicial appeals brought by the general public, and

¹²⁸ *A Bill for an Act Relating to Open Gov’t: Hearing on S.B. 2858 Before the Sen. Comm. on Judiciary and Labor*, 26th Leg., Reg. Sess. (Haw. 2012) (written statement of Riki Hokama, Member, City Council, County of Maui), available at http://www.capitol.hawaii.gov/session2012/Testimony/SB2858_TESTIMONY_JDL_02-02-12_LATE.pdf.

¹²⁹ *A Bill for an Act Relating to Open Gov’t: Hearing on S.B. 2858 Before the H. Comm. on Judiciary*, 26th Leg., Reg. Sess. (Haw. 2012) (written statement of Alfred B. Castillo, Jr., County Attorney, Office of the County Attorney, County of Kaua‘i), available at http://www.capitol.hawaii.gov/session2012/Testimony/SB2858_SD1_TESTIMONY_JUD_03-16-12_.pdf.

¹³⁰ *A Bill for an Act Relating to Open Gov’t: Hearing on S.B. 2858 Before the Sen. Comm. On Judiciary and Labor*, 26th Leg., Reg. Sess. (Haw. 2012) (written statement of Douglas S. Chin, Managing Director, Office of the Mayor, City and County of Honolulu), available at http://www.capitol.hawaii.gov/session2012/testimony/sb2858_testimony_jdl_02-02-12_late.pdf.

that agencies' appeals are instead subject to the higher "palpably erroneous" standard. The bill does not affect the standard to be applied by the courts in reviewing OIP decisions with respect to constitutional issues or other matters beyond OIP's sphere of expertise regarding the UIPA and Sunshine Law.¹³¹

Thus, the plain language of the bill and its legislative intent firmly establish that in agency appeals, the palpably erroneous standard of review is to be applied to OIP's legal, factual, and mixed factual and legal determinations under the UIPA and Sunshine Law and that the challenged OIP decision shall not be overturned unless there is a definite and firm conviction that a mistake has been made. The same palpably erroneous standard must also be applied to review OIP's precedential decisions that are not being directly appealed. The *de novo* standard of review is only applicable to the OIP opinion being appealed in a court action brought by a requester challenging an OIP opinion upholding the agency's denial of access to a record sought by that person. The new law does not address the standard of review in cases not involving the UIPA or Sunshine Law, such as constitutional issues, as they are beyond OIP's jurisdiction.

In its first Sunshine Law ruling since 1993,¹³² the Hawai'i Supreme Court applied the palpably erroneous standard in its unanimous decision in *Kanahele v. Maui County Council*,¹³³ which was issued on August 8, 2013. Although an OIP decision was not being directly challenged in *Kanahele*, the court cited seven OIP opinions¹³⁴ and viewed them under the palpably erroneous standard found in the new law¹³⁵ to determine whether the Sunshine Law had been violated by the repeated continuances of public hearings and by emails distributed by and between Maui

¹³¹ H.R.REP. NO. 105-12, 26th Leg., Reg. Sess. (2012) (Conference Comm.), reprinted in 2012 HAW. HOUSE J. 823, 824-25 (written remarks of Representative Gilbert Keith-Agaran). Nearly identical comments, with minor non-substantive changes, were included in the Senate Journal by Senator Clayton Hee. See 2012 HAW. SEN. J. 663-64 (comments of Senator Clayton Hee on S.B. 2858, S.D. 1, H.D.2., C.D. 1).

¹³² *Kaapu v. Aloha Tower Dev. Corp.*, 74 Haw. 365, 846 P.2d 882 (1993).

¹³³ *Kanahele v. Maui Cnty. Council*, 130 Haw. 228, 307 P.3d 1174 (2013).

¹³⁴ The court cited the following OIP formal opinions: Haw. OIP Op. Ltr. No. 01—06, 2001 WL 1876821, at *5 (Dec. 31, 2001); Haw. OIP Op. Ltr. No. 04—01, 2004 WL 232019, at *1 (Jan. 13, 2004); Haw. OIP Op. Ltr. No. 04—04, 2004 WL 409087, at *1 (Feb. 20, 2004); Haw. OIP Op. Ltr. No. 05—015, 2005 WL 2214087, at *2 (Aug. 4, 2005); Haw. OIP Op. Ltr. No. 06—02, 2006 WL 1308299, at *1 (Apr. 28, 2006); Haw. OIP Op. Ltr. No. 06—05, 2006 WL 2103475, at *4 (Jul. 19, 2006); Haw. OIP Op. Ltr. No. 07—02, 2007 WL 550326, at *2 (Feb. 2, 2007). *Kanahele*, 130 Haw. at 246-58, 307 P.3d at 1192-1204. As support for the palpably erroneous standard, the court also cited its decision in *Gillan v. Gov't Emps. Ins. Co.*, 119 Haw. 109, 119, 194 P.3d 1071, 1081 (2008), and the ICA Sunshine Law decision in *Right to Know Comm. v. City Council, City & Cnty. of Honolulu*, 117 Haw. 1, 13, 175 P.3d 111, 123 (App. 2007). *Id.* at 244-45, 307 P.3d at 1190-91.

¹³⁵ HAW. REV. STAT. § 92-1.5 (2012).

councilmembers.¹³⁶ After recognizing that that OIP is the agency charged with the responsibility of administering the Sunshine Law, the court went on to state that OIP's "opinions are entitled to deference so long as they are consistent with the legislative intent of the statute and are not palpably erroneous."¹³⁷ Ultimately, "based on the OIP's construction of the Sunshine Law as well as the legislative history of the statute,"¹³⁸ the court concluded that Sunshine Law had not been violated by the repeated continuances of meetings.¹³⁹ Consistent with OIP's opinions cited in the *Kanahele* decision, the court further ruled that the Maui councilmembers had violated the Sunshine Law by distributing written memoranda among themselves outside of a duly noticed meeting.¹⁴⁰ The *Kanahele* decision thus makes it reasonably certain that the courts will apply the palpably erroneous standard in reviewing OIP's decisions interpreting the Sunshine Law and the UIPA.

3. Record on appeal is limited to record presented to OIP

As for the facts of a case, the new law requires OIP, within thirty days of service of a complaint in an agency's appeal, to file in the circuit court a certified copy of the record that it compiled to make its decision and to mail a copy of the record index to the agency.¹⁴¹ The law further provides that "[t]he circuit court's review shall be limited to the record that was before the office of information practices when it rendered the decision, unless the circuit court finds that extraordinary circumstances justify discovery and admission of additional evidence."¹⁴² The Justification Sheet explained that "[t]he deferential review standard provided for, together with the general limitation of confining the court's review to the record before OIP, will allow a court to render its decision essentially on the pleadings."¹⁴³ Limiting the record on appeal in this manner also forces the agency to present its best case to OIP, rather than withholding facts and arguments to be made before a court in a subsequent appeal. As the House Judiciary

¹³⁶ See *Kanahele*, 130 Haw. at 243-48, 307 P.3d at 1189-94. See also *Supreme Court Issues Sunshine Law Opinion*, STATE OF HAWAII OFFICE OF INFO. PRACTICES (Aug. 12, 2013), <http://oip.hawaii.gov/whats-new/supreme-court-issues-sunshine-law-opinion/> (summarizing the *Kanahele* decision).

¹³⁷ *Kanahele*, 130 Haw. at 245, 307 P.3d at 1191.

¹³⁸ *Id.* at 248, 307 P.3d at 1194.

¹³⁹ *Id.* at 260, 307 P.3d at 1206.

¹⁴⁰ *Id.*

¹⁴¹ HAW. REV. STAT. § 92F-43(c) (2012).

¹⁴² *Id.*

¹⁴³ Justification Sheet, *supra* note 20, at 4.

Chair Representative Keith-Agaran noted in the House Journal:

As is typical in appeals from administrative decisions, this bill limits the record in an agency appeal to what was presented to OIP when it rendered its decision, thus requiring an agency to present its best case to OIP and not rely upon having a second chance to present new evidence in a judicial appeal. Only in extraordinary circumstances would the circuit court allow discovery and admission of additional evidence during an appeal from an OIP decision.¹⁴⁴

In opposing the bill, the Honolulu Mayor's Office had argued that limiting the record on appeal was "problematic" because OIP had no administrative rules covering agency appeals.¹⁴⁵ As the City's Managing Director argued:

OIP does not have any rules or procedures for agencies to submit evidence, facts, or arguments in support of their positions. As a result, what the parties submit, and what OIP considers, for purposes of an OIP advisory opinion is too random and unreliable to serve as an exclusive record

Before an agency can be bound by an OIP opinion, and before an agency's right to appeal can be restricted, there must be an established procedure whereby agencies are afforded an opportunity to present information and argument in support of their position. Rather than legislate deference to OIP advisory opinions in an appeal to Circuit Court, we believe the proper course would be for OIP to promulgate rules for a fair and equal administrative process whereby both individuals and agencies are allowed to present information and argument to OIP.¹⁴⁶

Requiring rules to be in place before the law was enacted, as desired by the City, would have been placing the proverbial cart before the horse. Moreover, except for identifying the items that will be provided to the circuit court as the record on appeal, OIP's new rules are not necessary to implement the new law. Nevertheless, anticipating the need for administrative rules to govern appeals to OIP before they are decided and become eligible to be appealed to the court, OIP proposed an effective date of January 1, 2013 for S.B. 2858.¹⁴⁷ Immediately after S.B. 2858 was

¹⁴⁴ H.R.REP. NO. 105-12, 26th Leg., Reg. Sess. (2012) (Conference Comm.), reprinted in 2012 HAW. HOUSE J., 823, 825 (written remarks of Representative Gilbert Keith-Agaran).

¹⁴⁵ *A Bill for an Act Relating to Open Gov't: Hearing on S.B. 2858 Before the H. Comm. on Judiciary*, 26th Leg., Reg. Sess. (Haw. 2012) (written statements of Douglas S. Chin, Managing Director, Office of the Mayor, City and County of Honolulu), available at http://www.capitol.hawaii.gov/session2012/Testimony/SB2858_SD1_TESTIMONY_JUD_03-16-12_.pdf.

¹⁴⁶ *Id.*

¹⁴⁷ Justification Sheet, *supra* note 20; *A Bill for an Act Relating to Open Gov't: Hearing on S.B. 2858 Before the H. Comm. on Judiciary*, 26th Leg., Reg. Sess. (Haw. 2012) (written

passed with this effective date, OIP reviewed appeals rules that it had previously drafted and revised the rules to conform to the new law. Upon completing the Chapter 91 rule-making process, OIP's administrative rules were adopted and went into effect on December 31, 2012.¹⁴⁸ These rules are explained in detail in the last part of this article.

4. "Fish or Cut Bait"—Thirty days for agency appeals, or agency is prevented from challenging an OIP decision requiring record disclosure under the UIPA

As requested by the League of Women Voters ("League"), the Senate Judiciary Committee added a thirty-day time limit for an agency to appeal an OIP decision.¹⁴⁹ At the League's further request, the House Judiciary Committee added a provision preventing an agency, which has not timely appealed, from challenging an OIP decision mandating disclosure, if an action to compel disclosure is later brought by a member of the public.¹⁵⁰ Consequently, the final version of S.B. 2858 provides in the new section 92F-43(a) as follows: "Within thirty days of the date of the decision, an agency may seek judicial review of a final decision rendered by the office of information practices under this chapter or part I of chapter 92, by filing a complaint to initiate a special proceeding in the circuit court"¹⁵¹

Additionally, the section providing for judicial enforcement of the UIPA by members of the public, HRS section 92F-15(b), was amended to read as follows:

In an action to compel disclosure, the circuit court shall hear the matter de novo; provided that if the action to compel disclosure is brought because an agency has not made a record available as required by section 92F-15.5(b) after the office of information practices has made a decision to disclose the record and the agency has not appealed that decision within the time period provided by section 92F-43, the decision of the office of information practices shall not be subject to challenge by the agency in the action to compel

statements by Cheryl Kakazu Park, Director of OIP), *available at* http://www.capitol.hawaii.gov/session2012/Testimony/SB2858_SD1_TESTIMONY_JUD_03-16-12_.pdf.

¹⁴⁸ HAW. CODE R. §§ 2-73-1 to -20 (LexisNexis 2013).

¹⁴⁹ S.B. 2858, S.D. 1, 26th Leg., Reg. Sess. (Haw. 2012); *A Bill for an Act Relating to Open Gov't: Hearing on S.B. 2858 Before the Sen. Comm. on Judiciary and Labor*, 26th Leg., Reg. Sess. (Haw. 2012) (written statement by the League of Women Voters), *available at* http://www.capitol.hawaii.gov/session2012/Testimony/SB2858_TESTIMONY_JDL_02-02-12_LATE.pdf.

¹⁵⁰ *Id.*

¹⁵¹ HAW. REV. STAT. § 92F-43(a) (2012).

disclosure.¹⁵²

The League requested this last provision to reduce the “risk of having to fight a belated agency challenge to the OIP decision.”¹⁵³ This new provision requires the agency to proverbially “fish or cut bait,” as it must timely file an appeal or no longer be able to challenge OIP’s decision in an enforcement action subsequently brought by a member of the public. As noted by the House Judiciary Chair, “[t]his provision thus encourages agencies to take timely action, and it discourages agencies from simply ignoring an OIP decision and indefinitely refusing to disclose a record that OIP has determined should be disclosed under the UIPA.”¹⁵⁴ Moreover, because the agency would not be able to challenge the OIP decision if it failed to timely appeal, the member of the public seeking to enforce the decision would have a better chance of prevailing and being awarded attorney fees and costs.¹⁵⁵

Neither the “fish or cut bait” nor any similar provision was added to the Sunshine Law, as that law differs from the UIPA with respect to OIP’s authority to impose remedies upon a finding of violation and the potential remedies available. Under the UIPA, OIP simply decides whether or not a record must be disclosed by an agency and if OIP mandates the disclosure of public records by an agency, then the UIPA specifically provides that “the agency shall make the record available.”¹⁵⁶ OIP has no enforcement powers nor can it seek court assistance to compel disclosure.¹⁵⁷ Therefore, if the agency fails to disclose a record as mandated by OIP, it is left to the requester whose record request was denied to seek judicial enforcement under HRS section 92F-15.¹⁵⁸

Under the Sunshine Law, however, OIP could find any number of potential violations, for which there could be various temporary or

¹⁵² *Id.* § 92F-15(b).

¹⁵³ *A Bill for an Act Relating to Open Gov’t: Hearing on S.B. 2858 Before the H. Comm. on Judiciary*, 26th Leg., Reg. Sess. (Haw. 2012) (written statement by the League of Women Voters), available at http://www.capitol.hawaii.gov/session2012/Testimony/SB2858_SD1_TESTIMONY_JUD_03-16-12_.pdf.

¹⁵⁴ H.R.REP. NO. 105-12, 26th Leg., Reg. Sess. (2012) (Conference Comm.), reprinted in 2012 HAW. HOUSE J., 823, 825 (written remarks of Representative Gilbert Keith-Agaran).

¹⁵⁵ See HAW. REV. STAT. § 92F-15(d) (“If the complainant prevails in an action brought under this section, the court shall assess against the agency reasonable attorney’s fees and all other expenses reasonably incurred in the litigation.”).

¹⁵⁶ *Id.* § 92F-15.5(b).

¹⁵⁷ *‘Ōlelo: The Corp. for Cmty. Television v. Office of Info. Practices*, 116 Haw. 337, 346 n.2, 173 P.3d 484, 493 n.2 (2007).

¹⁵⁸ HAW. REV. STAT. § 92F-15(a) allows the requester to bring an action against an agency that denies access to a record, with or without an OIP decision.

permanent remedies that OIP is not authorized to impose.¹⁵⁹ Rather, those remedies must be ordered by the court in enforcement actions to be brought by the attorney general or prosecuting attorney.¹⁶⁰ While the Sunshine Law authorizes OIP to determine whether the Sunshine Law has been violated and allows “any person” to sue to enforce the law itself, such a suit could not be brought to enforce an OIP decision mandating agency action because OIP lacks the statutory authority to mandate agency action as a remedy for a violation.¹⁶¹ Consequently, the Sunshine Law does not contain provisions similar to those found in the UIPA at HRS section 92F-15, which give a requester the right to seek judicial enforcement of an OIP opinion.¹⁶²

5. Miscellaneous provisions

The Sunshine Law was amended by the new law to state that “[a]n agency may not appeal a decision by the office of information practices made under this chapter, except as provided in section 92F-43.”¹⁶³ OIP suggested adding this provision to ensure that a person looking only at the Sunshine Law would be aware that the agency appeals process could be found in the UIPA, rather than in the Sunshine Law itself.¹⁶⁴

Finally, the new appeals procedure allows an agency “to initiate a special proceeding in the circuit court.”¹⁶⁵ Although the law does not define the “special proceeding,” it provides clear parameters, as it specifically does not require OIP or the requester to be parties to the appeal but gives them the right to intervene,¹⁶⁶ provides a thirty-day time limit for agency appeals,¹⁶⁷ and limits the appellate record to what was presented to OIP.¹⁶⁸ The new law also unambiguously directs that “[t]he circuit court shall uphold a decision of the office of information practices, unless the circuit court concludes that the decision was palpably erroneous”¹⁶⁹ and that the

¹⁵⁹ Potential remedies include a stay of agency proceedings, HAW. REV. STAT. § 92-12(e); voiding of the agency’s final action, *id.* § 92-11; imposition of a fine or imprisonment for willful violations that amount to a misdemeanor, *id.* § 92-13; the summary removal of a board member, *id.*; or any other appropriate remedy, *id.* § 92-12(b).

¹⁶⁰ *Id.* § 92-12(a).

¹⁶¹ *Id.* §§ 92-12(a)-(b) (giving the attorney general, the prosecuting attorney, and the circuit courts of the state the authority to enforce the provisions of the Sunshine Law).

¹⁶² *Id.* § 92F-15(a).

¹⁶³ *Id.* § 92-1.5.

¹⁶⁴ Statements by Cheryl Kakazu Park, Director, Office of Info. Practices.

¹⁶⁵ HAW. REV. STAT. § 92F-43(a).

¹⁶⁶ *Id.* § 92F-43(b).

¹⁶⁷ *Id.* § 92F-43(a).

¹⁶⁸ *Id.* § 92F-43(c).

¹⁶⁹ *Id.*

“[o]pinions and rulings 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.”¹⁷⁰ Moreover, as the UIPA already requires expedited court proceedings in appeals by a requester,¹⁷¹ the same expedited court procedures would rationally apply to appeals by agencies and could be applied by the courts without a statutory mandate to do so. Thus, while the law allows the court to further define the “special proceeding” under which agency appeals may be taken, its specific statutory provisions strictly limit agencies’ appeal rights and provide basic parameters for the courts’ special proceedings.

IV. NEW RULES REGARDING APPEALS TO OIP

Following the Legislature’s recognition of the agencies’ right to appeal OIP decisions and adoption of a clear, uniform appeals process in S.B. 2858, which Governor Abercrombie signed into law on June 28, 2012,¹⁷² OIP immediately went to work to complete its drafting of administrative appeals rules.¹⁷³ Although these administrative rules govern complaints to OIP regarding alleged UIPA or Sunshine Law violations, and not agency appeals of an OIP decision to the court,¹⁷⁴ the rules implement requirements established by the new law, such as defining the record that would be provided to the court upon an agency’s appeal from an OIP decision.¹⁷⁵ After review by the administration and a public hearing, OIP’s rules were approved by Governor Abercrombie and went into effect on December 31, 2012, one day before the effective date of the new law.¹⁷⁶

OIP’s administrative appeals rules arise out its dispute resolution function, and do not address its other duties to provide advice and training regarding the UIPA and Sunshine Law.¹⁷⁷ The rules largely follow OIP’s

¹⁷⁰ *Id.* § 92-12(d).

¹⁷¹ An expedited judicial appeals process for agency appeals is consistent with the existing provisions of HRS § 92F-15(f) that requires judicial enforcement actions brought by aggrieved persons under the UIPA to be given precedence on the court’s docket over all cases, assigned for hearings, trials, and arguments at the earliest practicable date, and “expedited in every way,” unless there are cases that the circuit court considers of greater importance. *Id.* § 92F-15(f).

¹⁷² *See* Act of June 28, 2012, No. 176, 2012 Haw. Sess. Laws 615 (codified at HAW. REV. STAT. §§ 92 to 92F (2012)).

¹⁷³ Statements by Cheryl Kakazu Park, Director, Office of Info. Practices. OIP’s administrative rules are authorized by HAW. REV. STAT. § 92F-42(12) and *id.* § 92-1.5.

¹⁷⁴ *See generally* HAW. CODE R. §§ 2-73-1 to -20 (LexisNexis 2013).

¹⁷⁵ *Id.* § 2-73-20.

¹⁷⁶ *Id.* §§ 2-73-1 to -20.

¹⁷⁷ STATE OF HAWAII OFFICE OF INFO. PRACTICES, IMPACT STATEMENT FOR PROPOSED

previously existing procedures for appeals to resolve live disputes between parties, and they do not govern OIP's actions in meeting its advisory and training functions, such as providing advice or assistance to only one party or guidance based on hypothetical situations.¹⁷⁸ The rules are further designed to provide an informal, flexible dispute resolution process as a relatively simple, timely, and free alternative to lawsuits filed in courts or to contested case proceedings.¹⁷⁹ While addressing appeals relating to the UIPA, Sunshine Law, and Department of Taxation ("DOTAX"),¹⁸⁰ the new rules remain true to the original legislative intent in establishing OIP to be "a place where the public can get assistance on records questions at no cost and within a reasonable amount of time."¹⁸¹

The major provisions of OIP's administrative appeals rules are discussed as follows. The discussion presumes that the reader already has a good understanding of the Sunshine Law and the UIPA, including the UIPA's distinction between government records and personal records.

A. Section 2-73-2: Definition of an Appeal to OIP

The "appeals" covered by the rules are defined as:

a written request by a person to OIP to review and rule on:

- (1) An agency's denial of access to information or records under [the UIPA,] chapter 92F, HRS; [sic]
- (2) The denial or granting of access to government records by the department of taxation under chapter 231, HRS, or
- (3) A board's compliance with [the Sunshine Law,] part I of chapter 92, HRS.¹⁸²

Notably, the rules do not allow for appeals to OIP from an agency's *granting* of access to public records under the UIPA. As the Impact Statement explains:

RULES OF THE OFFICE OF INFORMATION PRACTICES ON ADMINISTRATIVE APPEALS PROCEDURES (2012), <http://files.hawaii.gov/oip/Appeals%20Rules%20Impact%20Statement.pdf> [hereinafter IMPACT STATEMENT]. Prior to their adoption, OIP's proposed administrative appeals rules were accompanied by the IMPACT STATEMENT, which explained the proposed rules. As the proposed rules were adopted with minor changes, the IMPACT STATEMENT remains an important and authoritative source of the considerations that went into developing the rules.

¹⁷⁸ HAW. CODE R. § 2-73-4; IMPACT STATEMENT, *supra* note 177, at 12-13.

¹⁷⁹ IMPACT STATEMENT, *supra* note 177, at 9.

¹⁸⁰ See HAW. REV. STAT. § 231-19.5(f) (2012) (allowing appeals to OIP from "written opinions" of the Department of Taxation).

¹⁸¹ H.R.REP. NO. 112-88, 26th Leg., Reg. Sess. (1988) (Conference Comm.), reprinted in 1988 HAW. HOUSE J. 817, 818.

¹⁸² HAW. CODE R. § 2-73-2.

[T]he UIPA only recognizes a requester's right to appeal an agency's denial of access, not an agency's granting of access. This proposed rule therefore does not provide for a general appeal of an agency's granting of access under the UIPA.

The UIPA has no provision setting out a right to administratively appeal an agency's granting of access in the way that sections 92F-15.5 and 92F-27.5, HRS, set out the right to administratively appeal a denial of access. Thus, although section 92F-42(1), HRS, provides that OIP "[s]hall review and rule . . . on an agency's granting of access," the UIPA does not provide for OIP to do so as part of an administrative appeal process. The omission of any specific provision for appeal of an agency's granting of access is consistent with the structure of the UIPA's exceptions to disclosure in sections 92F-13 and -22, HRS, which allow, but do not require, an agency to withhold records covered by an exception. Thus, while OIP could conclude that records disclosed by an agency fell within an exception to disclosure such that the agency could have withheld all or a portion of the records, OIP could not conclude that the agency's disclosure actually violated the UIPA (except in the limited circumstance where the agency intentionally disclosed information explicitly described by specific confidentiality statutes). *See* HRS §§ 92F-13, -17, and -22 (1993). To the contrary, an agency's good faith disclosure of a government record would be immune from civil or criminal liability. HRS § 92F-16 (1993).¹⁸³

Although the rules do not allow a person to file an administrative appeal to challenge an agency's *granting* of access under the UIPA, the person may still seek an *advisory opinion*¹⁸⁴ from OIP as to an agency's granting of access.¹⁸⁵ For example, an agency might disclose records that a business claimed should have been withheld as confidential business information, in which case the business could ask OIP for an advisory opinion as to whether the UIPA actually required the agency to disclose the records, or whether the agency could have instead chosen to assert an exception to disclosure.¹⁸⁶

B. Section 2-73-11: What May Be Appealed

The rules allow any person to submit an appeal to OIP when:

- (1) The person seeks a review of an agency's denial of access to information or records under [the UIPA];
- (2) The person meets the requirements under chapter 231, HRS, for

¹⁸³ IMPACT STATEMENT, *supra* note 177, at 5-6.

¹⁸⁴ As explained earlier, advisory opinions are not covered by the administrative appeals rule. *See supra* note 177 and accompanying text.

¹⁸⁵ *See* HAW. REV. STAT. §§ 92F-42(1)-(3) (2012).

¹⁸⁶ *See id.*

appealing to OIP a decision of the department of taxation concerning disclosure of a written opinion and the person has exhausted the administrative remedies in accordance with rules established by the department of taxation;

(3) The person seeks to determine a board's compliance with or to prevent a violation of [the Sunshine Law]; or

(4) The person seeks to determine the applicability of [the Sunshine Law] to discussions or decisions of a public body.¹⁸⁷

A "person" is broadly defined by the rule and the UIPA as "an individual, corporation, government, or governmental subdivision or agency, business trust, estate, trust, partnership, association, or any other legal entity."¹⁸⁸

C. Section 2-73-12: Time Limits for Appeal to OIP

Depending on the basis for the appeal, the rules provide the following time limits for filing an appeal with OIP:

(1) For an appeal of a denial of access to records under [UIPA], . . . within one year after:

(A) Receipt of the agency's final written denial of access; or

(B) Receipt of the agency's partial denial of access; or

(C) Where the agency does not provide a written response to the request, the last day of the time period provided for the agency's written response under chapter 92F, HRS, and chapter 2-71.

(2) For an appeal of a decision by the department of taxation concerning the disclosure of a written opinion, within the time period set for appeal to OIP under chapter 231, HRS [which is currently sixty days from the date of the department's decision];

(3) Within six months after a board's action that the appellant contends was in violation of [the Sunshine Law]; or

(4) For an appeal to determine the applicability of [the Sunshine Law], to discussions or decisions of a public body, at any time during the public body's existence.¹⁸⁹

As the Impact Statement explains, the one-year time limit (under subsection (1) above) for a person seeking OIP's review of an agency's denial of access in response to a UIPA request is shorter than the statutory two-year period that a requester in such cases has to appeal to the circuit court de novo.¹⁹⁰ Since the statutory time period is not tolled by an

¹⁸⁷ HAW. CODE R. § 2-73-11.

¹⁸⁸ *Id.* § 2-73-2; HAW. REV. STAT. § 92F-3 (2012).

¹⁸⁹ HAW. CODE R. § 2-73-12.

¹⁹⁰ IMPACT STATEMENT, *supra* note 177, at 14-15. A requester's appeal under the UIPA

administrative appeal to OIP, the one-year limit to appeal allows time for an OIP decision to be issued while the requester is still within the two-year period for going to court de novo.

As with government records, the UIPA also provides a two-year statutory time limit for appealing denials of access to personal records, but the time may be tolled until an OIP final decision is reached.¹⁹¹ Therefore, the one-year rule for filing an appeal with OIP does not prejudice the requester, who will still have two years after OIP's final decision to file a court action.

It is also preferable for the requester to submit a fresh request after more than a year has passed to see if the agency's response remains the same before appealing to OIP. Even if an agency has already responded to a previous, identical record request, HRS section 92F-11(b) requires the agency to respond to a new record request made a year or more later.¹⁹² Thus, the practical effect of the law and this rule is that a requester who fails to appeal a denial of access to OIP within one year has the option of either (1) making a new request for the same records to the agency, and filing an appeal with OIP within one year of the denial of the new record request, or (2) going straight to court to appeal the denial of the original request, if the two-year limitation period has not yet passed.¹⁹³

For an appeal of a DOTAX decision, OIP's time limit for appeal refers to the law, which currently sets a sixty-day time limit from the date of the DOTAX's decision to appeal to OIP.¹⁹⁴

With respect to Sunshine Law violations, OIP's rule sets a six-month time limit from the date of an alleged violation for a person to appeal to OIP.¹⁹⁵ Because OIP does not have the power to void an action taken by a board, this rule assumes that a person seeking such a remedy would go straight to court within the ninety-day statutory period to file an enforcement action.¹⁹⁶ Thus, as the Impact Statement explains:

to the circuit court regarding general government records must be filed "within two years after the agency denial . . ." HAW. REV. STAT. § 92F-15(a) (2012).

¹⁹¹ In the case of an agency's denial of access to a personal record, the UIPA allows an individual to appeal to the circuit court no later than "two years after notification of the agency denial, or where applicable, the date of receipt of the final determination of the office of information practices." HAW. REV. STAT. § 92F-27(f).

¹⁹² HAW. REV. STAT. § 92F-11(b)(2).

¹⁹³ See IMPACT STATEMENT, *supra* note 177, at 14-15.

¹⁹⁴ A person who has exhausted administrative remedies for contesting DOTX's denial of access or granting of access to a written opinion may appeal to OIP "within sixty days of the date of the department's decision." HAW. REV. STAT. § 231-19.5(f). Thereafter, the appellant can appeal OIP's decision to circuit court "within thirty days after the date of the decision of the office of information practices." *Id.*

¹⁹⁵ HAW. CODE R. § 2-73-12(a)(3) (LexisNexis 2013).

¹⁹⁶ For a court challenge of an alleged violation, the Sunshine Law provides a ninety-day

[T]he time limit for appeal to OIP does not anticipate a need for an appeal to be filed or for an OIP determination to be issued prior to the 90-day limitation period for a suit to void an action taken in violation of the Sunshine Law. Instead, the proposed rule's six-month period reflects OIP's assessment of the length of time after which a board may have difficulty in responding to a complaint of an alleged violation, due to fading memories of what occurred at a meeting or during a conversation, turnover of board members, and other effects of the passage of time. OIP's six-month time limit for Sunshine Law appeals also helps to keep boards focused on their current, ongoing compliance with the Sunshine Law's requirements.¹⁹⁷

OIP has set this time period to limit new filings to appeals arising from a board's recent history. In contrast, for appeals to determine whether the Sunshine Law applies to a public body, OIP's rule allows an appeal to "be filed at any time during the body's existence, as the question of whether or not the body must follow the Sunshine Law is pertinent at any time in that period."¹⁹⁸

D. Section 2-73-12: Contents of an Appeal

All appeals must "include sufficient information about the appellant to enable OIP to contact and correspond with appellant."¹⁹⁹ Although appeals may be made anonymously, a person's identity is an essential element to prove a right to access personal records under the UIPA.²⁰⁰ In other cases, the weight and credibility of the evidence may be affected by the appellant's anonymity.²⁰¹

Additionally, the request for appeal may include a statement of relevant facts; a discussion of the appellant's basis for disagreeing with the agency's denial of access or the board's actions, or for believing that the Sunshine Law applies to the public body; and any other information that the appellant wants OIP to consider in ruling on the appeal.²⁰² To ensure easy access to OIP without the need for legal counsel, a statement by the appellant is not required, but providing one could help OIP to better understand the

limitation period for a suit to void a final action taken in violation of the law. HAW. REV. STAT. § 92-11; *see* HAW. REV. STAT. § 92-12 (providing enforcement procedures in general).

¹⁹⁷ IMPACT STATEMENT, *supra* note 177, at 16.

¹⁹⁸ HAW. CODE R. § 2-73-12(a)(4); IMPACT STATEMENT, *supra* note 177, at 16.

¹⁹⁹ HAW. CODE R. § 2-73-12(b).

²⁰⁰ *See generally* Haw. OIP Op. Ltr. No. 90-37 (Dec. 17, 1990), 1990 WL 482385; *see also* IMPACT STATEMENT, *supra* note 177, at 17.

²⁰¹ *See* IMPACT STATEMENT, *supra* note 177, at 17 (stating that an "appellant's factual allegations are likely to be more compelling coming from an identified individual . . .").

²⁰² HAW. CODE R. § 2-73-12(e)(1)-(3).

appellant's concerns and determine how best to proceed.²⁰³

On the other hand, an appeal based on the denial of records under the UIPA must "clearly identify or describe the [government] records or information to which access has been denied and for which appellant is seeking review, and shall include a copy of the agency's written denial of access"²⁰⁴ As the Impact Statement notes, "[t]his proposed rule requires the appellant to make a written request for records, due to the importance of beginning an appeal with a clear understanding of (1) what was requested and (2) how the agency responded."²⁰⁵

As for a Sunshine Law appeal, the appellant must clearly identify what board actions allegedly were non-compliant or the public body whose discussions and decisions are allegedly subject to the Sunshine Law.²⁰⁶

E. Section 2-73-13: OIP's Response and Notice of Appeal

Within five business days after accepting an appeal, OIP shall either:

- (1) Notify the appellant that the appeal will not be heard and specify the reasons why the appeal is not warranted or the additional information that OIP requires [in order to hear the appeal]; or
- (2) Issue a notice of appeal to the appellant and the agency whose action is being appealed.²⁰⁷

If OIP notifies the appellant that the appeal will not be heard, a brief explanation will be provided to the appellant, with a copy to the agency.²⁰⁸ For example, the explanation may be that an appeal is untimely under Hawai'i Administrative Rules ("HAR") section 2-73-12 because it complains of a board's e-mail vote on a board issue three years earlier. For an appeal based on a union's refusal to provide access to records, OIP's explanation may be that the appeal did not state a valid claim against a government agency under the UIPA or the Sunshine Law, as set out in HAR section 2-73-11.²⁰⁹ Where the agency's written denial of access was not submitted or the request and response dates were not provided, OIP could therefore explain that an appeal challenging the agency's denial of access could not be opened without the missing information.

If an appeal is accepted, then OIP will respond to the appellant with a

²⁰³ See IMPACT STATEMENT, *supra* note 177, at 19-20.

²⁰⁴ HAW. CODE R. § 2-73-12(c).

²⁰⁵ IMPACT STATEMENT, *supra* note 177, at 18.

²⁰⁶ HAW. CODE R. § 2-73-12(d).

²⁰⁷ *Id.* § 2-73-13(a)(1)-(2).

²⁰⁸ See *id.* § 2-73-13(c).

²⁰⁹ See *id.* § 2-73-11(4).

notice of appeal.²¹⁰ OIP will also send the agency a copy of the request to appeal, along with OIP's notice of appeal.²¹¹ The notice of appeal will give the parties an initial idea of what to expect, as it must include a description of general procedures that OIP will follow in resolving the appeal and set out the response required from the parties.²¹²

F. Section 2-73-14: Agency's Response

Upon receipt of OIP's notice of appeal, the agency must respond within ten business days with a written statement that includes the following information:

- (1) a concise statement of the factual background;
- (2) a list identifying or describing each record withheld, if applicable;
- (3) the agency's explanation of its position, including the agency's justification for the denial of access or actions complained of, with citations to the specific statutory sections and other law that support the agency's position;
- (4) any evidence necessary to support application of any claimed exception, exemption, or privilege; and
- (5) information as to how OIP may contact the agency officer or employee who is authorized to respond and make representations on behalf of the agency concerning the appeal.²¹³

Unlike the appellant, who is typically an individual member of the public, an agency is required to provide a substantive argument in support of its position in order to further the policy of both the UIPA and Sunshine Law to conduct government business as openly as possible.²¹⁴ To further this policy, the Sunshine Law specifically instructs that it be interpreted to favor openness and to disfavor closed meeting provisions,²¹⁵ and the UIPA unambiguously places the burden of proof on the agency to justify nondisclosure.²¹⁶ As a practical matter, an agency is also likely to have both superior knowledge of the relevant factual background and superior access to counsel or other resources to assist it in responding to the appeal. Thus, even though the agency is the appellee, the agency has the burden of proof to show that its action is justified by an exception to the general rule of openness under the Sunshine Law or the UIPA, and it must provide a

²¹⁰ *See id.* § 2-73-13(a).

²¹¹ *Id.* § 2-73-13(c).

²¹² *Id.* § 2-73-13(b).

²¹³ *Id.* § 2-73-14.

²¹⁴ *See* HAW. REV. STAT. §§ 92-1, 92F-2 (2012).

²¹⁵ *Id.* § 92-1(2)-(3).

²¹⁶ *Id.* § 92F-15(c).

substantive justification of its position to prevail in the appeal.

G. Section 2-73-15: Other Procedures on Appeal

This rule sets out a nonexclusive list of additional actions that OIP may take in the process of resolving an appeal.²¹⁷ Not all of the listed procedures will be applicable in an appeal, but they provide guidance as to how OIP may exercise its discretion to determine how to fairly and expeditiously resolve an appeal.²¹⁸

Note that OIP's rules intentionally do not provide for any form of discovery among the parties to an appeal.²¹⁹ OIP does not believe that a discovery process would be consistent with the legislative intent that review by OIP be expeditious, informal, and at no cost to the public.²²⁰ Additionally, as OIP is expressly exempt from holding contested case proceedings,²²¹ the rules are intended to retain the free and informal nature of OIP's dispute resolution process.

1. Participation by third parties

Depending on the circumstances of the pending case, HAR section 2-73-15(a) recognizes OIP's discretion to permit one or more third persons, in addition to the appellant and the agency, to participate in an appeal and to determine the extent of the permitted participation.²²² Generally speaking, such third persons would need to have a substantial interest in the record at issue, such as a person to whom the record refers or who may be affected by its disclosure. This rule is related to subsection (e), which allows OIP to consider input or relevant materials from persons who have not sought party status.²²³

2. Written statements and documents from parties other than the agency

As discussed above, an agency whose action is being appealed is required by HAR section 2-73-14 to submit a written statement of its position. HAR section 2-73-15(a) allows OIP to request, but not require,

²¹⁷ See HAW. CODE R. § 2-73-15.

²¹⁸ See *id.* § 2-73-15(j).

²¹⁹ See *id.* §§ 2-73-1 to -20.

²²⁰ H.R.REP. NO. 1288, 15th Leg., Reg. Sess. (1989) (Standing Comm.), reprinted in 1989 HAW. HOUSE J. 1319, 1319.

²²¹ See HAW. REV. STAT. § 92F-42(1).

²²² HAW. CODE R. § 2-73-15(a).

²²³ See *id.* § 2-73-15(e).

that other parties, including third-party participants, each submit a written statement to OIP.²²⁴ Typically, a relatively brief and informal statement will be adequate, such as a short e-mail explaining why an individual member of the public believes that certain government records should be disclosed. Where appropriate, an appellant or other participating party may be asked to submit a longer and more formally presented statement.²²⁵ For example, a business represented by counsel, and participating as a third party to support an agency's denial of a competitor's request for a proposal submitted by the business, may be asked to send in a more formal statement with legal argument and citations.

3. *In camera* review of documents

OIP often needs to review copies of undisclosed documents that are in the agency's or another party's possession.²²⁶ For example, in an appeal of an agency's denial of access to records, OIP may need to review the government records that are at issue in the appeal before determining whether a claimed exception to disclosure is applicable.²²⁷ In an appeal questioning whether an executive session was proper, OIP may review the minutes of the executive session.²²⁸ HAR section 2-73-15(c) allows OIP to require that documents be submitted to OIP and to examine the documents *in camera*, with appropriate protections against disclosure, as necessary to preserve a claimed exception, exemption, or privilege against disclosure.²²⁹ After its *in camera* review of a record, if OIP decides that the record should have been disclosed to the requester, then the agency, not OIP, remains responsible for providing the requester with access to those documents.²³⁰

4. *Restrictions on OIP's in camera* review

To generally assure agencies that they will not waive the attorney-client privilege by providing a record to OIP, HAR section 2-73-15(d) sets forth more specific restrictions on OIP's *in camera* examination of records that an agency claims are protected by the privilege.²³¹ Upon request, the

²²⁴ *Id.* § 2-73-15(a).

²²⁵ *See id.* § 2-73-15(b).

²²⁶ *See id.* § 2-73-15(c).

²²⁷ *See id.*

²²⁸ *See id.*

²²⁹ *Id.*

²³⁰ *See id.* § 2-73-15(k).

²³¹ *Id.* § 2-73-15(d). The attorney-client privilege is a possible exception to or exemption from disclosure under the UIPA and the Sunshine Law's executive session purposes. *See*

agency may provide the record in redacted form if OIP can still determine whether the privilege applies by reviewing the redacted version.²³²

5. *Input from non-parties and ex parte communications*

HAR section 2-73-15(e) makes clear that OIP is not limited to considering only the statements submitted by the parties to an appeal, but may also seek and accept information and relevant materials from any person and may speak to a party or another person without the presence of the other party or parties.²³³ Ex parte communications are specifically permitted, except to the extent that OIP has required the parties to copy one another on written submittals under HAR section 2-73-15(k).²³⁴ Moreover, HAR section 2-73-15(f) allows OIP to take notice of generally known and accepted facts,²³⁵ thus, in making its decision, OIP may refer to a newspaper article or similar source and determine its appropriate weight and credibility.²³⁶

6. *Consolidation, mediation, and conferences*

As appropriate, HAR section 2-73-15(g) allows OIP to consolidate appeals with similar facts or issues or similarly situated parties, as where several different appeals are filed regarding essentially the same actions by a board, or where multiple appellants seek the same records or information.²³⁷ Besides being the most efficient approach for OIP to resolve them, consolidated appeals will also give all the affected parties the opportunity to be heard on the common questions being resolved by OIP.

Mediation may be another effective way to reach a compromise between the parties and resolve an appeal. Thus, HAR section 2-73-15(h) allows OIP to ask the parties to mediate one or more issues within an appeal or an entire appeal, on terms set by OIP.²³⁸ As is consistent with the mediation process, parties will not be required to participate in mediation but may do

HAW. REV. STAT. §§ 92-5, 92F-13, 92F-22(5) (2012); *see also* *Cnty. of Kaua'i*, 120 Haw. 34, 46, 200 P.3d 403, 415 (App. 2009) (holding that redaction, in this case, was impractical since the privileged portions of the transcript were so intertwined).

²³² HAW. CODE R. § 2-73-15(d).

²³³ *Id.* § 2-73-15(e).

²³⁴ *Id.*

²³⁵ *Id.* § 2-73-15(f).

²³⁶ *See In re 'Īao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications*, 128 Hawai'i 228, 255, 287 P.3d 129, 156 (2012) (stating that there is precedent in Hawai'i for courts to take judicial notice of "facts as reported by newspapers").

²³⁷ HAW. CODE R. § 2-73-15(g).

²³⁸ *Id.* § 2-73-15(h).

so voluntarily.²³⁹

As a less formal version of a mediation or a hearing, or simply to help move an appeal forward, OIP may set up an informal conference under HAR section 2-73-15(i), with the parties' agreement.²⁴⁰ Such a conference could be used to gather information, to question witnesses or parties, to clarify and simplify the issues and the parties' positions, to hear oral argument, to discuss a settlement or informal resolution of the appeal, or take any other action that will help to resolve the appeal.²⁴¹ It may be attended by the parties and any additional witnesses, and might be conducted in person or via telephone or similar means.²⁴²

7. Extension of time limits

Under HAR section 2-73-15(k), OIP may require a party to provide to any other party a copy of the statement or other document submitted to OIP.²⁴³ If so, then delivery must be on the same date that the document is submitted to OIP.²⁴⁴ If delivery is improper, then OIP may order an extension of time limits or any other appropriate remedy.²⁴⁵

H. Section 2-73-16: Documents Submitted to OIP

Although OIP's rules do not require sworn statements, HAR section 2-73-16 nevertheless is a reminder that all documents submitted to the OIP in an appeal are subject to state law, which provides that unsworn falsification of a document is a criminal misdemeanor.²⁴⁶

I. Section 2-73-17: OIP's Decision

HAR section 2-73-17 provides that OIP will issue a final written decision on an appeal, and send a copy of the decision to each party.²⁴⁷ The rule recognizes that an OIP decision "may reach any conclusion and make any order that is consistent with the UIPA, the Sunshine Law, and other laws

²³⁹ "OIP may, at a party's request or on OIP's own initiative, *request* that the parties participate in a mediation of the appeal . . ." *Id.* (emphasis added).

²⁴⁰ *Id.* § 2-73-15(i).

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.* § 2-73-15(k).

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.* § 2-73-16; HAW. REV. STAT. § 710-1063 (2012).

²⁴⁷ HAW. CODE R. § 2-73-17(a).

referenced therein (such as confidentiality statutes or statutes controlling the disclosure of specific records or information, incorporated by the UIPA's exceptions and the Sunshine Law's closed meeting provisions)."²⁴⁸

If an agency's action or position is upheld, OIP's decision will notify the appellant of the right to seek judicial relief under the relevant section of the Sunshine Law, UIPA, or tax statutes.²⁴⁹ If the agency's action or position is not upheld, then OIP will inform the agency of its right to appeal OIP's decision to court under section 92F-43.²⁵⁰ Thus, OIP's decision will answer the questions most unsuccessful appellants will have: whether a further appeal is possible and what the next step may be.

The rule also distinguishes formal, published opinions with precedential value from unpublished memorandum opinions or other written dispositions that are advisory and have no precedential value.²⁵¹ Formal opinions are so designated by the director because of their discussion of general concepts under these laws and their broad applicability to similar factual situations.²⁵² Formal opinions fully set forth OIP's interpretations of provisions of the UIPA and the Sunshine Law, and they are relied upon as precedent by OIP in the issuance of its opinions.²⁵³

In contrast, OIP generally issues informal or memorandum opinions "in instances where the legal questions raised by a dispute have been previously resolved and discussed in a formal opinion, and where the legal opinion is based upon specific facts that limit the opinion's usefulness for

²⁴⁸ See *id.* §§ 2-73-17(a)(4)-(5); see also IMPACT STATEMENT, *supra* note 177, at 34-35.

²⁴⁹ See HAW. CODE R. § 2-73-17(c).

²⁵⁰ *Id.*; HAW. REV. STAT. §§ 92F-15.5, -43 (2012).

²⁵¹ HAW. CODE R. § 2-73-17(d); see also *Opinions*, STATE OF HAWAII OFFICE OF INFO. PRACTICES, <http://oip.hawaii.gov/laws-rules-opinions/opinions/> (last visited Oct. 12, 2013) [hereinafter *Opinions*]; *Informal Opinion Letter Summaries*, STATE OF HAWAII OFFICE OF INFO. PRACTICES, <http://oip.hawaii.gov/laws-rules-opinions/opinions/informal-opinion-letter-summaries/> (last visited Oct. 12, 2013) [hereinafter *Informal Opinion Letter Summaries*].

²⁵² See *Opinions*, *supra* note 251.

²⁵³ Some of OIP's formal opinions in its first twenty-three years of existence arose from requests for an advisory opinion that would not qualify as appeals under these proposed rules. See, e.g., Haw. OIP Op. Ltr. No. 89-01 (Sept. 11, 1989), <http://oip.hawaii.gov/wp-content/uploads/1989/09/opinion-89-01.pdf>; Haw. OIP Op. Ltr. No. 89-04 (Nov. 9, 1989), <http://files.hawaii.gov/oip/opinionletters/opinion%2089-04.pdf>; Haw. OIP Op. Ltr. No. 89-05 (Nov. 20, 1989), <http://files.hawaii.gov/oip/opinionletters/opinion%2089-05.pdf>. Although OIP will continue to accept requests for advisory opinions, it no longer intends to designate advisory opinions as formal opinions. OIP will, however, continue to rely upon and consider as precedent its previously existing formal opinions, even if they arose from requests for an advisory opinion and would not have qualified as appeals under these new rules. IMPACT STATEMENT, *supra* note 177, at 36-37.

general guidance purposes.”²⁵⁴ “These opinions are often abbreviated in form and refer the reader to OIP’s formal opinions for a full discussion of the legal concepts applied.”²⁵⁵ While not considered binding precedent on the underlying issues, “an agency could submit for OIP’s consideration an informal opinion previously issued to the agency to show that its actions were consistent with OIP’s prior advice, and OIP would consider the opinion for its relevance to showing the agency’s good faith”²⁵⁶

Not all dispositions will take the form of an opinion.²⁵⁷ OIP’s decision could be a simple written letter or disposition confirming a settlement, as where the parties had successfully resolved their dispute through mediation.²⁵⁸

J. Section 2-73-18: Dismissal of Appeal

HAR section 2-73-18 allows OIP to dismiss an appeal at any time and provides a nonexclusive list of possible good reasons for doing so:

- (1) A prerequisite for filing an appeal . . . has not been met;
- (2) The appeal is determined to be frivolous;
- (3) The issues are beyond OIP’s jurisdiction;
- (4) No violation of the law can be found when viewing the issues in the light most favorable to the appellant;
- (5) The appellant requests that the appeal be dismissed;
- (6) The appeal has been abandoned;
- (7) The same issues on appeal have been previously addressed in a published OIP decision; or
- (8) An OIP decision on the appeal would be advisory or moot.²⁵⁹

Because the list given in this proposed rule is not exclusive or exhaustive, OIP may dismiss an appeal for a sufficiently good reason, even if it is not listed in the proposed rule.²⁶⁰

K. Section 2-73-19: Reconsideration by OIP

HAR section 2-73-19 recognizes OIP’s discretion to reconsider any

²⁵⁴ *Informal Opinion Letter Summaries*, *supra* note 251.

²⁵⁵ *Id.*

²⁵⁶ IMPACT STATEMENT, *supra* note 177, at 37.

²⁵⁷ HAW. CODE R. § 2-73-17(d) (LexisNexis 2013).

²⁵⁸ IMPACT STATEMENT, *supra* note 177, at 37-38.

²⁵⁹ HAW. CODE R. § 2-73-18.

²⁶⁰ *See id.* (“The director may issue a notice dismissing all or part of an appeal at any time for good reason, *including but not limited to* [the reasons listed above]” (emphasis added)).

decision, either on its own initiative or on request.²⁶¹ For reconsideration of OIP's final decision in an appeal, a party has ten business days (or approximately two calendar weeks) from the date of issuance of the decision to submit a written request for reconsideration of that decision.²⁶² With or without a request, OIP may choose to reconsider at any time a precedent set by a prior OIP decision.²⁶³ In either case, reconsideration must be based on a change in the law, a change in the facts, or other compelling circumstances.²⁶⁴

The party seeking reconsideration may be required to provide a written statement setting out the basis for the request for reconsideration, and interested parties will be allowed by OIP to submit counterstatements.²⁶⁵ OIP will notify interested parties of "any request for reconsideration received and granted, a copy of the request, and any written statement filed."²⁶⁶

OIP's rule distinguishes between reconsideration of the decision in the appeal at hand, which is binding on the parties and must be requested within ten days,²⁶⁷ and reconsideration of a standing precedent, which may not involve the same parties and does not require an agency to take a particular action, so may be requested at any time.²⁶⁸ The Impact Statement gives the following example:

For instance, suppose that in an appeal by Kimo K. Public, who is seeking access to Widget Regulation Reports maintained by the Department of Commerce and Consumer Affairs ("DCCA"), OIP decides that the reports are public and issues a formal opinion ordering DCCA to disclose the reports. DCCA now has an obligation to disclose the reports as required by the decision, absent a successful request for reconsideration filed within ten days or a successful appeal to circuit court. Suppose further that DCCA does disclose the records to Mr. Public and does not seek reconsideration or appeal to circuit court at that time, but two years later, DCCA requests reconsideration of the issue on the basis that the reports now include different information than they previously did and a recent federal law protects information submitted by widget producers. Based on the changes in the facts and the law, OIP may reconsider the issue of whether Widget Regulation

²⁶¹ *Id.* § 2-73-19(a).

²⁶² *Id.* § 2-73-19(b) ("A party must make a request for reconsideration within ten days after the director issues a final decision . . ."); *see also id.* § 2-73-3(1) ("[A] period of time is measured in business days . . .").

²⁶³ *Id.* § 2-73-19(c).

²⁶⁴ *Id.* § 2-73-19(d)(1)-(3).

²⁶⁵ *Id.* § 2-73-19(e).

²⁶⁶ *Id.*

²⁶⁷ *See id.* § 2-73-19(b).

²⁶⁸ *See id.* § 2-73-19(c).

Reports are public. Nevertheless, OIP's reconsideration will not change DCCA's previous obligation, based on OIP's decision two years previously, to have produced the specific reports requested by Mr. Public that were the subject of the earlier appeal.²⁶⁹

L. Section 2-73-20: Record on Appeal to the Court

The new agency appeals law requires the court's review to be generally limited to the record before OIP and requires OIP to provide the circuit court with a certified copy of the record that it compiled to make its decision.²⁷⁰ HAR section 2-73-20 defines OIP's record to consist of all written, electronic, and other physical documents related to the appeal, including non-paper records such as audio or video recordings or e-mails or other electronic records, as well as an index.²⁷¹ Documents submitted to OIP for in camera review will be listed in the index as other documents are, but will be accessible only to OIP and the courts.²⁷² Within thirty days of the service on OIP of an agency's complaint to circuit court, OIP shall file a certified copy of the record in the circuit court and mail a copy of the index to the record to the agency.²⁷³

V. CONCLUSION

The changes to the UIPA and the Sunshine Law set out by Act 176 bring clarity to what had previously been a confused legal landscape as to an agency's appeal from an OIP decision. Similarly, the new administrative rules set out by HAR Chapter 2-73 bring clarity to the process by which individual citizens and others can bring a complaint to OIP regarding an agency's actions regarding access to government records or the meetings to a government board.

The new appeals law eliminates the problems described earlier and provides a clear and simple process allowing agencies to timely seek expedited judicial review of OIP's decisions, without requiring either OIP or the public to be unwilling parties to the appeal. The new law also restores most of OIP's authority by setting a high standard of judicial review that requires the courts to defer to OIP's decisions mandating disclosure of records under the UIPA, unless OIP's factual and legal

²⁶⁹ IMPACT STATEMENT, *supra* note 177, at 41-42.

²⁷⁰ HAW. REV. STAT. § 92F-43(c) (2012).

²⁷¹ HAW. CODE R. § 2-73-20.

²⁷² *Id.*

²⁷³ *Id.*

determinations are found to be “palpably erroneous.”²⁷⁴ Moreover, agencies can no longer simply ignore OIP’s decisions mandating disclosure, as they must now timely appeal within thirty days or be unable to challenge the decision if an enforcement action is filed by members of the public.²⁷⁵ Thus, members of the public now have a faster and easier means to obtain judicial enforcement where an agency ignores an OIP decision that records must be disclosed, and as prevailing parties, those members of the public will be entitled under existing law to recover reasonable attorney fees and costs. And for OIP, the new law enables the office to continue to expeditiously and informally resolve open government disputes, while also fulfilling its many responsibilities to provide training and advice to government agencies and the general public.

As appeals from OIP’s decisions will be limited to the record presented to OIP, the new administrative rules define the contents of the record that will be presented to the court for its consideration in an appeal. The main focus of the new administrative rules, however, is on appeals made to OIP, not appeals from OIP’s decisions. The new rules set out clearly what a complainant’s and an agency’s respective rights and obligations are when a complaint is filed with OIP, and what form OIP’s eventual decision may take.

The new standards in Act 176 and the new administrative rules remain true to both the UIPA provision exempting OIP from Chapter 91 contested case procedures and the UIPA’s original legislative intent that OIP would be “a place where the public can get assistance on records questions at no cost and within a reasonable amount of time.”²⁷⁶ While honoring OIP’s original mission, these changes will help OIP to move forward for its next twenty-five years and beyond.

²⁷⁴ HAW. REV. STAT. § 92F-15(b).

²⁷⁵ *Id.* § 92F-43(a).

²⁷⁶ H.R.REP. NO. 112-88, 14th Leg., Reg. Sess. (1988) (Conference Comm.), *reprinted in* 1988 HAW. HOUSE J. 817, 818.