

Clarification of OIP's Draft Rules to Process UIPA Record Requests
(September 20, 2017)

In response to questions received during the live informational briefings held in all counties, OIP provides the following clarifications of its draft rules regarding fee waivers and personal record requests.

1. Fee Waivers:

Fees in the draft rules have been increased to \$7.50 per 15-minute increment for search and to \$15.00 per 15-minute increment for review and segregation. The fee waiver is increased to \$400 per fiscal year per requester per agency for search, review, and segregation (SRS), and does not apply to any costs.

Under the draft rules, agencies no longer have to apply the public interest test for most fee waivers – waivers are automatically granted, and media requesters no longer have to prove that their request is in the public interest to get the \$400 SRS fee waiver from an agency.

The public interest test applies only if the agency intends to deny the \$400 fee waiver due to manifestly excessive interference (MEI) with its functions and duties, which will be rare cases. Even if MEI exists, the agency cannot deny a fee waiver that is in the public interest, using the test set forth in draft rule 3-200-21(a)(3), which is the same test currently used to determine public interest and consists of the following 3-step analysis:

- a) The requested record pertains primarily to the operation or activities of the agency;
- b) the requester has the primary intention and the actual ability to widely disseminate information from the government record to the general public at large; and
- c) the record is not readily available in the public domain.

The \$400 fee waiver applies per agency, not to a county as a whole. Whatever unit of government is keeping its own UIPA Record Request Log would generally be considered an "agency." While an entire county department may be using one Log and would be considered the agency responding to UIPA record requests (e.g., the Planning Department), a state department is typically much larger and may have many different agencies within it that are keeping their own Logs and would each be considered a separate agency. For example, the Professional and Vocational Licensing Division would be a separate agency from the Insurance Division or the state Department of Commerce and Consumer Affairs.

Agencies do not have to keep a running total of fee waivers granted to each requester but should use the Log so that when they start to recognize a requester's name, they can go back and see how much they have granted in fee waivers for a fiscal year. Agencies can also use the Log data to help establish unusual circumstances or MEI. If agencies do not keep track of fee waivers, they would be unable to determine when they can start charging a requester whose record requests have exceeded the \$400 fee waiver for the year.

The \$400 fee waiver applies per requester. For purposes of determining whether the \$400 maximum fee waiver has been met, agencies may add together all fees assessed to the same requester, despite differences in email addresses or other identifying particulars. Agencies may also consolidate fee waivers for requesters acting in concert, which will be a factual determination based on factors such as

requests by spouses or partners, or by individuals seeking similar records or advocating for a common cause.

2. Personal Record Requests Fees and Time Limits:

The existing administrative rules do not apply to personal record requests, which is why agencies could not charge for such requests. The draft rules would apply to personal record requests, so the same fees, costs, and waivers would apply to both personal and government record requests.

There are some differences, however, in the time limits that apply to personal versus government record requests. Part III of the UIPA **statutorily** establishes the **10-day** time limit to respond to a personal record request, which is extended to **30 days** for unusual circumstances. HRS section 92F-27(d)(1) also establishes penalties for:

(1) **actual damages** as a result of the failure of the agency to properly maintain the personal record, but in **no** case shall an individual who is entitled to recovery receive **less than \$1,000**, and

(2) the **costs** of the action together with reasonable **attorney fees**.

Because of the statutory requirements for personal record requests, the time limits to send out a Notice to Requester or Acknowledgment and to provide the requested records are sometimes different from those for government record requests.

3. Verification of Identity for Personal Record Requests:

A requester may be on the mainland or another island, so the rules do not require the requester to show up in person to make a record request. To verify the requester's identity, an agency may accept a scanned, mailed, or faxed copy of the requester's driver's license, passport, social security card, library card, or other identifying documentation. For particularly sensitive materials, an agency may require the requester to bring his/her identification to a notary and sign a notarized verification of the identification. OIP will draft a form for notarized verification as part of its training materials later.