

AMENDMENTS TO PROPOSED RULES OF
THE OFFICE OF INFORMATION PRACTICES
ON AGENCY PROCEDURES AND FEES FOR PROCESSING
GOVERNMENT RECORD REQUESTS

I. INTRODUCTION

On August 31, 1998, the Office of Information Practices ("OIP") held a public hearing on its proposed rules setting forth agency procedures for processing record requests, time limits for agency action, and the fees that an agency may charge for searching, reviewing, and segregating records. After reviewing the testimony received from the public hearing, the OIP has decided to make changes to its proposed rules and to hold a public hearing on its proposed rules as amended. This statement explains only the amendments that the OIP made to its proposed rules.

For a full description and explanation of the proposed rules before these amendments, the OIP had prepared and continues to make publicly available the Impact Statement for Proposed Rules of the Office of Information Practices on Agency Procedures and Fees for Processing Government Record Requests ("Impact Statement"). Among other things, the Impact Statement explains the purposes of the OIP's proposed rules in compliance with the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA").

II. AMENDMENTS TO PROPOSED RULES

The substantive amendments that the OIP made to several of its proposed rules are described below. Those rules to which no substantive amendment was made are listed as having no amendment. Nonsubstantive amendments, such as correcting the numerical references to other proposed rules, were made, where necessary, and are not described in this statement.

A. TITLE AND CHAPTER NUMBERS

Act 137, 1998 Hawaii Session Laws, transferred the OIP from the Department of the Attorney General to the Office of the Lieutenant Governor for administrative purposes. At the first public hearing on the proposed rules, the OIP announced that it would amend the proposed rules to change the title and chapter numbers to conform with Title 2 of the Hawaii Administrative Rules, the title assigned to the Office of the Lieutenant Governor. The change of the rules' title and chapter numbers is mandated by the OIP's transfer to the Office of the Lieutenant Governor.

B. PROPOSED RULE § 2-71-1 "Purpose"

No amendment.

C. PROPOSED RULE § 2-71-2 "Definitions"

The definition of the term "formal request" was amended to clarify that this term encompasses any record request in any

physical form, including electronic or computerized formats. Previously, the term "formal request" was defined as a written request. The Judiciary had testified that an amendment to clarify this term would be helpful.

D. PROPOSED RULE § 2-71-3 "Reporting to the OIP"

This new proposed rule was added to require agencies to report to the OIP concerning the amounts of fees charged by the agencies for searching for, reviewing, and segregating records in response to record requests. Currently, agencies are already required to annually report the number of written record requests they received in their record reports to the OIP, as required by the UIPA, section 92F-18(b), Hawaii Revised Statutes.

The OIP received testimony from the public expressing various concerns about the fees that a requester may be required to pay an agency to search for, review and segregate records in response to a record request. Consequently, the OIP believes that it is important to review and assess what impact the proposed fees will have. Data from agencies concerning their collection of these fees is essential for the OIP's review and assessment.

E. PROPOSED RULE § 2-71-11 "Informal requests for access to government records"

No amendment was made.

F. PROPOSED RULE § 2-71-12 "Formal requests for access to government records"

RIGHTS AND REMEDIES OF REQUESTER

Subsection (a) of this proposed rule previously stated that "[a] person who submits a formal request in accordance with this chapter shall have recourse to the procedures, rights, and remedies under this chapter and chapter 92F, HRS." The OIP received testimony from Sterling Morita of the Society of Professional Journalists ("SPJ") and Ian Lind that this statement implied that requesters of informal requests do not have the same rights under the UIPA to appeal an agency's denial of access to a record to the OIP or to court. The OIP deleted this statement in the proposed rule in order to eliminate this implication.

Notably, most of the procedures set forth in these proposed rules, such as time limits and agency notice requirements, expressly apply only to formal requests. Therefore, a requester wishing to make a request under these procedures must, therefore, submit a formal request.

FORM OF FORMAL REQUEST

In this proposed rule, the requirements for a formal request were amended to clarify that a formal request can be in any physical form, including written or electronic. This clarification is consistent with the amendment to the definition of the term "formal request" in § 2-71-2.

G. PROPOSED RULE § 2-71-13 "Formal request received"

TIME LIMITS FOR AGENCY RESPONSE

The proposed rule combines two previously proposed sections to create a single rule regarding timelines to be followed by an agency in response to a records request. The OIP received testimony criticizing the previously proposed time limits from various members of the public, including Sterling Morita of SPJ, Larry Meacham of Common Cause Hawaii, Beverly Kever from the Journalism Department at the University of Hawaii, Patricia Tummons of Environment Hawaii ("EH"), David Frankel of the Sierra Club's Hawaii Chapter, and Ian Lind. Generally, the testimony against the previously proposed time limits asserted that these time limits would result in unreasonably long delays in access to the records because it is presumed that agencies will always take the full time period allowed in order to respond.

This proposed rule was amended to achieve two results:

(1) simplify the agency response procedures by setting both the time limits and agency actions required in one provision, to which the agencies and the public can refer in order to determine which requirements apply; and (2) reduce the time spent by agencies in disclosing records.

As for records that, under section 92F-12, Hawaii Revised Statutes, are public in their entirety, or other totally public records, the agencies must disclose the records within ten business days after receiving the request, and no time extensions are provided. However, for records that will be disclosed partially and, therefore, require segregation, the agency time to review and determine its response remains at ten business days, but the time to actually make the disclosure was reduced from ten business days to five business days.

The proposed rule sets forth in new subsections (a) through (c) the three categories for classifying record requests and the corresponding time limits and agency requirements. Below is a summary of the three categories.

RECORDS THAT ARE PUBLIC IN THEIR ENTIRETY UNDER §92F-12, HRS

Under the previous version of the proposed rules, an agency could choose either to disclose a record within ten business days or to provide a notice within ten days, and disclose within

another ten business days. This proposed rule was amended to provide that, upon request, an agency must always disclose within ten business days any records that are required to be disclosed under section 92F-12, HRS, in their entirety, or any other records that are public in their entirety.

Where a record is public in its entirety, an agency would not need to provide a notice to describe any part of the record that will not be disclosed. Furthermore, there would not be any review and segregation fees that would be collected. There should be little, if any, search fees that would be collected since proposed rule § 2-71-31 was amended to give \$30 of "free time" in fees. Therefore, it would be reasonable to require agencies to disclose such records within ten days upon request.

RECORD THAT MUST BE SEGREGATED OR WILL NOT BE DISCLOSED

Where an agency receives a request for access to a record that is not public in its entirety and must segregate portions of this record, the agency must send the requester a notice within ten business days and disclose the public portions of the record within five business days after giving the notice. In the previous draft of the proposed rules, the time limit for record disclosure after giving notice was ten days.

Where an agency requires a prepayment of estimated fees in accordance with proposed rule § 2-71-19, the five-day time limit

for an agency to disclose a record after giving notice does not begin until after the prepayment is received. Furthermore, an agency may choose to disclose voluminous records incrementally where the agency meets the criteria for incremental disclosure set forth in § 2-71-15.

EXTENUATING CIRCUMSTANCES

Where extenuating circumstances exist, agencies may choose to provide an acknowledgment letter within ten business days after receiving the request, to be followed by notice and disclosure. However, the agency must provide notice within twenty business days of receiving the request and disclose the record five business days after notice. This provides the agency with a twenty-business day period to deal with the extenuating circumstances and a further five-business day period to prepare the record for disclosure.

Unlike the previous version of the proposed rules, the revised rules has no provision allowing a thirty-day extension to the time limit for record disclosure after notice on the basis that extenuating circumstances exist. However, if extenuating circumstances exist and the requested records are voluminous, the agency may still choose to disclose the records incrementally in accordance with § 2-71-15.

DIRECTING A REQUEST TO ANOTHER UNIT OF THE AGENCY

Both Sterling Morita of SPJ and Ian Lind testified that a previous provision of this proposed rule unreasonably required a requester to re-submit a record request to an agency just because the requester had originally submitted the request to a unit of the agency that did not maintain the record.

Consequently, this proposed rule was amended to require that when a unit of an agency receives a request for a record maintained by another unit of the agency, the receiving unit must forward the request to the head of the unit's department for referral.

H. PROPOSED RULE § 2-71-14 "Agency notice"

Both Sterling Morita of SPJ and Ian Lind testified that the description of records as "confidential" in subsection (b) of this proposed rule is confusing because several of the UIPA exceptions are discretionary. Therefore, the term "confidential" was changed to read "will not be disclosed." For consistency, this change in terms was also made in other proposed rules that had used the term "confidential."

This subsection (b) was also revised to clarify that an agency must cite the "specific" authorities under which access to request is denied. Specifically, an agency should cite the actual exception under the UIPA that the agency is relying upon

in denying access to a record. Sterling Morita of SPJ had testified that a requester should be informed of the specific citations for withholding each part of a record.

I. PROPOSED RULE § 2-71-15 "Extenuating circumstances"

This proposed rule was previously numbered as § 5-41-16. The previous version of this proposed rule set forth the time limits for disclosure of requested records. As explained in the discussion of proposed rule § 2-71-13, the time limits have been incorporated into the revised proposed rule § 2-71-13, and the original text of proposed rule § 5-41-15 was deleted. Consequently, proposed rule § 5-41-16 was renumbered as § 2-71-15. No substantive changes were made to the original version of this renumbered proposed rule.

J. PROPOSED RULE § 2-71-16 "Requester's responsibilities"

NO WRITTEN ASSURANCE OF FEES REQUIRED

This proposed rule was previously numbered as § 5-41-17. In this proposed rule, the OIP removed a previous provision concerning the requester's responsibility to provide written assurance of payment. Because the time limit for disclosure of a record was shortened to five business days after the agency has given notice, an agency should already have a fairly accurate estimate of the fees that may be assessed.

TIME LIMIT IN BUSINESS DAYS

As suggested in testimony by Patricia Tummons of EH, Sterling Morita of SPJ and Ian Lind, this proposed rule was amended to provide requesters twenty "business" days rather than just twenty calendar days before a requester is presumed to have abandoned a request under subsection (b). This change was made to be consistent with other proposed rules' time limits that are provided in terms of business days rather than calendar days.

K. PROPOSED RULE § 2-71-17 "Segregation of information in records"

This proposed rule was previously numbered as § 5-41-18. No substantive amendment was made.

L. PROPOSED RULE § 2-71-18 "Location of disclosure"

This proposed rule was previously numbered as § 5-41-19. No substantive amendment was made.

M. PROPOSED RULE § 2-71-19 "Assessment of fees"

ANY OTHER LAWFUL FEES

This proposed rule was previously numbered as § 5-41-20. Subsection (a) of this proposed rule previously specified possible agency services for which fees may be assessed as permitted by law, ordinance or agency rule. The OIP simplified this subsection so that it recognizes that an agency may charge

any other "lawful fees" in addition to the fees that may be assessed as authorized by this chapter.

NO WRITTEN ASSURANCE OF FEES REQUIRED

The OIP also removed a previous provision concerning the requester's responsibility to provide written assurance of payment. Because the time limit for disclosure of a record was shortened to five days after the agency has given notice, an agency should already have a fairly accurate estimate of the fees that may be assessed.

N. PROPOSED RULE § 2-71-20 "Public access to disclosable records provided by a secondary source"

This proposed rule was previously numbered as § 5-41-21. No substantive amendment was made.

O. PROPOSED RULE § 2-71-31 "Fees for searching for, reviewing, and segregating records; exceptions"

INITIAL \$30 OF FEES NOT ASSESSED

The OIP added to this proposed rule the provision that no requester shall be assessed for the first \$30 in fees for the search for, review or segregation of records in any combination of such fees. The OIP received testimony from Larry Meacham of Common Cause and other members of the public expressing concerns about the assessment of these fees in light of the UIPA's purpose of promoting public access to government records.

Testimony from Sterling Morita of SPJ and Ian Lind also questioned whether such fees justify the administrative burden upon agencies to collect and deposit these fees.

The OIP believes that the proposed rule's provision of the initial \$30 of "free time" for an agency's search for, review and segregation of records will mean that no fees will be charged for most requests that are typically not complicated and do not entail processing voluminous amounts of records. In turn, agencies would not need to process the small amounts of fees that would be collected from the majority of requests that they must process.

Furthermore, the OIP believes that the initial \$30 of "free time" in search, review and segregation fees, as set forth in this amended rule furthers the public interest behind the UIPA, particularly in light of the 100 per cent increase in copying fees mandated by Act 311, 1998 Hawaii Session Laws. The statutory increase in copying fees was passed by the Legislature after the OIP had originally proposed the fees set forth in this chapter. Notably, the UIPA does not give the OIP authority over copying fees.

NO REVIEW AND SEGREGATION FEES FOR ENTIRELY PUBLIC RECORDS

This proposed rule currently provides that no fee shall be assessed under this chapter where it is not necessary for the

agency to search for, review, or segregate a record in order to permit inspection or duplication. The OIP did not amend this provision. However, the OIP wishes to emphasize that, under this proposed rule, no fees for the review and segregation of records can be charged where access is requested to records that are public in their entirety, including records listed in section 92F-12, Hawaii Revised Statutes. Section 92F-12, Hawaii Revised Statutes, lists records that are required to be disclosed "[a]ny provision to the contrary notwithstanding." Ian Lind had testified that this chapter's fees should not apply to such records specifically required to be readily available.

P. PROPOSED RULE § 2-71-32 "Waiver of fees when public interest served"

This proposed rule was amended by increasing the cap on the waiver from \$30 to \$60 so that persons who qualify for the waiver will have a significantly greater amount of time spent by agencies searching for, reviewing, and segregating records that will be free of fees for these services.

Several persons have testified that the OIP should remove this cap on the amount of fees that can be waived. However, the criteria for this waiver was intended to be broad enough to encompass requesters such as non-profit organizations, public interest media groups, community newsletters, etc., so long as

the requester can show "the primary intention and the actual ability to widely disseminate information from the government to the general public at large." Thus, the scope of persons who would qualify for the waiver could conceivably go beyond reporters for the established daily newspapers.

Because the waiver is intended and may be used by a wide range of persons who qualify for the waiver, there will be multiple claims upon the government resources that are funded by taxpayers. Persons who qualify for the waiver should be encouraged to take advantage of it; however, their record requests to agencies should focus on the government information that will effectively meet their objectives in the public interest so that their requests are largely covered by the fee waiver.

Q. PROPOSED RULE § 2-71-33

The term "determined to be confidential" was changed to "will not be disclosed."

