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

I. INTRODUCTION

The Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), requires the Office of Information Practices ("OIP") to adopt certain administrative rules as follows:

> **§92F-42 Powers and duties of the office of information practices.** The director of the office of information practices:
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> . . . .
>
> (12) Shall adopt rules that set forth an administrative appeals structure which provides for (A) agency procedures for processing records requests; (B) a direct appeal from the division maintaining the record; and (C) time limits for action by agencies;
>
> (13) Shall adopt rules that set forth the fees and other charges that may be imposed for searching, reviewing, or segregating disclosable records, as well as to provide for a waiver of such fees when the public interest would be served;
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> . . . .

Haw. Rev. Stat. § 92F-42(12), (13) (1993). Consequently, the OIP is proposing rules in chapter 41 of Title 5, Hawaii Administrative Rules, that will set forth agency procedures for processing records requests, time limits for agency action, and the fees that an agency may charge for searching, reviewing, and segregating records.

Every state and county government agency, as defined in proposed rule § 5-41-2, shall be governed by these rules. The

proposed rules in this chapter specifically relate to those procedures and policies that all agencies must follow when responding to records requests under part II of the UIPA. The OIP's proposed rules concerning the appeals procedures to be followed when an agency denies access to a record will be set forth in another chapter.

In December 1995, the OIP circulated an initial draft of these proposed rules to other State and county agencies. The OIP received written comments and suggestions concerning the draft rules, and held six meetings to discuss the draft rules with representatives from agencies of the State and the City and County of Honolulu. In response to the agencies' suggestions and concerns raised in the written comments and at the meetings, the OIP amended the draft rules. This impact statement identifies those rules provisions that the OIP proposed or amended in response to the feedback from agencies.

II. PROPOSED RULES AND EXPLANATIONS

A. PROPOSED RULE § 5-41-1

(Purpose)

EXPLANATION OF PROPOSED RULE § 5-41-1

This proposed rule sets forth the purpose of the rules in this chapter. As explained in the "Introduction" of this Impact Statement, the UIPA requires the adoption of rules setting forth the matters described in this rule. See Haw. Rev. Stat. § 92F-42(12), (13) (1993). This set of proposed rules is limited

to setting forth the procedures for responding to requests for public access to records, while the procedures for responding to requests from individuals for personal records about themselves will be set forth in another chapter that is not discussed in this impact statement.

The purpose of establishing fees is to allow agencies to recoup some costs in responding to requests for government records rather than having to provide the search, review and segregation services entirely at taxpayers' expense. The proposed rules do provide agencies the option of establishing their own fees for the search, review, and segregation of records that are limited to the actual costs of providing these services. This option is proposed for those agencies that informed the OIP of their operational requirements to recoup the actual costs in providing these services. Although this option prevents the uniform application of one fee schedule, the OIP recognizes that one fee schedule cannot practically address the different needs and circumstances of all the State and county agencies that will be governed by the OIP's rules.

However, the assessment of fees for search, review, and segregation is not intended to obstruct public access to disclosable government records. Thus, under these proposed rules, the fees shall not exceed the actual costs in providing the services. The UIPA's legislative history states:

> It is the intent of your Committee that such charges for search, compilation, and segregation shall not be a vehicle to prohibit access to pubic records. It is the

> further intent of your Committee that the Office of Information Practices move aggressively against any agency that uses such charges to chill the exercise of first amendment rights.

H. Stand Comm. Rep. No. 342-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 969, 972 (1988).

B. PROPOSED RULE § 5-41-2

(Definitions)

EXPLANATION OF PROPOSED RULE § 5-41-2

This proposed rule provides the definitions for terms used in this chapter. Definitions for the terms "access," "record," and "requester" underscore that these proposed rules address procedures for responding only to requests for access to public records, and not to requests for access to one's own personal records. As requested by agencies, the OIP included definitions for the terms "disclosable record," "formal request," "informal request," and "prepayment."

This chapter uses certain terms and their definitions from the UIPA. Although several agencies have asked that this proposed rule repeat the UIPA's definitions rather than merely refer to the UIPA, the OIP finds that, as a practical matter, the reference to the UIPA eliminates the need to amend this rule should the definitions in the UIPA be amended later. Furthermore, in accordance with the rulemaking format set forth by the revisor of statutes, administrative rules should incorporate applicable sections of the Hawaii Revised Statutes by reference and should not repeat the statutory sections. See Haw. Rev. Stat. § 91-4.2 (1993); Hawaii Administrative Rules Drafting

Manual 2d ed. § 00-4-2(a)(1989).

The definition of the term "government record" that is used in the UIPA and, in turn, these proposed rules, is broad because it encompasses any record in any physical form that is maintained by an agency. See Haw. Rev. Stat. § 92F-3 (1993). Hence, the term "government record" includes unofficial copies of another agency's records, records that are in an agency's temporary possession or retention, and records that are publicly available elsewhere. Agencies must comply with the procedures set forth in these proposed rules when receiving a request for any government record.

The definition of the term "maintain" is taken from the Uniform Information Practices Code, a model code that was drafted by the National Conference of Commissioners on Uniform State Laws and upon which the UIPA was modeled. The OIP has issued several advisory opinions that refer to the Model Code's definition of the term "maintain." See, e.g., OIP Op. Ltr. No. 92-25 (Dec. 22, 1992); OIP Op. Ltr. No. 95-15 (May 8, 1995).

In addition, several other terms used in this chapter, and their definitions, are modeled upon similar provisions of the federal Freedom of Information Act, 5 U.S.C. § 552 (1988) ("FOIA"), and the Uniform Freedom of Information Act Fee Schedule and Guidelines, established by the federal Office of Management and Budget ("OMB Guidelines"). It is useful for the OIP to refer to the FOIA provisions and OMB Guidelines for guidance because most State and county agencies have not established agency

procedures or fees for the search, review, and segregation of records to which the OIP could refer.

In particular, the definitions for the terms "search," "review," and "segregate" are modeled after those used in the OMB Guidelines. 52 Fed. Reg. 10012, 10017 (1987). As defined in the OMB Guidelines, the term "review" does not include the time spent resolving issues of general law or policy about the application of exemptions from disclosure. This part of the definition repeats the express qualification on review fees set forth in the FOIA, 5 U.S.C. § 552(a)(4)(A) (1988).

Similarly, proposed rule § 5-41-2 includes this qualification in the definition of the term "review," so that no fee for review of a record is charged for time spent by the agency, the OIP, or any other person or agency that has an interest in the record, to resolve issues about access. The OIP is developing a training program about the UIPA for agencies so that they become more familiar with and can readily apply the UIPA's access provisions, as well as the procedures set forth in these proposed rules. Also, as defined, the term "review" does not include the time spent by an agency in assessing what records are being requested for access, preparing a notice in accordance with proposed rule § 5-41-14, or returning a record back to its original location.

Notably, the definition of the term "access" covers both inspection and copying of a government record. The UIPA allows both inspection and copying of any record that is not exempt

under the UIPA's exceptions. Thus, the procedures in these proposed rules must address both inspection and copying of records.

C. PROPOSED RULE § 5-41-11

(Informal requests)

EXPLANATION OF PROPOSED RULE § 5-41-11

Informal requests are treated outside the formal procedures established under the UIPA and these proposed rules. As explained in proposed rule § 5-41-12, and for evidentiary purposes, a person has recourse to the procedures, rights, and remedies under these proposed rules and the UIPA only when the person has submitted a formal request. For this reason, proposed rule § 5-41-11, provides that a request is presumed to be and shall be treated as a formal request when the request complies with proposed rule § 5-41-12, which lists the contents required of a formal request. A requester and an agency may agree to treat a formal request as an informal request, and the agency should make a note of this agreement on the request.

This proposed rule explains that requesters may informally make requests for access to records in any form--in person, by telephone or e-mail, or by any other method. An agency receiving an informal request has the option of working on the informal request, or instructing the requester to submit a formal request. The agency may charge the appropriate fees for responding to informal requests as provided under proposed rule § 5-41-20.

An agency may find it expedient and efficient to act upon

informal requests as often as possible, and may set their own procedures on how to respond to them. Many agencies already have existing procedures for responding to requests that agencies can continue to follow when responding to informal requests. For example, an agency that receives an informal request may orally inform a requester that the record requested for access is confidential or is not maintained by the agency.

The OIP cautions that agencies cannot prohibit a requester from using an alias or require the requester to reveal the requester's identity or business affiliation when the requester is seeking access to disclosable records. See OIP Op. Ltr. No. 90-29 (Oct. 5, 1990) (in general, if a record is subject to public inspection, any person may inspect and copy the record).

When an agency denies access to a record that was the subject of an informal request, this proposed rule provides that the requester then has the option of submitting a formal request for the same record in order to have recourse to the procedures, rights, and remedies afforded by these rules and the UIPA, including the time limits for agency action and the right to appeal an agency's denial of access.

D. Proposed Rule § 5-41-12

(Formal requests)

EXPLANATION OF PROPOSED RULE § 5-41-12

This proposed rule explains that, by submitting a formal request for access to a government record, the requester shall be afforded the procedures, rights, and remedies provided under

these proposed rules and the UIPA. This proposed rule then describes that a formal request must be in writing and must contain the items of information listed in this rule.

Formal requests help to minimize unnecessary misunderstandings between an agency and the requester concerning whether the requester has, in fact, requested access to records, and which particular records are the subject of the request. As discussed later, an agency may ask the requester to clarify the request for particular records. An agency may prefer to require requesters to submit all requests as formal requests; however, the agency must then comply with the procedures set forth in these rules, including providing written notice, when required, and adhering to time limits for responding and providing access to records. When the OIP provides training to agencies on these rules after they are adopted, the OIP will provide a sample formal request format that agencies and the public can use as a model formal request.

Right to Appeal Denial of Record Access

Importantly, a requester's right to appeal an agency's denial of access to a record is one of the rights afforded to a requester who submits a formal request. Under section 92F-15, Hawaii Revised Statutes, any person aggrieved by an agency's denial of access to a record may bring an action to compel disclosure in circuit court within two years after the agency's denial. Also, under section 92F-15.5, Hawaii Revised Statutes, the person may file an administrative appeal of an agency's

denial with the OIP.

A formal request and the agency's written response provide the best evidence of the facts so that review by the OIP or the court is focused on resolving legal issues concerning access to the records, rather than factual issues regarding the records requested and the agency's response. As a requester can bring a court action up to two years from the time of the agency's denial, the formal request and the agency's response to it may be the only evidence documenting the submission of a request and the failure of the agency to respond. The time limits for filing an appeal with the OIP will be set forth in administrative rules in another chapter that the OIP is required to adopt in accordance with section 92F-42(12), Hawaii Revised Statutes.

Required Contents of a Formal Request

This proposed rule requires the requester to provide certain items of information in a formal request. These items include information that would allow the agency to correspond with or contact the requester, which may consist of a name (including an alias), mailing address, and telephone number where the requester may be reached. This requirement does not make the actual name of the requester a condition for access to a record, but rather only allows the agency to contact and correspond with the requester regarding the request. If a requester is uncomfortable providing the requester's actual name, the formal request is valid even if the requester provides a pseudonym or alias so long as the requester ensures that mail or telephone calls will be

properly routed to the name, mailing address, and telephone number provided in the request.

Notably, however, if the formal request includes a request for a waiver of fees in the public interest, the requester's identity is part of the information that must be provided in order to determine whether the request qualifies for the waiver.[1]

The requirement that a formal request must provide a reasonable description of the record requested is similar to the FOIA's requirement that requests "reasonably describe" the records sought. 5 U.S.C. § 552(a)(3)(A) (1988). According to the FOIA's legislative history, a description is sufficient if it enables a professional federal employee, who is familiar with the subject area, to locate the record "with a reasonable amount of effort." H.R. Rep. No. 876, 93d Cong., 2d Sess. 6 (1974). If possible, the description should include the record name, subject matter, date, location and any other additional information that reasonably describes the requested record.

If the requester believes that a waiver of fees would serve the public interest in accordance with proposed rule § 5-4-32, the requester should request the waiver in the formal request for records, and provide a statement of facts supporting the waiver request. A requester's statement of belief that the requester is

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[1]When an individual requests access to personal records about the individual, the individual must provide verification of the individual's identity. Verification of an individual's identity will be set forth in the OIP's proposed rules in another chapter regarding procedures for an individual's access to personal records.

entitled to a waiver is not determinative. Rather, the agency must determine, from the statement of facts provided by the requester, whether the requester meets the criteria for a waiver under proposed rule § 5-41-32.

A requester must state in the formal request whether inspection or duplication of the record, or both, is being requested. Proposed rule § 5-41-19 provides guidance regarding the location of inspection and the means of providing a copy. As previously explained with regard to the definition of the term "access," the UIPA allows both inspection and copying of any record that is not exempt under the UIPA's exceptions. Thus, the procedures in these proposed rules must address equally both inspection and copying of records.

Several agencies have inquired about what actions they must take to comply with the federal Americans With Disabilities Act ("ADA") when a requester is unable to prepare a formal request because of a disability. Agencies should consult with their deputies attorney general or corporation counsel regarding compliance with other State and federal laws, such as the ADA, that are outside of the OIP's jurisdiction. Generally, when a requester cannot prepare a formal request, for example, because of illiteracy, the requester may have another person assist in preparing the actual formal request in writing. The UIPA neither prohibits or requires that an agency provide such assistance.

D. PROPOSED RULE § 5-41-13

(agency response to formal request)

EXPLANATION OF PROPOSED RULE § 5-41-13

This proposed rule requires the agency to respond to a formal request within ten business days after receiving a formal request. The agency must respond to a formal request for access to a government record that the agency maintains in one of the following ways: (1) provide a written notice, (2) disclose any disclosable record requested, (3) deny access to confidential information, or (4) provide a written acknowledgement. The OIP's first draft of these proposed rules had required an agency, in all cases, to provide a written notice within ten days of receiving a formal request. In response to comments received from agencies, this proposed rule has been redesigned to provide additional options so that an agency may determine the most efficient manner of initially responding to a formal request.

When an agency sends either a written notice or written acknowledgement to a requester by mail, the cancellation mark of the mailed notice or acknowledgement may be considered evidence of compliance, or lack thereof, with this proposed rule's time limit of ten business days. This proposed rule's time limit is similar to the time limit set forth in the FOIA. Under FOIA, a federal agency must determine within ten business days after receiving a FOIA request whether to comply with the request, and must promptly inform the requester of its determination. 5 U.S.C. § 552(a)(6)(A) (1988).

AGENCY NOTICE

Several agencies noted that a written notice in response to

each and every formal request adds to agencies' workload. Hence, this proposed rule allows an agency to provide access to a record within the ten business day period without having to provide a written notice when the agency will be charging fees of $15 or less for processing the request under proposed rule § 5-41-20. However, when an agency is denying access to a record, the agency must provide the written notice that sets forth the information required under proposed rule § 5-41-14(b). This notice sets forth the information about the agency's denial of access that may be reviewed by the court or the OIP if the requester decides to appeal this denial. The requirement that an agency's denial of access, as well as the request itself, be in writing best serves the appeals process by allowing the focus of an appeal to be on the legal issues rather than issues of fact.

Under this proposed rule, an agency would provide a written notice to the requester when the fees for processing the request exceed $15, or when the agency will not be providing record access within the ten business day period. Proposed rule §5-41-14 sets forth the items of information that the agency's notice must contain. Written notice is required to be provided so that the requester is informed about the estimated amount of fees that will be charged for processing the record request. Upon receiving this notice, the requester may choose to modify or abandon the record request in order to reduce the fees that will be charged. Also, under proposed rule § 5-41-14, the agency's notice may instruct the requester to make a prepayment consisting

of the estimated fees before the agency begins processing the request. If prepayment is required, an agency is not required to begin processing the request until prepayment is received in accordance with proposed rule § 5-41-15. Hence, a written notice allows both the requester and the agency to receive important information from each other regarding the processing of the request.

AGENCY ACKNOWLEDGMENT OF REQUEST RECEIVED

When the OIP circulated the first draft of these proposed rules, several agencies noted that there may be extenuating circumstances that prevent an agency from even providing written notice within the ten-business-day period after receiving the request. For this reason, where such extenuating circumstances do exist, this proposed rule provides agencies the alternative of sending a written acknowledgment of the request informing the requester that the agency will send the written notice within ten business days thereafter. The written acknowledgment can be a simple form letter. Thus, sending a written acknowledgment should not unjustifiably increase an agency's paper workload, but rather it allows an agency ten extra business days to prepare the written notice when extenuating circumstances exist.

DIRECTING A REQUEST TO ANOTHER UNIT OF THE AGENCY

Subsection (b) of proposed rule § 5-41-13 gives options to a unit of an agency about handling a record request that it received but that should have been directed to another unit of the agency. Several agencies informed the OIP that their

agencies consist of several satellite locations and that these satellite locations may find it difficult to be responsible for forwarding all requests to the appropriate unit that will respond to the requests, as was provided in this proposed rule's previous draft version. Under this proposed rule's current version, an agency may choose to select just one of these options to apply consistently to all misdirected requests and instruct all of its units accordingly. In response to agencies' comments, subsection (c) of this proposed rule clarifies that the time limit for responding to a request does not begin until the appropriate unit of the agency for responding to the request receives the request.

E. PROPOSED RULE § 5-41-14

(agency notice)

EXPLANATION OF PROPOSED RULE § 5-41-14

The contents of an agency's notice to a requester depends upon whether the agency intends to disclose or deny access to information in the requested record, or is unable to disclose the requested record for one of several reasons set forth in this proposed rule. Thus, the notice requires the agency to preliminarily review the request to determine: (1) what record is being requested or if a better description is needed, (2) whether the record requested is maintained by the agency and, if so, (3) whether the record is disclosable, confidential, or both. The notice requirements for incremental disclosure are discussed in the explanation of proposed rule § 5-41-16.

AGENCY INTENDS TO DISCLOSE RECORD

When an agency intends to disclose the requested record and will charge fees for responding to the record request, as authorized by proposed rule § 5-41-20, the agency must include in the notice an estimate of the fees and the amount of the prepayment, if any, that the requester must tender in accordance with proposed rule § 5-41-20. When informed of the estimated fees in the notice, the requester may choose to modify or abandon the request to reduce the fees that will be assessed.

The agency's notice must also give information about the location when the record will be available to the requester, as well as any instructions to the requester regarding any additional arrangements that the requester must make to inspect or copy the records. For example, the notice may instruct the requester to call an agency employee to schedule a date and time to come in and inspect records.

AGENCY INTENDS TO DENY ACCESS TO INFORMATION IN RECORD

When an agency intends to deny access to information in the requested record, the agency's notice must state each part of the record that the agency is keeping confidential, and the legal authority, under the UIPA or other laws, for keeping that part confidential. This information about the agency's denial of access will be reviewed by the court or the OIP if the requester decides to appeal this denial. The requirement that an agency's denial of access, as well as the request itself, be in writing best serves the appeals process by allowing the focus of an

appeal to be on the legal issues rather than issues of fact (i.e., whether in fact the agency denied access).

This proposed rule requires only that the agency's notice cite the applicable legal authority for confidentiality. As previously mentioned, the OIP will make training available to the agencies about the UIPA so that the agencies will be familiar with the UIPA's provisions, particularly with the UIPA's exceptions to disclosure so that the agencies can readily cite them. With regard to problematic records, the agency may also consult the OIP.

The OIP's previous version of these draft rules had required agencies to specifically explain the basis for keeping information confidential, but agencies informed the OIP that this requirement would require legal expertise that agency personnel preparing the notice do not have. However, if the requester appeals the agency's denial of access, the agency should be prepared to reasonably explain why they believe that the UIPA provision, or other law, cited provides the legal authority for keeping the information confidential.

Where a requested record is made public after certain confidential portions are segregated, the agency's notice must meet the requirements of both subsections (a) and (b) of proposed rule § 5-41-14. Specifically the agency must: (1) inform the requester that access to the disclosable part of the record will be provided after the specified procedures are followed, as well as (2) describe the parts that are confidential and cite the

legal authority for the denial of access.

AGENCY IS UNABLE TO DISCLOSE REQUESTED RECORD

When an agency is unable to provide access to a requested record for one of the reasons provided in this proposed rule, the agency's notice must explain why the agency is unable to do so. From the agency's notice, the requester should be able to determine what actions to take, namely whether to request the records from another agency that has the record requested, or submit further description or clarification of the record.

When an agency asserts that it does not maintain the record, the assertion should be based upon the agency's reasonable belief derived from its understanding of its record systems and its actual efforts to locate the requested record. An agency has a duty to conduct a reasonable search for the requested record, and should document the efforts taken to search for the record. The adequacy of the search can be challenged on an appeal. See generally United States Dep't of Justice, Freedom of Information Act Guide & Privacy Act Overview 24-25 (Sept. 1995) (discussion of the adequacy of an agency's search for responsive records under the FOIA).

Under section 92F-11(c), Hawaii Revised Statutes, agencies are not required to compile information in response to a records request, unless the information is readily retrievable. The language of this statute is identical to section 2-102(b) of the Uniform Information Practices Code, entitled "Duties of Agency."

The commentary to this section of the Uniform Information Practices Code states:

> The policy [of not requiring an agency to compile information] . . . is most important to agencies with manual record systems. In computerized record systems, however, agency retrieval capabilities are significantly greater . . . [Therefore t]he request . . . [should be granted] if the data could be routinely compiled, given the existing programming capabilities of the agency.

[Emphasis added.] Uniform Information Practices Code, Comment to section 2-102(b) [Duties of Agency]. See also OIP Op. Ltr. Nos. 90-35 (Dec. 17, 1990) and 92-7 (June 29, 1992).

As each agency has unique and varied degrees of programming capabilities and each agency faces different restraints upon its ability to respond to a records request, the OIP has determined that specific rules in this area may be unduly restrictive to both the agency and the requester. Therefore, the question of what is readily retrievable should be decided on a case-by-case basis, giving due consideration to the factors set forth in OIP's opinion letters on this subject matter.

If an agency determines that a summary or compilation of information is readily retrievable, then an agency may, where extenuating circumstances exist, take additional time to prepare the summary or compilation in accordance with proposed rule § 5-41-16, or the agency may choose to disclose the information incrementally if the criteria for incremental disclosure are met.

F. PROPOSED RULE § 5-41-15

(time limits for disclosure)

EXPLANATION OF PROPOSED RULE § 5-41-15

This proposed rule sets forth the time limits that an agency must follow when disclosing records under the UIPA. In those cases where the agency requires, from the requester, a prepayment or written assurance of fees payment in accordance with proposed rule § 5-41-20, an agency is not required to disclose the records until after receipt of the requester's prepayment or written assurance. In this way, an agency is not required to further process the request should the requester chooses not to provide the prepayment or written assurance and, thus, abandons the request as provided in proposed rule § 5-41-17.

Furthermore, this proposed rule recognizes that, when extenuating circumstances exist in accordance with proposed rule § 5-41-16, an agency may be unable to process a record request within the time limit of ten business days set for most requests. Therefore, the proposed rule allows an agency up to thirty additional business days to provide access to records where extenuating circumstances exist, and further allows the agency to disclose records incrementally if the criteria for incremental disclosure in proposed rule § 5-41-16 are met. Where the agency will be extending the time period for responding to a request, in accordance with proposed rule § 5-41-14, the agency must state in the notice to the requester both the extenuating circumstances that justify this extension, as well as the date when the agency will disclose the record, or the first increment if disclosure will occur incrementally. The time limits for disclosing records

incrementally will be discussed in the explanation of proposed rule § 5-41-16.

In comparison, the FOIA only specifies a time limit of ten business days for federal agencies to notify requesters of their decision to grant or deny access to requesters, and access to disclosable records should be granted promptly thereafter. The FOIA does allow an extension of up to ten additional days for federal agencies to provide notice under situations that are specified by the FOIA to qualify as "unusual circumstances." 5 U.S.C. § 552(a)(6)(B) (1988). Unlike federal agencies that have FOIA offices or officers to exclusively handle requests for records access, State and local agencies generally must juggle their duties under the UIPA with other statutory duties. For this reason, this proposed rule § 5-41-15 provides a longer time extension of thirty days than is provided under the FOIA for responding to a request where extenuating circumstances exist.

G. PROPOSED RULE § 5-41-16

(extenuating circumstances;incremental disclosure)

EXPLANATION OF PROPOSED RULE § 5-41-16

EXTENUATING CIRCUMSTANCES

This proposed rule defines what qualifies as "extenuating circumstances," under which an agency has up to thirty additional business days to respond to a formal request.[2]

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[2]In comparison, the UIPA allows an agency up to twenty additional working days to respond to an individual's request for access to personal records about that individual if the agency provides to the individual "a written explanation of the unusual circumstances causing the delay." Haw. Rev. Stat. § 92F-23

In comparison, under FOIA, a federal agency may extend the time period for responding to a request up to an additional ten business days in "unusual circumstances," which FOIA defines as three specific situations: (1) the need to search for and collect records from separate offices; (2) the need to examine a voluminous amount of records in order to respond to the request; and (3) the need to consult with another agency or agency component. 5 U.S.C. § 552(a)(6)(B) (1988).

This proposed rule's criteria for "extenuating circumstances" include consideration of those factors which affect an agency's ability to respond to a request as well as the efforts an agency must perform to respond to that particular request. Thus, this criteria is broader than the FOIA's criteria for "unusual circumstances." As previously noted, unlike federal agencies that have FOIA offices to exclusively handle record requests, State and county agencies generally do not have staff assigned only to responding to record requests. This proposed rule expressly recognizes that agencies must juggle several statutory duties and functions at the same time by including, as an extenuating circumstance, the agency's need for additional time to respond to a request in order to avoid an unreasonable interference with its other statutory duties and functions.

When an agency believes that it needs additional time to

(1993). This standard of "unusual circumstances" is more stringent than the standard of "extenuating circumstances" used in proposed rule § 5-41-16.

respond to a request because extenuating circumstances exist in accordance with this proposed rule, the agency must reasonably explain the extenuating circumstance in the agency's notice. If a requester disputes the existence of extenuating circumstances, the requester may file a complaint with the OIP, and the OIP will investigate the agency's claim of extenuating circumstances. See Haw. Rev. Stat. § 92F-42(8) (1993) (The OIP's powers and duties include "receiv[ing] complaints from . . . the public regarding the implementation of" the UIPA).

INCREMENTAL DISCLOSURE

This proposed rule explains the procedure for providing access to disclosable records incrementally. As requested by several agencies, this proposed rule was designed as a comprehensive section to cover all steps that need to be taken when an agency discloses records incrementally. Thus, guidance regarding agency notices and time limits for incremental disclosure are found in this proposed rule instead of the proposed rules generally covering agency notice and time limits.

Both the requester and the agency may benefit from incremental disclosure because: (1) the requester will be provided access to the records as the agency is able to make them available, and (2) this method allows the agency more time to process a request for voluminous records when extenuating circumstances also exist.

The OIP deleted a proposed requirement that an agency must provide notice before each increment and, furthermore, extended

the time period between the disclosure of each increment from ten to twenty business days. This version of the proposed rule requires only one agency notice to the requester that, among other things, states the agency's fee arrangement for incremental disclosure. The fee arrangement to be specified by the agency in accordance with this proposed rule will determine the actual spacing of an agency's disclosure of increments. The amount of information that an agency discloses in each increment is determined by the extent to which an agency is able to process the request during the interval of twenty business days.

H. PROPOSED RULE § 5-41-17

(Requester's responsibilities)

EXPLANATION OF PROPOSED RULE § 5-41-17

Under this proposed rule, the requester must take certain steps to support the processing of the record request. The requester must pay any fees assessed under sections 5-41-16 and 5-41-20, make arrangements with the agency to inspect and copy the record, provide written assurance of payment of remaining fees and provide further clarification or description if instructed by the agency.

As to payment of fees, a requester must tender prepayments (which may include a portion of the estimated fee for a pending records request and any outstanding fees from prior record requests) when instructed by the agency's notice under proposed rule § 5-41-14. After tender of the prepayment amounts, the requester must also pay any remaining fees before the agency

makes the requested record available for inspection or copying.

The requester's failure to fulfill the duties in the proposed rule raises the presumption that the request is abandoned. When the request is presumed abandoned and if the agency has already processed the records request, then the requester is liable for any remaining fees assessed by the agency, so long as the agency has informed the requester as to when and where the record would be available for inspection and copying in its notice. The agency may choose to collect the remaining fees for an abandoned request at the time the requester submits another records request or at any other time.

When a request is presumed to be abandoned, an agency need not take any further action to process the request. Thus, the agency may stop preparing a record for inspection or copying, and may undo any previous acts of preparation, for example, by returning a record to its original location, or recycling copies of records made.

This proposed rule recognizes that agencies cannot afford to devote staff time and resources toward processing record requests that a requester is not serious about pursuing. A requester demonstrates commitment to a request by diligently fulfilling the duties set forth in this proposed rule. This proposed rule sets forth a time limit of twenty business days for the requester to fulfill the delineated duties so that the agency will know when it can close a pending request. When a requester is deemed to have abandoned a record request under this proposed rule, the

requester can always submit another request and, thereby, get the processing of the request going again; however, the agency may require the requester to tender a prepayment, which may include any outstanding fees from this previous request, before the agency begins processing the subsequent request in accordance with proposed rule § 5-41-20.

I. PROPOSED RULE § 5-41-18

(Segregation of records)

EXPLANATION OF PROPOSED RULE § 5-41-18

The OIP has previously opined that, under the UIPA, agencies have the duty:

(1) To remove all "reasonably segregable" confidential information from a government record, and

(2) To make the unprotected or "public" information available for public inspection and copying.

See OIP Op. Ltr. No. 89-5 (Nov. 20, 1989); OIP Op. Ltr. No. 90-31 (Oct. 25, 1991); OIP Op. Ltr. No. 91-1 (Feb. 15, 1991); OIP Op. Ltr. No. 95-13 (May 8, 1995).

The UIPA does not expressly direct agencies to segregate confidential information from a record in order to disclose public parts of the record. However, several provisions of the UIPA suggest that agencies have this duty, which is consistent with the UIPA's general principles of access to government records. See Haw. Rev. Stat. § 92F-15(b) (1993) (court may examine the government record at issue, in camera, to assist it in determining whether it, or any part of it, may be withheld) (emphasis added); Haw. Rev. Stat. § 92F-42(13) (1993) (directing the OIP to adopt rules setting forth the fees that may be charged

by an agency for "segregating disclosable records").

The issue of whether a certain record is reasonably segregable must be addressed on a case-by-case basis. If this issue is raised on appeal to the OIP, the OIP will refer to its opinions and the case law for guidance in addressing this issue.

If public information in a record is not reasonably segregable from the record's confidential information, then an agency may keep the record confidential in its entirety. Whether the agency denies access either to a record in part or in its entirety, the agency must state the legal authority for withholding that part of the record. This requirement is explained more fully in this impact statement's explanation of proposed rule § 5-41-14 regarding the information that an agency must provide in its notice to a requester when denying access to a record, or a part thereof.

Subsection (b) of this proposed rule § 5-41-18 clarifies that an agency has a duty to properly segregate a record specifically by removing or replacing information in a manner that is apparent. By properly segregating, the agency provides the requester with the government record that was requested. Otherwise, the agency's failure to provide the record requested may trigger a civil action by the requester seeking injunctive relief and attorney's fees against the agency under section 92F-15, Hawaii Revised Statutes.

Additionally, depending on the circumstances, the improper segregation of information in the described manner could subject

agency employees to criminal liability for "tampering with a government record." This offense is a misdemeanor under section 710-1017, Hawaii Revised Statutes.

In a memorandum dated October 20, 1992, that was sent to all agencies, the OIP suggested a method of properly segregating confidential information from a paper record so that the removal of information is apparent. Briefly, this method involved making a copy of the record, and masking confidential information with a black marker, or correction fluid or tape, on the copy. Then a copy of the segregated version of the record can then be provided to the requester. In order to properly segregate confidential information on an electronic record, an agency may mark "XXXX" over confidential information on a copy of the record.

J. PROPOSED RULE § 5-41-19

(location of disclosure; alternatives)

EXPLANATION OF PROPOSED RULE § 5-41-19

As instructed by this proposed rule, an agency will ordinarily make a record available for public inspection or copying at the location where the agency maintains the record, or where the agency has accommodations for inspection and copying. For example, if a requested record is in storage at a site other than in an office of the agency, the agency would transport the record to an office where it can accommodate the request for inspection or copying.

ALTERNATIVE LOCATION FOR INSPECTION OF RECORDS

With regard to a requester's request for an alternative

location for inspection of a record, several agencies informed the OIP that moving the only originals of records that they maintain to another location puts the records at risk of loss or damage and, thus, jeopardizes the integrity of their recordkeeping systems. The UIPA recognizes that agencies must protect their records from loss or damage. See Haw. Rev. Stat. § 92F-11(e) (1993) (authorizes an agency to adopt rules to "protect its records from theft, loss, defacement, alteration, or deterioration")[3]

OIP will create model rule

Consequently, this proposed rule provides that an agency is not required to accommodate a request for an alternative location for inspection of a record where the record is the agency's only original record. Also, an agency is not required to accommodate this request where the arrangement would unreasonably interfere with the agency's functions. If a requester is unable to go to an agency's location to inspect a record and the agency cannot accommodate the request for an alternative location, the requester may ask for a copy of the record as an alternative and must pay the related copying fees.

However, the OIP expects agencies to recognize the difficulties faced by requesters residing on islands other than the one on which the requested records are located. Therefore, the OIP encourages State agencies to consider and develop methods of accommodating requests for record access from requesters on

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[3]The OIP will be preparing model rules that agencies may adopt under this provision.

other islands that would not jeopardize their records. By doing so, agencies will demonstrate a reasonable effort to accommodate off-island requests. Furthermore, an agency should consult with its deputy attorney general or corporation counsel regarding the actions that the agency must take to comply with the ADA or laws other than the UIPA.

DELIVERY OR TRANSMISSION OF RECORD COPY

Often, a requester may wish to have a copy of a record delivered or transmitted in a certain manner. Under this rule, an agency should make a reasonable effort to accommodate the request, but is not required to do so if the arrangement would unreasonably interfere with the agency's functions. Thus, an agency is not required to make special arrangements for delivery by messenger or courier, but the requester may make the arrangements to have a messenger service pick up the copy from the agency's designated location. In accordance with proposed rule § 5-41-20, an agency may require the requester to tender a prepayment to cover the full amount of any fees for mailing, facsimile or other transmission that the agency is authorized by law, ordinance, or agency rule to charge.

K. PROPOSED RULE § 5-41-20

(Payment of fees; prepayment)

EXPLANATION OF PROPOSED RULE § 5-41-20

This proposed rule acknowledges that an agency may charge fees for services related to the processing of requests for access to records where these fees are authorized by law,

ordinance, or agency rule. If an agency does charge fees for the search, review, or segregation of a record in order to respond to a record request, then the agency shall assess such fees in accordance with the rules proposed in subchapter 3 of this chapter. Haw. Rev. Stat. § 92F-42(13) (1993). All other fees that may be charged for services provided to process a record request are outside the scope of the UIPA and the OIP's jurisdiction.

DUPLICATION FEES

Duplication fees are separate and in addition to the fees for the search, review, and segregation of records that are provided in this chapter. The general statute governing duplication and reproduction fees, section 92-21, Hawaii Revised Statutes, states that "[s]uch reproduction cost shall include but shall not be limited to, labor cost for search and actual time for reproducing, material cost, ..." Haw. Rev. Stat. § 92-21 (Supp. 1995) (emphases added). Because section 92-21 allows the "labor cost for search" of the record to be included in the duplication fee, no agency may charge an additional "labor cost for search" under section 92-21, Hawaii Revised Statutes, if the agency assesses search fees pursuant to subchapter 3 of this chapter.

PREPAYMENT OF FEES

Under this proposed rule, an agency may require a requester to tender a prepayment that may include a portion of the estimated fees for processing a pending request as well as all

outstanding fees from previous requests. The prepayment provision of proposed rule § 5-41-20 ensures that an agency will recoup some costs incurred in processing record requests even when requester may change their minds about their requests after the agency has completed the steps to make the record available. In comparison, the FOIA requires prepayment, or advance payment, of fees only when the amount of fees is likely to exceed $200. 5 U.S.C. § 552(a)(4)(A)(v) (1988).

WRITTEN ASSURANCE OF FEES PAYMENT

An agency may also require a requester to provide written assurance of payment of fees when, after the agency begins processing a record request, the agency determines that the actual fees may exceed the estimated amount by more than $20. If the requester does not provide the written assurance, the requester is presumed to have abandoned the request and the agency need not process the request further. An agency's request for written assurance of fees payment is intended to inform the requester of the expected larger amount of fees to be assessed, and is not intended to allow an agency to delay the processing of the record request.

OUTSTANDING FEES

This proposed rule clarifies that a requester is liable for any fees outstanding from previous requests. An agency may include all outstanding fees as part of the prepayment required before processing a subsequent request in accordance with subsection (b) of this proposed rule. In this case, if the

requester does not make the required prepayment, the requester is presumed to have abandoned the subsequent request under proposed rule § 5-41-17 and the agency is not required to process the record request. However, in the case where the requester is presumed to have abandoned a previous record request, an agency may assess outstanding fees as part of a prepayment for a subsequent request only if, in accordance with subsection (e) of this proposed rule, the agency's notice informed the requester as to when and where the record would be made available.

Fees will not be refunded when the agency has already performed the services for which the fees were paid and the agency's response complies with the UIPA. Thus, if a requester decides to abandon or modify a request after having made a prepayment and the agency has already performed the services to process the request, the requester is not entitled to a refund and will be liable for any remaining fees for services performed.

ITEMIZATION OF FEES

The proposed rule requires an agency to provide an itemized bill of fees assessed when asked by the requester to do so. This requirement enables the requester to find out how fees were assessed without having to file an appeal.

L. PROPOSED RULE § 5-41-21

(Public access to disclosable government records provided by a secondary source)

EXPLANATION OF PROPOSED RULE § 5-41-21

This proposed rule anticipates that an agency may have

arrangements with one or more other persons to serve as a secondary source of information that the agency maintains. Such arrangements may include agreements with commercial information service providers, as well as distribution of information through a municipal store or public information office of an agency.

This proposed rule sets forth the agencies' duties in order to ensure that the agencies' arrangements with secondary sources comply with the UIPA. An agency is not excused from its duties under the UIPA by having an arrangement with a secondary source.[4] A requester cannot be referred to nor required to obtain the records from a secondary source. Therefore, even if an agency has an arrangement for a secondary source to provide public access to disclosable information from its records, the agency itself must disclose the public information when the agency receives the request for the information.

However, an agency may advise a requester that the records are available through a secondary source, as well as any services that the secondary source may offer, for example, more expedient disclosure or enhanced data.

Furthermore, agencies cannot transfer to the secondary source the authority to perform UIPA duties such as reviewing records for confidential information and segregating the

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[4]The UIPA recognizes that agencies must protect their records from loss or damage. See Haw. Rev. Stat. § 92F-11(e) (authorizes an agency to adopt rules to "protect its records from theft, loss, defacement, alteration, or deterioration"). The OIP will be preparing model rules that agencies may adopt under this provision.

confidential information before disclosure. In comparison, the OMB Guidelines allow federal agencies to contract with information service providers for the disclosure of records subject to restrictions similar to those provided in this proposed rule. 52 Fed. Reg. 10012, 10018 (1987).

L. PROPOSED RULE § 5-41-31

(Fees; exceptions)

EXPLANATION OF PROPOSED RULE § 5-41-31

Fee Rates Established by the OIP

This proposed rule states the general principle that an agency may charge fees for the search, review, or segregation of a record when any of these services is necessary to respond to a request for record access. When the agency does charge fees for these services, it shall charge the fees in accordance with this proposed rule.

As previously explained, the UIPA mandates that the OIP "adopt rules that set forth the fees and other charges that may be imposed for searching, reviewing, or segregating disclosable records." Haw. Rev. Stat. § 92F-42(12), (13) (1993). Accordingly, subsection (a) of this proposed rule sets forth specific fee rates for the search, review, and segregation of records.

The OIP intended that each fee rate set forth in subsection (a) be close to the averaged salary rate of agency employees who are likely to perform the particular service. Specifically, since clerical staff employees are likely to perform the searches

for records, the proposed fee rate for a record search hypothetically represents an averaged salary rate of all clerical agency employees. Because supervisory and professional staff employees are likely to perform the review and segregation of a record, the proposed fee rate for these activities is an averaged salary rate of supervisory or professional agency employees.

When an agency segregates information by redacting information on a copy of the record, the cost of making the copy is not to be included in the segregation fee.

In February 1996, the OIP conducted a survey of departments of the State and the City and County of Honolulu[5] regarding the salary rates of the employees that would be responsible for searching, reviewing, and segregating records requested for access under the UIPA. Twelve State departments and nineteen City departments responded to the OIP's survey. In reviewing the survey responses, the OIP concluded that its proposed fee rates are a close approximation of the averaged salary of State and county employees who would perform the search and review of records. The OIP's proposed fee rates were generally lower than the actual salaries reported in the survey. The survey responses from the agencies are available for review at the OIP.

The fee schedule set forth in subsection (a) of this

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[5]The OIP circulated its draft rules to the other counties for review and comment. However, the OIP did not include the neighbor island counties in its survey of salaries because the OIP believed that the salaries reported by the City and County of Honolulu would be comparable and representative of the other counties' salaries.

proposed rule states that the fee rates do not apply to those record requests that require fifteen minutes or less of search or review and segregation time. As for these record requests, the OIP believes that the small amount of revenue collected from these fees would be exceeded by the costs of processing the collection of these fees. In comparison, the FOIA instructs federal agencies that no fees may be charged by an agency when "the costs of routine collection and processing of the fees are likely to equal or exceed the amount of the fee." 5 U.S.C. § 552(a)(4)(A)(iv)(I) (1988). The FOIA also requires that the first two hours of search time be provided without charge, except where the records are requested for commercial use. 5 U.S.C. § 552(a)(4)(A)(iv)(II) (1988).

As previously discussed in the explanation of proposed rule § 5-41-1, the purpose of establishing fees is to allow agencies to recoup some costs in responding to requests for access to government records, rather than having to provide the services entirely at taxpayers' expense. Because the proposed fee rates set forth in subsection (a) of this proposed rule correspond to relatively low estimates of the actual average salaries of employees processing a record request, agencies will not likely recover all costs involved in responding to the record request.

Furthermore, the OIP notes that many government records are not stored or formatted to facilitate the search, review and segregation of information in response to a request. Hence, by allowing the recovery of most, but not all costs in processing a

record request, the draft rules provide a reasonable compromise so that requesters are not shouldering the full cost resulting from a record's location and format that are often not designed for ease in search, review, and segregation.

The OIP intended the fee rates in this subsection to serve as a unitary fee schedule that would be easy for the agencies to understand and the public to comply with. This purpose is consistent with the legislative intent behind the UIPA to create uniform procedures throughout the State for providing access to disclosable records.

Agencies' Adoption of Alternative Fee Rates

Several agencies have informed the OIP that they are bound by operational requirements to recoup the actual costs of searching, reviewing, and segregating records. Other agencies are already governed by statutes, ordinances or rules setting forth search, review, and segregation fees, such as flat fees. In order to address the different needs and circumstances of State and county agencies, subsection (b) of proposed rule § 5-41-31 provides agencies the option of complying with already established fees, or establishing their own fees for the search, review, and segregation of records so long as the fees do not exceed the actual costs incurred in performing these services. If agencies propose their own fees pursuant to subsection (b), this draft rule provides that the agency's fees are to be established by statute, ordinance, or rule. In this way, the public has an opportunity to review an agency's fees proposed in

legislation or rulemaking and assess whether the proposed fees exceed the agency's actual costs of providing these services.

FEES NOT APPLICABLE TO SUBPOENAS FOR DISCOVERY OF RECORDS OR INDIVIDUALS REQUESTING ACCESS TO PERSONAL RECORDS

The fees set forth in this proposed rule do not apply to records provided in response to subpoenas. OIP Opinion Letter No. 95-16 (July 18, 1995) concluded that the UIPA and the rules of pretrial discovery are two separate and distinct mechanisms for the disclosure or discovery of records. For example, record review under the UIPA and in response to a subpoena differ because, in the first instance, an agency assesses whether a UIPA exception to disclosure would apply and, in the second instance, the agency assesses whether a privilege may be asserted as a defense to discovery of the subpoenaed records.

The proposed fees for the search, review, or segregation of a record apply only to requests for public access to government records under Part II of the UIPA. Therefore, individuals may not be charged these fees when requesting access to personal records about themselves under Part III of the UIPA, entitled "Disclosure of Personal Records." One of the UIPA's underlying purposes is to "[m]ake government accountable to individuals in the collection, use, and dissemination of information relating to them." Haw. Rev. Stat. § 92F-2 (1993). This proposed rule's fee exclusion for individuals requesting access to personal records furthers this UIPA purpose. Similarly, the federal Privacy Act, 5 U.S.C. § 552a(f), provides an exemption from search and review

fees for individuals requesting access to their own personal records.

Furthermore, because the proposed rules do not include poverty as a basis for an exemption from the fees, the fee exclusion for individuals requesting access to their own personal records permits those impoverished individuals to have access to their own personal records without the burden of paying fees for the search, review, or segregation of the personal records requested.

The OIP recognizes that certain agencies may have operational requirements that necessitate the assessment of fees to individuals requesting access to personal records. Therefore, an agency may charge an individual these fees when provided by statute, ordinance, or rule. However, the OIP cautions that individuals claiming poverty may attempt to contest the assessment of these fees by arguing the deprivation of personal rights, and the OIP suggests that a provision for a fee waiver for personal record requests be considered.

EXEMPTIONS FROM FEES FOR SEARCH, REVIEW, AND SEGREGATION

An agency also may not charge the fees set forth in this proposed rule when no search, review, or segregation has been done in order to process a record request, or when the agency finds that the requester qualifies for a fee waiver in the public interest in accordance with proposed rule § 5-41-32. Under subsection (d) of this proposed rule, the agency may also agree to give an exemption to a state, county, or federal government

agency. The agency has discretion as to when it may grant this exemption to another agency.

M. PROPOSED RULE § 5-41-32

(Fee Waiver in the public interest)

EXPLANATION OF PROPOSED RULE § 5-41-32

This proposed rule sets forth the criteria for a waiver of fees in the public interest. As previously explained, the UIPA requires that the OIP's rules "provide for a waiver of such fees when the public interest would be served." Haw. Rev. Stat. § 92F-42(13) (1993). The provisions for a fee waiver in the public interest do not apply to duplication fees because such fees are not within the scope of the UIPA and these rules.

Subsection (a) of this proposed rule requires that a requester must both request the waiver and provide a statement of facts supporting the waiver in the formal request to the agency under proposed rule § 5-41-12. The agency has the burden of determining whether the requester qualifies for the waiver in accordance with subsection (b) of this proposed rule. Subsection (b) of this proposed rule sets forth the substantive criteria that an agency must refer to when assessing whether a fee waiver would serve the public interest.

The Legislature did not provide guidance regarding the UIPA's requirement that a waiver of fees be provided when the public interest would be served. To establish what is the public interest that should be served, the OIP looked at the stated

purposes of the UIPA, and at the FOIA that also provides a fee waiver in the public interest. The UIPA states:

> In a democracy, the people are vested with the ultimate decision-making power. Government agencies exist to aid the people in the formation and conduct of public policy. Opening up the government processes to public scrutiny and participation is the only viable and reasonable method of protecting the public's interest. Therefore the legislature declares that it is the policy of this State that the formation and conduct of public policy--the discussions, deliberations, decisions, and action of government agencies--shall be conducted as openly as possible.

Haw. Rev. Stat. § 92F-2 (1993). Further, the UIPA's purposes are also to "p]romote the public interest in disclosure" and "[e]nhance government accountability through a general policy of access to government." Id.

Given the stated purposes, the OIP concludes that the public interest served by the UIPA is, generally, the meaningful public participation in government processes in which public policy is formulated and established. Specifically, the UIPA encourages the free flow of information held in government records so as to further the public's understanding of the policies and actions of government.

A free flow of information requires that the information be transmitted or distributed to members of the public. In understanding how information is transmitted and distributed in today's modern society, it is clear that either government proactively disseminates information, or that members of the public search for and locate information. Commonly, modern democratic societies depend upon the news media for the

transmission and distribution of information held by the government. Therefore, the OIP concludes that one method of serving the public interest is by encouraging the free flow of information through the news media channels which broadly transmit or disseminate information to the public.

To determine how a fee waiver would best serve this public interest, the OIP looked to the FOIA for guidance. The FOIA provides a fee waiver if:

> [D]isclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

5 U.S.C. § 552(a)(4)(A)(iii) (1988) (emphasis added). The Department of Justice's FOIA Fee Waiver Policy Guidance ("Policy Guidance") was issued to all federal agencies in 1987 and incorporated into the Department of Justice's own regulations at 28 C.F.R. § 16.10 (1988). The Policy Guidance provides criteria for determining when disclosure of federal records is in the public interest.

The OIP determined that, in contrast to the Policy Guidance, news media representatives will almost always have commercial interests. Therefore, to exclude news media representatives from a fee waiver because of those commercial interests is counterproductive to supporting the public interest in a free flow of information held by the government. Consequently, the proposed rule does not require an agency to determine that the

disclosure of information is not primarily in the commercial interest of the requester.

However, the OIP recognizes the competing interests of taxpayers fully funding the commercial interests of the news media versus constricting the free flow of information by imposing the aggregate costs of obtaining the information. Thus, to balance these competing interests, this proposed rule limits the fee waiver to $30. This compromise allows more requesters to qualify for the waiver, but limits the total economic impact upon the taxpayer and the agencies of providing the required fee waiver.

P. PROPOSED RULE § 5-41-33

(Fees charged for records determined to be confidential)

EXPLANATION OF PROPOSED RULE § 5-41-33

Under this proposed rule, an agency may charge for the search and review of a record even when the record is ultimately determined to be exempt from disclosure under the UIPA or other law. The OMB Guidelines similarly advise that federal agencies may charge fees in these situations. 52 Fed. Reg. 10012, 10019 (1987).

Since the purpose of the proposed rules is to allow agencies to recoup some costs in responding to record requests under the UIPA, the OIP believes that it is fair to allow agencies to recoup costs even when the agencies' efforts to respond to requests do not result in the disclosure of the requested records. The OIP believes that imposing the search, review, and

segregation fees upon a request that ultimately does not result in the disclosure of the requested record supports the policy of making records publicly accessible. To prohibit an agency from collecting such a fee would impose greater burdens upon the taxpayer.

If the requester fails to pay the fees for the search or review of a record under this section after the agency has performed these services but determined that no responsive records are disclosable, the agency may assess the outstanding fees as part of the required prepayment for a subsequent record request in accordance with proposed rule § 5-41-20.

III. EFFECT ON AGENCY OPERATIONS OR PROGRAMS

All State and county agencies, as defined by section 92F-3, Hawaii Revised Statutes, shall be governed by these proposed rules. These proposed rules set forth the procedures that agencies must follow when responding to requests for access to government records under the UIPA. Thus, these proposed rules will guide, streamline, and make uniform agencies' efforts to comply with the UIPA's requirements regarding access to government records.

These proposed rules also set forth the fees that agencies may charge for the search, review, and segregation of records and related provisions. These rules will allow the State and counties to recoup some of the costs in responding to requests for access to government records.

IV. FINAL RESULT EXPECTED

As explained in the above section, these proposed rules will guide, streamline, and make uniform agencies' efforts to comply with the UIPA's requirements regarding access to government records, and will allow the State and counties to recoup some of the costs in responding to requests for access to government records. In turn, the UIPA's effectiveness will be enhanced, and public confidence in government will be bolstered.

V. FINANCIAL IMPACT ON THE STATE

The proposed rules set forth the fees that an agency may charge for the search, review, and segregation of records and related provisions. These fees have not been traditionally charged by all agencies. Collection of these fees should help minimize the financial hardship on government operations when agency personnel and facilities are used to process record requests under the UIPA.

As mandated by the UIPA, these proposed rules provide for a waiver of the fees for searching, reviewing, and segregating records when the public interest will be served. The proposed rules set forth the criteria as to when a waiver would be in the public interest under the UIPA, and also establishes a limit of $30 for the amount of fees that can be waived when a request qualifies for this fee waiver.

VI. IMPACT ON THE PUBLIC AND ECONOMIC GROWTH OF THE STATE

These proposed rules set forth the procedures that members of the public must follow when requesting access to records under the UIPA. Members of the public will also be charged fees for the search, review, and segregation of records when their record requests require more than fifteen minutes of any of these agency services. The proposed rules set forth certain exemptions from these fees, including an exemption for individuals requesting access to personal records and another exemption for when a waiver of the fees would serve the public interest. There will be little, if any, impact on the economic growth of the State by the adoption of these rules.

VII. OTHER ALTERNATIVES

The UIPA, in section 92F-42(12) and (13), Hawaii Revised Statutes, requires that the OIP adopt these rules. There are no alternatives to compliance with this statutory requirement.