IMPACT STATEMENT FOR PROPOSED RULES OF THE OFFICE OF INFORMATION PRACTICES ON ADMINISTRATIVE APPEALS PROCEDURES

I. INTRODUCTION

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

> **§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. . . .

HRS § 92F-42(12) (Supp. 2011). The Sunshine Law, part I of chapter 92, HRS ("Sunshine Law"), similarly requires:

> **[§92-1.5] Administration of this part.** The director of the office of information practices shall administer this part. The director shall establish procedures for filing and responding to complaints filed by any person concerning the failure of any board to comply with this part.

HRS § 92-1.5 (Supp. 2011). OIP proposes these rules in chapter 73 of Title 2, Hawaii Administrative Rules, which

set forth the procedures for filing an appeal with OIP under either the UIPA or the Sunshine Law, and OIP's review and decision on the appeal.

These draft rules implement the UIPA's and Sunshine Law's provisions and other laws that grant a person the right to complain or appeal to OIP, and authorize OIP to review and decide the appeal. The proposed appeal procedures will apply to all persons, including private entities, State or county executive branch agencies, the State Judiciary, Legislature, and county councils, that become parties to or have an interest in an appeal filed with OIP under the UIPA, Sunshine Law, or other applicable law. These proposed rules govern only the procedures relating to administrative appeals to OIP, and do not apply to appeals to circuit court.

Section 92F-41(c), HRS, provides that "[a]ll powers and duties of the office of information practices are vested in the director and may be delegated to any other officer or employee of the office." HRS § 92F-41 (Supp. 2011). References to OIP's powers and duties in these rules, therefore, refer to powers and duties of OIP's Director, and OIP's Director may delegate all aspects of

the processing of appeals to OIP staff while continuing to oversee and supervise the process.

II. PROPOSED RULES AND EXPLANATIONS

A. PROPOSED RULE § 2-73-1

(Purpose, scope and construction)

EXPLANATION OF PROPOSED RULE § 2-73-1

This proposed rule sets forth the purpose of these rules. As explained above, the UIPA requires the adoption of rules setting forth "an administrative appeals structure, which provides for a direct appeal from the division maintaining the record," and the Sunshine Law requires OIP to establish "procedures for filing and responding to complaints filed by any person concerning the failure of any board to comply with this part." HRS §§ 92-1.5 and 92F-42(12).

FILING OF AN APPEAL

As this proposed rule states, one of the purposes of this chapter is to establish procedures for filing a complaint or an administrative appeal with the OIP, as an

informal alternative to filing an appeal with the circuit court.

The Sunshine Law allows any person to file a complaint with OIP regarding a board's failure to comply with the Sunshine Law. HRS § 92-1.5. Filing a complaint with OIP is an alternative to filing a lawsuit in circuit court, which is also provided for by the Sunshine Law. HRS § 92-11 and 12.

The UIPA grants the right to administratively appeal an agency's denial of access to a government record to (1) a person seeking to inspect or copy a government record and (2) an individual seeking to inspect or copy a personal record pertaining to that individual. HRS §§ 92F-15.5 and 92F-27.5 (1993). In either case, filing an appeal with OIP is an alternative to filing a lawsuit in circuit court to compel disclosure, is optional, and does not prejudice the requester's "right to appeal to the circuit court after a decision is made by [OIP]." Id.

A person can also file an appeal to OIP contesting a decision by the Department of Taxation ("DOTAX") regarding what information constitutes a "written opinion" that is available for public inspection and copying. HRS §231-

19.5(f) (2001). Persons who meet the criteria of section 231-19.5, HRS, may appeal the DOTAX's decision to OIP "in accordance with procedures established by the office of information practices under sections 92F-15.5 and 92F-42(1)," HRS. Id. Section 231-19.5, HRS, provides that a person "aggrieved by a decision of the office of information practices" may appeal to the circuit court, but does not appear to provide for an appeal to the court without a prior OIP ruling. Persons challenging a DOTAX decision to disclose a written opinion, as well as those challenging DOTAX's denial of access to an opinion, may appeal to OIP after exhausting their administrative remedies with DOTAX.

In comparison to the statutory right to appeal to OIP regarding a DOTAX decision to disclose an opinion, the UIPA only recognizes a requester's right to appeal an agency's denial of access, not an agency's granting of access. This proposed rule therefore does not provide for a general appeal of an agency's granting of access under the UIPA.

The UIPA has no provision setting out a right to administratively appeal an agency's granting of access in the way that sections 92F-15.5 and 92F-27.5, HRS, set out

the right to administratively appeal a denial of access. Thus, although section 92F-42(1), HRS, provides that OIP "[s]hall review and rule . . . on an agency's granting of access," the UIPA does not provide for OIP to do so as part of an administrative appeal process. The omission of any specific provision for appeal of an agency's granting of access is consistent with the structure of the UIPA's exceptions to disclosure in sections 92F-13 and -22, HRS, which allow, but do not require, an agency to withhold records covered by an exception. Thus, while OIP could conclude that records disclosed by an agency fell within an exception to disclosure such that the agency could have withheld all or a portion of the records, OIP could not conclude that the agency's disclosure actually violated the UIPA (except in the limited circumstance where the agency intentionally disclosed information explicitly described by specific confidentiality statutes). See HRS §§ 92F-13, -17, and -22 (1993). To the contrary, an agency's good faith disclosure of a government record would be immune from civil or criminal liability. HRS § 92F-16 (1993).

It should be noted that although a person cannot file an administrative **appeal** to challenge an agency's granting

of access, a person can still seek an **advisory opinion** from OIP as to an agency's granting of access, as provided in proposed rule 2-71-4. For instance, suppose that an agency disclosed records containing information submitted by Universal Widgets. Universal Widgets believed the information could and should have been withheld as confidential business information under the frustration exception. Universal Widgets could not file an appeal to challenge the decision, but it could ask OIP for an advisory opinion as to whether the UIPA actually required the agency to disclose the records, or whether the agency may have had the option to assert an exception but chose not to.

OIP's REVIEW AND DECISION OF APPEAL

The UIPA requires OIP to review appeals 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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> (1) Shall, upon request, review and rule on an agency denial of access to information or records, or an agency's granting of access; provided that any review by the office of information practices shall not be a contested

> case under chapter 91 and shall be optional and without prejudice to rights of judicial enforcement available under this chapter; . . .

HRS § 92F-42(1).

Under section 92F-42(1), HRS, OIP's review of an agency denial of access has expressly been excluded from contested case hearings procedures under HRS chapter 91 because of the "legislative intent behind chapter 92F, that review by the Office of Information Practices be expeditious, informal, and at no cost to the public." H. Stand Comm. Rep. No. 1288, 15th Leg., 1989 Reg. Sess., Haw. H. J. 1319 (1989). Consequently, these proposed rules need not comply with the contested case requirements under chapter 91, HRS.

OIP is required by both the UIPA and the Sunshine Law to resolve Sunshine Law complaints:

> **§92F-42 Powers and duties of the office of information practices.** The director of the office of information practices:
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> . . . .
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> (18) Shall take action to oversee compliance with part I of chapter 92 by all state and county boards including:

(A) Receiving and resolving complaints; . . .

and

> **[§92-1.5] Administration of this part.** The director of the office of information practices shall administer this part. The director shall establish procedures for filing and responding to complaints filed by any person concerning the failure of any board to comply with this part.

HRS §§ 92-1.5 and 92F-42(18).

To further implement legislative intent, the language of proposed rule 2-73-1 requires that the proposed appeal rules as a whole "shall be construed to secure the just, equitable, speedy, and inexpensive resolution of appeals brought before OIP." OIP drafted this chapter with the objective of making the appeal procedure fair, flexible, and easy to understand and follow.

B. PROPOSED RULE § 2-73-2

(Definitions)

EXPLANATION OF PROPOSED RULE § 2-73-2

This proposed rule provides the definitions for terms used in this chapter. This chapter uses some terms and definitions from the UIPA, and some from other statutes.

This proposed rule does not repeat statutory definitions but rather refers to the UIPA or other statutory sections setting forth the definitions when a UIPA-defined term is used. According to the revisor of statutes, administrative rules should incorporate applicable sections of the HRS by reference and should not repeat the statutory sections. See HRS § 91-4.2 (1993); Hawaii Administrative Rules Drafting Manual 2d ed. § 00-4-2(a) (1984). In this way, the reference to the statutes eliminates the need to amend this rule should the definitions in the statutes be amended. This proposed rule also notes the same definitions for certain terms already defined in section 2-71-2, an administrative rule in a chapter previously adopted by OIP under this title.

The definitions of terms set forth in this proposed rule apply to an appeal filed with OIP under these proposed rules, and not to an appeal of an OIP decision to circuit court. An "appeal" is defined to include a complaint filed under the Sunshine Law as well as an appeal of an agency's denial of access to a government record, or an appeal from a DOTAX opinion. Thus, references to an "appeal" throughout these rules refer to Sunshine Law complaints,

UIPA appeals, and DOTAX appeals. Similarly, an "agency," which is defined as in section 92F-3, HRS, includes a board or a public body that may be the subject of a UIPA, Sunshine Law, or DOTAX complaint.

A "business day" is defined differently from the similar definition in section 2-71-2, HAR: for the purpose of appeals subject to these proposed rules, a "business day" is a day when **OIP** is open for business. Whereas only the agency responding to a record request under chapter 2-71, HAR, would be involved in the request such that its business days would be relevant for calculating deadlines, in an administrative appeal both OIP and the agency whose action is being appealed would have business days that could be used to calculate a deadline. The definition specifies OIP's business days to avoid confusion where OIP and the agency have different schedules due to furloughs or for another reason, and to ensure consistency of deadlines across appeals.

The term "government record" encompasses any record maintained by any State or county agency, including personal records. The DOTAX's written opinions are also a specific type of government record that may be the subject

of appeals to the OIP under UIPA provisions and the tax laws. See, HRS §§ 92F-27.5 & 231-19.5.

C. PROPOSED RULE § 2-73-3

(Computation of time)

EXPLANATION OF PROPOSED RULE § 2-73-3

This proposed rule sets out the method to be used in computing periods of time set out by these rules. In furtherance of the legislative intent that an appeal to OIP be an informal process, the proposed rule further allows OIP to provide an extension of time, or waive a deadline, where OIP finds it to be appropriate.

D. PROPOSED RULE § 2-73-4

(Other forms of assistance)

EXPLANATION OF PROPOSED RULE § 2-73-4

This proposed rule clarifies that OIP will continue its current practice of providing services that are not appeals covered by this new chapter, such as advisory opinions, guidance, training, informal advice by telephone or e-mail, assistance in obtaining an agency's response to a record request, and any other services consistent with

the UIPA or the Sunshine Law. As other forms of OIP assistance will not be appeals, they will not be subject to the procedural rules set out for appeals in this proposed chapter. Under this proposed rule, OIP's director will continue to have discretion to decide the appropriate designation for a request for OIP assistance that has been mislabeled by the requester as an appeal.

E. PROPOSED RULE § 2-73-11

(What may be appealed)

EXPLANATION OF PROPOSED RULE § 2-73-11

This proposed rule enumerates the situations in which a person may file an appeal with OIP. A person (defined in proposed rule § 2-73-2 to include an entity as well as an individual) may appeal a denial of access to a government or personal record or a DOTAX decision concerning disclosure of a written opinion, or may seek a determination about a board's compliance with or the applicability of the Sunshine Law. As discussed above, a person seeking to challenge an agency's decision to disclose a record (other than a written DOTAX opinion) may

not do so by filing an appeal, but may seek an advisory opinion from OIP on the issue.

F. PROPOSED RULE § 2-73-12

(Timing and content of appeal to OIP)

EXPLANATION OF PROPOSED RULE § 2-73-12

This proposed rule tells a prospective appellant how to request OIP review of an agency's denial of access to a government record or a DOTAX decision regarding disclosure of a written opinion, or a board's compliance with the Sunshine Law. The proposed rule sets a time limit for making the request to OIP, and explains what information must be provided in the request.

TIME LIMIT FOR APPEAL TO OIP

Under this proposed rule, a person seeking OIP's review under the UIPA must file the appeal with OIP within one year of an agency's denial of access in response to a UIPA request. If the requester fails to file an appeal with OIP within this time period, the requester can simply file a new request with the agency, which may be appealed if the request is denied. Alternatively, the requester has two years to appeal directly to the courts if an agency

denies access to records. HRS § 92F-15; HRS § 92F-27(e) (1993).

Besides the UIPA appeal time limits, the proposed rule also refers to the statutory time limit for appeal of a DOTAX decision to OIP. Under current law, a person who has exhausted administrative remedies for contesting DOTAX's denial of access or granting of access to a written opinion may appeal to OIP "within sixty days of the date of the department's decision." HRS § 231-19.5(f). The appellant can appeal OIP's decision to circuit court "within thirty days after the date of the decision of the office of information practices." Id.

For Sunshine Law cases, the proposed rule sets a six-month time limit from the date of the alleged violation to appeal to OIP. Although the Sunshine Law does not set a time limit for a court challenge to "requir[e] compliance with or prevent[] violations of" the law, it does provide a 90-day limitation period for filing a suit to void a final action taken in violation of the law. HRS §§ 92-11 and -12 (Supp. 2011 and 1993). Because OIP does not have the power to void an action taken by a board, this proposed rule assumes that a person seeking such a remedy would go

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

Finally, in seeking to determine whether the Sunshine Law applies to a public body, the appeal may be filed at any time during the body's existence, as the question of whether or not the body must follow the Sunshine Law is pertinent at any time.

REQUIRED CONTENTS OF AN APPEAL

The proposed rule requires the appellant to provide contact information, but the appellant is not required to provide his or her identity. The UIPA allows "any person" to make a general government record request, and the Sunshine Law allows "all persons" to attend and testify at an open meeting, and further allows "any person" to challenge a violation, regardless of his or her identity. See HRS §§ 92-3 and -12; 92F-11. Thus, the proposed rule is consistent with the "any person" standard in allowing anonymous appeals. An appellant may nevertheless prefer to be identified for several reasons. A Sunshine Law appellant's factual allegations are likely to be more compelling coming from an identified individual, and an appeal of an agency's denial of a personal records request will not be successful without the requester's identity since that is an essential element of a personal records request.

An appeal based on the denial of access to records under chapter 92F, HRS, must be based on a written request. Denials under chapter 92F, HRS, or the grant or denial of

access to a DOTAX opinion, must clearly identify the records or information at issue, and include a copy of either the agency's written denial of access, or OIP's determination that the agency's failure to respond to a request was effectively a denial of access. This proposed rule requires the appellant to make a written request for records, due to the importance of beginning an appeal with a clear understanding of (1) what was requested and (2) how the agency responded.

The rule, however, gives the Director discretion to accept an appeal if the request is substantiated but not in writing. This allows, for example, appeals to be filed when a requester may have lost or not made a copy of the written request, or if the requester is unable to write due to a disability or language issue.

Generally, an appellant who seeks to appeal an agency's oral denial of request made orally, such as over the telephone, may not appeal under these proposed rules and will need to make a written request to obtain the written agency denial (or OIP determination of an effective denial) required to file an appeal under this proposed rule. While the UIPA requires an agency to respond to

request, whether written or oral, the agency is only required to provide a written response to a written request.

Where an agency does not provide an adequate written response to a written request within the deadlines set forth by the UIPA and chapter 2-71, HRS, OIP will assist the requester in obtaining a proper response. If the agency does not respond even after OIP's involvement, OIP will ultimately determine that the agency's inaction is effectively a denial of the request, which the requester may then appeal under these proposed rules.

A Sunshine Law appeal must clearly identify or describe (1) what board actions allegedly violated the law, or (2) the public body in question, if the appellant seeks a determination of whether that body is subject to the Sunshine Law. In addition, the appeal request may include a short statement of relevant facts, the basis for the appellant's position, and any other relevant or necessary information submitted to OIP.

Consistent with OIP's longstanding practice, and to ensure that an appeal to OIP remains a straightforward process accessible to members of the general public without

the need for representation by counsel, the proposed rule does **not require the requester** to include a statement to file an appeal. A requester may file an appeal simply by pointing to a denial of access to government records or an incident alleged to have violated the Sunshine Law and will not have to prepare an argument in support of the requester's position. However, where a request does include this information, it will help OIP to understand what the appeal may concern, so that OIP can decide how best to process the appeal.

G. PROPOSED RULE § 2-73-13

(OIP response to appeal; OIP notice of appeal)

EXPLANATION OF PROPOSED RULE § 2-73-13

Under this proposed rule, OIP will respond in one of two ways. First, OIP may notify the appellant that the appeal will not be considered, with an explanation. The explanation may give reasons why the appeal as filed does not set out a valid basis for appeal as set out in section 2-73-11, or may notify requester as to what additional information must be provided to meet the requirements of section 2-73-12. For instance, for an appeal complaining

of a board's e-mail vote on a board issue three years before the appeal's filing date, OIP could notify the appellant that the appeal would not be considered because it was untimely under section 2-73-12. For an appeal based on a union's refusal to provide access to records, OIP could notify the appellant that the appeal would not be considered because it did not state a valid claim against an agency under the UIPA or the Sunshine Law, as set out in section 2-73-11. For an appeal filed to challenge an agency's denial of access to records, where the agency's written denial was not submitted or the requested records were not specified or the request and response dates were not provided, OIP could notify the appellant that the appeal could not be opened without the missing information.

OIP's second possible response is to issue a notice of appeal to the appellant and to the agency whose action is being appealed, informing them of the date the appeal was filed and providing the agency with a copy of the requester's appeal. OIP's notice of appeal must include a description of procedures that OIP will follow in resolving the appeal and set out the response required from the parties. Some procedures are set by these proposed rules;

section 2-73-14, for instance, sets out the timeline and content required for an agency's response to an appeal. Other procedures, listed in section 2-73-15, will not apply in every appeal. OIP's notice of appeal will thus alert the agency to the appropriate response required of the agency, and will give the agency and the appellant an initial idea of what to expect.

H. PROPOSED RULE § 2-73-14

(Agency response to appeal)

EXPLANATION OF PROPOSED RULE § 2-73-14

This proposed rule sets a timeline for an agency's response to an appeal and describes the information that the response must include.

Although an appellant is not required to set out a substantive argument in support of the appeal, an **agency is required** to provide a substantive argument in support of its position. This is primarily because the UIPA and the Sunshine Law both specify that it is the policy of the state to conduct government business as openly as possible. HRS §§ 92-1 and 92F-2 (1993). The Sunshine Law is required to be interpreted to favor openness and to disfavor closed

meeting provisions, and the UIPA specifically places the burden of proof to justify non-disclosure on the agency. HRS §§ 92-1 and 92F-15(c). The agency whose actions are being appealed has the burden of proof to show that its action is justified by an exception to the general rule of openness under the Sunshine Law or the UIPA, and thus must provide a substantive justification of its position to prevail in the appeal. An agency is also likely to have both superior knowledge of the relevant factual background, and superior access to counsel or other resources to assist it in responding to the appeal.

The agency's response must include a factual statement, including any facts necessary to support a claimed exception to the general rule of openness under either the UIPA (such as an exception or exemption) or the Sunshine Law (such as an executive session purpose or a permitted interaction); an argument explaining the agency's legal justification for its position, including appropriate citations; and contact information for the person authorized to speak for the agency. In addition, for an appeal based on denial of access to records, the response

must include a list identifying or describing the records withheld.

I. PROPOSED RULE § 2-73-15

(Other procedures for appeal)

EXPLANATION OF PROPOSED RULE § 2-73-15

This proposed rule sets out a list of additional actions OIP may take in the process of resolving an appeal. This list is not intended to be exclusive, and the listed procedures will not be applicable in every appeal and thus may or may not be used a particular appeal. Rather, this proposed rule provides guidance to the procedures that may be applicable in appropriate circumstances. Subsection (k) of the proposed rule also specifies that the process selected by OIP to resolve a particular appeal will be the process that OIP determines, in its discretion, will most fairly and expeditiously resolve the appeal in accordance with the law.

Participation by Third Parties

Depending on the circumstances of the pending case, section (a) of the proposed rule allows OIP to permit one or more third persons, in addition to the appellant and the

agency, to participate in an appeal. A prospective participant must make a written request to participate stating the reason for the request, but this rule gives OIP the discretion to decide whether to allow the third party to participate and to what extent the third party will be allowed to participate. Generally speaking, this rule is intended to allow a third person with a substantial interest in the record at issue to participate in an appeal as a party, such as a person who is referred to in the record or who may be affected by its disclosure, or a person who may be otherwise affected by the outcome of an appeal. The rule would also allow participation by a third person with a relevant perspective different from those of the original parties. Participation in this manner is not the only way for a third person to provide input regarding an appeal, as subsection (e) still allows OIP to consider input or relevant materials from persons who have not sought party status.

Written Statements and Documents from Parties Other than the Agency

As discussed previously, an agency whose action is being appealed is required by proposed rule § 2-73-14 to submit a written statement of its position. Subsection (b) of § 2-73-15 gives OIP the option to request a written statement from parties other than the agency. "Party" is defined in proposed § 2-73-2 to include a third person permitted to participate in the appeal, as well as the appellant and the agency, so this section allows the director to request statements from participating third parties as well as from the appellant.

It will often be helpful to have a written statement of the appellant's position in addition to the minimal information required to file an appeal. For a third person participating as a party, the motives for such participation would typically be to provide a written statement of position and to have the opportunity to respond to other parties' positions. Under this proposed rule, though, OIP may only **request**, and **not require**, such statements from the appellant or a third party participant.

When OIP requests written statements from the appellant and third party participants, OIP is required by this proposed rule to set a timetable for submission of

statements and any responses by the agency or other parties. OIP also has the option of setting requirements for the content and form of any statements that are submitted. A relatively brief and informal statement will serve best for many appeals, but where appropriate, an appellant or other participating party may be asked to submit a longer and more formally presented statement. For instance, an individual member of the public questioning a denial of access to records may be asked to send a short statement by e-mail explaining why she or he believes the records should be public, whereas a business represented by counsel and participating as a third party to support an agency's denial of a competitor's request for a proposal submitted by the business may be asked to send in a more formal statement with legal argument and citations.

OIP may also need to review copies of documents that are in the agency's or another party's possession. For example, in an appeal of an agency's denial of access to records, OIP may request copies of the original written record request and the agency's written denial, if the agency responded in writing. In addition, OIP will usually need to review the government records that are at issue in

the appeal. In an appeal questioning whether an executive session was proper, OIP will usually need to review the minutes of the executive session. Subsection (c) of this proposed rule allows OIP to require that documents be submitted to OIP and to examine the documents *in camera*, with appropriate protections against disclosure, as necessary to preserve a claimed exception or exemption against disclosure. OIP may determine after its *in camera* review of a record that the record should have been disclosed to the requester; however, it is the agency, not OIP, that would be responsible for providing the requester with access to those documents after an OIP decision under section 2-73-17 ordering their disclosure. The proposed rule is thus consistent with OIP's current practice, whereby OIP either returns such records to the agency that submitted them, or, if the agency prefers, destroys the records. To ensure that its record on appeal is complete in the event that an agency chooses to appeal OIP's decision under section 92___, however, OIP must wait to return or destroy such records until at least thirty days after issuing a decision.

Subsection (d) of the proposed rule sets forth more specific restrictions on OIP's *in camera* examination of certain records, namely those which an agency claims are protected by the attorney-client privilege, as recognized through the UIPA's exceptions to and exemptions from disclosure and the Sunshine Law's executive session purposes. See HRS §§ 92-5 and 92F-13 and -22 (Supp. 2011 and 1993). This subsection also allows the agency to request to provide the record in redacted form, which OIP will allow so long as OIP can still determine whether the privilege applies from a review of the redacted version of the record. The purpose of this subsection is generally to ensure that agencies need not fear that they will waive the attorney-client privilege by providing a record to OIP for its *in camera* review.

It should be noted that this proposed rule does not provide for any form of discovery among the parties to an appeal. This is an intentional omission. OIP does not believe that a discovery process would be consistent with the legislative intent that review by OIP be expeditious, informal, and at no cost to the public, as discussed in section A, supra.

Input from Non-Parties and *Ex Parte* Communications

Subsection (e) of this proposed rule makes clear that OIP is not limited to considering only the statements submitted by the parties to an appeal, but may also seek and accept information and relevant materials from any person. Further, to preserve the relatively informal process under which OIP has historically operated, this subsection provides that OIP can speak to a party or another person without the presence of the other party or parties. *Ex parte* communications are specifically permitted except to the extent that OIP has required the parties to copy one another on written submittals under subsection (k) of this proposed rule. Where OIP has required parties to copy one another on submittals and a party fails to do so, OIP can order an extension of time limits for a response or any other appropriate remedy to prevent a party from missing a deadline or being otherwise disadvantaged because of another party's failure to properly provide documents.

Another provision relating to the information OIP may consider is subsection (f), which allows OIP to take notice

of generally known and accepted facts. OIP may therefore refer to a newspaper article or similar source, and determine its appropriate weight and credibility, in making its decision on an appeal.

Consolidation, Mediation, and Conferences

Subsections (g), (h), and (i) set out possible procedures that will not apply in most appeals, but may be used when appropriate. Subsection (g), which allows OIP to consolidate appeals with similar facts or issues or similarly situated parties, will most commonly be applicable where several different appeals are filed regarding essentially the same actions by a board, or where multiple appellants seek the same records or information, often due to recent news reports regarding the board or the records in question. Consolidation of such appeals will often be the most efficient approach for OIP to resolve them, and it will also help to ensure that all the affected parties have the opportunity to be heard on the questions being resolved before any determination is made.

In some appeals, mediation may be an effective way to reach a compromise between the parties and resolve an

appeal. For this reason, subsection (h) of this proposed rule allows OIP to ask the parties to mediate one or more issues within an appeal or an entire appeal, on terms set by OIP. Parties will not be required to participate in mediation. Asking for parties' participation in mediation, rather than requiring it, reduces time spent by OIP and the parties where mediation is likely to be fruitless and is consistent with the mediation process.

Subsection (i) authorizes OIP to set up an informal conference to assist in resolving the appeal, with the parties' agreement. Such a conference may be attended by the parties and any additional witnesses, and might be conducted either in person or via telephone or similar means. The purpose for such a conference may be to gather information, to clarify and simplify the issues and the parties' positions, to discuss an informal resolution of the appeal, or to do anything else that will help to resolve the appeal. In the course of the conference, OIP's Director or staff may ask questions of the parties or witnesses, may offer them the chance to orally present their arguments, or may simply seek to facilitate a discussion among the parties. Thus, a conference may serve

as a less formal version of mediation or a hearing, or a conference may be simply a useful additional tool to help move an appeal forward. OIP expects that many issues may be resolved in conference, so that often a settlement may be reached without the need for further proceedings. Consistent with the Legislature's intention, these rules seek to retain the free and informal nature of OIP proceedings, where the formalities of a hearing or contested case proceeding are not required. See H. Stand Comm. Rep. No. 1288, 1989 Leg., 15th Reg. Sess., Haw. H. J. 1319 (1989).

J. PROPOSED RULE § 2-73-16

(Documents submitted to OIP)

EXPLANATION OF PROPOSED RULE § 2-73-16

This proposed rule notes that documents submitted to the OIP in an appeal are subject to section 710-1063, HRS, which provides that unsworn falsification of a document is a criminal misdemeanor. See HRS § 710-1063 (1993). OIP will generally rely on written representations made by the parties to an appeal, and thus reminds the parties to an

appeal through this rule that such representations should not include deliberate falsehoods.

K. PROPOSED RULE § 2-73-17

(Decision)

EXPLANATION OF PROPOSED RULE § 2-73-17

As this proposed rule provides, OIP will issue a final written decision on an appeal, and send a copy of the decision to each party. In addition to the general directives to resolve complaints under the Sunshine Law and the UIPA, this rule implements the specific requirement in section 92F-15.5, HRS, that "[i]f the decision is to disclose, the office of information practices shall notify the person and the agency, and the agency shall make the record available." HRS § 92F-15.5(b) (1993).

An OIP decision rendered under the UIPA may order access to a requested record, confirm an agency's position, or set forth any other order or conclusion that the Director considers appropriate. Thus, an OIP decision may reach any conclusion and make any order that is consistent with the UIPA, the Sunshine Law, and other laws referenced therein (such as confidentiality statutes or statutes

controlling the disclosure of specific records or information, incorporated by the UIPA's exceptions and the Sunshine Law's closed meeting provisions).

Where the decision upholds an agency's action or position, the decision will also notify the appellant of the right to seek judicial relief under the relevant section of the Sunshine Law, UIPA, or tax statutes. The UIPA specifically requires OIP to inform an unsuccessful appellant of the right to bring a judicial action, and to inform an agency whose position is not affirmed of the right to appeal OIP's decision to court under section 92F-___. HRS § 92F-15.5; Act ___. Thus, this notice will answer the questions most unsuccessful appellants will have: whether a further appeal is possible and what the next step may be.

This proposed rule also provides for decisions to be either in the form of published opinions, which will be used as precedent for future OIP decisions, or unpublished informal or memorandum opinions or other written dispositions, which will not be considered as precedent but still may be considered for other purposes. This is consistent with OIP's longstanding practice of designating

as formal and publishing only a limited number of opinions via distribution to a list of recipients and publication on OIP's website. **Formal opinions** are so designated because of their discussion of general concepts under these laws and their broad applicability to similar factual situations. Formal opinions offer legal guidance to the public and government agencies by fully setting forth OIP's interpretations of provisions of the UIPA and the Sunshine Law, and they are relied upon as precedent by OIP in the issuance of its opinions.

Past OIP formal opinions have included those arising both from disputes that would be resolved via the appeal process set out by these proposed rules, and from requests for an advisory opinion that would not qualify as appeals under these proposed rules. As discussed above, OIP will continue to accept requests for advisory opinions; however, OIP no longer intends to designate advisory opinions as formal opinions. OIP anticipates that the decisions arising out of appeals subject to these proposed rules, or (for a transitional period) existing requests converted to appeals, will be the only source from which OIP will designate its formal opinions after these rules come into

effect. OIP will, however, continue to rely upon and consider as precedent its existing formal opinions, which span twenty-three years.

In contrast, OIP issues **informal or memorandum opinions** generally in instances where the legal questions raised by a dispute have been previously resolved and discussed in a formal opinion, and where the legal conclusion is based upon specific facts that limit the opinion's usefulness for general guidance purposes. These informal or memorandum opinions are often abbreviated in form and refer the reader to OIP's formal opinions for a full discussion of the legal concepts applied. Under this proposed rule, an agency could submit for OIP's consideration an informal opinion previously issued to the agency to show that its actions were consistent with OIP's prior advice, and OIP would consider the opinion for its relevance to showing the agency's good faith, but would not consider the opinion as setting a binding precedent on the underlying legal issues.

This rule also allows a decision to take the form of a written disposition not in the form of an opinion. This would include instances in which parties had successfully

resolved their dispute through mediation, such that OIP did not need to write an opinion, but only to confirm the agreed upon resolution of the mediation.

L. PROPOSED RULE § 2-73-18

(Dismissal of appeal)

EXPLANATION OF PROPOSED RULE § 2-73-18

This proposed rule allows OIP to dismiss an appeal at any time, for good reason. The proposed rule lists various good reasons for dismissing an appeal, including a request for dismissal or abandonment of the appeal by the appellant. Other listed reasons go to the merit of the appeal: the appeal may be dismissed if the appeal is found to be frivolous or does not state a valid claim under the laws within OIP's jurisdiction, or if it turns out that a prerequisite for appeal under sections 2-73-11 and -12 was not met. To determine that an appeal does not state a violation of the law, however, OIP must view the issues raised in the light most favorable to the appellant. In other words, dismissal without the appellant's consent is appropriate only where it is clear that OIP would have no grounds to decide in the appellant's favor. Dismissal may

also be appropriate if OIP has previously ruled on the same issues, the issue is moot, or the matter is one that is not enforceable by OIP and would merely be an advisory opinion. Because the list given in this proposed rule is not exclusive or exhaustive, OIP may dismiss an appeal for a sufficiently good reason, even if it is not listed in the proposed rule.

M. PROPOSED RULE § 2-73-19

(Reconsideration)

EXPLANATION OF PROPOSED RULE § 2-73-19

OIP has the discretion to reconsider any decision, either on its own initiative or on request. For reconsideration of a final decision, a party has ten days from the date of issuance of a decision to submit a written request for reconsideration of that decision. The ten-day period actually amounts to approximately two weeks, because section 2-73-3 provides that a period of time is measured in business days. OIP may also reconsider a precedent set by a prior OIP decision, and this type of reconsideration may be requested at any time. In either case,

reconsideration must be based on a change in the law, a change in the facts, or other compelling circumstances.

The ten-day period to request reconsideration of a final decision will help to minimize the potential for delay in implementation of an OIP decision, especially a decision requiring an agency to release records to the appellant. It is important to note that a request for reconsideration is not an agency's last opportunity to challenge an OIP decision, as section 92F-___, HRS, allows an agency to seek court review of an OIP decision within thirty days of the decision, subject to a "palpably erroneous" standard of judicial review. (The statutory 30-day deadline is not subject to section 2-73-3 of these proposed rules and thus would be subject to the statutory standard for computation of time, which does not generally use business days. See HRS § 1-29 (2009).) Thus, an agency that fails to act within the reconsideration period will still have a chance to seek court review of the decision.

This proposed rule distinguishes between reconsideration of the decision in the appeal at hand, which must be requested within ten days, and

reconsideration of a standing precedent, which may be requested at any time. The decision in the appeal at hand is binding on the parties to the appeal and may require action to be taken by the agency involved. In contrast, a standing precedent provides legal guidance for future situations, which may or may not involve the same agency or other parties and does not require an agency to take a particular action. For instance, suppose that in an appeal by Kimo K. Public, who is seeking access to Widget Regulation Reports maintained by the Department of Commerce and Consumer Affairs ("DCCA"), OIP decides that the reports are public and issues a formal opinion ordering DCCA to disclose the reports. DCCA now has an obligation to disclose the reports as required by the decision, absent a successful request for reconsideration filed within ten days or a successful appeal to circuit court. Suppose further that DCCA does disclose the records to Mr. Public and does not seek reconsideration or appeal to circuit court at that time, but two years later, DCCA requests reconsideration of the issue on the basis that the reports now include different information than they previously did and a recent federal law protects information submitted by

widget producers. Based on the changes in the facts and the law, OIP may reconsider the issue of whether Widget Regulation Reports are public. Nevertheless, OIP's reconsideration will not change DCCA's previous obligation, based on OIP's decision two years previously, to have produced the specific reports requested by Mr. Public that were the subject of the earlier appeal.

N. PROPOSED RULE § 2-73-20

(Record of appeal)

EXPLANATION OF PROPOSED RULE § 2-73-20

Section 92F-___, HRS, which allows an agency to appeal to circuit court an OIP decision under these proposed rules, requires the court's review to be generally limited to the record before OIP, and also requires OIP to provide the circuit court with a certified copy of the record that it compiled to make its decision. This proposed rule requires OIP's record to include all documents related to the appeal, including non-paper records such as audio or video recordings or e-mails or other electronic records, as well as an index. The proposed rule also addresses documents submitted for *in camera* review, which will be

listed in the index as other documents are, but will be accessible only to OIP and the courts.

III. EFFECT ON AGENCY OPERATIONS OR PROGRAMS

These proposed rules set out the procedures for an appeal to OIP of an agency's denial of access or, in the case of DOTAX, granting of access to a government record, or a complaint to determine whether the Sunshine Law has been violated or whether a public body is subject to the Sunshine Law. When a person files such an appeal, OIP, the appellant, the State or county agency whose action is the subject of the appeal, and any other person with an interest in the appeal shall follow these proposed rules.

IV. FINAL RESULT EXPECTED

As explained in the above section, these proposed rules govern the procedures for an appeal to OIP of an agency's denial of access to a government record or, in the case of DOTAX, disclosure of a tax opinion, or a complaint to determine whether the Sunshine Law has been violated or whether a public body is subject to the Sunshine Law. The procedures set forth in these proposed rules were designed to make the appeal process fair, informal, and expedient.

The proposed rules recognize that an appeal to OIP will be available as an alternative to filing a court action to challenge a denial of access to a government record under the UIPA or to challenge a board's actions or a public body's status under the Sunshine Law. The decision to appeal to OIP does not prejudice a person's right to directly appeal to the circuit court under the UIPA, where the matter will be heard *de novo* by the court. HRS §§ 92F-15, 92F-15.5, and 92F-27. As of January 1, 2013, an agency may also appeal an OIP decision made under either the UIPA or the Sunshine Law section pursuant to section 92F-___, which allows an agency to seek court review of an OIP decision within thirty days of the decision and requires the court to employ a high "palpably erroneous" standard of review. Act ___ (SLH 2012). OIP's decision and any opinions are admissible in a court action. HRS § 92F-15, 27.

A person contesting a DOTAX decision on disclosure of a written opinion, however, must appeal first to OIP, after exhausting administrative remedies under DOTAX rules, before the person can file an action in circuit court. HRS § 231-19.5.

V. FINANCIAL IMPACT ON THE STATE

As stated in the previous section, appeal to OIP under the proposed rules will be an alternative to filing an action in circuit court under the Sunshine Law or the UIPA. Because these proposed rules were designed to make the appeal process informal, expedient, and at no cost to the public, OIP anticipates that most requesters will prefer to appeal to OIP rather than file an action in court.

OIP's informal alternative dispute resolution process will reduce the potentially large financial burden on the State and counties from persons filing actions in court to appeal denials of record access. Specifically, the State and counties will financially benefit from not having to pay the costs of defending against actions in circuit court, and, where the complainant prevails, the complainant's reasonable attorney's fees and all other expenses. See HRS § 92F-15(d).

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 filing an appeal

with OIP. These appeal procedures are designed to be informal, expedient, and at minimal or no cost to the members of the public. For example, individuals, small businesses, and non-profit organizations are not required to retain legal counsel to represent them before OIP, and OIP's informal process will provide inexpensive and quicker resolution of their disputes with government agencies without clogging the courts. Thus, there will be little, if any, negative impact on the economic growth of the State by the adoption of these rules, and instead, there may be a positive impact due to less litigation and more timely resolution of disputes. Moreover, the fair and reasonable resolution of disputes between members of the public and government agencies will help to promote accountability by the government and the public's trust in government.

VII. OTHER ALTERNATIVES

Sections 92-1.5 and 92F-42(12), HRS, require these proposed rules. Section 231-19.5, HRS, refers to "procedures established by the office of information practices under section 92F-15.5 and 92F-42(1)," HRS, with regard to appealing a decision by the DOTAX concerning the

disclosure of a written opinion. There are no alternatives to compliance with these statutory requirements.