

Guide to Appeals to the Office of Information Practices

This guide, in a question and answer format, provides an introduction to the process of administrative appeals **to** the Office of Information Practices (OIP) from government agency decisions under the Uniform Information Practices Act (UIPA), the Sunshine Law, and certain decisions of the State Department of Taxation to grant or deny access to their records. Chapter 2-73, Hawaii Administrative Rules (HAR), sets out OIP's administrative appeal procedures. Appeal procedures for judicially appealing **from** an OIP decision to circuit court are not covered in this guide.

OIP administers the state's open records law, the Uniform Information Practices Act (chapter 92F, Hawaii Revised Statutes (HRS)), and open meetings law, the Sunshine Law (part I of chapter 92, HRS). One of OIP's duties under those laws is to accept complaints from the public regarding possible violations of those laws, and the administrative appeal procedure rules set forth OIP's process for resolving those complaints.

In Q & A form, this guide answers several general questions about when the appeal rules apply and walks the reader through the process of an appeal to OIP. Because this is intended as a quick and readable guide, it focuses on the most generally applicable provisions of the administrative appeal rules and uses everyday language. Readers should be aware that more detail is provided in the rules themselves and OIP's Impact Statement, as well as a later Statement explaining changes to the initial draft of the rules, which are available on OIP's website. The Impact Statement's explanation of the rules includes relevant legal citations and examples, and the language of the rules themselves provides the legal standard for OIP's administrative appeal procedures in the event of disputes.

Q: Do the Appeal Rules apply to pre-2013 files?

A: The appeal rules apply in full to appeals filed from January 2013 forward.

Because older files may have been handled in a way inconsistent with the new rules, OIP will not apply the new rules retroactively to older files in a way that would penalize the parties involved. For instance, even though the request to open a pre-2013 file may have been made after what would have been the deadline for an appeal under the new rules, or the agency's response may not have included all the information required under the new rules, OIP will not dismiss the file for being filed late or automatically treat the agency's response as insufficient.

However, for pre-2013 files that would have been appeals under the new rules, OIP will apply the rules to those files going forward. Thus, OIP will ensure that its decision, or any other action it takes on a file, is consistent with what the rules require, and will keep a record of the file as required by the new rules.

Q: Must a person with a UIPA or Sunshine Law complaint appeal to OIP before going to court?

A: The UIPA and Sunshine Law do not require a person to appeal to OIP before going to court. Filing a Sunshine Law complaint with OIP is an alternative to filing a lawsuit in circuit court, which the Sunshine Law also allows. Similarly, under the UIPA, filing an appeal with OIP is an optional alternative to filing a lawsuit in circuit court to compel disclosure, and a requester still has the right to appeal to the court after OIP's decision.

However, the law regarding an appeal of the Department of Taxation's decision to disclose or deny access to a tax opinion allows a person "aggrieved by a decision of the office of information practices" to appeal to the circuit court, but does not appear to allow an appeal to the court without a prior OIP ruling. HRS § 231-19.5.

Q: Is an appeal to OIP a contested case hearing?

A: No, the UIPA specifically requires that an appeal to OIP **not** be a contested case hearing.

Q: What can be appealed?

A: A person who made a written record request under the UIPA can administratively appeal an agency's denial of access to the requested records, for both government records and personal records (records about the requester).

A person who believes that a board's actions violated the Sunshine Law can file an appeal with OIP asking whether the board violated the law.

A person who wants a determination as to whether a group is a "board" subject to the Sunshine Law in the first place can file an appeal asking that question.

A person complaining about an agency's **disclosure** of a record cannot file an appeal asking whether the agency should have disclosed the record (with one exception noted below). The

UIPA has specific statutory sections providing a right to administratively appeal a **denial** of access to OIP, but it does not have any section providing a right to administratively appeal an agency's **granting** of access, so OIP's appeal rules do not cover complaints about disclosure of a record. However, a person can still seek an **advisory opinion** from OIP about whether an agency's disclosure of a record was required under the UIPA.

For one specific type of record, though, the disclosure of a record can be appealed. A person can file an appeal to challenge a Department of Taxation decision to disclose a written opinion, as well as those challenging the department's denial of access to an opinion, after exhausting administrative remedies with the department.

Q: Can people still ask OIP for other types of assistance?

A: Yes, OIP still offers other types of assistance such as advisory opinions, guidance, training, and informal advice by telephone or e-mail, and those types of assistance are not subject to the appeal rules. OIP also continues to offer assistance to a requester who is having trouble getting an agency to respond to a record request. The requester has the choice to ask for OIP's assistance in getting a response from an agency that missed its deadline, or to move straight to the appeal process and appeal the non-response as a denial of access.

Q: How do I file an appeal?

A: Appeals are not required to be submitted in a specific form or a particular format, but they do need to be in written form and include specific information, as listed below. Requesters still have the option to use the existing Request for Assistance to the Office of Information Practices form to submit an appeal.

A UIPA appeal must clearly identify the records concerned (which can be done by attaching a copy of the original record request) and include a copy of the agency's written denial of access, or a written statement that the agency has not responded within the prescribed time.

A Sunshine Law appeal alleging that a board violated the Sunshine Law must clearly describe the board actions that the appellant believes violated the law.

A Sunshine Law appeal asking whether a group is subject to the Sunshine Law must clearly identify the group in question.

Every appeal must also include contact information for the person filing the appeal.

An appeal also can include a short statement of relevant facts, an explanation of the appellant's position, and any other relevant information for OIP to consider. The rules do not **require** the appellant to include a statement to file an appeal, but an appeal that includes this information will help OIP to better understand what the appeal is about and the reason for the appellant's complaint.

The deadline to file an appeal depends on what type of an appeal it is. For appeals involving records, the rules require a UIPA appeal to be filed within **one year** of the agency's denial of access in response to a UIPA request. The deadline to appeal the Department of Taxation's denial (or granting) of access to a written opinion is set by statute, and is currently sixty days after the decision to deny or grant access.

Under the rules, an appeal alleging that a board violated the Sunshine Law must be filed within **six months** after the alleged violation took place. However, a Sunshine Law appeal asking the question of whether a group is subject to the Sunshine Law in the first place can be filed at any time before the group dissolves.

Q: What happens after OIP gets an appeal?

A: OIP will respond in one of two ways. If the appeal is filed within the deadline, concerns an issue that can be appealed, and includes the required information, OIP will accept the appeal and will issue a Notice of Appeal to the appellant and to the agency whose action is being appealed. The notice of appeal will let the agency know the date the appeal was filed and will include a copy of the requester's appeal and a brief description of the appeal procedures and the response required.

If the appeal is not timely, or is missing necessary information, or does not raise an appealable issue, OIP will notify the appellant in writing that the appeal will not be considered, with an explanation of the reason why the appeal as filed was not valid.

Q: How should the agency respond?

A: The agency is required to respond to an appeal in writing within ten business days after the date it receives the notice of appeal from OIP.

For all appeals, the agency's response must include a statement of the facts relevant to the appeal and an explanation of the agency's position, including its justification for the actions complained of in the appeal (such as a denial of access to records or specific actions by a board alleged to have violated the Sunshine Law), and contact information for the agency employee or representative authorized to respond to the appeal.

The agency's statement must cite to the specific statutory sections and other legal authorities supporting its position, and include any evidence necessary to support its arguments. For instance, if an agency's statement argues that a particular exception to record disclosure applies, it should also provide whatever factual statements are necessary to support that argument.

Depending on the type of appeal, the agency's response may need to include additional information. For a UIPA appeal, the response must include a list identifying or describing each record withheld, and will typically also need to include an unredacted copy of the records in question for OIP's confidential review. For a Sunshine Law appeal, the response will often need to include the minutes of the relevant meeting.

Q: Can additional information be provided while the appeal is pending?

A: In addition to the information and materials submitted as part of the appeal, OIP may ask the person who filed the appeal, or any other parties participating in the appeal, to submit a written statement or statements. If OIP does so, OIP will also let all the parties know when the statement is due, whether there are any requirements as to the form it takes or what it includes, and when any response by the agency or other parties is due.

OIP can consider information or materials submitted by any person, not just parties to the appeal. However, if someone other than the person who filed the appeal and the responding agency wants to participate in the appeal as a party or in some other way, that person must submit a written request and must explain the reason for the request, and OIP will then determine whether to allow such participation.

Because an appeal before OIP is an informal proceeding, a party's or third person's communication with OIP can be *ex parte*, *i.e.*, outside the presence of the other party or parties. However, OIP does have the option to require the parties to copy each other on submissions.

Q: What happens when OIP has made a decision?

A: OIP's written decision on the appeal will be sent to all parties when it is issued. Similar to the courts, there is no specific deadline set for OIP's decision on an appeal.

A party can request that OIP reconsider its decision. The deadline to request reconsideration is ten business days after the date the decision was issued. If a party misses the deadline for reconsideration or if OIP declines to reconsider the opinion, the party still has the option of appealing the decision to court. Section 92F-42, HRS, sets out the standard for an agency's appeal of an OIP decision. For a record requester or Sunshine Law complainant, appeal to court is provided by section 92F-15, HRS (denial of general record request), section 92F-27, HRS (denial of a personal record request), or sections 92F-11 and -12, HRS (Sunshine Law complaint).

In some instances, OIP may issue a notice dismissing all or part of an appeal, instead of issuing a written decision. The circumstances in which OIP can dismiss an appeal are listed in H.A.R. section 2-73-18. OIP may also ask (but will not require) the parties to mediate the appeal, or an issue within the appeal, as an alternative means to resolve the appeal.

Q: What if I have other questions?

A: You can always contact OIP's Attorney of the Day with questions about the administrative appeal process, or about the UIPA and the Sunshine Law generally, at 586-1400 or oiip@hawaii.gov. Additionally, OIP's website at hawaii.gov/oiip has copies of the statutes and rules, past OIP decisions, and informative training videos and guides explaining the UIPA and the Sunshine Law.