STATEMENT ON RULES ADOPTED BY THE OFFICE OF INFORMATION PRACTICES ON ADMINISTRATIVE APPEALS PROCEDURES

I. INTRODUCTION

On November 15, 2012, the Office of Information Practices ("OIP") held a public hearing on its proposed rules implementing provisions of the Uniform Information Practices Act (Modified), chapter 92F ("UIPA"), Hawaii Revised Statutes ("HRS"); the Sunshine Law, part I of chapter 92, HRS ("Sunshine Law"); and other laws that grant a person the right to complain or appeal to OIP, and authorize OIP to review and decide the appeal. Seven members of the public attended the hearing, two persons provided oral and written testimony at the hearing, and three additional written testimonies were submitted to OIP through November 23, 2012. The oral recording of the hearing, along with all written testimonies, were posted to OIP's website at hawaii.gov/oip.

After reviewing all testimony, OIP has decided to adopt the rules with a few non-substantial changes based on comments from testifiers. While OIP considered testimony advocating additional changes to its rules, OIP determined that no additional changes were warranted.

This statement explains OIP's amendments to the proposed rules and OIP's reasons for not making the changes advocated by some testifiers. OIP's Impact Statement for Proposed Rules of the Office of Information Practices on

Administrative Appeals Procedures ("Impact Statement"), which OIP continues to make publicly available on its website at hawaii.gov/oip, gives a full description of the rules previously proposed by OIP and their purposes.

II. AMENDMENTS TO PROPOSED RULES

A. PROPOSED RULE § 2-73-11

The Corporation Counsel for the City and County of Honolulu ("Honolulu") commented that references to "chapter 92, HRS," should be to "part I of chapter 92, HRS." OIP agrees that this is the proper reference to the Sunshine Law and has made this change.

B. PROPOSED RULE § 2-73-12

OIP has corrected a reference to "chapter 92, HRS," to instead be to "part I of chapter 92, HRS."

The League of Women Voters ("LWV") commented that, where an agency has failed to respond in writing to a record request and thus there is no written denial, the proposed rule instead requires OIP's determination that the agency's failure to respond was effectively a denial of access, but the rules do not set out the process by which a person can obtain such a determination. LWV also expressed concern that obtaining such a determination could delay the appeal process. OIP notes that proposed rule 2-73-4 provides that OIP will continue to offer other forms of assistance, which would include assistance in getting an agency to respond properly under the UIPA. In many such cases, an agency's failure to respond is a result of inattentiveness rather

than an intentional denial of access. Nonetheless, in response to LWV's concern, OIP has amended this proposed rule to allow a requester to appeal based on the requester's own written statement that the agency has not responded within the prescribed time, and has amended the time period for appeal to run from the date by which the agency should have responded.

C. PROPOSED RULE § 2-73-18

Maui County Council Chair Danny A. Mateo, writing as an individual ("Mateo"), commented that the rule should incorporate a time frame within which the parties can request that an appeal be considered abandoned. OIP notes that it would necessarily be OIP, and not the parties, that would make the determination that an appeal has been abandoned and issue a notice dismissing it on that basis. However, OIP has amended the proposed rule to adopt Mateo's suggestion of a time frame by adding twenty business days as the period after which an appellant's failure to respond to OIP could be considered an abandonment of the appeal. OIP does not intend the addition of a time frame to imply that a request will automatically be dismissed where a requester fails to respond within twenty business days, but rather to clarify that a response made within twenty business days cannot be considered a failure to respond justifying dismissal of an appeal. This is consistent with the time period after which a record request may be considered abandoned due to a requester's lack of response in section

2-71-16. Note that the time period in the amended rule is given as "twenty days," but those days are business days, because time periods are calculated in business days unless otherwise provided under section 2-73-3.

D. § 2-73-19

Mateo commented on the portion of the rule providing that OIP shall notify the other parties of any request for reconsideration received and granted, including a copy of the request and any statement filed, and "may allow the other parties to submit a counterstatement." Specifically, Mateo commented that an agency should always have the right to submit a counterstatement, and should know the basis for reconsideration. In response to this comment, OIP has amended the proposed rule to make clear that, where a request for reconsideration has been granted, the other parties will have the right to submit a counterstatement prior to issuance of the reconsidered final decision. OIP believes that the other parties will be able to determine the basis for reconsideration from the request for reconsideration and any statement filed with it.

III. EXPLANATION OF THE RULES IN RESPONSE TO OTHER TESTIMONY

A. PROPOSED RULE § 2-73-1

Beverly Ann Deepe Keever ("Keever") and the Society of Professional Journalists, Hawaii Chapter ("SPJ"), submitted testimony stating that the rules should not be construed to secure a "just, equitable, speedy and inexpensive" resolution as stated in this proposed rule, but rather a

resolution that is "expeditious, informal, and at no cost to the public," to be identical to the language used in a committee report forming part of the UIPA's legislative history. The primary concern of the commenters appears to be that because the rule uses the term "inexpensive," the appeal process set forth by these rules would not be "at no cost to the public."

These comments appear to be based on a belief that the wording used in a committee report carries the force of law and therefore should not be changed, reflecting a confusion between the weight of committee report language and the weight of statutory language. Committee reports and other legislative history offer background as to how statutory language came to be chosen, and are important indications of legislative intent as such, but do not carry legal force in the way a statute does.

The statute itself only requires agencies to "assure reasonable access to facilities for duplicating records and for making memoranda or abstracts" and says nothing about providing records to requesters at no cost. HRS § 92F-11(d). Moreover, the UIPA specifically recognizes that requesters will incur costs as it requires OIP to "adopt rules that set forth the fees and other charges that may be imposed for searching, reviewing, or segregating disclosable records," which OIP has done at Chapter 71, Hawaii Administrative Rules ("HAR").

The proposed rules do not require members of the public to pay any fees to file an appeal, but reasonably contemplate that persons may incur incidental copying or delivery costs to prepare a written appeal and provide supporting documentation to OIP. Note, too, that the proposed rules require only a minimal level of information for an appellant to file an appeal, which helps to ensure that members of the general public can easily appeal an issue without the assistance of counsel. Consequently, OIP believes that it is not necessary to amend its proposed rules, which apply to both agencies and members of the public, as the rules accurately and reasonably express the UIPA's purpose to secure a "just, equitable, speedy and inexpensive" resolution of appeals under the UIPA and resolution of complaints under the Sunshine Law.

C. PROPOSED RULE § 2-73-3

SPJ recommended that (1) the number of extensions should be limited, (2) the time period for each extension should be limited to 10 days, and (3) extensions should only be allowed under specified conditions. Honolulu commented that there should be specific criteria for when OIP will extend a deadline. Mateo also commented that adding guidance on how to obtain an extension of time would be helpful. Separately, when discussing time limits generally, Mateo described circumstances in which a board would have difficulty meeting time limits.

Because these proceedings are specifically required **not** to be contested cases, and are instead intended to be informal, OIP believes that it would be inappropriate to create rigid conditions for when, and for what period, a deadline may be extended. OIP also notes that the Rules of the Circuit Courts of the State of Hawai'i do not contain specific criteria or guidance as to when an extension will be granted.

OIP also notes that taken together, Mateo's concern that the deadlines may not allow sufficient time for a response in some circumstances and the SPJ's concern that extensions should be strictly limited are an illustration of why extensions of deadlines are called for in appropriate circumstances and it is important for the rules to allow flexibility in that regard.

E. PROPOSED RULE § 2-73-11

Keever and SPJ both commented that appeals of personal records should be included. The proposed rule already includes appeals of personal records: it specifically allows an appeal where a "person seeks a review of an agency's denial of access to information or records under [section]. . . 92F-27.5, HRS," which is the section allowing a person to appeal to OIP an agency's denial of access to personal records. It is not necessary to add in references to other sections of the UIPA dealing with personal records,

as those are inherently raised in an appeal dealing with personal records.

Honolulu questioned whether a "public body" in the usual sense of the term was necessarily a board subject to the Sunshine Law. As explained in the next section, this term is used only in the context of an appeal to determine whether such a body is in fact subject to the Sunshine Law.

F. PROPOSED RULE § 2-73-12

Mateo expressed concern that an appeal of a board's decision had no limitation period, but instead could be filed at any time. This concern is based on a misreading of the rule providing for time limits on filing appeals.

The rule sets a six-month period to appeal an alleged violation of the Sunshine Law in section 2-73-12(a)(3). The clause Mateo commented on as allowing an appeal any time during a public body's existence, section 2-73-12(a)(4), is for "an appeal to determine the applicability of chapter 92, HRS, to discussions or decisions of a public body." (OIP has corrected the reference to refer to part I of chapter 92 only, as noted above.) As explained in the Impact Statement, this provision allows a person to seek a determination of whether the Sunshine Law applies to a body in the first place. Thus, "public body" is not defined as being a specific type of entity such as a board, or defined at all, because the question raised by such an appeal is whether a group meets the definition of a "board" subject to the Sunshine Law, and the question of whether the group is

actually required to follow the Sunshine Law may appropriately be raised at any point before the group dissolves. The wording is taken from the long-standing language of section 92-12(c), HRS, the Sunshine Law provision allowing an individual to go to court to determine whether a "public body" is subject to the Sunshine Law. Although OIP agrees that there may be clearer ways to describe the question of whether a group is subject to the Sunshine Law, use of the existing statutory language ensures consistent interpretation.

SPJ and Keever suggested adding a specific reference to an appeal of a denial of records under HAR § 2-71-13, which sets out the time limits for an agency to respond to a formal record request. As noted above, an appeal to OIP of a denial of access under the UIPA would be made under one of the statutory sections specifically allowing such an appeal, specifically § 92F-15.5 for government record requests and § 92F-27.5 for personal record requests. It is not necessary to add in references to other sections of the UIPA, or to administrative rules promulgated to implement the UIPA, as those are inherently raised in a UIPA appeal. OIP also notes that insofar as the commenters' concern is to ensure that a requester can still appeal where an agency has simply failed to respond, the amendment made to this rule in response to LWV's concerns addresses that situation.

Honolulu questioned whether there is a potential for conflict between time periods stated as "six months" or "one

year" and the general rule stated that time periods are measured in business days "unless otherwise stated." OIP does not believe this constitutes a potential conflict, as time periods measured in months or years are "otherwise stated" from time periods measured in days. The reason for stating long time periods in months or years is to make them readily understandable; a time period such as 120 days or 240 days (approximately six months and a year, respectively, as measured in business days) is far less intuitive.

G. PROPOSED RULE § 2-73-13

Mateo commented that the rules do not provide a time for OIP to assess whether an appeal meets the rules' requirements, and that the agency does not have the opportunity to comment on OIP's decision to accept an appeal and whether the basis for an appeal is sufficient. OIP notes that the appeal itself provides the agency's opportunity to comment on whether the basis for an appeal is sufficient. The agency can dispute any factual allegations, argue its view of the law, and otherwise make whatever arguments it wishes to in its response to the appeal.

Honolulu commented that (1) it is not clear when an appeal is "not warranted," and (2) standards for when an appeal will be heard should be added. OIP notes that sections 2-73-11 and -12 set forth the standards for what may be appealed and what information an appeal must contain, and the UIPA and Sunshine Law themselves set forth the standards for what agency actions may constitute a violation

of those laws. OIP does not believe it is necessary to restate those standards in this section.

Honolulu also questioned whether saying that an appeal "will not be heard" is the same as dismissing an appeal. As set out in this proposed rule, in a situation where OIP finds no appeal is warranted, OIP will not issue a notice of appeal to the appellant and agency; in other words, no appeal is opened so there is no appeal to dismiss. By contrast, rule section 2-73-18, which governs the dismissal of an appeal, applies to an appeal that has been opened and is pending.

Keever suggested that the rule should require OIP to post on its website all materials filed as part of an appeal in addition to the notice of the appeal, as well as a list of all submitted appeals that were rejected as not meeting the rules' requirements for filing an appeal with an explanation of the reason each was rejected. SPJ likewise suggested that those materials should be required to be made available to the public (without specifying a means). OIP notes that the information in question would generally be public upon request in any case, with the possible exception of requesters' identities and some materials in certain personal record appeals. However, a requirement for OIP to keep a website on which it provided access to a significant part of its routine correspondence and attached materials would have a negative impact on OIP's deliberative process and ability to actually perform its work in a timely

fashion, in addition to the demands it would place on OIP's access to server space and technical support. OIP therefore declines to create such a requirement in its rules.

With respect to the description of procedures required to be included with OIP's Notice of Appeal, Mateo commented that the agency should know beforehand what procedures will be used. OIP notes that the purpose of these proposed rules is to set out the procedures that will be used in appeals; the description of procedures included with the Notice of Appeal merely serves to alert the agency to those procedures.

Keever and SPJ suggested that the Notice of Appeal's description of appeal procedures should specify that the agency has the burden of proof. In drafting these rules, OIP opted against including a rule specifying a burden of proof because the burden of proof, which as noted in the Impact Statement does generally lie with an agency, is already established by statute.

Keever also suggested that the description of appeal procedures state that the appellant has no responsibilities in an appeal. Mateo, to the contrary, suggested that the appellant be required to provide more information and documentation than the proposed rules require. Honolulu similarly questioned in what circumstances it could be appropriate for OIP to accept an appeal without written documentation of the response or agency request, and suggested setting out specific criteria for doing so.

OIP believes that the concerns raised by Mateo and Honolulu illustrate why it is necessary for OIP to place some obligation on an appellant to provide adequate information for OIP and a responding agency to determine what is being appealed, while the concerns raised by Keever emphasize the legislative intent that an appeal should be an accessible and informal process. OIP believes that the proposed rule in its current form represents a balance of these concerns, and thus OIP declines to amend it in the direction of requiring either more or less documentation from an appellant.

H. PROPOSED RULE § 2-73-14

SPJ asked what would be the consequence of an agency's failure to respond to an appeal within the prescribed period and whether an agency could unfairly delay the proceedings through its failure to respond in a timely fashion. Honolulu and Mateo, on the other hand, expressed concern that the prescribed period for an agency's response to an appeal would be too short in some circumstances. As discussed earlier, the rules provide for possible extensions to the time to respond, in recognition of the fact that agencies will sometimes be unable to respond within ten business days. OIP believes the current deadline, combined with the agency's ability to request an extension, appropriately balances appellants' and agencies' interests.

Mateo also commented that the rules provided no limit on the number of appeals that could be taken as to a single

action. Indeed, multiple persons could file appeals regarding the same action by a board, and there is similarly no limit on the number of court complaints that could be filed regarding the same action by a board. Rule section 2-73-15(g), however, protects against the undue proliferation of appeals related to the same action by providing that appeals can be consolidated where appropriate.

Mateo commented that the rules did not provide for an agency's response when it no longer had the relevant documents. OIP notes that the rules do allow an agency to respond to an appeal, and it is up to the agency to make its arguments in that response.

Mateo also suggested that the rules should allow for *in camera* review by OIP with additional protections where there is a claim of privilege. OIP notes that proposed rule sections 2-73-15(c) and (d) do provide for *in camera* review, including additional protections where a claim of attorney-client privilege is at issue. Honolulu commented that an agency would be placed in a dilemma when required to "release" a document it believes is privileged to OIP for its *in camera* review. OIP notes that HRS § 92F-42(5) allows OIP to "examine the records of any agency for the purpose of [investigating possible violations by an agency] and seek to enforce that power in the courts of this State[.]" Thus, the dilemma Honolulu anticipates is the result of the existing law and is not a creation of these proposed rules. Notwithstanding OIP's statutory right to review agency

records, because OIP is aware of agencies' concerns regarding the treatment of records claimed to be privileged, proposed rule section 2-73-15(d) provides additional protections for such records, including the possibility that OIP may allow an agency to submit such records for review in redacted form.

I. PROPOSED RULE § 2-73-15

Keever commented that members of the public should never be required to provide copies of a statement or other document to other parties or provide additional information in an appeal. Mateo commented that members of the public should always be required to provide the agency with a copy of any submittal, and should be required to provide more information to open an appeal as a general rule. OIP believes that the proposed rules represent a balance that recognizes that, while in some instances it may be appropriate to expect an appellant to provide additional information and copy other parties on its statements, such as where the appellant is a business represented by counsel, in many other instances it will not be appropriate to do so, such as where the appellant is an individual member of the public. The rules therefore allow for, but do not generally require, such obligations on the part of the appellant.

Honolulu commented that the various procedures set out in section 2-73-15 that may be used in an appeal, including the possible participation of a third party and possible mediation, should be more strictly limited with a set

standard for when such participation or a request for mediation would be allowed. As noted above, the appeals governed by these rules are specifically required **not** to be contested cases, and were instead intended to be informal. OIP believes that the more stringent standards suggested by Honolulu would be inconsistent with that legislative intent.

K. PROPOSED RULE § 2-73-17

Honolulu suggested that the requirement that an OIP decision give notice of the appellant's right to seek judicial review might be expanded to include a statement of the time for such appeal. While OIP believes that this is generally a good idea, and in fact OIP's opinions currently do include such a statement as a standard practice, OIP does not believe it is necessary to require it by rule.

SPJ and Keever suggested that OIP be required by rule to issue a decision within five business days of receiving statements from all parties. Mateo also commented that there is no requirement that a decision be issued by a specified deadline. OIP notes that the suggestion that OIP's decisions be issued within a week of receiving all parties' statements suggests an unfamiliarity both with the typical timeframes for court decisions and the minimum time generally required to analyze and render a written legal opinion and factual findings regarding a dispute. In any case, while it is not OIP's desire to delay issuance of its decisions, OIP must recognize that its resources are and have historically been limited. Further, given the

deference required to be applied by courts where an agency appeals an OIP decision, OIP believes it is critical that its opinions be legally and factually well-founded, and the importance of those opinions in providing precedents regarding the laws OIP administers also makes it important that those opinions be carefully written. OIP also notes that if it failed to meet such a deadline, there would have to be a consequence for the appeal in question: either the appellant would prevail by default, which would be somewhat consistent with the legislative intent behind the UIPA and the Sunshine Law but unfair to the agency, or the agency would prevail by default, which would be both unfair to the appellant and inconsistent with the legislative intent. Thus, OIP does not believe it would be prudent to set a deadline on issuance of its decisions.

SPJ and Keever also suggested that OIP be required to publicly disclose appeal decisions. Such decisions are typically public, and in fact, OIP does post the full text of its formal opinions and summaries of its informal opinions on its website. Nonetheless, given the limited resources available to OIP, OIP does not intend to create a legal requirement for the office to publish all its decisions. Any person may, as always, request a copy of such a decision under the UIPA.

Mateo asked whether section 2-73-17(d), which states that informal or memorandum opinions are not precedential but may be considered for other purposes, should explicitly

state that a body following an informal or memorandum opinion shall be considered to be acting in good faith. As OIP's Impact Statement observed with regard to this section, the purpose of that section's statement that non-precedential opinions may still be considered for other purposes is to allow an agency following an informal or memorandum opinion to show that its actions were consistent with OIP's prior advice. OIP therefore believes that the rule as proposed already does allow an agency to raise (and OIP to consider) its reliance such an opinion to show its good faith.

M. PROPOSED RULE § 2-73-19

Keever and SPJ commented that OIP should not have the authority to reconsider a prior published OIP decision. They expressed particular concern that the portion of the standard allowing reconsideration based on "other compelling circumstances" would provide an unlimited authority to abandon prior precedents. The reconsideration standard set forth in the proposed rules is the same one OIP adopted ten years ago in its Opinion Number 02-08, based on the standards applied by courts for either reconsidering a prior decision within the same litigation or for overturning a standing precedent. As OIP wrote on page 5 of that opinion,

> The standard used by courts for reconsidering a conclusion of law is that the appealing party must show the findings of fact are clearly erroneous or the conclusions of law are incorrect. Child Support Enforcement v. Jane Roe, 96 Haw. 1, 13, 25 P.3d 60, 72 (2001) (citation omitted). The

> standard for overruling a settled precedent, or stare decisis, is "compelling justification." Hilton v. S. Carolina Pub. Rys. Cmsn., 502 U.S. 197, 202, 112 S. Ct. 560, 565 (1991).

The "other compelling circumstances" language the commenters point to as providing unlimited authority to abandon settled precedents, in other words, is based on the standard used by the U.S. Supreme Court to overrule a settled precedent, and is a standard OIP has followed for ten years. OIP therefore does not agree that the standard is either overbroad or inappropriate. OIP also notes that there have been very few instances since OIP was created in 1989 in which a precedent has been overturned.

Mateo commented that OIP, as the arbiter of an appeal, should not also be the one to decide whether it should be reconsidered. OIP believes Mateo's comment may be conflating a party's request that OIP reconsider its decision in an appeal with a party's appeal of an OIP decision to a court. As with a request for reconsideration of a court's decision, which is made to the court itself prior to any appeal, a party may request that OIP reconsider its final decision in an appeal and if OIP declines to do so, the party still has the option of appealing the decision to court.

Honolulu suggested that OIP provide a means for effective notice to agencies that may be affected by a challenge to a prior published OIP decision. OIP agrees that notice could be appropriate in some circumstances,

particularly where a precedent is primarily applicable to a limited and readily discernible set of agencies or individuals, but is not feasible in many cases in which all agencies may be affected or concerned individuals are not readily identified. Moreover, OIP is already providing timely communications of open government news to agencies, the media, and members of the public through its "What's New" articles that are e-mailed and posted on its website. Additionally, nothing prevents the parties in the appeal from contacting their constituencies or agencies with similar interests to provide amicus curiae briefs or seek to join the appeal. To avoid challenges and delays by third parties simply because they were not notified as required by a rule, OIP declines to specifically require formal legal notice to third parties in its rules.

Mateo commented that if a prior published opinion is reconsidered, the effect should be prospective. OIP notes that the proposed rule does indeed provide that in such an event, the reconsideration would not alter the effect of the original decision with respect to the specific dispute involved in the original decision.

Keever suggested that any request for reconsideration of a decision should be required to be disclosed to the public. As with the discussion above regarding the filed appeals and related materials, statements submitted, and decisions issued, although requests for reconsideration would for the most part be publicly available upon request,

OIP will not create an affirmative legal requirement for itself to publish a substantial portion of its files.

N. PROPOSED RULE § 2-73-20

Keever suggested that the record of each appeal before OIP should be required to be made public. OIP notes that the record of an appeal is likely to include material such as records or executive meeting minutes that were alleged to be confidential and that OIP may in fact have determined to be confidential in whole or in part, so publication of the entire record on appeal would effectively frustrate the purpose of the appeal process for UIPA appeals and some Sunshine Law appeals. In any event, even for those portions of the record that would be public upon request, OIP will not create an affirmative legal requirement for itself to publish a substantial portion of its files.

Keever also suggested that OIP be required to mail a copy of the index to the record to all parties, not just the agency, when the agency has filed an appeal of an OIP decision in the circuit court. OIP notes that this proposed rule is based on the process for a lower court's transmission of the record to an appellate court in the event of an appeal. When an agency has filed a judicial appeal of an OIP decision, the agency's service of its complaint on the appellant and any other party notifies them of the agency's appeal to the court, which is a separate proceeding. The appellant and any other party in the appeal before OIP are not necessary parties to and may opt not to

intervene in the agency's appeal to the court. For this reason, OIP does not believe it is necessary to automatically mail the index to the record to the appellant and any other party to the completed OIP proceedings. Should the appellant or another party seek a copy of the index to the record, though, either as a prelude to intervening in the agency's appeal or for any other reason, they could certainly obtain a copy of the index from OIP or, presumably, the circuit court with which a copy of the record (including the index) has been filed.