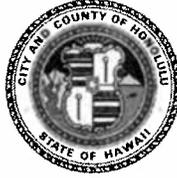


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November 23, 2012

HAND DELIVERY

Cheryl Kakazu Park
Director
Office of Information Practices
State of Hawaii
250 South Hotel Street, Suite 107
Honolulu, Hawaii 96813

Dear Ms. Park:

Re: Proposed Administrative Rules for Administrative
Procedures for Appeals to the Office of Information
Practices

Please accept this communication as written testimony of the Department of the Corporation Counsel, City and County of Honolulu, for the proposed administrative rules of the State Office of Information Practices ("OIP") establishing administrative procedures for appeals to OIP. A public hearing on the proposed rules was held on Thursday, November 15, 2012, and written testimony on the proposed rules is to be accepted by OIP through Friday, November 23, 2012.

GENERAL COMMENTS

We found the rules to be confusing in that there are several subject matters consolidated and addressed in the rules; denial of access to information and records, filing of complaints, appeals, and advising on statutory compliance. While we appreciate OIP's desire to consolidate the rules for ease in access, consideration should also be made to the non-lawyer members of the public who will be pursuing redress to OIP through application of the rules.

SPECIFIC COMMENTS

Our comments are directed to specific provisions in the rules that we have addressed below in order of their appearance in the rules:

1. Section 2-73-3 (3) “Computation of Time.” The discretion afforded to OIP to extend the time prescribed in the rules “where is deems appropriate” does not afford an adequate standard (notice to the public) of the criteria to be applied by OIP to extend deadlines. It is our position that case law requires the inclusion of a standard or criteria to be applied by the agency when the administrative rule affords the agency discretion in taking action on a matter, otherwise the rule is at risk of being invalidated and the action of the agency deemed arbitrary.
2. Section 2-73-11(3) “What may be appealed.” Subsection (3) references compliance with or to prevent a violation of “chapter 92, HRS.” Pursuant to Hawaii Revised Statutes (“HRS”) Section 92-1.5 and in reviewing the structure of other Sections of the rules, we suspect the reference should instead be to “part I” of Chapter 92, HRS. The following Subsection (4) addresses “chapter 92, HRS.”
3. Section 2-73-11(4) “What may be appealed.” Subsection (4) refers to a “public body.” The term is not defined. HRS Section 92F-42(18) affords OIP oversight of “state and county boards” and rendering advice to “government boards”; it’s not apparent that OIP’s authority extends to public bodies in the usual sense of the term. The term appears in following Sections as well.
4. Section 2-73-12 (a)(1) and (a)(3) “Timing and content of appeal to OIP.” Paragraphs (a)(1) and (a)(3) refer to “one year” and “six months,” respectively. Section 2-73-3 “Computation of Time” establishes that “unless otherwise stated” in the rules, the period of time is measured in business days. There is a potential for conflict that should be addressed with the business day computation of time and references here to one year or six months periods of time.
5. Section 2-73-12 (c) “Timing and content of appeal to OIP.” The Section refers to an “otherwise substantiated appeal” that OIP may accept “at the director’s discretion” without written documentation of the request or the agency response. The “otherwise substantiated appeal” does not afford an adequate standard (notice to the public) of the criteria to be applied by OIP when an appeal

will be acceptable without documentation. As stated, it is our position that case law requires the inclusion of a standard or criteria to be applied by the agency when the administrative rule affords the agency discretion in taking action on a matter, otherwise the rule is at risk of being invalidated and the action of the agency deemed arbitrary.

6. Section 2-73-13 (a)(1) "OIP's response to appeal; OIP's notice of appeal." The Section provides that after receiving an appeal, OIP may determine that the appeal is not warranted and the appeal "will not be heard." It is unclear to us whether the clause "will not be heard" means that the appeal is "dismissed." If so, we suggest the clause be substituted with the word "dismissed" to conform to language utilized in the rules, and if not, the clause be clarified.

7. Section 2-73-13 (a)(1) "OIP's response to appeal; OIP's notice of appeal." The Section provides that after receiving an appeal, OIP may determine that the appeal is "not warranted" and the appeal will not be heard. The term "not warranted" does not afford an adequate standard (notice to the public) of the criteria to be applied by OIP when an appeal will not be heard. As stated, it is our position that case law requires the inclusion of a standard or criteria to be applied by the agency when the administrative rule affords the agency discretion in taking action on a matter, otherwise the rule is at risk of being invalidated and the action of the agency deemed arbitrary. We note that in contrast, Section 2-73-18 "Dismissal of appeal" does set forth specific instances where OIP will dismiss an appeal. If suitable, reference to Section 2-73-18 could be included in this Section.

8. Section 2-73-14 "Agency's response to an appeal." The Section affords the agency 10 business days to respond to OIP's notice of an appeal. The time limitation may be unreasonable for a board or commission subject to the Sunshine Law that must first ensure the availability of a quorum of its members to meet on a date certain and to post a 6-day notice prior to its meeting. Also, the time for appeal in Section 2-73-12 is one year for denial of access to records under Chapter 92F, HRS, and six months of board action alleged to be in violation of the Sunshine Law. As a practical matter, all agencies may not have ready access to their records of actions taken one year or six months ago to be able to respond within ten business days.

9. Section 2-73-15 "Other procedures for appeal." The Section affords OIP broad discretion in processing the appeals, including the determination of third party participation in Subsection (a); OIP may solicit input or relevant materials from any person on pending appeals in Subsection (c); OIP

may on its own initiative request mediation in Subsection (h); and OIP in its discretion may determine which procedures are best suited for each appeal in Subsection (j). As stated, it is our position that case law requires the inclusion of a standard or criteria to be applied by the agency when the administrative rule affords the agency discretion in taking action on a matter, otherwise the rule is at risk of being invalidated and the action of the agency deemed arbitrary.

10. Section 2-73-15 (d) "Other procedures for appeal." Subsection (d) presumes that an agency that is claiming the attorney-client privilege for its refusal to release the document may be required to release the document to OIP for *in camera* review. We comment that this places the agency in a very difficult place being forced to either release the confidential document or refuse compliance with the OIP demand.

11. Section 2-73-17(c) "Decision." The Subsection provides that if the agency's position is affirmed, the OIP decision shall notice the appellant's right to seek judicial review. OIP may wish to include the time for the appeal as well.

12. Section 1-73-19 "Reconsideration." We question how agencies will know when a prior published OIP opinion is being challenged through a request for reconsideration. Agencies that have long relied upon a published OIP opinion and take no issue with the opinion would have a significant interest in a challenge to the opinion. We suggest OIP provide a means for effective notice to agencies which may have a significant interest in participating in the reconsideration.

We look forward to the next iteration of your proposed administration rules. Thank you for the opportunity to provide our written testimony.

Very truly yours,


ROBERT CARSON GODBEY
Corporation Counsel

RCG:ml

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