

TESTIMONY FOR OFFICE OF INFORMATION PRACTICES'
ADMINISTRATIVE RULE-MAKING HEARING, NOV. 15, 2012,
PRESENTED BY BEVERLY ANN DEEPE KEEVER

Aloha,

My name is Bev Keever.

I find these draft rules very disappointing.

OIP seems to have forgotten that it was established nearly a quarter century ago to provide a process that is **expeditious, informal, and at no cost to the public.** These draft rules don't do that.

CHANGES PROVIDING MORE TRANSPARENCY--AND FASTER

These draft rules, which will have the force of law once approved, should provide for more transparency-- and should provide for it faster. Specifically, five changes to these draft rules are needed.

1. New rules should make OIP responsible for handling complaints and appeals when government agencies fail to respond at all to requests for public records.
2. New rules should call for public disclosure of all of OIP and agency decisions made during the processing of a denial of access of records or violation of the open-meetings law.
3. New rules should include time limits on OIP for its own decision-making in every procedure.
4. New rules should state explicitly that OIP's procedures shall specify that 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 Hawaii's open-meeting or open-records law.
5. New rules should delete 2-73-19(c) that gives OIP's director unlimited authority to reconsider and overturn OIP's precedent-setting formal opinions, many of which provided uniform guidance to state and city agencies and mandated transparency under previous administrations.

I would like to go through selected pages of OIP's draft rules showing the amendments I am offering. On these pages my additions are underscored in bold; OIP's underscoring is not boldfaced. My explanation for the change made is in italics. Deletions of OIP's language are strikethroughs.

GENERAL PROVISIONS

§2-73-1 Purpose, scope, and construction. The purpose of this chapter is to establish:

(1) The procedures for filing an administrative appeal with the state office of information practices, as an informal alternative to judicial action, under:

- (A) The Uniform Information Practices Act (Modified), chapter 92F, HRS, or
- (B) Chapter 231, HRS;

(2) The procedures for filing an administrative complaint concerning a board's failure to comply with part I of chapter 92, HRS; and

(3) The procedures for the office of information practices to process and render a decision on a complaint or appeal.

This chapter shall be construed to secure the ~~just, equitable,~~
~~speedy, and inexpensive~~ resolution of

appeals and complaints brought before the office of information practices- [Eff] (Auth: HRS §§92-1.5, 92F-42(1), (12), (17)) (Imp: HRS §§92-1.5, 92F-15.5, 92F-27.5, 92F-42(18), 92F-___; 231-19.5) through a process that is expeditious, informal, and at no cost to the public. [Auth: H. Stand. Com. Rep. No. 1288, 15th Leg., 1989 Reg. Sess., Haw. H.J. 1319.] [Explanation: The public would be better informed and OIP would be more credible, if the overblown language in these draft rules is deleted, as I've indicated, and my underscored additions are substituted. The new additions are a quote from the legislative history of Hawaii's Freedom of Information Law [H.R.S. Chapter 92F], as referenced in OIP's impact statement. OIP should fulfill the review process as set forth by the Legislature and not cloak it in vague generalities.] Add at top of page 73-3.

§2-73-2 Definitions. Unless the context otherwise requires, in this chapter:

"Access" shall be as defined in section 2-71-2.

"Agency" shall be as defined in section 92F-3, HRS, and shall include a board as defined herein.

"Appeal" means a written request by a person to OIP to review and rule on:

- (1) An agency's denial of access to information or records under chapter 92F, HRS, which shall include an agency's failure to respond within the time limits set forth in Hawaii Administrative Rules 2-71-13 or+ [Explanation: An agency's failure to respond constitutes a silent, even underhanded, form of denial of access that should be covered by an appeal to OIP as it effects its legislative mandate to secure an expeditious resolution of a requester's grievance.]

- (2) The denial or granting of access to government records by the department of taxation

under chapter page 73-3

SUBCHAPTER 2

PROCEDURES FOR APPEAL TO OIP

§2-73-11 What may be appealed. A person may submit an appeal to OIP when:

The person seeks a review of an agency's denial of access to information or records under sections 92-15.5 or 92F-27.5, HRS or 92F-23, HRS., or; *[Explanation: See above about agency's failure to abide by time limits set by statute that also cover personal records in 92F-23 and/or administrative rules that should be subject to appeal to OIP.]*

- (2) The person meets the requirements under chapter 231, HRS, for appealing to OIP a decision of the department of taxation concerning disclosure of a written opinion and the person has exhausted the administrative remedies in accordance with rules established by the department of taxation;
- (3) The person seeks to determine a board's compliance with or to prevent a violation of chapter

92, HRS; or

(73-7)

(4) The person seeks to determine the applicability of chapter 92, HRS, to discussions or decisions of a public body.

[Eff] (Auth: HRS §§92-1.5, 92F-42(1), (12), (17)) (Imp: HRS §§92-1.5, 92F-15.5, 92F-27.5, 92F-42(18), 231-19.5)

§ 2-73-12 Timing and content of appeal to OIP. (a) An appeal shall be filed with the director within the following time limits, whichever is applicable:

(1) For an appeal of a denial of access to records under chapter 92F, HRS, or Hawaii Administrative Rules 2-71-13, that was based on a written request, within one year after:

- (A) Receipt of the agency's written denial of access;
- (B) Receipt of the agency's written partial denial of access; or
- (C) OIP's determination that an agency's failure to respond constitutes a denial

of access;

(2) For an appeal of a decision by the department of taxation concerning the disclosure of a written opinion, within the time period set for appeal to OIP under chapter 231;

(3) Within six months after a board's action that the appellant contends was in violation of part I of chapter 92; or

(4) For an appeal to determine the applicability of chapter 92, HRS, to discussions or decisions of a public body, at any time during the public body's existence.

(b) An appeal shall include sufficient information about the appellant to enable OIP to contact and correspond with appellant.

(c) An appeal based on the denial of records or information under chapter 92F, HRS, or Hawaii Administrative Rules 2-71-13, shall clearly identify or describe the records or information to which access has been denied and for which appellant

(2) Issue a notice of appeal to the appellant and the agency whose action is being appealed.

(b) OIP's notice of appeal shall include a description of the general appeal procedures that OIP will follow in resolving the appeal and shall set out the responsibilities of the parties, except the appellant, in responding to the appeal. These procedures shall specify that 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 92F, HRS, and thus must provide a substantive justification of its position to prevail in the appeal. The appellant is not required to assume any responsibilities primarily because both statutes specify that it is the policy of the state to conduct government business as openly as possible. [Explanation: This more specific language and rationale about the issue in the appeal and the general appeal procedures that are being added here are spelled out by OIP in its own impact statement. But this language needs to be included in the administrative rules to better inform the public about the issue at hand, to provide clearer guidance to the agencies as to their responsibilities, to delimit OIP's prerogatives and to acquire the force of law.]

(c) The director shall send to the agency and to the appellant a copy of the appeal filed by the appellant, together with OIP's notice of appeal. These materials shall be disclosed to the public, including by posting on OIP's web site along with a listing of appeals that OIP has rejected and the reason for the rejection, although the appellant may decline to be publicly identified. [Eff] (Auth: HRS §§92-1.5, 92F-42(1), (12)) (Imp: HRS §§92-1.5, 92F-15.5, 92F-27.5, 92F-42(17), (18), 231-19.5) [Explanation: This whole appeals process should be more transparent. Without this public disclosure called for in this amendment, there's no way to let third parties permitted in 2-73-15 that follows to know that they may have an interest in the outcome of a case and hence could become a third party. In many cases, the public and the news media have an interest in an agency's failure to disclose or to comply with the Sunshine Law. Increasing transparency would also facilitate better informing the public and providing up-to-date guidance to government officials at all levels.]

§ 2-73-14 Agency's response to appeal. The agency shall respond to the notice of appeal within ten business days of

submitting statements, OIP shall set a briefing timetable for such statements and any responses thereto and may set requirements as to the form and content of statements and responses submitted.

(c) OIP may require any party except the appellant to submit to OIP the original or a copy of one or more documents necessary for its ruling, including government records or minutes at issue in an appeal.

[Explanation: This addition underscores that the burden of proof is on the agency denying the information and that the OIP has no authority to shift any burden whatsoever to the person making the complaint.]

OIP may examine the documents *in camera* as necessary to preserve any claimed exception, exemption, or privilege against disclosure. OIP shall take measures necessary to protect any records submitted for *in camera* review from unauthorized disclosure.

(d) If OIP requires the agency to provide, for OIP's *in camera* review, documents that the agency asserts are protected by the attorney-client privilege as well as the relevant exception or exemption to disclosure, OIP shall:

(k) OIP may require a party except the appellant to provide to any other party a copy of a statement or other document submitted to OIP. When a party is required to provide a copy of a document to another party, delivery shall be on the same date that the document is submitted to OIP by first class mail, e-mail, facsimile, or personal delivery. If a party is not properly provided with copies under this rule, OIP may order an extension of time limits or any other appropriate remedy. [Eff _____] (Auth: HRS §§92-1.5, 92F-42(1), (4), (5), (12), (17), (18)) (Imp: HRS §§92-1.5, 92F-11, 92F-15, 92F-15.5, 92F-27.5, 92F-42(5), (17), (18), 231-19.5)

§ 2-73-16 Documents submitted to OIP. All documents submitted to OIP under this chapter are subject to section 710-1063, HRS, which provides that unsworn falsification is a misdemeanor. [Eff _____] (Auth: HRS §§92-1.5, 92F-42(1), (12), (17)) (Imp:

HRS §§92-1.5, 92F-15.5, 92F-27.5, 92F-42(18), 213-19.5)

§2-73-17 Decision. (a) The director shall within five business days issue a final written decision on an appeal and send a copy of the decision to each party and disclose that decision to the public. The decision may:

- (1) Order access to all or part of a requested record;
- (2) Confirm the agency's decision on disclosure or nondisclosure;
- (3) State a time limit for an agency's compliance;
- (4) Contain any other order or conclusion consistent with chapter 92F, HRS; and,
- (5) Contain any order or conclusion consistent with part I of chapter 92, HRS.

(b) If the decision is a determination that the written opinion of the department of taxation shall be available for public inspection, access shall be provided in accordance with the time limits set under

(7) The same issues on appeal have been previously addressed
in a published OIP decision; or

(8) An OIP decision on the appeal would be advisory
or moot.

[Eff] (Auth: HRS §§92-1.5, 92F-42(17))

(Imp: HRS §§92-1.5, 92F-15.5, 92F-27.5, 92F-42(17), (18), 231-
19.5)

§ 2-73-19 Reconsideration. (a) The director has the
discretion, on the director's own initiative or upon request
by a party, to reconsider any decision made under this
chapter.

(b) A party must make a request for reconsideration within
ten days after the director issues a final decision as
provided in section 2-73-17.

~~(c) At the sole discretion of the director, a precedent
set by a prior published OIP decision may be reconsidered, on
the director's own initiative or upon~~

~~request, at any time. Reconsideration of a prior published
OIP decision's precedential value does not alter that
decision's binding effect on the parties involved in the
specific dispute at issue in that decision.~~

~~(d) Reconsideration of either a final decision or
of a precedent shall be based upon one or more of
the following:~~

- ~~(1) A change in the law;~~
- ~~(2) A change in the facts; or~~
- ~~(3) Other compelling circumstances. [Explanation: The
discretion bestowed upon the OIP director in this
draft covering "any decision" is overly broad. On
a case by case basis, OIP would likely be mandated
by a change in the law or a change in the facts to
distinguish its decision at hand from an earlier
OIP opinion, but this distinguishing could be done
without granting the director such wide-ranging
authority. Because OIP's impact statement on page
36 explains how valuable these earlier formal
opinions spanning 23 years are, giving the
director limit-less authority to overturn them
seems unnecessary and unwise.]~~

(e) Any request for reconsideration of a decision
shall be made in writing and shall be
disclosed to the public. OIP may require ...

allowed, OIP shall fix the time for filing of the statement and any response thereto.

[Eff] (Auth: HRS §§92-1.5, 92F-42(17))
(Imp: HRS §§92-1.5, 92F-15.5, 92F-27.5, 92F-42(17), (18), 231-19.5)

§2-73-20 Record of appeal; transmittal to circuit court.

OIP shall maintain a record of each appeal before OIP, including an index, and it shall be made public. Within thirty days of the service on OIP of an agency's complaint to circuit court pursuant to section 92F-___, HRS, the director shall file a certified copy of the record in the circuit court and mail a copy of the index to the record to the agency, to the appellant and to all third parties. The record may be in written, electronic, or any other physical form, or a combination thereof, and shall include all documents related to the appeal, including correspondence, audio or video recordings, and e-mails, submitted in any form. A document that is submitted for *in camera* review shall be listed in the index in the same manner

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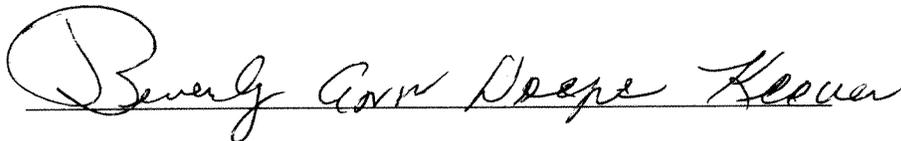


NEW REVISION NEEDED FOR PUBLIC E-INPUT

These and other changes to the draft rules calling for more transparency and faster access to it are regarded as being significant enough that OIP should:

- submit a revised draft incorporating some, if not all, comments from the public,
- or else justify its refusal to include them,
- post the revised draft on its web site and enable posting of all public comments on this new revision (much like the Legislature accepts e-testimony and posts all of it on its web site).

Submitted by

A handwritten signature in cursive script that reads "Beverly Ann Deepe Keever". The signature is written in black ink and is positioned above a horizontal line.

Beverly Ann Deepe Keever, Ph.D., MLIS, MSJ

Professor Emerita

School of Communications

University of Hawai'i at Manoa