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November 23, 2012

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

Dear Ms. Kakazu-Park:

**SUBJECT: PROPOSED OIP RULES FOR ADMINISTRATIVE
APPEAL PROCEDURES (PAF 12-190)**

Thank you for the opportunity to provide comment on the proposed rules of the Office of Information Practices for administrative appeal procedures. I appreciate the work that has gone into your Office's preparation of these rules and accompanying Impact Statement, and regret that I was not able to attend the public hearing on November 15. My chief concerns with the proposed rules relate to the timing, and to some extent, the content of appeals. May I please request that you consider my comments below, which are written from the perspective of how these rules may affect the operations of a county legislative body.

The Maui County Council has not had the opportunity to take a formal position on these rules. Therefore, I am providing this testimony in my capacity as an individual member of the Maui County Council.

Time Limitations:

Respectfully, the rules should provide meaningful time limitations for an administrative appeal. Under Rule 2-73-12(a)(4), there is no time limitation for an appeal to determine the applicability of Chapter 92, Hawaii Revised Statutes ("HRS"), to discussions or decisions of a public body, so long as the body still exists.

Once a county's legislative body enacts a law, appropriate steps are taken to abide by that law and enforce it. The time for challenge to discussions or decisions leading to the enactment of a law should, therefore, not be without end. Assuming there is no differentiation by council term (none is apparent), the limitless time frame to assert an administrative appeal for a continuing board calls into question impacts on legislation

that may have already been implemented. It is unclear whether there is a time limitation within which a legislative act may be voided based on a Sunshine law challenge, and whether such a challenge would be limited to the state of the law at the time the discussion or decision occurred. Public confidence in a county's laws can be seriously undermined if there is no time frame within which an appeal can be brought based on a perceived violation of the Sunshine law. Moreover, as a practical matter, when an appeal is raised long after the action complained of occurred, it will be difficult for a legislative branch to reconstruct what occurred.

Under Rule 2-73-12, subsections (a)(4) and (a)(3) may often overlap if a Sunshine law challenge is brought. If (a)(3) applies to the grounds for appeal, it is unclear whether the appeal must be brought within six months, or whether it can still be stated under (a)(4) at any time.

The one-year limitation for appealing the denial of access to records under Chapter 92F, pursuant to subsection (a)(1), is not a meaningful limitation. As noted in the Impact Statement, at page 14, "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." The rule encourages delay and promotes uncertainty. It also disregards the impact on the agency, which will then need to respond to the same records request on multiple occasions, particularly if multiple requesters are involved.

I would encourage uniform and meaningful time limitations of 30 days for any of the bases for appeal stated in the proposed rules. Uniformity would eliminate any question over how to interpret the time frame for appeal, and 30 days would provide a reasonable amount of time within which to state an administrative appeal.

Content of Appeal:

With respect to the content of the appeal, the proposed rules require little information to assist the OIP in evaluating the merits of an appeal. Subsection (b) requires only contact information for the appellant. The documentation described in subsection (c) may be waived at the director's discretion "where an otherwise substantiated appeal is submitted", but there is no indication as to how the director would otherwise substantiate the appeal. I would encourage the rules to provide an objective means for the agency to understand and investigate the actions it is being accused of. Subsection (d) provides for an identification of actions, but then subsection (e) only provides a minimal list of what the request for appeal may include; not even a statement of relevant facts is required.

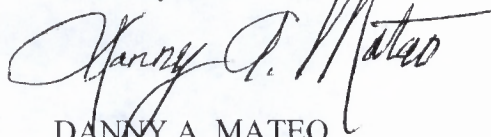
The agency must know what it is alleged to have done wrong, have the means to look it up, and in the case of a records request, see how and when it responded.

Finally, I have attached some additional concerns with the proposed rules for your consideration.

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Thank you for allowing me the opportunity to comment. I do hope these comments will be seriously considered and integrated as you deem appropriate.

Sincerely,

A handwritten signature in black ink, appearing to read "Danny A. Mateo". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

DANNY A. MATEO
Council Chair

Attachment

paf:cmn:12-190b1

1. Rule 2-73-3(3) (page 73-6). Guidance would be helpful on how a request for a time extension can be made and when.
2. Rule 2-73-13 (pages 73-11 to 73-12). OIP's response to appeal; OIP's notice of appeal.
 - a. The rules do not establish a time frame within which the director shall conduct the initial review of an appeal to assess whether it complies with the requirements of the rule. There is no indication how OIP will determine whether the appeal is warranted without a required minimal threshold showing. The agency is without opportunity to comment on OIP's decision whether to accept an appeal, or on the sufficiency of any showing of the basis for appeal. The rules also fail to specify the length of time the requester would have to provide the additional information required by OIP under subsection (a)(1). These omissions promote instability for the agency.
 - b. The agency should know beforehand what procedures will apply to the administrative appeal, rather than state, as subsection (b) does, that the notice of appeal shall include a description of the general appeal procedures.
3. Rule 2-73-14 (pages 73-12 to 73-13). Agency's response to appeal.
 - a. While the appellant lacks meaningful time limitations, the agency must respond within 10 business days of receipt of a notice of appeal. Since there is no time limit within which an appeal based on discussions or decisions of a board can be stated, it may be difficult for the agency to retrieve the information and respond within this time frame. In addition, there is no provision made for an agency's response when it no longer has the documents or response complained of.
 - b. There is no limitation on the number of appeals that may be taken on a single action.
 - c. The agency is required to provide "a list identifying or describing each record withheld" within 10 business days. If the agency does not have an existing list and the records are voluminous, it will be difficult for the agency to meet this deadline. Perhaps a provision could be made for the agency to submit a summary of the records or the actual records (if available) for "in camera" review. If the records were withheld based on privilege, the OIP may wish to consider affording the agency some protection (e.g., no inadvertent waiver of the privilege by the turnover of records to OIP in conjunction with an appeal). (See page 29 of Impact Statement.)

4. Rule 2-73-15(k) (page 73-18). The rule provides that OIP may require a party to provide to any other party a copy of a statement or other document submitted to OIP. The agency should be entitled to receive a copy of the information being provided to OIP.
5. Rule 2-73-17 (page 73-19). The rule provides that the director issues the final decision on the appeal, but does not provide an opportunity for the agency to be heard. There is no indication of the time frame within which a decision will be rendered. An appeal of unknown duration could have serious impacts on the legislative body's work and efficiency.
6. Rule 2-73-17(d) (page 73-20). The rule provides that, "Informal or memorandum opinions shall not be considered as precedent, but may be considered for other purposes." Should the rules explicitly state that a body following informal or memorandum opinions shall be viewed to be acting in good faith compliance? To the extent OIP determines that its informal or memorandum opinions should no longer be followed, any action found to be in violation despite adherence to such opinions should apply prospectively. Such an outcome should also include an agency's reliance upon informal letters and/or attorney-of-the-day advice. This would foster a healthy exchange between OIP and the agency where an uncertain circumstance can reasonably be anticipated.
7. Rule 2-73-18(6) (page 73-21). The rule should be revised to incorporate a time frame within which the parties can say an appeal has been abandoned.
8. Rule 2-73-19 (pages 73-22 to 73-24). Reconsideration.
 - a. It seems awkward to make the arbiter of the appeal the one who decides whether it shall be reconsidered, in the absence of any criteria for such a determination.
 - b. Subsection (c) allows the director to set aside a prior published opinion of the OIP, although it will not affect the decision's binding effect on the specific dispute. If a prior published opinion of the OIP is reconsidered, the impact of reconsideration should not be limited to the specific dispute at hand; to the extent the agency has been relying upon earlier published opinions of the OIP in its governance, such actions should be shielded. Again, the effect of reconsideration should be prospective.
 - c. Under subsection (e), OIP may require the party seeking reconsideration to provide a written statement, and may allow the other parties to submit a counterstatement. I believe the agency should have a right to know the basis for reconsideration and a right to respond.