

OFFICE OF THE LIEUTENANT GOVERNOR

Adoption of Chapter 2-73
Hawaii Administrative Rules

December 6, 2012

SUMMARY

Chapter 2-73, Hawaii Administrative Rules, entitled
"Agency Procedures and Fees for Processing Government
Record Requests," is adopted.

HAWAII ADMINISTRATIVE RULES

TITLE 2

OFFICE OF THE LIEUTENANT GOVERNOR

SUBTITLE 7

OFFICE OF INFORMATION PRACTICES

CHAPTER 73

ADMINISTRATIVE APPEAL PROCEDURES

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SUBCHAPTER I

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 **DEC 31 2012**] (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)

§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:
- (2) The denial or granting of access to government records by the department of taxation under chapter 231, HRS, or
- (3) A board's compliance with part I of chapter 92, HRS.

"Appellant" means the person filing an appeal with OIP.

"Board" shall be as defined in section 92-2, HRS.

"Business day" means a day when OIP is open for the transaction of public business pursuant to section 78-1.6, HRS.

"Decision" means a ruling by OIP under this chapter.

"Director" means the director of OIP, or a person designated by the director.

"Government record" shall be as defined in section 92F-3, HRS.

"Individual" shall be as defined in section 92F-3, HRS.

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

"OIP" means the office of information practices, office of the lieutenant governor, State of Hawaii.

"Party" means an appellant or agency or board, or an interested or aggrieved person permitted to participate in an appeal before OIP under this chapter, in a capacity other than as a witness.

"Person" shall be as defined in section 92F-3, HRS.

"Sunshine Law" means part I of chapter 92, HRS.

"UIPA" means the Uniform Information Practices Act (Modified), chapter 92F, HRS. [Eff **DEC 31 2012**]
(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)

§2-73-3 Computation of Time. Unless otherwise stated in these rules, in computing any period of time prescribed by these rules:

- (1) a period of time is measured in business days;
- (2) the day of the act or event from which the designated period of time begins to run shall not be included, but the last day of the period shall be included; and
- (3) OIP upon request may, where it deems appropriate, extend the time prescribed by these rules for doing any act, or may permit an act to be done after the expiration of time.

[Eff **DEC 3 1 2012**] (Auth: HRS §§92-1.5, 92F-42(1), (12), (17)) (Imp: §§92-1.5, 92F-15.5, 92F-27.5, 92F-42(18), 231-19.5)

§2-73-4 Other forms of assistance. OIP may continue to provide to any person various forms of assistance other than the appeals provided for under this chapter, including advisory opinions, guidelines, or training. Such other forms of assistance shall not be subject to the procedures set forth in this chapter.

[Eff **DEC 3 1 2012**] (Auth: HRS §§92-1.5, 92F-42(17)) (Imp: §§92-1.5, 92F-42(2), (3), (4), (8), (9), (10), (11))

§§2-73-5 to 2-73-10 (Reserved).

SUBCHAPTER 2

PROCEDURES FOR APPEAL TO OIP

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

- (1) The person seeks a review of an agency's denial of access to information or records under sections 92F-15.5 or 92F-27.5, HRS;
- (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 part I of chapter 92, HRS; or
- (4) The person seeks to determine the applicability of part I 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, that was based on a written request, within one year after:
 - (A) Receipt of the agency's written denial of access; or
 - (B) Receipt of the agency's written partial denial of access; or
 - (C) Where the agency does not provide a written response to the request, the last day of the time period provided for the agency's written response under chapter 92F, HRS, and chapter 2-71.
- (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, HRS;

- (3) Within six months after a board's action that the appellant contends was in violation of part I of chapter 92, HRS; or
- (4) For an appeal to determine the applicability of part I 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, shall clearly identify or describe the records or information to which access has been denied and for which appellant is seeking review, and shall include a copy of the agency's written denial of access or a copy of the appellant's written statement that the agency has failed to respond to the request for records or information within the time period provided by chapter 92F, HRS, and chapter 2-71.

Where an otherwise substantiated appeal is submitted regarding an agency's denial of any record request under chapter 92F, HRS, OIP may accept such

appeal, at the director's discretion, without written documentation of the request or agency response.

(d) An appeal based on part I of chapter 92, HRS, shall clearly identify what action or actions of a board the appellant contends were not in compliance with that part, or the public body whose discussions and decisions the appellant contends are subject to that part.

(e) The request for appeal may include:

(1) A statement of relevant facts;

(2) A discussion of the appellant's basis for disagreeing with the agency's or the board's actions or for believing that part I of chapter 92, HRS, applies to the public body; and

(3) Any other information the appellant provides to OIP for its consideration in ruling on the appeal. [Eff **DEC 31 2012**]

(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)

§ 2-73-13 OIP's response to appeal; OIP's notice of appeal. (a) When the director receives an appeal, the director shall initially review the appeal to

assess whether the appeal complies with the requirements of section 2-73-12 before accepting the appeal. Within five business days after accepting an appeal, the director shall either:

- (1) Notify the appellant that the appeal will not be heard and specify the reasons why the appeal is not warranted or the additional information that OIP requires; or
- (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 in responding to the appeal.

(c) The director shall send to the agency a copy of the appeal filed by the appellant, together with OIP's notice of appeal. [Eff **DEC 31 2012**] (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)

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

business days of receipt of the notice with a written statement to OIP that includes the following:

- (1) a concise statement of the factual background;
- (2) a list identifying or describing each record withheld, if applicable;
- (3) the agency's explanation of its position, including the agency's justification for the denial of access or actions complained of, with citations to the specific statutory sections and other law that support the agency's position;
- (4) any evidence necessary to support application of any claimed exception, exemption, or privilege; and
- (5) information as to how OIP may contact the agency officer or employee who is authorized to respond and make representations on behalf of the agency concerning the appeal. [Eff DEC 31 2012] (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)

§ 2-73-15 Other procedures for appeal. (a) OIP may permit participation in an appeal by one or more third persons upon written request, and may determine the extent to which the persons may participate. The written request for participation shall state the reason for the request, which OIP shall consider in determining whether to allow the third person's participation. Participation by a third person may be based on the third person's interest in the outcome of the appeal, and may include situations where the third person is referred to in, or was the source of, a record whose disclosure is at issue; situations in which the third person could be affected by the outcome of the appeal; and situations in which the third person's participation would offer a relevant perspective different from those of the original parties.

(b) OIP may request that parties other than the agency submit a written statement to OIP. In the event that parties other than the agency will be 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 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. 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:

- (1) Review the record submitted solely for the purpose of assessing application of the claimed exception or exemption;
- (2) Return or destroy the record as directed by the agency upon issuance of a final decision of the appeal; and
- (3) Prevent the voluntary disclosure of the record or information contained in the record.

Upon request, OIP may allow an agency to provide such a record in redacted form for OIP's *in camera* review, if OIP determines that application of the exception or exemption may be determined by review of the redacted record.

(e) OIP may, orally or in writing, seek any additional information from a party or any other person, and may consider input or relevant materials from any person on pending appeals. A party or other person's contact with OIP may be *ex parte* except as provided in subsection (k) below.

(f) OIP may take notice of generally known and accepted facts.

(g) OIP may consolidate appeals that have similar issues or facts, or similarly situated parties.

(h) OIP may, at a party's request or on OIP's own initiative, request that the parties participate in a mediation of the appeal or any issue in the appeal, upon terms set by OIP.

(i) OIP may request any party or witness to attend in person, by telephone, or by another means, an informal conference arranged by OIP for any purpose that will assist in the resolution of the appeal, including but not limited to questioning the parties or

witnesses, hearing oral argument of the parties, narrowing the issues, or seeking an informal resolution of the appeal.

(j) OIP shall, in its discretion, determine which procedures are best suited to fairly and expeditiously resolve each appeal consistent with the intent and purposes of the applicable law.

(k) OIP may require a party 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)

DEC 31 2012

§ 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
DEC 31 2012

] (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 issue a final written decision on an appeal and send a copy of the decision to each party. 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 chapter 231, HRS.

(c) If the agency's position is affirmed, the decision shall note that the appellant has the right to seek judicial review. If the agency's position is not

affirmed, the decision shall note that the agency has the right to seek judicial review.

(d) Decisions may take the form of published opinions, unpublished informal or memorandum opinions, or other written dispositions. The director shall determine whether to designate a decision for publication or to issue it as an informal or memorandum opinion or other written disposition. Published opinions shall be considered as precedent and followed, unless overruled pursuant to section 2-73-19 or a court decision. Informal or memorandum opinions shall not be considered as precedent, but may be considered for other purposes. [Eff **DEC 3 1 2012**] (Auth: HRS §§92-1.5, 92F-42(1), (12)) (Imp: HRS §§92-1.5, 92F-15.5, 92F-27.5, 92F-42(17), (18), 92F- , 231-19.5)

§2-73-18 Dismissal of appeal. The director may issue a notice dismissing all or part of an appeal at any time for good reason, including but not limited to the following:

- (1) A prerequisite for filing an appeal under this chapter has not been met;
- (2) The appeal is determined to be frivolous;
- (3) The issues are beyond OIP's jurisdiction;

- (4) No violation of the law can be found when viewing the issues in the light most favorable to the appellant;
- (5) The appellant requests that the appeal be dismissed;
- (6) The appeal has been abandoned by the appellant's failure to respond to OIP within twenty days after the date OIP sent the appellant a request for a response, or other circumstances indicate the appeal has been abandoned;
- (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 **DEC 31 2012**]
(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.

(e) Any request for reconsideration of a decision shall be made in writing. OIP may require the party seeking reconsideration to provide a written statement setting out the basis for the request for reconsideration. The other parties will be given notice of any request for reconsideration received and granted, a copy of the request, and any written

statement filed. OIP shall allow the other parties to submit a counterstatement and shall fix the time for filing of the counterstatement and any response thereto. [Eff **DEC 3 1 2012**] (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. Within thirty days of the service on OIP of an agency's complaint to circuit court pursuant to section 92F-43, 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. 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 as other documents, but only OIP and the courts and the courts' staff shall have access to documents submitted for *in camera* review. [Eff **DEC 3 1 2012**] (Auth:

HRS §§92-1.5, 92F-42(1), (12), (17)) (Imp: HRS §§92-
1.5, 92F-15.5, 92F-27.5, 92F-42(1), (18), 92F-43, 231-
19.5)

OFFICE OF THE LIEUTENANT GOVERNOR

Chapter 2-73, Hawaii Administrative Rules, on the Summary Page dated December 6, 2012, was adopted on December 6, 2012, following a public hearing held on November 15, 2012, after public notice was given in the Honolulu Star Advertiser on October 14, 2012.

The adoption of chapter 2-73 shall take effect ten days after filing with the Office of the Lieutenant Governor.

Cheryl Kakazu Park

Cheryl Kakazu Park,
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APPROVED:

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Neil Abercrombie
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Date: 12.20.12

APPROVED AS TO FORM:

[Signature]
Deputy Attorney General

Filed

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OFFICE