

H.B. NO. 2596

A BILL FOR AN ACT

RELATING TO OPEN GOVERNMENT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. Chapter 92F, Hawaii Revised Statutes, is
2 amended by adding to part IV a new section to be appropriately
3 designated and to read as follows:

4 "§92F- Agency appeal of a decision by the office of
5 information practices. An agency may not appeal a decision by
6 the office of information practices made under this chapter or
7 part I of chapter 92, except as provided in this section. An
8 agency may seek judicial review of a decision rendered by the
9 office of information practices under this chapter or part I of
10 chapter 92, by filing a complaint to initiate a special
11 proceeding in the circuit court of the judicial circuit where
12 the request for access to a record was made, or the act the
13 office determined was prohibited under part I of chapter 92
14 occurred. The agency shall give notice of the suit to the
15 office of information practices and the person who requested the
16 decision for which the agency seeks judicial review, by serving
17 a copy of the complaint on them respectively; provided that

1 neither the office of information practices nor the person who
2 requested the decision shall be required to participate in the
3 proceeding; and provided further that the court shall proceed to
4 review the decision pursuant to the rules applicable to a
5 special proceeding, upon the expiration of time that an answer
6 to the complaint would otherwise need to be filed under the
7 rules of court by the office or the person upon whom the
8 complaint was served. The office of information practices or
9 the person who requested the decision may intervene in the
10 proceeding. The office of information practices, within 30 days
11 of service of the complaint upon it, shall file a certified copy
12 of the record that it compiled to make its decision, in the
13 circuit court, and mail a copy of the index to that record to
14 the agency. The circuit court's review shall be limited to the
15 record that was before the office of information practices when
16 it rendered the decision, unless the circuit court finds that
17 extraordinary circumstances justify discovery and admission of
18 additional evidence. The circuit court shall uphold a decision
19 of the office of information practices unless it concludes that
20 the decision was palpably erroneous."

21 SECTION 2. Section 92-12, Hawaii Revised Statutes, is
22 amended to read as follows:

1 "§92-12 Enforcement. (a) The attorney general and the
2 prosecuting attorney shall enforce this part.

3 (b) The circuit courts of the State shall have
4 jurisdiction to enforce the provisions of this part by
5 injunction or other appropriate remedy.

6 (c) Any person may commence a suit in the circuit court of
7 the circuit in which a prohibited act occurs for the purpose of
8 requiring compliance with or preventing violations of this part
9 or to determine the applicability of this part to discussions or
10 decisions of the public body. The court may order payment of
11 reasonable [~~attorney~~] attorney's fees and costs to the
12 prevailing party in a suit brought under this section.

13 (d) Opinions and rulings of the office of information
14 practices shall be admissible in an action brought under this
15 part and shall be considered as precedent unless found to be
16 palpably erroneous.

17 [~~(d)~~] (e) The proceedings for review shall not stay the
18 enforcement of any agency decisions; but the reviewing court may
19 order a stay if the following criteria have been met:

20 (1) There is likelihood that the party bringing the action
21 will prevail on the merits;

1 (2) Irreparable damage will result if a stay is not
2 ordered;

3 (3) No irreparable damage to the public will result from
4 the stay order; and

5 (4) Public interest will be served by the stay order."

6 SECTION 3. Section 92F-15, Hawaii Revised Statutes, is
7 amended by amending subsection (b) to read as follows:

8 "(b) In an action to compel disclosure, the circuit court
9 shall hear the matter de novo. Opinions and rulings of the
10 office of information practices shall be admissible[-] and shall
11 be considered as precedent unless found to be palpably
12 erroneous, except that in an action to compel disclosure brought
13 by an aggrieved person after the office of information practices
14 upheld the agency's denial of access to the person as provided
15 in section 92F-15.5(b), the opinion or ruling upholding the
16 agency's denial of access shall be reviewed de novo. The
17 circuit court may examine the government record at issue, in
18 camera, to assist in determining whether it, or any part of it,
19 may be withheld."

20 SECTION 4. Section 92F-27, Hawaii Revised Statutes, is
21 amended to read as follows:

1 "**§92F-27 Civil actions and remedies.** (a) An individual
2 may bring a civil action against an agency in a circuit court of
3 the State whenever an agency fails to comply with any provision
4 of this part, and after appropriate administrative remedies
5 under sections 92F-23, 92F-24, and 92F-25 have been exhausted.

6 (b) Opinions and rulings of the office of information
7 practices shall be admissible and shall be considered as
8 precedent unless found to be palpably erroneous, except that the
9 opinion or ruling upholding the agency's denial of access to the
10 aggrieved person shall be reviewed de novo. The circuit court
11 may examine the record at issue, in camera, to assist in
12 determining whether it, or any part of it, may be withheld.

13 ~~[(b)]~~ (c) In any action brought under this section the
14 court may order the agency to correct or amend the complainant's
15 personal record, to require any other agency action, or to
16 enjoin such agency from improper actions as the court may deem
17 necessary and appropriate to render substantial relief.

18 ~~[(e)]~~ (d) In any action brought under this section in
19 which the court determines that the agency knowingly or
20 intentionally violated a provision of this part, the agency
21 shall be liable to the complainant in an amount equal to the sum
22 of:

1 (1) Actual damages sustained by the complainant as a
2 result of the failure of the agency to properly
3 maintain the personal record, but in no case shall a
4 complainant (individual) entitled to recovery receive
5 less than the sum of \$1,000; and

6 (2) The costs of the action together with reasonable
7 attorney's fees as determined by the court.

8 ~~(d)~~ (e) The court may assess reasonable attorney's fees
9 and other litigation costs reasonably incurred against the
10 agency in any case in which the complainant has substantially
11 prevailed, and against the complainant where the charges brought
12 against the agency were frivolous.

13 ~~(e)~~ (f) An action may be brought in the circuit court
14 where the complainant resides, the complainant's principal place
15 of business is situated, or the complainant's relevant personal
16 record is situated. No action shall be brought later than two
17 years after notification of the agency denial, or where
18 applicable, the date of receipt of the final determination of
19 the office of information practices."

20 SECTION 5. Statutory material to be repealed is bracketed
21 and stricken. New statutory material is underscored.

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H.B. NO. 2596

1 SECTION 6. This Act shall take effect on January 1, 2013.

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INTRODUCED BY:

Calvin H. Gray

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BY REQUEST

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JAN 23 2012

H.B. NO. 2594

Report Title:

Sunshine Law; Uniform Information Practices Act; Appeals

Description:

Creates a process for an agency to obtain judicial review of Office of Information Practices decisions made under either part I of chapter 92 or chapter 92F, Hawaii Revised Statutes, and clarifies standard of review.

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.

JUSTIFICATION SHEET

DEPARTMENT: Office of the Lieutenant Governor, Office of Information Practices.

TITLE: A BILL FOR AN ACT RELATING TO OPEN GOVERNMENT.

PURPOSE: To create a process for an agency to obtain judicial review of Office of Information Practices (OIP) decisions under a "palpably erroneous" standard, provided that OIP or a member of the public affected by the decision shall not be required to participate and that review shall be limited to the record before the Office of Information Practices except in extraordinary circumstances, and to further clarify that de novo review of an OIP opinion applies where a requester appeals to the court after OIP upholds the agency's denial of access, and that in other actions under the Sunshine Law or Uniform Information Practices Act, OIP opinions are admissible and are precedential unless "palpably erroneous." To allow time for the adoption of adopt administrative rules relating to the new appeals process, the effective date of the proposal will be January 1, 2013.

MEANS: Add a new section to part IV of chapter 92F and amend sections 92-12, 92F-15(b), and 92F-27, Hawaii Revised Statutes.

JUSTIFICATION: The Uniform Information Practices Act (UIPA) allows record-requesting members of the public to challenge a record denial through an informal process of review by OIP. If a requester is dissatisfied with this informal resolution process, then the law currently allows a requester to go to court to seek de novo review of a decision by the Office of Information Practices (OIP) upholding a denial of access to records by a government agency.

Until the Hawaii Supreme Court's decision in County of Kauai v. OIP, 120 Haw. 34, 200 P.3d 403 (2009), OIP understood that the UIPA did not provide the agency with a similar right to

challenge an OIP decision mandating access to records. The UIPA's legislative history indicates that the lack of a process for agency appeals was an intentional omission, intended to prevent lawsuits between agencies.

Notwithstanding this legislative intent, Hawaii's appellate courts in 2009 allowed an agency to sue OIP as a way of challenging its UIPA decision on executive meeting minutes. Despite the lack of an appeal right under the UIPA, the courts found appellate jurisdiction under the Sunshine Law, which OIP also administers and had interpreted in rendering an earlier, separate decision on executive meeting minutes.

Because the courts and agencies obviously believe that OIP opinions should ultimately be reviewable, and are likely to continue to seek ways to accomplish such review, continued litigation over agencies' appeal rights would be contrary to the statutory intent to avoid "agencies suing agencies." Thus, the proposed bill seeks to create a uniform procedure applicable to both the UIPA and the Sunshine Law that would strictly define and limit agencies' right to appeal OIP opinions without requiring OIP's appearance in the appeal. Extending the process for judicial review applicable under both laws will create further uniformity and clarity as to the weight given to an OIP opinion and the remedies available to an agency or other person dissatisfied with that opinion.

At present, the appellate courts have set two different standards of review for OIP's opinions under the UIPA and the Sunshine Law respectively. The Hawaii Supreme Court has indicated (in dicta) that an abuse of discretion standard applies to OIP's determinations on core UIPA issues such as providing guidance to the public and agencies as to when agency records should be opened to the public. 'Olelo v. OIP, 116 Haw. 337, 346 (2007). The Hawaii Intermediate Court of Appeals has applied the "palpably erroneous" standard for its review of OIP's Sunshine Law decisions. Right to Know Comm. v. City Council, 117 Haw. 1, 13 (2008).

For the sake of uniformity, OIP seeks to set a single standard of review applicable to both laws. OIP believes that the "palpably erroneous" standard is preferable to the abuse of discretion standard in that it requires deference to OIP's statutory interpretations of provisions of the Sunshine Law or UIPA, in addition to OIP's factual determinations or mixed determinations of fact and law, whereas the abuse of discretion standard would require deference only as to factual or mixed factual and legal determinations. The "palpably erroneous" standard will give greater clarity to the agencies and members of the public who seek OIP's opinion on how Sunshine Law or UIPA provisions apply or are interpreted in particular situations, because the OIP opinions thus obtained will carry greater precedential weight.

The review process proposed by this bill would allow an agency to obtain judicial review of an OIP decision under a palpably erroneous standard by bringing suit against the decision itself, rather than against either OIP or the member of the public who originally requested the opinion. Court review would be limited to the record before OIP, except in extraordinary circumstances. OIP and the person who requested its opinion would be given notice of the suit and would have the right to intervene, but would not be required to participate in the special proceeding.

To avoid confusion as to the effect of the new review process on a record requester's existing right to go to court on a de novo basis after receiving an unfavorable opinion, the bill would further clarify that de novo review only applies in a requester's (not an agency's) appeal to court after an OIP decision upholding the agency's denial of access, and the de novo standard does not apply to other OIP decisions that may be considered by the court in the course of that appeal. The bill would also align the standards under parts II and III of the UIPA for a record requester's appeal to court after an OIP decision upholding an

agency's denial of access, and would codify the standard currently recognized by Hawaii's courts for admissibility and precedential weight given to OIP opinions in Sunshine Law litigation.

Impact on the public: This bill will not force members of the public to go to court to defend an agency's appeal of an OIP opinion. Members of the public will remain entitled to de novo review when challenging an opinion from OIP upholding an agency's denial of access to a record.

Impact on the department and other agencies: This bill will give agencies the right to challenge an OIP opinion under either the Sunshine Law or the UIPA, and will provide a uniform process for doing so. Just as a judge is not required to appear on appeal to defend his or her decision, this bill will relieve OIP of the need to go to court to defend its prior opinions. The proposed appeal process will not require either OIP or the requester to participate in the judicial review proceeding. The deferential review standard provided for, together with the general limitation of confining the court's review to the record before OIP, will allow a court to render its decision essentially on the pleadings.

Impact on the New Day Plan: The proposed clarification of when, and under what standard, judicial review of OIP's decisions is available will eliminate the public's and agencies' confusion regarding this issue and allow administration of the open records and open meeting laws to work more smoothly. This will promote the New Day Plan's goal to improve government transparency and to rebuild public confidence in government.

GENERAL FUND: None.

OTHER FUNDS: None.

PPBS PROGRAM
DESIGNATION: None.

OTHER AFFECTED

AGENCIES:

All state and county agencies subject to the
UIPA and all state and county boards subject to
the Sunshine Law.

EFFECTIVE DATE: January 1, 2013.