

ACT 301

S.B. NO. 1016

A Bill for an Act Relating to Administrative Rules.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. The legislature finds that until early last year, the Hawaii Administrative Procedure Act required agencies, as a part of the rulemaking process, to give copies of the proposed rulemaking action free of charge to persons who requested them. During the 1998 legislature, two measures were enacted that had an impact on fees charged for agency rules. The first, Act 2, Session Laws of Hawaii (SLH) 1998, required agencies adopting rules to mail copies of proposed rules to interested persons who requested them, but only after the person paid for the cost of the copy and postage, rather than free of charge as had previously been the case. In addition, Act 311, SLH 1998, raised the fee for reproducing government records from twenty-five cents a page to fifty cents a page.

The enactment of Acts 2 and 311, SLH 1998, led to confusion among many state agencies. Some questioned whether those amendments required them to charge for copies of rules. Others wondered whether the agencies could set their own fees, or whether the statutory fee set by Act 311 would apply. In a study conducted by the legislative reference bureau entitled "The Price of Access: Fees for Copies of State Administrative Agency Rules", the bureau found that for a variety of reasons, a significant majority of state agencies or programs did not want to charge, did not plan to charge, or would not charge for copies of rules unless required to do so by a higher or other external authority.

That requirement came in the form of a letter opinion from the attorney general dated September 21, 1998, in which the attorney general stated that by virtue of the amendments made by Acts 2 and 311, SLH 1998, agencies are now required to charge fees for copies of proposed rules, and that those fees must be at the rate of fifty cents a page. Agencies may waive the fees for other state agencies and, under section 92-28, Hawaii Revised Statutes, may reduce fees charged to the public by as much as fifty per cent (i.e., down to twenty-five cents per page), but only with the approval of the governor. The bureau's study determined that copies of rules could typically be produced for less than ten cents a page.

The legislature did not intend that fees for copies of rules be mandatory, and finds that these high fees, now interpreted to be mandatory, are a significant and unnecessary barrier to public access. At fifty cents a page, members of the public will have to pay \$11 to \$12 on average for a copy of proposed rules in a typical rulemaking action. In large rulemaking actions, the cost of a single copy could run to hundreds of dollars. These fees are simply not affordable to the average small business or private citizen. Further, since most state rules are not currently posted in electronic form, such as on the internet, the public has few alternative methods by which to obtain copies of proposed rules. Requiring all agencies to charge for copies

of rules simply does not make sense. A significant majority of state agencies and programs do not believe that it is in their best interests to charge for copies, for a variety of reasons. Agencies seeking the broadest possible dissemination of their proposed rules have no reason to establish cost barriers.

On the other hand, mandating free copies could be unfairly burdensome to agencies whose operations are required to be self-funding, or in other instances where the demand for copies is extremely high. Where the demand is high, agencies should at least have the option to print a large number of copies and charge fees to recover their costs, which, under the circumstances, may only be a few cents per page.

The legislature finds that authorizing, instead of requiring agencies to charge fees cuts through many of these problems. The ability of the agency to charge a higher fee, a lower fee, or no fee at all gives each agency the flexibility to determine what is in its own best interests. The legislature's intent is to ensure that any fees charged for copies, mailing, or both, do not constitute an unreasonable barrier to public access. The cost of producing copies of rules themselves, whether proposed or final, is not particularly high. The cost to agencies of staff time spent identifying and searching for rules for which copies are requested can be recovered through reasonable fees for searching, identifying, and segregating records to be copied. These types of fees and charges are now being standardized by the office of information practices in its proposed rules now pending approval by the governor.

Many of the problems involved in charging and collecting fees can be avoided altogether by utilizing alternatives ranging from agreements with private copying services to other forms of technology. The posting of agency rules, both proposed and final, on the internet holds a great deal of promise for promoting public access while bypassing the issue of charging and collecting fees for copies. A few agencies have already taken the initiative to establish websites that include their rules. Others plan to post their rules on the internet in the near or the distant future. Meanwhile, the lieutenant governor's office is implementing an ambitious project to coordinate executive agency efforts to post all final rules on the internet. The legislature wholeheartedly endorses and supports this project as a significant step forward in promoting public access to state administrative agency rules.

The purpose of this Act is to implement the recommendations of the legislative reference bureau's study by:

- (1) Allowing rather than requiring agencies other than the office of the lieutenant governor to charge fees for copies of proposed and final rules at a rate of not more than ten cents a page, plus actual costs of mailing, if any;
- (2) Clarifying that informational or educational publications that contain copies of statutes, agency rules, or both, are subject to the same fee considerations, and thus exempt from the statutory rate of fifty cents a page;
- (3) Specifying that the fees for copies are separate from any reasonable charges for staff time spent searching for, identifying, or segregating the rules for which copies are requested; and
- (4) Requiring state agencies, beginning January 1, 2000, to post public notices of proposed rulemaking actions and the full text of their proposed rules on the internet through the lieutenant governor's office.

These amendments are intended to make clear that agency rules, whether proposed or final, and related publications, must be available to the public at rates that are closer to actual reproduction costs, while giving agencies the flexibility to distribute copies free of charge if they so desire. Agencies would thus be able to use newer technologies such as fax machines or posting rules on the internet without having to try to recover mandated charges of arbitrary amounts. This is intended to

enable agencies to operate in the manner that they feel most appropriate, ensure that any fees allowed do not constitute unreasonable barriers to public access, and avoid the problems inherent in trying to create blanket exemptions for classes such as public interest, nonprofit, or tax exempt organizations. The one agency that is exempted from the fee requirement of ten cents per page is the office of the lieutenant governor for rules in its general collection (as opposed to the office's own rules). Making the lieutenant governor's general collection subject to the same fee of ten cents per page for copies could result in that office being overwhelmed by requests by any and every individual seeking to obtain copies of final rules for every state agency.

Requiring agencies to post the full text of their proposed rules on the internet through the office of the lieutenant governor is intended to:

- (1) Expedite the efforts of the office of the lieutenant governor to post all final state agency rules on the internet by helping to ensure that all state departments have at least some staff capable of producing documents in the form needed for posting on the internet. The preparation for posting of proposed rules will provide earlier and more regular opportunities for departmental staffs to work with the office of the lieutenant governor in standardizing necessary procedures; and
- (2) Simultaneously improve public access and reduce the need for agencies to provide paper copies by giving interested persons the alternative of downloading or printing the proposed rules from the internet, and being able to access the information from their home, their place of business, or a public library.

In many respects, the price of public access to its own governmental processes is tantamount to the price of democracy. The legislature intends that this price remain within reach for all.

SECTION 2. Chapter 91, Hawaii Revised Statutes, is amended as follows:

1. By adding two new sections to be appropriately designated and to read:

“§91-A Fees for proposed and final rules. (a) Notwithstanding any law to the contrary, each agency may charge up to a maximum fee of ten cents per page, plus the actual costs of mailing, for the reproduction of paper copies of the following:

- (1) Proposed and final rules, whether new rules, amended rules, or repealed rules, in any format; and
- (2) Notices of proposed rulemaking actions pursuant to section 91-3(a)(1).

This section shall not apply to the reproduction by the office of the lieutenant governor of other agencies' rules, kept in the general collection of the office of the lieutenant governor. Charges for the reproduction of paper copies of rules in the general collection of the office of the lieutenant governor shall be as stated in section 92-21.

(b) Informational or educational publications (that are produced by agencies for noncommercial use and which contain copies of state statutes, proposed or final rules, or both, shall be subject to the same fees as specified in subsection (a).

(c) The fees specified in subsection (a) shall not include any charges for searching, identifying, or segregating rules in preparation for reproduction. Agencies may charge separate fees for these activities in accordance with rules adopted by the office of information practices.

§91-B Proposed rulemaking actions and rules; posting on the lieutenant governor's internet website. (a) Beginning January 1, 2000, all state agencies,

through the office of the lieutenant governor, shall make available on the website of the office of the lieutenant governor each proposed rulemaking action of the agency and the full text of the agency's proposed rules or changes to existing rules. The internet website shall provide instructions regarding how to download the information regarding proposed rulemaking actions and the full text of the agency's proposed rules.

(b) Each state agency, to the greatest extent feasible, shall:

- (1) Ensure that all information pertaining to that agency that is contained on the lieutenant governor's website is current and accurate; and
- (2) Advise individuals contacting the state agency of the availability of the proposed rulemaking actions and the full text of the agency's proposed rules on the lieutenant governor's website."

2. By amending section 91-3 to read:

“§91-3 Procedure for adoption, amendment, or repeal of rules. (a) Prior to the adoption of any rule authorized by law, or the amendment or repeal thereof, the adopting agency shall:

- (1) Give at least thirty days' notice for a public hearing. The notice shall include:
 - (A) A statement of the topic of the proposed rule adoption, amendment, or repeal or a general description of the subjects involved; and
 - (B) A statement that a copy of the proposed rule to be adopted, the proposed rule amendment, or the rule proposed to be repealed will be mailed to any interested person who requests a copy, pays [in advance] the required fees for the copy and the postage, if any, together with a description of where and how the requests may be made;
 - (C) A statement of when, where, and during what times the proposed rule to be adopted, the proposed rule amendment, or the rule proposed to be repealed may be reviewed in person; and
 - (D) The date, time, and place where the public hearing will be held and where interested persons may be heard on the proposed rule adoption, amendment, or repeal.

The notice shall be mailed to all persons who have made a timely written request of the agency for advance notice of its rulemaking proceedings, [and] given at least once statewide for state agencies and in the county for county agencies. Proposed state agency rules shall also be posted on the internet as provided in section 91-B; and

- (2) Afford all interested persons opportunity to submit data, views, or arguments, orally or in writing. The agency shall fully consider all written and oral submissions respecting the proposed rule. The agency may make its decision at the public hearing or announce then the date [as to] when it intends to make its decision. Upon adoption, amendment, or repeal of a rule, the agency, if requested to do so by an interested person, shall issue a concise statement of the principal reasons for and against its determination.

(b) Notwithstanding the foregoing, if an agency finds that an imminent peril to the public health, safety, or morals, or to livestock and poultry health, requires adoption, amendment, or repeal of a rule upon less than thirty days' notice of hearing, and states in writing its reasons for such finding, it may proceed without prior notice or hearing or upon such abbreviated notice and hearing, including posting the abbreviated notice and hearing on the internet as provided in section 91-

B, as it finds practicable to adopt an emergency rule to be effective for a period of not longer than one hundred twenty days without renewal.

(c) The adoption, amendment, or repeal of any rule by any state agency shall be subject to the approval of the governor. The adoption, amendment, or repeal of any rule by any county agency shall be subject to the approval of the mayor of the county. [The provisions of this] This subsection shall not apply to the adoption, amendment, and repeal of the rules [and regulations] of the county boards of water supply.

(d) The requirements of subsection (a) may be waived by the governor in the case of the State, or by the mayor in the case of a county, whenever a state or county agency is required by federal provisions to adopt rules as a condition to receiving federal funds and the agency is allowed no discretion in interpreting the federal provisions as to the rules required to be adopted; provided that the agency shall make the adoption, amendment, or repeal known to the public by [giving]:

- (1) Giving public notice of the substance of the proposed rule at least once statewide prior to the waiver of the governor or the mayor[.]; and
- (2) Posting the full text of the proposed rulemaking action on the internet as provided in section 91-B.

(e) No adoption, amendment, or repeal of any rule shall be invalidated solely because of [the]:

- (1) The inadvertent failure to mail an advance notice of rulemaking proceedings [or the];
- (2) The inadvertent failure to mail or the nonreceipt of requested copies of the proposed rule to be adopted, the proposed rule amendment, or the rule proposed to be repealed[.]; or
- (3) The inadvertent failure on the part of a state agency to post on the website of the office of the lieutenant governor all proposed rulemaking actions of the agency and the full text of the agency's proposed rules as provided in section 91-B.

Any challenge to the validity of the adoption, amendment, or repeal of an administrative rule on the ground of noncompliance with statutory procedural requirements shall be forever barred unless the challenge is made in a proceeding or action, including an action pursuant to section 91-7, that is begun within three years after the effective date of the adoption, amendment, or repeal of the rule.”

3. By amending section 91-4.1 to read:

“§91-4.1 Rulemaking actions; copies in Ramseyer format. Each state agency adopting, amending, or repealing a rule shall prepare a certified copy of the rule changes according to the Ramseyer format. Each state agency shall maintain a file of the copies in the Ramseyer format and shall make the file available for public inspection and copying at a [reasonable] cost[.] as specified in section 91-A.”

4. By amending subsection (b) of section 91-5 to read:

“(b) Compilations and supplements shall be made available free of charge upon request by the state officers in the case of a state agency and by the county officers in the case of a county agency. As to other persons, each agency may fix a price to cover mailing and publication costs[.] as specified in section 91-A. Each state agency adopting, amending, or repealing a rule shall file a copy with the revisor of statutes.”

SECTION 3. Chapter 92, Hawaii Revised Statutes, is amended as follows:

1. By amending section 92-21 to read:

“§92-21 Copies of records; other costs and fees. Except as otherwise provided by law, a copy of any government record, including any map, plan, diagram, photograph, photostat, or geographic information system digital data file, which is open to the inspection of the public, shall be furnished to any person applying for the same by the public officer having charge or control thereof upon the payment of the reasonable cost of reproducing such copy. [The] Except as provided in section 91-A, the cost of reproducing any government record, except geographic information system digital data, shall not be less than 50 cents per page, sheet, or fraction thereof. The cost of reproducing geographic information system digital data shall be in accordance with rules adopted by the agency having charge or control of that data. Such reproduction cost shall include[,] but shall not be limited to[,] labor cost for search and actual time for reproducing, material cost, including electricity cost, equipment cost, including rental cost, cost for certification, and other related costs. All fees shall be paid in by the public officer receiving or collecting the same to the state director of finance, the county director of finance, or to the agency or department by which the officer is employed, as government realizations; provided that fees collected by the public utilities commission pursuant to this section shall be deposited in the public utilities commission special fund established under section 269-33.”

2. By amending section 92-24 to read:

“§92-24 Directors of finance and commerce and consumer affairs; fees. [The] Except as provided in section 91-A, the director of finance and the director of commerce and consumer affairs each shall charge the following fees:

- (1) For administering any oath, \$1;
- (2) For preparing every photostat copy of any document on record in the director’s office, 50 cents per page or portion thereof;
- (3) For preparing every typewritten copy of any document on record in the director’s office, 50 cents per page or portion thereof;
- (4) For preparing a certificate of compliance, \$5 for the original certificate, and \$1 for each additional copy thereof, of which \$4 from each certificate and 75 cents of each additional copy shall be deposited in the special fund referred to in section 415-128, and the balance deposited to the general fund of the State;
- (5) For comparing any document submitted for certification, 15 cents per page or portion thereof;
- (6) For certifying any document on record in the director’s office, 25 cents for each certification;
- (7) For all other acts and duties, the fees of which are not otherwise provided for, such charges as each may from time to time prescribe.”

3. By amending section 92-28 to read:

“§92-28 State service fees; increase or decrease of. Any law to the contrary notwithstanding, the fees or other nontax revenues assessed or charged by any board, commission, or other governmental agency may be increased or decreased by the body in an amount not to exceed fifty per cent of the statutorily assessed fee or nontax revenue, in order to maintain a reasonable relation between the revenues derived from such fee or nontax revenue and the cost or value of services rendered, comparability among fees imposed by the State, or any other purpose which it may deem necessary and reasonable; provided that:

- (1) The authority to increase or decrease fees or nontax revenues shall be subject to the approval of the governor and extend only to the following: chapters 36, 92, 94, 142, 144, 145, 147, 150, 171, 188, 189, 231, 269, 271, 321, 338, 373, 412, 415, 421, 425, 431, 438, 439, 440, 442,

- 447, 448, 452, 453, 455, 456, 457, 458, 459, 460, 461, 463, 464, 466, 467, 469, 471, 482, 485, 501, 502, 505, 572, 574, and 846 (pt II);
- (2) The authority to increase or decrease fees or nontax revenues established by the University of Hawaii under chapters 304, 305, 306, and 308 shall be subject to the approval of the board of regents; provided that the board's approval of any increase or decrease in tuition for regular credit courses shall be preceded by an open public meeting held during or prior to the semester preceding the semester to which the tuition applies;
 - (3) This section shall not apply to judicial fees as may be set by any chapter cited in this section; [and]
 - (4) The authority to increase or decrease fees or nontax revenues pursuant to this section shall be exempt from the public notice and public hearing requirements of chapter 91[.]; and
 - (5) Fees for copies of proposed and final rules and public notices of proposed rulemaking actions under chapter 91 shall not exceed 10 cents a page, as required by section 91-A.

SECTION 4. In codifying the new sections added to chapter 91, Hawaii Revised Statutes, by section 2 of this Act, the revisor of statutes shall substitute appropriate section numbers for the letters used in the designation of the new sections in this Act.

SECTION 5. Statutory material to be repealed is bracketed. New statutory material is underscored.¹

SECTION 6. This Act shall take effect upon its approval.

(Approved July 6, 1999.)

Note

1. Edited pursuant to HRS §23G-16.5.