

THE PRICE OF ACCESS: FEES FOR COPIES OF STATE ADMINISTRATIVE AGENCY RULES

KEN H. TAKAYAMA

Assistant Director for Research

Report No. 6, 1998

Legislative Reference Bureau
State Capitol
Honolulu, Hawaii 96813
Internet: www.state.hi.us/lrb/

This report has been cataloged as follows:

Takayama, Ken H.

The price of access: fees for copies of state administrative agency rules. Honolulu, HI: Legislative Reference Bureau, December 1998.

1. Administrative agencies - Rules and practice - Hawaii. 2. Public records - Fees - Hawaii.
KFH421.5 L35 A25 98-6

FOREWORD

This report has been prepared in response to Senate Resolution No. 92 (1998), requesting the Legislative Reference Bureau to study the issue of mailing copies of proposed administrative agency rules to interested citizens and public interest groups who request them.

The Bureau sincerely appreciates the time and effort contributed by representatives of Common Cause/Hawaii and of all of the State's executive departments and attached agencies, in meeting with the Bureau to discuss concerns and issues raised by the Resolution for this report. In addition, the Bureau specifically acknowledges the efforts of the Office of the Attorney General in researching and drafting the legal opinion that significantly affected the focus of this report. This report could not have been completed without the generous cooperation and assistance contributed by everyone involved.

Wendell K. Kimura
Acting Director

December 1998

TABLE OF CONTENTS

	<u>Page</u>
FOREWORD	<i>iii</i>
1. INTRODUCTION AND BACKGROUND	1
Introduction	1
Administrative Rulemaking	1
1998 Legislation	3
2. IMPACTS, PRACTICES AND PROBLEMS	6
Agency Reactions	6
Final Rules: The Other Side of the Coin.....	8
Request for Clarification.....	9
The Attorney General’s Opinion: The “Double Whammy”	10
Agency Rule Filings	12
Alternative Methods of Obtaining Copies of Rules	13
Cost of Providing Copies	14
Summary	17
3. ALTERNATIVES	18
Amendments to the Hawaii Administrative Procedure Act.....	18
Use of Private Copying Services.....	22
“Fax Back”	23
Internet	23
Analysis of Alternatives.....	25
4. FINDINGS AND RECOMMENDATIONS	27
Findings.....	27
Recommendations	29
Conclusion	31

Appendices

A. Senate Resolution No. 92, Nineteenth Legislature, Regular Session of 1998.....	33
B. Letter dated September 21, 1998 from the Department of the Attorney General to Wendell K. Kimura, Acting Director, Legislative Reference Bureau.....	35

Chapter 1

INTRODUCTION AND BACKGROUND

Introduction

Senate Resolution No. 92 (1998), a copy of which is attached as Appendix A, directed the Legislative Reference Bureau to conduct a study in response to concerns raised by the enactment of Act 2, Session Laws of Hawaii 1998. Act 2 amended the Hawaii Administrative Procedure Act to require 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 the postage, rather than free of charge as had previously been the case.

The Resolution expressed particular concern about the issue of mailing copies of proposed rules to “interested citizens who request copies” and “public interest groups”. However, events occurring after the adoption of S.R. No. 92, have caused, in the Bureau’s judgment, the more basic issue of fees charged for the copies of rules to significantly overshadow the issue of mailing. Mailing costs are insignificant if the item being mailed is expensive, and moot if the item is unaffordable.

Chapter 1 of this study provides this introduction and background information on the basic issues in the study.

Chapter 2 discusses agency reactions to Act 2 and other legislation concerning fees for public records, the impact of an Attorney General’s opinion interpreting that legislation, general public access to copies of rules in Hawaii and other states, and estimates of the cost to agencies of producing copies of rules.

Chapter 3 discusses alternative courses of action to lower barriers to making copies of rules available to interested persons and public interest groups.

Chapter 4 contains findings and recommendations.

Administrative Rulemaking

Administrative rulemaking is a well established concept in American law, and the standard method by which executive agencies of the federal and all state governments implement and interpret legislative enactments.

The purposes of administrative rulemaking are to implement legislation and to establish operating procedures for state agencies. Generally, a legislative act will provide the skeleton or superstructure for a program. Agencies are required to “fill in the details” and implement the program on a day-to-day basis. Illustratively, the state unemployment insurance law requires, among other things, that a claimant (1) be registered for work; (2)

be available for work; (3) not have quit the claimant's last job voluntarily without good cause or have been fired for misconduct. The statute, however, does not spell out in any greater detail what any of those conditions mean. Consequently, the department has to make certain determinations in order to apply the statutory requirements to varying classes of applicants.

The result of this process of "filling in the details" is that the departments are accorded a great deal of discretion in applying the law, particularly where the controlling statute is couched in general terms, *e.g.*, "misconduct". Clearly, agencies should not be allowed to apply differing standards among similarly situated members of the public.

The law which controls administrative rulemaking is chapter 91, Hawaii Revised Statutes, the Hawaii Administrative Procedure Act (HAPA). Briefly, the law requires, among other things, that administrative agencies follow certain specified procedures in order to impose upon the public requirements which affect private rights. For a rule to become binding upon the public, an agency must (1) publish notice of public hearing; (2) hold a hearing in which all persons are allowed to submit data, views, or arguments orally or in writing; (3) have the rule approved by the governor, and filed in the office of the lieutenant governor on a permanent basis for public inspection.¹

The foregoing requirements in Hawaii are set forth in section 91-3, Hawaii Revised Statutes, which lays out the general procedural requirements for administrative rulemaking. Prior to February 26, 1998, section 91-3 read in relevant part as follows:

§91-3 Procedure for adoption, amendment or repeal of rules. 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) Either:
 - (i) A statement of the substance of the proposed rule adoption, amendment, or repeal ; or
 - (ii) A general description of the subjects involved and the purposes to be achieved by the proposed rule adoption, amendment, or repeal; 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 at no cost to any interested person who requests a copy, together with a description of where and how the requests may be made; and
 - (C) 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,

¹ Samuel B.K. Chang, "Background to Administrative Rulemaking", contained in Hawaii Administrative Rules Drafting Manual, 2d ed., Legislative Reference Bureau (Honolulu: 1984), p. 7.

- and published at least once in a newspaper of general circulation in the State for state agencies and in the county for county agencies.
- (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 shall, if requested to do so by an interested person, issue a concise statement of the principal reasons for and against its determination. (*Underscoring added for emphasis*)

As indicated in the underscored subparagraph above, section 91-3(a)(1)(B) stated clearly and unambiguously that for purposes of an agency's public notice and hearing in a rulemaking action, the agency had to give copies of the proposed rules (or amendments or repeals) free of charge (including mailing costs) to persons who requested them. Effective February 26, 1998, all of this changed.

1998 Legislation

During the 1998 Regular Session of the Hawaii State Legislature, two measures were enacted that would have an impact on fees charged for proposed agency rules. These measures were Act 2 and Act 311, Session Laws of Hawaii 1998, respectively.

1. Act 2

Act 2, which was signed into law on February 26, 1998, was a 179-page bill that amended a number of statutory provisions relating to the publication of public notices to give agencies greater flexibility in complying with the notice requirements. Instead of having to publish notices specifically in "a newspaper of general circulation in the State" as was typically required, agencies are now authorized to provide for statewide publication:

- (A) In a daily or weekly publication of statewide circulation; or
- (B) By publication in separate daily or weekly publications whose combined circulation is statewide.²

One of the many statutory sections amended by Act 2 was section 91-3(a), Hawaii Revised Statutes. Using the Hawaii Legislature's normal bill drafting conventions in which deleted language is bracketed and added language underscored, section 27 of Act 2 changed section 91-3(a) as shown below:

SECTION 27. Section 91-3, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

"(a) Prior to the adoption of any rule authorized by law, or the amendment or repeal thereof, the adopting agency shall:

² 1998 Haw. Sess. Laws, Act 2, section 2, codified as Hawaii Rev. Stat., sec. 1- .

- (1) Give at least thirty days' notice for a public hearing. The notice shall include:
 - (A) [Either:
 - (i) A statement of the [substance] topic of the proposed rule adoption, amendment, or repeal[;] or
 - [(ii) A] a general description of the subjects involved [and the purposes to be achieved by the proposed rule adoption, amendment, or repeal]; 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 [at no cost] to any interested person who requests a copy, pays in advance for the copy and the postage, together with a description of where and how the requests may be made; [and]
 - ~~(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~~
 - [(C)] (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 [published] given at least once [in a newspaper of general circulation in the State] statewide for state agencies and in the county for county agencies.
- (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 [shall], if requested to do so by an interested person, shall issue a concise statement of the principal reasons for and against its determination."

The change to the last few lines of subsection (a)(1) changing the publication of notice in a newspaper of general circulation in the State to the giving of notice statewide was the type of amendment commonly made by Act 2 to a number of different statutory provisions. However, subsection (a)(1)(B), which previously required that copies of proposed rules be mailed free of charge to persons who requested them, was amended to provide instead for the mailing of copies to persons who pay in advance for the copy and the postage. A new subparagraph (C) was also added to require that the notice state when and where the text of the rulemaking proposal could be reviewed in person.

The latter amendments concerning payment for the copies and availability of copies for inspection were not a case of "last minute" or "surprise" changes to the bill, which was originally introduced as Senate Bill No. 1285. Although not contained in the bill as originally introduced, both amendments were added in the first set of changes made to the bill by the Senate Committees on Commerce, Consumer Protection, and Information Technology, and Ways and Means in the Senate Draft 1 version of the bill. They were not altered during the remainder of

the legislative process, which included two sets of amendments made by the House of Representatives, and a third set made by a Conference Committee. The amendments were made in February of 1997, fully a year before the bill became law.

2. Act 311

Act 311 was a wide ranging measure that amended a variety of statutory provisions, including several provisions relating to fees and charges. One of the fee sections amended was section 92-21, Hawaii Revised Statutes which had provided since 1976³ that the “cost of reproducing any government record, ...shall not be less than 25 cents per page, sheet, or fraction thereof.... 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.”

Section 4 of Act 311 raised the fee from 25 cents a page to 50 cents a page.

³ 1976 Haw. Sess. Laws, Act 212, section 3.

Chapter 2

IMPACTS, PRACTICES AND PROBLEMS

Agency Reactions

In conducting this study, the Bureau thought it important to obtain input from affected administrative agencies regarding the impact (or at least the perceived impact) of Act 2 on their rulemaking activities. To accomplish this, the Bureau conducted a series of meetings with staff from all of the executive departments as well as agencies attached to those departments for administrative purposes. Many, if not most, appeared to be cognizant of the passage of Act 311 (or at least the amendment to section 92-21, Hawaii Revised Statutes, that would raise copying fees from 25 to 50 cents a page) even though that measure would not become law until July 21, 1998. By comparison, relatively few were aware of the fee provisions for proposed rules in Act 2, which had become law several months earlier.

People inclined to think the worst about government agencies would likely assume that the executive agencies were gleefully embracing the fee provisions of Act 2 as a wonderful opportunity to rid themselves of bothersome inquiries from the public about rulemaking proposals. In fact, the responses were extremely varied. Many questioned whether the amendments made by Act 2 to section 91-3, Hawaii Revised Statutes, actually required them to charge for copies of rules. They also wondered whether the agencies could set their own fees, or whether the statutory fee set by section 92-21 would automatically apply. Neither Act 2 nor Act 311 could provide definitive answers to those questions.

Prior to the effective date of Act 2, the law was clear—people could get copies of proposed rules free of charge. By comparison, during the summer of 1998, the law was not clear, and the agencies appeared to be in uncharted waters, heading in different directions. When asked to state whether they planned to charge for copies of proposed rules, and if so, at what rate, the agency responses included the following:

- (a) Of those who planned to charge fees for copies of proposed rules:
 - (1) A few agencies believed that Act 2 required them to charge for copies, and that they were required to charge at the statutory rate of 50 cents a page;
 - (2) A few agencies believed that they had to charge for copies, but had the leeway to charge at a lower rate—primarily to recover costs;
 - (3) A few believed that the law authorized rather than required them to charge, and planned to charge fees in order to recover costs.

Of the agencies who were planning to charge for copies, some felt that at least their own, if not all agencies, should charge if only to recover costs. Agencies whose programs were self-

funded understandably tended to have a greater concern for being able to recover their costs. Others did not want to charge but simply felt compelled to do so as a matter of law.

- (b) Of those who did not plan to charge for copies:
 - (1) The bulk—a significant majority of the agencies or programs stated that they did not want to charge, did not plan to charge, and would not charge unless required to do so by higher or other external authority. Their reasons for not wanting to charge varied from one agency or program to another and included the following:
 - (A) Some agencies wanted to ensure that their proposed rules are disseminated as broadly as possible among the public. In their experience, problems and controversies in their public hearings tended to stem not so much from the proposed rulemaking actions themselves as from rumors and misinformation circulating in the community. Widespread dissemination of the proposed rules helps to minimize the rumors and misinformation, thereby making the public hearings go more smoothly. Charging for copies of rules would tend to restrict dissemination and, therefore, be contrary to the agencies' best interests;
 - (B) Many felt that the cost to the agency in staff time and paperwork involved in collecting and accounting for the relatively small amounts paid for copies of rules would likely exceed or simply wouldn't be worth the revenues received. It's easier to just give out the copies, especially when the number of requests is not very high;
 - (C) For programs funded by the general fund, any of the staff time referred to in (B) would be a loss to the agency, as any revenues collected would go to the general fund rather than to the agency;
 - (D) Proposed rules are the administrative equivalent of bills in the Legislature—and people get copies of bills free of charge;
 - (E) Collecting fees for “hard” copies given to a person on site or mailed to them is one thing, but charging, for example, for faxed copies seems a little silly, especially when the agency incurs no phone charges. Even more extreme would be a situation where the agency has posted rules on the Internet that are then downloaded or printed by the recipient. Attempting to charge and collect fees in these situations could lead to an “administrative nightmare”. Further, if fees are not charged for copies that are downloaded from the Internet, faxed, or sent by other electronic means, then the agency is in the potentially perverse position of supplying free copies to those who can afford fax machines and computers while charging those who cannot afford them for the hard copies that are distributed;

- (F) In a few cases, the agency is sending the proposed rules to someone (for example, an expert) because the agency is seeking their help. It makes no sense for the agency to charge a fee to someone who is helping them;
 - (G) Some staff in federally funded programs questioned whether a requirement that they charge for copies of proposed rules would conflict with the federal requirements of their programs; and
 - (H) A few agencies felt that philosophically, it just doesn't seem right to charge people a fee to participate in the governmental process of adopting rules that may be regulating a part of their lives.
- (2) Taking item (1)(H) above (philosophical objections) even further, a few agencies felt so strongly that people should be able to receive copies of proposed rules free of charge that they said they would ignore any law or interpretation of law that required them to charge.

The foregoing responses reflected, in some cases, differences between departments as a whole, and in other cases, between agencies or programs within or attached to the same department. In one meeting, representatives from a single department split several different ways, with: (1) one program reporting they would charge for copies at 50 cents a page, even though they didn't really want to, because they believed they had to under the law; (2) a second program saying they would charge because they thought it was a good idea—although they had very few requests for copies; (3) a majority saying they wouldn't charge unless they had to precisely because the low volume of requests would not generate enough revenues to justify the administrative costs and; (4) one program reporting that they would not charge unless they had to because it just didn't seem right to do so.

Generally speaking, the representatives of the significant majority of agencies and programs who did not plan to charge for copies, unless required to do so, believed that the 50 cents a page rate should be treated as an authorized maximum instead of a mandatory charge. Subject to that ceiling, the individual agencies should be allowed to charge a lower rate or give out copies free of charge.

Final Rules: The Other Side of the Coin

Although technically beyond the scope of S.R. No. 92, which only discusses proposed rules, some of the public access issues discussed in this study with respect to proposed rules apply equally to final rules.

Final rules are administrative agency rules that have been formally adopted pursuant to all of the requirements of the Hawaii Administrative Procedure Act (HAPA). Unlike proposed rules, which are still being contemplated for adoption, final rules have the force and effect of law. The Office of the Lieutenant Governor, by virtue of its status as the official depository of

agency rules, has a complete set of all final rules adopted by state agencies under the HAPA because filing with that office is a requirement for the rules to become effective.¹

Departments and agencies also have copies of their final rules on file, as the rules implement or interpret the laws establishing the functions, duties, and programs of the agencies. Members of the public can therefore obtain copies of final rules from either the Office of the Lieutenant Governor or the adopting agency. As a practical matter, if a person simply wants copies of a particular set of rules, it is probably easier to get them through the adopting agency, which is likely to be more familiar with the rules requested. By comparison, the Office of the Lieutenant Governor would be searching a very large collection of all rules filed by every state agency. On the other hand, in situations such as litigation where it is necessary to obtain official certification that the rules in fact are on file with the Lieutenant Governor and therefore in effect, there is no substitute for receiving such certification from the Lieutenant Governor.

While many agencies expressed concern over the prospect of having to charge for copies of proposed rules, hardly any concerns were expressed concerning final rules. Agency practices on distributing proposed rules generally fell into three categories:

- (1) Where agencies believed there would be high demand for copies of final rules, they tended to print copies in quantity and charge fees at a level designed to recoup expenses;
- (2) Many agencies said they did not charge if requests for copies were only occasional and did not involve a large number of pages;
- (3) For situations other than the first category, agencies generally reported charging 25 cents a page (the then applicable statutory rate which was raised to 50 cents by Act 311 in 1998).

As a practical matter, agencies appeared to treat final rules on the same basis as any other government record.

Request for Clarification

Faced with the obvious lack of uniformity and, in some cases, outright confusion on the part of the agencies in response to Act 2 and Act 311, the Bureau requested an opinion from the Attorney General for the purpose of clarifying the following issues:

- (1) Does section 91-3(a)(1)(B), Hawaii Revised Statutes, as amended by Act 2, Session Laws of Hawaii 1998, require agencies to charge fees for copies of proposed rules?

¹ County administrative agency rules must be filed with the Clerk of the particular county. Hawaii Rev. Stat. §91-4.

- (2) If “Yes” to issue (1), must the fees charged be those specified in section 92-21² or 92-24,³ Hawaii Revised Statutes as applicable?
- (3) If agencies are required to charge fees for copies of proposed rules, do they have any authority, inherent or otherwise, to waive or reduce fees under any circumstances (for example, in giving copies to other government agencies or people who do not have the ability to pay)?

Aside from obtaining guidance for the executive agencies in their Implementation of Acts 2 and 311, the Bureau believed that this clarification would also better enable the Legislature to respond more clearly and precisely to any perceived problems.

The Attorney General’s Opinion: The “Double Whammy”

On September 21, 1998, the Attorney General issued a clear and unequivocal opinion (a copy of which is attached as Appendix B) in response to the issues raised by the Bureau. Shortly after receiving it, the Bureau distributed copies of the opinion to all executive departments. According to the Attorney General:

- (1) Agencies are required to charge fees for copies of proposed rules;
- (2) The fees must be at the rate of 50 cents a page as established by sections 92-21 and 92-24, as applicable; and
- (3) Agencies are authorized to waive the foregoing fees for other state agencies, and to reduce fees charged to the public.

While these were not the answers that most agencies wanted to hear, the necessary guidance has at least been issued, and all executive agencies should be able to respond to inquiries and requests concerning these issues in a consistent manner.

Other points of analysis discussed in the opinion are as follows:

- (1) The amendments made by Act 2 to section 91-3(a)(1)(B), HRS, evidence “an intent to require an interested person to pay these fees prior to obtaining a mailed copy....By implication, we, therefore, believe that agencies are required to charge and collect these fees”;⁴

² 25 cents per page, increased to 50 cents per page by Act 311, Session Laws of Hawaii 1998.

³ This section provides that the directors of commerce and consumer affairs, and finance, respectively “shall each charge” 50 cents per page or portion thereof for every photostat copy of any document on record in the director’s office.

⁴ Letter Opinion from Rodney J. Tam, Deputy Attorney General, and approved by Margery S. Bronster, Attorney General, to Wendell K. Kimura, Acting Director, Legislative Reference Bureau, September 21, 1998, at p. 3.

- (2) Section 92-21, HRS literally applies to government records, which clearly include proposed agency rules;⁵
- (3) Based on the language and history of section 92-21, HRS, “agencies are required to charge at least 50 cents per page for paper copies of proposed rules....” The copying and postage fees can be avoided by interested persons as copies of proposed rules must be available for inspection in person;⁶
- (4) “[M]ultiple originals would be considered ‘copies’. Thus, agencies must still charge at least 50 cents per page for multiple originals....”⁷
- (5) The 50 cents a page charge applies to “each side of a sheet of paper of the requested copied material...[provided] to interested persons. Thus, a two-sided copy...would cost 50 cents for each side (or \$1 total). Conversely, multiple pages ...that are copied onto one side of a sheet of paper, would cost 50 cents.”⁸
- (6) “[B]ased on the language and intent of the section, [92-21] we infer that agencies are required to charge the reasonable cost of copying the proposed rules onto computer diskettes, compact discs, magnetic tapes, etc. through rulemaking”;⁹
- (7) Section 92-21, HRS establishes the minimum fee for paper copies of proposed rules at 50 cents a page. Under section 92-28, HRS, an agency may reduce that fee charged to the public “by up to fifty per cent (i.e., agencies may decrease the fee down to 25 cents per page) by demonstrating the reasonable relationship of the lower fee amount to the cost of service provided, and by obtaining the governor’s approval.” Section 92-28 also authorizes the reduction of fees “for copies of proposed rules on computer diskettes, compact discs, magnetic tapes, etc. with the governor’s approval.”¹⁰
- (8) “State agencies are precluded from charging other agencies for copies (paper or electronic) of proposed rules.”¹¹

In analyzing the various issues discussed in the opinion, the Attorney General noted a few areas in which legislative modification was advisable because the law was either unclear, or problematic under certain circumstances.

The first recommendation was the establishment of some type of exception to the rate of 50 cents a page in section 92-21 for certain informational or educational publications and booklets that may contain copies of statutes, adopted agency rules, or both. Historically, some agencies, notably the Department of Commerce and Consumer Affairs and the Department of

⁵ *Id.*, at 5.

⁶ *Id.*, at 9, and n. 12.

⁷ *Id.*, n. 16, at 10.

⁸ *Id.*, at 10.

⁹ *Id.*, at 11.

¹⁰ *Id.*, at 12-13.

¹¹ *Id.*, at 13.

Labor and Industrial Relations, have printed large numbers of copies of these publications and distributed them at a cost level designed solely to recover expenses, which is far cheaper than the statutory rate of 25 or 50 cents a page. Because the requested opinion, technically, was limited to proposed rules (the subject of the study requested by S.R. No. 92), the Attorney General did not address the applicability of section 92-21 to these types of publications. Rather, the Attorney General noted that if section 92-21 “was broadly applied to these types of paper copies, this construction may conflict with longstanding administrative practice”. The Attorney General, therefore, recommended that the Legislature amend section 92-21 “to clarify the scope of its application, and either prescribe fees for the various types of copies and methods of reproduction or allow agencies to set the fees themselves.”¹²

Second, the Attorney General also recommended that there be some form of exception for situations where the proposed rules are voluminous and lengthy. In these situations, even a reduction of the fees to 25 cents a page, as authorized under section 92-28, could still result in a charge that is high enough to deter public participation. Accordingly, the Attorney General recommended that sections 91-3, 92-21, and 92-28, HRS be amended to provide for this exception.¹³

Agency Rule Filings

According to the log maintained by the Office of the Lieutenant Governor, of all rulemaking actions filed by executive agencies, a total of 88 rule filings were made during the thirteen months from October 1, 1997 to October 31, 1998. The shortest rule filing consisted of a single page while the longest was 213 pages. Of the 88 filings, 66 of those filings were anywhere from one to 25 pages long; 14 were 26 to 50 pages in length, while four were over 100 pages. None of the filings were in the 76 to 100 page range. The average length of a filing¹⁴ was 23 pages.

During the Bureau’s meetings with agencies and programs in the executive departments that adopt rules, two agencies mentioned that they were in the process of adopting lengthy amendments to their existing rules. The State Procurement Office of the Department of Accounting and General Services was proposing over 100 pages of amendments to the existing procurement rules,¹⁵ while the Hazardous Waste program of the Department of Health was proposing amendments to existing rules that exceeded 1,400 pages—which would make it one of, if not the longest single rulemaking action in state history.

At 50 cents a page, assuming existing patterns hold, members of the public can look forward to paying somewhere in the vicinity of \$11 to \$12 for a copy of proposed rules in a typical rulemaking action. In an extreme example, such as the proposed amendments to the

¹² *Id.*, at 10.

¹³ *Id.*, at 13.

¹⁴ This average was calculated by adding the total number of pages filed and dividing this total by 88, the number of filings made.

¹⁵ The State Procurement Office posted the text of its proposed rules on the Internet, thereby giving the public the opportunity to browse, download, or print their own copies of the agency’s proposed rules.

hazardous waste rules—which could affect any number of small businesses, the cost would be over \$700.

Alternative Methods of Obtaining Copies of Rules

What alternative means does the public have of obtaining copies of an agency's proposed rules short of paying 50 cents a page? Unless the agency ignores the law as interpreted by the Attorney General or posts an electronic version of the proposed rules on the Internet, the short answer to the question, at least in Hawaii today is, for all practical purposes, "little or none". This is not to say that there is no access at all. Interested people can personally inspect copies of proposed rules at the proposing agency during regular business hours. One alternative not addressed by the Attorney General's opinion is the possibility that agencies could loan copies of proposed rules to interest persons who could then make their own copies at their own expense—and in all likelihood, less than 50 cents a page.

As it is, Hawaii definitely provides fewer alternatives than many other states. In 42 states and the District of Columbia,¹⁶ public agency notices, including those concerning agency rulemaking, are published in a state register. Often modeled after the Federal Register, these state publications are intended to serve as that state government's official newspaper or public agency notice bulletin board to provide a single source where the public can look to find this type of information. This does not mean that Hawaii's system for notifying the public about hearings on proposed rulemaking is inferior. A state register, which is usually published weekly or monthly, may not be as readily accessible to the general public as the newspapers in which public notices for rulemaking must be published in Hawaii.

However, with respect to rulemaking, a number of states publish far more than just notices of public hearings. Twenty-five states require that the full-text of the agencies' proposed rules be published in the state register. Thirteen states require the publication of notices only, while the remaining states give the adopting agencies the choice of publishing either the full text of the proposed rules or just a notice of hearing.¹⁷ Consequently, in at least 25 states, if a person could not get copies of proposed rules from the adopting agency, they can make their own copies from the state's register.

With respect to final rules, 44 states and the District of Columbia publish their rules in a state administrative code, not unlike the Code of Federal Regulations.¹⁸ These codes provide access to the full text of administrative agency rules in places other than agency offices and the official state depository.

Hawaii is one of only two states that does not publish either a state register or code as an official state government publication.¹⁹ Within the past year, however, Weil Publishing Co., Inc.

¹⁶ National Association of Secretaries of State, Administrative Codes and Registers Section, State and Federal Survey (Eagan, MN: West Group, 1997 & 1998).

¹⁷ Id.

¹⁸ Id.

¹⁹ Id., at v-vi.

has developed and made available for purchase on a subscription basis, Weil's Code of Hawaii Rules (WCHR) and Weil's Hawaii Government Register. They are purely private publisher's versions of a state administrative code and state register. Although neither is published with any state endorsement or support, both provide a great deal of useful information.

The WCHR is a sixteen volume loose leaf publication that is intended to replicate all of the currently valid administrative agency rules that are on file at the Office of the Lieutenant Governor. The register is a monthly publication that includes, among other things, listings of individuals appointed to state offices, opinions issued by the Attorney General and the Office of Information Practices, notices of proposed rulemaking (but not the full text of the proposed rules), and other notices and announcements issued by other state agencies.

The administrative code, the WCHR, is a large publication and is not cheap. The cost of a subscription to the WCHR is \$1810.00 a year including shipping and handling. The cost of the WCHR includes a subscription to Weil's Hawaii Government Register. As a loose leaf publication, the WCHR needs to be updated regularly to account for the constant changes in agency rules. Each month, replacement pages for the WCHR are shipped to the subscriber along with the most current issue of the register. The cost of a subscription to the register alone is \$295.00 a year.²⁰

Copies of final rules (but not proposed rules) can be obtained (at a cost of 50 cents a page) at the Office of the Lieutenant Governor, where all rules must be filed in order to take effect. Agencies are also supposed to send copies of their final rules to the State Publications Distribution Center, which is part of the State Library System.²¹ Library staff report, however, that on a number of occasions, agencies have not transmitted copies of rules that are subsequently requested by library patrons. In those instances, the librarians have to contact the adopting agency to obtain the needed rules. Copies of all of the State's rules are supposed to be in the collections of seven depository branches of the State Library System. These include four branches on Oahu and one each on the islands of Kauai, Maui, and Hawaii.²²

Cost of Providing Copies

How much does it cost to produce copies of rules? Estimates undoubtedly will vary according to assumptions made and the circumstances in which agencies find themselves. The primary components will include the cost of labor, amount of time involved, and the cost of supplies and equipment. The cost of labor can vary tremendously, depending upon the salary of the individual who is making the copies for distribution.²³ The amount of time involved can vary

²⁰ Telephone interview with Nancy Provencal, Weil Publishing Company, Inc., Augusta, Maine, November 30, 1998.

²¹ Hawaii Rev. Stat., §§93-1 to 93-5.

²² Telephone interview with Patrick McNally, State Publications Distribution Center, Library of Hawaii, July 15, 1998. The specific branches are the Main Branch in Downtown Honolulu, as well as Kaimuki, Pearl City, Kaneohe, Lihue, Kahului, and Hilo.

²³ While it may be reasonable to argue that the cost of an employee's fringe benefits should also be included, the cost of at least some of these benefits, such as retirement benefits and health insurance, while borne by the State of Hawaii, are not paid out of the budget of the employing agency. Therefore, for purposes of this

according to the type of copying equipment used, as can the cost of equipment. A higher speed, more complicated copying machine might cost more to operate, but can also reduce the employee time involved. Additionally, the cost of paper can be affected, for example, by market prices at the time of purchase as well as the quantity purchased.

As a simple, informal experiment, the Bureau ran ten copies of a set of 25 pages of rules—slightly longer than the average set of rules filed with the Lieutenant Governor between October 1997 and October 1998. The copies were produced on the Bureau's Kodak 235 copier which produces approximately 85 copies (pages) a minute. The Bureau pays approximately \$8,500 a year to operate the copier, including costs for toner and maintenance, and produces approximately 250,000 copies on the machine each year.²⁴ Using a high estimate, given price fluctuations, the cost of the recycled paper used for the copying was approximately \$25 per case (the use of nonrecycled paper would be less expensive) of ten reams of paper, with 500 sheets per ream. The time taken to produce the ten collated, stapled sets was just under six minutes, including the time taken to correct a jammed machine.

Based on the foregoing, the cost components of producing the copies, which consisted of a total of 250 pages, were as follows:

- (1) Paper: \$1.25 (one-half of a ream at \$2.50 per ream);
- (2) Equipment: \$8.50 (3.4 cents per copy, derived by dividing the \$8500 annual operating cost by the 250,000 copies produced);
- (3) Labor: 96 cents (if copies are made by an employee earning \$20,000 a year, which equals \$9.62 an hour (\$20,000 divided by 52 weeks a year, divided by 40 hours per week)); \$1.92 if produced by someone earning \$40,000 a year).

Assuming that the copies were produced by an employee earning \$20,000, then the cost of producing the ten sets totaling 250 pages would be \$10.71, or 4.3 cents a page. If the employee earned \$40,000 a year, the cost would be \$11.67 or 4.7 cents a page. If the copies had been produced by the Governor, who is paid \$94,780 a year, the cost would be \$14.31 or 5.7 cents a page. Each scenario results in a production cost considerably below the 50 cents a page required to be charged for copies of rules, and would still be the case even if employee benefits and other overhead expenses were presumed to double the cost.

The cost of mailing any of those sets of 25 pages of proposed rules in a manila envelope would have been \$3.00 for priority and \$1.24 for first class mail. A call to one of the local

exercise, it is probably fairer to say that the real cost of labor to the employing agency in producing copies of rules consists of the employee's salary and time. For similar reasons, it would not be appropriate to include other overhead expenses such as office space or air conditioning that are not paid out of the budget of the agency issuing the rules.

²⁴ The number of copies produced varies considerably between months, with much higher totals during months when the Legislature is in session. As part of the Bureau's agreement with Kodak, the Bureau pays approximately one cent per for each copy above a certain monthly minimum. These charges are included in the \$8500 annual figure. Interview with Daniel T. Aono, Chief, Legislative Reference Bureau Systems Office, November 27, 1998.

stations of the United States Postal Service revealed that both priority and first class mail would, under normal circumstances, be expected to reach a destination in-State within two to three days. Given the minimal difference in delivery time, agencies would in all likelihood, pay the lower first class rate. At \$1.24, the cost of mailing the rules would be just under ten percent of the cost of the copy itself.²⁵ Consequently, in what would likely be the great majority of cases, the issue of who pays for the cost of mailing copies of proposed rules is distinctly less significant than the issue of the cost of obtaining the copies of the rules themselves.

At 50 cents a page, each of the ten sets of proposed rules would bring in fees of \$12.50—assuming anyone was willing or felt the need to pay that price for the copies. The distribution price of a single set would be more than enough to recoup the cost of producing all ten sets by an employee earning \$40,000 a year or less.

But was the Bureau's experiment fair to the agencies? Did it fairly reflect the time that agency staffs would have to spend tracking down the rules that would need to be copied? At least with respect to proposed rules, the answer to both questions would appear to be a definite "Yes". Unlike final rules, proposed rules have not yet been incorporated into the agency's body of adopted rules. Barring the unlikely event that an agency would have a large number of different rulemaking actions going forward simultaneously, there is only going to be a single, readily identifiable set of rules scheduled to be the subject of a public hearing on a specified date. If copies of the proposed rules are not made in advance for distribution, a set can easily be segregated and set aside for copying upon request.

Requests for copies of final rules would appear to require more search time on the part of agency staffs. Instances can readily come to mind of staff needing to search through dozens or hundreds of pages of rules to locate the particular provision of which a copy is requested. Similarly, requests of a broad, general, or vague nature could also be very time consuming. Even in these cases, however, once the rules themselves are located, the time spent actually making copies of the rules should be no different than the time spent making copies of proposed rules, or, for that matter, any other records of conventional size. If an agency feels it necessary or appropriate to charge fees to recoup for staff time expended in searching for rules, an appropriate means for doing so would be the "research" (search, review and segregation) fees authorized by the Office of Information Practice.²⁶

²⁵ Items weighing over 11 ounces are required to be shipped by priority mail and thus subject to the higher schedule of rates. However, the 25-page sample and envelope in the Bureau's experiment weighed only 4.5 ounces, thereby indicating that items up to at least 50 pages in length could still be shipped at the lower first-class rate. As noted earlier, of 88 rulemaking actions completed between October 1, 1997 and October 31, 1998, only four were longer than 50 pages.

²⁶ The Office of Information Practices has proposed rules that cover, *inter alia*, fees for searching, reviewing, and segregating governmental records. Public hearings have already been held on the proposed rules, which are now awaiting gubernatorial approval. Section 5-41-31(a) of these proposed additions to the Hawaii Administrative Rules authorizes agencies to charge the following fees:

- (1) For a search for the record, \$2.50 per fifteen minutes or fraction thereof, except that no fee shall be charged for the actual time spent in a record search that is performed in fifteen minutes or less;
- (2) For the review and segregation of the record, \$5 per fifteen minutes or fraction thereof, except that no fee shall be charged for the actual time spent in the review and segregation of a record that is performed in fifteen minutes or less; and

Finally, it should be noted that the statutory fee of 50 cents a page for copies of government records is something of a sore point with many members of the public. The Director of the Office of Information Practices stated that her offices receives more complaints about that particular statute than any other law—and that was before Act 311 took effect, when the fee was still 25 cents a page. The Director reported that her office received on average at least two or three calls a day, virtually every working day of the year, from people who were not just irate but “enraged” at the fact of having to pay fees that they thought were highly excessive.²⁷

Summary

Prior to February 26, 1998, the law was absolutely clear that agencies were required to give or mail copies of proposed rules to members of the public free of charge. In the wake of the enactment of Act 2 and Act 311, Session Laws of Hawaii, 1998, most state executive agencies went through a period of uncertainty as to whether they in fact were required to charge for copies of proposed rules, and, if so, whether those charges needed to be at the statutorily established rates for government records of 50 cents a page. For a variety of reasons, a significant majority of agencies throughout the executive departments did not want to have to do so, and did not plan to unless ordered.

These issues have been clarified and put to rest by an Attorney General’s opinion issued on September 21, 1998, which states unequivocally that agencies are required to charge the public for copies of proposed rules, and must do so at a rate of 50 cents a page. The agencies have some leeway to reduce those fees to 25 cents a page at the lowest, but only with the approval of the Governor. Practically speaking, there are, at present, few alternative methods by which the public can get copies of proposed rules. At this juncture, for better or worse, the law is clear, and it is settled. The remaining question is whether the Legislature believes that change is in order.

(3) If applicable, the actual rate of charge, based upon time expenditure, that is charged to the agency by a person other than the agency for services to assist the agency in the search for the record.

²⁷ Interview with Moya T. Davenport Gray, Director of the Office of Information Practices, June 9, 1998.

Chapter 3

ALTERNATIVES

The requirement that state agencies charge and collect fees of 50 cents a page for copies of proposed rules that they distribute (plus the cost of postage of anything mailed to the recipient) is bound to have an impact on the availability of the rules to the public. Unless agencies disregard the Attorney General's opinion discussed earlier or post their proposed rules on the Internet, public access will essentially be limited to those willing and able to pay comparatively high fees, and those able to personally inspect copies of the proposals at agency offices.

Public access to agency rules can be improved in a number of ways. The most obvious of these involve legislative enactments to change the law. Others, however, involve the use of technology or changes to agency practices, and can therefore be as limited or wide ranging as an agency desires.

Amendments to the Hawaii Administrative Procedure Act

The mandatory charging of fees for copies of proposed rules stemmed from amendments to the rulemaking provisions (specifically section 91-3(a), HRS) made by Act 2, Session Laws of Hawaii 1998. The literal language of Act 2 did not require that fees be charged—this legislative intent was inferred in the Attorney General's opinion, based upon a reading of the language used. The Legislature can amend the Hawaii Administrative Procedure Act to make it clear, for example, that state and county agencies are authorized rather than required to charge fees for copies. Similarly, if the Legislature does not believe it appropriate for agencies to charge the statutory rate of 50 cents a page, the Legislature can either set the fee itself, authorize the agencies to do so, or some combination of the two.

Most agency representatives who spoke with the Bureau believed that the agencies should be allowed to charge fees lower than 50 cents a page, if any at all. A representative of Common Cause/Hawaii, (after expressing pleasant surprise that most agencies did not want to have to charge fees) stated the organization's belief that people should be able to receive copies of proposed rules free of charge because the people have already paid for them through their tax dollars. Common Cause/Hawaii also acknowledged that the cost of providing free copies could become burdensome to agencies where the full text of the rules is voluminous. Common Cause/Hawaii therefore takes the position that people should be able to receive copies of proposed rules free of charge if they are less than 50 pages in length. Where the rules are lengthier than 50 pages, the affected agency should be able to charge fees to recover their actual costs of duplication.¹

¹ Interview with Mr. Larry Meacham, Executive Director, Common Cause/Hawaii, August 17, 1998.

To some degree, it is useful to see how other jurisdictions handle the issue of charging fees for copies of proposed rules. As a backdrop, however, it should be noted that most states generally provide more information to the general public on proposed rulemaking than is available in Hawaii. As discussed earlier, 43 states and the District of Columbia publish state registers and of those, 25 publish the full text of proposed rules. In five other states, some agencies publish the full text in the register while others publish notices only.

1. Model State Administrative Procedure Act (1981)

In 1981, the National Conference of Commissioners² on Uniform State Laws finalized and recommended for adoption by the states the 1981 version of the Model State Administrative Procedure Act (MSAPA). The Hawaii Administrative Procedure Act, chapter 91, Hawaii Revised Statutes, is based on the National Conference's older 1961 version of the MSAPA. Section 3-103 of the 1981 MSAPA provides in relevant part:

(b) Within [3] days after its publication in the [administrative bulletin], the agency shall cause a copy of the notice of proposed rule adoption to be mailed to each person who has made a timely request to the agency for a mailed copy of the notice. An agency may charge persons for the actual cost of providing them with mailed copies. (Underscoring added for emphasis)

According to one commentator, the 1981 MSAPA clearly assumed that the full text of proposed rules would be widely available, and that authorization to charge refers primarily to the cost of mailing.

The requirement of the 1981 MSAPA that an actual copy of the notice of proposed rule adoption be mailed to persons requesting such notices, together with the requirement that the actual text of a proposed rule be incorporated into the notice, means that mailed notices will necessarily include the specific text of a proposed rule. Direct notice of this kind is important so that those who do not have easy access to the administrative bulletin but are especially interested in the proposed rules of a particular agency may receive reliable notice.

To avoid undue costs to the agency, §3-103(b) also provides that those who opt to receive such mailed notices must defray the "actual costs" of providing those mailed notices to them. In light of the increased cost of mailing, imposition of these costs on those individuals who desire such personalized treatment seems fair. This is especially so since the published notice of that proposed rule adoption in the administrative bulletin will be so widely and easily available as an alternative for members of the public who wish to avoid those costs.³

² The commissioners who make up the National Conference are representatives from all states. The commissioners from Hawaii are the individuals who are appointed to the Hawaii State Commission to Promote Uniform Legislation, established under chapter 3, Hawaii Revised Statutes. As a general rule, the purpose of the National Conference is to develop proposed legislation for adoption in all states on subjects which are not appropriate for federal legislation, but for which a substantial degree of uniformity among all of the states is beneficial. Some of the better known uniform laws developed and recommended by the National Conference include the Uniform Commercial Code, the Uniform Probate Code, and the Uniform Interstate Family Support Act.

³ Arthur E. Bonfield, State Administrative Rule Making (Boston: Little, Brown and Company, 1986), p. 179.

However comparable or incomparable the foregoing situation might be considered to Hawaii, the fact of the matter remains that even though rules are presumed to be readily available to the public through the state's administrative bulletin (or register), and that the mailing of copies to the person clearly entails added expense and additional cost to the agency, the 1981 MSAPA still only provides that the agency may charge for the copies but does not require it.

2. Other States

The following table provides a general overview of positions taken by various states in their respective Administrative Procedure Acts with respect to charging fees for copies of rules:

State	Provision
Florida West's F.S.A. §120.54(2)(a)	Must be available at no cost.
Louisiana La R.S. §49:953F.(3)(f)	Agency must make copies available to interested persons. Fees unspecified.
Maine 5 M.R.S.A. §8503 3-A	Agency required to make copies available. No fees specified.
Missouri Vernon's Ann. M.S. §536.021 2.(3)	Complete copy must be made available to interested persons at cost not to exceed actual cost of reproduction.
New York N.Y. CLS. State Administrative Procedure Act §6-a.(b)	Must send to any person a copy of complete text upon written request. No mention of fees.
North Dakota N.D. Century Code §28-32-02 4.	Agency may charge for actual cost of providing copies.
Ohio Baldwin's Ohio R.C. §119.03(B)	Must be available without charge to any affected person.
Oklahoma 75 Okl.St. Ann. §303 9.	Agency may charge persons for actual cost of mailing a copy to the person.
Rhode Island G.L. of R.I. Ann., 1956 §42-35-3(a)(1)	Copies must be available at agency and by mail to any member of public upon request. No mention of fees.
Tennessee T.C.A. §4-5-218(b)	Agency may charge reasonable compensatory fees.
Wisconsin West's W.S.A. §227.14(5)	Copies must be available to the public at no cost.

3. Suggestions of Common Cause/Hawaii

Representatives of Common Cause/Hawaii (CC/H) were interviewed for this study because the organization took a strong interest in the issues involved in this study. The representatives both advocated the enactment of certain specific statutory amendments, and also

encouraged state agencies to use other alternative methods to improve public access to proposed rules. CC/H's suggested statutory amendments will be discussed here, and the alternative methods later in this chapter.

CC/H urged⁴ the enactment of legislation to require agencies to distribute copies of proposed rules free of charge except where the rules were fairly lengthy. Specifically, CC/H took the position that any charges for copies of proposed rulemaking actions should be calculated on the basis of the first 50 pages being free, with the agency being allowed to charge for actual costs of reproduction for anything after the first 50 pages. The CC/H representative acknowledged that the figure of 50 pages was arbitrary, but felt that to be an appropriate demarcation. As a practical matter, based on the Bureau's review of rule filings during the thirteen months between October 1, 1997 and October 31, 1998, approximately 90 percent of the rule filings during that period were 50 or fewer pages in length. Drawing the line at 25 pages would still have kept approximately three-quarters of the rule filings in the "free" zone.

On the issue raised in S.R. 92 concerning copies for "public interest groups", CC/H recognized that attempting to provide any kind of fee exemption for such groups would be difficult or impossible to apply fairly in a consistent manner. Without even attempting to define the term "public interest" itself, a public interest "group" could be a profit making or nonprofit corporation, unincorporated association, or virtually any other type of entity.

Recognizing the difficulties inherent in exempting organizations on the basis of their being "public interest groups", CC/H suggested the possibility of providing an exemption from fees to nonprofit organizations. While the concept of a benefit or privilege for a nonprofit organization is easy to understand—because just about anyone would believe they would know a nonprofit organization if they saw one—the real difficulty, once again, lies in the reality of day-to-day administration. While all nonprofit corporations are required to file their articles of incorporation and annual reports with the Director of Commerce and Consumer Affairs⁵, there is at present, no mechanism in Hawaii to allow, much less require unincorporated nonprofit entities to register with the State. Therefore, practically speaking, an agency would have no way of knowing whether the nonprofit organization a person claimed to represent even existed, much less whether the individual truly represented that nonprofit organization.

In the face of these practical difficulties, CC/H modified its recommendation to limit the exemption to entities that are tax exempt under federal or state income tax law. This exemption would at least have a chance of being implemented because entities must receive documentation from the Internal Revenue Service or the state Department of Taxation acknowledging their tax-exempt status. If, however, the intent of the exemption is to reduce the financial burden upon public interest groups or on nonprofit organizations that are public spirited but short of funds, then a fee exemption based on tax exempt status falls far short of this goal. This exemption, which would benefit Common Cause/Hawaii, would also benefit wealthy tax exempt organizations such as the Kamehameha Schools/Bishop Estate and the Weinberg Foundation, but would exclude many other poorer nonprofit community organizations, incorporated or otherwise,

⁴ Interview with Larry Meacham, Executive Director, Common Cause/Hawaii, August 17, 1998.

⁵ Hawaii Rev. Stat. §§415B-34 and 415B-12.

that either do not qualify, or have not taken the formal steps necessary to obtain tax exempt status.

Given the fact that most state executive agencies indicated that they did not want to charge fees at least for copies of proposed rules unless required to do so, it seems clear that a “cleaner” or more easily administrable approach would be to replace the requirement that agencies charge fees with an option to do so. To the extent that an agency charged no fees at all, the benefit would accrue to all interested persons be they public interest groups, profit or nonprofit organizations whether incorporated or otherwise, or just “regular folks”.

Use of Private Copying Services

At a very basic, if almost simplistic level, it would appear that agencies could give interested persons the option of either paying for copies of proposed rules, or borrowing and copying them at their own expense. While the entire premise of this approach is unquestionably that of an honor system, it is really no different from the system used by public libraries for generations.

Purely for purposes of comparison, the Bureau called a number of private copying services listed in the Yellow Pages of the telephone directory for Honolulu. Compared to the statutory rate of 50 cents a page, the fees charged by several copying services in downtown⁶ Honolulu were distinctly cheaper. The fees ranged from a low of four cents to a high of ten cents per side. Most gave discounts for either self-serve, double sided copying, or larger numbers of copies. Calls to eight other copying services⁷ in different areas on the island of Oahu revealed rates ranging from three to twelve cents a page, with discounts offered under a variety of circumstances.

A Common Cause/Hawaii representative⁸ specifically recalled that Kinko’s entered into agreements with various professors at the University of Hawaii to copy materials for students. The professors left copies of course materials with the copying service. Students then went to the copying service and had copies of the materials made at their convenience. Under the arrangement, the students paid for the copies, had the convenience of a service that was open 24 hours a day, and the copying service got the business. The arrangement was terminated, however, when concerns about copyright were raised. Copyright would definitely not be an issue with proposed state rules, however, and private copying services generally often are open for longer hours than state agencies. Kinko’s stated that they would very definitely be interested in exploring arrangements with state agencies where no copyrighted material is involved. Material could be provided in electronic format on a diskette, which would involve less physical bulk, and would produce better quality copies.⁹

⁶ Best Instant Printing and Professional Image on Alakea Street, Kinko’s, Island Printing Centers, and Downtown Duplication, Inc., on Bishop Street, and Aloha Graphics on S. King Street.

⁷ These included: Aloha Copy Systems, Aiea Copy Center, Copymart, Grace in Action Ministries, Big Red Quickprint Center, Complete Business Services, and Copy Rite.

⁸ Interview with Desmond Byrne, Common Cause/Hawaii, August 12, 1998.

⁹ Telephone interview with Ron Kuhn, Regional Manager, Kinko’s, November 30, 1998.

“Fax Back”

Another alternative suggested by Common Cause/Hawaii is the use of what has been informally referred to as a “fax back” system, in which documents are loaded into a computer, and faxed by the computer to callers who access the computer and request the particular document.¹⁰

One state department that has made effective use of a fax back system is the Department of Taxation in its “Forms By Fax” program. The Department established the program in February 1997 because it had been receiving anywhere from 10,000 to 20,000 calls a year requesting copies of various tax forms. Established by contract with a private vendor, the system allows the Department to transmit the data to the vendor’s computer. By entering an appropriate document identification number, callers can obtain copies of any of approximately five dozen different tax forms—although callers are limited to requesting three documents in any one call. Access is available 24 hours a day, but heavy demand may result in the document being received some hours later when the load is lighter.¹¹

At an annual cost of \$21,600¹² a year, the contract cost for the program is not insignificant, but the Department believes that the savings in staff time, reduction of the load on the Department’s telephone and fax lines, and convenience to the public more than justify the cost. The Department has also made forms available through its website. At the time the Forms by Fax program was conceived, however, the Department believed that the program would serve the needs of many individuals and businesses who did not yet have ready access to the Internet.¹³ The 8,000 or so calls received by the Forms by Fax system during the first six months of 1998 appear to validate this belief.

Internet

Many of the issues discussed in this report concerning the availability of agency rules, whether proposed or final, can be avoided or minimized if the text of the rules in question is available on the Internet. Anyone who has access to the Internet, whether through a home computer or otherwise, would have access to that agency’s rules twenty-four hours a day, without regard to physical distance. The individual could produce printed copies of the rules as needed. While the number of people who have their own computers with Internet access are undoubtedly still in the minority, every branch of the Hawaii State Library System currently has at least one terminal with Internet text access.¹⁴

¹⁰ Byrne interview.

¹¹ Telephone interview with June Yamamoto, Chief, Taxpayers Services Branch, Department of Taxation, November 27, 1998, and December 1, 1998.

¹² Telephone interview with Isao Asada, Administrative Services Office, Department of Taxation, November 23, 1998.

¹³ Yamamoto interview.

¹⁴ Telephone interview with Patrick McNally, State Publications Distribution Center, Library of Hawaii, December 1, 1998.

1. Agency Rules on the Internet

As of this writing, a few state agencies have posted rules on the Internet. These agencies include the:

- (1) University of Hawaii;
- (2) Harbors and Highways Divisions of the Department of Transportation;
- (3) Ethics Commission;
- (4) State Procurement Office of the Department of Accounting and General Services;
- (5) Department of Land and Natural Resources—several agencies;
- (6) Department of Commerce and Consumer Affairs—several attached agencies;
- (7) Hawaii Community Development Authority; and
- (8) Department of Health—two agencies.

The Bureau's own website at www.state.hi.us/lrb/ presently contains links to most of these sites and is being updated continually. Additionally, beginning with this year's 1998 Supplement to the Bureau's Hawaii Administrative Rules Directory (which functions as a detailed table of contents for all agency rules filed at the Office of the Lieutenant Governor) identifies those rules that are posted on the Internet.

In the Bureau's meetings with representatives of the executive departments, it became evident that a number of agencies are in the process of either developing websites or have long term plans to do so. Many have contemplated at least the possibility of including their rules on a website, but some have taken more initiative or made more progress than others. Some agencies simply do not have the equipment or technical expertise among their staff to accomplish this. Others have obtained equipment but are in the process of establishing appropriate networks. Still others are planning or have begun work on websites but have placed higher priority on posting materials other than rules for which there is greater public demand such as forms or informational publications.

2. Final Rules on the Internet; Lieutenant Governor's Office

During the past two years, the Lieutenant Governor's Office has been laying the groundwork for a project designed to eventually post all of the rules filed with that office on the Internet. The size of the project is substantial, as the great bulk of the rules in the existing collection were prepared and filed before most people were aware that the Internet even existed. Some of the older rules were prepared on manual or electric typewriters rather than computers. Not having the staff to convert all of the documents itself, the Lieutenant Governor's Office sees

its role as one of overseeing and coordinating the work of the respective agencies who would have the responsibility for converting their own rules. At a minimum, a certain amount of training will be required for at least some of the agency staffs involved, and specified standards must be established for the production of documents to be posted.¹⁵

As of this writing, none of the rules in the Lieutenant Governor's collection have yet been posted on the Internet. As presently conceived, the project will apply only to final rules, as proposed rules are not filed with the Lieutenant Governor. To the extent that this project is implemented, however, the State will have something that resembles an electronic version of an administrative code for its rules. Under the uniform format for administrative agency rules established by the Bureau pursuant to section 91-4.2, Hawaii Revised Statutes, each rule section is assigned a unique number by the adopting agency according to a numbering scheme that consists of titles, chapters, and sections. A title represents all of the rules of a department and any administratively attached agencies. Within each title, rules are divided into chapters, and chapters into sections.¹⁶ The practical effect of the numbering scheme is that if organized in numerical order, the State's rules will take on the appearance of an administrative code, even though not formally codified.

Analysis of Alternatives

The recent Attorney General's Opinion on fees for copies of proposed rules has established a single uniform standard by which to operate: all agencies must charge 50 cents a page for copies of rules whether they want to or not, unless authorized by the Governor to reduce the fees to an amount of not less than 25 cents a page. Common Cause/Hawaii advocates an approach that would require all copies of proposed rules to be free up to the first 50 pages in length, while allowing agencies to collect actual reproduction costs for any pages over 50. Both approaches have the benefit of providing a single uniform approach under which all agencies can operate. The problem with the "one size fits all" approach, however, is that the one size is a straitjacket.

The problem with requiring everyone to charge for copies is that a significant majority of agencies simply do not believe that it is in their best interests to do so, 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 copies and charge fees to recover their costs, which, under the circumstances, may only be a few cents a page.

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

¹⁵ Telephone interview with Ken Kitamura, Business Services Officer, Office of the Lieutenant Governor, December 1, 1998.

¹⁶ Ken H. Takayama, Hawaii Administrative Rules Drafting Manual, 2nd ed., (Honolulu: 1984), §§00-3-1 to 00-3-11, at 25 to 31.

each agency the flexibility to determine what is in its own best interests. Under this scenario, the Legislature's primary focus would be on ensuring that any fees charged for copies, mailing, or both, do not constitute an unreasonable barrier to public access. The only reason for requiring all agencies to charge for copies under all circumstances would be if the Legislature believed that agency staffs would "give away the store" by wastefully incurring costs that are grossly excessive. As noted earlier, the cost of producing copies of rules themselves, whether proposed or final, is not particularly high. Concerns about the cost to agencies of staff time searching for rules for which copies are requested can be addressed through the "research" fees authorized 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 at varying points on a continuum between the near and the distant future. Meanwhile, the Lieutenant Governor's Office is slowly implementing an ambitious project to coordinate executive agency efforts to post all final rules on the Internet. The Legislature's new computer system is designed to among other things, make the database of the entire Hawaii Revised Statutes, as well as all proposed legislation available for public access on the Internet. Efforts to provide similar public access to proposed and final agency rules, which are very much a part of the law of the State, should be spotlighted and supported.

Chapter 4

FINDINGS AND RECOMMENDATIONS

Senate Resolution No. 92 (1998) requested the Legislative Reference Bureau to study the issue of state agencies charging fees for copies of proposed administrative agency rules, primarily with regard to mailing copies to interested persons and public interest groups. Events occurring subsequent to the adoption of the Resolution, however, necessitated shifting the primary focus of the study from the issue of mailing to the cost of copies of the rules themselves.

Findings

1. Prior to the enactment of Act 2 and Act 311, Session Laws of Hawaii 1998, the Hawaii Administrative Procedure Act, specifically, section 91-3(a), Hawaii Revised Statutes, required agencies to give or mail copies of proposed agency rules free to charge to interested persons who requested them.

2. In a letter opinion dated September 21, 1998, the Attorney General interpreted the amendments made by Act 2 and Act 311 as requiring executive agencies to charge fees for copies of proposed rules at the rate of 50 cents a page. Subject to various requirements including gubernatorial approval, agencies are allowed to reduce those fees to not less than 25 cents a page.

3. In meetings with representatives of agencies and programs within and attached to each of the executive departments, it became evident to the Bureau that at least with respect to proposed rules, a significant majority of agencies and programs, for a variety of reasons, did not want to charge fees for copies. Many of those same agencies, however, thought it reasonable and appropriate to charge the then standard statutory rate of 25 cents a page (which was raised to 50 cents a page by Act 311). A number of agencies also reported that they did not wait for checks to clear before issuing copies of documents or other items for which a person had paid.

4. In Hawaii, interested persons must place a greater reliance on agencies to obtain copies of proposed and final rules than is the case in many other states where more alternatives exist. In 25 states, agencies are required to publish the full text of their proposed rules in an official state register (a state version of the Federal Register), while five states give them the option to publish either the full text or just a notice of public hearing. Forty-four states publish their final rules in a state administrative code. Hawaii has neither an official state code nor a register, although a private publishing company has published an administrative code of final rules. The company also publishes a register, but does not include the full text of the proposed rules. A few agencies have posted rules on the Internet, but these constitute a fairly small percentage of the State's rules.

5. Three states, Florida, Ohio, and Wisconsin have provisions in their Administrative Procedure Acts requiring agencies to provide copies of rules at no cost. Four other states, Missouri, North Dakota, Oklahoma, and Tennessee require that fees reflect the actual cost of

reproduction. The 1981 version of the Model State Administrative Procedure Act adopted by the National Conference of Commissioners on Uniform State Laws authorizes agencies to charge fees for copies that are mailed to requestors. This appears to be premised on an assumption that copies will otherwise be readily available to interested persons through a state register.

6. Out of 88 rulemaking actions filed by state agencies between October 1, 1997 and October 31, 1998, 66, or three-quarters were no longer than 25 pages. At 50 cents a page, however, the cost of a 25 page rule filing would be \$12.50, which, from the standpoint of public access, makes the cost of the rules themselves a significantly greater barrier than the \$1.24 cents it would cost to mail the 25 pages by either priority or standard mail. Copies of very lengthy rulemaking actions, which can be hundreds of pages long, will be affordable to only the wealthiest of requestors.

7. The cost of obtaining copies of rules themselves renders the issue of mailing the copies a secondary concern. To those who cannot afford the item sought, the issue of mailing is immaterial.

8. The cost of photocopying ten copies of a 25 page document averaged between four and five cents a page, assuming that the person producing the copies was paid less than \$40,000 a year, and not including the cost of employee benefits and other overhead expenses not typically paid by most state agencies. However, even if including those expenses was assumed to double the cost of the copies, that cost would still be less than ten cents a page.

9. The cost of producing copies of rules should not include or be confused with staff time spent finding and segregating the material to be copied. Under normal circumstances, proposed rules would be both segregated and readily identifiable. However, even if staff needs to search for and segregate proposed or final rules, charges for those staff costs may be collected as “research” (search, review and segregation) fees under rules proposed by the Office of Information Practices that are now awaiting gubernatorial approval.

10. Under the foregoing circumstances, a mandatory charge of 50 cents a page for copies of agency rules, as interpreted by the Attorney General’s opinion, constitutes an unreasonable barrier to public access to laws that regulate the people of this State.

11. By law, the Governor could approve agency requests to lower the mandatory fees to a minimum of 25 cents a page. Even this rate, however, appears to be excessive, and to that extent, an unreasonable barrier to public access.

12. While the existing system provides a single, uniform approach for all agencies to follow in charging fees for rules, the one size that fits all appears to be a straitjacket.

- Some agencies, particularly some of those required to be self-funding, believe that they need to charge fees for copies of rules.

- Most agencies, in addition to not wanting to have to charge for copies of proposed rules, believe that the agencies should have the option to decide whether or not to charge.
- The fee scheme suggested by Common Cause/Hawaii under which agencies would not be able to charge for the first 50 pages and any remainder subject to actual costs of reproduction effectively allows agencies to give copies away, but to the extent that free copies are mandated, could be problematic for agencies required to be self-funding.

13. Granting exemptions from fees to “public interest” or even to “nonprofit” organizations are easy concepts to articulate that would be much more difficult to implement fairly. Any definition of “public interest” is inherently arbitrary and could not identify organizations with precision. Unincorporated nonprofit organizations are not required to register with the State or any other entity. Therefore, there is no official registry that an agency could use to verify that a particular nonprofit organization even exists much less is represented by a particular individual who purports to do so.

Limiting the exemption to tax exempt organizations could provide the necessary level of precision to implement, but would effectively provide fee exemptions for some organizations having substantial assets, while not exempting many smaller nonprofit community organizations.

14. The Office of the Lieutenant Governor is presently undertaking a project to post on the Internet all final agency rules filed with that office. When completed, the posted rules will resemble an electronic version of a state administrative code. As the Office does not have the staff or resources to do all of the work itself, the Office envisions its primary role as one of coordinating agency efforts and providing training to agency staffs to accomplish the work.

Recommendations

1. Unless the Legislature believes that agency staffs must be required to charge fees for copies of rules to prevent them from unnecessarily wasting state funds, the Legislature should add a new provision to the Hawaii Administrative Procedure Act, chapter 91, Hawaii Revised Statutes, and make necessary conforming amendments to chapter 92 to:

- (a) Allow (rather than require) 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;
- (b) Clarify 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 50 cents a page; and
- (c) Provide that the fees for copies are separate from any reasonable charges for staff time spent searching for or segregating the rules for which copies are requested.

The foregoing amendments would make it clear that agency rules, whether proposed or final, and related publications must be available to the public at rates that are at most, 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, focus the Legislature's role on ensuring 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 should be exempted from the fee requirement of ten cents a page, at least for the time being, is the Office of the Lieutenant Governor for rules in its general collection. Making the Lieutenant Governor's general collection subject to the same fee of ten cents a 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.

2. The Legislature should, after consultation with the Administration, consider 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.

This recommendation is not intended to eliminate the requirement of printed newspaper notice. Rather, the intent of this recommendation is to:

- 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.
- 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.

3. The Legislature may wish to consider the broader issue of fees for government records generally. While issues concerning fees for government records other than rules are beyond the scope of this study, many of the issues and concerns that arose in this study could and likely will arise with respect to other records. While the Attorney General's opinion that agencies are required to charge fees of 50 cents a page for copies of rules might be limited to those types of records, it could also be a harbinger of a broader interpretation that agencies must charge 50 cents a page for copies of any government records.

CONCLUSION

The issues addressed in this study, charging and collecting fees for copying and mailing proposed and final agency rules, are firmly rooted in a system that is traditional but also has great potential for change. Agency rules, like most other government records, have traditionally been maintained primarily on paper, with paper copies photocopied from paper originals. The system does not have to remain this way. Even if the basic original records remain on paper, electronic and computer technologies can be used to promote public access to these government records in a manner that avoids many of the issues and problems involved in dealing with paper copies.

The Bureau believes that the Legislature should not place its primary focus upon problems that arise under the traditional paper system. Instead, the Bureau urges the Legislature to encourage and support the efforts of state executive agencies to improve public access to rules through electronic and computer technologies that can make the information readily available to the world. The State has the opportunity to accomplish much of this by having proposed rules posted on the Internet through the website being established by the Office of the Lieutenant Governor. Aside from giving the public access to the full-text of proposed agency rules, this will also help to accelerate the efforts of the Office of the Lieutenant Governor to post its collection of current final rules on the Internet. Over a period of time, these efforts will produce an online version of a state administrative code, and at least the rules portion of a state register. The Legislature should seize this opportunity to move the State forward.