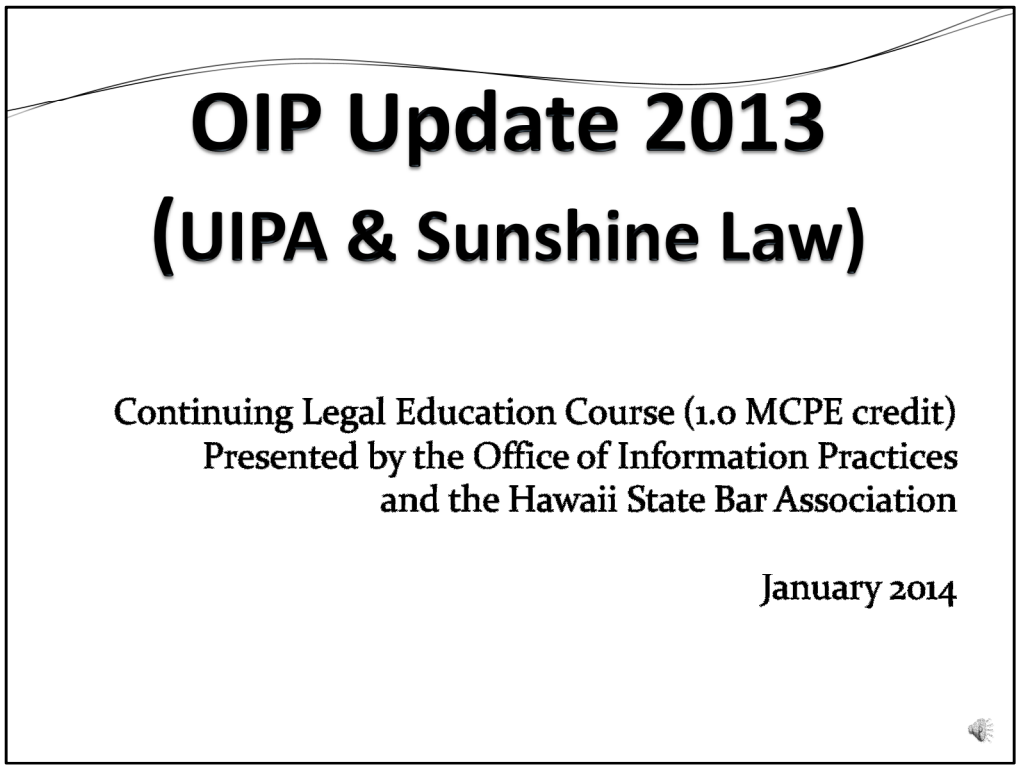
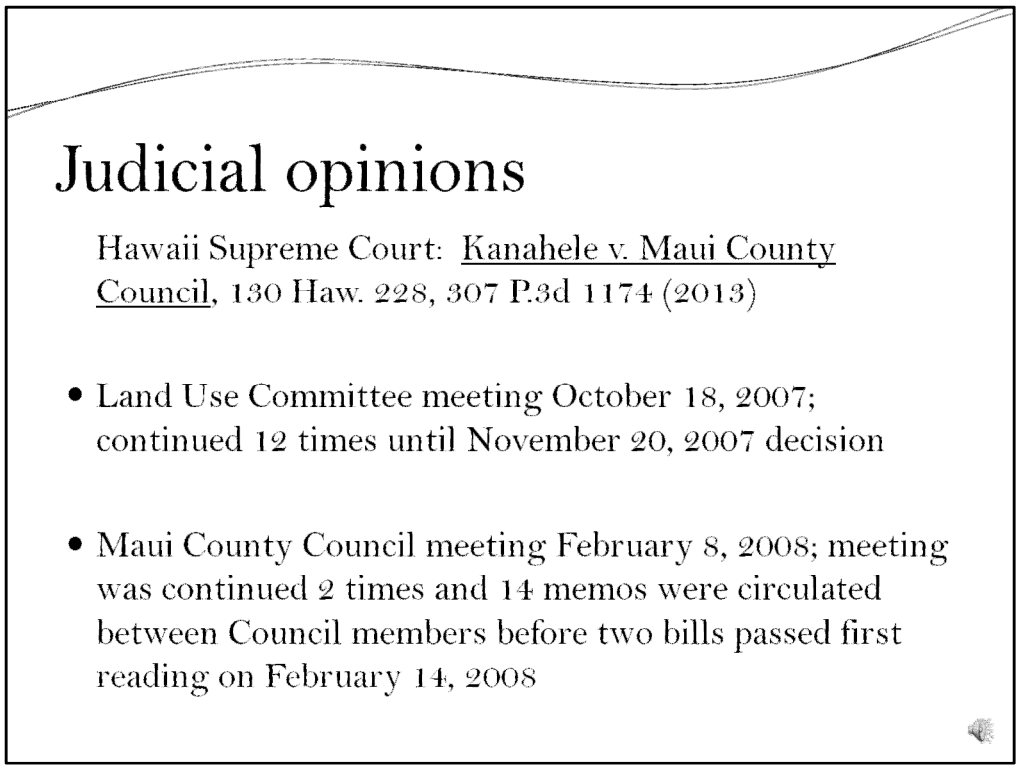


(January 25, 2014 – online training)

Thank you for participating in this online training by the state Office of Information Practices (OIP). I am OIP's Director, Cheryl Kakazu Park, and I would like to thank staff attorneys Jennifer Brooks and Lorna Aratani, who also helped in preparing this program.

Today's update on matters affecting OIP in 2013 will first discuss the Hawaii Supreme Court's decision in Kanahele v. Maui County Council and its impact on Sunshine Law (SL) matters. Jennifer will then discuss OIP's appeals rules, which were adopted following the 2012 legislative changes giving agencies the right to appeal OIP decisions. We'll also discuss OIP's formal opinion regarding personal records, which overruled portions of older opinions and explains the analytical framework for responding to personal records requests under the Uniform Information Practices Act (UIPA). Finally, we'll end with a discussion of the State's open data policy and how OIP will be helping the Office of Information Management and Technology (OIMT) to implement the policy.

We have a lot of material to present, so let's get started.



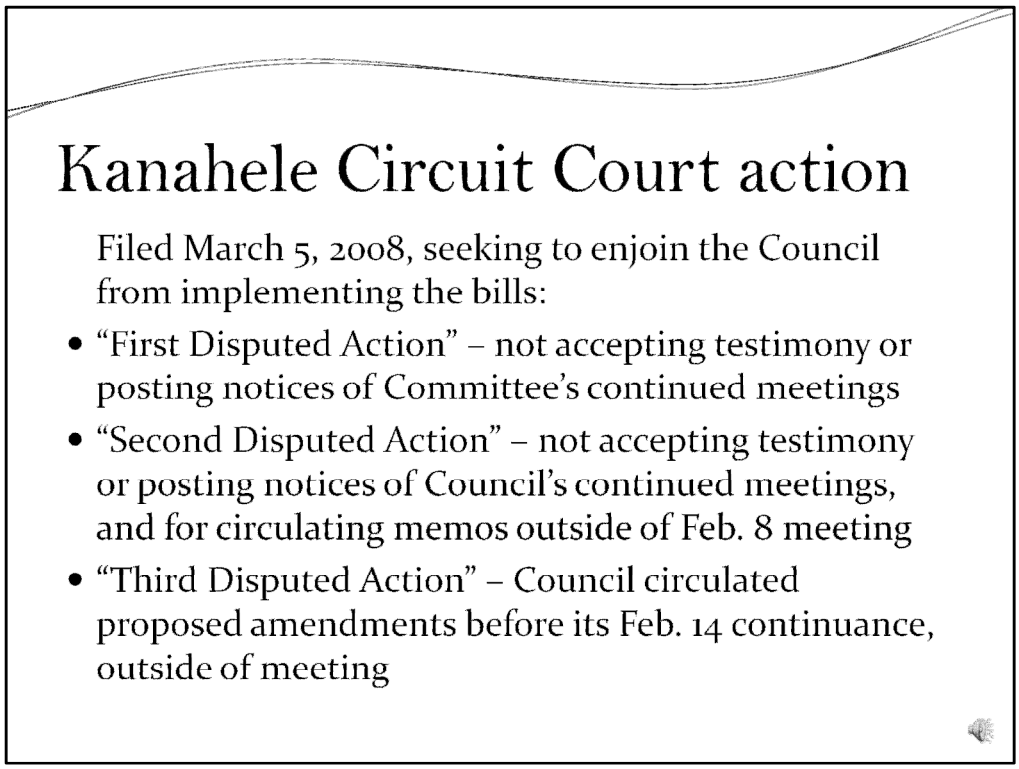
The Hawaii Supreme Court had been silent on the Sunshine Law for 25 years, but in August 2013, it had a lot to say in Kanahele v. Maui County Council, 130 Haw. 228, 307 P.3d 1174 (2013). The unanimous decision written by Justice Richard Pollack discusses the facts and rationale in great length and detail, which I will summarize before attempting to predict the case's impacts.

In Kanahele, Maui County Council's Land Use Committee (Committee) and the Council itself (Council) posted meeting agendas for their respective meetings regarding a residential development in Wailea. The Committee posted an agenda for its meeting on October 18, 2007, at which public testimony was taken before the Committee recessed the meeting, and announced that it would be continued for decision-making four days later. The Committee continued the October meeting for a total of 12 times, without posting any new agendas, and finally decided on November 20, 2007 to recommend that the full Council pass two proposed bills relating to the Wailea development.

The Council then posted an agenda and held a meeting on February 8, 2008, on the first reading of two proposed bills. After public testimony was closed, the Council recessed and continued the meeting until February 11. At the continued meeting on the 11th, the Council considered and unanimously voted to adopt proposed amendments that had been presented in written memos circulated to the Council, with copies given to the County Clerk, Director of Council Services, Planning Director, and Corporation Counsel. The developer's representative was invited by the Council Chair to then comment on the amendments, and he asked the Council to reconsider its amendments. The meeting was recessed and continued until February 14.

Before the February 14 continuance, additional memos were circulated by Council members. Between February 7 and 14, a total of 14 memos were circulated among Council members regarding the proposed bills and amendments.

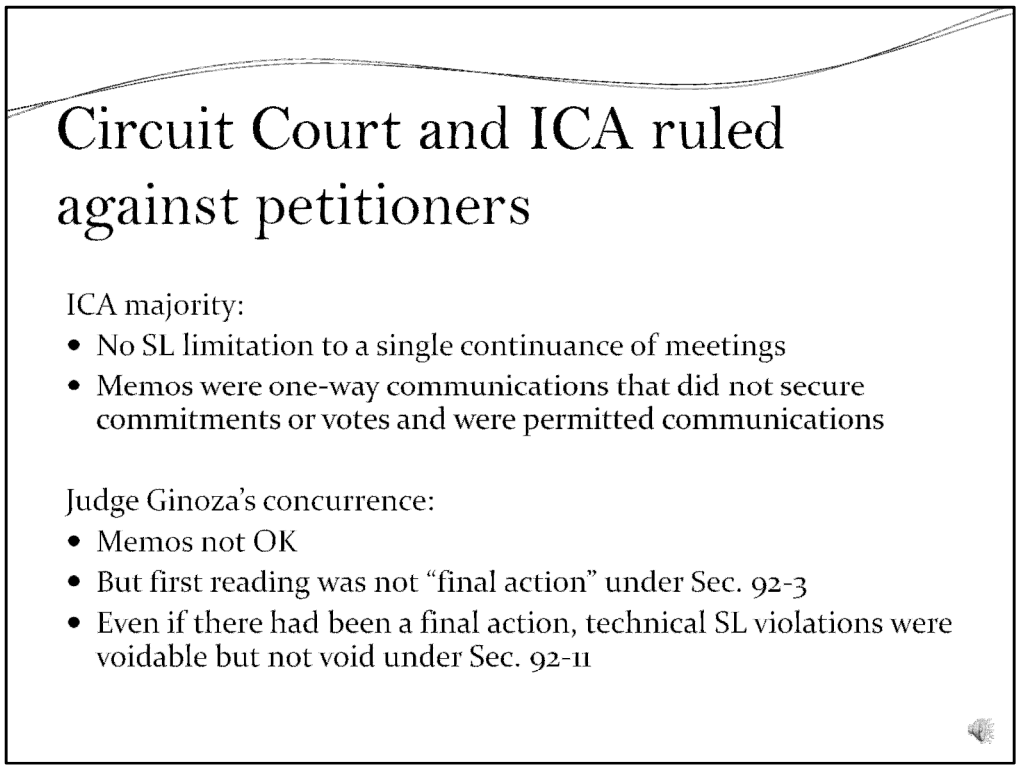
On February 14, which was the second continuance of the February 8 meeting, no further public testimony was taken before the Council reconsidered many of the amendments that it had previously approved and passed the two bills on first reading. Thereafter, the Council posted an agenda for March 18, 2008, for the second and final reading of the bills, at which time additional public testimony was taken. At the March 18 meeting, the Council passed, without any further changes, the two bills concerning the development.



On March 5, 2008, before the passage of the bills, members of the public (Petitioners) filed an action in the circuit court seeking to enjoin the Council from implementing the bills. Petitioners alleged as the "First Disputed Action" that the Committee had violated the Sunshine Law by not accepting public testimony and by not filing and posting notices of the 12 continued meetings, and that the Committee had considered information that was not available at the October 18 meeting for which a notice had been posted.

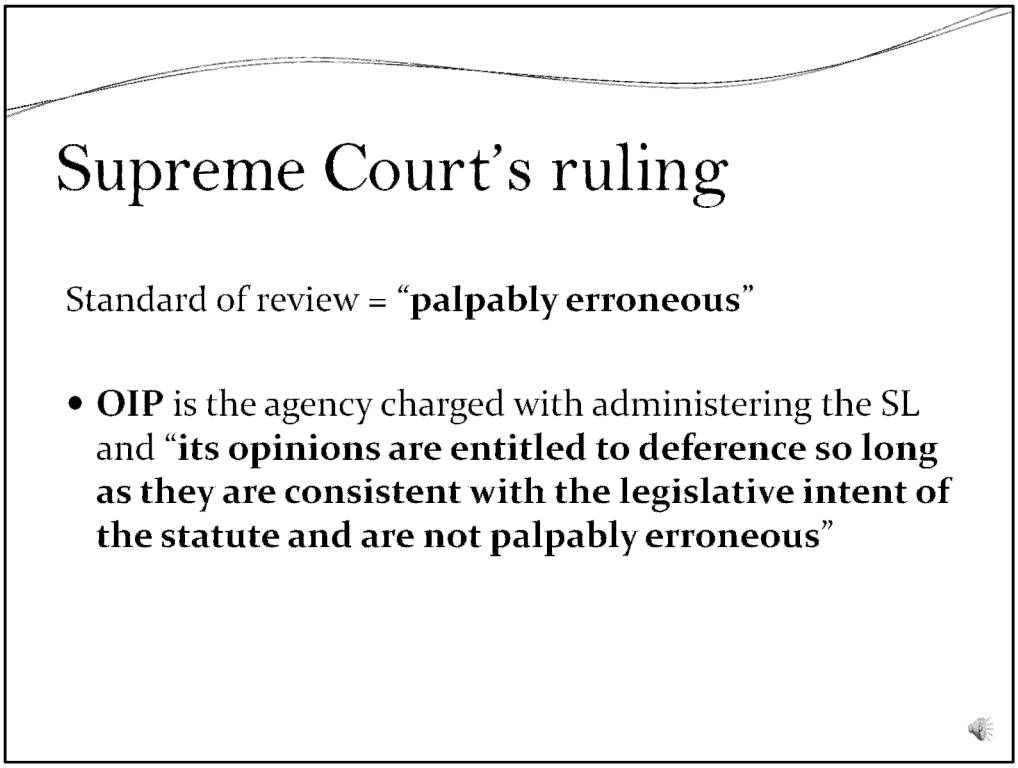
As their "Second Disputed Action," Petitioners alleged that the Council also did not accept public testimony or post notices for its two continued meetings, and that Council members had circulated to each other memoranda that were outside of the noticed February 8 meeting.

Finally, as their "Third Disputed Action," Petitioners alleged that the Council members had circulated proposed amendments prior to its February 14 continuance, which were outside of a noticed meeting.



The circuit court ultimately ruled against the Petitioners, and the Intermediate Court of Appeals (ICA) upheld the circuit court's decision. The ICA majority rejected Petitioners' contention that the recessed meetings violated the Sunshine Law on the basis that nothing in the statute limits boards to a single continuance. The ICA majority also concluded that the Council members' memos were one-way communications that did not involve securing commitments or votes of other members and were thus within the scope of permissible communications under the Sunshine Law.

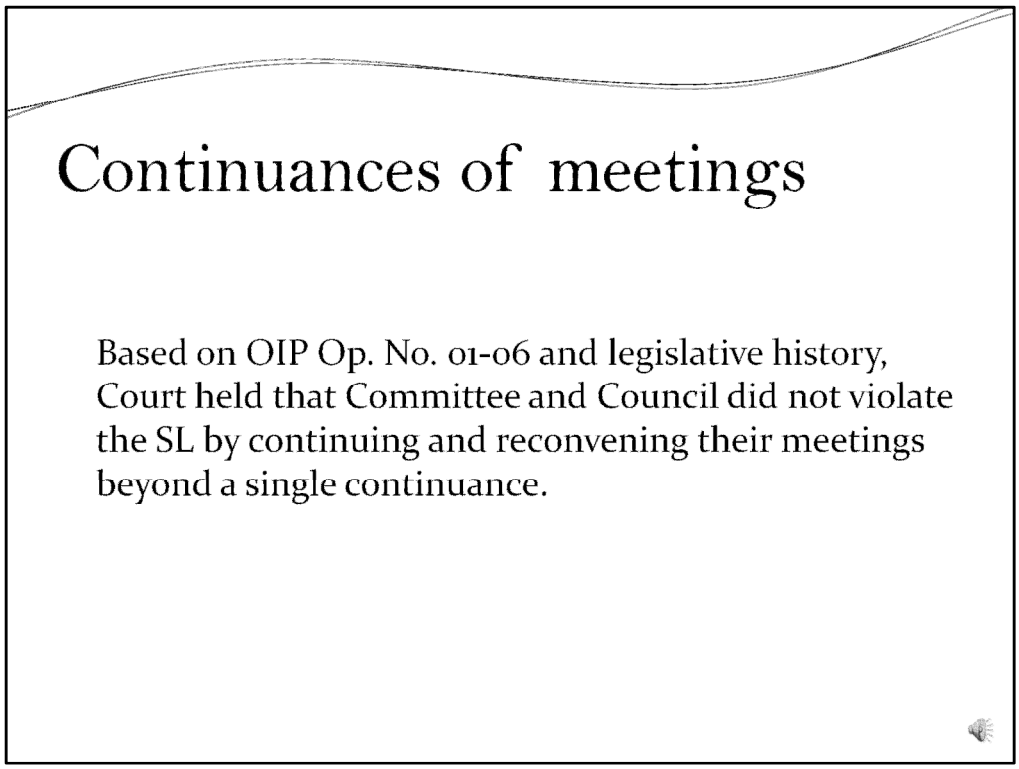
In a separate concurring opinion, ICA Judge Lisa Ginoza disagreed that the memos comported with the Sunshine Law because there were part of the Council's deliberation toward their decision on the first reading of the bills and there was no evidence that the memos had been disseminated to the public or made available at the meetings. Judge Ginoza also disagreed that the memos fell within the Sunshine Law's permitted interactions, noting that they had been distributed to more than a quorum of members, which took them outside of most permitted interactions and violated the spirit of the Sunshine Law. Ultimately, however, Judge Ginoza concluded that the Council's passage on first reading of the bills was not a "final action" taken in violation of the open meeting requirements of HRS Sec. 92-3. Even if there had been a final action that "may be voidable" under HRS Sec. 92-11, she concluded that voiding due to the technical violations of the Sunshine Law was not warranted when the memos had been provided to the County Clerk and discussed at Council meetings and the Petitioners had failed to show that they were affected in any way or prejudiced by the challenged memos.



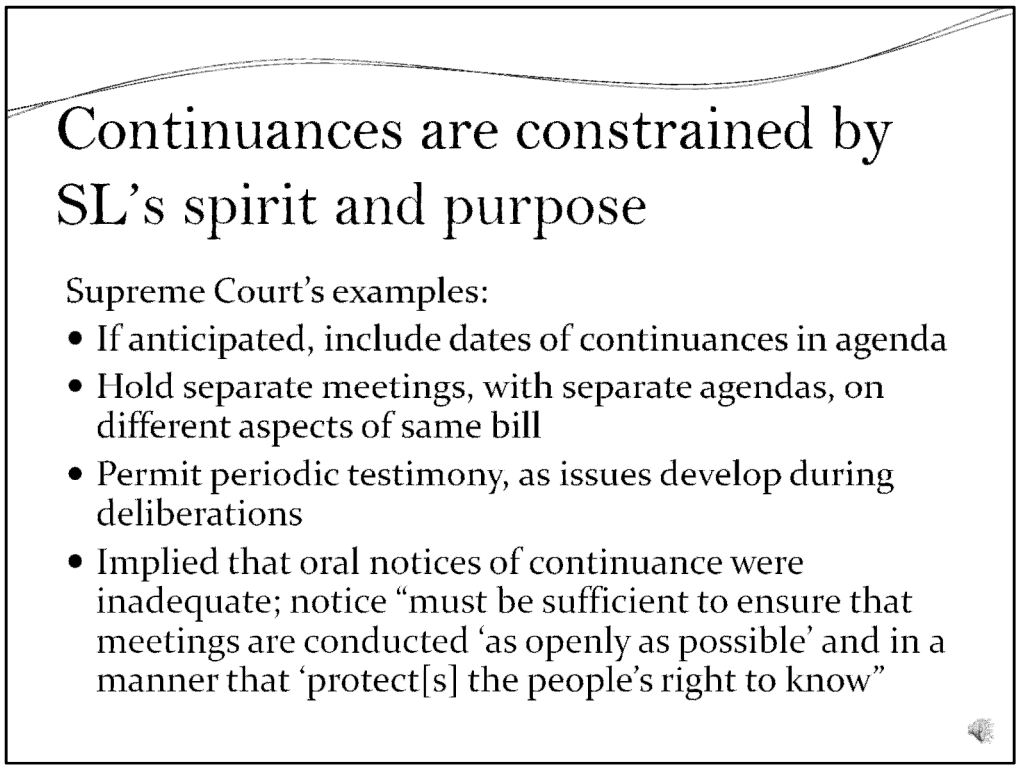
On appeal, the Supreme Court began with a discussion of the standard of review, noting that "when an ambiguity exists, we consider interpretations of the statute made by the administrative agency responsible for enforcing the statute and 'follow the same, unless the construction is palpably erroneous.'" An agency's statutory interpretation "is palpably erroneous when it is inconsistent with the legislative intent underlying the statute."

As the court recognized, "OIP is the agency charged with the responsibility of administering the Sunshine Law," and "**its opinions are entitled to deference so long as they are consistent with the legislative intent of the statute and are not palpably erroneous**."

Notably, the "palpably erroneous" standard of review was used by the ICA in Right to Know Committee v. City Council, City and County of Honolulu, 117 Hawaii 1, 4, 175 P.3d 111, 113 (App. 2007), which was cited by the Supreme Court later in the Kanahele decision. The "palpably erroneous" standard is also found in the 2012 legislative amendments to the appeals provisions of UIPA and Sunshine Law, which OIP had advocated.



In considering whether the Sunshine Law limits a continuance of a public meeting to just one time, the Court concluded that the statute was not dispositive, so it turned to OIP's opinions, which the Court examined under the palpably erroneous standard of review. After examining a 2001 OIP opinion regarding the Liquor Commission (OIP Op. No. 01-06), the Court concluded that OIP's interpretation of the Sunshine Law is supported by the statute's legislative history, insofar as it permits more than a single continuance without requiring a new agenda and without requiring additional public testimony to be accepted at every continued meeting. Based on OIP's construction of the Sunshine Law as well as the legislative history, the Court held that the Committee and Council did not violate the Sunshine Law by continuing and reconvening their meetings beyond a single continuance.



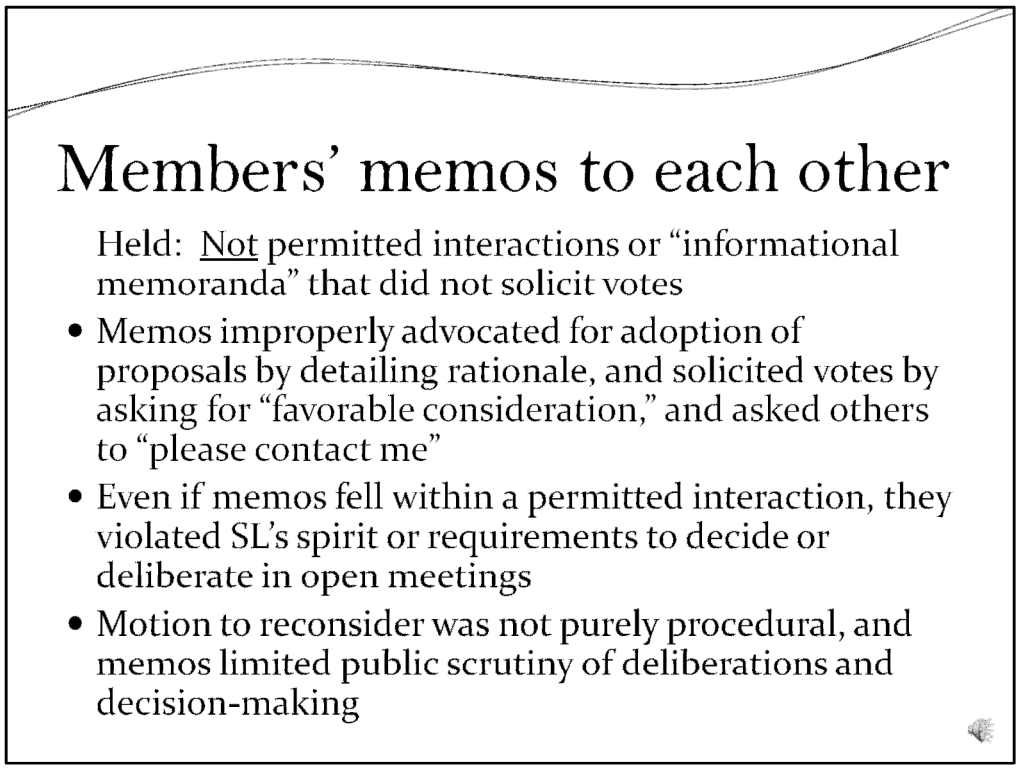
Nevertheless, the Court emphasized that "boards are constrained at all times by the spirit and purpose of the Sunshine Law," and the Court went on to provide the following examples of various procedural devices that could be used to ensure that meetings are continued in a manner that complies with this spirit and purpose:

"For example, if a board is cognizant that a single meeting will be insufficient for the consideration of an agenda item and anticipates continuances, a board may include the dates of continuances in the agenda posted pursuant to HRS § 92-7(a). . . . A board is also not required to serially recess meetings on an agenda item of reasonably major importance. Rather, a board may decide to hold separate meetings, with separate agendas, on different aspects of the same bill.

. . .

A board may also consider permitting periodic oral testimony by members of the public, as issues develop during the deliberation process."

Further, while the Court noted that the Sunshine Law does not require the posting of a new agenda and acceptance of oral testimony at each continuance and reconvening of a meeting beyond the first continuance, it implied that oral notices of the continuances alone were inadequate and stated that "the means chosen to notify the public of the continued meeting must be sufficient to ensure that meetings are conducted 'as openly as possible' and in a manner that 'protect[s] the people's right to know.'"

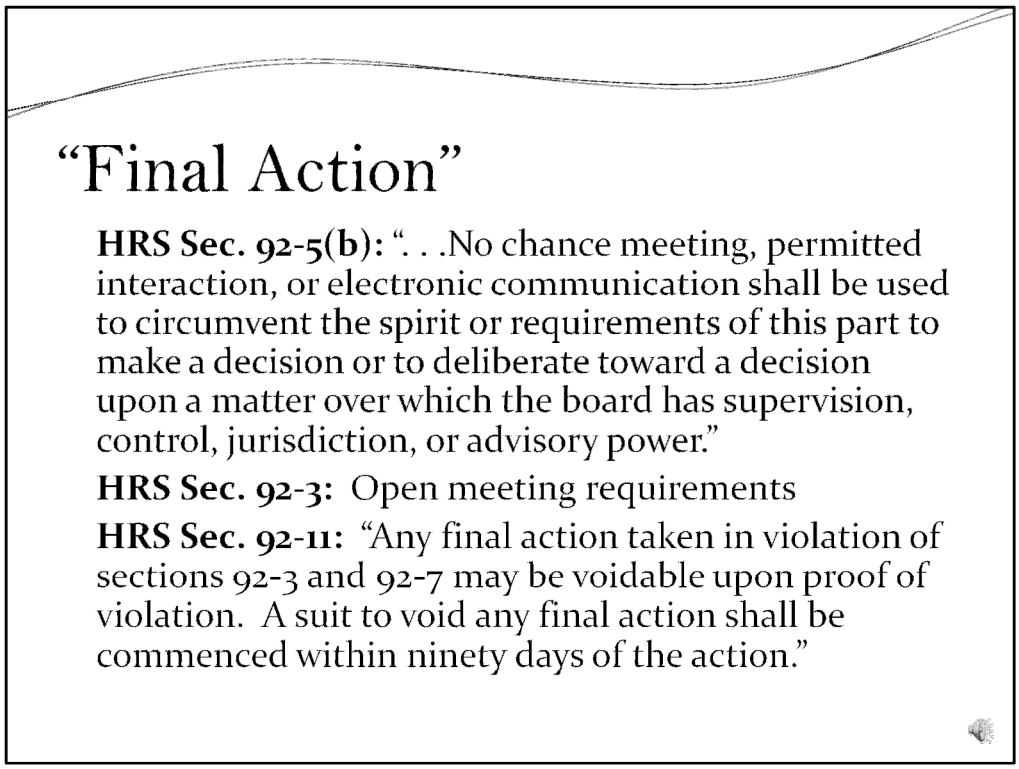


With respect to the second issue on appeal, the Court held that the challenged memoranda sent by Council members to all other members did not fall within any of the Sunshine Law's permitted interactions, and that the ICA majority opinion had erred in characterizing them as "one-way communication[s]" or "informational memoranda" that did not solicit a vote or commitment to vote. After discussing OIP's 2004 opinion disallowing the collection of board members' signatures, outside of a meeting, on documents making a recommendation for a certain action (OIP Op. No. 04-01), the Court determined that the Council members' memoranda in Kanahele improperly advocated for the adoption of proposals by detailing their rationale and justifications, and solicited votes by asking for "favorable consideration" of the proposal contained within them.

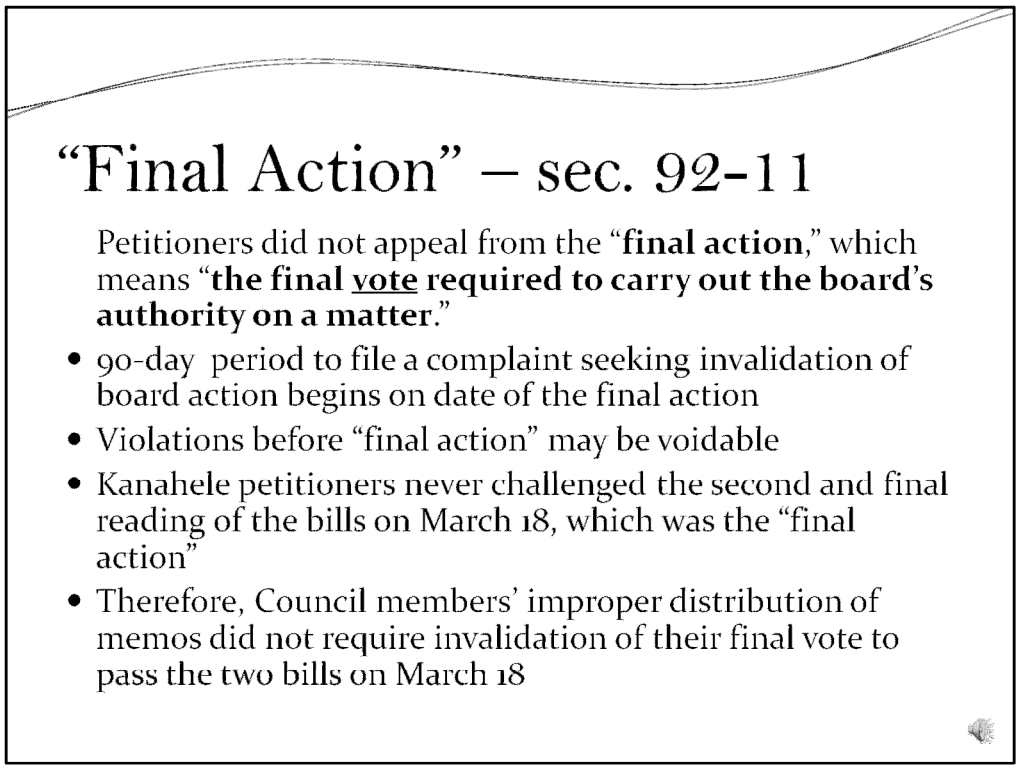
While recognizing the practical benefit of reducing lengthy and complex proposals to writing, the Court concluded that the Council members' memos did not simply memorialize their proposed amendment because each memo's concluding paragraph contained a solicitation for votes and were thus clear examples of how the memos were being used to circumvent the spirit of the Sunshine Law to openly decide or deliberate toward a decision.

Even if the memoranda could be considered to fall within a permitted interaction, the Court concluded that they would nevertheless violate HRS § 92-5(b)'s spirit or requirements to decide or deliberate matters in open meetings, citing the ICA's decision in Right to Know Comm. v. City Council, City & Cnty. of Honolulu, 117 Haw. 1, 4, 175 P.3d 111, 113 (App. 2007), as well as OIP's underlying opinion in that case (OIP Op. Ltr. No. 05-15). Although there was no evidence of telephone or in-person interaction by Council members outside of a duly noticed meeting, the language of the memoranda encouraged and invited such improper interaction by stating "please contact me."

The Court determined that the challenged memos had the effect of undermining the public's ability to witness and participate in the deliberation process of bills that would have a significant impact on the community. Citing a 2007 OIP opinion (OIP Op. No. 07-02), the Court agreed that a motion to reconsider actions was not "purely procedural" and instead had a substantive effect as it "wipes the slate clean" and opens up the underlying question for consideration as if no action had been taken. In Kanahele, the Court concluded that the Council decided to reconsider many of the amendments it had previously adopted based on written justifications in memos circulated outside a meeting, which effectively limited public scrutiny of the Council's deliberations and decision-making in violation of the Sunshine Law's spirit or requirements.



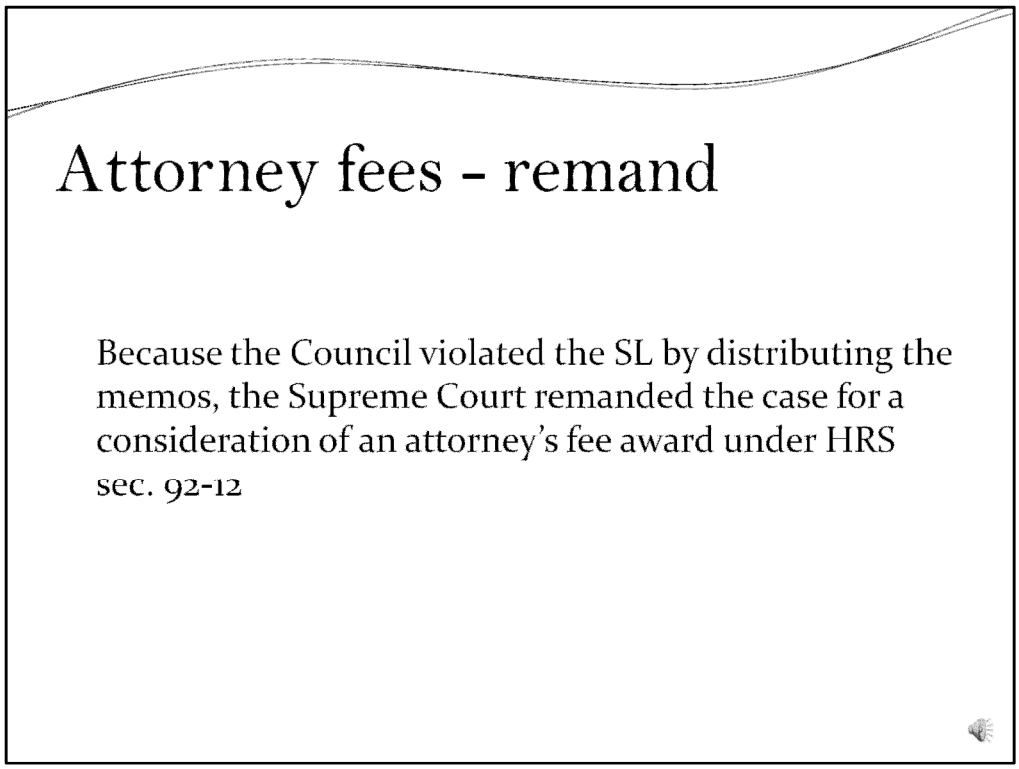
Despite concluding that the distribution of the memoranda among board members did not fall within a permitted interaction and violated HRS § 92-5(b), the Court ultimately concluded that it need not determine whether such action also constitutes a violation of the open meeting requirements of HRS § 92-3, so as to trigger the voidability analysis under § 92-11, which states: "Any final action taken in violation of sections 92-3 and 92-7 may be voidable upon proof of violation. A suit to void any final action shall be commenced within ninety days of the action."



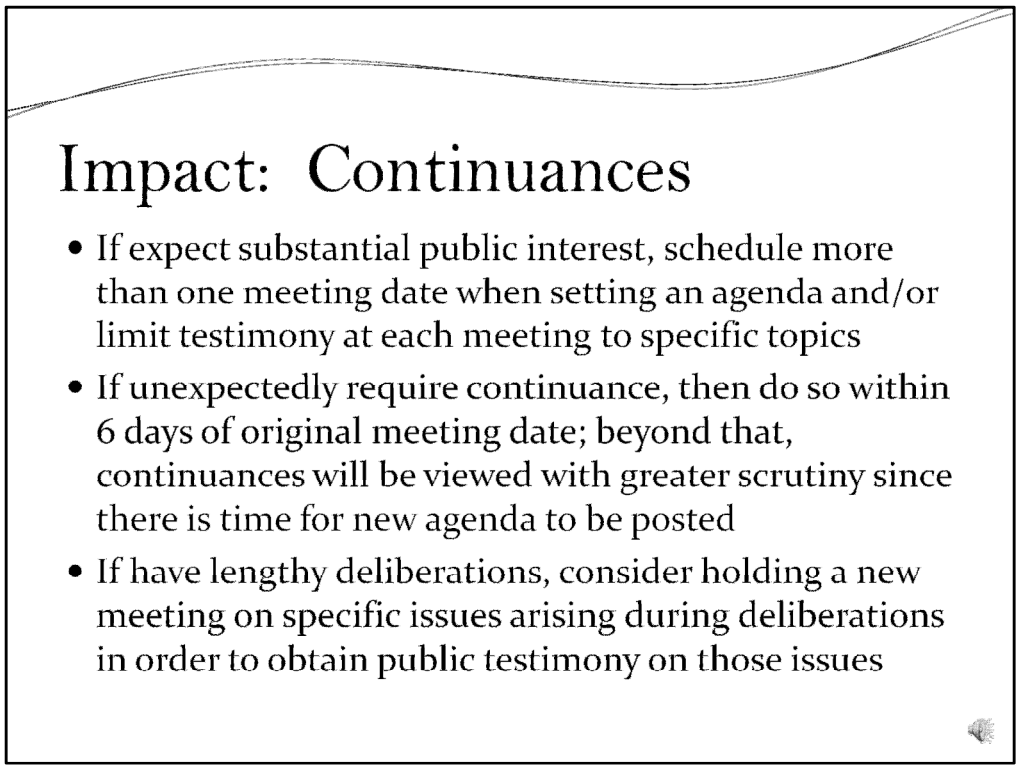
Ultimately, the Court adopted Judge Ginoza's concurring opinion analysis to hold that "the Petitioners did not appeal from a "final action" within the meaning of § 92-11 with respect to the challenged memoranda." The Court went on to define "final action" to mean "the final vote required to carry out the board's authority on a matter."

The Court expressly limited this definition to the context of determining when the 90-day period starts for the filing of a complaint seeking invalidation, and declined adopting it as a definition of when a violation of the Sunshine Law might warrant invalidation under HRS § 92-11. The Court specifically refused to adopt an approach that would not invalidate a final action if the violation was merely "technical," or if the board had "substantially complied" with the law, or if there was no demonstrated "prejudicial effect." The Court also stated earlier that it was not suggesting that the remedy of voidability under HRS Section 92-11 "applies only to meetings at which a 'final action' is taken, or that any actions taken in violation of the Sunshine Law during meetings or discussions prior to the 'final action' are 'cured' if the final action is taken in compliance with the Sunshine Law." Thus, the Court left open the possibility of voiding a properly taken "final action" based on a technical violation that occurred earlier in the process, so long as the HRS Section 92-11 suit was filed within 90 days of the final vote.

As the Kanahele petitioners, however, never challenged the second and final reading of bills on March 18, 2008, the Court ultimately held that the Council members' improper distribution of the challenged memoranda did not require invalidation of their final action in voting to pass the two bills.

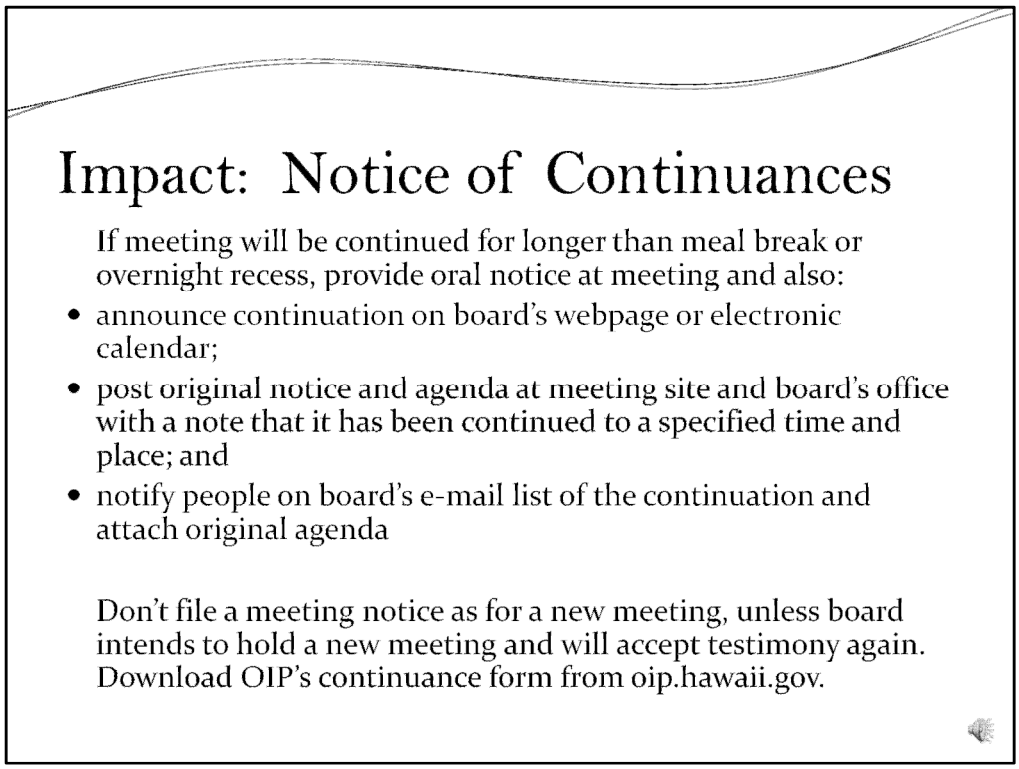


Nevertheless, because the Council violated the Sunshine Law by distributing the memoranda, the Court remanded the case to the circuit court for a consideration of an attorney's fee award under HRS § 92-12(c) (2012).



So what impact will the Kanahele decision have?

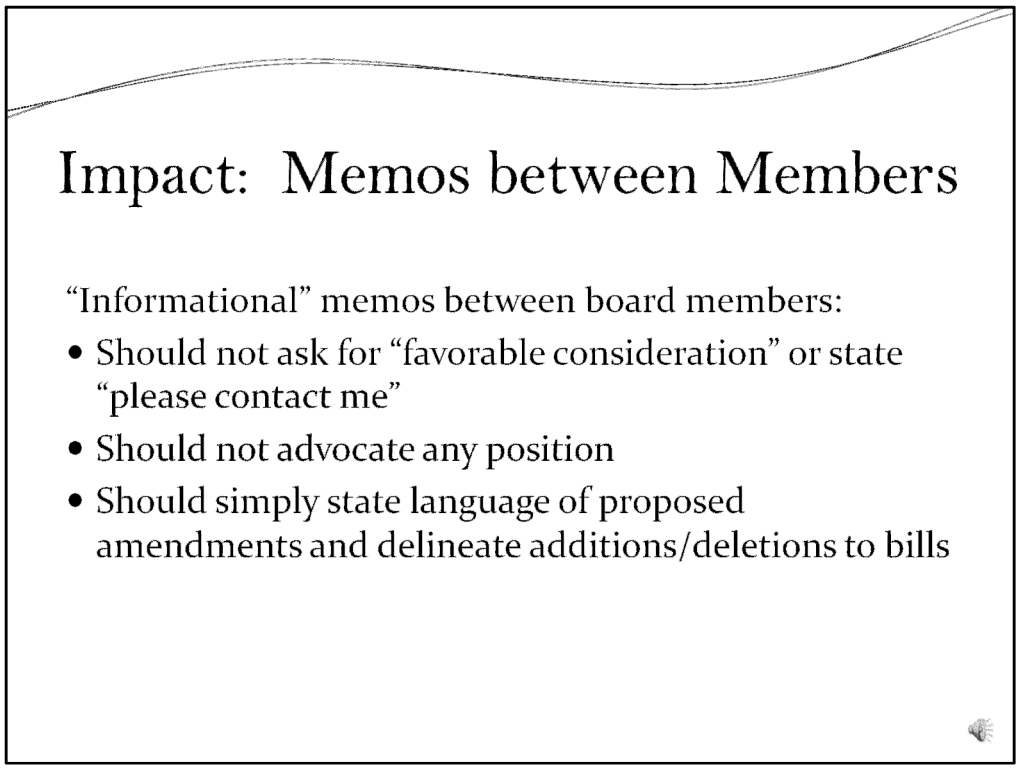
First, OIP appreciates the Court's guidance and the specific examples that it gave on how to continue meetings in a way that would pass Sunshine Law muster. Based on the Court's suggestion that "a board may include the dates of continuances in the agenda posted pursuant to HRS § 92-7(a)" if the board anticipates continuances, OIP suggests that it schedule more than one meeting date at the time it sets an agenda for a matter expected to generate substantial public interest. Alternatively, the board could schedule more than one meeting and limit testimony at each meeting to specific topics. If a board unexpectedly encounters circumstances requiring the continuance of a meeting, then it generally could do so to a date within six days of the meeting date; any continuances after six days would be viewed with greater scrutiny since there should be sufficient time to post a new meeting notice and the Court has cautioned that a board is "not required to serially recess meetings on an agenda item of reasonably major importance." If the board is in a lengthy deliberation process, it may consider holding a new meeting on specific issues that have developed during the deliberations in order to obtain public testimony on those issues.



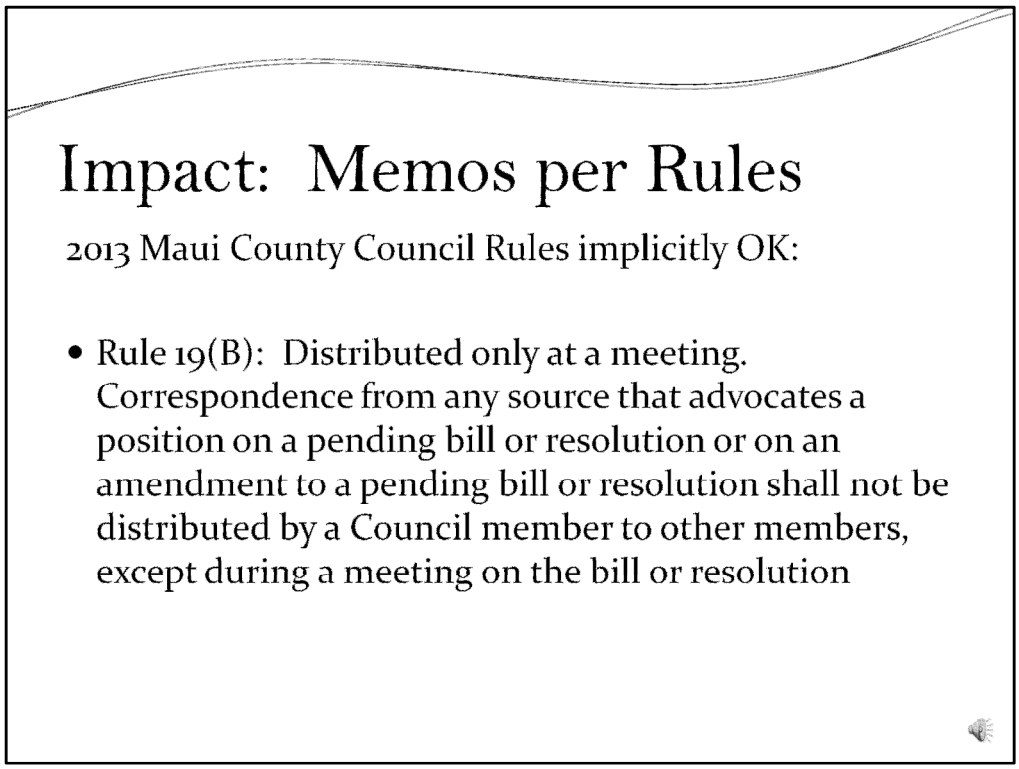
With respect to notice of continuances, the Court recognized that filing a new agenda and acceptance of oral testimony are not required at each continued meeting, but strongly implied that **oral notices alone were inadequate** in light of the spirit and purpose of the Sunshine Law. Thus, OIP recommends that where a meeting is being continued for longer than a meal break or an overnight recess, a board should make an effort to notify the public through additional means, and not just orally announce that the meeting is being continued to a specific date, time and place. Depending on the circumstances, such additional means would include making an announcement on a board's webpage or electronic calendar, and physically posting the original notice and agenda at the meeting site and at the board's office with a note that it has been continued to a specified date, time and place.

OIP anticipates that continuances will normally be held within six days of the originally scheduled meeting, so recognizes that there may not be sufficient time to mail notices to interested persons on the board's mailing list. If the board maintains an e-mail list of interested persons, however, the board should make a good faith effort to e-mail them with notice of the continuation date, time and place and attach the original agenda.

A board need not, and in fact should not, post a meeting notice as would be filed for a new meeting, unless it intends to hold a new meeting and will accept testimony again. Instead, OIP has developed a new notice of continuation form to which the original meeting agenda should be attached. You can download this continuation form from OIP's forms page at oip.hawaii.gov.

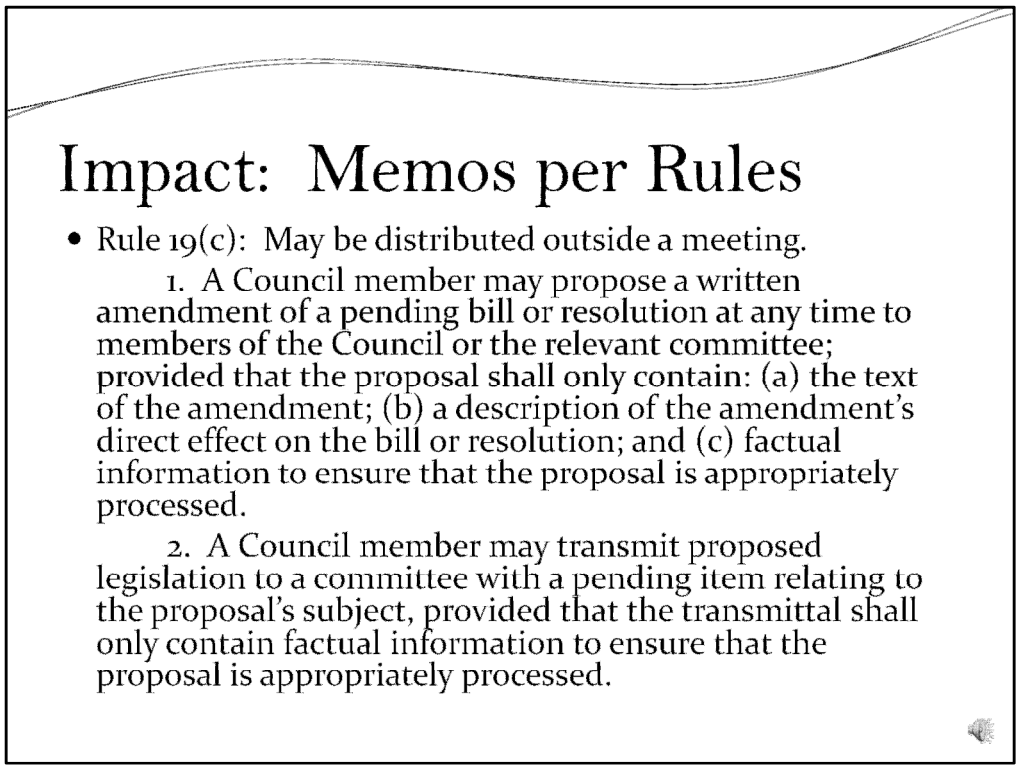


Second, with respect to the exchange of memos between Council members, the Court clearly rejected the argument the memos were merely one-way or informational communications that did not seek commitments to vote when they asked for "favorable consideration" of their contents and were distributed to all members, and were not limited to just two members. On the other hand, if the memos had not advocated any position, sought favorable consideration, or asked others to "please contact" the writer, and if they were simply 'informational' in the sense that they merely recorded the language of the proposed amendment and delineated any additions or deletions that would be made to the language of the bills, then they might have passed Sunshine Law muster.

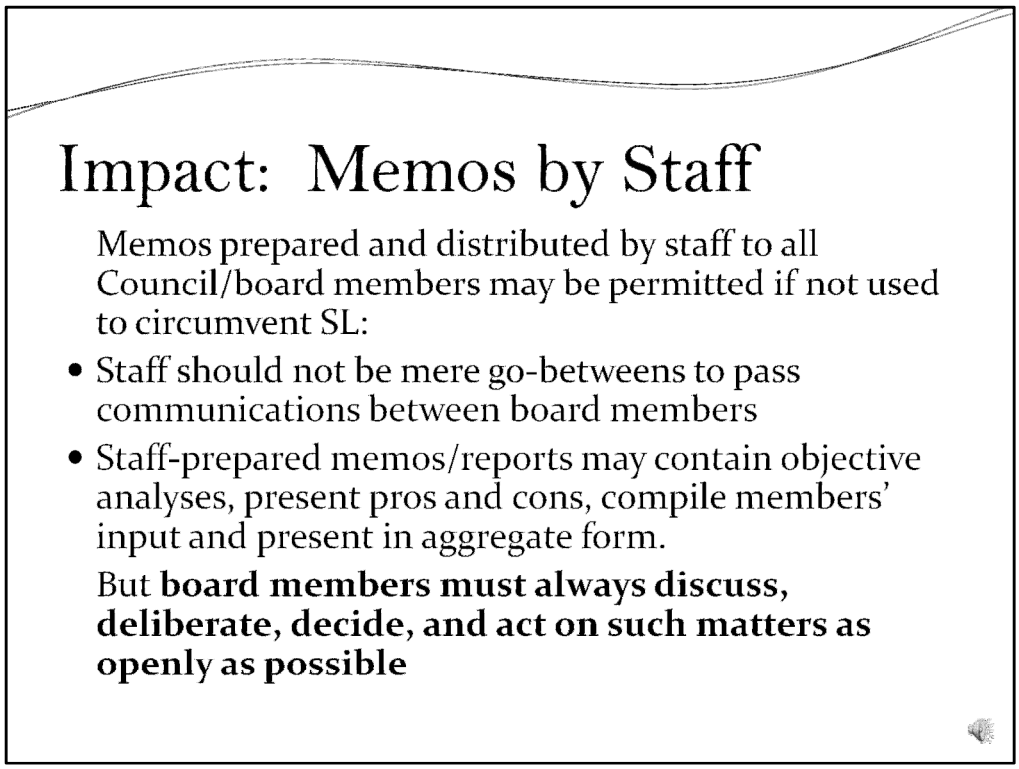


Interestingly, the Court quoted in footnote 30 the 2013 Maui Rules of the Council Rule 19(B) and (C), which OIP had reviewed for the Council and which allow the distribution of certain factual information. Although these rules were not in effect at the time of the Council members' 2008 memos in the Kanahele case, the Supreme Court apparently views them with favor.

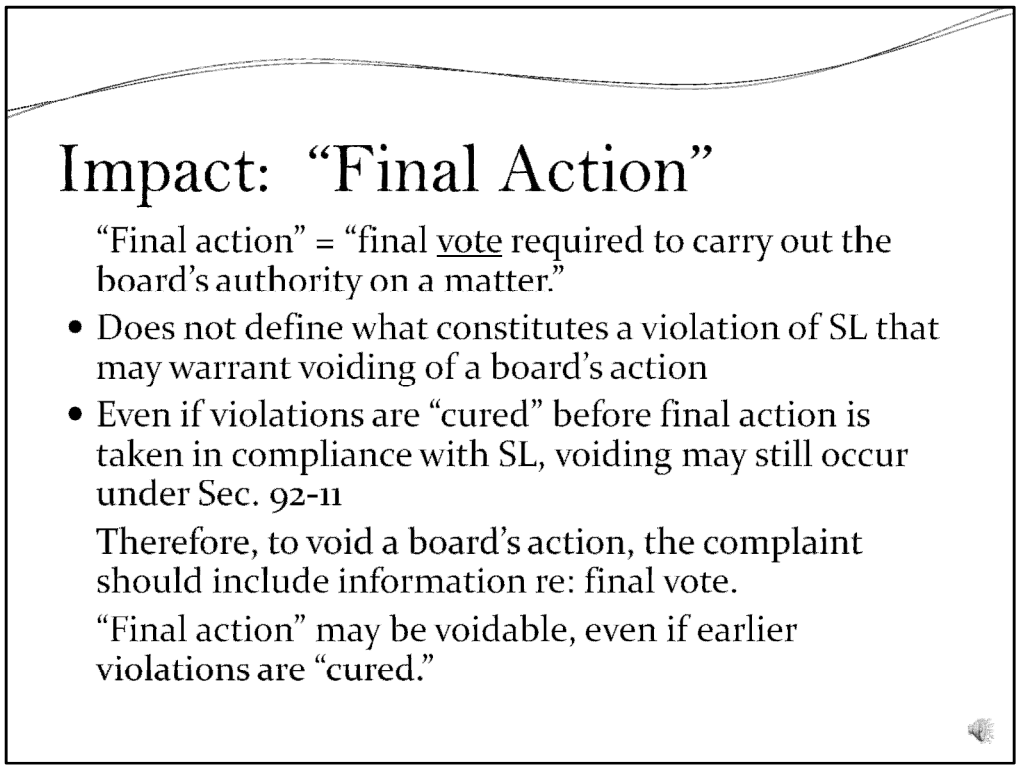
Rule 19(B) allows correspondence that advocates a position on a pending bill or resolution, or an amendment, to be distributed by a Council member to other members only at a meeting on the bill or resolution.



Rule 19(C) allows distribution by a Council member to other members of the Council or relevant committee outside a meeting only of (a) the text of a proposed amendment; (b) the amendments' direct effect on the bill or resolution; and (c) factual information to ensure that the proposal is appropriately processed. Additionally, "[a] Council member may transmit proposed legislation to a committee with a pending item relating to the proposal's subject, provided that the transmittal shall only contain factual information to ensure that the proposal is appropriately processed."



Besides the option of adopting rules or a practice along the same line as the 2013 Maui rules regarding communications by and between Council members, OIP suggests that memos prepared and distributed by staff members to all of the Council or other board's members may be permitted under the Sunshine Law, so long as such communications are not being used as a way to circumvent the law. In other words, staff should not be used as mere go-betweens to pass communications from one member to another. As long as it is not being used to improperly advocate for a member's position or to solicit votes on an issue, staff-prepared memorandum or a report may contain objective analyses, present pros and cons, compile members' input and present it in an aggregate form, such as "Several members asked staff to research potential traffic impacts from the proposal . . ." or "One member expressed concerns to staff about the potential legal liability to the County and asked staff to suggest ways to address the issue." While staff can assist boards in reducing lengthy and complex proposals to writing, board members should always be cognizant of their Sunshine Law responsibility to discuss, deliberate, decide, and act on such matters as openly as possible.

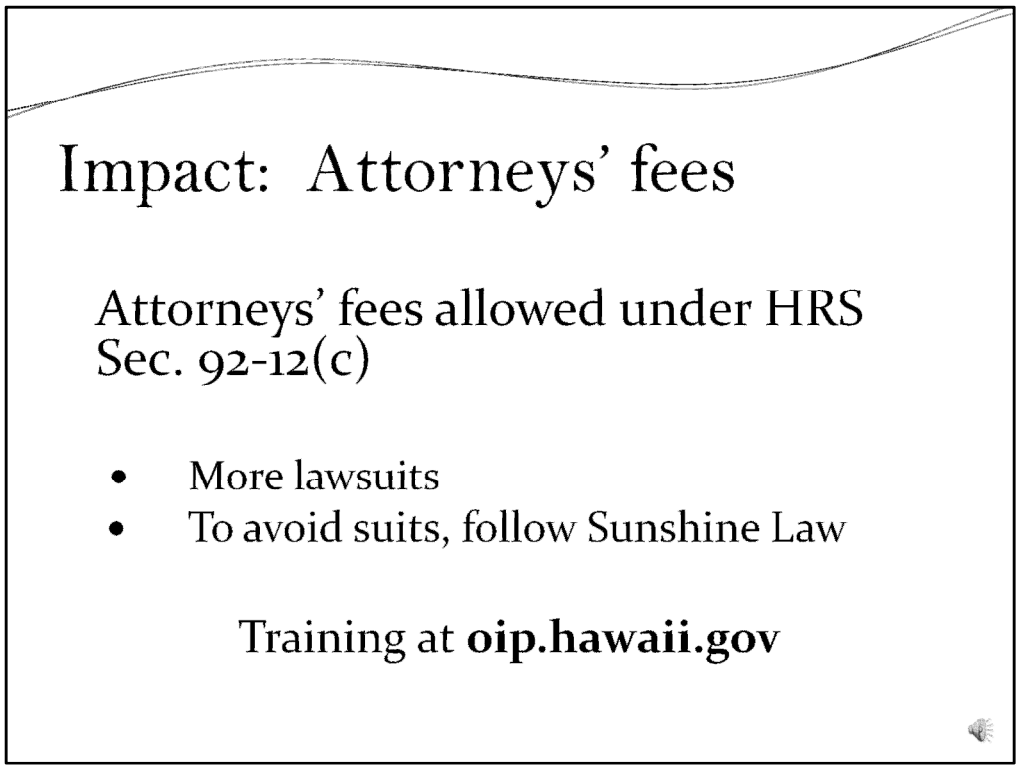


The third area impacted by the Kanahele decision is the question of when a "final action" may be voided under HRS Sec. 92-11.

Notably, the Court did not ultimately resolve the issue of whether the distribution of memoranda among board members constituted a violation of Sec. 92-3 so as to trigger the voidability analysis under Sec. 92-11. Instead, the Court concluded that the Petitioners never challenged the Council's second reading of the bills on March 18, 2008, which it determined to be the "final action" from which the Petitioners should have appealed. The Court defined "final action" under Sec. 92-11 to be the "final vote required to carry out the board's authority on a matter."

But this definition of "final action" does not define what constitutes a violation of the Sunshine Law that may warrant voiding a board's action. Even if actions taken in violation of the Sunshine Law earlier in the process are "cured" before final action is taken in compliance with the law, the Court indicated that Sec. 92-11's remedy of voiding the final action may still occur.

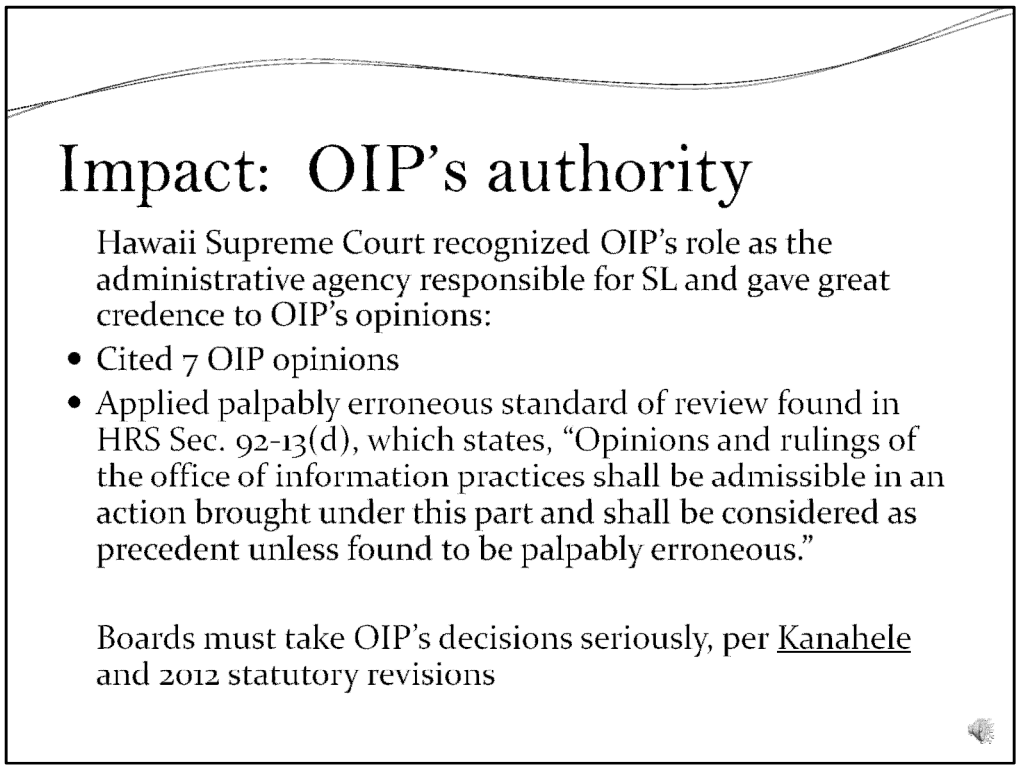
The clear conclusion for future Sunshine Law plaintiffs is that in order to void a board's action, the complaint should include information regarding the board's "final vote required to carry out its authority on a matter," even if the actual Sunshine Law violations that are the basis for the complaint occurred earlier in the process. As for boards, the Court's decision left open the possibility of having final actions voided due to technical Sunshine Law violations that occurred earlier, regardless of a board's attempt to "cure" them before the final action. This is not to say, however, that it would be fruitless for boards to attempt to "cure" potential Sunshine Law violations, as efforts to cure may still help to show that a board was attempting to act within the spirit and purpose of the Sunshine Law.



The fourth area impacted by the Kanahele decision was the Court's remand of the case for the circuit court's consideration of an award of the Petitioners' attorneys' fees under HRS 92-12(c).

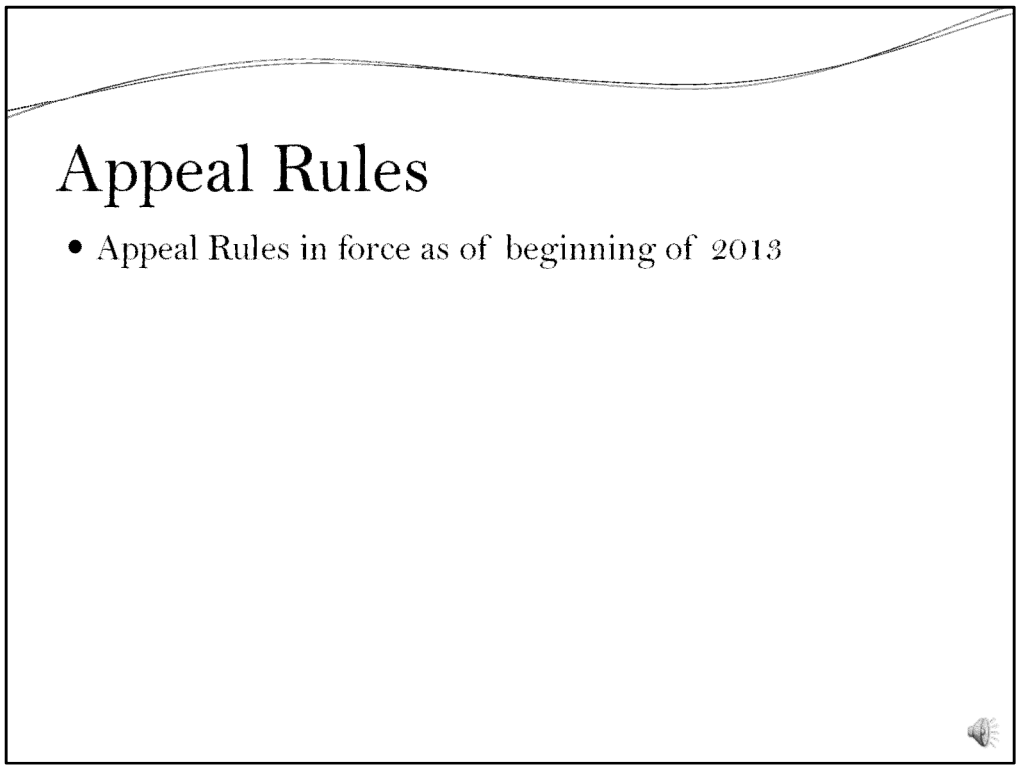
The impact of the Supreme Court's remand in Kanahele for consideration of attorney fees may be to encourage more lawsuits by members of the public to seek to void actions taken in alleged violation of the Sunshine Law. To avoid such actions, boards should take greater care to adhere to the Sunshine Law.

OIP has a lot of Sunshine Law training materials and a quiz available on its website at oip.hawaii.gov.

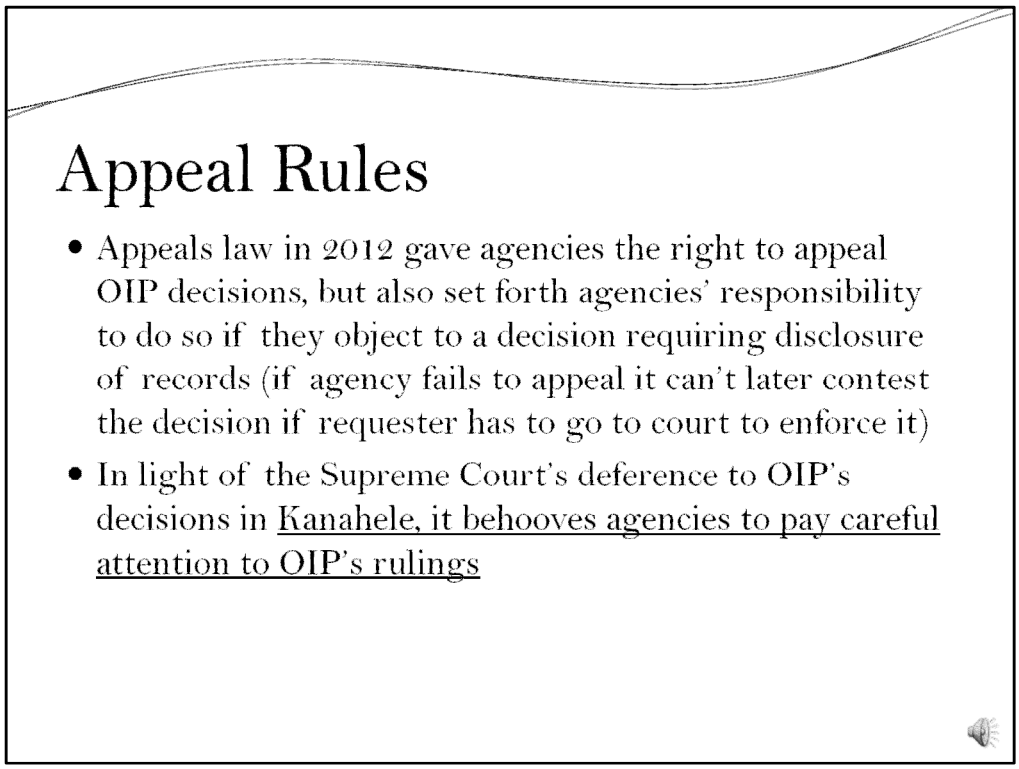


Last but not least, the Court recognized OIP's role as the administrative agency responsible for enforcing the statute and gave great credence to OIP's opinions, favorably citing seven of them and applying the palpably erroneous standard of review. Although this was not a case involving a direct challenge to an OIP opinion, the Court followed the palpably erroneous standard set forth in HRS Sec. 92-13(d), which states, "Opinions and rulings of the office of information practices shall be admissible in an action brought under this part and shall be considered as precedent unless found to be palpably erroneous."

OIP believes that the Kanahele decision, in conjunction with the 2012 amendments to the Sunshine Law and UIPA, set a high standard of review in appeals from OIP's decisions and require boards to take OIP's rulings seriously, as will be discussed further in the next section.



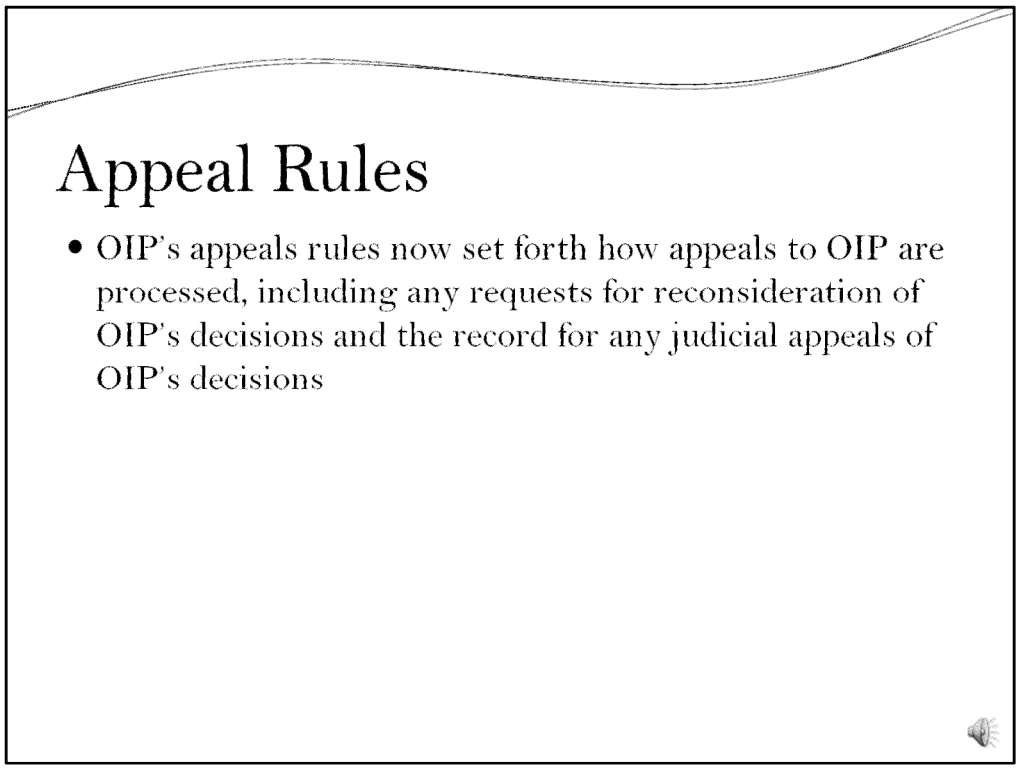
OIP's new administrative rules governing appeals made **to** OIP under either the UIPA or the Sunshine Law went into effect on the first day of 2013. The rules make up chapter 2-73 of the Hawaii Administrative Rules. So during the past year, all newly filed complaints to OIP that a record request was wrongly denied under the UIPA, or that a board violated the Sunshine Law, all those requests have been processed under the new rules, and for files opened prior to 2013, OIP has been following the new rules going forward, as far as practicable.



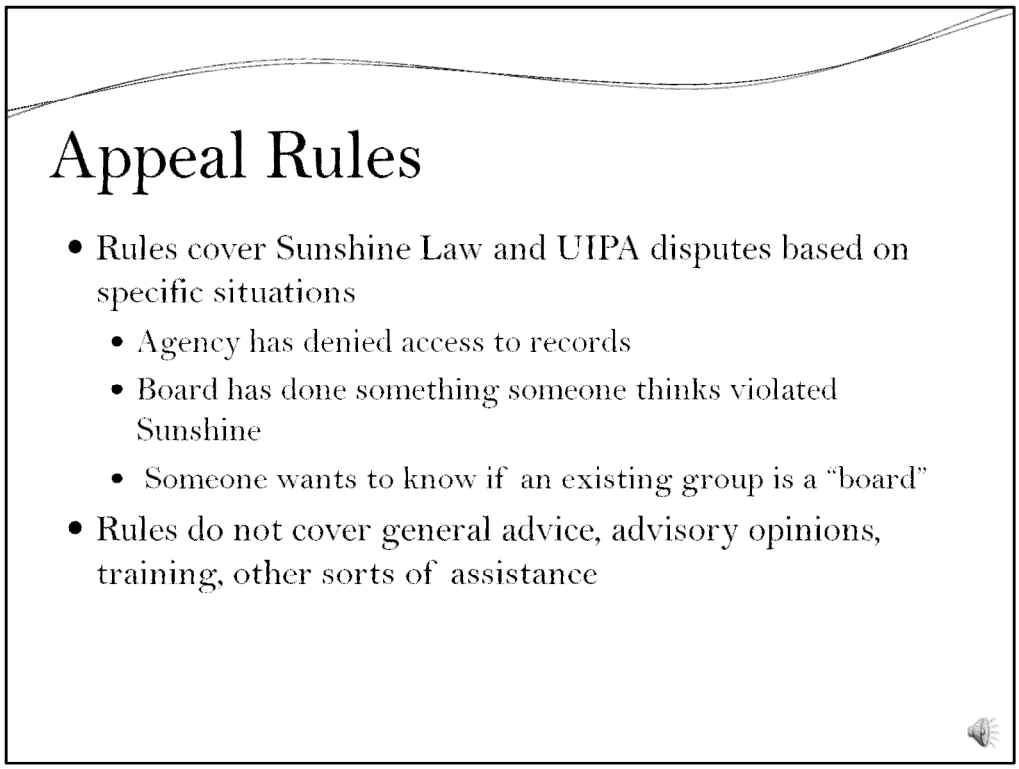
Let me be clear that the new appeal rules apply to OIP's own handling of members of the public's appeals **to** OIP regarding board or agency actions – they don't apply to appeals to court **from** an OIP decision. But the rules are intended to complement the new process for appealing an OIP decision to court -- as many of you are aware, a change in the law in 2012 gave agencies the right to appeal OIP decisions to court and set out the procedure for doing so – and the record of the proceedings at the OIP level is what the court will be looking at in deciding the court appeal, absent extraordinary circumstances.

Especially where the issue involves disclosure of records, agencies should bear in mind that their ability to appeal an OIP decision carries a corollary **obligation** to appeal if the agency does later want to challenge an OIP decision requiring disclosure. If the agency hasn't appealed within the 30 day appeal time limit after an OIP decision but hasn't disclosed the record either, and the requester ultimately ends up going to court to enforce that decision, the agency isn't going to get a second chance to challenge the decision because in that circumstance, the law specifically provides that OIP's decision is no longer subject to challenge.

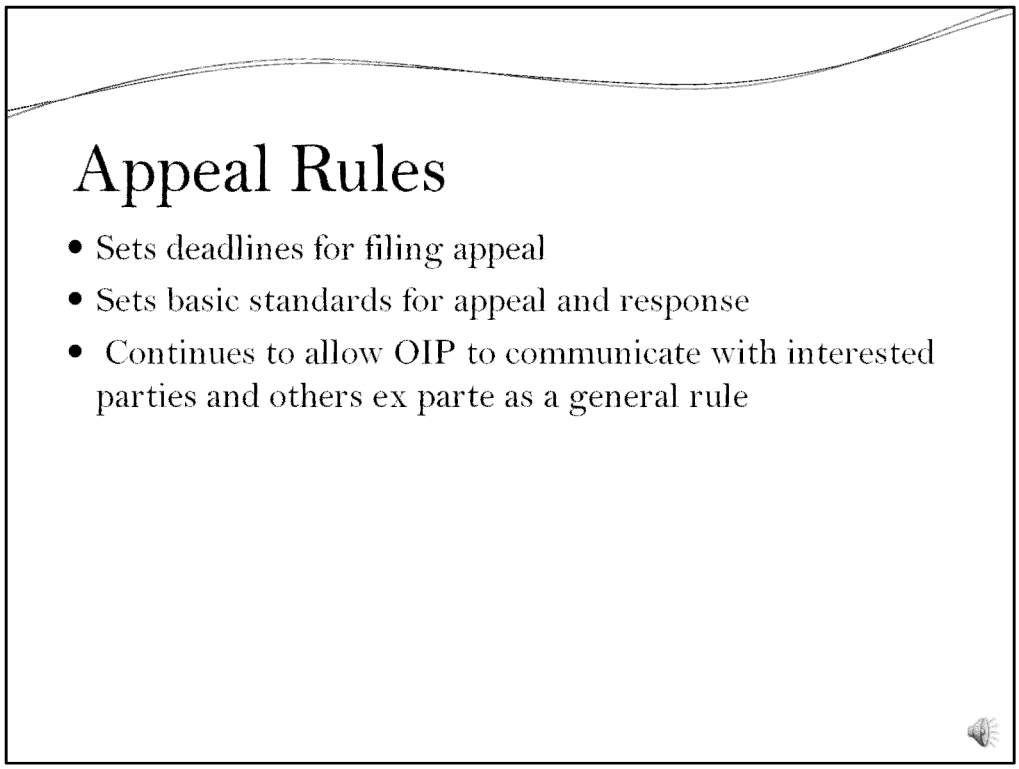
When the agency has appealed in a timely fashion, or as we saw in the Kanahele decision when a court is looking at OIP's formal decisions as precedent, the standard of review is a deferential "palpably erroneous" standard. So between the standard of review and the general limitation of review in a court appeal to the record that was before OIP, even when an agency fully intends to appeal any unfavorable OIP decision, it should still be sure to present its best case to OIP during the proceedings before OIP, which, again, are governed by the new appeal rules.



The new appeal rules cover how OIP will process appeals, from filing to decision to any possible requests for reconsideration, as well as keeping the record of proceedings.



They apply for a limited subset of the work OIP does, specifically UIPA or Sunshine Law disputes arising from an agency's denial of access to records, or a dispute as to whether a board has followed the Sunshine Law's requirements, or a dispute as to whether a group is a "board" subject to the Sunshine Law in the first place. The rules do **not** apply to the other sorts of functions that OIP has performed and continues to perform, which would include providing general advice through its Attorney of the Day service, providing advisory opinions on the UIPA and the Sunshine Law, offering in-person and online training, providing guidance through publications, and other forms of assistance.

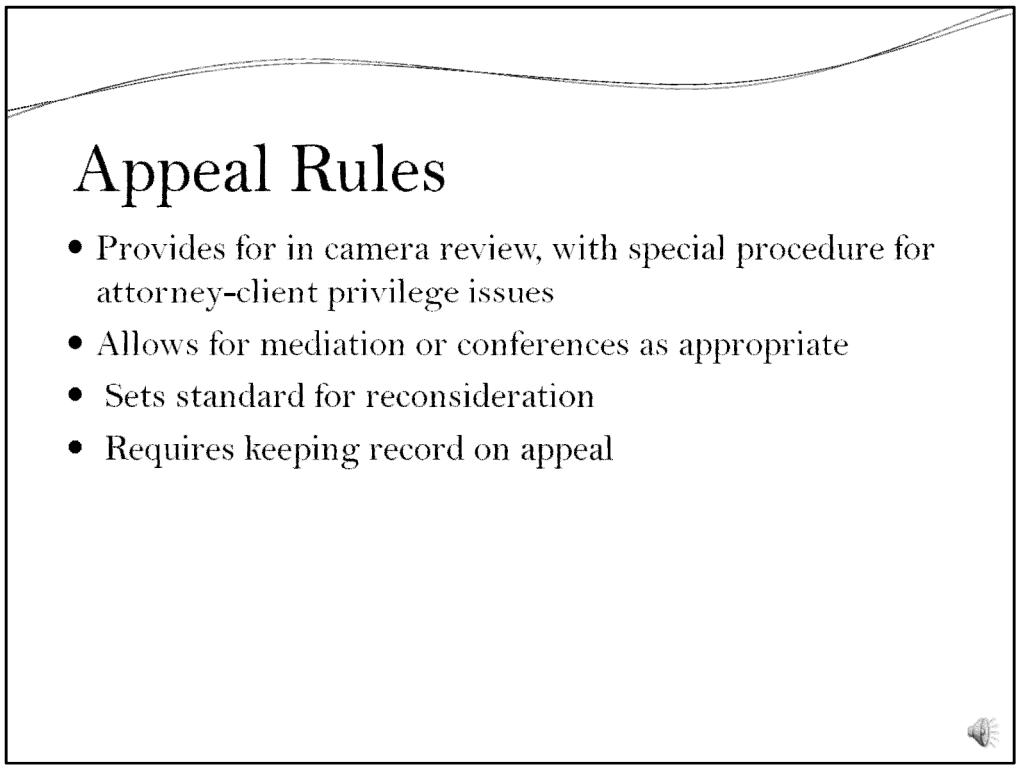


I won't go into great detail about the specific provisions of the rules, since you can look up whichever one you need in chapter 2-73, and OIP's website has not just a copy of the rules but also of the Impact Statement explaining the purpose and intent behind each rule. But I will run quickly over the key issues the rules cover.

They set a limitation period for when an appeal can be filed, which ranges from six months from an alleged Sunshine Law violation to one year from an agency's alleged denial of a record request under the UIPA. And note that someone who's appealing whether a group is a "board" subject to Sunshine Law in the first place can raise that question at any time while the group exists; but if the person also wanted to complain at the same time that something the group did violated the Sunshine Law, that complaint would have to be filed within six months of the time the group did whatever it was.

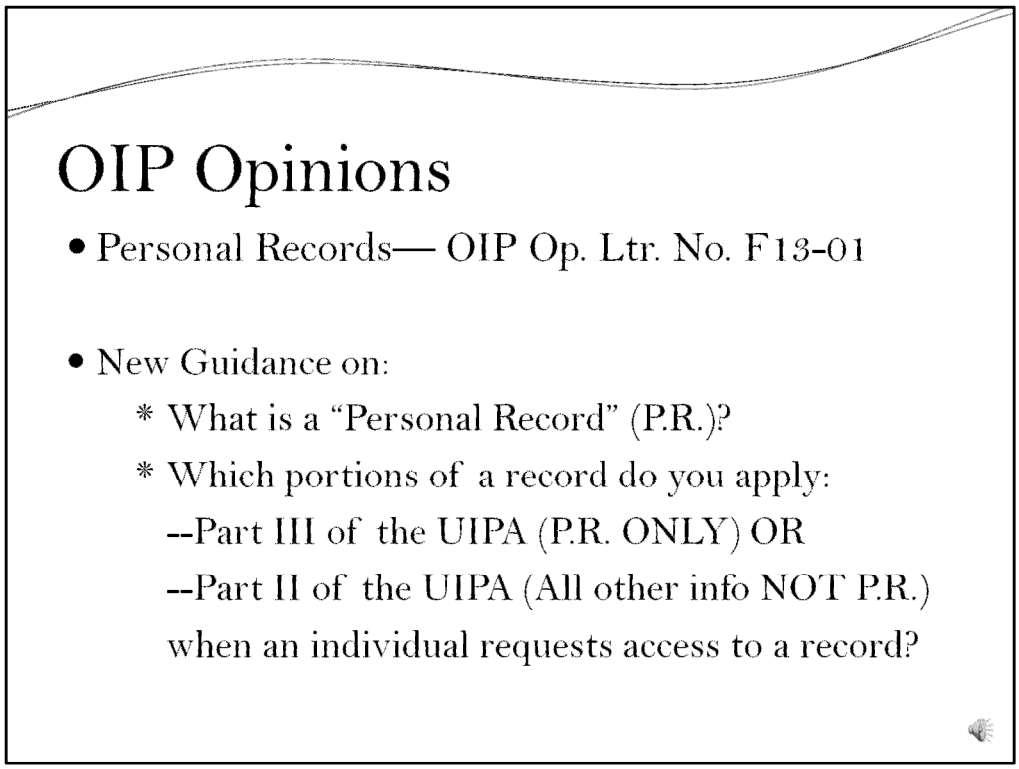
The rules also set out basic standards for what must be included in the appeal and the response. The person filing the appeal basically has to provide enough information to allow OIP, and the agency, to figure out specifically what is being complained about – if it's a record denial, what the record request was and what the agency's response was, if any; if it's a Sunshine Law issue, what board it is and what exactly happened that the requester wants OIP to address. The requester has the option to include further facts or argument, but isn't required to. Now the agency, which generally has the burden of proof, has to include a somewhat greater level of detail in its response, including its arguments and any factual background and evidence necessary to support those arguments.

These rules don't fundamentally alter OIP's longstanding, relatively informal process – they still allow OIP to communicate with third parties, and to communicate ex parte, as a general rule. They formalize the manner in which a third person who wants to actually participate in the appeal can seek to do so, such as where an agency record contains what may be confidential business information and the business wants to submit its position.



The rules formalize OIP's longstanding practice of reviewing disputed records or minutes *in camera* and have special provisions to protect records that are claimed to be attorney-client privileged, and includes the possibility that in appropriate circumstances the agency can provide a redacted form of those records so long as there's still enough information in the unredacted portion for OIP to determine whether the privilege applies.

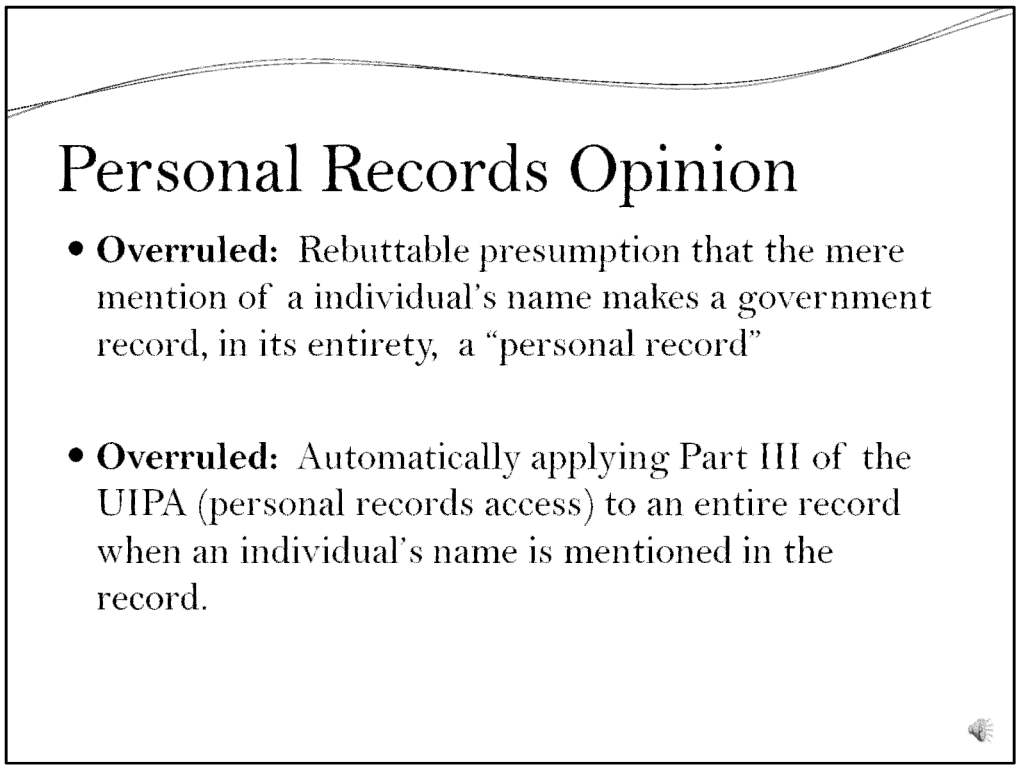
And the rules allow for consolidation of related appeals, and for mediation or conferences among all parties when it's appropriate in a particular appeal. The rules set standards for the form of OIP's decision, as well as for when OIP can dismiss an appeal without issuing a decision. For requests for reconsideration, the rules provide a 10 day deadline for a request for reconsideration of a newly issued decision and also formalize the standard previously set in OIP opinions for when OIP will reconsider a decision, whether that be a new decision or a precedent set in an older decision. Finally, the rules require OIP to keep the record of its proceedings in an appeal that will be sent up to the circuit court in the event of an appeal by an agency from OIP's eventual decision.



You just heard how OIP's new rules govern appeals filed with OIP. Now we'll discuss OIP's latest guidance concerning access to personal records when requested by an individual identified in the records. OIP's formal opinion, F 13-01, explains the legal analysis that an agency must perform when responding to a request for personal records.

The record at issue in Opinion Letter number F 13-01 was an investigative report prepared in response to allegations by four employees about a supervisor's workplace conduct. The record requesters were the employees who filed the complaint. OIP found that several portions of the investigative report were the requesters' personal records because the report contained information only about them, such as their allegations and their accounts of the alleged workplace violence. Other portions of the report were the joint personal records pertaining to more than one employee, such as each requester and the supervisor they were complaining about. Still other portions of the report were not personal records of any requester, and were disclosable as public records. The opinion explained the differences between these various types of records that were found in the same report, as well as the distinctions between requests made under Parts II and III of the UIPA.

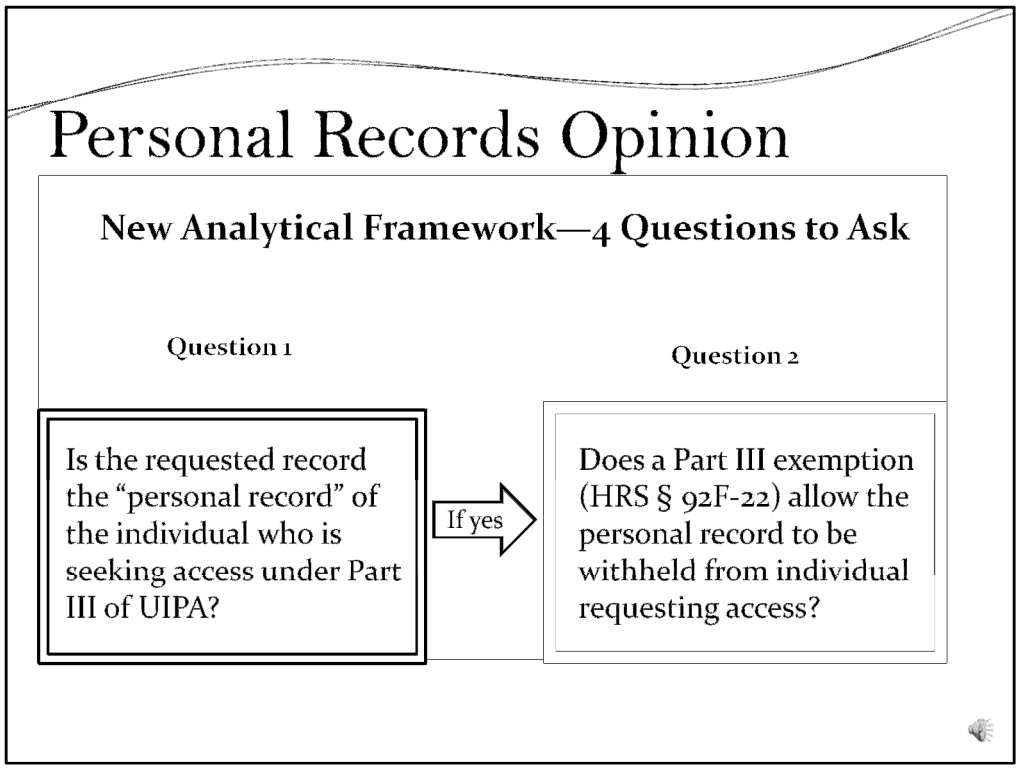
While a government record is generally defined as any information that is maintained by an agency, a personal record is information in a government record ABOUT an individual, which includes, but is not limited to the individual's education, financial, medical, or employment history, or items that contain or make reference to the individual's name, identifying number, symbol, or other identifying particular, such as a finger or voice print or a photograph. **Part II** of the UIPA governs the **public's** right of access to **government records** and **Part III** governs an **individual's** right to access and correct factual errors in any government record that constitutes a "**personal record."** Part III provides different and often broader rights when an individual is seeking access to his or her own personal records, as compared to the Part II rights of the public to seek access to government records. Under both Parts, an agency must disclose a government record, upon request, unless a provision of the applicable part allows the agency to withhold the government record from that requester.



Previously, older OIP opinions had created a "rebuttable presumption" under Part III, which presumed that an entire government record was an individual's personal record so long as the individual is named or identified at least once in the record. Under this old rebuttable presumption theory, the mere mention of the requester's name made the entire document his or her "personal record" governed by Part III of the UIPA.

Last year, in Opinion Letter F13-01, OIP overruled this rebuttable presumption. Instead, the opinion instructs agencies to now focus on reviewing the subject matter and contents of the record to determine what record information is "about" an individual in order to constitute that individual's personal record. The opinion also explains that government records, or portions thereof, may be about more than one individual and would constitute "joint personal records" of all individuals whom the information is collectively about, thus giving each of them access to their own respective personal records within a report.

Finally, other portions of a report may not be personal records of the requester and access would instead be governed by Part II of the UIPA. OIP Op. Letter F13-01 sifts through these various scenarios and provides a new analytical framework built around four main questions designed to help an agency know when to apply Parts II and III of the UIPA.

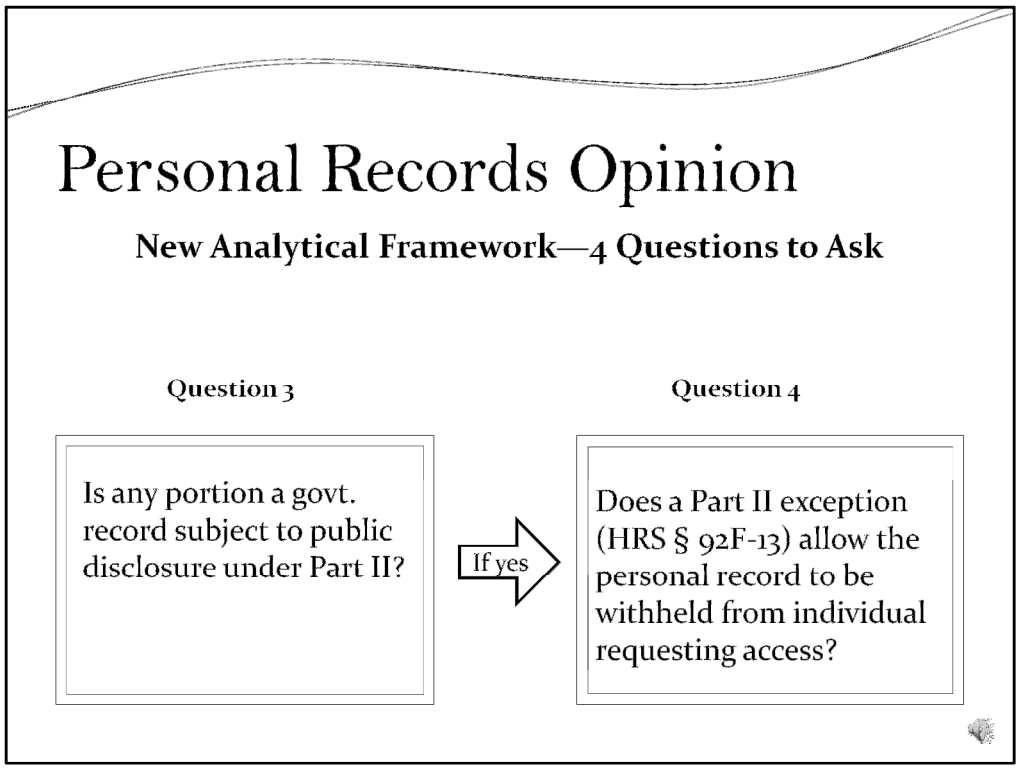


It is important to note that an agency does NOT have to go through these 4 questions if the agency chooses to disclose the **entire** record, under either Part II or Part III of the UIPA. But if the entire record is not being disclosed, then the first question that the agency should ask is: **Is the requested record the "personal record" of the individual who is seeking access under Part III of the UIPA?**

The agency should review the subject matter and contents of the record to determine what information, if any, is the individual's personal record. If the subject matter and contents of the record identify and are directly or contextually "about" the individual, then the entire record is the individual's personal record. If there are only portions of the record that identify and are "about" the individual, then only those portions constitute the individual's personal record.

For example, in OIP Op. F13-01, the agency properly disclosed, as personal records, each requester's own statements concerning the workplace incident that were contained in the investigative reports. The agency should also have disclosed those portions of the report that constituted joint personal records of each requester and the supervisor who was the subject of the investigation, such as the statements of other employees concerning the workplace incident.

After determining whether all or a portion of the record is a personal record or joint personal record, the second question is: **Does a Part III exemption in HRS Section 92F-22 allow the withholding of access to the personal record?** Remember that Part III of the UIPA governs an individual's right of access to personal records, so these exemptions are only relevant to personal record requests, such as the Part III exemptions for ongoing administrative proceedings or to protect the identity of a confidential source. Likewise, Part II exemptions only apply to Part II requests; consequently, the privacy exception found in Part II is not applicable to personal record requests.



The third question that an agency should ask is: **Is any portion of the requested record a government record subject to the public disclosure requirements of Part II?** If the agency answered the first question about what portion of the record is a personal record, then it has already done the work to answer this third question. Whatever was found earlier to not be the individual's personal record would likely be a government record falling under Part II of the UIPA.

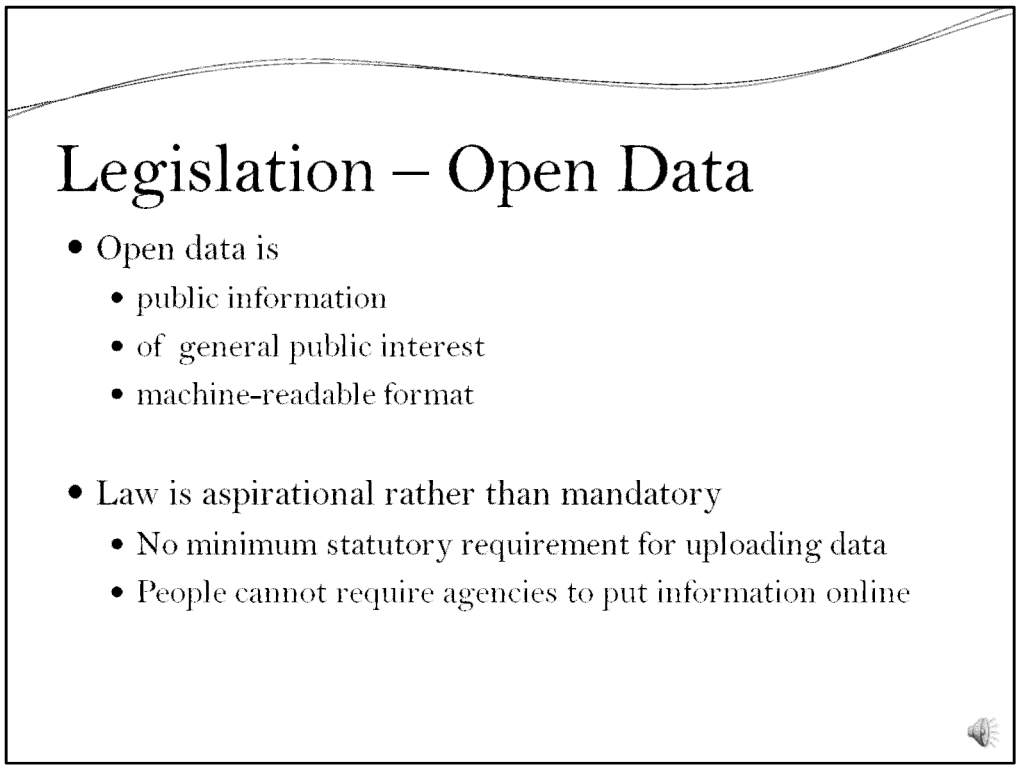
Keep in mind that even if information in the record is NOT the requester's personal record, the requester may still have the right to access portions of it as a member of the public under Part II of the UIPA. For example, in the investigative report described in OIP Op. F13-01, the following portions of the report were not about any of the requesters and were instead specifically and exclusively about other individuals, such as:

- Information about other employee's statements about the respondent, which was unrelated to the incident being investigated;
- A listing of employees in the office where the alleged incident occurred; and
- The report's recommendation of disciplinary actions.

Whether such Part II information must be disclosed would depend on the fourth and final question: **Does an applicable Part II exception in HRS Section 92F-13 allow the nondisclosure of a government record that is not a personal record?** Part II provides five exceptions that apply only to government records that are not personal records and allow a record to be withheld from anyone requesting access. For example, one Part II exception is for matters involving the "clearly unwarranted invasion of personal privacy," which involves a balancing test and only applies when the individual is found to have a significant privacy interest in the record that is not outweighed by the public interest in disclosure. As another example, portions of a consultant's report or a draft decision may be withheld under the Part II exception for "frustration of a legitimate government function."

In summary, the four-step analytical process explained in OIP Op. F13-01 helps an agency to: (1) initially determine whether or not information in a record is an individual's personal record, and if so, then (2) apply the exemptions in Part III for personal records. For the remainder of a requested record that is not a personal record, then the process goes on to: (3) identify those portions that are potentially subject to public disclosure under Part II and (4) determine whether a Part II exception allows nondisclosure of such information. Again, remember that an agency does not even have to go through the four-part analysis if the agency anticipates that it will be disclosing the record in its entirety under either Part II or Part III.

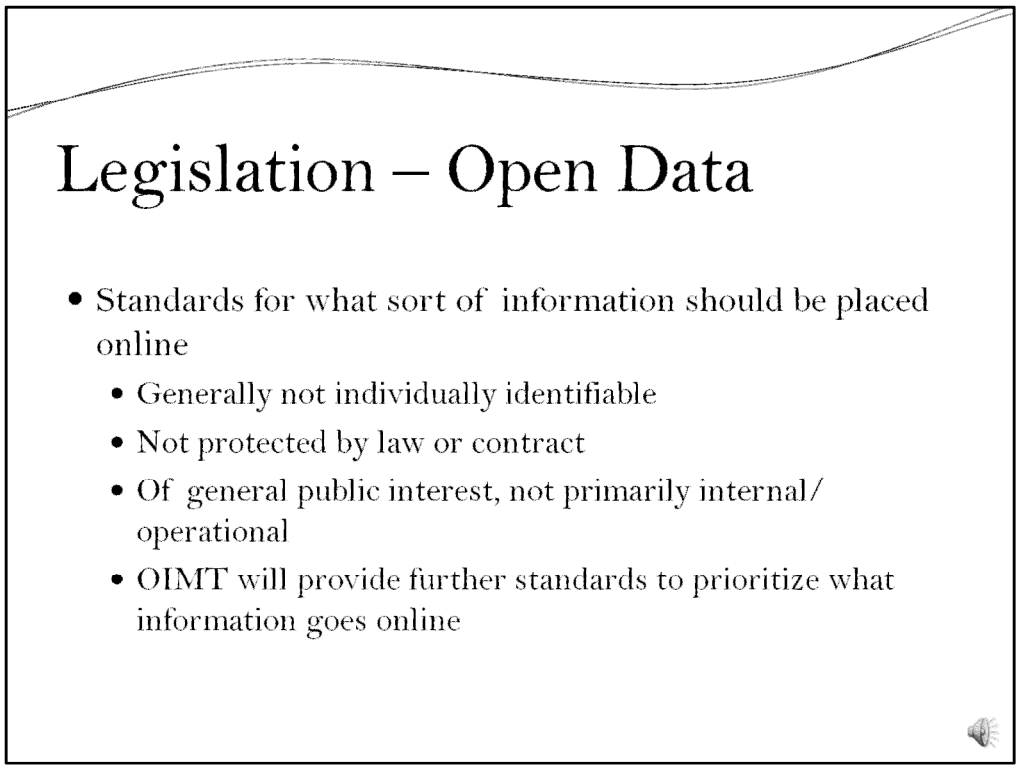
Now, let's turn the presentation back to Jennifer to discuss the State's open data efforts.



Moving on to legislation with open government implications, in 2013 the Legislature passed an Open Data bill to help further the state's open data initiative, that is, the push to get public data and information that's generated by state agencies onto the data.hawaii.gov website. The new law requires the executive branch departments to make electronic data sets available to the public, subject to the limitations and conditions set out in the law. The bill was signed into law as Act 263, and has been codified as part of chapter 27, HRS.

When we talk about open data, as defined in the new law, we're talking about sets of data originating from government agencies, where that data is public information to start with, and is of general public interest – it relates to whatever it is the agency does as its functions, rather than primarily being about internal administration – and the data is in a machine-readable format, meaning that instead of being published as, say, a pdf, it's a file type that can be manipulated and can be used by different programs. On the data.hawaii.gov site, you can look at a dataset in basically spreadsheet form, or you can use the tools on the site to focus in on particular parts of the data, or create charts of different sorts, or show it as a map – but you can also import the data into another program or app, maybe combine it with data from other sources, not necessarily governmental sources, to create something new.

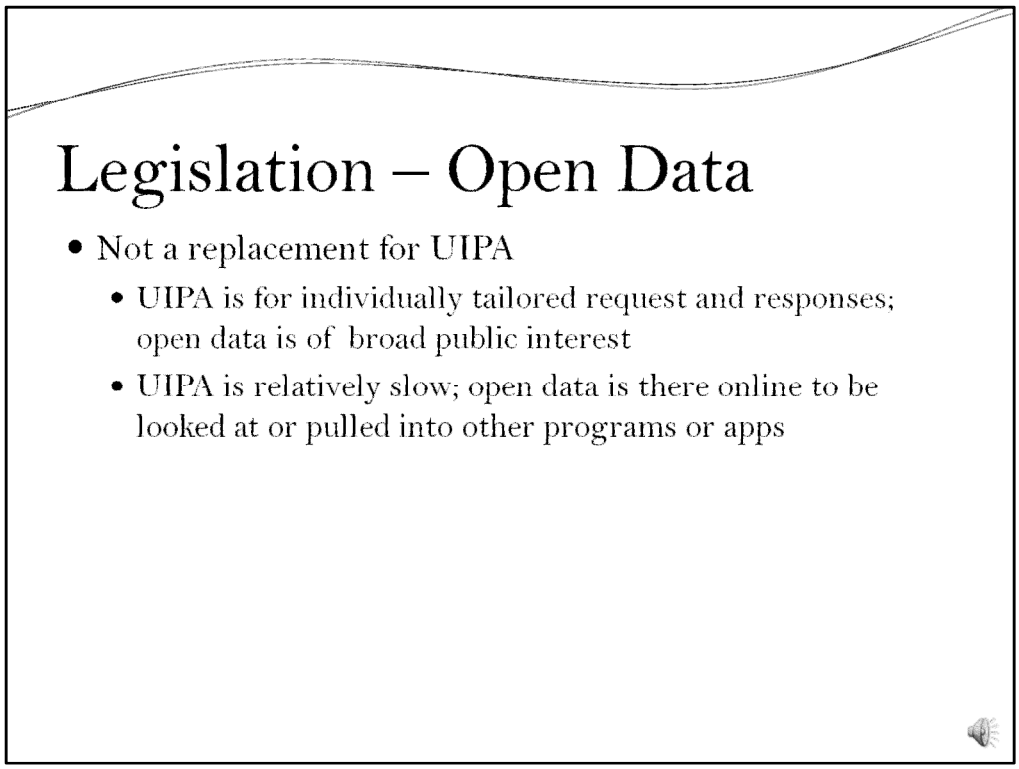
This law as written is aspirational, not mandatory, as it affects the agencies. There is no minimum statutory requirement for an agency to upload data – no one will be violating the statute if they haven't uploaded so many datasets by such and such a date. And it makes clear that people cannot require an agency to put a particular set of data online, so the process remains within each agency's control as far as what data the agency will put online and when – the law functions more as both strong encouragement and a source of guidelines for how this fairly new frontier in open government will work in Hawaii.



In what is now sections 27-44.1 and -44.3 of the HRS, the law sets out standards for what sort of information can be placed online as an open data set, and it also calls for the Chief Information Officer to develop policies and procedures to implement those standards as well as the law in general, including the technical standards.

As a starting point, to be open data, information must at least be public information under the UIPA – in other words, if someone requested records containing that information under the UIPA, it would all be provided, unredacted. This law adds a few additional restrictions, though, in recognition of the fact that information provided as machine-readable open data is likely to end up much more widely disseminated and used than information in a paper record or a pdf that's made public under the UIPA. So the new law says that personally identifiable information cannot be posted unless the identified individual has consented, or the posting is "necessary to fulfill the lawful purposes or duties of the department." In other words, for something like campaign spending information, where knowing who made each donation and to what politician is pretty much the whole point, that information is appropriate as an open data set and in fact is already on the data.hawaii.gov site. But for something like salary information for public employees, even though it would be public including the names under the UIPA, it would not be appropriate for the state to take the initiative to put it online with the names as machine-readable open data, which could readily be pulled into any app or a business's marketing profile software and combined with, say, the public Facebook profile for that person and home ownership information or whatever else is available.

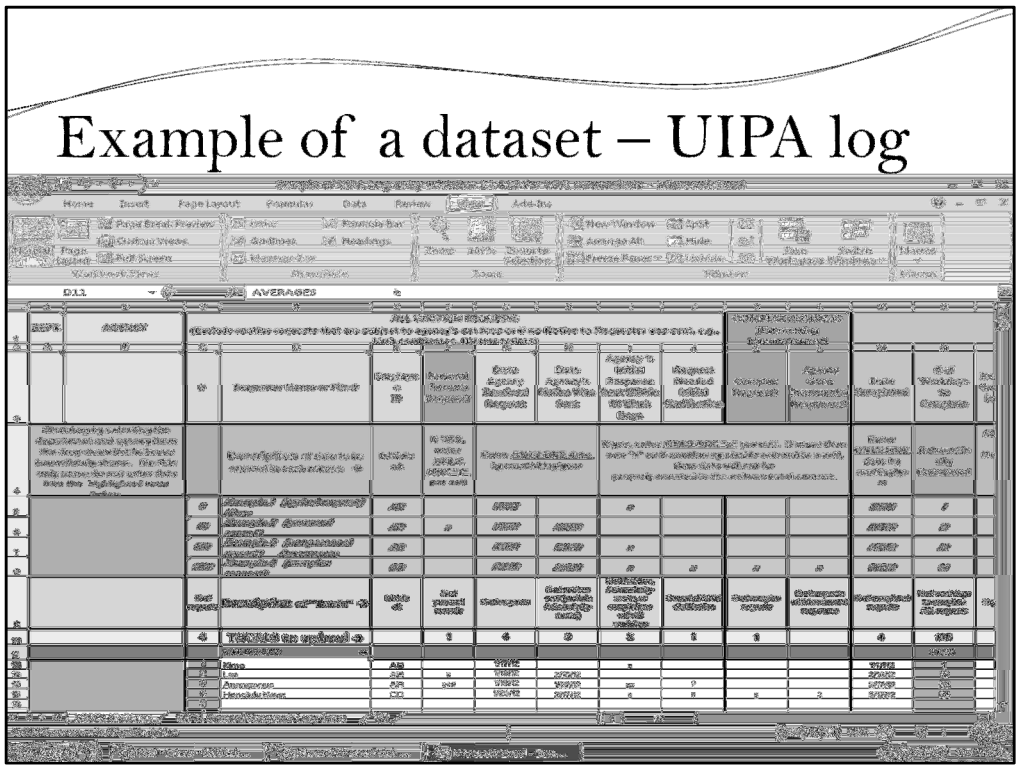
The law also bars putting information that is protected by law or contract online as open data, or data that the state is licensing from a third party, and it also provides that OIMT's open data policy shall not require departments to post information that is of minimal public interest – i.e. information that's mainly internal or operational.



The Open Data law is not a replacement for the UIPA – although they both deal with public disclosure of government information, it's in significantly different contexts. The UIPA covers individual requests, initiated by a particular requester and tailored to that requester's interests, and it works on the presumption that records are public unless the agency can show that they fall under one of the law's exceptions to disclosure. Disclosure of information as open data is a process that begins with the agency, and it applies to information that is of broader public interest and is in a form that allows it to be made machine-readable – i.e., databases, spreadsheets, not memoranda, typically.

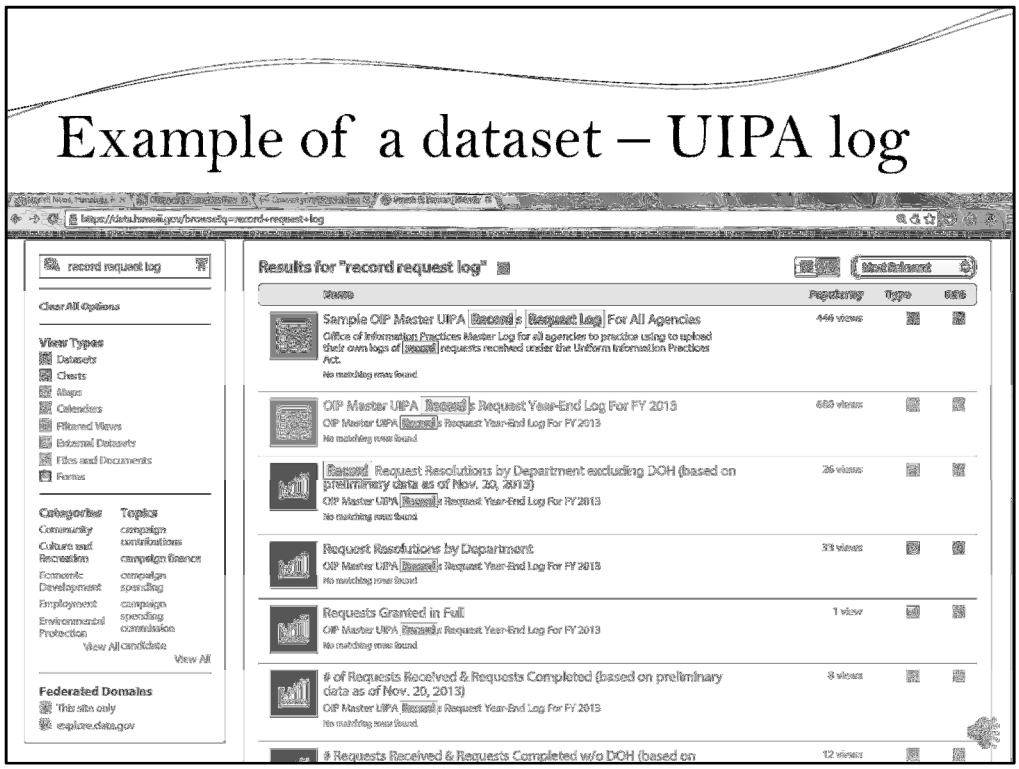
And the UIPA is a relatively slow process for the person looking for a piece of information, whereas with open data, once it's uploaded, it's there online to be looked at any time or automatically pulled into other programs or apps. Open data offers immediate satisfaction, but only so long as what the person is looking for is there online. A UIPA request takes time, but the requester can specify exactly what he or she is looking for.

Example of a dataset – UIPA log



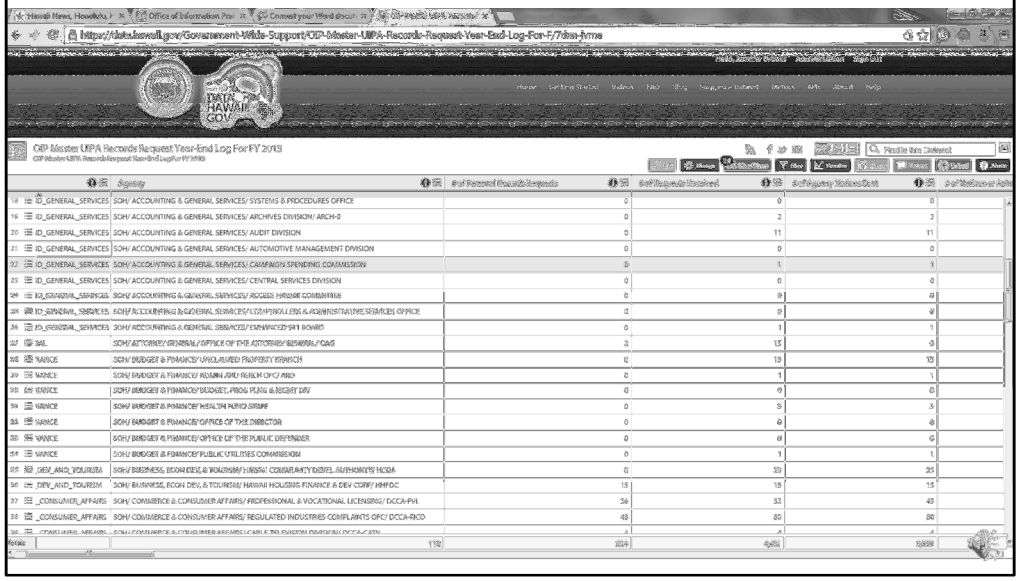
As an example of an open data set, let's take a look at the log of UIPA requests made to each agency, which each agency fills out using a spreadsheet form provided by OIP and then the log is periodically uploaded to the master log on data.hawaii.gov by each agency. Here's a sample set of data in the form of the original Excel spreadsheet, as it looks when the agency is filling it out.

Example of a dataset – UIPA log



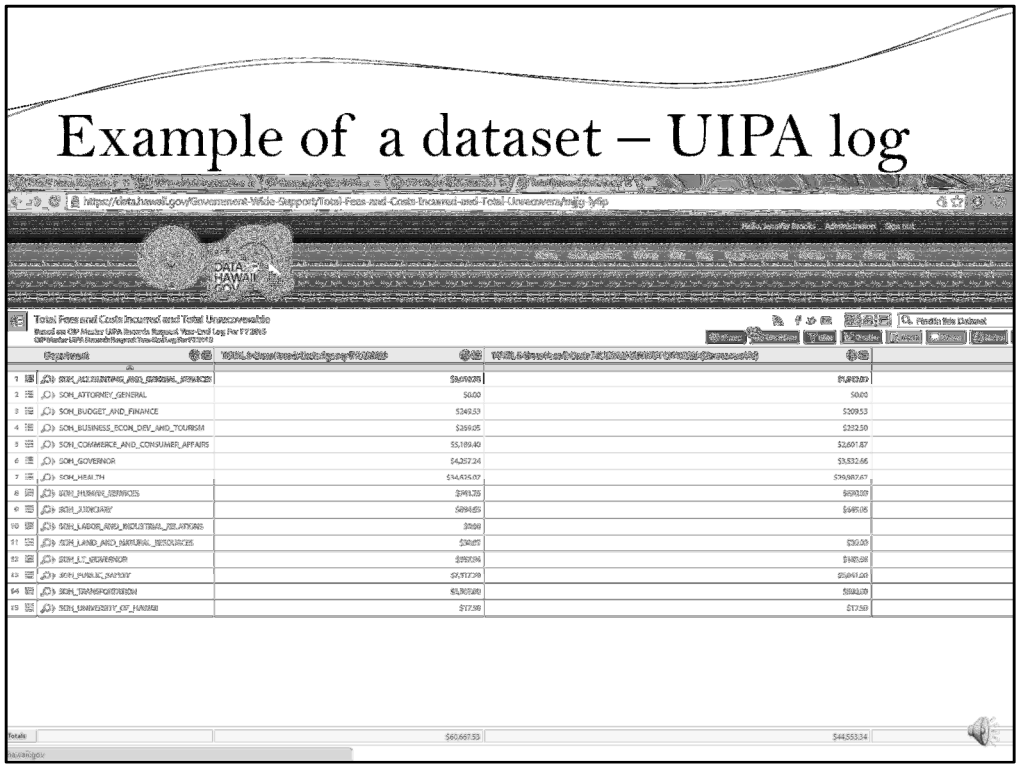
Here's that open data set made from that information, in other words the annual log of all record requests, showing up as a search result on data.hawaii.gov.

Example of a dataset – UIPA log



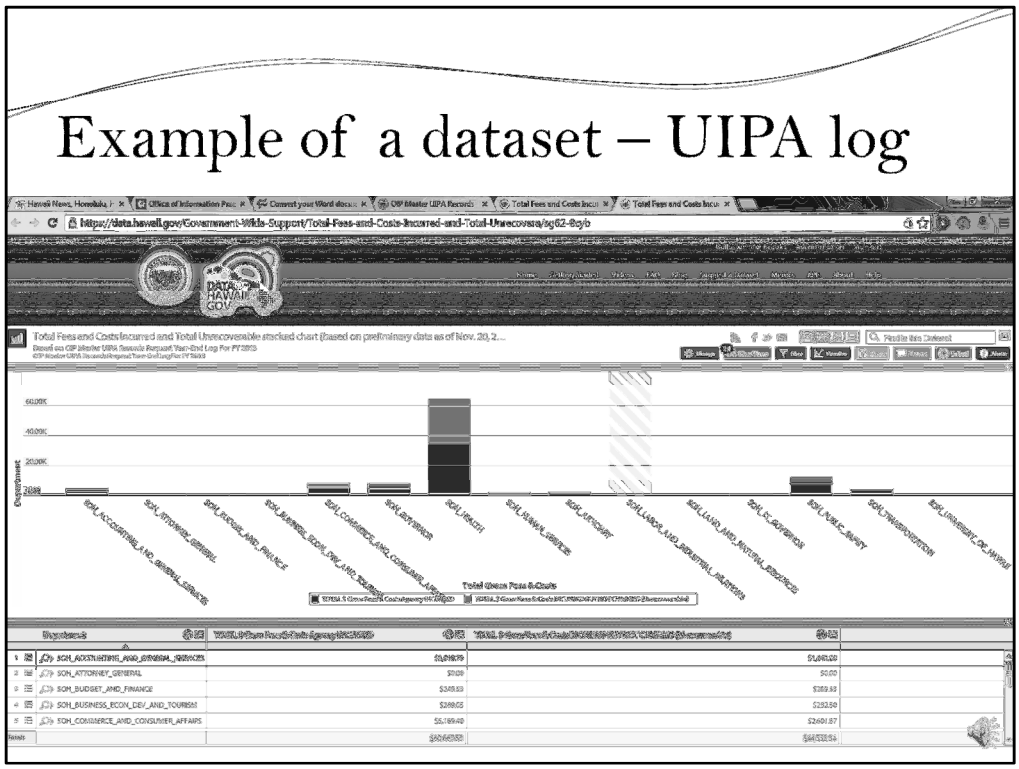
Now if we click on that search result, we'd get to the year-end log for FY2013, so this is the dataset as it looks on the data.hawaii.gov, and it's shown here in table form.

Example of a dataset – UIPA log



Now here it is in a view that is selecting only specified information – this one is looking specifically at total fees incurred, and how much of that represented fees that were incurred but unchargeable.

Example of a dataset – UIPA log



And here's that same drilled-down information, the total fees incurred, and how much of those total fees were fees that were not chargeable, but in a bar chart visualization. And this is done using the tools available right on the data.hawaii.gov site.

Detailed UIPA Log Instructions, Frequently Asked Questions, & Other Training Materials:

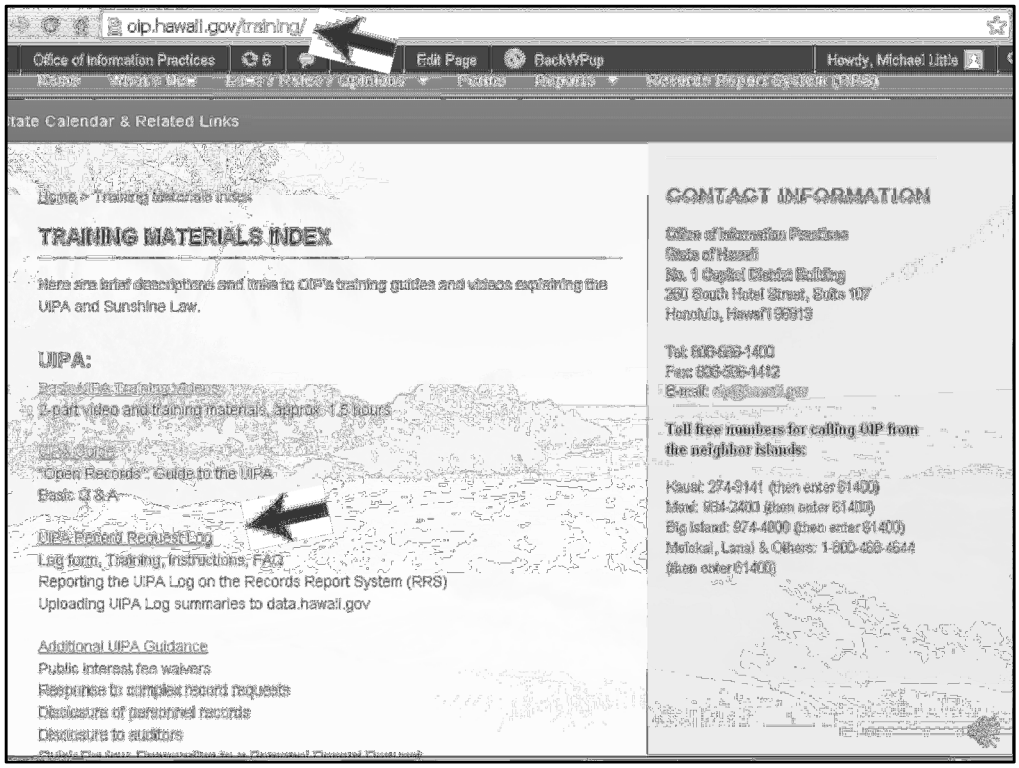
- OIP's website **oip.hawaii.gov**
- Click Training, then UIPA section to take you to **oip.hawaii.gov/training**

By the way, for anyone with questions about how an agency is supposed to use the OIP Record Request Log, training materials on how to use the Log, and also how to download the Log totals to data.hawaii.gov, are already on OIP's website, where there are also PowerPoint presentations on various topics, Frequently Asked Questions about the Log, detailed instructions, sample forms, and the Log form itself. You can go to OIP's training page at:

http://oip.hawaii.gov/training/

To get to OIP's website, go to **oip.hawaii.gov**, click on the training box in the box on the right, and look for the UIPA or Sunshine Law training materials, as the next two slides illustrate.

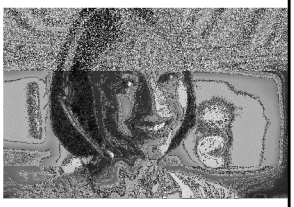
Here's the **OIP home page**, with the **Training** link on the right side.



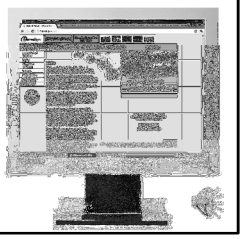
And here's the **UIPA training page**.

For UIPA Coordinators who have editing or publishing privileges, OIP has a separate short training session on how to upload the data sets onto data.hawaii.gov. That training is available on OIP's website.

Need Help?



- Call OIP **586-1400**
- E-mail: **oip@hawaii.gov**
- OIP website: **www.hawaii.gov/oip**



We thank you for attending this course and for your work in ensuring the public's right to open records and government transparency. We've covered a lot of different issues today, so we will be happy to answer your questions for anyone who wants to stick around after the end of the presentation. If we can't answer them now, you can always get help from OIP's staff attorneys by calling (808) 586-1400 or emailing OIP at **oip@hawaii.gov**.

Mahalo and aloha.