

OIP Update 2013 (UIPA & Sunshine Law)

Continuing Legal Education Course (1.0 MCPE credit)
Presented by the Office of Information Practices
and the Hawaii State Bar Association

January 2014

Judicial opinions

Hawaii Supreme Court: Kanahele v. Maui County Council, 130 Haw. 228, 307 P.3d 1174 (2013)

- Land Use Committee meeting October 18, 2007; continued 12 times until November 20, 2007 decision
- Maui County Council meeting February 8, 2008; meeting was continued 2 times and 14 memos were circulated between Council members before two bills passed first reading on February 14, 2008

Kanahele Circuit Court action

Filed March 5, 2008, seeking to enjoin the Council from implementing the bills:

- “First Disputed Action” – not accepting testimony or posting notices of Committee’s continued meetings
- “Second Disputed Action” – not accepting testimony or posting notices of Council’s continued meetings, and for circulating memos outside of Feb. 8 meeting
- “Third Disputed Action” – Council circulated proposed amendments before its Feb. 14 continuance, outside of meeting

Circuit Court and ICA ruled against petitioners

ICA majority:

- No SL limitation to a single continuance of meetings
- Memos were one-way communications that did not secure commitments or votes and were permitted communications

Judge Ginoza’s concurrence:

- Memos not OK
- But first reading was not “final action” under Sec. 92-3
- Even if there had been a final action, technical SL violations were voidable but not void under Sec. 92-11

Supreme Court’s ruling

Standard of review = “**palpably erroneous**”

- OIP is the agency charged with administering the SL 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**”

Continuances of meetings

Based on OIP Op. No. 01-06 and legislative history, Court held that Committee and Council did not violate the SL by continuing and reconvening their meetings beyond a single continuance.

Continuances are constrained by SL's spirit and purpose

Supreme Court's examples:

- If anticipated, include dates of continuances in agenda
- Hold separate meetings, with separate agendas, on different aspects of same bill
- Permit periodic testimony, as issues develop during deliberations
- Implied that oral notices of continuance were inadequate; notice "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'"

Members' memos to each other

Held: Not permitted interactions or "informational memoranda" that did not solicit votes

- Memos improperly advocated for adoption of proposals by detailing rationale, and solicited votes by asking for "favorable consideration," and asked others to "please contact me"
- Even if memos fell within a permitted interaction, they violated SL's spirit or requirements to decide or deliberate in open meetings
- Motion to reconsider was not purely procedural, and memos limited public scrutiny of deliberations and decision-making

"Final Action"

HRS Sec. 92-5(b): "... No chance meeting, permitted interaction, or electronic communication shall be used to circumvent the spirit or requirements of this part to make a decision or to deliberate toward a decision upon a matter over which the board has supervision, control, jurisdiction, or advisory power."

HRS Sec. 92-3: Open meeting requirements

HRS Sec. 92-11: "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."

"Final Action" – sec. 92-11

Petitioners did not appeal from the "final action," which means "the final vote required to carry out the board's authority on a matter."

- 90-day period to file a complaint seeking invalidation of board action begins on date of the final action
- Violations before "final action" may be voidable
- Kanahele petitioners never challenged the second and final reading of the bills on March 18, which was the "final action"
- Therefore, Council members' improper distribution of memos did not require invalidation of their final vote to pass the two bills on March 18

Attorney fees - remand

Because the Council violated the SL by distributing the memos, the Supreme Court remanded the case for a consideration of an attorney's fee award under HRS sec. 92-12

Impact: Continuances

- If expect substantial public interest, schedule more than one meeting date when setting an agenda and/or limit testimony at each meeting to specific topics
- If unexpectedly require continuance, then do so within 6 days of original meeting date; beyond that, continuances will be viewed with greater scrutiny since there is time for new agenda to be posted
- If have lengthy deliberations, consider holding a new meeting on specific issues arising during deliberations in order to obtain public testimony on those issues

Impact: Notice of Continuances

If meeting will be continued for longer than meal break or overnight recess, provide oral notice at meeting and also:

- announce continuation on board's webpage or electronic calendar;
- post original notice and agenda at meeting site and board's office with a note that it has been continued to a specified time and place; and
- notify people on board's e-mail list of the continuation and attach original agenda

Don't file a meeting notice as for a new meeting, unless board intends to hold a new meeting and will accept testimony again. Download OIP's continuance form from oip.hawaii.gov.

Impact: Memos between Members

"Informational" memos between board members:

- Should not ask for "favorable consideration" or state "please contact me"
- Should not advocate any position
- Should simply state language of proposed amendments and delineate additions/deletions to bills

Impact: Memos per Rules

2013 Maui County Council Rules implicitly OK:

- Rule 19(B): Distributed only at a meeting. Correspondence from any source that advocates a position on a pending bill or resolution or on an amendment to a pending bill or resolution shall not be distributed by a Council member to other members, except during a meeting on the bill or resolution

Impact: Memos per Rules

- Rule 19(c): May be distributed outside a meeting.
 1. A Council member may propose a written amendment of a pending bill or resolution at any time to members of the Council or the relevant committee; provided that the proposal shall only contain: (a) the text of the amendment; (b) a description of the amendment's direct effect on the bill or resolution; and (c) factual information to ensure that the proposal is appropriately processed.
 2. 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.

Impact: Memos by Staff

Memos prepared and distributed by staff to all Council/board members may be permitted if not used to circumvent SL:

- Staff should not be mere go-betweens to pass communications between board members
- Staff-prepared memos/reports may contain objective analyses, present pros and cons, compile members' input and present in aggregate form.

But board members must always discuss, deliberate, decide, and act on such matters as openly as possible

Impact: "Final Action"

"Final action" = "final vote required to carry out the board's authority on a matter."

- Does not define what constitutes a violation of SL that may warrant voiding of a board's action
- Even if violations are "cured" before final action is taken in compliance with SL, voiding may still occur under Sec. 92-11

Therefore, to void a board's action, the complaint should include information re: final vote.

"Final action" may be voidable, even if earlier violations are "cured."

Impact: Attorneys' fees

Attorneys' fees allowed under HRS Sec. 92-12(c)

- More lawsuits
- To avoid suits, follow Sunshine Law

Training at oip.hawaii.gov

Impact: OIP's authority

Hawaii Supreme Court recognized OIP's role as the administrative agency responsible for SL and gave great credence to OIP's opinions:

- Cited 7 OIP opinions
- Applied palpably erroneous standard of review found 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."

Boards must take OIP's decisions seriously, per Kanahele and 2012 statutory revisions

Appeal Rules

- Appeal Rules in force as of beginning of 2013

Appeal Rules

- Appeals law in 2012 gave agencies the right to appeal OIP decisions, but also set forth agencies' responsibility to do so if they object to a decision requiring disclosure of records (if agency fails to appeal it can't later contest the decision if requester has to go to court to enforce it)
- In light of the Supreme Court's deference to OIP's decisions in Kanahele, it behooves agencies to pay careful attention to OIP's rulings

Appeal Rules

- OIP's appeals rules now set forth how appeals to OIP are processed, including any requests for reconsideration of OIP's decisions and the record for any judicial appeals of OIP's decisions

Appeal Rules

- Rules cover Sunshine Law and UIPA disputes based on specific situations
 - Agency has denied access to records
 - Board has done something someone thinks violated Sunshine
 - Someone wants to know if an existing group is a "board"
- Rules do not cover general advice, advisory opinions, training, other sorts of assistance

Appeal Rules

- Sets deadlines for filing appeal
- Sets basic standards for appeal and response
- Continues to allow OIP to communicate with interested parties and others ex parte as a general rule

Appeal Rules

- Provides for in camera review, with special procedure for attorney-client privilege issues
- Allows for mediation or conferences as appropriate
- Sets standard for reconsideration
- Requires keeping record on appeal

OIP Opinions

- Personal Records— OIP Op. Ltr. No. F13-01
- New Guidance on:
 - * What is a “Personal Record” (P.R.)?
 - * Which portions of a record do you apply:
 - Part III of the UIPA (P.R. ONLY) OR
 - Part II of the UIPA (All other info NOT P.R.)
 when an individual requests access to a record?

Personal Records Opinion

- **Overruled:** Rebuttable presumption that the mere mention of a individual’s name makes a government record, in its entirety, a “personal record”
- **Overruled:** Automatically applying Part III of the UIPA (personal records access) to an entire record when an individual’s name is mentioned in the record.

Personal Records Opinion

New Analytical Framework—4 Questions to Ask

Question 1

Is the requested record the “personal record” of the individual who is seeking access under Part III of UIPA?

→ If yes →

Question 2

Does a Part III exemption (HRS § 92F-22) allow the personal record to be withheld from individual requesting access?

Personal Records Opinion

New Analytical Framework—4 Questions to Ask

Question 3

Is any portion a govt. record subject to public disclosure under Part II?

→ If yes →

Question 4

Does a Part II exception (HRS § 92F-13) allow the personal record to be withheld from individual requesting access?

Legislation – Open Data

- Open data is
 - public information
 - of general public interest
 - machine-readable format
- Law is aspirational rather than mandatory
 - No minimum statutory requirement for uploading data
 - People cannot require agencies to put information online

Legislation – Open Data

- Standards for what sort of information should be placed online
 - Generally not individually identifiable
 - Not protected by law or contract
 - Of general public interest, not primarily internal/operational
 - OIMT will provide further standards to prioritize what information goes online

Legislation – Open Data

- Not a replacement for UIPA
 - UIPA is for individually tailored request and responses; open data is of broad public interest
 - UIPA is relatively slow; open data is there online to be looked at or pulled into other programs or apps

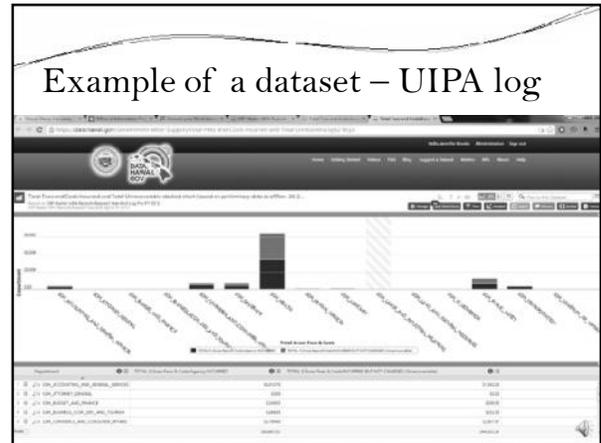
Example of a dataset – UIPA log

Example of a dataset – UIPA log

Example of a dataset – UIPA log

Example of a dataset – UIPA log

Request ID	Date	Status
1. JY1-100-000001-000001-000001	02/17/14	000001
2. JY1-100-000001-000001-000002	02/17/14	000002
3. JY1-100-000001-000001-000003	02/17/14	000003
4. JY1-100-000001-000001-000004	02/17/14	000004
5. JY1-100-000001-000001-000005	02/17/14	000005
6. JY1-100-000001-000001-000006	02/17/14	000006
7. JY1-100-000001-000001-000007	02/17/14	000007
8. JY1-100-000001-000001-000008	02/17/14	000008
9. JY1-100-000001-000001-000009	02/17/14	000009
10. JY1-100-000001-000001-000010	02/17/14	000010



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

The screenshot shows the OIP website homepage. The navigation menu includes: Home, What's New, Laws / Rules / Opinions, Forms, Reports, Records Report System (RRS), State Calendar & Related Links, What's New, Laws / Rules / Opinions, Training, and Contact Us. An arrow points to the 'Training' link.

The screenshot shows the 'TRAINING MATERIALS INDEX' page. It lists various training materials, including 'UIPA: Basic UIPA Training Videos' (a 2-part video and training materials, approx. 1.5 hours). An arrow points to this link. Other links include 'UIPA Guide', 'Open Records', 'UIPA Records Log', 'Log Rpt., Training, Instructions, FAQ', 'Reporting the UIPA Log on the Records Report System (RRS)', 'uploading UIPA Log summaries to data.hawaii.gov', and 'Additional UIPA Guides'.

Need Help?

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