

Office of Information Practices

State of Hawaii

Annual Report 2014*



This report to the Governor and the Legislature summarizes the activities and findings of the Office of Information Practices from July 1, 2013, to June 30, 2014, in the administration of the public records law (the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes) and the open meetings law (the Sunshine Law, Part I of chapter 92, Hawaii Revised Statutes).

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History



In 1988, the Legislature enacted the comprehensive Uniform Information Practices Act (Modified) (“UIPA”), codified as chapter 92F, Hawaii Revised Statutes, to clarify and consolidate the State’s then existing laws relating to public records and individual privacy, and to better address the balance between the public’s interest in disclosure and the individual’s interest in privacy.

The UIPA was the result of the efforts of many, beginning with the individuals asked in 1987 by then Governor John Waihee to bring their various perspectives to a committee that would review existing laws addressing government records and privacy, solicit public comment, and explore alternatives to those laws. In December 1987, the committee’s work culminated in the extensive *Report of the Governor’s Committee on Public Records and Privacy*, which would later provide guidance to legislators in crafting the UIPA.

In the report’s introduction, the Committee provided the following summary of the underlying democratic principles that guided its mission, both in terms of the rights we hold as citizens to participate in our governance as well as the need to ensure government’s responsible maintenance and use of information about us as citizens:

Public access to government records ... the confidential treatment of personal information provided to or maintained by the government ... access to information about oneself being kept by the government. These are issues which have been the subject of increasing debate over the years. And well such issues should be debated as few go more to the heart of our democracy.

We define our democracy as a government of the people. And a government

of the people must be accessible to the people. In a democracy, citizens must be able to understand what is occurring within their government in order to participate in the process of governing. Of equal importance, citizens must believe their government to be accessible if they are to continue to place their faith in that government whether or not they choose to actively participate in its processes.

And while every government collects and maintains information about its citizens, a democratic government should collect only necessary information, should not use the information as a “weapon” against those citizens, and should correct any incorrect information. These have become even more critical needs with the development of large-scale data processing systems capable of handling tremendous volumes of information about the citizens of this democracy.

In sum, the laws pertaining to government information and records are at the core of our democratic form of government. These laws are at once a reflection of, and a foundation of, our way of life. These are laws which must always be kept strong through periodic review and revision.

Although the UIPA has been amended over the years, the statute has remained relatively unchanged. Experience with the law has shown that the strong efforts of those involved in the UIPA’s creation resulted in a law that anticipated and addressed most issues of concern to both the public and government.

Under the UIPA, all government records are open to public inspection and copying unless an



exception in the UIPA authorizes an agency to withhold the records from disclosure.

The Legislature included in the UIPA the following statement of its purpose and the policy of this State:

In a democracy, the people are vested with the ultimate decision-making power. Government agencies exist to aid the people in the formation and conduct of public policy. Opening up the government processes to public scrutiny and participation is the only viable and reasonable method of protecting the public's interest. Therefore the legislature declares that it is the policy of this State that the formation and conduct of public policy—the discussions, deliberations, decisions, and action of government agencies—shall be conducted as openly as possible.

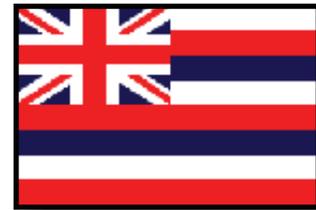
However, the Legislature also recognized that “[t]he policy of conducting government business as openly as possible must be tempered by a recognition of the right of the people to privacy, as embodied in section 6 and section 7 of Article I of the Constitution of the State of Hawaii.”

Accordingly, the Legislature instructed that the UIPA be applied and construed to:

- (1) Promote the public interest in disclosure;
- (2) Provide for accurate, relevant, timely, and complete government records;
- (3) Enhance governmental accountability through a general policy of access to government records;
- (4) Make government accountable to individuals in the collection, use, and dissemination of information relating to them; and
- (5) Balance the individual privacy interest and the public access interest, allowing access unless it would constitute a clearly unwarranted invasion of personal privacy.

In 1988, the Office of Information Practices (OIP) was created by the UIPA to administer that statute. In 1998, OIP was given the additional responsibility of administering Hawaii's Sunshine Law, part I of chapter 92, HRS, which had been previously administered by the Attorney General's office since the law's enactment in 1975.

Like the UIPA, the Sunshine Law opens up the governmental processes to public scrutiny and participation by requiring state and county boards to conduct their business as transparently as possible in meetings open to the public. Unless a specific statutory exception is provided, the Sunshine Law requires discussions, deliberations, decisions, and actions of government boards to be conducted in a meeting open to the public, with public notice and with the opportunity for the public to present testimony.



OIP provides legal guidance and assistance under both the UIPA and Sunshine Law to the public as well as all state and county boards and agencies. Among other duties, OIP also provides guidance and recommendations on legislation that affects access to government records or board meetings. The executive summary provides an overview of OIP's work during the past fiscal year.



Executive Summary



The state Office of Information Practices (OIP) administers Hawaii's open government laws: the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), requiring open access to government records, and the Sunshine Law, Part I of chapter 92, Hawaii Revised Statutes, requiring open meetings. Additionally, following the enactment of Act 263, SLH 2013 (see HRS § 27-44), OIP was charged with assisting the state Office of Information Management and Technology (OIMT) to implement Hawaii's Open Data policy, which seeks to increase public awareness and electronic access to non-confidential and non-proprietary data and information available from state agencies; to enhance government transparency and accountability; to encourage public engagement; and to stimulate innovation with the development of new analyses or applications based on the public data made openly available by the state. Besides providing relevant background information, this annual report details OIP's performance for fiscal year 2014, which began on July 1, 2013, and ended on June 30, 2014.

OIP serves the general public and the state and county government entities by providing training and legal guidance regarding the UIPA and Sunshine Law and assistance in obtaining access to public records and meetings. As a neutral third party, OIP resolves UIPA and Sunshine Law disputes through a free and informal process that is not a contested case or judicial proceeding.

With 8.5 full-time equivalent (FTE) positions, OIP performs a variety of services. In addition to resolving formal cases through opinions or correspondence, OIP provides same-day advice over the telephone, via e-mails, or in person through its Attorney of the Day (AOD) service. OIP prepares extensive training materials and provides in-person as well as online training programs, including continuing legal education programs for attorneys. During the legislative

session, OIP monitors hundreds of bills and resolutions and provides proposals and testimony on legislation impacting open government issues. OIP also monitors lawsuits that involve the UIPA or Sunshine Law. OIP proactively undertakes special projects, such as the UIPA Record Request Log, or must occasionally draft or revise its administrative rules. Throughout the year, OIP shares UIPA, Sunshine Law, and Open Data updates and information with interested groups and members of the public, state and county government agencies, board members and staff, and the media. The chart below provides

	<u>2011</u>	<u>2012</u>	<u>2013</u>	<u>2014</u>
Informal Requests (AODs)	676	940	1,050	1,109
Formal Requests	142	135	177	204
Training	11	25	16	19
#Training Materials	8	14	19	23
# Legislation Monitored	180	267	134	181
#Lawsuits Monitored	1	4	7	17
# Public Communications	7	48	30	35
Rules	0	0	0	1
Special Projects	-	-	14	14

Figure 1

an overview of the various types of services performed by OIP since FY 2011.

Additional details and statistics are found later in this annual report, along with OIP's goals, objectives and action plan. This Executive Summary provides an overview, as follows.

Budget and Personnel

After years of budget cuts, work furloughs, pay cuts, and other restrictions, OIP fortunately received additional resources in fiscal biennium 2014-15 to fulfill its new open data responsibilities and to address the increasing number of requests it is receiving from agency personnel and members of the general public. For fiscal biennium 2014-15, OIP was authorized to fill a fifth attorney position created by Act 263 to assist with open data and open government matters, and one of OIP's most senior attorneys was appointed to that position. Thus, in FY 2014, OIP operated with 8.5 full-time equivalent (FTE) positions, including 3.5 FTE staff attorneys and a 1.0 FTE open data attorney.

OIP's budget allocation is the net amount that it was authorized to use of the legislatively appropriated amount minus administratively imposed budget restrictions. In FY 2014, with the additional funding through Act 263 and for collective bargaining increases, OIP's total allocation was \$539,757, up from \$390,933 in FY 2013. See **Figure 3** on page 17. OIP's allocation in FY 2014 for personnel costs was \$450,895 and for operational costs was \$88,862. See **Figure 3** on page 17. The unusually high allocation for operational costs in FY 2014 is due in large part to the acquisition of new computer equipment and software; travel expenses to conduct training on all neighbor islands for the introduction of the UIPA Record Request Log; and unspent funds resulting from budget restrictions imposed earlier in the year and delays in obtaining approvals to hire.

Legal Assistance, Guidance, and Rulings

One of OIP's core functions is responding to requests for assistance from members of the public, government employees, and board members and staff. In FY 2014, OIP received 204 formal and 1,109 informal requests for assistance for a total of 1,313 requests, which is a 7.0% increase over FY 2013 and a 60% increase since FY 2011. See **Figure 1** on page 6. Formal and informal requests for assistance come from the public and from government boards and agencies seeking OIP's guidance regarding the application of and compliance with the UIPA, Sunshine Law, and the State's Open Data policy; for assistance in obtaining records from government agencies and appeals from agencies' denial of access under the UIPA; and for advisory opinions regarding the rights of individuals or the functions and responsibilities of agencies and boards under the UIPA and the Sunshine Law.

Eighty-four percent of the requests for assistance (1,109 requests) are typically responded to within the same day through OIP's Attorney of the Day (AOD) service. Significantly, AOD inquiries have increased 64% from 676 in FY 2011 to 1,109 in FY 2014. While AOD inquiries have been taking an increasing amount of the staff attorneys' time, agencies typically conform to this general advice given informally, which thus prevents or resolves many disputes that would otherwise lead to more labor-intensive formal cases.

Many situations, however, are not amenable to quick resolution and OIP must open formal cases, which require more time to investigate, research, review, and resolve. While most formal requests for assistance are resolved through correspondence with the parties, OIP must sometimes issue formal or informal (memorandum) opinions. Because OIP already has a considerable body of precedent-setting formal opinions that have resolved many legal questions, OIP has been issuing more memorandum opinions that are based on prior precedent and are binding only on the parties directly involved. Additionally, because agencies find it easier to provide records, revise

agendas, or re-do meetings than to engage in a protracted dispute with OIP, they will typically follow OIP's advice and will request an opinion only when there is a legitimate dispute or a need for legal clarity. Finally, where a formal opinion may be forthcoming, OIP usually obtains the agencies' cooperation and may sometimes resolve a case without a formal opinion because the agencies do not want to risk having an adverse decision rendered by OIP that would be difficult to challenge on appeal to the courts, due to the "palpably erroneous" standard of review that was incorporated into the UIPA and Sunshine Law with the passage of Act 176 in 2012. Thus, most cases are resolved by OIP without opinions. Nevertheless, in FY 2014, OIP issued two formal opinions and 27 informal opinions, for a total of 29 opinions, which was ten more opinions than in FY 2013.

In FY 2014, OIP also resolved 37% more formal cases (195) as compared to the 142 cases resolved the prior year. Notably, OIP succeeded in significantly reducing the age of pending cases by 8 years: while one 12-year-old case was resolved in FY 2011, OIP's two oldest cases resolved in FY 2014 were four years old.

Despite the substantial increase in cases resolved, the number of pending cases increased nearly 8% in 2014 to 122 (as compared to 113 in FY 2013), largely due to a 15% increase in the number of formal cases (204) filed in FY 2014 as compared to the prior year (177). See **Figure 1** on page 6.

Of the formal cases, a disproportionately large number have been filed in recent years by a small group of persons: in FY 2014, 36% (73) of the formal requests came from one individual (10 cases), one couple (19 cases), and a group of inmates (44 cases). Moreover, due to litigation in the courts, over which OIP has no control, OIP has suspended work on two pending cases. Without these cases that are in litigation or filed by repeat requesters, OIP would have had only 30 formal cases pending at the end of FY 2014. To address the current backlog of cases in a manner that is fair to all requesters, OIP's priority for FY 2015 is to resolve the 30 pending cases not tied

to litigation or filed by the top three requester groups and to resolve the remaining cases as OIP's resources permit.

To meet these goals and resolve formal cases in a timely manner, OIP will need to retain the open data attorney position that is currently funded only through the end of FY 2015. OIP will also seek to rearrange currently authorized positions and obtain additional funding so that its legal resources can be increased to a total of 5.0 FTE attorneys, who can respond to AOD inquiries and resolve formal cases as OIP's anticipated workload continues to grow.

Education

In addition to opinions, OIP provides guidance on the UIPA and Sunshine Law to agencies and members of the public through videos, written guides, webinars, in-person training sessions, continuing legal education seminars, an online Sunshine Law quiz, and other means. "Quick Reviews" were initiated in FY 2013 to provide guidance and practical tips addressing questions of immediate widespread interest or which often arise in AOD inquiries. Since FY 2011, OIP has almost tripled the number of training materials that are freely available on its website, from 8 in FY 2011 to 23 in FY 2014. See OIP Service Overview, **Figure 1** on page 6.

All of OIP's training materials, the UIPA and Sunshine Law statutes, administrative rules, opinions, and a subject matter index of opinions can be easily found on OIP's website at **oip.hawaii.gov**. Moreover, OIP's website links to the State Calendar, where public meeting agendas are electronically posted, and to other relevant state, county, and federal websites. By using and improving its technological resources to cost-effectively communicate and expand its educational efforts, OIP has been able to more efficiently leverage the time and knowledge of its small staff and to effectively make OIP's training and advice freely and readily available to all members of the public, and not just to government employees or board members.

In FY 2014, the UIPA Record Request Log was expanded to cover the four counties, the Office of Hawaiian Affairs (OHA), and the Oahu Metropolitan Planning Organization (OMPO), and OIP provided in-person training on Oahu and all neighbor islands. Thus, beginning in FY 2015, all counties, OHA, and OMPA have joined all state departments, the offices of the Governor and Lt. Governor, the Judiciary, the University of Hawaii, and other independent agencies, in using the UIPA Record Request Log to track record requests and ensure compliance with the UIPA. Besides helping agencies to keep track of record requests and costs, the Log provides detailed instructions and training materials that educate agency personnel on how to timely and properly fulfill UIPA requests, and the Log collects important open data information showing how agencies are complying with the UIPA. In FY 2015, OIP will prepare a year-end report summarizing the data posted by government agencies on the Master Log for FY 2014, which will be posted on OIP's website at oip.hawaii.gov/reports.

Open Data and Communications

The UIPA Record Request Log is part of OIP's open data efforts, which seek to increase public awareness and electronic access to non-confidential and non-proprietary data and information available from state agencies; to enhance government transparency and accountability; to encourage public engagement; and to stimulate innovation with the development of new analyses or applications based on the public data made openly available by the state. The Log provides OIP and the public with valuable information and accountability as to how many UIPA record requests are being made, how they are being resolved, how long it takes to complete requests, and how much they are costing the government and requesters. The Log process also helps to educate the agencies on how they can use the State's open data portal at data.hawaii.gov to upload their own information

online to make it more readily accessible and usable by the public.

The Log is just one new way that OIP has demonstrated its commitment to an open data policy. OIP has long embraced the open data concept by making its opinions, subject matter index, and training materials easily accessible on its website at oip.hawaii.gov for anyone to freely use. What's New articles informing readers of OIP's latest training materials, legislation, and open government issues are frequently emailed to government agencies, media representatives, community organizations, and members of the public, and past articles are posted in the What's New archive on OIP's website at oip.hawaii.gov.

In addition to its own open data efforts, OIP participates on both the Open Data Council and the Access Hawaii Committee to encourage the creation of electronic data sets that can make government information more readily accessible to the public. OIP is helping OIMT, as the lead agency, to draft the state's Open Data policy and procedures and to advise agencies on how to select data to post online. To give people ideas as to how public information may be visualized and eventually used to create other data bases or solutions, OIP has created charts and graphs based on data posted online by other agencies, provided links to where the data can be found, and publicized the open data efforts of other agencies. In the spirit of open data, OIP is calling upon the public for help in developing apps that anyone can easily use to create customized visualizations of the data that is being posted on the Master Log at data.hawaii.gov so that the public can examine and compare specific agencies' or departments' results to each other or to the state or county as a whole, and thus encourage government accountability and compliance with the UIPA.

In FY 2015, OIP will continue to champion open data efforts and encourage other state and county government agencies to make public data readily available online.

Legislation

OIP serves as a resource for government agencies in reviewing their procedures under the UIPA, Sunshine Law, and Open Data policy. OIP continually receives comments on these laws and makes recommendations for legislative changes to amend or clarify areas that have created confusion in application or work counter to the legislative mandate of open government. During the 2014 legislative session, OIP reviewed and monitored 181 bills and resolutions affecting government information practices, and testified on 28 of these measures. See **Figure 1** on page 6.

While OIP was originally created in 1988 as a permanent agency within the Department of the Attorney General (AG), it was “temporarily” moved to the Lt. Governor’s office in 1998 when the administration of the Sunshine Law was transferred to OIP from the AG. Because the Hawaii Constitution does not allow the Governor and Lt. Governor’s offices to have permanent agencies attached to them, OIP will advocate in FY 2015 for legislation to find a new “home” where it can retain its independence while being permanently attached for administrative purposes. A potential new home would be the state Department of Accounting and General Services (DAGS), where other open government agencies are administratively attached, namely the State Campaign Spending Commission and the Elections Commission. DAGS is also where agencies related to records creation, management, and retention are located, such as the Office of Information Management and Technology and the State Archives.

Litigation

OIP monitors litigation in the courts that raise issues under the UIPA or the Sunshine Law or that challenge OIP’s decisions, and may intervene in those cases. A person filing a civil action relating to the UIPA is required to notify OIP in writing at the time of filing. OIP tracked 17 lawsuits that were closed or still pending at the end of FY

2014. See **Figure 1** on page 6. Summaries of each case are provided in the Litigation section of this report.

Records Report System

OIP is directed by statute to receive and make publicly available reports of records that are maintained by state and county agencies. These reports are maintained on the Records Report System (RRS), an online database which contains the titles of over 29,000 government records that may be accessed by the public. See **Figure 16** on page 58. Although the actual records are not with OIP and instead remain with the originating agency, OIP assists agencies in filing and updating their records reports on the RRS database that OIP administers. OIP has created a guide for the public to locate records, to retrieve information, and to generate reports from the RRS, which the public can access through OIP’s website at oip.hawaii.gov.

Since the fall 2012 launch of the state’s **data.hawaii.gov** website, the RRS is playing a greater role in serving as a reference point in agencies’ efforts to determine what datasets they currently maintain are candidates for publication on data.hawaii.gov, while also ensuring that confidential data is not inadvertently posted onto the website. In FY 2015, OIP will continue to work closely with OIMT to revise or improve the RRS policies and procedures in a manner that will encourage open data while protecting private or confidential information.



Goals, Objectives, and Action Plan



Pursuant to Act 100, SLH 1999, as amended by Act 154, SLH 2005, OIP presents its Goals, Objectives, and Action Plan for One, Two, and Five Years, including a report on its performance in meeting previously stated goals, objectives, and actions.

OIP's Mission Statement

“Ensuring open government while protecting your privacy.”

Statement of Goals

OIP's overall goal is to fairly and reasonably construe and apply the Uniform Information Practices Act (Modified), chapter 92F, HRS (UIPA), and the Sunshine Law, Part I of chapter 92, HRS, in order to achieve the common purpose of both laws, which is as follows:

In a democracy, the people are vested with the ultimate decision-making power. Government agencies exist to aid the people in the formation and conduct of public policy. Opening up the government processes to public scrutiny and participation is the only viable and reasonable method of protecting the public's interest. Therefore the legislature declares that it is the policy of this State that the formation and conduct of public policy—the discussions, deliberations, decisions, and action of government[al] agencies—shall be conducted as openly as possible.

With the passage of Act 263, SLH 2013 (see HRS § 27-44), OIP has adopted another goal to properly implement Hawaii's Open Data policy, which seeks to increase public awareness and

electronic access to non-confidential and non-proprietary data and information available from state agencies; to enhance government transparency and accountability; to encourage public engagement; and to stimulate innovation with the development of new analyses or applications based on the public data made openly available by the state.

Objectives

- **Legal Guidance.** Provide legal guidance to members of the public and all state and county agencies regarding their open government rights and responsibilities under the UIPA and Sunshine Law, and OIP's related administrative rules.
- **Investigations and Dispute Resolution.** Assist the general public, conduct investigations, and provide an informal dispute resolution process as an alternative to court actions filed under the UIPA and Sunshine Law, and resolve appeals under section 231-19.5(f), HRS, arising from the Department of Taxation's decisions concerning the disclosure of the text of written opinions.
- **Training and Assistance.** Train state and county agencies and their legal advisors regarding the UIPA and Sunshine Law, and assist them in creating policies and procedures to provide open data in accordance with these laws.

- **Records Report System.** Maintain the Records Report System (RRS) and assist agencies in filing reports for the RRS with OIP.
- **Legislation and Lawsuits.** Monitor legislative measures and lawsuits involving the UIPA and Sunshine Law, and provide testimony or legal intervention, as may be necessary.

Policies, Action Plan, and Timetable to Implement Goals and Objectives in One, Two, and Five Years

Since FY 2011, OIP has focused its limited resources on training and communication in order to cost-effectively provide services to the greatest potential number of people and increase compliance by more government agencies. As a result, agency personnel and the general public appear to now have greater awareness and knowledge of UIPA and Sunshine Law issues. While OIP will continue its training and communication efforts, OIP's action plan for the next few years will be to focus on reducing its backlog of formal cases in a manner that is fair to all requesters. Additionally, in FY 2015, OIP will be supporting legislation to provide it with a permanent home within a state department for administrative purposes. For the long term, OIP will continue to encourage agencies to electronically post open data on **data.hawaii.gov** and to use the UIPA Record Request Log, so that OIP will have reliable data to consider when it revises or adopts administrative rules, which is anticipated to occur in FY 2019.

Year One:

Legal Guidance. While OIP typically resolves 84% of its cases on the same day through its informal AOD service, many requests for OIP's assistance require much more staff time and resources and involve the opening of formal cases. In FY 2014, OIP opened 204 formal cases at the

request of government agencies, private organizations, and the public. Thanks to the addition of another staff attorney, OIP resolved a record number of formal cases (195) in FY 2014, which was a 37% increase in case resolution over the prior year. Over the past three years, OIP also succeeded in significantly reducing the age of the oldest pending cases from 12 years to 4 years.

Despite significantly resolving more cases and reducing the age of pending cases, OIP ended FY 2014 with a backlog of 122 cases. The 8% increase in OIP's backlog is the result of a 15% increase in the number of formal cases filed last year. Additionally, OIP's progress in resolving formal cases has been slowed by the need to respond daily to AOD inquiries, which have increased 64% from 676 in FY 2011 to 1,109 in FY 2014.

Notably, OIP continues to receive a disproportionately large number of formal cases from a small group of persons: in FY 2014, 73 (36%) of the formal requests came from one individual (10 cases), one couple (19 cases), and a group of inmates (44 cases). Moreover, two of the pending cases are tied to litigation in the courts, over which OIP has no control. Without these 75 cases in litigation or by repeat requesters, OIP would have had only 47 pending formal cases, which would be a reasonable ongoing workload.

For FY 2015, OIP's goal will be to reduce the age and number of formal cases that are from FY 2014 or earlier, in a manner that is fair to all requesters.

Action: Reduce the age and number of OIP's formal cases filed before FY 2015 that are not in litigation or filed by the top three groups of repeat requesters.

To address the current backlog of 122 cases in a manner that is fair to all requesters, OIP's priority for FY 2015 is to resolve the pending cases not tied to litigation or filed by the top three requester groups. As resources permit, OIP

will resolve the remaining pending and new cases.

To meet these goals and timely resolve formal cases despite an anticipated increase in workload, OIP will need to retain the open data attorney position that is currently funded only through the end of FY 2015. OIP will also need funding to retain its existing staff and maximize its current authorized positions.

Investigations and Dispute Resolution. OIP will continue to investigate claimed violations of the UIPA and Sunshine Laws and issue decisions in response to these claims. OIP's reviews are not contested cases under chapter 91, HRS, and requesters may seek direct relief from the courts instead of from OIP.

Action: Maintain current efforts to promptly and fairly complete investigations and resolve disputes.

Training and Assistance. OIP will continue its action plan to provide training videos, guides, and other written materials online at **oip.hawaii.gov** and will supplement its online training with customized live training for state and county government entities. In FY 2015, OIP will supplement its training and assistance with the following action to achieve its goal of implementing the state's Open Data policies.

Action: Encourage state agencies to electronically post open data onto data.hawaii.gov.

Act 263, SLH 2013, requires each Executive Branch department to use reasonable efforts to make electronically available to the general public, through the State's open data portal at **data.hawaii.gov**, appropriate and existing electronic data sets that the departments maintain. Although the Office of Information Management and Technology (OIMT) is the lead agency for open data efforts, Act 263

authorized the creation of an attorney position in OIP to help promote open data and compliance with the UIPA. One of OIP's most experienced attorneys has filled this position and is working closely with OIMT to create open data policies, procedures, and standards consistent with the UIPA and state and federal laws relating to security and privacy, and to assist state agencies in determining whether data sets are appropriate for posting on data.hawaii.gov and their agency websites. As this attorney position has been authorized only for fiscal biennium 2014-15, its continued funding is a top priority for OIP in FY 2015.

Consistent with the Open Data policy, OIP posts all of its own opinions, training materials, reports, and What's New communications on its website at **oip.hawaii.gov**, which links to the State's open data portal at data.hawaii.gov.

Additionally, OIP developed the UIPA Record Request Log as a tool to help government agencies (1) keep track of record requests by the general public; (2) report the numbers and types of record requests and their outcomes to OIP; (3) properly assist requesters and comply with the UIPA; (4) easily calculate fees and costs; and (5) advance the UIPA's goal to keep government open and agencies accountable to the public. The results of all agencies within each department are summarized on the Master UIPA Record Request Log posted on the State's open data website at data.hawaii.gov, where members of the public as well as the agencies themselves can review how well the agencies are meeting their UIPA responsibilities.

In FY 2014, all 17 state Executive Branch departments, the offices of the Governor and the Lt. Governor, the

University of Hawaii, and the Judiciary were using the Log and reported results on the Master Log at data.hawaii.gov. At the end of FY 2014, the Log was also expanded to cover the four counties, OHA, and the Oahu Metropolitan Planning Organization (OMPO). As part of OIP's Training and Assistance objective, OIP will strive, by the end of FY 2015, to have all of the above-named agencies using the UIPA Record Request Log and reporting their summaries on the Master Log at data.hawaii.gov.

Records Report System. The RRS has been accessible and used by the agencies via the internet since 2004. The RRS requires agencies to enter, among other things, public access classifications for their records and to designate the agency official having control over each record. To protect the security of private or confidential information, however, it is necessary for the agencies to identify data sets that should not be publicly disclosed. The RRS provides an existing framework that can be better utilized by agencies to identify private or confidential records that should be secured and not publicly disclosed.

Action: Continue to train and advise the Office of Information Management and Technology (OIMT) and other state and county agencies on how to use the access classification capabilities of the RRS to uniformly identify and protect private or confidential records, while promoting open access to public data that may be disclosed.

OIP will work with OIMT to incorporate the RRS classifications of public records into the policies and procedures that are being drafted to advance the State's Open Data policy.

Legislation and Lawsuits. Since OIP's creation in 1988, it has provided legal guidance to nearly all state and county agencies and has monitored relevant legislation and lawsuits. While OIP was

originally established to administer the UIPA, it was additionally given the responsibility in 1998 of administering the Sunshine Law, which had previously been enforced by the Attorney General's Office (AG). Because OIP was administratively attached to the AG at that time, it was "temporarily" moved in 1998 for administrative purposes to the Office of the Lt. Governor, where it remains today. In order to be considered a permanent agency, Article V, Section 6 of the Hawaii Constitution requires the agency to fall within a principal department. House Concurrent Resolution 121, SLH 2014, called for a study to determine the feasibility of attaching OIP on a permanent basis for administrative purposes to the Department of Accounting and General Services (DAGS).

While OIP will continue to monitor all legislative measures and lawsuits related to the UIPA and Sunshine Law, it also seeks to establish OIP permanently within a state department.

Action: Advocate for OIP's permanent placement within DAGS for administrative purposes.

As long as the state's policy is to conduct its business as openly as possible, there will always be a need for OIP to ensure government transparency and accountability. OIP was created in 1988 as a permanent agency and would like to return to that status.

A potential department to house OIP for administrative purposes is DAGS, where other open government groups such as the State Campaign Spending Commission and the Elections Commission are administratively attached. DAGS is also home to agencies involved in the creation, management, and retention of public records, namely OIMT and the State Archives. Therefore, in FY 2015, OIP will support legislation to be administratively attached to DAGS as a permanent agency, provided OIP can continue to

maintain its independence as a government watchdog promoting transparency and accountability.

Year Two:

OIP will continue to implement its various programs and initiatives conducted in FY 2014 and 2015 as its action plan to implement its goals and objectives in Year Two.

In particular, OIP would like to promote the state's Open Data policy by making it easier for the public to request and track UIPA record requests, and for the government to more efficiently and cost-effectively fulfill and report those requests through a web-based system. Thus, OIP will undertake the following action to be implemented in FY 2016:

Action: Develop a pilot program for a web-based system that works seamlessly with the UIPA Record Request Log and would allow: (1) the public to electronically request and track state agencies' progress in responding to UIPA requests; (2) government agencies to electronically fulfill requests and report results; and (3) provide an electronic repository for public records provided in response to requests.

OIP has initiated discussions with OIMT as to the prospect of adapting an existing open source application to coordinate with the UIPA Record Request Log and allow agencies to electronically receive, track, and fulfill UIPA record requests.

Year Five:

OIP will continue to implement its various programs and initiatives conducted in the previous fiscal years as its action plan to implement its goals and objectives in Year Five, as long as it is provided adequate personnel and financial resources. OIP may reallocate resources in response to changing needs or amendments to the UIPA and Sunshine Law. By the end of FY 2019, OIP will strive to implement the following action:

Action: Adopt administrative rules relating to personal records and revise other existing rules if necessary.

In 1998, OIP adopted chapter 2-71, Hawaii Administrative Rules, relating to agency procedures for processing government record requests under Part II of the UIPA. In FY 2013, OIP created the UIPA Record Request Log to help agencies track requests made to them and report data to OIP via the Master Log on data.hawaii.gov.

Based on data being collected, and in accordance with the administrative rule-making process set forth in chapter 91, HRS, OIP anticipates adopting, by the end of FY 2019, administrative rules relating to agency procedures for processing personal record requests under Part III of the UIPA and revising, if necessary, its existing rules relating to Part II of the UIPA.



Highlights of Fiscal Year 2014

Budget and Personnel

OIP's budget allocation is the net amount that it was authorized to use of the legislatively appropriated amount, minus administratively imposed budget restrictions. In FY 2014, OIP's total allocation was \$539,757, up from \$390,933 in FY 2013. This includes the additional appropriation through Act 263 to assist with open data and open government matters.

OIP's allocation for personnel costs in FY 2014 was \$450,895 and for operational costs was \$88,862. See **Figure 3** on page 17.

In FY 2014, OIP had 8.5 full-time equivalent (FTE) total approved positions.

The unusually high allocation for operational costs in FY 2014 is due in large part to the acquisition of new computer equipment and software; travel expenses to conduct training on all neighbor islands for the introduction of the UIPA Record Request Log; and unspent funds resulting from budget restrictions imposed earlier in the year and delays in obtaining approvals to hire.

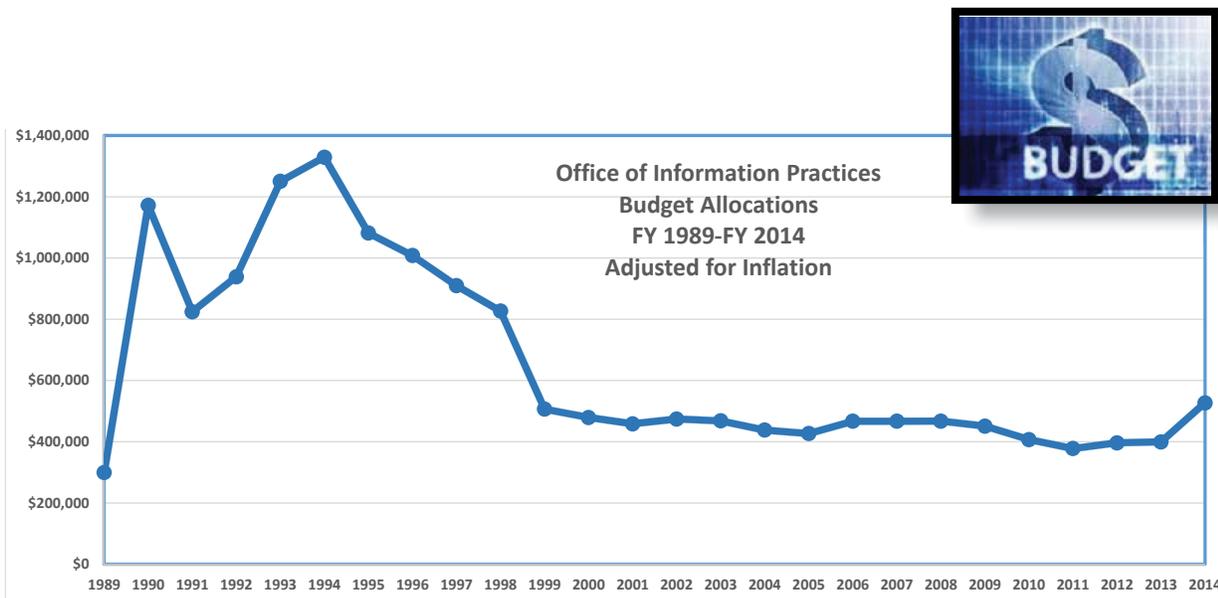


Figure 2



**Office of Information Practices
Budget FY 1989 to FY 2014**

Fiscal Year	Operational Expense Allocation	Personnel Allocation	Total Allocation	Allocations Adjusted for Inflation**	Approved Positions
FY 14	88,862	450,895	539,757*	539,757*	8.5
FY 13	18,606	372,327	390,933	399,447	7.5
FY 12	30,197	352,085	382,282	396,329	7.5
FY 11	42,704	314,454	357,158	377,903	7.5
FY 10	19,208	353,742	372,950	407,115	7.5
FY 09	27,443	379,117	406,560	451,082	7.5
FY 08	45,220	377,487	422,707	467,329	7.5
FY 07	32,686	374,008	406,694	466,889	7.5
FY 06	52,592	342,894	395,486	466,954	7
FY 05	40,966	309,249	350,215	426,840	7
FY 04	39,039	308,664	347,703	438,137	7
FY 03	38,179	323,823	362,002	468,302	8
FY 02	38,179	320,278	358,457	474,285	8
FY 01	38,179	302,735	340,914	458,463	8
FY 00	37,991	308,736	346,727	479,278	8
FY 99	45,768	308,736	354,504	506,500	8
FY 98	119,214	446,856	566,070	826,639	8
FY 97	154,424	458,882	613,306	909,569	11
FY 96	171,524	492,882	664,406	1,007,961	12
FY 95	171,524	520,020	692,544	1,081,672	15
FY 94	249,024	578,513	827,537	1,329,146	15
FY 93	248,934	510,060	758,994	1,250,270	15
FY 92	167,964	385,338	553,302	938,724	10
FY 91	169,685	302,080	471,765	824,483	10
FY 90	417,057	226,575	643,632	1,172,183	10
FY 89	70,000	86,000	156,000	299,458	4

*Total allocation for FY 2014 includes the additional appropriation through Act 263 to assist with open data and open government matters.

**Adjusted for inflation, using U.S. Bureau of Labor Statistics CPI Inflation Calculator.

Figure 3



Legal Assistance, Guidance, and Rulings

Overview and Statistics

All branches and levels of Hawaii’s state and county governments, as well as members of the public, seek OIP’s assistance. The government inquiries come from the executive, legislative, and judicial branches of the state and counties, and include government employees and officials as well as volunteer board members.

In FY 2014, OIP received a total of 1,313 formal and informal requests for assistance, which is a 7.0% increase over FY 2013.

Formal Requests

Of the total 1,313 UIPA and Sunshine Law requests for assistance, 1,109 were considered informal requests and 204 were considered formal requests. Formal requests are categorized and explained as follows. See **Figure 4**.

Formal Requests - FY 2014	
Type of Request	Number of Requests
Requests for Assistance (UIPA)	46
Requests for Advisory Opinion	3
UIPA Appeals	36
Sunshine Law Appeals & Requests for Opinion	38
Correspondence	64
UIPA Requests	15
Reconsideration Requests	2
Total Formal Requests	204

Figure 4



Requests for Assistance

OIP may be asked by the public for assistance in obtaining a response from an agency to a record request. In FY 2014, OIP received 46 such requests for assistance.

In these cases, OIP staff attorneys will generally contact the agency to determine the status of the request, provide the agency with guidance as to the proper response required, and in appropriate instances, attempt to facilitate disclosure of the records.

Requests for Legal Opinions

Upon request, OIP provides written formal or informal advisory opinions on UIPA or Sunshine Law issues. In FY 2014, OIP received 3 requests for UIPA opinions and 4 for Sunshine Law opinions.

Appeals

Prior to FY 2013, OIP provided written rulings on appeals by requesters who have been denied access to all or part of a requested record by an agency. With OIP’s adoption of new administrative rules effective January 1, 2013, OIP defines “appeals” to also include the board’s compliance with the Sunshine Law and the denial or granting of access to government records by the Department of Taxation. In FY 2014, OIP received 36 UIPA appeals and 38 Sunshine Law appeals and requests for opinion.

Sunshine Law Investigations/ Requests for Opinions

In FY 2014, OIP received 38 Sunshine Law complaints and requests for investigations and rulings concerning open meeting issues. After adoption of OIP’s new administrative rules effective January 1, 2013, such requests are now

considered Sunshine Law appeals and are not being opened as Sunshine Law investigation files. See page 25 for further information about Sunshine Law requests.

Correspondence and UIPA Requests

OIP may respond to general inquiries, which often include simple legal questions, by correspondence. In FY 2014, OIP received 64 such inquiries by correspondence, along with 15 UIPA record requests made to OIP for its own records.

Types of Opinions and Rulings Issued

In responding to requests for opinions, Sunshine Law complaints, and UIPA appeals, OIP issues opinions that it designates as either formal or informal opinions.

Formal opinions concern actual controversies and address issues that are novel or controversial, that require complex legal analysis, or that involve specific records. Formal opinions are used by OIP as precedent for its later opinions and are “published” by distributing to government agencies and boards, and other persons or entities requesting copies.

The full text of formal opinions are also available on OIP’s website at oip.hawaii.gov. Summaries of the formal opinions are posted on OIP’s website and are also found here on pages 26-27. OIP’s website contains a searchable subject-matter index for the formal opinions.

Informal opinions, also known as memorandum opinions, are public records that are sent to the parties involved but are not published for distribution. Summaries of informal opinions are available on OIP’s website and are also found in this report beginning on page 28.

Because informal opinions generally address issues that have already been more fully analyzed in formal opinions, or because their factual basis limits their general applicability, the informal opinions provide less detailed legal discussion and are not considered to be legal precedents.

AOD Inquiries			
Fiscal Year	Total	Public	Government Agencies
FY 14	1,109	280	829
FY 13	1,050	270	780
FY 12	940	298	642
FY 11	676	187	489
FY 10	719	207	512
FY 09	798	186	612
FY 08	779	255	524
FY 07	772	201	571
FY 06	720	222	498
FY 05	711	269	442
FY 04	824	320	504
FY 03	808	371	437
FY 02	696	306	390
FY 01	830	469	361

Figure 5

Informal Requests

Attorney of the Day Service (AOD)

The vast majority (84%) of the requests for assistance are informally handled through OIP’s AOD service through telephone calls and e-mails. The AOD service allows the public, agencies, and boards to receive general legal advice from an OIP staff attorney, usually within that same day. Over the past 14 years, OIP has received a total of 11,432 inquiries through its AOD service, an average of 816 requests per year. In FY 2014, OIP received 1,109 AOD inquiries, thus exceeding the average by over 34%. See **Figure 5**. Since FY 2011, AOD inquiries have increased 64%.

Members of the public use the service frequently to determine whether agencies are properly responding to record requests or to determine if government boards are following the procedures required by the Sunshine Law. Agencies often use the AOD service for assistance in responding to record requests, such as how to properly respond to requests or advice regarding specific information that may be redacted from records under the UIPA’s exceptions. Boards also use the service to assist them in navigating Sunshine Law requirements.

Of the 1,109 AOD inquiries in FY 2014, 829 (75%) came from government boards and agencies seeking guidance to ensure compliance with the UIPA and Sunshine Law, and 280 inquiries (25%) came from the public. See **Figures 6 and 7**.

Of the 280 public requests, 218 (78%) came from private individuals, 25 (9%) from media, 20 (7%) from private attorneys, 9 (3%) from public interest groups, and 8 (3%) from businesses. See **Figures 7 and 8**.

AOD Inquiries from the Public FY 2014	
Types of Callers	Number of Inquiries
Private Individual	218
News Media	25
Private Attorney	20
Public Interest Group	9
Business	8
TOTAL	280

Figure 7

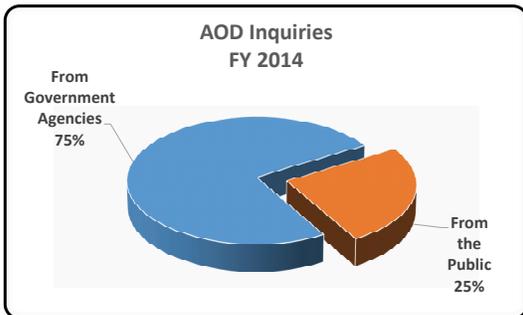


Figure 6

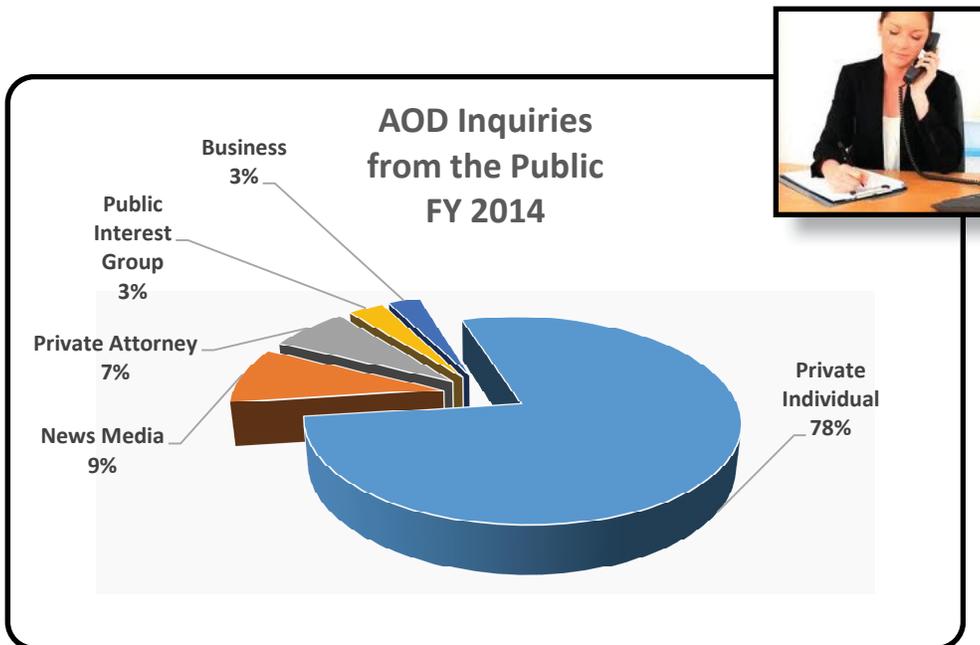


Figure 8

UIPA Requests:

UIPA AOD Inquiries

In FY 2014, OIP received 605 AOD requests concerning the UIPA. These numbers reflect calls both from the public and from the agencies themselves. For a summary of the numbers and types of AOD, please see **Figures 9 to 13** that follow. A sampling of the AOD advice given starts on page 38.

State Agencies and Branches

In FY 2014, OIP received a total of 365 AOD inquiries about state agencies. About 46% of

these requests concerned four state agencies: the Department of Health (56), the Department of Commerce and Consumer Affairs (52), the Department of Transportation (33), and the Department of Education (28). As shown below in **Figure 9**, about 78% of the requests were made by the agencies themselves seeking guidance to comply with the UIPA.

OIP also received 20 inquiries concerning the legislative branch and 6 inquiries regarding the judicial branch. See **Figure 9** below. These AOD requests do not include general inquiries.



**AOD Requests About
State Government Agencies
FY 2014**

Executive Branch Department	Requests by Agency	Requests by Public	Total Requests
Health	43	13	56
Commerce and Consumer Affairs	44	8	52
Transportation	31	2	33
Education (including Public Libraries)	20	8	28
Land and Natural Resources	17	6	23
Agriculture	15	3	18
Lieutenant Governor (including OIP)	4	10	14
Attorney General	11	1	12
Business, Econ Development, & Tourism	12	0	12
Human Services	8	4	12
Accounting and General Services	11	0	11
Labor and Industrial Relations	8	3	11
Public Safety	2	7	9
Budget and Finance	7	0	7
Governor	5	1	6
Hawaiian Home Lands	4	1	5
Human Resources Development	5	0	5
Tax	1	0	1
Defense	0	0	0
TOTAL EXECUTIVE	248	67	315
TOTAL LEGISLATURE	18	2	20
TOTAL JUDICIARY	1	5	6
University of Hawaii System	12	5	17
Office of Hawaiian Affairs	3	0	3
Unnamed Agency	2	2	4
TOTAL STATE AGENCIES	284	81	365

Figure 9

County Agencies

In FY 2014, OIP received 77 AOD inquiries regarding various county agencies and boards. Of these, 31 inquiries (40%) came from the public.

Of the 77 AOD inquiries, 32 inquiries concerned agencies in the City and County of Honolulu, down from 40 in the previous year. See **Figure 10**. As shown below, 40% of these requests were made by the agencies themselves seeking guidance to comply with the UIPA.

The largest number of requests (4 each) concerned the Honolulu Police Department, the Honolulu Fire Department, and the Office of the Mayor.

OIP received 45 inquiries regarding neighbor island county agencies and boards: Hawaii County (13), Kauai County (27), and Maui County (5). See **Figures 11 to 13**.



**AOD Inquiries About
City and County of Honolulu
Government Agencies - FY 2014**

Department	Requests by Agency	Requests by Public	Total Requests
Fire	3	1	4
Mayor	1	3	4
Police	1	3	4
City Ethics Commission	3	0	3
City Council	0	2	2
Civil Defense	0	2	2
Planning and Permitting	0	2	2
Transportation Services	0	2	2
Board of Water Supply	1	0	1
Budget and Fiscal Services	0	1	1
Corporation Counsel	1	0	1
Enterprise Svcs	0	1	1
Environmental Svcs	0	1	1
Neighborhood Commission/ Neighborhood Boards	1	0	1
Parks and Recreation	1	0	1
Prosecuting Attorney	1	0	1
Unnamed Agency	0	1	1
TOTAL	13	19	32

Figure 10



**AOD Inquiries About
Hawaii County
Government Agencies - FY 2014**

Department	Requests by Agency	Requests by Public	Total Requests
County Council	1	1	2
Parks and Recreation	0	2	2
Public Works	0	2	2
Corporation Counsel	3	0	3
Mayor	0	1	1
Police	1	0	1
Finance	1	0	1
Planning	0	1	1
TOTAL	6	7	13

Figure 11



**AOD Inquiries About
Kauai County
Government Agencies - FY 2014**

Department	Requests by Agency	Requests by Public	Total Requests
Police	10	0	10
County Council	7	1	8
County Attorney	6	0	6
Planning	1	1	2
Water	1	0	1
TOTAL	25	2	27

Figure 12



**AOD Inquiries About
Maui County
Government Agencies - FY 2014**

Department	Requests by Agency	Requests by Public	Total Requests
Corporation Counsel	2	1	3
Parks and Recreation	0	1	1
Police	0	1	1
TOTAL	2	3	5

Figure 13



Sunshine Law Requests:

Since 2000, OIP has averaged more than 251 requests a year concerning the Sunshine Law. In FY 2014, OIP received 529 requests, which is 298 more than the average requests previously received each year and 81.7% more than it received in FY 2013. See **Figure 14**.

Of the 1,109 AOD requests made in FY 2014, 491 (44%) involved the Sunshine Law and its application. OIP also opened 38 case files for appeals and formal requests for assistance regarding the Sunshine Law. See **Figure 15**.

Of the 491 AOD requests involving the Sunshine Law, 453 were requests for general advice, and 38 were complaints. Also, 188 of the AOD requests involved the requester's own agency.

In FY 2014, OIP provided 6 training sessions on the Sunshine Law to boards and commissions, as well as to other agencies and groups. See page 45 for a list of the sessions provided. OIP also continued to make its Sunshine Law video training materials available on the OIP website. These free online materials include a PowerPoint presentation with a voice-over and written examples, which OIP's attorneys formerly presented in person. The videos and on-line training have enabled OIP to reduce its in-person basic training on the Sunshine Law,

Sunshine Law Inquiries			
Fiscal Year	AOD Inquiries	Formal Requests	Total
2014	491	38	529
2013	264	27	291
2012	356	23	379
2011	166	13	179
2010	235	21	256
2009	259	14	273
2008	322	30	352
2007	281	51	332
2006	271	52	323
2005	185	38	223
2004	209	17	226
2003	149	28	177
2002	84	8	92
2001	61	15	76
2000	57	10	67

Figure 15

and to develop additional or more specialized training materials or sessions, such as customized workshops to critique participants' own agencies and minutes. Moreover, the online training is not restricted to government personnel, and is freely and readily accessible to members of the public.

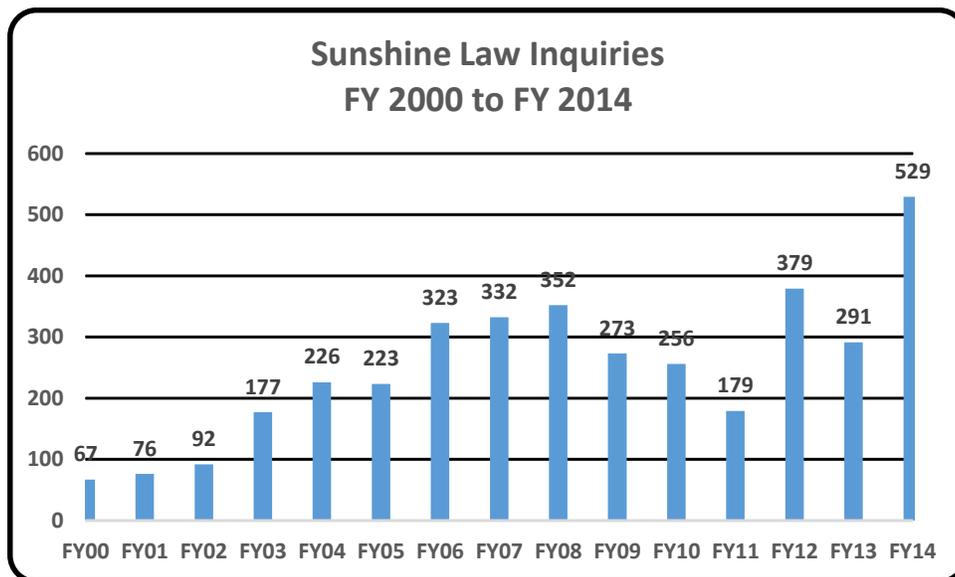


Figure 14

Formal Opinions

In FY 2014, OIP issued two formal opinions, one related to the UIPA and the other related to the Sunshine Law. While the full text versions of opinions are controlling and can be found at oip.hawaii.gov, they have been summarized below.

UIPA Formal Opinion:

Denial of Access to a Corporation Counsel Opinion

A requester asked whether the Department of Planning and Permitting, City & County of Honolulu (DPP), is required by the UIPA to disclose an opinion issued by the Department of the Corporation Counsel, City & County of Honolulu (Corporation Counsel), regarding the permitted uses of the Waikele Caves (Memorandum). OIP concluded that the Memorandum is not subject to mandatory disclosure under section 92F-12(a) (1) or (2), HRS.

OIP also found that the Memorandum contains confidential communications between DPP and the Corporation Counsel that are protected from disclosure by the attorney-client privilege under Rule 503, Hawaii Rules of Evidence (HRE), and, as such, may be withheld from public disclosure under section 92F-13(2), (3) and (4), HRS.

OIP further concluded that DPP did not voluntarily waive the attorney-client privilege, which protects the Memorandum from disclosure under Rule 503, HRE, because DPP was required by

the UIPA to provide the Memorandum to OIP for an *in camera* review. Moreover, the mandatory disclosure of the Memorandum by DPP to OIP for an *in camera* review is, in itself, a privileged communication under Rule 502, HRE, and not subject to waiver under Rule 511, HRE. Consequently, the Memorandum is protected from disclosure under OIP's administrative rules at subsections 2-73-15(c) and (d), HAR, and the UIPA at section 92F-13(2) and (4), HRS. [*OIP Op. Ltr. No. F14-01*]



Sunshine Law Formal Opinion:

Written Testimony and Minutes

A requester asked whether the Board of Land and Natural Resources (BLNR) violated the Sunshine Law by not including in its minutes the views expressed in written testimony that had been submitted to BLNR about an agenda item for its meeting on July 27, 2012.

Section 92-9(a), HRS, sets forth the Sunshine Law's requirement for a board to keep minutes, but OIP found no express requirement that a board's minutes should reflect views presented in written testimony. OIP also noted that a written testimony is itself a government record providing a complete and accurate record of its contents, while minutes may be the sole record of oral testimony presented to a board. Finally,

under the “permitted interaction” provided by the Sunshine Law in section 92-2.5(d)(2), HRS, board members may hear testimony or presentations when a meeting has been cancelled but are required to create only a record of oral testimony or presentations “in the same manner as would be required by section 92-9,” HRS.

Given the lack of an express statutory requirement for written testimony to be described in minutes, the accessibility of written testimony as a government record, and the instruction of section 92-2.5(d)(2) to create a written record of the “oral” testimony or presentations after a meeting is cancelled, OIP concluded that the Sunshine Law only requires that a board’s minutes describe the board’s actions and the oral testimony and oral presentations which occurred during the meeting. Thus, OIP found that BLNR’s minutes, which did not describe the written testimony, complied with the Sunshine Law’s requirement that they reflect “the matters discussed at the meeting and the views of the participants.” [*OIP Op. Ltr. No. F14-02*]



Informal Opinions

In response to requests made for opinions, OIP in FY 2014 issued 12 informal opinions relating to the UIPA and 15 informal opinions relating to the Sunshine Law. Except for an opinion pending OIP's reconsideration, summaries of these informal opinions are provided below. In the event of a conflict between the full text and a summary, the full text of an opinion controls.

UIPA Informal Opinions:

Whether Kona Ambulatory Surgery Center, LLC, is an Agency Subject to the UIPA

Requester asked whether Kona Ambulatory Surgery Center, LLC (KASC), is an agency subject to the UIPA.

OIP first discussed a finding by the Hawaii Supreme Court that "threshold issues that relate to the applicability of UIPA, such as the definition of 'agency' . . . are not left to OIP's discretion." *Olelo: The Corp. for Comm'y Tel. v. Office of Information Practices*, 116 Haw. 337, 346 (Haw. 2007). Courts will rule *de novo* on whether or not an entity is an "agency" subject to the UIPA. *Id.* In other words, courts will make a determination on this threshold issue without deference to an OIP opinion.

OIP then noted the UIPA defines an "agency" as "any unit of government in this State, any county, or any combination of counties; department; institution; board; commission; district; council; bureau; office; governing authority; other instrumentality of state or county government; or corporation or other establishment owned, operated, or managed by or on behalf of this State or any county[.]" HRS § 92F-3 (2012).



OIP opined that KASC is not owned by the State, and KASC is not operated by the State, managed by the State, or managed on behalf of the State. As such, OIP concluded that KASC is not an agency subject to the UIPA. [UIPA Memo 14-1]

Request for Response from OIP

Requesters sought a decision as to whether OIP properly denied, under Part III of the UIPA, Requesters' request for a copy of a response from OIP to Requesters' email.

OIP found that the denial of Requesters' request was proper under the UIPA. OIP performed a reasonable record search and determined that OIP did not maintain a government record that was responsive to Requesters' request. The UIPA applies only to existing government records, which are maintained by government agencies, and agencies cannot be compelled to create a requested record.

Requesters were also informed of their right to seek assistance directly from the courts. [UIPA Memo 14-2]

Advisory Committee Lists

Requester sought an opinion on whether the Department of Commerce and Consumer Affairs (DCCA), Regulated Industries Complaints Office (RICO), must disclose the list of its Advisory Committee members for the real estate profession (ACM list) under Part II of the UIPA.

OIP found that RICO's legitimate government function of enforcing professional licensing laws would likely be frustrated if the ACM list is made public because the number of potential ACMs willing to serve would almost certainly decline. The ACM list may be withheld under section 92F-13(3), HRS, which does not require disclosure of government records that, by their nature, must be confidential in order to avoid the frustration of a legitimate government function. *[UIPA Memo 14-3]*

Applicant Summaries for Applicants on Judicial "Shortlist"

Requester sought a decision as to whether, under Part II of the UIPA, the Office of the Governor must make public the Applicant Summaries prepared and submitted to the Governor during the judicial selection process by the Judicial Selection Commission (JSC), which set out detailed educational background, work experience, and other information regarding the judicial applicants named on the JSC's selected list of nominees.

OIP found that applicants listed on a judicial "shortlist" generally have a significant privacy interest, not outweighed by the public interest in disclosure, in the information in the Applicant Summaries, as the public interest in information about applicants named to a "shortlist" but not appointed is not equivalent to the public interest in the eventual appointee, or in a serving government employee, so such information may generally be withheld under the UIPA's exception for information whose disclosure would be a clearly unwarranted invasion of personal privacy. See HRS §§ 92F 13(1) and -14. However, information about an applicant that is already public, whether because the applicant has taken affirmative steps to make it public or because the information is public under the UIPA as part of the previously existing government personnel records relating to the applicant's current or prior government employment, should not be withheld. *[UIPA Memo 14-4]*

Records No Longer in Possession of Agency

Requester sought a decision regarding Hawaii Technology Academy Public Charter School's (Academy) alleged failure to properly respond to his record requests under Part II of the UIPA and chapter 2-71, Hawaii Administrative Rules (HAR), and the alleged destruction of video footage records after he requested them.

OIP found that the Academy did not respond to Requester's requests within the time periods set forth in chapter 2-71, HAR. The video footage had been routinely taped over and because it is not possible to provide access to a record that does not exist, the Academy had no further obligation under the UIPA to provide access to it. OIP further found that the video footage should not have been destroyed while a record request was pending, but did not find bad faith as there was no intentional or knowing destruction of the footage.

As to the other requested records, the Department of the Attorney General (AG) subsequently opened a criminal investigation, and as part of that investigation the AG took possession of these records. Because the Academy no longer maintains these records, it was not obligated under the UIPA to make the records available to Requester. *[UIPA Memo 14-5]*

Director's Calendar

Requester sought a decision as to whether the Department of Health (DOH) properly denied, under Part II of the UIPA, her request for a copy of the former DOH Director's "public work calendar for the time period of July 11 through August 8, 2011."

OIP found that the calendar kept by the former Director was not a "government record" subject to disclosure under the UIPA because, although maintained in the agency's office, it was held or controlled by an employee personally and not in his or her official capacity as an employee

of the agency. Consequently, DOH's denial of Requester's request is outside the scope of the UIPA and the jurisdiction of OIP. [UIPAMemo 14-6]

Names of Individuals Who Signed Notarized Certificates of Experience

Requester sought a decision as to whether the Department of Commerce and Consumer Affairs, Professional and Vocational Licensing Division, Contractors License Board (CLB) properly redacted names of individuals (Certifiers) who signed notarized certificates of experience (Experience Certificates) contained in a contractor's licensing file under Part II of the UIPA.

OIP found that the UIPA's exception to disclosure at section 92F-13(1), HRS, for records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy, protects the names of Certifiers from public disclosure because contractors have a significant privacy interest under subsections 92F-14(b)(7) and (8), HRS, in the names of the Certifiers who completed Certificates of Experience for the contractors' applications for licensure, and this privacy interest is not outweighed by the public interest in disclosure. HRS § 92F-14(a) (2012).

In addition, OIP found that the CLB's legitimate government function of granting contractor licenses would likely be frustrated if the identities of Certifiers are made public because the number of potential Certifiers willing to complete Experience Certificates will likely decline. Certifiers' identities may be withheld under section 92F 13(3), HRS, which does not require disclosure of government records that, by their nature, must be confidential in order to avoid the frustration of a legitimate government function. [UIPA Memo 14-7]

List of Organizations Exempt from the General Excise Tax

Requester sought a decision as to whether the Department of Taxation (DOTAX) properly denied Requester's request to inspect a record under the UIPA. Specifically, Requester asked to inspect a list of organizations that are exempt from the general excise tax (GET).

OIP found that DOTAX properly denied access to the list of GET-exempt organizations (List), because these organizations' identities constitute "return information" that is made confidential under section 237-34(b), HRS. Therefore, DOTAX is not required to disclose the List under the UIPA exception for "[g]overnment records which, pursuant to state or federal law . . . are protected from disclosure." HRS § 92F-13(4) (2012). [UIPA Memo 14-8]

Fingerprint Database

Requester sought a decision as to whether the Department of Transportation (DOT) properly denied access to its fingerprint database under Part II of the UIPA.

OIP found that the fingerprint database is part of the statewide traffic records system. OIP previously opined that any request for individually identifiable information from the statewide traffic records system should be made in writing to the Director of Transportation for a determination of whether a request is "legitimate," within the meaning of section 92F-12(b)(6), HRS, or section 19-121-6, HAR, and that this determination lies with the Director of Transportation, not OIP. OIP Op. Ltr. No. 91-13 at 9. Requester submitted multiple requests to DOT for access to the fingerprint database. DOT denied each request. OIP declined to revisit this issue, as it is solely within DOT's power to determine who may access information in the statewide traffic records system.

Requester later amended his request, stating that he no longer sought access to the fingerprint database, and indicating that he would instead obtain individuals' fingerprints and personal information from their healthcare providers who contract with Requester's company. Requester would then ask DOT to verify the identity of the individuals using its database. OIP concluded that a request to have DOT verify the identity of an individual using a fingerprint submitted to it by Requester is not a request for a government record that would trigger the UIPA. *[UIPA Memo 14-9]*

Memorandum Header Information in Correspondence with Legal Counsel

Requester sought a decision as to whether the Department of Land and Natural Resources (DLNR) properly denied access to the following records sought from DLNR's Division of Boating and Ocean Recreation (DOBOR) under the UIPA:

- 1) Memorandum header information (Memo Headers) in correspondence between DLNR and the Department of the Attorney General (AG) that would confirm AG's legal conclusions on matters specified by Requester. Requester sought access to the following information in the Memo Headers: names of DLNR employees and AG deputy attorneys general who were the senders and recipients of the correspondence, dates, and the subject matters of the correspondence;
- 2) DOBOR's "worksheet for cruise ship passenger fees to disembark and embark from Kailua Pier, Island of Hawaii, and Lahaina Small Boat Harbor, Island of Maui" (Worksheet);
- 3) DOBOR's Capital Improvement Program (CIP) appropriation requests forwarded to the Governor for review and submission to the Legislature for its 2011 regular session (CIP Requests); and

- 4) DOBOR's summary financial statement for the fiscal year ending in June 2010 (Financial Summary).

OIP found that because Requester asked for disclosure of the Memo Headers only from memoranda that confirm the AG's legal conclusions on specific matters, DLNR is not required to acknowledge or disclose the specifically requested Memo Headers because, if DLNR did maintain the subject memoranda, the mere acknowledgment or disclosure of the Memo Headers from the memoranda would actually confirm the legal advice provided by AG therein. Such legal advice constitutes confidential communications protected under both the attorney-client privilege and the deliberative process privilege. Therefore, the Memo Headers are exempt under section 92F-13, HRS, as government records that are protected from disclosure "pursuant to state or federal law" and "must be confidential in order for the government to avoid the frustration of a legitimate government function." HRS § 92F-13(3), (4) (2012).

The Worksheet and the CIP Requests also fall within the deliberative process privilege and are, therefore, exempt from disclosure under the UIPA's "frustration" exception.

Finally, DLNR does not maintain the requested Financial Summary and is not required by the UIPA to compile and create it. HRS § 92F-11(c) (2012). *[UIPA Memo 14-10]*

Correspondence About UIPA Request

Requester sought a decision as to whether the Department of Enterprise Services (DES) properly denied access under Part II of the UIPA to written communications about an earlier UIPA request made by a Honolulu Civil Beat (Civil Beat) reporter.

OIP found that one e-mail exchange that was responsive to the record request did not involve an attorney-client communication and was between

City employees in two different agencies. As such, it was not an internal agency communication and thus could not properly be withheld under the deliberative process privilege recognized under the UIPA's exception for information whose disclosure would frustrate a legitimate government function. The e-mail exchange should have been disclosed under the UIPA.

OIP also found that the remaining records in dispute are communications between DES and its attorneys, and as such were properly withheld based on the attorney-client privilege as expressed in the UIPA's exceptions for information whose disclosure would frustrate a legitimate government function and information protected from disclosure by state law. HRS §§ 92F-13(3) and (4) (2012). [UIPA Memo 14-12]

Sunshine Law **Informal Opinions:**

Sunshine Law informal opinions are written to resolve investigations and requests for advisory opinions. Overall, OIP wrote 15 informal opinions concerning the Sunshine Law in FY 2014, as summarized below.

Board Consideration of Matters Made Confidential by the Procurement Code

DLNR asked for an opinion on whether the Legacy Land Conservation Commission (LLCC) may enter into executive meetings under the Sunshine Law to make recommendations on procurement proposals submitted in accordance with the Procurement Code, chapter 103D, HRS.

The statute expressly exempts from the Sunshine Law "discussions, deliberations, or decisions required to be conducted or made confidentially

under" the Procurement Code. HRS § 103D-105 (2012). OIP advised that whenever the LLCC is engaged in discussions, deliberations, or decisions that are required to be confidentially conducted or made under the Procurement Code, it is not required to follow the Sunshine Law. [Sunshine Memo 14-1]

Notice and Subcommittee Meetings

Requester asked for an investigation into whether the Kahana Planning Council (Council) violated the Sunshine Law by failing to correctly notice its meetings, by doing business through subcommittees whose meetings were not open to the public, and by Council members having other discussions of board business outside Council meetings.

OIP found that the Council's subcommittees regularly failed to provide the public notice required by the Sunshine Law; however, OIP noted that the Council has made assurances that it now understands this requirement and will follow it in the future. OIP also found that the Council did not meet the Sunshine Law's requirement that it file a copy of its notice in its office. However, the Council, which does not have a dedicated office or staff, attempted to meet the requirement by posting the notice on bulletin boards at its usual meeting place where they would be most accessible to those interested in the Council. Although the failure to keep an additional copy at the DLNR office offering administrative support was a technical violation, OIP did not find that it caused any actual public harm.

OIP could not conclude, from the facts presented, that the Council's meetings failed to meet any of the Sunshine Law's other notice requirements, or that its members discussed Council business outside of Council meetings. [Sunshine Memo 14-2]

Whether the Information Technology Steering Committee Is a Board Subject to Sunshine Law

Requester asked whether the Information Technology Steering Committee is a board subject to the Sunshine Law.

The Information Technology Steering Committee was created within the Department of Accounting and General Services by section 27-32, HRS, in 2010, for the purpose of assisting the Chief Information Officer in various decisions relating to the development and implementation of state information technology strategic plans.

To be a “board,” a group must be: (1) an agency, board, commission, authority, or committee of the State or its political subdivisions; (2) which is created by constitution, statute, rule, or executive order; (3) to have supervision, control, jurisdiction or advisory power over specific matters; (4) which is required to conduct meetings; and (5) which is required to take official actions.

OIP found that the Information Technology Steering Committee meets all elements of the Sunshine Law’s definition of a “board,” so it is subject to the Sunshine Law. [*Sunshine Memo 14-3*]

Whether the Information Privacy and Security Council Is a Board Subject to Sunshine Law

Requester asked whether the Information Privacy and Security Council (Council) is a board subject to the Sunshine Law.

The Council was created within the Department of Accounting and General Services (DAGS) by section 487N-5, HRS, in 2008, for the purpose of creating and administering guidelines for government agencies to deal with the unintended disclosure of personal information.

As described in the previously described opinion, the Council meets all elements of the Sunshine

Law’s definition of a “board,” so it is subject to the Sunshine Law. [*Sunshine Memo 14-4*]

Executive Session

Requesters asked for an investigation into whether the University of Hawaii’s (UH) Board of Regents (Board) violated the Sunshine Law by holding an executive session at its meeting on May 24, 2013, to discuss the search for a new UH President.

OIP found that the Board properly discussed its executive session agenda item regarding the UH President in a closed meeting in accordance with section 92-5(a)(2) and (5), HRS.

In OIP’s opinion, when the Board discussed “the names of three prospective potential candidates,” it fulfilled the criteria of section 92-5(a)(2), HRS, because the Board’s discussion of this topic (1) related to the “hire” of an “officer,” *i.e.*, the UH President, and (2) named specific individuals as potential candidates, thus making it a “consideration of matters affecting privacy,” *i.e.*, the named individuals’ privacy.

The other topics discussed in executive session did not concern individuals who were named for possible hiring consideration, so these other topics do not qualify under section 92-5(a)(2), HRS, for discussion in executive session. Instead, these other topics, which consisted of the Board’s briefing on the Sunshine Law and drafting of a public statement, were matters that the Board discussed with its legal counsel, who was also serving as the Board’s Acting Secretary at the time. In OIP’s opinion, the Board’s discussion with its legal counsel on these topics is covered by section 92-5(a)(4), HRS, which allows discussion in executive session for the purpose of “consult[ing] with the board’s attorney on questions and issues pertaining to the board’s powers, duties, privileges, immunities, and liabilities.”

Although OIP found that the Board was authorized to consult with its legal counsel in executive session under section 92-5(a)(4), HRS, the

minutes indicate that the Board had only announced that it was going into executive session “pursuant to HRS §92-5(a)(2),” and did not specify that it would also be consulting with legal counsel as well. The Sunshine Law requires that the Board announce the specific purposes for its discussion in executive session. HRS § 92-4 (2012) (requiring that “[a] meeting closed to the public shall be limited to matters exempted by section 92-5” and that “[t]he reason for holding such a meeting shall be publicly announced”). OIP advised that, in the future, the Board should announce all of its reasons for meeting in executive session, and cite the authorizing Sunshine Law provisions, in order to fully comply with section 92-4, HRS. [*Sunshine Memo 14-5*]

Testimony Requirement at a “Briefing”

The Board of Land and Natural Resources (BLNR) published a notice for a “briefing” held on June 13, 2013, which included an agenda that contained two items, each of which was described as a “non-decision making item.” A member of the public alleged that public testimony was not allowed at the briefing, and that this violated the Sunshine Law.

The Sunshine Law requires that “boards shall afford all interested persons an opportunity to submit data, views, or arguments, in writing, on any agenda item. The boards shall also afford all interested persons an opportunity to present oral testimony on any agenda item.” HRS § 92-3 (2012). OIP found that, as a board subject to the Sunshine Law, BLNR must allow for public testimony at its meetings, including meetings designated as “briefings,” on every agenda item.

OIP does sometimes recommend that boards conduct a meeting again if a provision of the Sunshine Law was violated. In this instance, BLNR stated that it would be sure to allow for public testimony at all future BLNR public briefings. And, there was a subsequent BLNR meeting at which the public was allowed to testify on the same two matters that were discussed at the briefing

on June 13, 2013. As such, BLNR had already taken the corrective action that OIP would have recommended. Thus, OIP instead recommended that BLNR members and support staff review OIP’s Sunshine Law training materials available on OIP’s website. [*Sunshine Memo 14-6*]

Executive Meeting to Discuss University of Hawaii President

Requesters, who were reporters for *Hawaii News Now* and *Hawaii Reporter*, a member of the Society of Professional Journalists, and the Senate President, made similar requests asking whether the University of Hawaii (UH) Board of Regents (BOR) violated the Sunshine Law when it discussed, in executive meeting, the future employment and requested leave of absence of the outgoing UH President. The Senate President also requested OIP review the executive meeting minutes to determine whether there were any Sunshine Law violations.

OIP found that the executive agenda item regarding the UH President was sufficiently detailed to allow the public to understand the subject matter and decide whether to attend and participate in the meeting. And, when read together with the public portion of the agenda pertaining to the UH President, it was clear that the executive meeting was to discuss the UH President’s new position with the School of Medicine. OIP therefore concluded that the agenda met the Sunshine Law’s notice requirements.

OIP also concluded that the BOR properly entered into an executive meeting to discuss matters affecting the UH President’s privacy, which arose from consideration of the proposal to hire her as a future faculty member of UH. Given the Sunshine Law’s express language allowing the executive meeting to consider the hire or evaluation of an employee “where consideration of matters affecting privacy will be involved” and the sufficiently detailed notice of the BOR’s intent to discuss the UH President’s proposed hire as a faculty member, OIP further concluded that the BOR’s discussions in an executive meeting did not violate the

Sunshine Law. Moreover, the subsequent limited disclosure by a few BOR members of what was discussed in the reconvened public portion of the meeting was not an indication that the executive meeting was not appropriate at the time it was convened. *[Sunshine Memo 14-7]*

Mailing of Notice in a Timely Manner

Requester filed a complaint alleging that the Motor Vehicle Repair Industry Board (MVR) and the Motor Vehicle Industry Licensing Board (MVIL) violated the Sunshine Law by not mailing meeting notices in a timely manner. Both boards are attached to the Department of Commerce and Consumer Affairs (DCCA) for administrative purposes.

As boards subject to the Sunshine Law, the MVIL and MVR must comply with all notice requirements in section 92-7, HRS, including the mailing requirement. OIP found that the Sunshine Law's mailing notice requirement in section 92-7(e), HRS, was violated once each by the MVIL and MVR. OIP found insufficient evidence to show a "consistent pattern" of DCCA's mailing notices late as alleged by Requester. OIP noted that DCCA had already taken the corrective action that OIP would have recommended, *i.e.*, canceling the meeting that had not yet occurred, and reminding staff about the Sunshine Law's notice mailing requirement. OIP also recommended that MVIL and MVR members and support staff review OIP's Sunshine Law training materials available on OIP's website, and contact OIP's "attorney of the day" any time with questions. *[Sunshine Memo 14-8]*

Notice and Agenda; Identification Requirement

Requester asked for an investigation into whether the Board of Health ("BOH") violated the Sunshine Law by (1) stating on its agenda that no public testimony would be accepted, (2) not providing the street address of the meet-

ing location, and (3) requiring a member of the public who wished to attend the meeting to leave identification with a security guard.

OIP found that the agenda statement that public testimony would not be accepted was contrary to the Sunshine Law's requirement that a board accept testimony from all interested persons at every meeting. *See* HRS § 92-3 (2012). However, OIP noted that according to BOH the statement was included by mistake, which BOH attempted to rectify by sending a correction to members of the public on its mailing list.

In this specific instance, BOH's failure to include the street address of the meeting location did not violate the Sunshine Law's requirement that a notice include the place of the meeting. The notice did include the building name, Kinau Hale, and room number and in this instance the building name is well enough known that OIP finds that the public could still reasonably determine the meeting location. OIP would recommend inclusion of the Kinau Hale street address as a good practice, however, and notes that BOH has stated that the address was left off of the notice by accident and will be included in future notices.

Requiring a member of the public to leave identification with a security guard to attend the meeting was in violation of the Sunshine Law's requirement that "all persons shall be permitted to attend any meeting[.]" HRS § 92-3. OIP noted that BOH has stated that it will ensure future meetings are held in publicly accessible meeting rooms. *[Sunshine Memo 14-9]*

Board's Closed Meeting to Approve and Execute a Final Order upon Remand

Requester asked for a decision as to whether the Contractors License Board (Board), Department of Commerce & Consumer Affairs (DCCA), violated the Sunshine Law by meeting in a closed session on October 18, 2013 for its members to approve and execute the Final Order upon

Remand (Order upon Remand) concerning a petition for declaratory relief.

OIP found that the Board was exercising its adjudicatory functions during its closed meeting when it approved and executed the Order upon Remand. The Board did not violate the Sunshine Law's open meeting requirements because the Board's adjudicatory functions are exempt from these requirements under section 92-6, HRS.

[Sunshine Memo 14-10]

Request for Investigation

Requester asked for a decision whether the Kauai County Board of Ethics (Board) violated the Sunshine Law, Part I of chapter 92, Hawaii Revised Statutes (HRS), by not allowing him to provide oral testimony on an agenda item discussed during a meeting of the Board held on October 14, 2011.

OIP found that the Board failed to comply with section 92-3, HRS, by not affording Requester an opportunity to present oral testimony on an agenda item when it was discussed by the Board at its meeting on October 14, 2011. Despite this violation of section 92-3, HRS, the Board did not take any final action on the agenda item at its October 14, 2011 meeting that may be voidable. Instead, the Board considered the substance of the agenda item at a subsequent special meeting, at which Requester was allowed to testify.

[Sunshine Memo 14-11]

Amendment of Neighborhood Board's Agenda

Requester asked for an opinion as to whether the Sunshine Law would have allowed the Makakilo/Kapolei/Honokai Hale Neighborhood Board (Board), at the request of a Councilmember, to add the Landfill Benefits Package (LBP) to its agenda during its May 25, 2011 meeting. The LBP related to the Councilmember's intention to make a motion at a Honolulu City Council

meeting for a \$500,000 appropriation to the Board (appropriation proposal).

Because the LBP included the Councilmember's appropriation proposal, it was a matter of "reasonably major importance" and would have "affect[ed] a significant number of persons." HRS § 92-7(d) (2012). Thus, adding the LBP to the Board's agenda would have violated the Sunshine Law. *[Sunshine Memo 14-12]*

Agenda Item for Discussion of Settlement Agreement

Requester asked whether the Kauai County Council (Council) violated the Sunshine Law during three executive sessions in October 2009 by discussing and ultimately approving a settlement agreement with a business entity under an agenda item that did not reference the dispute or the business entity, and whether the subsequent public disclosure of the agreement means that the portion of the meeting devoted to its discussion should be public.

OIP found that the agenda description for the executive sessions did not adequately notify members of the public that the Council would be discussing a claim by and a potential settlement agreement with Sunrise Capital, which deprived members of the public of the opportunity to testify regarding the dispute or the agreement. *See* HRS §§ 92-3 and -7(a) (2012). The Council's discussions regarding the Sunrise Capital claim and the agreement it eventually voted to enter into with Sunrise Capital were thus done in violation of the Sunshine Law.

The County's public disclosure of the settlement agreement did not waive its ability to withhold minutes of the executive sessions in which it discussed the agreement with its counsel. *See* HRS § 92-5(a)(4) (2012). If Requester or another member of the public requests a copy of those minutes, they may still be withheld to the extent that disclosure would defeat the lawful purpose of the executive meeting. HRS § 92 9(b) (2012).

[Sunshine Memo 14-13]

Sufficiency of Agendas

Requester asked for six separate determinations as to whether the Board of Land and Natural Resources (BLNR), the Small Business Regulatory Review Board (SBRRB), and the Communication Access Committee of the Disability and Communication Access Board (DCAB Committee) violated the Sunshine Law by considering items that Requester believed were insufficiently described on eight agendas, for their respective meetings.

Of the eight agendas being reviewed, OIP concluded that an item on the agenda for one of BLNR's meetings did not provide the public with adequate notice under the Sunshine Law, as the description of the land at issue was incomplete. However, BLNR corrected the agenda description to describe the land accurately and considered the matter at another open meeting, which mitigated any harm to the public.

OIP concluded that an item on the agenda for another BLNR meeting provided sufficient detail of what the board intended to consider at the meeting, and, therefore, satisfied the Sunshine Law's notice requirements.

OIP further concluded that items on the five agendas pertaining to the adoption, amendment or repeal of administrative rules did not meet the notice and agenda requirements of the Sunshine Law, as they did not provide the public with reasonable notice of all of the matters that the boards would be considering.

However, with regard to these agenda items concerning administrative rulemaking, the Hawaii State Legislature has since amended the Sunshine Law's public meeting notice requirements in section 92-7(a), HRS. For the proposed adoption, amendment or repeal of administrative rules, Act 68 now conforms the Sunshine Law requirements for agenda descriptions to chapter 91, HRS's requirements for providing notice of rulemaking generally.

Under this new law, when a Sunshine Law board considers administrative rule changes, its

agenda is sufficient to give public notice under the Sunshine Law if it meets the notice requirements for administrative rulemaking in section 91-3(a)(1)(A), HRS (statement of topic or general description of the subjects of proposed rules) and section 91-2.6, HRS (where proposed rules may be viewed on the Internet), and includes a statement of when and where the proposed rules may be viewed in person. Consequently, a Sunshine Law board that follows the rulemaking notice requirements may, but is no longer required to, also meet the Sunshine Law's notice requirements to detail on its agenda each rule proposed to be adopted, amended or repealed and to describe the effect of each rule.

Finally, with respect to the eighth agenda, OIP concluded that DCAB's agenda items were sufficiently described, so there was no Sunshine Law violation. [*Sunshine Memo 14-14*]

Sufficiency of Council Agenda

Requesters asked for a decision as to whether: (1) the Hawaii County Council (Council) violated the Sunshine Law by not listing on its agenda for its February 1, 2012 meeting (Agenda) five "Communications" concerning Bill No. 270, which proposed a new county building code and repealed the existing building code; and (2) whether the Council's time limit on oral testimony was reasonable. The five Communications at issue proposed amendments to Bill No. 270 that had been approved by the Council and incorporated into Draft 7 of Bill No. 270, which was listed on the Agenda.

OIP found that the Council did not violate the Sunshine Law because the Council properly listed Draft 7 of Bill No. 270 on the Agenda as the item for its consideration and was not required to also list the Amendment Communications that related to this bill. Furthermore, OIP found that the Council's time limit on oral testimony was reasonable. [*Sunshine Memo 14-15*]



General Legal Assistance and Guidance

To expeditiously resolve most inquiries from agencies or the public, OIP provides informal, general legal guidance, usually on the same day, through the Attorney of the Day (AOD) service. AOD advice is not necessarily official policy or binding upon OIP, as the full facts may not be available, the other parties' positions are not provided, complete legal research will not be possible, and the case has not been fully considered by OIP. The following summaries are examples of the types of AOD advice provided by OIP staff attorneys in FY 2014.

UIPA Guidance:

Processing Verbal Record Requests

An employee who provides administrative support to a State board that is subject to the Sunshine Law received a verbal request for a copy of the recording of a recent board meeting, which had both public and executive sessions. She asked how to process the request. OIP advised that verbal record requests should be responded to in a "reasonable time," as required by OIP's administrative rules. The ten business day time limit for written record requests does not apply unless a requester makes a written request. OIP advised that the caller should provide the recording for the public portion of the meeting. If disclosure of the executive portion would defeat the lawful purpose of the executive session, then the caller may withhold the recording of this closed portion of the meeting.

OIP also advised that the Sunshine Law gives boards 30 days to prepare minutes, but that time limit would not apply to a UIPA request for a recording, because the recording would be



a verbatim record of what happened and would not need to be prepared the way minutes must be. Therefore, under the UIPA, the recording must be provided within 10 business days of a written request.

Certified Payroll Records

A State employee received a request from a contractor who wanted a copy of the certified payroll for a different contractor. The employee asked what should be redacted before she discloses the record. OIP advised that section 92F-12(a) (9), HRS, requires disclosure of certified payroll records on a public works contract, except for social security numbers and home addresses.

Charging Fees for a UIPA Request

An agency asked three questions as to how to close out its fees for a UIPA request. First, if the agency's copy fees estimated before work commenced was higher than the actual copy fees once the request was processed, should the agency refund the difference?

OIP advised that the rules for processing record requests set out in chapter 2-71, Hawaii Administrative Rules, call for fees (and possible prepayment) based on the agency's **estimated** search, review, and segregation time and copying fees. It is expected that the final total after a request

is processed will not match up exactly with the estimated fees set out in the Notice to Requester. Thus, there will be some accounting once the request is complete, either in the form of a final invoice for the balance due (which would be more typical since the allowed prepayment amount is only half the estimated search, review, and segregation fees), or in the form of a refund if the total fees actually incurred were less than the amount prepaid based on the agency's estimate.

Second, the requester asked whether an agency must charge fees in advance, or if it can wait to invoice the requester once the request has been completed, so the exact amount is known. While an agency must provide an estimate to the requester, it is not required to actually collect a prepayment based on its estimated fees. An agency can instead choose to notify the requester of the estimated fees and state that no prepayment is required, and then present its invoice for the fees actually incurred once the request has been filled. In such case, however, the agency would take the risk that it will not recover its fees and costs if the requester withdraws or abandons the request after the agency has already done the work.

Third, the requester asked what, if anything, should an agency do if a request the agency is processing seems likely to take much more time than was estimated in its Notice to Requester. If an agency finds as it is processing a request that the fees incurred are going to be significantly higher than its Notice to Requester indicated, it would be a good idea for the agency to keep the requester updated, even though such updates are not strictly required. One of the purposes of the Notice to Requester is to let the requester know what level of fees she or he is agreeing to before an agency moves forward with the request, and a requester who prepaid \$50 toward a \$100 fee estimate would be surprised and unhappy to be later presented with a much larger bill for fees actually incurred. So where the fees incurred are likely to significantly exceed the fees originally estimated, letting the requester know and confirming that the requester still wants to follow through with the request is in the interest of both the agency and the requester.

Choosing Datasets for Open Data

An agency staffer newly tasked with working on open data asked for a policy or guidance on questions about choosing datasets to upload to the State's open data site at data.hawaii.gov and in formulating goals for the State dashboard at dashboard.hawaii.gov. The agency was considering beginning with datasets that had been previously published in aggregate form, but for which the underlying datasets had not been published.

OIP advised that the open data law itself, particularly as codified in sections 27-44 through 27-44.3, HRS, sets restrictions on what should be used as open data, such as limiting disclosure of individually identifiable information and information protected by law or contract as well as information falling within one of the UIPA's exceptions to disclosure. The State Office of Information Management and Technology, with OIP's assistance, is working on a policy addressing both technical standards and how to prioritize selection of open data to upload; however, it remains at the draft stage.

OIP recommended that the agency begin by looking at the Records Report System ("RRS") classification for the records or information it was considering for publication as open data. If the RRS classification was anything other than "public," that would mean that at least a portion of the records or data was not public, so the agency would need to take a closer look at what portion of it, if any, could be published as open data. In this case, for example, the data underlying the previously published report may have included personal information that was confidential and not disclosable.

OIP also recommended that once the agency had identified specific pieces of information it was concerned about, it contact OIP again for guidance on whether the information would fall under an exception to disclosure under the UIPA, or whether there might be any other reason it should not be used as open data.

High-Profile Records Placed Online by Agency

An agency received a media request for records relating to an event that had been in the headlines recently. The agency expected to get several more requests for the same records, so it planned to put the records online, redacted as needed. The original media requester complained about the agency's plan to put it online, saying that doing so would be contrary to the purpose of the UIPA as it would take away his news "scoop."

OIP advised that putting records of high public interest online would be both legal and consistent with the UIPA's intent, which is to ensure public access to government records rather than to protect media members' ability to scoop competitors. If the original requester preferred to follow through with his UIPA request rather than wait for the agency to put the records online, he could of course do so, although subject to fees. OIP also advised that the public interest waiver would still apply to the request, even though the agency was planning to put the records online.

Identity of Public Housing Tenant who was Issued a Notice of Violation

After two public housing tenants got into a fight, an agency issued a Notice of Violation (NOV) to both tenants in accordance with its rules. The agency called OIP to inquire whether the UIPA required public disclosure to one tenant of the name of the other tenant involved in the fight.

OIP advised the agency that it should publicly disclose that a NOV was issued to each tenant involved in the violation in accordance with its rules. However, the name of the other tenant involved in the fight is not required to be disclosed under the UIPA's "clearly unwarranted invasion of personal privacy" exception. The UIPA recognizes that tenants in public housing have a

significant privacy interest in records revealing their eligibility for social services, including their identities as public housing tenants. The privacy exception applies because this significant privacy interest is not outweighed by any public interest in this information relative to what it would reveal about the agency's policies and actions.

Financial Records of a Mortgage Brokerage Company that is No Longer in Business

An agency received a request for access to records about a mortgage brokerage company that is no longer in business. Records that the agency maintains about this company include detailed financial records from an audit. The agency contacted OIP as to whether it must disclose the company's financial records in response to the records request.

OIP advised the agency that generally the UIPA's "frustration of a legitimate government function" exception protects detailed financial records that an agency maintains about a business because the UIPA's legislative history indicates that this exception applies to confidential commercial and financial information. OIP advised that an agency may withhold such financial records even about a company that is no longer in business because there may be a successor company to which the records would still relate. If the agency learns, however, that the company has ceased to exist in any form, the agency cannot withhold access to the defunct company's records under the "frustration" exception.

Sunshine Law Guidance:

Filing Meeting Notices

A state employee asked whether OIP's website is where she can electronically file Sunshine Law meeting notices. OIP advised that, by statute, she must file her board's notice with the Lt. Governor's office (in person or by facsimile), and should contact that office for procedural questions on how to file. State Executive Branch agencies are also required by Executive Memorandum No. 11-11 to file Sunshine Law notices on the State online Calendar. OIP does not administer the online Calendar.

Errors on a Meeting Notice Filed on the State Calendar

A state employee explained that a meeting notice with the correct starting time was properly filed with the Lt. Governor's office. Less than six days before the meeting, she learned that the notice on the State online calendar had the wrong start time for the meeting. The employee could not fix the error on the online calendar, and asked if OIP can. OIP advised that the board was in compliance with the Sunshine Law's notice requirement because the correct notice was filed with the Lt. Governor's office. OIP does not administer the online calendar and recommended that caller contact the administrator to ask about changing the time on the calendar. OIP also suggested that the caller contact her deputy AG for advice concerning the Governor's Executive Memorandum No. 11-11 regarding the posting of meeting notices on the online calendar.

Votes Needed to Enter Executive Meeting

A county attorney called to clarify the number of votes needed to enter an executive meeting when the board is entitled to 7 members, and 5 will be present at the meeting. OIP's Sunshine Law Guide states at page 22 that "[t]wo-thirds of the board members present must vote in favor of holding the executive meeting, and the members voting in favor must also make up a majority of all board members, including members not present at the meeting or membership slots not currently filled." With 5 present, 4 members would need to vote in favor of conducting an executive meeting.

Councilmember Postings on Facebook

A member of the public complained that a county council Member constantly posts political activity on the Member's Facebook profile and blocks anyone who posts disagreement. OIP was asked whether this is a Sunshine Law violation. OIP has not been asked to formally opine on use of social media by a particular member of any board. However, OIP's Open Meetings Guide to "The Sunshine Law" for State and County Boards states, that

Board members cannot discuss board business between themselves when they are outside of a properly noticed meeting by way of the telephone or by memoranda, fax, e-mail, or social media, such as Facebook. As a general rule, if the statute prohibits board members from discussing board business face-to-face, board members cannot have that same discussion through another type of media.

The Guide goes on to state that "[t]he Sunshine Law only applies to boards and their discussions, deliberations, decisions, and actions. Because the Sunshine Law does not apply to non-board

members, a board member may discuss board business with non-board members outside of a meeting.” Because the individual who contacted OIP was not a member of the county council, the Member’s discussion with him, or any other person who is not a member of the council, via social media about council business is not, on its face, a violation of the Sunshine Law.

OIP also advised that the Sunshine Law does not address the public’s right to free speech on government websites or websites connected to government officials or employees.

Conference Attendance by Board Members

A county deputy corporation counsel asked for guidance on whether members of a county commission could attend a conference. The conference included a plenary session and “break out” sessions. A quorum or more of commission members wanted to attend. Section 92-2.5(e), HRS, states:

(e) Two or more members of a board, but less than the number of members which would constitute a quorum for the board, may attend an informational meeting or presentation on matters relating to official board business, including a meeting of another entity, legislative hearing, convention, seminar, or community meeting; provided that the meeting or presentation is not specifically and exclusively organized for or directed toward members of the board. The board members in attendance may participate in discussions, including discussions among themselves; provided that the discussions occur during and as part of the informational meeting or presentation; and provided further that no commitment relating to a vote on the matter is made or sought.

At the next duly noticed meeting of the board, the board members shall report their attendance and the matters presented and discussed that related to official board business at the informational meeting or presentation.

OIP advised that if a board is treating an entire conference as being one event that discusses board business at all times, then OIP would advise that a quorum should not attend. For multi-day conferences, OIP has not formally addressed whether the “meeting” is the whole conference, or whether each breakout session can be considered a separate event, so OIP has, thus far, advised boards that they may treat each breakout session as a separate event, as long as they meet the requirements of section 92-2.5(e), HRS, for each of those events.

While OIP has not formally opined on this, it may be reasonable in some cases, depending upon the facts specific to a particular conference, to apply the Sunshine Law’s permitted interaction for informational meetings to each separate session of the conference, rather than to the conference as a whole. For example, assuming that the general sessions consist of welcome remarks, a blessing, and speeches that do not involve discussion of board business, *i.e.*, discrete matters currently on an agenda or likely to come before the board in the foreseeable future, then such sessions may be attended by more than a quorum of members.

For smaller breakout sessions where members know that board business will be discussed, they should follow the provisions of the “informational meeting or presentation” permitted interaction at section 92-2.5(e), HRS. This section allows less than a quorum to attend any conference sessions in which board business will be discussed, and allows those members to actively participate in the session’s discussions. If the commission takes this approach, it must make certain that members do not later discuss the board business

covered in the individual sessions during other portions of the conference, such as during meals or social events, as those other portions of the conference would not be part of the “informational meeting” the members had attended.

And, for each session at which commission business is discussed, section 92-2.5(e), HRS, requires the members attending that session to report their attendance and the matters presented and discussed that related to commission business at the commission’s next meeting.

Finally, OIP noted that members of a board attending a conference should always be mindful of the spirit of the Sunshine Law set forth in section 92-1, HRS. Section 92-5(b), HRS, expressly prohibits the use of a chance meeting (a gathering of board members where board business is not discussed—see section 92-2, HRS’s definition of “chance meeting”) or permitted interaction to circumvent the spirit or requirements of the Sunshine Law.

to select its chair and vice-chair without utilizing a secret ballot process and making a record, by individual members, of the vote taken.



Sunshine Law Record of Votes

A board selected its chair and vice-chair by collecting a paper ballot with the name of the desired chair and vice-chair. The ballot did not identify the individual board member who voted and submitted the ballot.

OIP advised the board that its secret ballot process violated the board’s open meeting requirement under section 92-3, HRS. Moreover, the board would not be able to comply with the requirement for keeping written minutes with a “record, by individual member of the votes taken[.]” § 92-3, HRS. Although the board’s action to select its chair and vice-chair was “voidable” under section 92-11, HRS, the action may be remedied by the board taking another vote at a subsequent meeting

Education and Communications

Training

Each year, OIP makes presentations and provides training on the UIPA and the Sunshine Law. OIP conducts this outreach effort as part of its mission to inform the public of its rights and to assist government agencies and boards in understanding and complying with the UIPA and the Sunshine Law.

Since FY 2011, OIP has more than tripled the number of training materials that are freely available on its website at oip.hawaii.gov on a 24/7 basis. Additionally, OIP has produced online video training on the UIPA and Sunshine Law, which is accessible by all, including members of the public.

Because basic training and educational materials on the UIPA and Sunshine Law are now conveniently accessible online, OIP has been able to produce more specialized training workshops that are customized for a specific agency or board. OIP has also created accredited continuing legal education (CLE) seminars. The CLE seminars are specifically geared to government attorneys who advise the many state and county agencies, boards, and commissions on Sunshine Law and UIPA issues. By training these key legal advisors, OIP can leverage its small staff and be assisted by many other attorneys to help obtain government agencies' voluntary compliance with the laws that OIP administers.

In FY 2013, OIP launched via its website the UIPA Record Request Log, currently being used by all state Executive Branch departments, the Judiciary the University of Hawaii, and other independent agencies to record and report data about requests for public information. Besides helping agencies keep track of record requests and costs, the Log provides detailed instructions and training materials that help educate agency personnel on



how to timely and properly fulfill UIPA requests. It also collects important information showing how agencies are complying with the UIPA. In FY 2014, OIP continued to offer online and live training for state agencies as well as all four counties.

In FY 2014, OIP continued posting online “Quick Reviews” that provide easy-to-read guidance and practical tips on how to comply with the UIPA and Sunshine Law. “What’s New” articles informing readers of OIP’s latest training materials and relevant open government information are regularly emailed to government agencies, media representatives, community organizations, and members of the public, and past articles are also posted in the What’s New archive on OIP’s website. The What’s New articles and Quick Reviews allow OIP to more widely disseminate the advice it gives in response to Attorney of the Day (AOD) inquiries and to timely address questions of widespread interest.

In FY 2013, OIP created an online Sunshine Law test, which allows individuals to test their knowledge of the law. This is another educational and practical tool to help state and county boards comply with the Sunshine Law. Whether a person is a board member who is required to have Sunshine Law training, an attorney who advises boards, or a member of the public who wants to assess their knowledge of the law, OIP’s new online test is something that a person can do at their convenience and at no cost. The online test randomly selects ten multiple-choice or true/false questions about the state’s Sunshine Law, and upon completion of the test, correct answers and explanations for each question are provided. Those who correctly answer at least

seven questions will receive an automatically generated certificate showing their successful passage of the test. The Sunshine Law test, along with the law, guides, and other training materials, are available at no charge on the training page of OIP’s website at oip.hawaii.gov.

OIP continues to present training sessions for the general public, various state agencies, and the constantly changing cast of state and county board members.

UIPA and Sunshine Law Training

OIP provided 19 training sessions in FY 2014 on the UIPA and Sunshine Law for the following agencies and groups:

- 8/22/13 Town Square “The Conversation” Radio Talk Show: “*Kanahele v. Maui County Council*”
- 10/11/13 Department of Agriculture: “UIPA Record Request Log”
- 11/1/13 Department of the Attorney General: “Brown Bag Session on UIPA/OIP Updates”
- 11/25/13 Legislature House Majority: “UIPA and Sunshine Law”
- 12/11/13 Department of Commerce and Consumer Affairs: “UIPA Q&A and UIPA Record Request Log”
- 12/17/13 ALL Government Agencies: “UIPA Record Request Log”
- 12/18/13 ALL Government Agencies: “UIPA Record Request Log” via webinar
- 1/13/14 ALL Government Agencies: OIP CLE Course “2013 OIP Updates” (held at DLIR)
- 1/23/14 ALL Government Agencies: OIP CLE Course “2013 OIP Updates” via webinar, online streaming
- 2/18/14 University of Hawaii Law School (Administrative Law Section Class): “UIPA”
- 2/20/14 Charter School Commission: “UIPA Record Request Log Q&A”
- 5/21/14 Kauai County Council: “Executive Sessions Under the Sunshine Law” via teleconference
- 6/4/14 Department of Health, Developmental Disabilities Division: “UIPA Record Request Log”
- 6/10/14 City & County of Honolulu: “UIPA Record Request Log”
- 6/13/14 Office of Hawaiian Affairs: “OIP Updates and UIPA Record Request Log”
- 6/20/14 County of Hawaii: “OIP Updates and UIPA Record Request Log”
- 6/23/14 County of Maui: “OIP Updates and UIPA Record Request Log”
- 6/24/14 County of Kauai: “OIP Updates and UIPA Record Request Log”
- 6/24/14 Department of Health, Developmental Disabilities Division Supervisors: “UIPA Record Request Log”



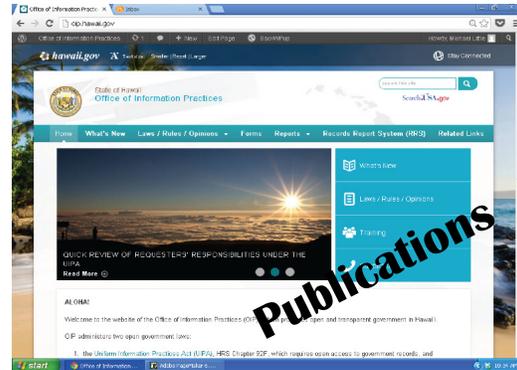
Publications

OIP's online publications and website play a vital role in the agency's ongoing efforts to inform the public and government agencies about the UIPA, the Sunshine Law, and the work of OIP.

Other than a few printed copies of the Annual Report and a pamphlet, all of OIP's publications are available online at oip.hawaii.gov, where they can be readily updated by OIP as necessary. While all Annual Reports can be found on the "Reports" page of oip.hawaii.gov, the other publications can be found on the "Laws/Rules/Opinions" or "Training" pages of the website and are organized under either the Sunshine Law or UIPA headings. Additionally, all of OIP's forms can be found on the "Forms" page at oip.hawaii.gov.

OIP's publications include the Sunshine Law and UIPA training guides and videos described below, as well as the *Guide to Appeals to the Office of Information Practices*, which explains the administrative rules to file an appeal to OIP when requests for public records are denied by agencies or when the Sunshine Law is allegedly violated by boards. OIP also prepares Quick Reviews and other materials, which provide additional guidance on specific aspects of the Sunshine Law or UIPA.

To help the agencies and the public, OIP has also created model forms that can be used at various points in the UIPA or Sunshine Law processes.

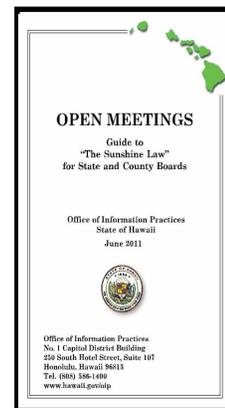


Sunshine Law Guides and Video

Open Meetings: Guide to the Sunshine Law for State and County Boards (Sunshine Law Guide) is intended primarily to assist board members in understanding and navigating the Sunshine Law. OIP has also produced an *Open Meetings* Guide specifically for neighborhood boards.

The Sunshine Law Guide uses a question and answer format to provide general information about the law and covers such topics as meeting requirements, permitted interactions, notice and agenda requirements, minutes, and the role of OIP. OIP also produced a 1.5 hour Sunshine Law training video. The video provides basic training utilizing the same PowerPoint presentation and training materials that OIP formerly presented in person. The video makes the Sunshine Law basic training conveniently available 24/7 to board members and staff as well as the general public, and has freed OIP's staff to do many other duties.

OIP has also created Agenda Guidance for Sunshine Law Boards, which is posted on OIP's website.



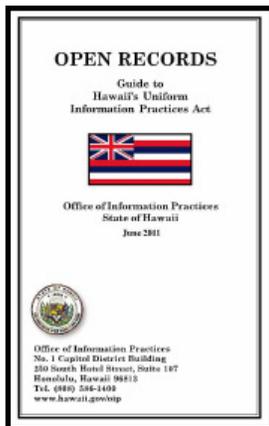
UIPA Guides and Video

Open Records: Guide to Hawaii's Uniform Information Practices Act (UIPA Guide) is a guide to Hawaii's public record law and OIP's administrative rules.

The UIPA Guide navigates agencies through the process of responding to a record request, such as determining whether the record falls under the UIPA, providing the required response to the request, analyzing whether any of the excep-

tions to disclosure apply, and how the agency may review and segregate the record. The UIPA Guide includes answers to a number of frequently asked questions.

In addition to the UIPA Guide, a printed pamphlet entitled *Assessing Government*



Records Under Hawaii's Open Records Law explains how to make a record request, the amount of time an agency has to respond to that request, what types of records or information can be withheld, fees that can be charged for search, review, and segregation, and what options are available for an appeal to OIP if an agency should deny a request.

As it did for the Sunshine Law, OIP has produced a 1.5 hour long video of its basic training on the UIPA.

Additionally, as discussed earlier in the "Training" section, OIP in FY 2013 implemented the UIPA Records Request Log, which will be a useful tool to help agencies comply with the UIPA's requirements.

Model Forms

OIP has created model forms for use by agencies and the public.

To assist members of the public in making a record request to an agency, OIP provides a

"Request to Access a Government Record" form that provides all of the basic information the agency requires to respond to the request. To assist agencies in properly following the procedures set forth in OIP's rules for responding to record requests, OIP has forms for the "Notice to Requester" or, where extenuating circumstances are present, the "Acknowledgment to Requester."



Members of the public may use the "Request for Assistance to the Office of Information Practices" form when their request for government records has been denied by an agency or to request other assistance from OIP.

To assist agencies in complying with the Sunshine Law, OIP provides a "Public Meeting Notice Checklist."

OIP has created a "Request for OIP's Concurrence for a Limited Meeting" form for the convenience of boards seeking OIP's concurrence to hold a limited meeting, which will be closed to the public because the meeting location is dangerous to health or safety, or for an on-site inspection where public attendance is not practicable. Before holding such a meeting, a board must, among other things, obtain the concurrence of OIP's director that it is necessary to hold the meeting at a location where public attendance is not practicable.

A "Notice of Continuance of Meeting" form can be used when a convened meeting must be continued past its originally noticed date and time. A Quick Review provides more specific guidance and practice tips for meeting continuances.

All of these forms may be obtained online at oip.hawaii.gov.

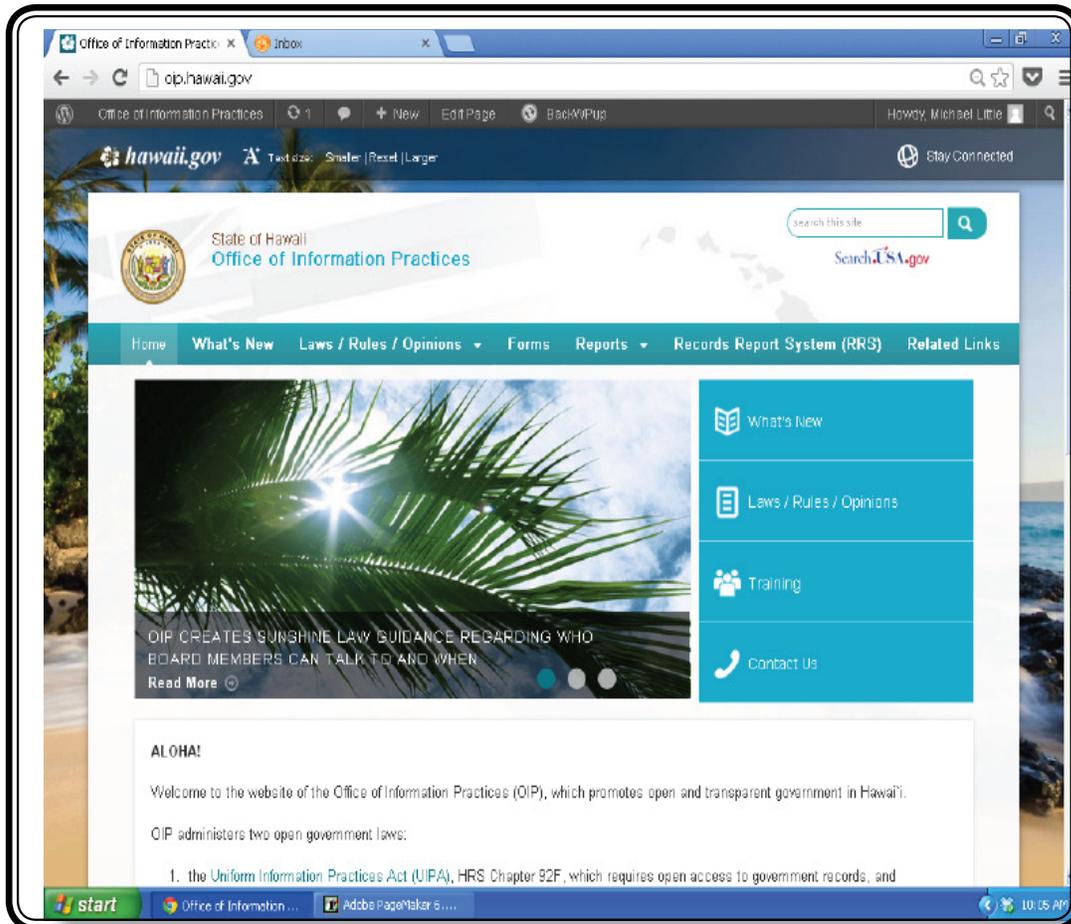


Communications

OIP's website at oip.hawaii.gov and the *What's New* articles that are e-mailed and posted on the website, continue to be important means of disseminating information on open government issues. In FY 2014, OIP continued its communications to the agencies and public, mainly through 35 *What's New* articles.

Visitors to the OIP site can access, among other things, the following information and materials:

- The UIPA and the Sunshine Law statutes
- OIP's administrative rules
- OIP's recent annual reports
- Model forms created by OIP
- OIP's formal opinion letters
- Formal opinion letter summaries
- Formal opinion letter subject index
- Informal opinion letter summaries
- Training guides, presentations, and other materials for the UIPA, Sunshine Law, and Appeals to OIP
- General guidance for commonly asked questions
- Guides to the Records Report System and links to the RRS
- *What's New* at OIP and in open government news



Website Features

OIP's website at oip.hawaii.gov features the following sections, which may be accessed either through the menu found below the state seal or through four large links located on the right of the home page (What's New, Laws/Rules/Opinions, Training, and Contact Us).

"What's New"

The OIP's frequent *What's New* articles provide helpful tips and current news regarding OIP and open government issues. To be included on OIP's *What's New* e-mail list, please e-mail oip@hawaii.gov.

"Laws/ Rules/ Opinions"

This section features these parts:

➤ *UIPA*: the complete text of the UIPA, with quick links to each section; training video and guide to the law; UIPA Record Request Log training and instructions; additional UIPA guidance; and a guide to administrative appeals to OIP.

➤ *Sunshine Law*: the complete text of the Sunshine Law, with quick links to each section; training video and guide to the law; additional guidance, including quick reviews on agendas, minutes, and notice requirements; a Sunshine Law Test to test your knowledge of the law; and a guide to administrative appeals made to OIP.

➤ *Rules*: the full text of OIP's administrative rules ("Agency Procedures and Fees for Processing Government Record Requests"), along with a quick guide to the rules and OIP's impact statement for the rules; and the "Administrative Appeal Procedures," with a guide to OIP's appeals rules and impact statement.

➤ *Formal Opinions*: a chronological list of all OIP opinion letters, an updated subject index, a summary of each letter, and the full text of each letter.

➤ *Informal Opinions*: summaries of OIP's informal opinion letters, in three categories: Sunshine Law opinions, UIPA opinions, and UIPA decisions on appeal.

➤ *Legislative History*: recent legislative history of bills affecting the UIPA and Sunshine Law.

"Forms"

Visitors can view and print the model forms created by OIP to facilitate access under and compliance with the UIPA and the Sunshine Law. This section also has links to OIP's training materials.

"Reports"

OIP's annual reports are available here, beginning with the annual report for FY 2000. Also available are reports to the Legislature on the commercial use of personal information and on medical privacy.

In addition, this section has an archive of OIP's newsletter, *OpenLine*, with issues from November 1997 through December 2011. The newsletter has been replaced by the *What's New* articles on the website.

"Records Report System (RRS)"

This section has guides to the Records Report System for the public and for agencies, as well as links to the RRS online database.

"State Calendar and Related Links"

To expand your search, visit the growing page of links to related sites concerning freedom of information and privacy protection, organized by state and country. You can link to Hawaii's State Calendar showing the meeting agendas for all state agencies or visit Hawaii's open data site at data.hawaii.gov and see similar sites of cities, states, and other countries. The UIPA Master Record Request Log results are also posted by the various departments and agencies on data.hawaii.gov.

"Training"

The training link on the right side of the home page will take you to all of OIP's training materials, as categorized by the UIPA, Sunshine Law, and Appeals to OIP.



Legislation Report

One of OIP's functions is to make recommendations for legislative changes to the UIPA and Sunshine Law. OIP may draft proposed



bills and monitor or testify on legislation to clarify areas that have created confusion in application, to amend provisions

that work counter to the legislative mandate of open government, or to provide for more efficient government as balanced against government openness and privacy concerns. To provide for uniform legislation in the area of government information practices, OIP also monitors and testifies on proposed legislation that may impact the UIPA or Sunshine Law; the government's practices in the collection, use, maintenance, and dissemination of information; and government boards' open meetings practices. Since adoption of the State's Open Data policy in 2013, OIP has also tracked open data legislation.

During the 2014 Legislative session, OIP reviewed and monitored 181 bills and resolutions affecting government information practices, and testified on 28 of these measures. OIP was most significantly impacted by the following legislation:

► **Act 68**, signed on April 30, 2014, enacts **S.B. 2249, S.D. 1, H.D. 1**. This act conforms the level of detail required in a public meeting agenda for the proposed adoption, amendment, or repeal of administrative rules to the level of detail required by the rule-making standards provided in HRS Chapter 91, rather than the general Sunshine Law standard.

► **SB 2881, SD 1** was a bill to repeal the sunset provision for the UIPA provision regarding

duplicative requests by the same requester, which was originally passed in response to a deluge of "birther" requests. SB 2881, SD 1 died in the House Judiciary Committee. Therefore, agencies should be aware that after July 1, 2014, the repeat requester provision found in HRS Section 92F-11(b) was repealed and agencies must respond to duplicate requests from the same requester.

► **Act 121**, signed on June 23, 2014, enacts **S.B. 2591, SD 1, HD 1, CD 1**. This act requires additional detail and updating of the annual report regarding police misconduct and the retention of disciplinary records for at least 18 months after the final annual report of an incident. It retains the UIPA language found in HRS Section 92F-14(b)(4)(B)(v) permitting disclosure of information concerning a police officer's discharge, with an amendment providing that prior to disclosure, at least 90 days must have elapsed after issuance of a decision to discharge a police officer.

► **Act 221**, signed on July 7, 2014, enacts **HB 2139, HD 1, SD 1, CD 1**. This act amends the Sunshine Law to permit an unlimited number of county councilmembers to discuss board business, no more than once a month, as guests at a public meeting in Hawaii of another board or community group, without having to file an agenda or accept public testimony at the meeting. All other requirements for Sunshine Law meetings and limited meetings remain in effect, including requirements to provide six days advance notice, take minutes, and videotape the guest meetings. Additionally, if the host group is a Sunshine Law board, then the host group must comply with the notice, agenda, testimony, minutes, and all other Sunshine Law requirements. The new law will sunset on June 30, 2016.



Litigation Report



OIP monitors litigation that raises issues under the UIPA or the Sunshine Law or involves challenges to OIP’s rulings.

Under the UIPA, a person may bring an action for relief in the circuit courts if an agency denies access to records or fails to comply with the provisions of the UIPA governing personal records. A person filing suit must notify OIP at the time of filing. OIP has standing to appear in an action in which the provisions of the UIPA have been called into question. Under the Sunshine Law, a person may file a court action seeking to require compliance with the law or prevent violations. A suit seeking to void a board’s “final action” must be commenced within 90 days of the action.

Under either law, OIP’s opinions and rulings shall be considered a precedent unless found to be palpably erroneous by the court, which is a high standard of review.

With the exception of four cases previously reported in OIP’s 2013 Annual Report, the cases that OIP monitored in FY 2014 are summarized below.

UIPA Litigation:

Certified Copy of Birth Certificate

Sunahara v. DOH
CAAP-12-0000501 (1st Cir. Court)

In 2012, Duncan Sunahara (Plaintiff) requested that the Defendant Department of Health (DOH) provide a certified copy of the original certificate of live birth for his sister, Virginia Sunahara, who

was born on August 4, 1961 (the same birth date as that of President Barack Obama), and died on August 5, 1961. DOH provided a computer generated abstract of the birth record for Virginia Sunahara.

Plaintiff filed a lawsuit in the First Circuit Court against DOH, claiming that DOH did not respond to his request. As previously reported in OIP’s 2013 Annual Report, the Circuit Court granted DOH’s Motion for Summary Judgment and Plaintiff filed an appeal with the Intermediate Court of Appeals (ICA).

The ICA issued a Summary Disposition Order on May 29, 2014, finding that the DOH had satisfied its burden at the circuit court to show that there is no genuine issue as to any material fact regarding Plaintiff’s alleged entitlement to a certified copy of his sister’s birth certificate. The ICA also found that DOH is not required to provide Plaintiff with a certified copy or to allow inspection of the birth certificate, and that DOH did not violate the law when it provided an abstract. Finally, the ICA found that Plaintiff is not entitled to the birth certificate under section 92F-11, HRS, and affirmed the circuit court’s rulings in favor of DOH.

Mug Shots and Other Documents for All Individuals Booked into Oahu Jails and Correctional Facilities

Prall v. HPD
Civil No. 13-1-1917-07 ECN (1st Cir. Court)

Plaintiff Kyle Prall, a Texas resident and principal of Citizens Information Associates LLC, and Information Freedom, LLC, filed a complaint in the First Circuit Court for declaratory judgment and injunctive relief asking the circuit court to compel the Defendants, Honolulu Police Department (HPD) and Department of Public Safety (PSD), to disclose booking photos and mug shots on every individual booked into all of the Oahu Jails and Correctional Facilities, and for “jail/arrest” logs, including corollary information such as name, date of birth, booking date, gender, race, age, street address, city, state, zip code, photos, inmate charge dates, code, and other information in CSV or Excel format. Plaintiff had made several record requests to Defendants covering different time periods. Some records were provided by both agencies in response to these requests. Plaintiff’s complaint alleged that Defendants failed to disclose government records that are public under the UIPA, failed to identify records that were being withheld as required by OIP’s administrative rules, and that Defendants failed to provide any records in a “usable format.” This case is still in the early pretrial stages of litigation.

Maui County Council’s Approval of the Real Property Tax Classification and Rates for Timeshare Properties

Ocean Resort Villas Vacation Owners Association v. County of Maui
Civil No. 13-1-0848 (2) (2nd Cir. Court)

In August 2013, Plaintiffs filed a lawsuit in the Second Circuit Court alleging that the new Real Property Classification and Tax Rates for Timeshare Properties recently approved by the Maui County Council violates the Equal Protection clauses of the United States and Hawaii Constitutions because they intentionally and arbitrarily categorize and tax non-resident timeshare owners compared to similarly situated residents. Plaintiffs also alleged that Maui County Councilmembers circulated memoranda or engaged in other improper interactions or discussions, outside of public meetings, with the purpose of circumventing the spirit or requirements of the Sunshine Law, and sought a declaration that the new timeshare tax rate set forth in the Council’s resolution is void due to violations of the Sunshine Law.

In August 2014, the Court denied the Defendants’ Motion for Partial Summary Judgment. The trial is set for February 2015.

Police Disciplinary Records

Peer News LLC v. City & County of Honolulu
Civil No. 13-1-2981-11 (KKA) (Int. Ct. of
App.)

In October 2013, Plaintiff asked the Honolulu Police Department (HPD) to provide information regarding 12 police officers who received 20-day suspensions because of employment misconduct during 2003–2012 according to HPD’s annual disclosure of misconduct to the State Legislature. Plaintiff asked for the suspended employees’ names, nature of the misconduct, summaries of allegations, and findings of fact and conclusions of law. HPD denied Plaintiff’s records request, asserting that the UIPA’s “clearly unwarranted invasion of personal privacy” exception protected the suspended police officers’ identities.

Plaintiff filed a lawsuit in the First Circuit Court alleging that HPD failed to disclose the requested records about the 12 suspended police officers as required by the UIPA and in accordance with an OIP opinion in 1997. In March 2014, the Court granted Plaintiff’s Motion for Summary Judgment and ordered the Defendants to disclose the requested records about the suspended police officers. As the Court noted, the Hawaii Supreme Court had rendered a decision in *State of Hawaii Organization of Police Officers v. Society of Professional Journalists, University of Hawaii Chapter (SHOPO)*, concluding that the privacy provision of Article I, Section 6, of the Hawaii Constitution does not protect police officers’ privacy interest in records about employment misconduct that led to suspension or discharge.

The circuit court’s decision here also followed OIP’s Opinion Letter Number 97-1 as precedent and recognized that this OIP opinion was not erroneous. As background, OIP Opinion Letter

No. 97-1 addressed the competing interests of the Supreme Court’s opinion in *SHOPO* and the Legislature’s amendment of the UIPA in 1995. OIP opined that, while the Legislature in 1995 had recognized the police officers’ privacy interest in disciplinary records resulting in suspension to be significant, OIP determined that this privacy interest was outweighed by the greater public interest in disclosure of these records, as the Supreme Court had recognized in *SHOPO*. Thus, the OIP Opinion concluded that the UIPA requires public disclosure of the police suspension records because the public interest outweighs the privacy interest.

An appeal has been filed in this case by Intervenor State of Hawaii Organization of Police Officers. The Hawaii Intermediate Court of Appeals has granted a stay of judgment pending appeal.

Presentence Investigation Report

Marks v. Hawaii Paroling Authority
Civil No. 13-1-3219-11 (GWBC) (1st Cir.
Court)

Plaintiff Donald Marks (Plaintiff) requested that the Hawaii Paroling Authority (HPA) provide his Presentence Investigation Report regarding Cr. No. 94-1-0144. HPA subsequently denied his request. Thereafter, on December 10, 2013, Plaintiff filed a *pro se* lawsuit. This case is pending.

Agreements with Community Correctional Center

Kong v. Maui Drug Court
S.R.P. No. 12-1-0013(2) (2nd Cir. Court)

Plaintiff Stanley Kong (Plaintiff) made a UIPA request that the Maui Community Correctional Center (MCCC) provide a copy of the contract agreement and stipulations signed by him upon entering the Maui Drug Court Program in MCCC. Plaintiff also requested the approval form granting him inmate to inmate correspondence and visits by MCCC. MCCC failed to respond to both requests. Thereafter, on December 27, 2012, Plaintiff initiated suit *pro se*. This case is pending.

Identity of Source

Boyd v. University of Hawaii
Civil No. 12-1-2099-08 VLC (1st Cir. Ct.)

In August 2012, Plaintiffs Charles D. Boyd and Jane Doe filed a lawsuit in the First Circuit Court against the Defendant University of Hawaii (UH), alleging that UH had violated the UIPA by not disclosing the identity of a source who claimed that Plaintiffs had engaged in research misconduct.

UH contends that the inquiry and investigation procedures of its Ethics Committee, which assists in evaluating alleged violations of research misconduct, are confidential pursuant to: (1) the UIPA; (2) UH Executive Policy E5.211, which sets forth the policies and procedures regarding research misconduct; and (3) the terms of the applicable collective bargaining agreement.

In July 2014, the court granted UH's Motion for Summary Judgment, finding that there is no government record containing the identity of the source. Thus, there was no record to disclose.

Even if there was such a record, the court found it would not be required to be disclosed under Part II and Part III of the UIPA because the identity of the source need not be disclosed under the exceptions for clearly unwarranted invasions of personal privacy, section 92F-13(1), HRS, and frustration of a legitimate government function, section 92F-13(3). Also, the court found that the source had been promised confidentiality. UH Policy E5.211 provided confidentiality to persons who provide information and are promised confidentiality as part of an investigation. After the Order granting UH's summary judgment motion was filed, Final Judgment was entered on September 8, 2014. Plaintiffs' Notice of Appeal was filed on October 8, 2014.

Agency's Duty to the Public to Maintain Accurate and Complete Records

Molfino v. Yuen
2014 WL 5905007 (Haw. S. Ct., November 13, 2014)

The Hawaii Supreme Court addressed an issue whether the County of Hawaii had a legal duty to maintain accurate, relevant, timely, and complete records under chapter 92F, Hawaii Revised Statutes (HRS). In this case, Plaintiff brought a negligence action for alleged monetary damages after Plaintiff sold a piece of property based upon a determination from the County of Hawaii Planning Department that the tax map key (TMK) records for the property reflected the existence of only two pre-existing lots, when additional documents found later showed that the property actually consisted of six pre-existing lots.

While recognizing that one of the "underlying purposes and policies" of chapter 92F, HRS, was to "[p]rovide for accurate, relevant, timely, and complete government records,"

the Hawaii Supreme Court also noted that section 92F-16, HRS, provides immunity from liability for good faith disclosure or nondisclosure of a government record and that the UIPA does not create a statutory legal duty to maintain a property's TMK file "in accurate, relevant, timely, and complete condition at all times." Consequently, the Court held that there was no statutory basis for imposing negligence liability upon the County Planning Department in this case.

County Board Member's Facebook Page

Mamuad v. County of Maui
Civil No. 1400102 JMS-BMK (U.S. District Court for the District of Hawaii)

A county employee, who was a county liquor commissioner, created an anonymous Facebook page during his personal time for discussion of county activities, including government affairs. The employee filed a complaint in March 2014 alleging that the county infringed his right to freedom of speech by ordering him to shut down the Facebook page on the grounds that it was harassment of a police officer who was frequently discussed on the page. OIP tracked this litigation to see whether there had been online discussion of the liquor commission's business between the plaintiff and other commissioners. However, the facts were never fully developed; less than two months after the case was filed, the parties reached a settlement and rewrote its anti-harassment policy, and the case was dismissed on June 19, 2014.

UIPA Request Not Responded To

Continental Pacific LLC v. Hee, et al.,
Civil No. 13-1-2999-11 (RAN) (1st Cir. Court)

A corporation made a UIPA request to a state senator, who did not respond to the request. In November 2013, the corporation filed a complaint alleging that the non-response was an unjustified denial of access under the UIPA. The senator alleged that he had never received the request. The senator then responded to the original request in the manner required by the UIPA, and the lawsuit was dismissed without prejudice in June 2014.

Sunshine Law Litigation:

OIP's In Camera Review of Records

County of Maui v. OIP
Civil No. 13-1-1079 (2) (2nd Cir. Ct.)

The Maui County Corporation Counsel filed a lawsuit in the Second Circuit Court against OIP seeking to enjoin OIP from issuing an opinion in an appeal filed against the Maui County Council's Policy and Intergovernmental Affairs Committee (PIA Committee). The lawsuit arose after the PIA Committee, during a public meeting, voted to enter an executive session to discuss its "powers" with its attorney. *The Maui News* then filed an OIP appeal, which questioned whether some of the items discussed in the executive session should have been done in public and asked for a determination as to whether the PIA Committee properly went into executive session.

As part of its powers as a neutral third party decision maker for Sunshine Law appeals, OIP asked the PIA Committee Chair for a copy of the

executive minutes for the sole purpose of determining whether the Committee properly entered into the executive session for the reasons stated during the public portion of the meeting. Instead of providing the relevant portions of the minutes for OIP's review and redacting what was necessary to protect the attorney-client privilege, and despite assurances from OIP that the minutes would not be further disclosed by OIP, the Maui Corporation Counsel instead filed this lawsuit on behalf of Maui County. Corporation Counsel also asked the court to find that the County of Maui is not obligated to provide the executive minutes to OIP, for judgment finding OIP acted beyond its authority and barring OIP from taking any adverse action against Maui County, and for fees and costs. This case is being vigorously contested by OIP.

Access to Minutes of Closed Meetings

Akana v. Machado
Civil No. 13-1-2485-09 VLC (1st Cir. Ct.)

Office of Hawaiian Affairs (OHA) Trustee Rowena Akana (Plaintiff) filed a complaint for declaratory and injunctive relief against the Chairperson and other members of OHA's Board of Trustees (Defendants) for judgment finding that the practices and procedures of OHA to provide the public and Co-Trustees access to records of closed executive meeting of Trustees were unreasonably cumbersome and not properly adopted by OHA's Board of Trustees. Plaintiff sought injunctive relief which would provide any trustee with unfettered access to minutes and records for closed executive meetings. Plaintiff also sought injunctive relief to provide the public with reasonable and timely access to minutes and records for closed executive meetings.

Defendants answered the complaint denying the allegations and requesting dismissal of the Complaint and denial of the relief sought by

Plaintiff. Defendants filed a Counterclaim for injunctive relief alleging that Plaintiff breached her fiduciary duty when Plaintiff, without proper authorization, disclosed confidential, proprietary or privileged information. Plaintiff answered the Counterclaim by denying the allegations that Plaintiff had breached her fiduciary duty to OHA. The case is pending in the Circuit Court of the First Circuit.

Alleged Violation of Sunshine Law When Considering Applicants to Replace a Councilmember During an Executive Meeting Closed to the Public

Syngenta Seeds, Inc. v. County of Kauai
Civil No. 14-00014 (D. Haw.)

Various companies engaged in the production and planting of genetically modified seeds on Kauai (Plaintiffs) filed a federal lawsuit against the Defendant County of Kauai that challenged the legality of a county legislative measure restricting the use of pesticides and the planting of genetically modified crops. In one of the 13 claims asserted by Plaintiffs, it was alleged that applications to replace a Kauai County Councilmember were kept secret by the sitting members of the Kauai County Council (Council). After meeting in executive session to review and evaluate the applicants, the number of applicants were winnowed down to two, whose names were subsequently revealed.

Plaintiffs alleged that section 92-4, HRS (authority to conduct executive meetings) and section 92-5, HRS (matters that may be considered in executive session) were violated when the Council deprived the public of an opportunity to know the identity of every applicant. Plaintiffs further alleged that the privacy interest of each applicant was outweighed by the public interest in knowing the background of the applicant and

whether or not the applicant would support a measure restricting the use of genetically modified crops. After the federal court considered motions for summary judgment filed by the parties on the various claims asserted in the lawsuit, including the claim that sections 92-4 and 92-5, HRS, were violated, the court issued an “Order on Preemption and Order on Various Motions” that invalidated the measure because it was preempted by a comprehensive framework of state law and “denied as moot” the alleged violations of the Sunshine Law. This case has been appealed.



Records Report System



The UIPA requires each state and county agency to compile a public report describing the records it routinely uses or maintains and to file these reports with OIP. HRS § 92F-18(b)(2012).

Public reports must be updated annually by the agencies. OIP makes these reports available for public inspection through the RRS database, which may be accessed by the public through OIP's website.

OIP developed the Records Report System (RRS), a computer database, to facilitate collection of this information from agencies and to serve as a repository for all agency public reports required by the UIPA, but not for the actual records, which remain with the agency.

As of FY 2014 year end, state and county agencies have reported 29,758 records. See **Figure 16**.



Records Report System

Status of Records Reported by Agencies: 2014 Update

Jurisdiction	Number of Records
State Executive Agencies	20,849
Legislature	836
Judiciary	1,645
City and County of Honolulu	3,909
County of Hawaii	947
County of Kauai	930
County of Maui	642
Total Records	29,758

Figure 16

RRS on the Internet

Since October 2004, the RRS has been accessible on the Internet through OIP’s website. Agencies may access the system directly to enter and update their records data. Agencies and the public may access the system to view the data and to create various reports. A guide on how to retrieve information and how to create reports is also available on OIP’s website at oip.hawaii.gov.

Key Information: What’s Public

The RRS requires agencies to enter, among other things, public access classifications for their records and to designate the agency official having control over each record. When a government agency receives a request for a record, it can use the RRS to make an initial determination as to public access to the record.

State executive agencies have reported 51% of their records as accessible to the public in their entirety; 18% as unconditionally confidential, with no public access permitted; and 26% in the category “confidential/conditional access.” Another 5% are reported as undetermined. See **Figure 17**. OIP is not required to, and in most cases has not reviewed, the access classifications.

Records in the category “confidential/conditional access” are (1) accessible after the segregation of confidential information, or (2) accessible only to those persons, or under those conditions, described by specific statutes.



With the October 2012 launch of the state’s new open data website at data.hawaii.gov, the RRS access classification plays an increasingly important role in determining whether actual records held by agencies should be posted onto the Internet. To prevent the inadvertent posting of confidential information onto data.hawaii.gov, agencies may not post records that are classified as being confidential, and they must take special care to avoid posting confidential data from records that are classified in the RRS as being public or “confidential/conditional.”

Note that the RRS only lists government records and information and describes their accessibility. The system does not contain the actual records, which remain with the agency. Accordingly, the record reports on the RRS contain no confidential information and are public in their entirety.

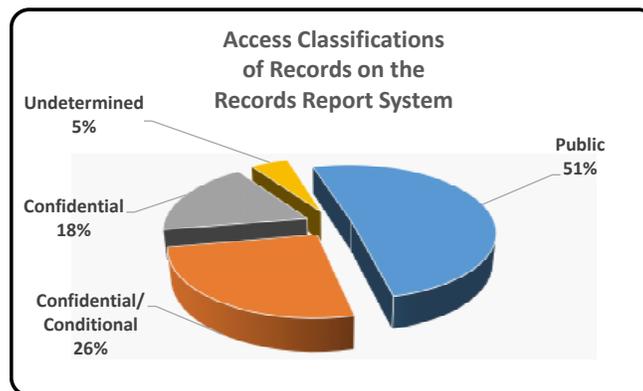


Figure 17

Notes