

# Office of Information Practices

State of Hawaii

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## Annual Report 2013

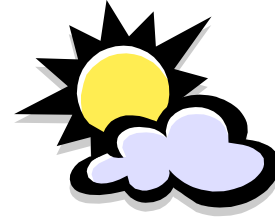


This report to the Governor and the Legislature summarizes the activities and findings of the Office of Information Practices in the administration of the public records law, the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes, and the open meetings law, Part I of chapter 92, Hawaii Revised Statutes, from July 1, 2012, to June 30, 2013.



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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.



*Ensuring open government while protecting your privacy*

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 its 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 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. Besides providing relevant background information, this annual report details OIP's activities for fiscal year 2013, which began on July 1, 2012, and ended on June 30, 2013.

OIP serves the general public and the state and county government entities by providing assistance and legal guidance in the application of both laws. OIP also provides education and training in both laws, primarily to government boards and agencies. To resolve UIPA and Sunshine Law disputes, OIP administers a free and informal process that is not a contested case or judicial proceeding.

Since Cheryl Kakazu Park became OIP's Director in April 2011, OIP has focused its limited resources on education and communication in order to cost-effectively provide services to the greatest potential number of people and increase compliance by more government agencies. Thus, since FY 2011, OIP has more than tripled the number of training materials that are freely available on its website 24/7. With the basic training on the UIPA and Sunshine Law readily available on-line, OIP is now able to provide live training sessions that better meet the specific needs of government agencies and OIP has also created continuing legal education courses for attorneys to help them properly advise their clients about Hawaii's open government laws and procedures.

Moreover, in FY 2013, OIP launched the UIPA Record Request Log, currently being used by state Executive Branch departments,

University of Hawaii, and the Judiciary, to record and report data about requests for public information. Besides helping agencies to keep track of record requests and costs, the Log also provides detailed instructions and training materials that help educate agency personnel on how to timely and properly fulfill UIPA requests and it collects important information showing how agencies are complying with the UIPA.

In FY 2013, OIP also began 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 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.

Thanks to the help of the Department of Accounting and General Services' Information and Communication Services Division (ICSD), OIP was able to update its website during FY 2013 to have the same look and feel as other state agencies. The new and improved site was unveiled on July 1, 2013 at [oip.hawaii.gov](http://oip.hawaii.gov). The UIPA and Sunshine Law statutes, rules, OIP's formal opinions, summaries of informal opinions, various training materials, and an archive of OIP's What's New articles are posted and searchable on the website. Moreover, OIP's website now links to the State Calendar where public meeting agendas are 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 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.

OIP's emphasis on education and communication has resulted in greater public and agency awareness of the open government requirements. Formal cases opened by OIP increased by 42 cases from 135 in FY 2012 to 177 in FY 2013, a 31% increase. Attorney of the Day (AOD) inquiries increased from 940 in FY 2012 to 1,050 in FY 2013, an 11.7% increase. Notably, OIP had the same number of staff positions in FY 2011 as in FY 2013, but the number of AOD requests increased over 55% since FY 2011 and the total number of inquiries increased by more than 40% from 822 to 1,227 in the past two years. Not surprisingly, the tremendous increase in total inquiries adversely affected OIP's ability to reduce its formal case backlog, which grew from 78 at the beginning of FY 2013 to 113 at the end.

Fortunately, during the 2013 session, the Legislature appropriated an additional \$100,000 and authorized the creation of one new attorney position for the fiscal biennium 2014-2015 in order to help with OIP's ongoing duties and the increased workload that is expected to result from the open data initiatives being developed by the state Office of Information Management and Technology (OIMT). Governor Neil Abercrombie signed this legislation as Act 263, SLH 2013, which encourages state agencies to place public information online at [data.hawaii.gov](http://data.hawaii.gov), where it can be freely viewed and used by anyone. For the upcoming fiscal years, OIP will be working with OIMT to develop guidelines on what data should be posted online without breaching privacy or proprietary interests, and OIP will assist agencies in complying with this new law and other challenges in a continuing

effort to make government more transparent and accountable.

## 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 2013, OIP's total allocation was \$390,933, up from \$382,282 in FY 2012. OIP's allocation for personnel costs in FY 2013 was \$372,327 and for operational costs was \$18,606. See **Figure 1** on page 16. In FY 2013, OIP operated with a total staff of 7.5 full-time equivalent (FTE) positions, including the Director.

Following years of budget cuts, work furloughs, pay cuts, and other restrictions, OIP will receive additional resources in fiscal biennium 2014-2015 to address the increasing number of requests it is receiving from agency personnel and members of the general public. The slight increase in OIP's budget allocation allowed it to remain fully staffed (with mandatory pay cuts) in FY 2013. Looking forward, Act 263, SLH 2013 will be of tremendous help to OIP when it receives its allocation of the legislatively appropriated \$100,000 for each year of the fiscal biennium 2014-2015 and is authorized to fill a fifth attorney position created by the Act to assist with open data and open government matters.

## Legal Assistance and Guidance

Each year, OIP receives hundreds of requests for assistance from members of the public, government employees, and board members and staff.

In FY 2013, OIP received 1,227 formal and informal requests for assistance, which is a 14% increase over FY 2012. This number includes both formal and informal requests from the public

and from government boards and agencies for general guidance regarding the application of and compliance with the UIPA and Sunshine Law; requests from the public for assistance in obtaining records from government agencies; requests from the public for investigations of actions and policies of agencies and boards for violations of the Sunshine Law, the UIPA, or OIP's administrative rules; requests for advisory opinions regarding the rights of individuals or the functions and responsibilities of agencies and boards under the UIPA and the Sunshine Law; and requests by agencies and boards for training under both laws. Of the 1,227 total requests, 936 related to the UIPA and 291 related to the Sunshine Law.

Of the total requests, 1,050, or 85%, were in the form of AOD inquiries regarding the application of, and compliance with, the UIPA and Sunshine Law. See **Figure 4** on page 19. The AOD service allows the public, agencies, and boards to receive general legal advice from an OIP staff attorney, usually through phone calls or e-mails on the same day as the inquiry. Over the past 13 years, OIP has received a total of 10,323 inquiries through its AOD service, which is an average of 794 requests per year. In FY 2013, OIP received 1,050 AOD inquiries, thus exceeding the average by over 32%. See **Figure 4**.

Besides informal AOD requests, OIP received a total of 177 formal requests for assistance in FY 2013, as compared to 135 the previous year.

## **Opinions**

OIP resolves complaints made under the Sunshine Law or the UIPA. When a complaint is filed, OIP will generally investigate the complaint and may issue a formal or informal (memorandum) opinion. For FY 2013, OIP issued one formal opinion and 17 informal opinions, for a total of 18 opinions, as compared to 25 in FY 2012. Because OIP already has a considerable body of precedent-setting formal opinions that have resolved many legal questions, OIP has

been issuing more informal opinions that are based on prior precedent. Informal opinions are also issued when the legal conclusion is based upon specific facts that limit the opinion's usefulness for general guidance purposes.

The full text of OIP's formal opinions, summaries of OIP's informal opinions, and a searchable subject matter index of all opinions may be found on OIP's website at [oip.hawaii.gov](http://oip.hawaii.gov).

## **Education**

OIP provides education to the public and to government agencies and boards regarding the UIPA and the Sunshine Law.

Each year, OIP presents numerous live training sessions throughout the state to government agencies and boards. In FY 2013, OIP conducted 16 live training workshops and seminars, including courses providing continuing legal education (CLE) credits to state, county, and private sector attorneys, to help them properly advise government agencies and clients.

Since FY 2011, OIP has more than tripled the number of training materials that are freely available on its website 24/7. OIP has produced on-line video training on the UIPA and Sunshine Law, which is accessible by all, including members of the public.

In FY 2013, OIP launched the UIPA Record Request Log, which is on OIP's website at [oip.hawaii.gov](http://oip.hawaii.gov), to record and report data about requests for public information. Besides helping agencies keep track of record requests and costs, the Log also provides detailed instructions and training materials that help educate agency personnel on how to timely and properly fulfill UIPA requests and it collects important information showing how agencies are complying with the UIPA.

In FY 2013, OIP also began posting online "Quick Reviews" that provide easy to read guidance and practical tips on how to comply with the



UIPA and Sunshine Law.

## Communications

“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 posted in the What’s New archive on OIP’s website at [oip.hawaii.gov](http://oip.hawaii.gov).

## Legislation and Litigation

OIP serves as a resource for government agencies in reviewing their procedures under the UIPA and the Sunshine Law. OIP also continually receives comments on both laws regarding their implementation and makes recommendations for legislative changes to clarify areas that have created confusion in application, or to amend provisions that work counter to the legislative mandate of open government or that hinder government efficiency without advancing openness.

During the 2013 legislative session, OIP reviewed and monitored 134 bills and resolutions affecting government information practices, and testified on 26 of these measures.

**Act 263**, Session Laws 2013, enacted **H.B. 632, H.D. 2, S.D. 2, C.D. 1** relating to open data. The Open Data law provides greater public access by encouraging state executive branch departments to electronically publish and regularly update public information online. The law requires each executive branch department to “use reasonable efforts to make appropriate and existing electronic data sets maintained by the department electronically available to the public through the State’s open data portal at [data.hawaii.gov](http://data.hawaii.gov).”

Consistent with the UIPA, OIP will assist the Office of Information Management and

Technology (OIMT) to develop policies and procedures to determine which data sets are appropriate for online disclosure. OIP will also advise the agencies on their responsibilities under Act 263 and the UIPA.

Additionally, 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. In FY 2013, OIP tracked seven lawsuits.

## 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 29,743 government records that may be accessed by the public. OIP continually assists agencies in filing and updating their records reports. 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](http://oip.hawaii.gov).

Since the fall 2012 launch of the state’s [data.hawaii.gov](http://data.hawaii.gov) website, the RRS is playing a greater role in ensuring that confidential data is not inadvertently posted onto the website. In FY 2013, OIP worked closely with OIMT to develop processes and training materials for government agencies to use and post data to [data.hawaii.gov](http://data.hawaii.gov). With the additional Act 263 position in FY 2014, OIP looks forward to providing greater assistance to OIMT to help agencies post more open data onto [data.hawaii.gov](http://data.hawaii.gov) and increase government transparency and accountability.



# Goals and Objectives



## 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.

## Objectives and Policies

- **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.

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

Since FY 2011, OIP has focused its limited resources on education 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, as evidenced by a significant increase in the number of requests for OIP's assistance and inquiries regarding compliance. 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 and encouraging agencies to electronically post open data on [data.hawaii.gov](http://data.hawaii.gov).

### **Year One: FY 2014**

**Legal Guidance.** OIP will continue its Attorney of the Day (AOD) program to immediately address inquiries regarding the law received by OIP on a daily basis by telephone or e-mail, or on a "walk-in" basis. OIP will also continue to provide legal guidance through correspondence and the issuance of formal and informal opinions in response to appeals and requests for assistance or opinions. Additionally, OIP will supplement its legal guidance with the following action:

**Reduce backlog of OIP's formal cases.**

OIP has been significantly reducing its backlog since FY 2011 and has closed cases that were originally filed as far back as 2000. Recent progress in resolving cases, however, has been slowed by the need to respond on a daily basis to AOD inquiries, which have increased 55% from 676 in FY 2011 to 1,050 in FY 2013. Additionally, progress in reduction of the backlog has been hampered by a small number of requesters who have filed significant numbers of OIP cases and who frequently use the AOD service, thus utilizing a disproportionate amount of staff attorneys' time with multiple inquiries and files. To illustrate, formal cases filed with OIP increased by 42 cases (31%) from 135 in FY 2012 to 177 in FY 2013. Of the 177 cases filed in FY 2013, one individual filed 42 of them. While OIP's authorized staff position count has remained the same since FY 2011, an open data attorney position was authorized for the fiscal biennium 2014 through 2015, which we anticipate will alleviate the workload and allow OIP to reduce its backlog of cases.

**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.

**Training and Assistance.** OIP will continue 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 2014, OIP will supplement its training and assistance with the following 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 data.hawaii.gov, appropriate and existing electronic data sets that the departments maintain. The Act also authorized the creation of an additional attorney position in OIP to promote open data and the UIPA. One of OIP's most experienced attorneys has filled this position and will work closely with the Office of Information Management and Technology (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.

**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. OIP will continue to train and assist agencies in filing reports with OIP. In FY 2014, OIP will also engage in the following action:

**Advise the Office of Information Management and Technology (OIMT) on how to use the access classification capabilities of the RRS to uniformly identify confidential records.** Consistent with the policy directive of Act 263, SLH 2013, OIP will work with OIMT to encourage agencies to share open data with the public through data.hawaii.gov and other government websites. 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. OIP will advise and cooperate 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.

**Legislation and Lawsuits.** OIP will continue to monitor all legislative measures and lawsuits related to the UIPA and Sunshine Law. If necessary, OIP will submit legislative testimony and intervene in lawsuits.

## **Year Two: FY 2015**

OIP will continue to implement to its various programs and initiatives conducted in FY 2014 as its action plan to implement its objectives and policies. Additionally, for FY 2015, OIP will do the following:

**Encourage use of the UIPA Record Request Log by all state and county agencies.** Consistent with the state's open data goals, OIP has developed the UIPA Record Request Log as a tool to help government agencies to: (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. Results of each department are summarized on the Master UIPA Record Request Log posted on the State's open data website at [data.hawaii.gov](http://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 2013, 13 state Executive Branch departments, the University of Hawaii, and the Judiciary were using the Log and reported results on the Master Log at [data.hawaii.gov](http://data.hawaii.gov). Therefore, as part of its Training and Assistance objective, OIP will strive, by the end of FY 2015, to have all state and county agencies subject to the UIPA using the UIPA Record Request Log and reporting their summaries on the Master Log at [data.hawaii.gov](http://data.hawaii.gov).

**Resolve all formal cases in a timely manner.** OIP anticipates that requests for assistance and OIP's caseload will continue to grow as a result of OIP's efforts to increase open data postings and use of the UIPA Record Request Log by all agencies. While there will nec-

essarily be a backlog because of the time needed to investigate, research, and resolve cases, OIP's goal by FY 2015 is to resolve most formal cases within one year of being opened. Achievement of this goal will largely depend upon OIP having sufficient personnel resources to work on cases, while still performing other duties, such as AOD inquiries and training.

### **Year Five: FY 2019**

OIP will continue to implement its various programs and initiatives conducted in the previous fiscal years as its action plan to implement its objectives and policies, 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 achieve the following objectives:

**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](http://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.

## **Process to Measure the Performance of Programs and Services in Meeting the Stated Goals, Objectives, and Policies**

Performance will be measured by comparing actual results with the goals established above on a fiscal year basis as follows:

### **Year One: FY 2014**

**Reduce backlog of OIP's formal cases.** By the end of FY 2014, OIP should resolve all formal cases arising from requests for investigations or opinions and appeals of agency decisions, which have been pending before FY 2012, as well as 50% of those cases that were filed in FY 2013.

**Encourage state agencies to electronically post open data onto data.hawaii.gov.** By the end of FY 2014, OIP will have developed, in conjunction with OIMT, policies, procedures, and standards for state agencies to post open data onto **data.hawaii.gov** and their own agency websites.

**Advise the Office of Information Management and Technology (OIMT) on how to use the access classification capabilities of the RRS to uniformly identify confidential records.** By the end of FY 2014, OIP will have advised OIMT about the desirability of incorporating the existing RRS into OIMT's policies and procedures for protecting private or confidential data from being publicly disclosed as part of the State's open data efforts.

### **Year Two: FY 2015**

**Encourage the use of the UIPA Record Request Log by all state and county agencies.** By the end of FY 2015, all state and county agencies subject to the UIPA should be using the UIPA Record Request Log and reporting results on the Master Log at **data.hawaii.gov**.

**Resolve all formal cases in a timely manner.** By the end of 2019, OIP should have no more than 15% of formal cases pending from FY 2018 and 5% from FY 2017 or earlier.

**Year Five: FY 2019**

**Adopt administrative rules relating to personal records and revise other existing rules, if necessary.** By the end of FY 2015, OIP should complete public hearings on the draft rules and receive the Governor's approval to adopt administrative rules relating to agency procedures for processing personal record requests under Part III of the UIPA, and to revise, if necessary, its existing rules relating to Part II of the UIPA.

# Highlights of Fiscal Year 2013

## 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 2013, OIP's total allocation was \$390,933, up from \$382,282 in FY 2012. OIP's allocation for personnel costs in FY 2013 was \$372,327 and for operational costs was \$18,606. See **Figure 2** on page 17.

In FY 2013, OIP had 7.5 full-time equivalent (FTE) total approved positions, and was fully staffed for most of the year.

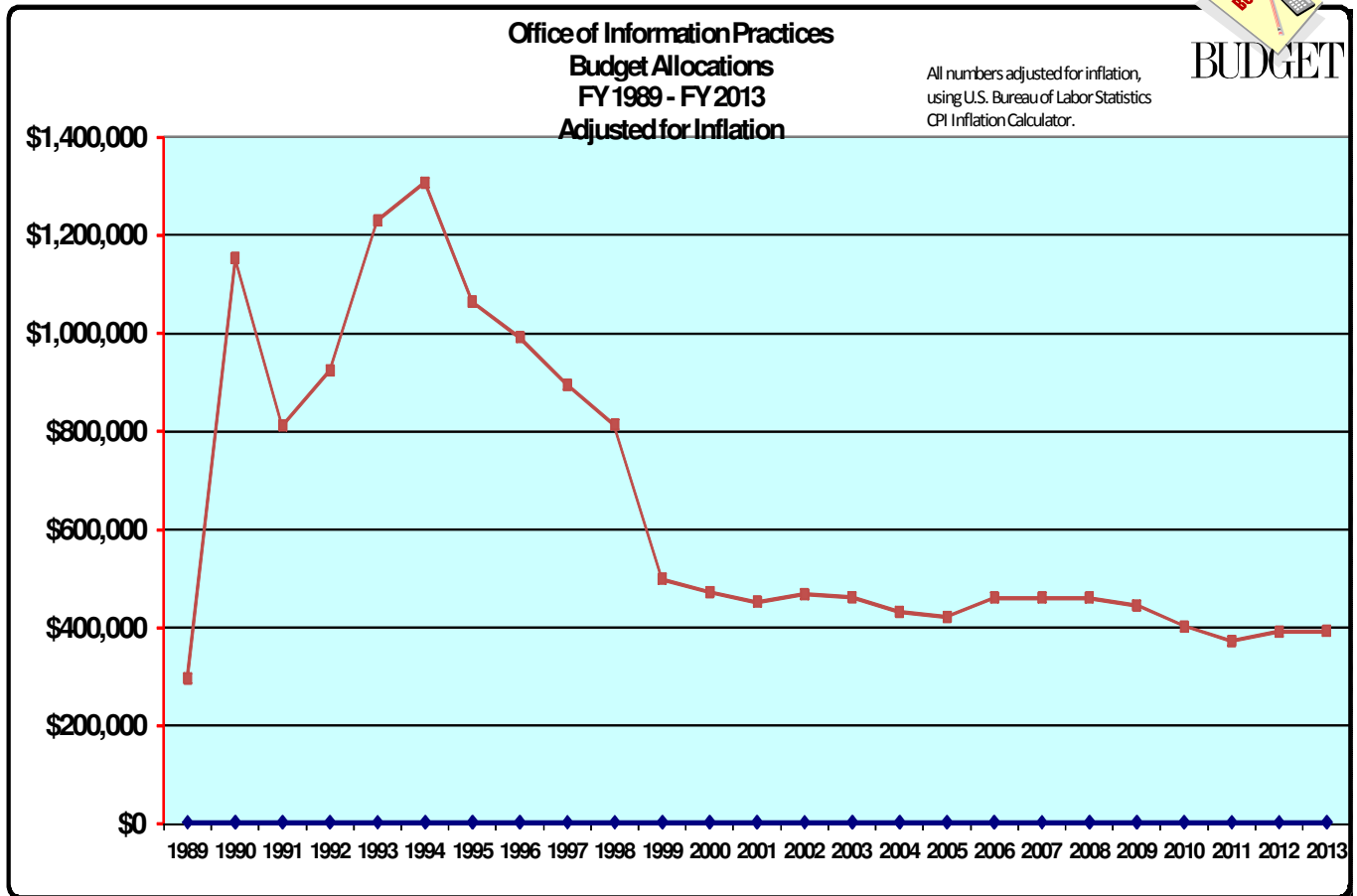


Figure 1





**Office of Information Practices  
Budget FY 1989 to FY 2013**

<b>Fiscal Year</b>	<b>Operational Expense Allocation</b>	<b>Personnel Allocation</b>	<b>Total Allocation</b>	<b>Allocations Adjusted for Inflation</b>	<b>Approved Positions</b>
FY 13	18,606	372,327	390,933	390,933	7.5
FY 12	30,197	352,085	382,282	388,945	7.5
FY 11	42,704	314,454	357,158	370,903	7.5
FY 10	19,208	353,742	372,950	399,528	7.5
FY 09	27,443	379,117	406,560	442,677	7.5
FY 08	45,220	377,487	422,707	458,621	7.5
FY 07	32,686	374,008	406,694	458,190	7.5
FY 06	52,592	342,894	395,486	458,253	7
FY 05	40,966	309,249	350,215	418,887	7
FY 04	39,039	308,664	347,703	429,973	7
FY 03	38,179	323,823	362,002	459,577	8
FY 02	38,179	320,278	358,457	465,448	8
FY 01	38,179	302,735	340,914	449,667	8
FY 00	37,991	308,736	346,727	470,348	8
FY 99	45,768	308,736	354,504	497,063	8
FY 98	119,214	446,856	566,070	811,237	8
FY 97	154,424	458,882	613,306	892,621	11
FY 96	171,524	492,882	664,406	989,181	12
FY 95	171,524	520,020	692,544	1,061,519	15
FY 94	249,024	578,513	827,537	1,304,381	15
FY 93	248,934	510,060	758,994	1,226,975	15
FY 92	167,964	385,338	553,302	921,234	10
FY 91	169,685	302,080	471,765	809,122	10
FY 90	417,057	226,575	643,632	1,150,343	10
FY 89	70,000	86,000	156,000	293,878	4

**Figure 2**



# 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.

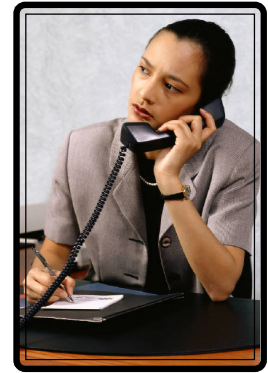
In FY 2013, OIP received a total of 1,227 formal and informal requests for assistance, which is a 14% increase over FY 2012. This total includes 1,050 Attorney of the Day (AOD) requests regarding the application of, and compliance with, the UIPA and Sunshine Law. See **Figure 4**. Of the 1,227 total requests, 936 related to the UIPA and 291 related to the Sunshine Law.

### Formal Requests

Of the total 1,227 UIPA and Sunshine Law requests for assistance, 1,050 were considered informal requests and 177 were considered formal requests. Formal requests are categorized and explained as follows. See **Figure 3**.

<b>Formal Requests FY 2013</b>	
<b>Type of Request</b>	<b>Number of Requests</b>
Requests for Assistance	40
Requests for Advisory Opinion	7
UIPA Appeals	34
Sunshine Law Investigations/ Requests for Opinion	27
Correspondence	44
UIPA Requests	25
<b>Total Formal Requests</b>	<b>177</b>

**Figure 3**



### 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 2013, OIP received 40 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 opinions on UIPA or Sunshine Law issues. In FY 2013, OIP received 7 requests for UIPA 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 2013, OIP received 56 appeals.

### Sunshine Law Investigations/ Requests for Opinions

In FY 2013, OIP received 27 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 details on these.

## Correspondence and UIPA Requests

OIP may respond to general inquiries, which often include simple legal questions, by correspondence. In FY 2013, OIP received 44 such inquiries by correspondence, along with 25 UIPA record requests made to OIP itself.

### 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, such as:

- WestLaw;
- Michie, for annotation of the Hawaii Revised Statutes;
- Persons or entities on OIP’s mailing list.

The full text of formal opinions are also available on OIP’s website at [oip.hawaii.gov](http://oip.hawaii.gov). Summaries of the formal opinions are posted on OIP’s website and are also found here on pages 26-28. The website also 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, however, are available on OIP’s website and found in this report beginning on page 29.

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 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 4

## Informal Requests

### Attorney of the Day Service (AOD)

The vast majority (85%) 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 13 years, OIP has received a total of 10,323 inquiries through its AOD service, an average of 794 requests per year. In FY 2013, OIP received 1,050 AOD inquiries, thus exceeding the average by over 32%. See **Figure 4**.

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 frequently use the service to assist them in navigating Sunshine Law requirements.

Of the 1,050 AOD inquiries in FY 2013, 780 (75%) came from government boards and agencies seeking guidance to ensure compliance with the UIPA and Sunshine Law, and 270 inquiries (25%) came from the public. See **Figure 5**.

Of the 270 public requests, 190 (70%) came from private individuals, 31 (12%) from media, 25 (9%) from private attorneys, 17 (6%) from businesses, and 7 (3%) from public interest groups. See **Figures 6 and 7**.

<b>Types of Callers</b>	<b>Number of Inquiries</b>
Private Individual	190
News Media	31
Private Attorney	25
Business	17
Public Interest Group	7
<b>TOTAL</b>	<b>270</b>

Figure 6

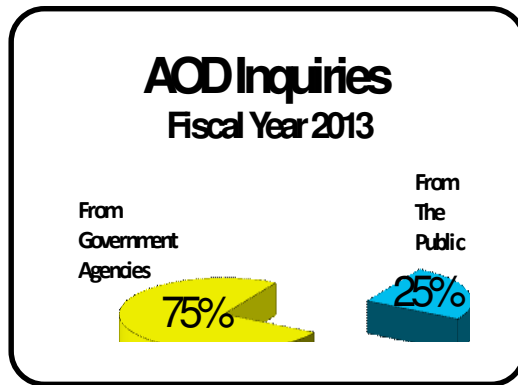


Figure 5

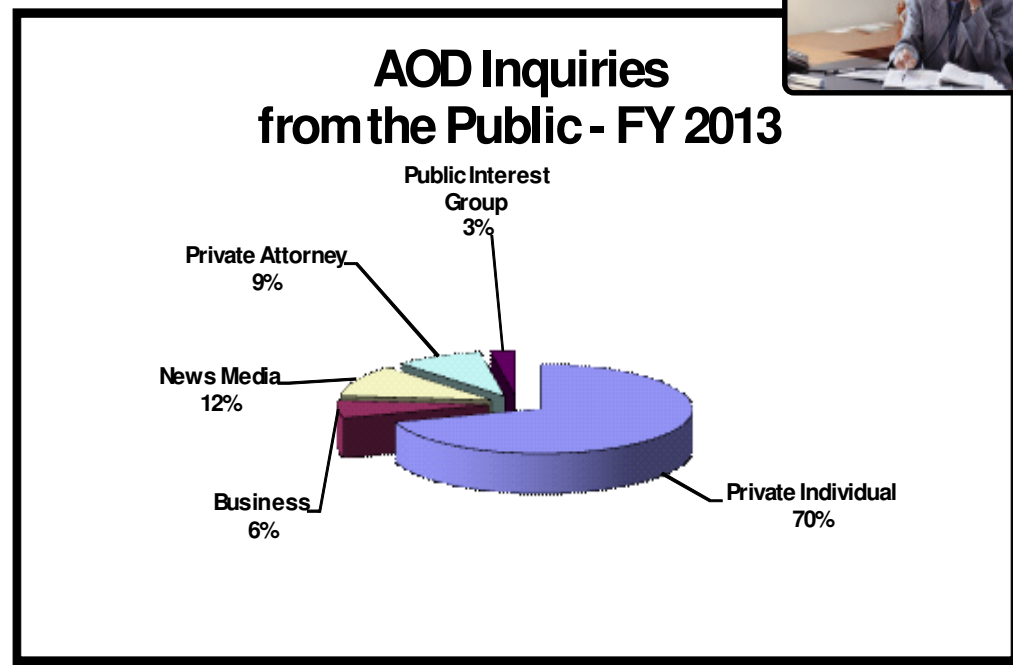
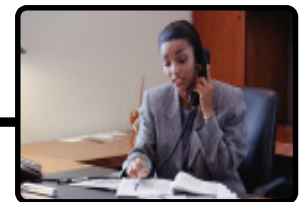


Figure 7

**UIPA Requests:****UIPA AOD Inquiries**

In FY 2013, OIP received 505 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 8 to 12** that follow. A sampling of the AOD advice given starts on page 35.

***State Agencies and Branches***

In FY 2013, OIP received a total of 416 AOD

inquiries about state agencies. About 52% of these requests concerned five state agencies: the Department of Land and Natural Resources (104), the Office of the Governor (31), the Department of Health (29), the Department of Commerce and Consumer Affairs (29), and the University of Hawaii (26). As shown below in **Figure 8**, about 39% of the requests were made by the agencies themselves seeking guidance to comply with the UIPA.

OIP also received 9 inquiries concerning the legislative branch and 15 inquiries regarding the judicial branch. See **Figure 8** below.


**AOD Requests About  
State Government Agencies  
FY 2013**

<b>Executive Branch Department</b>	<b>Requests by Agency</b>	<b>Requests by Public</b>	<b>Total Requests</b>
Land and Natural Resources	36	68	104
Health	12	17	29
Commerce and Consumer Affairs	23	6	29
Education (including Public Libraries)	5	8	13
Human Services	7	12	19
Lieutenant Governor (including OIP)	0	18	18
Labor and Industrial Relations	5	6	11
Transportation	9	9	18
Agriculture	8	4	12
Governor	6	25	31
Attorney General	4	7	11
Accounting and General Services	5	5	10
Tax	6	7	13
Business, Econ Development, & Tourism	16	3	19
Hawaiian Home Lands	1	3	4
Human Resources Development	0	2	2
Budget and Finance	0	3	3
Public Safety	6	3	9
Defense	0	0	0
<b>TOTAL EXECUTIVE</b>	<b>149</b>	<b>206</b>	<b>355</b>
<b>TOTAL LEGISLATURE</b>	<b>3</b>	<b>6</b>	<b>9</b>
<b>TOTAL JUDICIARY</b>	<b>5</b>	<b>10</b>	<b>15</b>
<b>University of Hawaii System</b>	<b>6</b>	<b>20</b>	<b>26</b>
<b>Office of Hawaiian Affairs</b>	<b>2</b>	<b>6</b>	<b>8</b>
<b>Unnamed Agency</b>	<b>0</b>	<b>3</b>	<b>3</b>
<b>TOTAL STATE AGENCIES</b>	<b>165</b>	<b>251</b>	<b>416</b>

**Figure 8**

**County Agencies**

In FY 2013, OIP received 84 AOD inquiries regarding various county agencies and boards. Of these, 51 inquiries (60%) came from the public.

Of the 84 AOD inquiries, 40 inquiries concerned agencies in the City and County of Honolulu, up from 34 in the previous year. See **Figure 9**. As shown below, about one-third of the requests were made by the agencies themselves seeking guidance to comply with the UIPA.

The largest number of requests (12) concerned the Honolulu Police Department, including 3 requests from the agency itself seeking guidance to comply with the UIPA.

OIP received 44 inquiries regarding neighbor island county agencies and boards: Hawaii County (16), Kauai County (14), and Maui County (14). See **Figures 10 to 12**.



**AOD Inquiries About  
City and County of Honolulu  
Government Agencies - FY 2013**

Department	Requests by Agency	Requests by Public	Total Requests
Police	3	9	12
City Ethics Commission	3	4	7
Planning and Permitting	1	3	4
Parks and Recreation	2	1	3
Board of Water Supply	1	1	2
Design and Construction	0	2	2
Transportation Services	0	2	2
Budget and Fiscal Services	0	1	1
City Council	1	0	1
Corporation Counsel	0	1	1
Human Resources	0	1	1
Liquor Commission	0	1	1
Mayor	0	1	1
Neighborhood Commission/ Neighborhood Boards	1	0	1
Unnamed Agency	0	1	1
<b>TOTAL</b>	<b>12</b>	<b>28</b>	<b>40</b>

Figure 9



**AOD Inquiries About  
Hawaii County  
Government Agencies - FY 2013**

Department	Requests by Agency	Requests by Public	Total Requests
County Council	4	2	6
Board of Ethics	0	3	3
Clerk's Office	1	0	1
Corporation Counsel	1	0	1
Mayor	0	1	1
Police	0	1	1
Property Tax Office	0	1	1
Prosecuting Attorney	0	1	1
Unnamed Agency	1	0	1
<b>TOTAL</b>	<b>7</b>	<b>9</b>	<b>16</b>

Figure 10



**AOD Inquiries About  
Kauai County  
Government Agencies - FY 2013**

Department	Requests by Agency	Requests by Public	Total Requests
County Council	2	4	6
Police	0	3	3
County Attorney	1	1	2
Water	0	2	2
Prosecuting Attorney	0	1	1
<b>TOTAL</b>	<b>3</b>	<b>11</b>	<b>14</b>

Figure 11



**AOD Inquiries About  
Maui County  
Government Agencies - FY 2013**

<b>Department</b>	<b>Requests by Agency</b>	<b>Requests by Public</b>	<b>Total Requests</b>
County Council	2	1	3
Planning	0	3	3
Police	2	1	3
Corporation Counsel	0	2	2
Prosecuting Attorney	0	2	2
Liquor Control	0	1	1
<b>TOTAL</b>	<b>4</b>	<b>10</b>	<b>14</b>

Figure 12





**Sunshine Law Requests:**

Since 2000, OIP has averaged more than 231 requests a year concerning the Sunshine Law. In FY 2013, OIP received 291 requests, which is 60 more than the average requests previously received each year. See **Figure 13**.

Of the 1,227 AOD requests made in FY 2013, 264 (21%) involved the Sunshine Law and its application. OIP also opened 27 case files for formal requests for assistance, consisting of 5 written requests for opinions and 22 written requests for investigations regarding the Sunshine Law. See **Figure 14**.

Of the 264 AOD requests involving the Sunshine Law, 235 were requests for general advice, and 29 were complaints. Also, 162 of the AOD requests involved the requester's own agency.

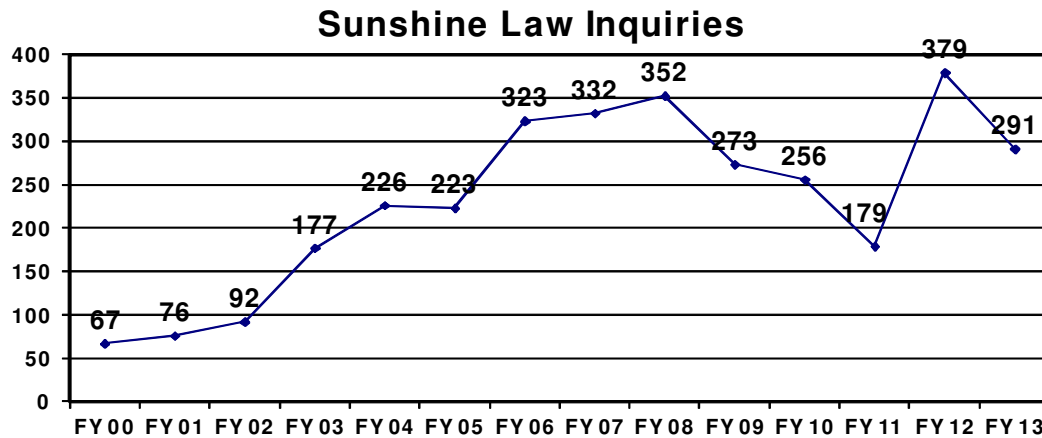
In FY 2013, OIP provided 8 training sessions on the Sunshine Law to boards and commissions, as well as other agencies and groups. See page 45 for a list of the sessions provided.

In FY 2013, OIP continued to make its Sunshine Law video training materials available on the OIP website. These free on-line 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

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

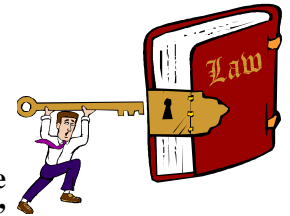
**Figure 14**

training have enabled OIP to reduce its in-person basic training on the Sunshine Law, 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 13**

## Formal Opinions



In FY 2013, OIP issued one formal opinion related to the UIPA and summarized as follows.

### *UIPA Formal Opinion:*

#### **Investigative Report on Workplace Violence Complaint**

Requesters asked whether the Department of Transportation (DOT) properly denied their request under Part III of the UIPA for disclosure of an investigative report (Report), which was prepared by DOT's Office of Civil Rights (OCR) in response to a workplace violence complaint (Complaint) filed by four Requesters. The Complaint alleges that another DOT employee (Respondent) was the aggressor in a workplace violence incident against one of the Requesters (Complainant). The other three Requesters (Witnesses) were interviewed by OCR regarding this incident.

#### **Analytical Framework for Responding to a Personal Record Request:**

Because the Requesters were individuals asking for access to the Report, which contained information "about" them, DOT must first consider their records requests as "personal records" requests under Part III of the UIPA. In order to respond to a personal record request, an agency should follow this analytical framework:

#### **1) What is the "personal record" of the individual requesting access under Part III of the UIPA?**

An agency should review the subject matter and contents of the requested record in order to ascertain what, if any, information in the record identifies and is specifically about the individual requesting access, and thereby determine whether all or a portion of the record constitutes that individual's "personal record." This OIP opinion partially overrules two past OIP opinions to the extent that they had created a rebuttable presumption that an entire record is a personal record merely because the record mentioned an individual's name.

#### **2) Does an applicable Part III exemption in section 92F-22, HRS, allow the withholding of access to the personal record?**

When an agency has determined that the record, or portions thereof, is an individual's personal record, the agency may withhold the personal record from the individual only when there is an applicable Part III exemption as set forth in section 92F-22, HRS.

#### **3) What portion, if any, is a government record subject to the public disclosure requirements of Part II of the UIPA?**

Any portion that is not a personal record must be reviewed under Part II of the UIPA to determine whether the requester, as a member of the general public, would be entitled to access the government record.

**4) Does an applicable Part II exception in section 92F-13, HRS, allow the non-disclosure of a government record that is not a Part III personal record?**

An agency may withhold such portion of the record from public access only when it falls within an exception to required public disclosure, as set forth in section 92F-13, HRS. If no Part II exception applies, the agency must publicly disclose that portion of the government record.

Using this analytical framework, the opinion concluded that under Part III of the UIPA, most of the Report is the personal record of the Complainant since she is identified throughout the Report as the purported victim of the alleged workplace violence incident, which is the subject matter of the Report. OIP further found that limited portions of the Report are about each Witness and, therefore, constitute that Witness' personal record. Thus, each Witness' personal record varies and consists specifically of each Witness' own statement in the Report, sections of the Report describing the allegations and background of the Complaint received from all four Requesters (Complainant and all Witnesses), and items of information specifically about that identified Witness in the Report's scope of investigation and analysis.

However, certain portions of the Report are not the personal records of any of the Requesters because these portions consist of information that is specifically and exclusively about the Respondent or other DOT employees who had been interviewed (and are not among the Requesters). Such portions that are not the Requesters' personal records include the Report's analysis of the other DOT employees' credibility, their statements concerning the Respondent's past conduct unrelated to the alleged incident, as well as the Report's recommendations that specifically concern only the Respondent.

As to such portions of the Report that are not the Requesters' personal records, DOT's disclosure is governed instead by provisions in Part II of the UIPA requiring public disclosure of government records to the general public unless an exception applies.

OIP found that no exemptions to disclosure in section 92F-22, HRS, allow DOT to withhold those portions that are their personal records from any of the Requesters. At the time of the Requesters' personal records requests, DOT had asserted that it was not required to disclose the Report under the exemption for "investigative reports and materials, related to an upcoming, ongoing, or pending . . . administrative proceeding against the individual." HRS § 92F-22(4)(2012). However, because the Respondent was suspended and all proceedings have concluded, this Part III exemption does not apply to the Report at this time. Consequently, because no Part III exemption applies to the personal records, OIP concluded that DOT must disclose to each Requester those portions of the Report that comprise the particular Requester's personal record.

OIP found, however, that Part II's "clearly unwarranted invasion of personal privacy" exception under section 92F-13(1), HRS, does apply to certain portions of the Report. Specifically, OIP concluded that other DOT employees who were not Requesters or the Respondent had significant privacy interests in the Report's analysis about their credibility and their observations about the Respondent's past conduct, which were unrelated to the misconduct that resulted in her suspension, and that this significant privacy interest was not outweighed by the public interest in disclosure. Because these DOT employees' significant privacy interests outweigh the public interest in disclosure, portions of the Report may be withheld from public disclosure under the privacy exception set forth in section 92F-13(1), HRS.

On the other hand, the privacy exception did not apply to certain employment misconduct that resulted in the Respondent's suspension, including her name, the nature of misconduct for which she was suspended, DOT's summary of the allegations, findings of fact, conclusions of law, and the discipline imposed. Section 92F-14(b)(4)(B), HRS, expressly states that the employee has no significant privacy interest in this misconduct information when the employee was suspended, and the public interest in disclosure outweighs a privacy interest that is not significant. Furthermore, as the opinion explains, the listing of DOT employees in the office, including their names, job titles, and start dates, is mandated to be public by the UIPA. HRS § 92F-12(a)(14)(2012). Consequently, the information described in this paragraph is required to be disclosed under Part II of the UIPA.

*[OIP Op. Ltr. No. F13-1]*



## Informal Opinions

In response to requests made for opinions, OIP in FY 2013 issued 10 informal opinions under the UIPA and 7 informal opinions under the Sunshine Law. Summaries of these informal opinions are below.

### UIPA Informal Opinions:

#### Denial of Request for Personal Records

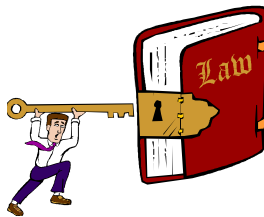
Under Part III of the UIPA, Requester sought all information about her that was maintained by the City and County of Honolulu Department of the Prosecuting Attorney (Prosecutor's Office), including its cases on Honolulu Police Department (HPD) Report Numbers 10-247773, 10-248246, and 10-248247; information maintained by Victim/Witness Kokua Services (VWKS) and the Visitor Aloha Society of Hawaii (VASH); and "minutes" of her meetings with a VWKS employee.

The Prosecutor's Office does not maintain the requested police reports, any records about Requester at VWKS, or the VWKS employee's notes.

VASH is not part of the Prosecutor's Office. It is a private non-profit entity and is not subject to the UIPA.

The only responsive record maintained by the Prosecutor's Office, the "Conferral Sheet," is protected from disclosure by section 92F-22(5), HRS, which allows an agency to withhold personal records protected by statutory privilege. Because the Conferral Sheet con-

sists of attorney work product, it is protected by the attorney work product privilege at Hawaii Rules of Penal Procedure (HRPP) Rule 16(e)(5)(i) (2011), and may be withheld under section 92F-22(5), HRS. [UIPA Memo 13-1]



#### Denial of Access to Personal Records

Requester asked whether the Department of the Attorney General (AG) properly denied his request, under Part III of the UIPA, for records from his arbitration hearing. The hearing was the result of his appeal of the employment actions taken against him by the AG.

OIP found the following:

1. The records are maintained by the Department of the Attorney General and are subject to the UIPA.
2. Neither the collective bargaining statute nor collective bargaining agreements preempt the UIPA.
3. The collective bargaining statute does not prohibit Requester's access to his personal records. [UIPA Memo 13-2]

## UH Fact Finders' Report

Requester asked whether redactions made by the University of Hawaii (UH) to the Fact Finders' Report (Report) produced for UH regarding a canceled concert deal were proper under Part II of the UIPA.

OIP found that the Report should have been publicly disclosed, with the sole exceptions of (1) the name of an individual making a personal loan, mentioned at page 8 of the Report and in Attachment 44, and (2) a description of the medical condition the concert promoter suffered from, mentioned at paragraph 78 of the Report.

OIP recommended that before the Hawaii Senate Special Committee on Accountability (Committee) provides the correctly redacted Report to record requester Hawaii News Now, the Committee return the Report to UH so that UH can redo the redaction as provided for in OIP's memorandum opinion. [UIPA Memo 13-3]

## Failure to Respond to Request for Records

The County of Kauai Department of Public Works' (Works-K) failure to respond at all to a record request amounted to an effective denial of access. As such, Works-K failed to comply with the UIPA's mandate that agencies publicly disclose government records unless an exception applies, and failed to uphold the burden of proof imposed by the UIPA to justify its nondisclosure. OIP advised Works-K to immediately provide Requester with the records; or if it intends to charge fees, Works-K should provide notice within ten business days. [UIPA Memo 13-4]

## List of Nominees

Requester sought a determination as to whether the Office of the Governor (Governor's Office) and the Department of Land and Natural Resources Commission on Water Resource Management (CWRM) properly denied, under Part II of the UIPA, Requester's requests for lists of nominees (Lists) provided to the Governor by the Nominating Committee for the CWRM. Specifically, Requester asked whether the Lists are public after the Governor has made his appointments but prior to confirmation by the Senate.

OIP found that neither the Governor's Office nor the CWRM is required by the UIPA to publicly disclose the Lists after the Governor makes his CWRM appointments but before confirmation by the Senate, under the UIPA's "privacy" and "frustration" exceptions. [UIPA Memo 13-5]

## Complainant's Request for Records of Closed Case File

Requester asked whether the Honolulu Ethics Commission (Commission) properly denied his request for access to a case file.

OIP found that portions of the requested case file are Requester's personal record. Requester is entitled to those portions under Part III of the UIPA, which governs access of an individual to his personal records maintained by government agencies, subject to any applicable exemptions to disclosure at section 92F-22, HRS. The remainder of the case file is not about Requester and is not his personal record, but is available to him under Part II of the UIPA, which governs public access to government records, except to the extent that the exceptions to disclosure at section 92F-13, HRS, allow the Commission to withhold certain portions from the public. [UIPA Memo 13-6]

## **Findings from an Investigation of Alleged Hostile Work Environment and the Action Taken by the Liquor Commission**

Requesters sought an opinion as to whether the Honolulu Liquor Commission (HLC) properly denied their request under Parts II and III of the UIPA for (1) the findings set forth in a report of an investigation into allegations of a hostile work environment at the HLC (Report), and (2) the action that the HLC took after reviewing the Report.

OIP found that several sentences within three paragraphs in the Report's findings are about the Requesters because they identify and refer to the Requesters, either by individual name or by describing them as those who filed the complaints that prompted the investigation (Complainants). Such information about the Requesters constitutes the Requesters' "personal records." HRS § 92F-3 (definition of "personal record"). Because none of the exemptions in Part III of the UIPA apply, the Requesters' personal records consisting of these specific sentences must be disclosed to the Requesters.

OIP also found that the rest of the Report's findings consist of information about other HLC employees, and are not about any of the Requesters. As such, this information is subject to Part II of the UIPA, which governs public access to government records. The other HLC employees have a significant privacy interest in the Report's information about them, and this significant privacy interest outweighs the public interest in disclosure. Thus, the information about other HLC employees in the Report's findings is protected from public disclosure under the UIPA's "clearly unwarranted invasion of personal

privacy" exception set forth in section 92F-13(1), HRS. Furthermore, the HLC maintains no records indicating the action, if any, that was taken after the HLC reviewed the Report. [UIPA Memo 13-7]

## **Inter-Agency Memoranda Concerning Surplus Status of Certain Regional Park Parcels**

Requester asked whether the Department of Budget and Fiscal Services, City and County of Honolulu (BFS) properly denied the request by Save Haleiwa Beach Park (SHBP) for public disclosure of memoranda that BFS sent to and received from other City and County of Honolulu departments concerning the surplus status of certain regional park parcels, as identified by tax map key numbers, under Part II of the UIPA.

OIP found that under the UIPA, BFS is not required to disclose the memoranda that it sent and received from other City departments concerning the identified regional park parcels because the memoranda contain predecisional and deliberative material that falls within the deliberative process privilege. Therefore, the memoranda may be withheld under the UIPA's exception to disclosure for "[g]overnment records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function." HRS § 92F-13(3) (2012). [UIPA Memo 13-8]

## **Disclosure of Personnel Settlement Agreement**

Requester asked whether a settlement agreement between the Department of Land and Natural Resources (DLNR) and a former employee is subject to public disclosure under Part II of the UIPA.

Because the employee waived his privacy interest in the status of his separation from the agency, and no other information in the settlement agreement potentially implicated the employee's privacy, OIP concluded that the settlement agreement is not protected from disclosure by the UIPA's privacy exception found at section 92F-13(1), HRS. Thus, the agreement as a whole is subject to public disclosure under the UIPA. *[UIPA Memo 13-9]*

## **Training Materials and DUI Manual**

Requester appealed the Honolulu Police Department's (HPD) denial under Part II of the UIPA for copies of employee training materials and the DUI manual used to train officers.

OIP determined that HPD failed to meet its burden under section 92F-15(c), HRS, to justify nondisclosure. Because of HPD's failure to meet this burden, OIP could not opine that the requested records are protected from disclosure by subsections 92F-13(2) or -(3), HRS. *[UIPA Memo 13-10]*

## **Sunshine Law Informal Opinions:**

Sunshine Law informal opinions are written to resolve investigations and requests for advisory opinions. Overall, OIP wrote seven informal opinions concerning the Sunshine Law in FY 2013, as summarized below.

## **Sunshine Law Complaints About Agendas and Executive Meeting**

Requester asked whether the Hawaii County Board of Ethics (Board) violated the Sunshine Law at its meetings on October 14, 2009, and November 19, 2009. The issues were whether the Board violated the Sunshine Law by allegedly (1) insufficiently and inconsistently describing agenda items and (2) holding an executive session for a discussion that should have taken place in an open meeting. OIP concluded as follows:

1. The agenda items listing petitions and informal advisory opinions for the October 14, 2009 and November 19, 2009 meetings had sufficient detail to meet the Sunshine Law's notice requirements. In other words, the agenda allowed the public to understand what the Board intended to consider and to decide whether or not to participate in the meeting.
2. The executive session held by the Board on November 17, 2009, on the Board's draft letter on Petition 2009-12, was properly a closed session under the Sunshine Law. *[Sunshine Memo 13-2]*



## **Sunshine Law and Uniform Information Practices Act Complaints about Agendas and Meetings**

Requester alleged several actions by the Hawaii County Board of Ethics (Board) violated the Sunshine Law and the Uniform Information Practices Act (UIPA) before and during two Board meetings on June 10, 2009 and July 8, 2009.

OIP concluded:

1. The June and July agendas provided sufficient public notice.
2. The evidence was insufficient to find that the Board discussed the Requester's petitions and made decisions in advance of the June meeting.
3. Although notice of the June meeting was not timely mailed to Requester, there was no harm as he received actual notice six days before the meeting and participated in it.
4. The Board did not violate the UIPA by not immediately providing a letter requested during an open meeting. [*Sunshine Memo 13-4*]

## **Board Members' E-mail Correspondence to Other Members**

An e-mail sent by one member of the Hawaii Community Development Authority (HCDA) to other members included discussions of matters within HCDA's authority that were anticipated to appear on HCDA's agenda in the foreseeable future. As such, the e-mail amounted to HCDA discussion of official business in violation of the Sunshine Law's open meeting requirement. [*Sunshine Memo 13-5*]

## **Public Testimony**

Requester asked for an investigation into whether certain actions of the North Shore Neighborhood Board (NSNB) at its meeting on September 28, 2010 violated the Sunshine Law. Specifically, Requester alleged that NSNB improperly restricted the public's right to provide comments and ask questions relating to its agenda item listed as: "Andy Anderson Presents Conceptual Proposal/ Old Haleiwa Hotel' Replica Plans" (Hotel Proposal).

OIP found that the Chair's preliminary statements at the start of NSNB meeting did not prevent members of the public in attendance from exercising their right under the Sunshine Law to present oral testimony on the proposed land sales, a topic that was related to NSNB's agenda item concerning the Hotel Proposal. OIP found, however, that NSNB technically violated the Sunshine Law's oral testimony requirement when it adjourned its meeting without giving the public the opportunity to present oral testimony on the Hotel Proposal after the developer's presentation. [*Sunshine Memo 13-6*]

## **Overtime Task Force Is Not Subject to the Sunshine Law**

The Department of Human Resources Development (DHRD) sought an advisory opinion as to whether the Task Force on Overtime (Overtime Task Force) is subject to the Sunshine Law.

OIP found that the Overtime Task Force is not subject to the Sunshine Law because it does not meet all of the elements required by the Sunshine Law. Specifically, the Overtime Task Force was created by a Senate Resolution rather than by "constitution, statute, rule, or executive order." HRS § 92-2(1) (1993). [*Sunshine Memo 13-1*]

### **Applicability of Sunshine Law and UIPA to Hawaii Health Connector**

The Board of Directors of the Hawaii Health Connector (Connector) is not a “board” as defined by the Sunshine Law, and therefore is not subject to the open meetings or other requirements of the Sunshine Law.

The Connector is not an agency as defined in the UIPA, and therefore is not subject to the UIPA’s public record or other requirements. [Sunshine Memo 13-3]

OIP determined that neither the Sunshine Law, nor the UIPA, restricted the Council from voting to confirm the Appointees when the Appointees’ Applications had not yet been made publicly available upon request. While the delay in providing access to the requested Applications was unfortunate in this case, the agencies involved in the appointment process have revised the Application form in order to prevent similar delays. [Sunshine Memo 13-7]



### **Council Vote to Confirm the Mayor’s Appointees to County Boards and Commissions**

On January 21, 2010, the Kauai County Council (Council) held two publicly noticed meetings. At the first meeting, the Council interviewed each individual who had been appointed by the Mayor to a County board or commission (Appointee), as named on the Council’s agenda. At the second meeting on the same day, the Council voted to confirm each Appointee.

In order to prepare and present public testimony about the Appointees at the Council’s meeting, the Requester made a written request on January 11, 2010, to the Office of the County Clerk seeking access to each Appointee’s completed “Application to Board or Commission” form (Application) under the Uniform Information Practices Act (Modified), chapter 92F, HRS (UIPA), but was not granted access to the Applications in time for the Council’s meetings on January 21. Requester thus asked OIP for an investigation into whether the Council violated the Sunshine Law by voting to confirm each Appointee when the public had not yet been given access to the Applications completed and submitted by the Appointees.

## General Legal Assistance and Guidance



To expeditiously resolve most inquiries from the agencies or general 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 2013.

### Designating Staff to Respond to UIPA Requests

An office within the Department of Business, Economic Development, and Tourism (DBEDT) designated a specific employee to respond to record requests, and generally asked that requests for records be sent in a certain format (U.S. mail). A record requester nonetheless sent a record request in another medium (e-mail) to a different employee. DBEDT asked whether it is still required to respond. OIP advised that the UIPA does not prohibit an agency from designating specific members of staff to handle incoming requests, and does not prevent staff from asking that requests be submitted in a particular format. But, they should still respond if requests are received differently. OIP also advised that DBEDT consult with its deputy attorney general to make sure that other laws, such as those that provide protections for individuals with disabilities, are complied with.

### UIPA Guidance:

#### E-mail Strings

A requester asked for copies of records maintained at the Governor's office. One responsive record was a string of e-mails. Most of the content of the e-mail string was unrelated to the record request, but there was one e-mail in the middle of the string that was responsive. The Department of the Attorney General, which was assisting the Governor's office in responding to the request, asked whether the entire e-mail string should be provided, or just the responsive portion. OIP advised that the Governor's office should treat the e-mail string as one record that is responsive to the request, and that the entire string should be provided. Portions of the e-mail string that may be withheld under section 92F-13, HRS, could be redacted prior to disclosure.

### How to Appeal an Agency's Assertion that Requested Records Do Not Exist

Requesters made a request for a copy of a recording of an agency meeting. The agency responded that there were no recordings. Requesters questioned whether there really were recordings despite the agency's response, and asked whether this is something OIP can look into. OIP may open an appeal file when an individual contests an agency's claim that no responsive records exist in response to a record request. In such cases,

OIP may ask the agency to describe its search of its file system where such records would most likely be maintained.

Regarding recordings of meetings, OIP informed requesters that some boards keep recordings of their meetings, while other boards record their meetings only for purposes of preparing minutes, and then destroy the recording. Some boards do not record their meetings at all. Boards are required by the Sunshine Law to prepare meeting minutes, but are not required to keep a recording of their meetings. For state boards that do maintain recordings of meetings, retention is governed by the Department of Accounting and General Services' general records schedule, which is outside OIP's jurisdiction.

### **Charter School Lease**

A charter school submitted required financial documents to the state, including its lease with a private landowner. The charter school had agreed to keep the lease confidential. However, the Department of Education believed that the UIPA requires the lease to be disclosed upon request and consulted with OIP. OIP agreed that the lease must be available for public inspection because none of the UIPA exceptions to disclosure appeared to apply to the lease. Specifically, the lease did not fall under the "frustration of a legitimate government function exception" because it did not meet the criteria for confidential business and financial information and its disclosure would not affect the state's ability to obtain this required information.

### **Disclosure of the Year of a Degree Earned by a University Faculty Member**

The University of Hawaii (UH) asked OIP if the year that a faculty member earned a degree is publicly disclosable. OIP advised that

UH should disclose, upon request, the year in which an employee obtained a degree because this date would not be protected under the UIPA's privacy exception. This date is not as strong an indication of the employee's age as is the date of graduation from high school and, thus, the employee's privacy interest is not as significant. Further, the public has a substantial interest in ensuring that the employee has met the educational requirements for employment at UH. Thus, because the public interest outweighs the privacy interest, the date that the degree was obtained is publicly disclosable.

### **Rates Charged to Judiciary Under Contract**

LexisNexis asked the Judiciary to disclose its contract with Westlaw. The Judiciary consulted with OIP because Westlaw wanted the Judiciary to keep confidential the online research rates that it charges to the Judiciary under their contract. OIP agreed with the Judiciary that it must disclose Westlaw's contract rates because the rates constitute government purchasing information that is not protected by a UIPA exception.

### **Non-governmental E-mail Account**

An agency received a request for e-mails sent by a temporary contract hire. The temporary hire did not have an agency e-mail account, so instead had been using a personal Gmail account for work-related e-mail. The agency did not have the temporary hire's personal e-mail account on its servers. The agency asked whether the e-mails were subject to the UIPA.

OIP advised that the question would be whether the agency had administrative control over the e-mail in the Gmail account, such that they would have a legal right to access

those e-mails even if the account owner did not want to share them. In the absence of a contractual provision giving the agency such a right, the e-mails in the Gmail account were likely not subject to the UIPA as agency records.

### **Redaction of Information Under UIPA Request Versus Information Voluntarily Placed Online By Agency**

An agency was getting many requests for copies of written testimony submitted to its attached board. The testimony often included contact information such as e-mail or home addresses. The agency asked whether it is proper to release that information, given that it is now part of the public record.

Another agency wanted to place a roster of employee names with department and work e-mail address on its website, but one employee had asked to be excluded from the roster based on safety concerns relating to a personal situation.

OIP advised the first agency that although home contact information usually carries a significant privacy interest, in the case of public testimony, the testifier is generally considered to have waived his or her privacy interest in the information by including it in public testimony, so release of the contact information as part of the copies of public testimony provided to requesters would be required under the UIPA. OIP also advised it has distinguished that situation from the one where a testifier includes private information about a third party—a testifier does not have the right to waive someone else's privacy.

If the agency puts testimony online, now or in the future, it could (and should) redact the contact information first. That is because putting the testimony online is a voluntary act, not a response to a UIPA request, so the agency can choose to put up less than 100%

of what would be publicly available to a UIPA requester. This is the approach the Legislature has taken when it puts testimony online. A person could still request the full testimony under the UIPA, and would be entitled to get it with the contact information included, but most people are more interested in getting immediate access to information online and do not require the testifier's contact information. Proactively placing the information online would reduce agency time spent responding to requests and allow more protection of personal contact information.

Similarly, OIP advised the second agency that since it was voluntarily putting the employee information online, it would not be subject to the same standard of required disclosure as would apply when responding to a UIPA request. Thus, even though a public employee's name and work address could be public in response to a UIPA request, the agency could still omit that information from a roster it was putting online on its own initiative.

### **Company Bank Account Numbers, Insurance Policy Numbers, and Signatures**

An agency responding to a UIPA request asked if it could redact company bank account numbers, direct work contact information for various people, insurance policy numbers, and signatures.

OIP advised that company bank account numbers and direct business contact information for people the agency may need to contact can typically be redacted under the UIPA's frustration exception. For the insurance policy numbers, OIP advised that it was not clear how disclosure of those would be harmful and the agency would need to provide factual justification for the redaction if challenged. If the agency has a good faith argument that disclosure could lead to identity theft or similar harm, then it can redact the

policy number information, subject as always to the possibility of appeal. Signatures should not be redacted. OIP noted that signatures are routinely disclosed as part of correspondence in Hawaii and elsewhere and have not been treated as private information by courts, so the possibility of signature forgery is not something that at this time OIP sees as justifying redaction of signatures.

### **Last Four Digits of Social Security Number**

An agency had been told in 2001 that the last four digits of a social security number should not be redacted, and wanted to know if that was still the general rule.

OIP advised that in OIP Op. Ltr. No. 11-01, it concluded that the full social security number should be redacted when responding to a request because as demonstrated by a recent study, the last four digits combined with reasonable guesses as to year and place of birth could allow someone to determine the full social security number.

### ***Sunshine Law Guidance:***

#### **Meeting Room May Be Changed; Board Need Not File New Notice**

A board attached to the Department of Health was scheduled to meet, and the room number for the meeting was properly listed on the board's published notice. Staff learned that the air conditioning would be turned off in the room on the day of the meeting, which would likely render the room unusable. Staff asked if they should file a new notice with a new room number.

Because the meeting was scheduled five days from the date staff contacted OIP, OIP advised that a new notice could not be filed because the Sunshine Law requires notice to be published six calendar days before a meeting. OIP advised that staff may post a note on the door of the meeting room which clearly indicates the meeting has been moved to a different room, but only if the new room is a short distance away, for example, in the same building, or close enough that one would not have to drive there.

Alternatively, the board could convene the meeting, and if it becomes unbearably hot, the meeting could be continued to a reasonable date, time, and location without the need to file another notice, so long as the details of the continued meeting are clearly announced.

#### **Correction of Minutes**

At a July Public Land Development Corporation (PLDC) meeting, an individual spoke against North Shore development. At PLDC's September meeting, the July minutes were approved, and a motion was made to strike the portion of the minutes summarizing the individual's testimony at her request. The motion passed. PLDC staff called OIP because

another PLDC meeting was soon to occur and a PLDC member wanted the individual's testimony summary reinstated in the July minutes because he felt the original minutes were accurate. Staff asked what the procedure is for reinstating something into previously adopted minutes.

OIP advised that the Sunshine Law requires that minutes be a true reflection of matters discussed and views of participants (OIP Op. Ltr. No. 03-13 states that "views of the participants" refers primarily to board members). However, minutes should include some reference to what was said by testifiers. The procedural question of reinstating a summary of testimony that was previously stricken from minutes is beyond the scope of the Sunshine Law, and OIP suggested that PLDC consult with a deputy attorney general.

### **Executive Meetings to Consult with Attorney**

Honolulu Ethics Commission (HEC) staff asked OIP for guidance on when legal counsel for the Commission may be present for an executive meeting. Sometimes legal counsel for HEC is its own staff, and sometimes it is the Department of the Corporation Counsel. OIP's Guide to the Sunshine Law states that a board may allow non-board members into executive meetings when their presence is necessary or helpful to the discussion, deliberation or decision-making on a topic. The Guide also notes that a board's attorney may participate during the entire executive meeting, even if the meeting topics do not include offering legal advice. Attorneys employed by the HEC may be in executive meetings with the Commission. However, when a deputy Corporation Counsel is called in to an executive meeting only for a specific agenda item, once that agenda item is completed, the deputy should leave, unless the Commission then wants the deputy's advice on additional agenda items.

### **Permitted Interaction: Informational Briefings**

The Maui Office of Council Services (OCS) asked OIP two questions.

1. OCS first asked whether the Sunshine Law applies when a quorum of Council members jointly attend a gathering that is not specifically organized for members, but where Council business is discussed, and the members passively listen to the discussion but do not engage in discussion. OIP has not formally opined on such situations, but other jurisdictions have found this type of interaction to be prohibited by their open meetings laws. OIP advised it is best for members to avoid these situations, however, if members nonetheless find themselves in one of these situations, they should be mindful that their actions do not show an intent to interact on Council business, for example, by ensuring that members sit separately. In the event that a complaint is submitted to OIP or the courts, any facts the members have to show an intent to avoid communicating on Council business would serve in their favor. More detailed advice from OIP would depend upon the specific situation.

2. OCS asked the extent to which the Sunshine Law applies when Council members jointly attend a gathering that does not discuss Council business. OIP advised that any number of board members may freely discuss matters that are not board business outside of a meeting. The Sunshine Law includes a definition for "chance meeting," which means "a social or informal assemblage of two or more members at which matters relating to official business are not discussed." HRS § 92-2 (2012). Accordingly, board members may attend lunches, social and ceremonial events, or board retreats, without violating the Sunshine Law, so long as board business is not discussed, deliberated, or decided upon. This applies to trainings on Sunshine or ethics laws, for example, which are not typically board

business. For county councils, OIP has advised that members may attend NACO (National Association of Counties) and HSAC (Hawaii State Association of Counties) conferences, as the business of specific councils is not usually discussed at these conferences, with the caveat that if discussions move into areas that are Council business, then members should take appropriate measures to avoid discussing business of their own Council.

### **Permitted Interactions: Ceremonial Presentation of County's Budget**

The Maui County Council asked for advice in light of changes to the Sunshine Law made by the Legislature in 2012, particularly the additions to the permitted interactions section. The Maui Mayor was going to present the Council with his proposed budget. Proposed legislation to enact the operating budget for the ensuing fiscal year and a capital program would accompany the presentation. The ceremonial presentation of the budget would be pre-announced and open to the public, press, and department representatives.

1. The Council asked whether all nine Council members could attend budget presentations. The County budget is Council business as the Council is charged with passing or rejecting the budget no later than June 10 annually. Board business, however, may only be discussed by board members at a properly noticed meeting of a quorum of a board, or as set forth in the Sunshine Law's list of "permitted interactions."

OIP has not been asked to formally opine on a specific situation in which a quorum of a board is in attendance at a ceremonial gathering that was not organized specifically for the members, but where board business will be discussed and the members passively listen to the discussion but do not engage in dis-

ussion. Assuming that the Mayor's presentation will cover Council business (the budget) and that Council members will not be in a noticed meeting (and assuming no permitted interactions apply), OIP advised that all Council members could attend the ceremonies, provided that the Members not discuss or otherwise communicate with each other during the presentation about a specific issue that is before the Council or is likely to come before the Council in the foreseeable future.

The Council is not precluded from choosing to file a meeting notice indicating that it will be listening to a public presentation by the Mayor. If the Council does file a notice, however, the public must be allowed to testify on all agenda items, and the other requirements of the Sunshine Law, such as for keeping minutes, must also be followed.

2. The Council asked how to distinguish the Budget presentation from informational meetings that are "permitted interactions." OIP advised that the Sunshine Law now includes a permitted interaction which allows two or more members of a board, but less than a quorum, to 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. 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. And, at the next board meeting, the members must report their attendance and the matters presented and discussed that related to official board business. This permitted interaction applies when board business is being discussed at an informational meeting, and allows discussion of board business by less than



a quorum of members that otherwise could only be done in a Sunshine Law meeting.

In this instance, the event is a ceremonial one akin to a State of the County address, at which the Council members are not expected to take part in any discussion. OIP therefore advised that there would be a good-faith argument that all Council members can attend the Mayor's budget presentation so long as the members are merely listening to the budget presentation. This would not constitute discussion of Council business by the Members, and therefore, it is not something that can only be done in a public meeting or as allowed by a permitted interaction.

### **Permitted Interaction: Informational Meeting Not Open to Public**

A board asked whether, under section 92-2.5(e), HRS, an event would need to be open to the public for it to be considered an "informational meeting" that less than a quorum of board members could attend and discuss board business.

OIP advised that an informational meeting does not have to be open to the public to allow board members to attend under that permitted interaction. In fact, some events specifically listed as examples of an informational meeting in the statute, such as conventions or seminars, are typically not open to the public in the Sunshine Law sense because they typically involve a payment to attend.

### **Subcommittees Subject to the Sunshine Law**

A Maui County Board asked OIP whether the Sunshine Law allows a board to have subcommittees and whether subcommittees are subject to the Sunshine Law's requirements

and permitted interactions. As OIP explained, the Sunshine Law does not govern whether a board may have committees or subcommittees. However, if the board is allowed by the legal authority that created the board to have committees or subcommittees, then the committees or subcommittees are considered to be "boards," like the parent board itself, and thus subject to all of the Sunshine Law's open meeting provisions. In other words, all entities that fit the Sunshine Law's definition of the term "board" in section 92-2, HRS, are subject to the open meeting requirements, regardless of whether the entity is called a board, commission, task force, committee or subcommittee. Hence, the Sunshine Law's provision setting forth permitted interactions does apply to a board's subcommittee.

*Note:* OIP Opinion Letter No. 08-01 advised that when a board's committee or subcommittee conducts a meeting, board members who are not members of that committee or subcommittee cannot attend this meeting. Other board members' attendance would cause the committee or subcommittee's meeting to become a convening of the board that does not fulfill the Sunshine Law's meeting requirements.

### **Public Utilities Commission**

OIP was asked whether the Public Utilities Commission (PUC) was subject to the Sunshine Law's open meeting requirements. The PUC is a board subject to the Sunshine Law. However, OIP noted that the PUC's functions are largely adjudicatory, and the Sunshine Law, in section 92-6, HRS, exempts a board's adjudicatory functions from its public meeting requirements.

## **Not Scheduling or Cancelling a Meeting**

A caller questioned whether the Sunshine Law allows a board to not schedule or cancel a meeting when the board routinely holds a monthly meeting. As OIP explained, the Sunshine Law does not govern when and how often a board holds its meetings or when a board does cancel a noticed meeting. OIP encourages a board that has cancelled a previously noticed meeting, at the very minimum, to post a notice of the cancellation at the meeting location.

## **Including Board Members in Strategic Planning Groups**

An agency was setting up internal strategic planning groups and asked OIP for advice on how participation by members of a Sunshine Law board attached to the agency could affect the strategic planning groups. If a board member was invited to be a member of one of the strategic planning groups, would that make the group subject to the Sunshine Law? If two or more were members participating, would that make a difference? What about if a board subcommittee asked to meet with a strategic planning group—would it have to be a Sunshine Law meeting?

OIP advised that a Sunshine Law board member is always considered a board member, even when participating in a different group, so to the extent the strategic planning group was discussing board business, there could be Sunshine Law issues if that resulted in two or more board members discussing board business together. While the strategic planning group itself would not become subject to the Sunshine Law; the board members would still need to make sure the Sunshine Law permitted their discussion of board business, even though it was in the context of a strategic planning group meeting.

So, if only one board member participated in a group, there would not be a Sunshine Law problem because there would not be a discussion of board business among Council members—the board member might be discussing board business, but only with third parties. If two members participated, their discussion would be covered by the Sunshine Law's two-person permitted interaction, but they would need to take care not to do anything that could be construed as committing to vote or seeking a commitment to vote on a board issue. For three or more members, participation would be problematic. If a board subcommittee set up a meeting with a strategic planning group, it would need to notice it as a meeting of the subcommittee under the Sunshine Law. Although the strategic planning group would not be obligated to notice the meeting, the board subcommittee, as a committee of a Sunshine Law board, would still have to notice it and follow the law's other meeting requirements.

## **Recording of a Public Meeting**

A member of the public requested audiotape recordings of a public meeting. One recording had a ten-minute break in the meeting during which the recorder was left running, and recorded a conversation between a board member and the board's attorney. The board's administrator asked OIP if the board could leave that portion out when making a copy of the recording.

OIP advised that since the portion of the tape recording the break appeared to be responsive to the phrasing of the request, they should not delete that portion without mentioning it. However, they might be able to withhold that portion if they could establish that an exception to disclosure under the UIPA (such as frustration based on attorney-client privilege) applied to it. If the board believed there was a good faith basis to withhold that portion of the tape, it should state on its Notice to Requester

that the ten-minute break portion was being redacted, and state the exception allowing redaction.

OIP further recommended that the board not keep the recorder running during breaks in the future.

## **Board Member with Temporary Disability**

A neighbor island member of a statewide board broke his ankle and could not fly to the next meeting in Honolulu, which was less than 6 days away. The board asked whether the member could still attend remotely, even though there was not time to file a new notice.

OIP advised that the 2012 amendment to section 92-3.5, HRS, allowed the member to attend from the neighbor island on the basis that his temporary disability prevented him from attending the meeting in Honolulu. As a member prevented from attending in person by a disability, he would not need to have his location listed as a public meeting location on the (already filed) agenda, but he would need to announce at the meeting where he was attending from and who was with him, and he would need an audio-video connection to the 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](http://oip.hawaii.gov) on a 24/7 basis. 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 issues. By training these key legal advisors, OIP can leverage its small staff and be assisted by many other attorneys to help OIP to 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 state Executive Branch departments, the University of Hawaii, and the Judiciary, 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 2013, OIP began 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.

Also 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 also 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](http://oip.hawaii.gov).

OIP continues to present live training sessions for the general public, various state agencies, and the constantly changing cast of state and county board members. The following is a listing of the 16 workshops and training sessions OIP conducted during FY 2013.

## UIPA Training

OIP provided training sessions on the UIPA for the following agencies and groups:

- 8/30/12 ALL Cabinet: “Overview of UIPA Record Request Log”
- 10/10/12 “Basic UIPA Training”
- 10/10/12 “UIPA Record Request Log”
- 10/19/12 ALL Government Agencies: “OIP Update: the News that Government Attorneys Need to Know (Because Your Clients Will Ask About It)” - CLE Course (UIPA and Sunshine Law)
- 12/4/12 Department of Health: UIPA Record Request Log Upload Training
- 2/11/13 Department of Transportation; Highways and Harbors Divisions: “UIPA Record Request Log”

- 2/22/13 Department of Transportation; Airports Division: “UIPA Basics and Record Request Log”
- 6/25/13 University of Hawaii: “UIPA Record Request Log”

## Sunshine Training

OIP provided training sessions on the Sunshine Law for the following agencies and groups:

- 10/24/12 Department of Commerce and Consumer Affairs; Professional and Vocational Licensing Division: Board and Commission Members Orientation at State Capitol
- 11/7/12 Kauai County Board and Commission Members: “Sunshine Law Overview”
- 11/14/12 Department of Land and Natural Resources; Oahu Island Burial Council: “Sunshine Law Overview”
- 1/9/13 Department of Accounting and General Services; Campaign Spending Commission: “Sunshine Law Overview”
- 1/14/13 Maui County Council: “Sunshine Law Overview” via teleconference
- 5/6/13 Department of Labor and Industrial Relations; Language Access Advisory Council: “Sunshine Law Overview”
- 6/29/13 University of Hawaii: “Sunshine Law Overview”
- 6/29/13 City & County of Honolulu; Neighborhood Commission: Orientation for Neighborhood Board members



## Publications

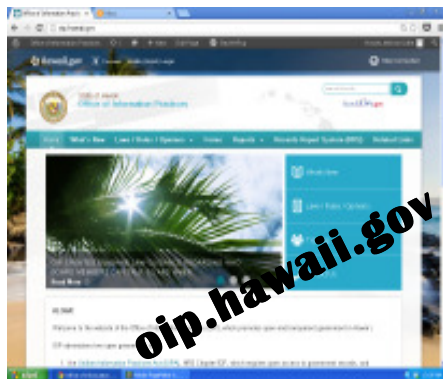
OIP's printed and online publications and website play a vital role in the agency's ongoing efforts to inform the public and government agencies about the UIPA, the Sunshine Law, and the work of OIP.

In FY 2013, OIP added to its website Quick Review guides to the Sunshine Law, which explain the requirements of meeting notices and minutes. To explain the new administrative rules for appeals to OIP, which became effective on December 31, 2012, OIP created a new *Guide to Appeals to the Office of Information Practices* (Appeals Guide). This Appeals Guide summarizes in question and answer format the main points to know in filing an administrative appeal to OIP when requests for public records are denied by an agency or when the Sunshine Law has been allegedly violated by an agency.

OIP has also updated its existing guides on the UIPA and Sunshine Law to reference the new Appeals Guide, OIP's administrative rules, and statutory amendments, and to incorporate the

July 2012 and January 2013 amendments into the statutes that are included with the guides.

All updated guides, statutes, and rules can be found on [oip.hawaii.gov](http://oip.hawaii.gov) under "Laws/ Rules/ Opinions" or "Training." OIP's forms and publications are also available on the OIP website.



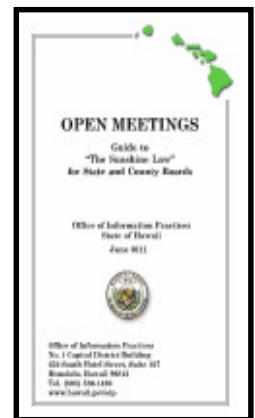
## Sunshine Law Guides and Videos

The *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

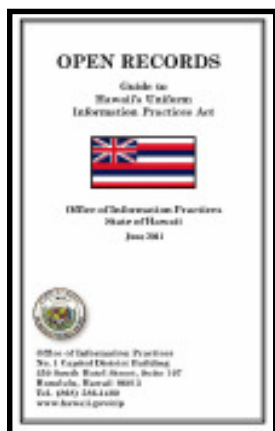
of the exceptions to disclosure apply, and how the agency may review and segregate the record. The UIPA Guide includes answers to a number of frequently asked questions.

In addition to the UIPA Guide, a three-fold pamphlet

provides the public with basic information about the UIPA. The pamphlet, "Accessing 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 and any fees that can be charged for search, review, and segregation. The pamphlet also discusses 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 is 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. In order to hold 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.

All of these forms may be obtained online at [oip.hawaii.gov](http://oip.hawaii.gov).



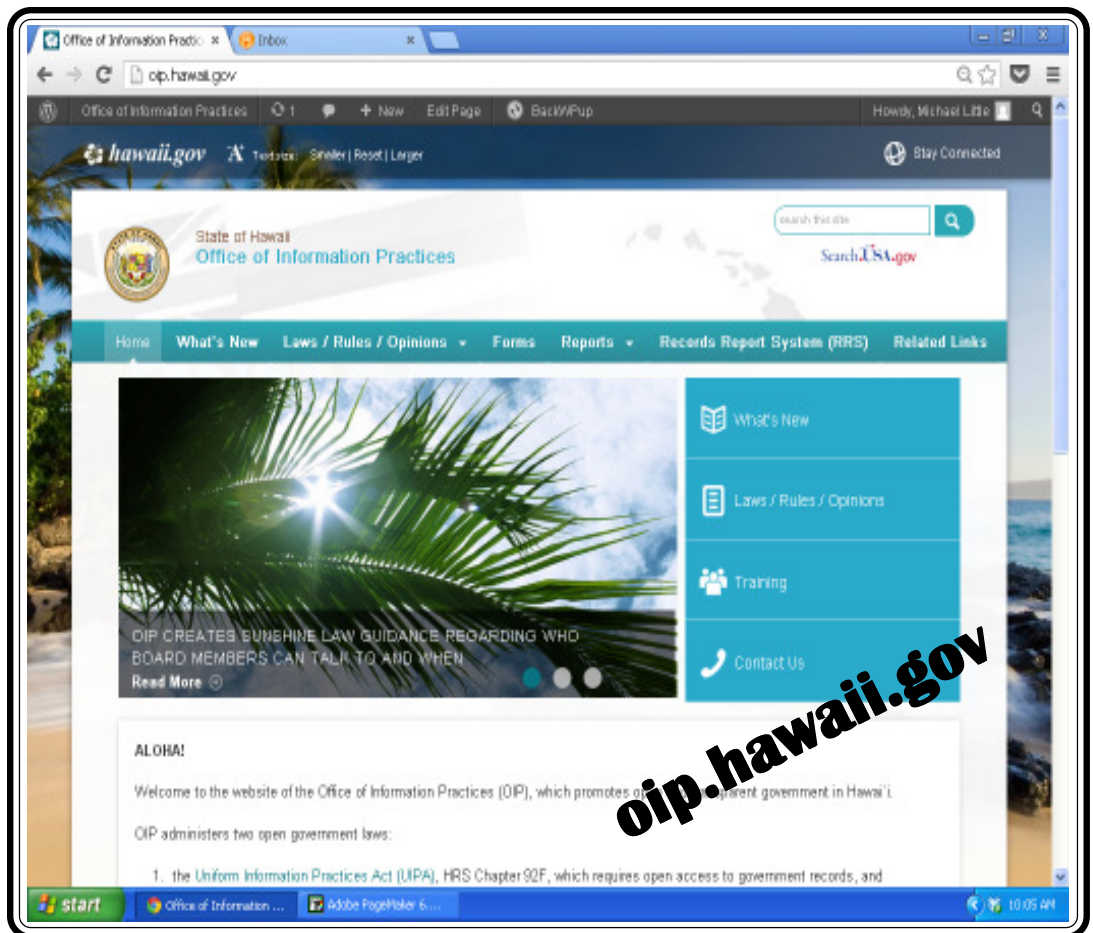
## Communications

OIP's website at [oip.hawaii.gov](http://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. In FY 2013, OIP continued its communications to the agencies and public, mainly through 30 *What's New* articles.

The OIP website has been updated and improved. Besides having the same look and feel as the other state agency sites, OIP's new website offers easy links to other state, county, and federal sites, including the State Calendar showing the meeting agendas for all state agencies. Thanks to OIP's Record Report Specialist Michael Little and the invaluable

assistance of Bryce Fujii of the state's Information and Communication Services Division, OIP's website is now better organized, more user-friendly, and modern. Users can still find the relevant laws, rules, and legal opinions, along with OIP's training materials, forms, *What's New* updates, and other materials, and the site is easier to navigate and search. The new website address is [oip.hawaii.gov](http://oip.hawaii.gov), and the old address of [hawaii.gov/oip](http://hawaii.gov/oip) will redirect you to the site.

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 and the Sunshine Law
- 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

**“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 [oiip@hawaii.gov](mailto:oiip@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 the new 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.

OIP’s website also serves as a gateway to Internet sites on public records, privacy, and informational practices in Hawaii, other states, and the international community, with links to open data sites, including [data.hawaii.gov](http://data.hawaii.gov) and the State Calendar.

**Website Features**

OIP’s new website features the following sections, which may be accessed through the menu below the state seal, as well as four large links located on the right of the home page (What’s New, Laws/Rules/Opinions, Training, and Contact Us).

➤ *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.



# 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.

During the 2013 Legislative session, OIP reviewed and monitored 134 bills and resolutions affecting government information practices, and testified on 26 of these measures. OIP was most significantly impacted by the following legislation:

► **Act 263**, signed on July 3, 2013, enacts **H.B. 632, H.D. 2, S.D. 2, C.D. 1**. The Open Data law provides greater public access by encouraging state executive branch departments to electronically publish and regularly update public information online. The law requires each executive branch department to "use reasonable efforts to make appropriate and existing electronic data sets maintained by the department electronically available to the public through the State's open data portal at [data.hawaii.gov](http://data.hawaii.gov)."

State, county, and federal agencies have already begun loading open data onto the following websites: [data.hawaii.gov](http://data.hawaii.gov), [data.honolulu.gov](http://data.honolulu.gov), and [data.gov](http://data.gov).

The new law encourages state agencies to make existing, non-confidential data sets freely available online and to continually update them, in order to enhance government transparency and accountability, encourage public engagement, and to stimulate innovation with the development of new analyses or applications based on the public data sets. An early example of how open data can work is the DaBus app, which is based on public data and provides real-time information tracking the location of Oahu buses and when they can be expected to arrive at bus stops.

The new law does not require the agencies to create new data sets, nor does it affect whether or not government records must be disclosed under the Uniform Information Practices Act (UIPA), chapter 92F, HRS.

OIP will assist the Office of Information Management and Technology (OIMT) in developing policies and procedures to determine which data sets are appropriate for online disclosure consistent with the UIPA. OIP will also advise the agencies on their responsibilities under Act 263 and the UIPA. Fortunately, a new full-time position was authorized by Act 263 to provide OIP with additional resources to fulfill its increased duties through 2015.



# 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.

The seven cases that OIP monitored in FY 2013 are summarized below, beginning with the first Hawaii Supreme Court decision regarding the Sunshine Law since 1993.

## **Hawaii Supreme Court Ruling in *Kanahele v. Maui County Council***

In *Kanahele v. Maui County Council*, 130 Haw. 228 (August 8, 2013), the Hawaii Supreme Court emphasized the spirit and purpose of the Sunshine Law and provided guidance consistent with OIP's interpretation of the law. Although an OIP decision was not being directly challenged in *Kanahele*, the Court favorably cited seven OIP opinion let-

ters and referred to the "palpably erroneous" standard of reviewing OIP opinions that was added to the Sunshine Law and UIPA in Act 176, SLH 2012.

In *Kanahele*, Maui County Council's Land Use Committee (LUC) and the Maui County Council (MCC) each posted meeting agendas for their initial meetings on October 18, 2007 and February 8, 2008, respectively, on matters concerning a 670-acre residential development. After taking public testimony at the initial meetings, the LUC and MCC each continued the meetings multiple times, without posting any further written notices.

During the continuance period, several MCC members transmitted written memorandums to all other members asking them to favorably consider various bill amendments being proposed in the memoranda. Although copies of the memoranda were given to the County Clerk, Director of Council Services, Planning Director, and Corporation Counsel, and the developer's representative was invited to provide comments on early proposals, no further public testimony was taken before the MCC passed two bills concerning the development on first reading at a February 14, 2008 meeting. Thereafter, the MCC posted an agenda for March 18, 2008, for the second and final reading of the bills, at which time additional public testimony was taken. At this meeting, the MCC passed, without any further changes, the two bills concerning the development.

On March 5, 2008, members of the public (petitioners) filed an action in the circuit court seeking to enjoin the bills from being implemented by the MCC. The circuit court

ultimately ruled against them, and the Intermediate Court of Appeal (ICA) upheld the circuit court's decision, with a separate concurring decision by Judge Lisa Ginoza.

On appeal, the Supreme Court upheld the ICA's conclusion that the Sunshine Law does not limit a continuance of a public meeting to just one time and stated that "based on the OIP's construction of the Sunshine Law as well as the legislative history of the statute, we conclude that the LUC and MCC did not violate the Sunshine Law by continuing and reconvening the October 18, 2007 meeting and February 8, 2008 meeting beyond a single continuance." Nevertheless, the Court emphasized that "boards are constrained at all times by the spirit and purpose of the Sunshine Law," and went on to provide several examples of procedural devices that could be used to ensure that meetings are continued in a manner that complies with this spirit and purpose.

The Court further noted that while the Sunshine Law does not require the posting of a new agenda and acceptance of oral testimony at each continued or reconvened meeting, it implied that oral notices alone were inadequate.

The Court also held that the memoranda sent by MCC members to other members did not fall within any of the Sunshine Law's permitted interactions, and that they violated the Sunshine Law's requirements to decide or deliberate matters in open meetings. But the Court stopped short of concluding that the distribution of the memos was a Sunshine Law violation requiring the MCC's actions to be voided, because the petitioners had not appealed from the "final action," which the Court defined as "the final *vote* required to carry out the board's authority on a matter." The Court, however, remanded the case to the circuit court for consideration of an attorney's fee award under the Sunshine Law.

For a more detailed summary of the decision, see <http://oip.hawaii.gov/whats-new/supreme-court-issues-sunshine-law-opinion/>. A copy of this decision can be found on OIP's website on the Sunshine Law page: <http://oip.hawaii.gov/laws-rules-opinions/sunshine-law/>.

## Denial of Access to Records

Kilakila O Haleakala (Plaintiff) filed a complaint against the University of Hawaii (UH), alleging that UH had violated the UIPA by denying access to records requested by Plaintiff concerning the proposed construction of an advanced technology solar telescope project in the summit area of Haleakala. Plaintiff had submitted a request to UH for all e-mails and correspondence between UH and U.S. Senator Daniel K. Inouye, and between UH and Governor Neil Abercrombie, regarding the project.

The First Circuit Court granted Plaintiff's motion for summary judgment, rejecting UH's argument that disclosure of the requested records would result in the frustration of a legitimate government function. The Court referred to the legislative history of the "frustration" exception, which indicates that the disclosure of certain types of records described therein would frustrate a legitimate government function, and then found that the e-mails and correspondence at issue were not of the type excepted from disclosure.

The court conducted an *in camera* inspection of the records, with any proposed redactions and identification of any records that were protected as either work product or by attorney-client privilege, and ordered the disclosure of most of the records, finding that a few of them fell outside the scope of Plaintiff's request. The court assessed attorney's fees and costs against UH.

## Certified Copy of Birth Certificate

Duncan Sunahara (Plaintiff) requested that the 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 thereafter filed a lawsuit in the First Circuit Court against DOH, claiming that DOH did not respond to his request. Plaintiff alleged violations of (1) section 338-18, HRS, of the Public Health Statistics Act, which requires that certain individuals be provided with certified copies of vital records; (2) the UIPA; and (3) chapter 91, HRS, the Hawaii Administrative Procedures Act (HAPA). Plaintiff asked the court to order DOH to provide a certified copy of the original paper birth certificate, to allow him or his representative to be present at the copying of his sister's original birth certificate, and to be awarded fees, costs, and other legal and equitable relief.

DOH filed a Motion to Dismiss Complaint, which the court treated as a Motion for Summary Judgment. DOH's Motion and accompanying documents argued that it did respond to Plaintiff's request when it provided a computer generated abstract of his sister's birth certificate and informed him that he was only entitled to an abstract. DOH cited to section 338-13, HRS, which, it argued, allows DOH's director to choose the process by which copies of vital records are made. DOH also cited its administrative rules, which allow abbreviated copies of vital records to be prepared by computer printout, or any other process approved by the director. Thus, DOH argued that by providing a computer generated abstract of Virginia Sunahara's birth certificate, it is in compliance with the law. DOH also argued that the UIPA does not entitle Plaintiff to ob-

tain a certified copy of his sister's original birth certificate or allow him to be present for the copying. DOH further asserted it did not violate HAPA when it adopted its administrative rules in 1975.

The circuit court found there to be no genuine issue of material fact, and granted DOH's Motion for Summary Judgment. Plaintiff thereafter filed an appeal with the Intermediate Court of Appeals. The appeal is pending.

## Judicial Nominee List

In August 2011, Oahu Publications, Inc., dba Honolulu Star-Advertiser (Plaintiff), filed a complaint against Governor Neil Abercrombie (Governor), alleging that the Governor violated the UIPA by his denial of access to the lists of judicial candidates provided to him by the Judicial Selection Commission. The Governor argued that based on the Hawaii Supreme Court's decision in *Pray v. Judicial Selection Committee*, it was within his discretion to decide whether to disclose the candidate lists provided to him.

In November 2011, the First Circuit Court granted Plaintiff's motion for summary judgment and ordered disclosure of the requested lists. Two days later, the Judicial Selection Commission announced that it was changing its policy and would, in the future, make public the lists of judicial candidates it sends to the Governor. The court subsequently granted Plaintiff's motion for attorney's fees and costs and entered final judgment in June 2012. The Governor did not appeal the ruling requiring disclosure of the candidate lists, but did appeal the fee award of \$69,627 in legal fees in July 2012.

On October 18, 2013, the Intermediate Court of Appeals ruled in favor of the Honolulu Star-Advertiser, allowing the newspaper to recover the requested attorney fees and costs.

## Timely Disclosure of Records

Rosen Bien Galvan & Grunfeld, LLP (Plaintiff) filed a lawsuit in the First Circuit Court against the Hawaii Department of Public Safety (PSD) following Plaintiff's UIPA request to PSD for records relating to the deaths in 2010 of two inmates from Hawaii held at private prisons. Plaintiff alleged that PSD violated the UIPA by failing to produce government records and to disclose them in a timely manner, and by failing to identify the records that would not be disclosed and specifying the legal authority for denying access.

In September 2013, the court granted Plaintiff's Motion for Partial Summary Judgment, finding that PSD had not complied with section 92F-11, HRS, and Hawaii Administrative Rules (HAR) sections 2-71-13 and 2-71-15, by failing to provide Plaintiff with access to government records within the time limits set by the HAR. PSD had not produced a record for over six months after Plaintiff submitted its request, and had failed to provide Plaintiff with timely incremental disclosures. The Court found that PSD's claims of administrative burden did not relieve PSD of its statutory and regulatory obligations.

The court ordered PSD to provide all the records responsive to Plaintiff's request, which were not protected from disclosure by section 92F-13, HRS, on an incremental basis in accordance with a timetable set forth in the court's order. With respect to seventeen categories of records to which PSD had denied access, the court ordered PSD to provide Plaintiff with information regarding the specific record or parts thereof that would not be disclosed.

## Identity of Source

Charles D. Boyd and Jane Doe (Plaintiffs) filed a lawsuit in the First Circuit Court against the University of Hawaii (UH), alleging that UH had violated the UIPA by not releasing 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) chapter 92F, HRS, (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. This case is pending.

## Interagency Disclosure of Records

In the special proceeding *State of Hawaii v. John A. Freudenberg*, Civil Number SP 12-1-000413, the Department of the Prosecuting Attorney, City and County of Honolulu, moved to compel disclosure of Sex Offender Treatment Program records regarding an inmate whose parole hearing was upcoming.

The Department of Public Safety, which opposed disclosure, argued in part that the "Office of Information Practices' Opinion Letter 93-14, which found that HRS section 92F-19(a)(3) does not authorize the interagency disclosure of information otherwise protected from disclosure by specific state statutes, is determinative and requires that the Prosecutor's Motion be denied."

The First Circuit Court ultimately denied the Prosecuting Attorney's motion, noting in the minutes "that it was persuaded by OIP Opinion Letter 93-14."



# 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).

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.

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.

To date, state and county agencies have reported 29,743 records. See **Figure 15**.



## **Records Report System**

### **Status of Records Reported by Agencies: 2013 Update**

<b>Jurisdiction</b>	<b>Number of Records</b>
State Executive Agencies	20,834
Legislature	836
Judiciary	1,645
City and County of Honolulu	3,909
County of Hawaii	947
County of Kauai	930
County of Maui	642
<b>Total Records</b>	<b>29,743</b>

**Figure 15**



## 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](http://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 16**. 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](http://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](http://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.

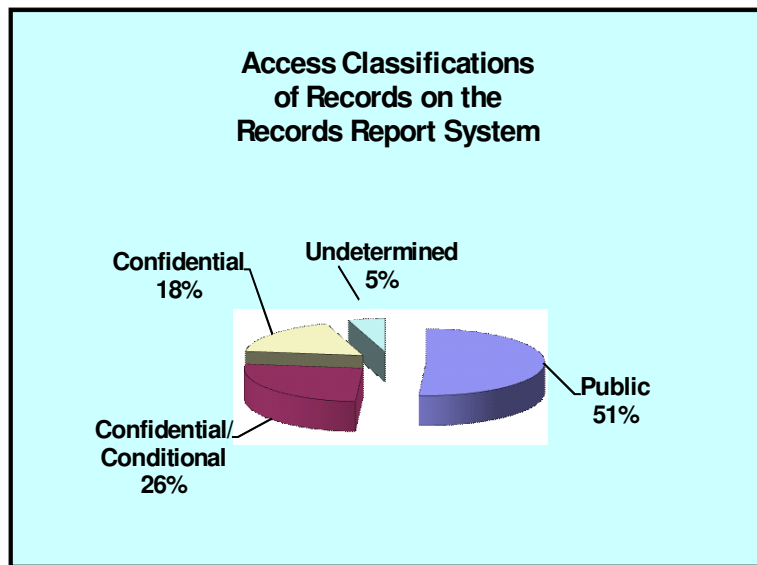


Figure 16