

OIP's Draft Rules: Agency Procedures & Fees for Processing UIPA Record Requests

The Uniform Information Practices Act
(Modified), Chapter 92F, HRS

Hawaii's Office of Information Practices

(September 2017)



Welcome to this informational briefing by the Office of Information Practices on OIP's draft rules to implement Hawaii's Open Records Law, which is called the Uniform Information Practices Act, or UIPA for short, and is found at Chapter 92F of the Hawaii Revised Statutes.

OIP has existing administrative rules for the UIPA, which were adopted in 1998. OIP has drafted new rules to clarify and update the current rules, extend them to cover personal record requests, and address problem areas. Through this informational briefing on the draft rules, OIP is seeking to inform and solicit comments from government agencies and the general public **before OIP prepares the rules that it will propose for public hearing and eventual adoption.**

This presentation assumes that you already know the existing rules and is not meant to be basic training, which is available through other training materials on OIP's website.

Purpose of today's briefing is to summarize OIP's draft rules about how UIPA record requests should be processed by agencies, **so can get comments and make revisions before finalizing proposed rules**

Draft rules, this presentation, and survey are on the **Rules page at oip.hawaii.gov**

OIP would like the completed surveys and comments on draft rules by the end of September, so that it can prepare rules for public hearing before 2017 ends.

- OIP needs time to create and provide training for agencies, so do not anticipate new rules going into effect until July 2018



The **purpose** of this presentation is to **summarize the most significant changes being considered in the draft rules**. OIP also invites you to more closely examine the draft rules themselves, which will be posted on OIP's **Rules page at oip.hawaii.gov**. This PowerPoint presentation and an online survey can also be found there. **Please fill out the online survey** to give OIP feedback and your comments about this presentation and the draft rules.

OIP hopes to receive your completed surveys and any additional comments on these draft rules by the end of September 2017, so that appropriate changes can be made before OIP prepares the actual rules that it will propose for a public hearing that will hopefully take place before the end of 2017.

Next year, OIP will need considerable time to create new training materials, revise the UIPA Record Request Log, and provide training for the state and county agencies when the Legislature is not in session, so OIP is targeting July 1, 2018, as the effective date for any new rules.

DRAFT RULES:

***New* Chapter 3-200, Hawaii Admin. Rules**

Replaces Chapter 2-71, HAR (to be repealed)

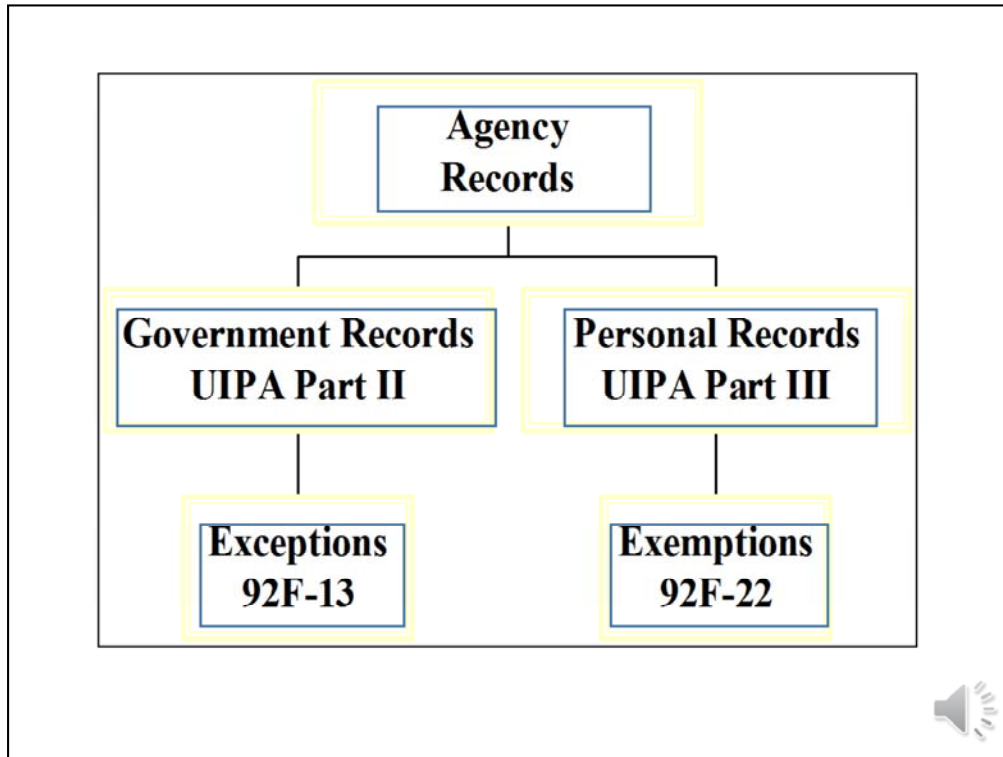
Key new features:

- **Personal record request procedures**
- **Revisions to time limits & other procedures**
- Procedures to **protect records** and **prevent manifestly excessive interference with agency functions**
- **Fees & fee waiver**



Once adopted, OIP's new rules will be placed in a new chapter 3-200 in Title 3 of the Hawaii Administrative Rules ("HAR"), and the existing rules will be repealed. OIP will also repeal and renumber its separate administrative rules relating to appeals made to OIP, but those changes are relatively minor and will not be discussed in this presentation.

Instead, today's presentation will focus on the significant new features of the draft rules for processing UIPA record requests, which are summarized as follows. First, the draft rules add the procedures and fees for processing requests for **personal records**. Second, the draft rules **revise and clarify the time limits and other procedures** for responding to record requests. Third, the draft rules propose ways that an agency can **protect records from loss or damage and also prevent manifestly excessive interference with the agency's functions and duties**. Fourth, **fees have been updated, the fee waiver has been substantially revised, and a new inspection fee has been added**.



Let's start with a reminder that the UIPA has separate and different provisions governing access 1) by the public for **government** records, which are found in **Part II** of the UIPA, and 2) by an individual to his or her **personal** records, which are found in **Part III** of the UIPA. Besides **access** to personal records, **Part III also governs requests to amend or correct a personal record.**

Exceptions to disclosure of government records are listed in HRS Section 92F-13, while **exemptions** from disclosure of personal records are found in HRS section 92F-22.

The existing rules apply only to requests for government records, but the new rules will also apply to personal record requests. While there are some differences in how these two types of records are processed, personal records are now generally subject to the same fees and costs as government records under the draft rules.

- **Government Record** (UIPA definition) =
“maintained by an agency” & any person can request
- **(New) Personal Record** (UIPA definition) =
“about an individual” & only that individual can request
- **“Record”** (Rules definition, Sec. 3-200-2) =
Government Record or Personal Record



The draft rules incorporate by reference the statutory definitions for government and personal records. A **government record means information “maintained by an agency** in written, auditory, visual, electronic or other physical form.” **Any person** may request access to government records. On the other hand, a **personal record means information “about an individual”** that is maintained by an agency. **Only the individual who is the subject of the personal record has the right to access to it.** Personal records can be in a file specifically labeled with the person’s name, such as a personnel file or investigation, or it could be documents such as educational, financial, or medical records that reference the individual by name, social security number, or other method of identification.

Keep in mind that **a request for an unrelated person’s personal records is not a personal records request.** **Who the requester is** determines whether it’s a government record request or a personal record request. Former President Obama can make a personal record request for his own birth certificate. But if an unrelated third party requests President Obama’s birth certificate, that would be a government record request subject to Part II of the UIPA, which has requirements and exceptions different from those under Part III for personal record requests.

Sometimes a government record contains personal information, such as personal cell phone numbers, email or home addresses, social security numbers, or other information, which must be redacted before it is disclosed to the public. Other times, a government record contains personal information that must be disclosed to the public, such as information relating to government loans or the discharge of public employees. In both these examples, the government record rules apply, not the personal record rules, assuming that the requester is not the person about whom the records relate.

The draft rules will specify when they apply only to a government record or only to a personal record. **When they refer simply to a “record,” the rules apply to both government or personal records.**

(New) Personal Records (Subchapter 4)

Implementing Part III of the UIPA

NOT applicable to requests for government records

- **Individual's access only for "accessible" personal record**
- **Must verify the identity** of the individual or the individual's agent
- Also for an individual's request for **amendment & correction** of personal records



While many provisions of the draft rules apply to both government and personal record requests, **a new subchapter 4 was created for provisions that apply only to personal records** and not to requests for government records.

In summary, the new subchapter 4 rules provide for access only to personal records that are "accessible." They also set forth the procedures for verifying the identity of the individual, or the individual's agent, when the individual is making a request under Part III of the UIPA. This new subchapter also provides procedures relating to requests for amendment or correction of personal records.

(New) “Accessible” Personal Record

(Sec. 3-22-41)

**Agency is able to locate the record
with reasonable effort**

i.e., Records are indexed by individuals’ names, OR
individual gives helpful info for retrieval

**When *Personal Records* are NOT “accessible,”
they are processed as a request for *Government
Records* with different time limits & fees**



When it receives a request for personal records, an agency is not required to expend an unreasonable amount of time or effort to go through all of its files to try to find every bit of personal information about a requester. **The personal records must be “accessible,”** meaning that the agency is able to locate the record with reasonable effort. For example, an agency would reasonably be able to locate a record when the record is filed or indexed by the individual’s name or unique identifier, or when the individual provides helpful information to retrieve specific information.

If a requested personal record is not accessible, the request will instead be processed as a request for government records, and different time limits and fee amounts may apply.

(New) Verifying an Individual's Identity

(Sec. 3-200-42)

Identification is required for processing a request for a personal record

Identity verification **options:**

- Requester provides **identifying number or address that matches agency's records** about requester
- **Requester shows identifying documents**

One government-issued I.D. with photo & signature (driver's license, passport) **OR**

Two I.D.s with name & signature (credit card, library card)



Because the UIPA gives **an individual** the right to access his or her **own** personal records, a **personal record request cannot be made anonymously** and an **agency must verify the requester's identity** to ensure that he or she is the individual about whom the record concerns. Moreover, a **personal record request can only be made by an individual person**, because companies or other entities cannot have personal records by definition.

To verify the requester's identity, the requester can provide an identifying number or e-mail address that matches the agency's records about the requester.

Alternatively, the requester can provide identifying documents, either **one government-issued I.D. showing the individual's photo and signature**, such as a driver's license or passport, **or two I.D.s showing the individual's name and signature**, such as a credit card or library card. The rules will also allow an agency to ask for additional identification in appropriate circumstances.

(New) Verifying the Identity of an Individual's Agent (Sec. 3-200-42)

Required for processing a **personal record request by an agent of the individual**

Agent verification:

- Evidence of the **agent's identity** (same as prior slide) **AND**
- Evidence re: **agent's authority to represent individual**

Court order, letter of guardianship, birth certificate
(if the agent is the individual's parent)



The draft rules recognize that an agent of an individual may make a personal record request on behalf of the individual, such as where a child requests the death certificate of a parent, or someone is acting as the guardian of an individual. Where the agent is making the request, the draft rules require the agency to **verify the agent's identity and also verify the agent's authority to represent the individual**. The agency may verify the agent's authority by reviewing evidence of such authority; for example, a court order or letter of guardianship, or a minor's birth certificate naming a parent who is acting on behalf of the minor.

(New) Correction & Amendment of Personal Record—Request (Sec. 3-200-43)

- **Written request from individual:**

- Describe** portion of personal record that is believed to have factual error, misrepresentation or misleading entry

- Explain why** the record should be corrected or amended

- Provide evidence** supporting correction or amendment

- Request specific language or information for** correction or amendment

- Only for an **accessible personal record**



In addition to governing **access** to personal records, the draft rules provide **procedures for the correction or amendment of accessible personal records**. First, the correction or amendment should be requested **in writing**, such as an email, and must contain certain information that an agency needs to process the request. The request should **describe** the portion of the personal record that is believed to have a factual error, misrepresentation or misleading entry. Then the request should **explain why** the record should be corrected or amended and **provide evidence** supporting the requested correction or amendment. Finally, the request should **specify the language** or information that should be used **to make the correction or amendment**.

Remember, the correction and amendment provisions apply only to personal records that are “**accessible**.”

(New) Correction & Amendment of Personal Record—Agency's Response

(Sec. 3-200-43(c))

Agency must respond **within 20 business days** after receiving complete formal request:

- **Notify Requester that the record is NOT maintained or NOT accessible**

-OR-

- **Make correction or amendment & notify requester**

-OR-

- **Notify Requester of reason for denial and procedures to request agency's review of its decision**



After receiving the request for correction or amendment, **an agency has 20 business days to respond**. The agency may respond by notifying the requester that the agency does not maintain the record or that the record is not accessible. **If the record is maintained and accessible, the agency may respond by making the requested correction and amendment** and notifying the requester of the action taken. If the agency will deny the request, then it must notify the requester of the **reason for its denial and the procedures** for the agency's review of its decision.

(New) Correction & Amendment of Personal Record—Review of Denial

(Sec. 3-200-44)

After agency's denial, Requester can request review:

- **Written request** for review
- **No later than 20 days after Requester received denial**
- **Attach original request** for correction or amendment

Agency's final determination:

- **Make correction or amendment, notify Requester**
- **Affirm denial & allow Requester to submit a statement as part of the personal record**



If the agency denies the requested correction or amendment, the requester may submit a **written request for review of the denial no later than 20 days** after the requester received the denial. When submitting a request for review of a denial, the requester should attach the original request for correction or amendment.

When a requester asks for a review of a denial of a request to correct or amend, the **agency shall make a final determination**. In its final determination, the agency may make the requested correction or amendment and notify the requester. Alternatively, the **agency may affirm the denial, in which case it must allow the requester to submit a statement to be included as part of the requester's personal record**.

Remember, the correction and amendment provisions of the **new subchapter 4 in OIP's draft rules only apply to personal records**. There is no UIPA right to correct or amend government records.

Let's turn now to rules that apply to both personal and government record requests.

NOTICE TO REQUESTER (NTR)

(Sec. 3-200-14)

NTR is required for formal requests when the entire record is not disclosed immediately or fees are being assessed.

NTR provides information about:

- 1) **Who:** Requester, agency, & contact info
- 2) **What:** Records requested
- 3) **When:** Disclosure after prepayment?
- 4) **Where:** Location for disclosure or inspection
- 5) **How:** Amount and instructions for payment
- 6) **Why:** Legal authority for denial; cite UIPA exception(s)



Like the existing rules, the draft rules require that a Notice to Requester (or “NTR”) be sent, generally within 10 business days, but with several caveats and exceptions that will be described later.

OIP has an NTR model form on its website, which it will update after the new rules are adopted. Until then, you may continue to use the current NTR form to respond to record requests. Agencies do not have to use OIP’s form, but the form makes it easy to respond by providing all of the information that is needed, which include:

“Who” is the requester and the agency staffperson handling the requesting, and their contact information?

“What” records were requested?

“When” will disclosure be made and is prepayment first required?

“Where” will the records be disclosed or available for inspection?

“How” much are the fees and costs and how is payment to be made?

“Why” are the requested records being withheld and what is the legal authority for the agency’s denial of access to any portion of the requested record?

NTR:

Send for:

- **Formal** Request

Need not send for:

- **Informal** Request -- not in writing
 - But must **disclose personal record** within 10 business days of verifying requester's identity
- **(New) Routine** Request – less than 15 minutes
(Count, but not log in UIPA Record Request Log)
- Request for **Amendment or Correction of Personal Record** – **New** Subchapter 4



The NTR must be sent in response to **“formal” requests** that are **in writing and provide sufficient information** as to what records are being requested.

“Informal” requests that are **not in writing** do not require a notice to requester to be sent by the agency. An agency may respond by simply providing access to the record, informing the requester that it does not maintain the record, or denying access and advising the requester to make a formal written request. For an informal request, the agency response must be within a reasonable time, but is not subject to a fixed deadline. However, **if the informal request is for a personal record, the agency must disclose the record within 10 business days of verifying the requester's identity.**

NTRs also need not be sent for “routine” requests, which are those that take less than 15 minutes for the agency to process. For example, routine requests would be for agency brochures handed at the counter. Routine requests also include requests for certified records such as birth and death certificates, student transcripts, or subpoenas, which are processed under procedures outside the UIPA. Routine requests also need not be individually logged in the agency's UIPA Record Request Log, but should be counted for statistical purposes and reported as a total number when the agency's Log is submitted to OIP.

An NTR is not necessary to respond to a request for amendment or correction of a personal record, which was described earlier.

(New) DUPLICATIVE REQUESTS

(Sec. 3-200-20)

Agency is not required to respond with an NTR or make records available when:

1. Pending request is **duplicative or substantially similar to former request**
2. Agency **already responded within last 9 months**
3. Agency **response to same request would remain unchanged**

If criteria met, agency must send a written notification that no response will be provided to any duplicative requests.



An agency need not send an NTR or make records available when a requester's subsequent request is **duplicative** of an earlier request made by the same requester. The draft rules provide specific criteria for when an agency may decline to respond to a requester's subsequent duplicative request. First, the pending request has to be **duplicative or substantially similar** to the earlier request. Second, the agency has to have **already responded to the earlier request within the last 9 months** before the agency received the pending request. Finally, the agency's **response to the pending request would remain unchanged from its earlier response**. If all the criteria are met, then the agency must instead send to the requester a written notification that no response will be provided to any duplicative requests.

(New) Consolidating One Requester's Multiple Requests

(Sec. 3-200-34)

Agency has **option to consolidate** formal requests from **one** requester

Time Limits for Consolidated Response:

- The applicable **time limits for first request received**
- **Incremental disclosure** time limits for MEI requests



The draft rules add a provision allowing an agency to consolidate the formal requests from one requester. If an agency does consolidate multiple requests, the time limits for the consolidated requests will be the time limits that start running with the first request received.

Later on, we'll discuss how requests that cause manifestly excessive interference with an agency's functions can also be consolidated and subject to the longer time limits for incremental disclosure.

FORMAL REQUEST: CONTENTS

(Sec. 3-200-12)

- Written, including email
- Requester's contact information
- **(New) Requester's name or unique identifier, if requester seeks personal records**
- **(New) An identifying particular such as an e-mail address, if requester seeks a fee waiver**
- Description of requested record
- Request to inspect or obtain copy of record



For the agency to be able to process a formal request, it must be **in writing** and contain certain information, starting with the **requester's contact information**. Although government record requests may still be made anonymously, **the requester's name and sufficient identifying information**, such as a drivers' license number, **must still be provided for personal record requests to verify that the individual is entitled to have access** to the record. **And if a fee waiver is desired** the request should **include a name or identifying particular, such as an email address**, so that the agency can track the waived amounts.

The formal request must also provide a **sufficient description** of the requested record so that the agency can locate the requested record with reasonable effort. Information about the record may include the record name, subject matter, and other descriptive information. Lastly, the formal request should state whether the requester wants to **inspect the record or obtain a copy** of the record.

(New) Request for Summary or Compilation of Information in Record

(Sec. 3-200-5)

Summary/compilation is **NOT** required, **unless** information is **readily retrievable in the form requested**—HRS § 92F-11(c)

(New) **Readily retrievable when the time to prepare** the compilation or summary is:

- Substantially less than the time to prepare the record for disclosure, **and**
- **No more than 30 minutes**



Sometimes, requesters ask for lists or summaries of the information contained within records instead of the actual records. The UIPA does not require an agency to summarize or compile information from a record unless the information is “readily retrievable by the agency in the form in which it is requested.” (HRS section 92F-11(c))

A new rule will clarify when information is “readily retrievable.” If it would **take substantially less time to create a compilation or summary** than to review and segregate the records for disclosure, **and no more than 30 minutes**, then the information will be considered “readily retrievable” and the agency must create a compilation or summary for disclosure, and can charge appropriate fees and costs to do so.

The agency’s NTR should state whether or not it is creating the requested compilation or summary and any fees, costs, or prepayment that may be required.

(New) TIME LIMITS START AFTER:
(Sec. 3-200-13(c))

Agency requested & received:

- Description or clarification of record
To enable agency to search for the record
- Verification of individual's identity
For personal record request only



As with the existing rules, the draft rules provide **time limits for the NTR to be sent to the requester and the records to be disclosed**. These time limits, however, **do not start until the agency knows what it should be looking for**. If the request is not clear, the agency can ask for additional clarification of the record request. The time limits for the agency to act will start after the agency has received a **sufficient description or clarification of the records being requested**.

In the case of **personal record requests**, the time limits start to run only after the agency has received sufficient information **to verify the requester's identity** as the individual about whom the personal records concern.

TIME LIMITS: **NOTICE to REQUESTER (NTR)**

(Sec. 3-200-13(a))

10 business days after formal request is received for government records, or for personal records not requiring prepayment

(New) But **5 business days** after personal record request is received, if **requiring prepayment** of fees & costs

Unusual Circumstances

Send Acknowledgement first

NTR is not required if record is **disclosed in its entirety and no fees or costs assessed**



Once the time limits start to run, an agency will have **10 business days to provide the NTR for government records, or for personal records not requiring prepayment. A new draft rule, however, would give the agency only 5 business days** from when it receives a verified **personal** record request to provide an NTR if it will require the requester to **prepay** fees and costs. The reason for this new rule is because the statute specifically requires agencies to provide access to personal records within ten business days, unless an exemption under HRS section 92F-22 applies or unusual circumstances exist. (HRS section 92F-23) The NTR for personal record requests has to go out earlier in order to allow time for the requester to receive the NTR and provide the prepayment, and the agency to then disclose the records in time to meet the statutory deadline.

If **unusual circumstances** exist, the NTR will come after an agency provides a written **acknowledgement** of the request, so the NTR has a different time limit. We'll discuss unusual circumstances separately.

Finally, remember that **an NTR is optional and not required when the record is being disclosed in its entirety and no fees or costs are being assessed.**

TIME LIMITS: **DISCLOSE RECORD**

(Sec. 3-200-13(b), (c), & (d))

For government records:

10 business Days after request is received

(When no prepayment required)

5 business Days after prepayment is received

(When prepayment is required)

For personal records:

10 business days after verification, whether or not prepayment is required

Unusual Circumstances have extended time limits for disclosure



In addition to sending an NTR, an agency must actually **disclose** the record, if it going to do so, **within certain time limits**. Starting from the date it receives a complete formal request for a **government record**, the agency has **ten business days to disclose a record when the agency's NTR did not require a prepayment**. If the agency sent out a **notice requiring prepayment**, then the agency has a time limit to disclose the record within **5 business days from the date it receives the prepayment from the requester**.

For personal record requests, the statutory time limit for disclosure is 10 business days, whether or not prepayment is required.

When **unusual circumstances** exist, the time limits for disclosure are extended.

TIME LIMITS:

UNUSUAL CIRCUMSTANCES

(Sec. 3-200-13(d))

10 Business Days after receiving request, send
ACKNOWLEDGEMENT of request

20 Business Days after receiving request, send
NOTICE to Requester

5 Business Days after sending Notice, **DISCLOSE
RECORDS**

New rule about “unusual circumstances” is similar to current rules about “extenuating circumstances” and “incremental disclosure.”



When **unusual circumstances** exist, an agency may choose to send an **acknowledgement**, which provides it with extra response time. The agency has a time limit of **10 business days to send a written acknowledgement** of the formal request. If a written acknowledgement has been sent, then the agency has a **maximum of 20 business days from the date of receipt of the request to send the NTR**. If the record is to be disclosed, then the agency must do so within a **time limit of 5 business days after sending the NTR or 5 days after receipt of any required prepayment**.

If these time limits sound familiar, it is because they are the same as those for “extenuating circumstances” and “incremental disclosure” under the current rules.

Unusual Circumstances (Sec. 3-200-15)

Allow for **extended time limits for responding to a formal request—NTR, record disclosure**

Allow for **incremental disclosure** of voluminous government records

Despite unusual circumstances, **must disclose personal records within 30 business days**



The draft rules now use the term “**unusual**” circumstances to track the statutory language (HRS 92F-23) and provide extended time limits for agency responses.

When unusual circumstances exist, incremental disclosure of records is still permitted by an agency, **but only for government record requests**. By statute, **even when there are unusual circumstances, agencies must still disclose personal record requests within a maximum of 30 business days** from the time of the verified request, if no exemption applies. (HRS section 92F-23)

Unusual Circumstances exist when:

(Sec. 3-200-15)

- Agency must **consult with another person**
(Including agency from whom records were received,
but not to consult OIP or agency's attorney)
- Request requires **extensive agency efforts**
(Search, review, segregation, other preparation)
- Agency requires **extra time** to avoid unreasonable interference with
its other duties
(E.g., agency spends much time responding to requests)
- **Natural disaster** or situation beyond agency control



Similar to the existing rules, unusual circumstances exist when the agency **must consult with another person**, including an agency from whom the records were received, to determine whether the record is protected from disclosure. As with the existing rules, unusual circumstances do not exist when the agency consults with OIP, or with the agency's attorney, about what exemptions might apply.

Unusual circumstances do exist when the request requires **extensive agency efforts** to search for, review, or segregate the records, or otherwise prepare them for inspection or copying.

Unusual circumstances also exist when the agency requires extra time to respond in **order to avoid unreasonable interference with its other duties**, and include situations when the agency is already devoting a significant amount of time to processing other record requests.

Finally, a **natural disaster** or other situation beyond the agency's control would continue to constitute an unusual circumstance under the draft rules.

LOCATION FOR INSPECTION/COPYING

(Sec. 3-200-18)

- At **agency office** where the record is maintained
- **(New) Alternative place** due to security concerns or administrative hardship
- **(New) Agency option**—mutually agreeable location



Similar to the current rules, the draft rules continue to provide that the location for the inspection or copying of records shall be where the agency maintains the record. The draft rules, however, allow the **agency to designate an alternative location** due to security concerns or administrative hardship, **or to mutually agree with the requester on a different location where records will be inspected or copied**. For example, an agency office with no suitable area open to the public can choose to provide the records in another room or in a different building that is open to the public, rather than in its secure work areas where the records are normally maintained. Alternatively, an agency has the option to mutually agree with a requester to send the records to a neighbor island office instead of the Oahu office where they are normally maintained.

(New) INSPECTION OF RECORDS

(Sec. 3-200-18)

Agency may protect from loss or damage by:

- **Allowing inspection of a copy** instead of original record
- **Lending** to requester agency **equipment or a copy in digital or electronic format** (copying fees assessed when borrowed copy is not returned)
- May require Requester to **sign a statement of criminal or civil liability** for loss/damage



Requesters sometimes seek to inspect records before asking for copies of them. **To protect records from loss or damage**, the draft rules clarify that in appropriate circumstances an agency may **provide a copy of records for inspection rather than the original record**, such as where the record will be segregated and the agency doesn't want to black out portions of its original record.

If the requester seeks to inspect records that are in digital or electronic form, the agency may allow the requester to **use the agency's equipment** to do so at the agency's office, or it could **lend a copy of the record** in digital or other electronic format. This draft rule recognizes that many agencies do not have public terminals available for viewing digital or electronic records. If the requester fails to return the digital copy by a specified date, then the agency **may assess the copying cost to the requester**, which the requester must pay before the agency must respond to any further requests from that person.

Moreover, prior to inspection, an **agency may require a requester to review and sign a statement** informing the requester of criminal or civil liability when loss or damage to the record results from the requester's inspection of the requested record.

REQUESTER'S RESPONSIBILITIES

(Sec. 2-300-16)

If agency requests, Requester shall:

- **Pay fees & costs assessed**

Fees & costs for current & previous requests

- **Make arrangements to inspect or obtain a copy** of the record
- Provide further **description or clarification** of requested record
- Provide info to enable **verification of requester's identity** (for personal record requests)



While the agency has many requirements to follow, the requester has certain responsibilities as well. Similar to the current rules, the draft rules retain the requesters' responsibilities and allow the agency to not process a request if the requester fails to meet his or her responsibilities.

A requester is responsible for paying the fees and costs as assessed by the agency. Like the existing rules, the draft rules allow an agency to assess a requester the fees and costs for a current request **as well as for previous requests where the fees or costs had not been paid**. As under the existing rules, **until a requester pays for fees and costs assessed in a prior request, the agency need not process a new request**.

The requester is also responsible for communicating with the agency to make arrangements for inspecting or obtaining a copy of the record; to provide further description or clarification of the requested record if needed by the agency; and to provide sufficient information that enables the agency to verify the requester's identity when the request is for a personal record.

ABANDONMENT OF REQUEST

(Sec. 3-200-16(b))

Agency has no further duty to process a record request:

- Requester **fails to comply** with duties 20 days after agency notice or availability of record to be disclosed
- Requester is **presumed to have abandoned** request



If a requester does not fulfill these responsibilities **within 20 business days** of the agency's notice, then the **agency has no duty to further process the request and the request is presumed to be abandoned**. The request is also presumably abandoned if the requester does not pay for the records within 20 business days from the agency's notice, or does not come by to inspect or pick up records within 20 business days from when the requester asked for the record to be made available for inspection or pick up.

(New) Manifestly Excessive Interference w/ Agency Functions (MEI)

(Sec. 3-200-21)

Agency determines:

- 1) One or more requesters working in concert
- 2) Acted under the UIPA **causing manifestly excessive interference** with an agency's discharge of its other lawful duties



Recognizing the difficulties an agency faces when a requester, or group of requesters working in concert, **act under the UIPA to cause manifestly excessive interference (“MEI”)** with the discharge of the agency's other lawful duties, the draft **rules provide measures that the agency can take to limit such interference without taking away a requester's ability to make reasonable UIPA requests**. OIP expects that MEI will rarely occur, but the draft rules allow an agency to make a determination that a requester, or several requesters working in concert, have acted under the UIPA in a manner that is causing manifestly excessive interference with the agency's discharge of its other duties, which then allows the agency to take further steps as discussed in the next few slides.

(New) Manifestly Excessive Interference w/ Agency Functions

(Sec. 3-200-21)

Agency makes its MEI determination based upon requests made w/in **preceding 24 months**; and **other factors including**:

- Demands for **service outside of the UIPA**
- **Threatening, abusive actions or language**
- Evidence of **frivolous/punitive** behavior

Requester may seek OIP or court review of agency determination.



To determine whether MEI exists, the agency must **look primarily at requests made within the preceding 24 months** but may consider **other factors**, such as the requester's demands for the agency's services beyond its UIPA duties, abusive actions and language from the requester, and evidence of a pattern of behavior that is frivolous, punitive, or harassing in nature.

A requester may ask OIP or the courts to review an agency's MEI determination.

(New) Manifestly Excessive Interference w/ Agency Functions

(Sec. 3-200-21)

After determining that there is MEI, an agency may:

- **Consolidate** formal requests from requester(s) **and incrementally disclose government records**;
- **Give only one fee waiver for all requester(s)**; and
- **Deny the fee waiver** in the following fiscal year.

NO denial of fee waiver if a request is in the **public interest**
- use same public interest criteria as current rule



If an agency determines that a requester's actions are causing MEI, the agency may take several **actions to prevent further MEI and be able to do its work**. First, the agency may **consolidate pending and future requests from the requester, or requesters acting in concert, and incrementally disclose** the records, **so long as the records requested are government records**. In other words, the requester is free to make new requests, but those requests effectively go to the end of the line while the agency is working its way through the consolidated request on an incremental disclosure timeline.

Second, the agency may group all the requesters working in concert for the purpose of **providing only one fee waiver** to the group as a whole.

Finally, the agency may **deny the requester a fee waiver throughout the fiscal year following the agency's determination** that the requester's actions are causing MEI, **unless a request is in the public interest**. **The existing criteria for determining whether a request is in the public interest remain the same in this new rule:** (1) when the requested record pertains primarily to the operations or activities of the agency; (2) the requester has the primary intention and the actual ability to widely disseminate information from the government record to the general public; and (3) the record is not readily available in the public domain.

The fees and fee waiver provisions have been substantially changed in the draft rules and are discussed next.

(New) SRS FEES

(Sec. 3-200-31)



Increased SRS fees:

- \$7.50 per 15 minutes to search
- \$15 per 15 minutes to review or segregate

(New) SRS fee waiver up to \$400 in a fiscal year only for search, review, or segregation fees, not costs



OIP's administrative rules for fees that may be assessed to process record requests have not changed since they were adopted in 1998, even though government expenses have increased over the intervening decades. After reviewing the salary ranges for clerical staff that would likely do the search function and for supervisory and executive managerial positions that would likely do the review and segregation of records, **OIP's draft rules propose an increase from \$2.50 to \$7.50 per 15-minute increment for search fees and from \$5.00 to \$15.00 per 15-minute increment for review and segregation fees.**

Although the new rules propose to substantially increase the fees, **most requesters will not be paying the fees because the new rules also provide a requester with a total maximum fee waiver of \$400 per fiscal year from an agency to search for, review, or segregate records, but this waiver will not apply to costs.** The \$400 waiver is intended to keep record requests free or affordable for most people, as the UIPA Record Request Log results since FY 2015 show that the overwhelming majority of state and county requesters paid zero, or less than \$5, for fees and costs.

After using the Log data since FY 2015 to calculate the average number of hours that it takes state and county agencies to search for, review and segregate record requests, OIP estimates that the fee waiver would allow a requester to annually make approximately 5 typical requests, 13 personal record requests, or one complex record request to the same agency in a year without having to pay fees.

(New) SRS FEE WAIVER (Sec. 3-200-31)

- Applies to any requester & replaces \$30/\$60 waivers per request
 - Limited exception for MEI
- Up to \$400 total SRS fees waived in a fiscal year
- Requester's name or unique identifier required
(Use Log to keep a running total of fee waivers)

Requester is limited to \$400 in fee waivers per year, even if using multiple names/emails



The \$400 cumulative fee waiver would apply to any requester and replaces the \$30 or \$60 per-request fee waivers under the existing rules. **Agencies no longer have to determine whether a request is in the public interest, unless they are denying the fee waiver due to manifestly excessive interference with its other lawful duties.**

The fee waiver only applies to the fees that an agency can charge for searching for, reviewing and segregating records, and up to a total of \$400 may be waived in one fiscal year. The \$400 fee waiver does not apply to costs for copying, delivery, or other lawful charges.

In order to receive a fee waiver, the requester will **need to provide a name, or unique identifier such as an email address, so that the agency can track the amount of fee waivers** it has granted to the requester in a year. This is where logging requests on the Record Request Log will help the agency to keep track of fee waivers.

Requesters cannot obtain more than a total of \$400 in fee waivers per fiscal year by using multiple names, email addresses, or other identifying characteristics. Thus, an agency may count requests from the same requester using different names, email addresses or other identifiers toward the requester's \$400 total in fee waivers in a year.

(New) Consolidating Formal Requests from Multiple Requesters for Fees

(Sec. 3-200-34)

Agency has **option to consolidate** formal requests from **several** requesters:

- When 2 or more requesters submit formal requests for access to **same or substantially similar records**
- **To assess each requester an equal portion** of total estimated fees
- For consolidated requests, **use time limits for the first request received**



Existing rules don't make it clear how an agency should handle multiple requests for the same or similar records that come in around the same time. An agency cannot assess payment for more time than it ultimately spends working on a request, but because the first requester is currently assessed all of the SRS fees for a record, then the second requester is not charged fees for substantially similar record requests.

To allow for a more fair division of SRS fees, the draft rules would allow an agency to consolidate formal requests from multiple requesters for substantially similar records in order to split the total SRS fees equally between all requesters. If the agency does consolidate the requests for substantially similar records, the agency must still observe the time limits that start running with the first formal request received. **Thus, this section only applies for requests that come in at around the same time, because the agency still needs to meet the deadline for the first request.**

SRS FEES CHARGED, EVEN IF NO DISCLOSURE OF RECORDS

(Sec. 3-200-35)

SRS fees can be assessed, even if the agency withholds the record in its entirety, **IF the agency had reasonably believed that the requested record would be disclosable when it incurred the fees.**

Note: **Agency may require outstanding fees to be prepaid before processing a subsequent formal request.**



As in the existing rules, the new rules specifically state that an agency can charge fees to search for, review and segregate a record, even if the agency withholds the record from access in its entirety, **so long as the agency reasonably believed that the requested record would be disclosable when it incurred the fees.**

Remember, too, that an agency may require a requester to prepay the outstanding fees from previous formal requests before the agency discloses records in response to a pending formal request.

(New) FEE to Prevent Loss & Damage During Inspection (Sec. 3-200-32)

- Supervision of inspection to prevent record loss or damage
- \$7.50 per fifteen minutes
- After initial 2 hours of inspection



The draft rules propose a new fee that an agency can charge for supervising a requester's inspection of records in excess of two hours. The proposed fee is **\$7.50 per fifteen minutes** and can be **charged after the requester has already spent 2 hours to inspect the records**.

This inspection fee is one of the new measures that an agency can use to prevent loss or damage to a record or manifestly excessive interference with its duties. (HRS section 92F-11(c), as amended by Act 165, SLH 2017). It recognizes the burden for an agency in those limited situations where an agency staff person is pulled away from his or her other duties to sit in a room supervising a requester looking at agency original records for many hours or what may even be multiple days.

The **SRS fee waiver does not apply to the inspection fee**, as it is for a different purpose and the requester is already getting the first two hours of inspection free.

COSTS & PREPAYMENT

(Sec. 3-200-19)



- “other lawful fees and costs”
(e.g. statutory copy fees)
- “reasonable incidental costs”
(e.g. postage, CDs, extra copies for segregation)
- Prepayment of costs still ok



In addition to fees, the draft rules **allow an agency to assess 100% of costs**. The new rules **distinguish between “other lawful fees and costs,”** meaning those like copy fees that are set by statute or other legal authority, **and “reasonable incidental costs of services . . . to respond,”** meaning those like postage or CDs that the agency reasonably incurs in the course of fulfilling the request. **The new rule thus allows agencies to charge for extra copies it must make to segregate records, unlike the current rule.**

Agencies can also continue to **require prepayment** of fees and costs before the agency discloses a requested record. An agency can require a **prepayment of 50% of the search, review and segregation fees and 100% of all other costs,** such as copying and delivery. The agency can also **require prepayment of 100% of the outstanding fees and costs owed from previous requests.**

Additional New Rules

- **OIP's copying cost & other costs** (Sec. 3-200-51)

25 cents/page for copying, faxing, scanning

Actual costs to create other physical copies of records

- **Government records for research** (Sec. 3-200-22)

Agency responds in requests for access in same manner as for government records

- **Personal records collection; protection of personal info** (Sec. 3-200-46)

Agency complies with other laws re: personal info



Finally, the new rules have a few miscellaneous provisions that generally will not affect the timeline and mechanics of agencies' responses to record requests.

First, a rule specific to OIP establishes the copying fees that OIP will charge when it responds to record requests.

In order to satisfy a statutory requirement, the draft rules add a provision clarifying that access to government records for research will be handled the same way as other requests for government records.

Also to satisfy the UIPA's requirement that OIP adopt certain rules, the draft rules contain a provision about personal records **collection**. Because Hawaii statutes dealing with personal records collection were adopted after the UIPA was created, OIP's proposed rule simply requires agencies to comply with other applicable laws regarding collection of personal information.

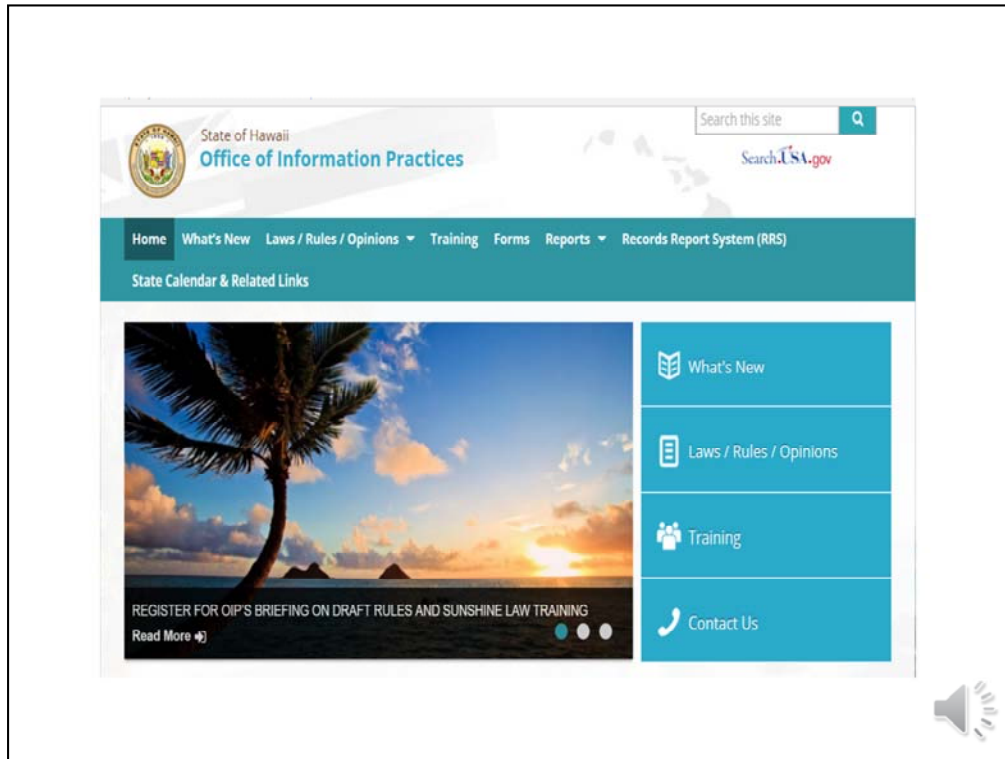
Use UIPA Record Request Log

Log will help agencies to:

- **Understand changes** to rules
- Track the amount of SRS **fee waivers** for each requester during a fiscal year
- Track hours to support “**unusual circumstances**”
- Provide evidence “**manifestly excessive interference**” with agency’s functions



In accordance with any new rules that will eventually be adopted, OIP will revise its UIPA Record Request Log next year to help the agencies **understand the changes** in the rules. The Log will also be a good way for the agencies to **track the amount of fee waivers** being granted to requesters each fiscal year. The Log can also help the agency to establish that “**unusual circumstances**” exist or to provide evidence that a requester is causing “**manifestly excessive interference**” with the agency’s functions.



The draft rules, this PowerPoint presentation, and the online survey are on the Rules page at **oip.hawaii.gov** and OIP will be sending out What's New articles so that you can stay informed and involved with the rulemaking process. **OIP encourages you to complete the survey and provide written comments on the draft rules by the end of September 2017**, so that they can be considered before OIP prepares the actual rules that it will propose for public hearing and adoption.

Need Help?



- **Attorney of the Day (AOD):** 586-1400
- **E-mail AOD:** ois@hawaii.gov
- **OIP Website:** www.oip.hawaii.gov
- **Write:** 250 S. Hotel Street, # 107,
Honolulu, HI 96813



If you have any questions, please contact OIP's Attorney of the Day by calling, emailing, or writing to OIP.

Mahalo for taking the time to learn and helping to create new rules that will govern the processing of UIPA record requests and will keep Hawaii's government open and transparent.