Transcription of UIPA Training Video

Good morning, good evening, good afternoon, depending on where you are. Welcome to the Uniform Information Practices Act. Now, I'm going to be giving you the opportunity to take a break about halfway through this presentation, and the total presentation should be about an hour and a half.

We are, about halfway through, going to go through a set of fake records, which you should have with you. You should be able to get them online from the same place that you got this video, and if you don't have them already please go to our website at hawaii.gov/oip, training section, to look for those handouts. You want the Shrimp Board records. So again, about halfway through you'll have the chance to take a break and at that point you can pause this, look for the records, and we'll continue on with them.

But to begin with now we're going to start with the purpose and the policy behind the Uniform Information Practices Act. Now the statute itself says that "it is the policy of this State that the formation and conduct of public policy—the discussions, deliberations, decisions and actions of government agencies—shall be conducted as openly as possible" and the Uniform Information Practices Act, the state's records law, carries out that policy.

So there are several purposes to the UIPA, and we start out by talking about the policy and the purpose behind the law because those come into play whenever there's a question about either what the law requires in a given factual situation or in those instances when it is perhaps not clear what the statute itself means—does this comma placed here mean this or that? So, again, we at OIP are charged with interpreting when there is an ambiguity in favor of openness and a court likewise would be. And this would be these questions of either how does the law apply in a given factual setting, or what does the law mean, what does this phrase in the statute mean. So we go over the purpose and the policy behind the law because that helps you when you're applying it to understand what the law is intended to do, and so when questions arise in your own use of this law you have a better idea of what the answer might be.

Now a primary purpose of the UIPA is to protect the public's interest in disclosure. The law is also intended to open up the governmental process to public scrutiny and public participation. And then the law is also intended to make the government accountable to individuals in the collection, use, and dissemination of information relating to them. So again the law not just carries out the government's interest in opening up information to the public, but also is an effort to make the government accountable to individuals for information the government has about those individuals. I'm going to give you a roadmap of the topics we're going to cover during the course of this presentation. First, we're going to go with the general concept that records are presumed public. Then we are going to go over the exceptions to disclosure under the law. We're going to go over the mechanics of responding to a request. And then finally we're going to talk a little bit about personal records, a record request made by an individual about that person himself or herself, and how they are treated differently.

So these are four key points that I'd like to you to come away from this remembering and they are also the four points we're going to be covering in more detail as we go along. And we'll start with his first point that records are presumed public. Now the general rule behind this law is that government records are open to public inspection and copying unless restricted or closed by law. In other words, the default is that government records are open, and it's up to the agency to demonstrate that no in this case there is a legal basis for withholding them.

And I want to emphasize that this applies to government records, because then you have the question of what is a government record. Generally speaking, a government record is any information in tangible form that is maintained by an agency. So that would include the obvious, paper records. It would also include records in electronic form. It would include video recordings. It would include pictures, photographs, again anything in tangible form. The other boundary, of course, is what is "maintained?" Well, the obvious would be your files that you use all the time in your office.

Generally speaking, everything in your office is going to be a government record. There is not a requirement that they be part of some sort of formal system of files, but of course there are going be limits on it. Things like your phone bill that you stuck in your desk because you're going to pay it over lunchtime doesn't become a government record just because it's stuck in your desk. And similarly there might be things like notes that you take that you're not filing anywhere, you're just throwing away after a meeting. Something like that might not be. But, generally speaking, anything in your office that's information stored in tangible form would be considered a government record.

And "maintained" would also extend to information, records that the agency has administrative rights to. For instance, an agency has a contractor performing some function of the agency and the contract provides "agency shall have the right to review all records relating to the performance of this function" or "performance of this contract." The agency in that case would have administrative control over the records because it has the legal right to get them whenever it wants to, and so those records relating to the performance of that contract would then also be considered records of the agency administratively controlled. So again, that's background on what a government record is, and the general presumption is that government records are open to the public, and it's up to the agency to show that they are restricted or closed by law.

We're going to move to the second of the four major points that we're going over, and having dealt with the presumption the records are public, we're now going to talk about the exception, the situations in which agency can actually withhold or redact a record. So we're now going to go on to the five exceptions to disclosure, and I'm going to start by showing you the basic structure of the statute. You can see that the category of government records would include both the public request and the personal request. Basically, it's actually not two different types of records, it's two different types of record requests. So you could have the same record, and it's a public request if it's made by just anybody, it doesn't matter who in the public. It's a personal request if it's made by somebody who's referred to in that record that the record is actually about.

So we're talking now about Part II, public records requests. So the exceptions that we're looking and going to discuss are the exceptions that are found in section 92F-13 of the Hawaii Revised Statutes. So again, we're talking about Part II of the UIPA, public record requests. Now, we said we were about to get into the exceptions to disclosure and indeed the general rule is that records are presumed public, but there are exceptions that may apply and the agency has the burden to establish that those exceptions do apply.

However, there's an exception to that general rule, which is that there is basically a laundry list of situations in section 92F-12 HRS, a laundry list of situations where it specifies categories of records that are public without exception. And the reason for this is these are in some instances types of records that were historically public and the legislature wanted, at the time it passed the UIPA, to ensure that these records would remain public, that you wouldn't have agencies saying well there's this new law now, so maybe land ownership records now have a privacy interest. They wanted to make sure that historically public records remained public. There are other types of information where they had not been historically public but the legislature had really studied the issue at the time it passed the UIPA and wanted to draw a specific balance. So, for instance, agency rules, policy, and interpretation, final opinions, and orders. Things that are the law of the agency. Government procurement information, although this one actually is still subject to withholding for confidential business information. Land ownership, state leases, contract hires, minutes of public meetings, certified payroll records, building permit information, that's some of the historically public, rosters of licensees or permit holders.

Government personnel information: now this isn't everything, this isn't getting into evaluations, let's say, but for government employees there are some types of information, salary (salary exact, or salary range, depending on the status), hours worked, position number, job description, some basic resume information that shows the person is qualified for the position. There is some information like that that is automatically public about government employees. Employee misconduct: this is for government employees that have actually been suspended or terminated, only terminated in the case of a police officer for misconduct. At that point that information would become public. Information where the individual that it refers to has consented, or where it's already made public by law.

These are some examples of information that would be public and the exceptions would not apply. And, again, this is kind of an exception to the exceptions. It's an exception to the general rule that records are presumed public, but exceptions may apply.

So, we are going to go over the five exceptions to what would otherwise be required disclosure. The first of them is the privacy exception. We will talk about that in more detail.

The second, the litigation privilege exception, this one is basically for your attorney general. This applies where there is litigation or the prospect of litigation and the information is privileged or would be privileged against discovery. So it's not just because you have litigation, or you may have litigation, it also has to fall under a privilege such as the attorney-client privilege or the attorney work product privilege. So again, that's why I say this really is for the attorneys, making it such that when you're in litigation people cannot get it at privileged

information by using the UIPA.

The frustration exception. This one also we're going to spend more time on.

The confidentiality statute or court order exception. This one applies where there is a confidentiality statute or a court order saying that specified information or specified records shall be confidential.

And finally there is the legislature exception for the working papers of the legislature. These really are part of frustration anyway, but I suppose the legislature wanted to make sure that their own interests were protected when they passed this.

So there are three of them that are probably the most frequently used: the privacy exception, which we are going to talk about in more detail; the frustration exemption, which again we're going to talk about it more detail; and then the confidentiality statute or court order one, which is really dependent on whether you have a confidentiality statute or court order.

The privacy exception applies in a situation where you have a clearly unwarranted invasion of personal privacy if the information in the record were disclosed, and let me emphasize the personal privacy. This is intended to protect the privacy interests of individuals, of actual persons, so it is not going to apply to financial information of a corporation. That might fall under frustration in appropriate circumstances, but only actual persons, individuals, have a privacy interest that would be protected by the privacy exception. So to find this clearly unwarranted invasion of personal privacy you would need, first, a significant privacy interest in the information, and then you also need to find that that privacy interest was not outweighed by the public's interest in disclosure.

It's a balancing test. Generally speaking, the significant privacy interest is going to be enough, and generally speaking as an agency, when you find a significant privacy interest, you will go ahead and withhold. But if OIP or a court is looking at it we've got to look at the balance. If there is a high public interest in disclosure that is strong enough to outweigh that significant privacy interest then the privacy exception is not going to apply. There are some legislative history examples that OIP has developed in the course of our opinions over the years. For instance, medical information is one, Social Security numbers, home contact information, personal contact information (and this would include personal cell numbers, home addresses, home phone numbers), personal e-mail information, financial information of an individual. The fact that someone's name shows up as part of an investigation into a criminal law issue, and this isn't just that somebody shows up as a suspect, this applies whenever somebody's name comes up in connection, even if this is a victim or as a potential witness. Social services, that someone is a recipient of social services are receiving welfare benefits. Then personnel file information; now please note that for government employees there is sometimes personnel information that is automatically public. We discussed those when we were talking about that laundry list information, such as the hours, the general resume information, a salary or salary range of another site, personnel file information to carry significant privacy interests. And then for private-sector employees, personnel information about private-sector employees generally

carries a significant privacy interest.

Then move to the balancing test again, we need to balance the privacy interest against the public interest in disclosure. Now the public interest in disclosure is basically a question of whether the information is going to shed light on an agency's performance. Is it going to shed light on the conduct of government officials? Is it going to promote governmental accountability, and this is similar to the type of public interest we might think of in the sense that is it newsworthy? Are people interested in it, but it's not identical. I'm going to give you an example to point out the differences.

There are two different home invasion situations. Now the first of these is the Dana Ireland police investigation. The situation in the first of these again, Dana Ireland on the Big Island, from over a decade there was a lot of interest in looking at the investigation files and it was because there were questions being raised about the performance of the police department in that case, though it was for purposes of governmental accountability, there were questions raised about how government had performed in that situation and it was for that reason that the media was interested. So that was a case where the newsworthiness of the information really is aligned with the public interest in disclosure, there was a strong public interest in another situation.

There was a home invasion of maybe five years ago, of a home of one of the *Lost* actors and there was media interest in that because it was a *Lost* actor, in this case however, the newsworthiness would not align in the public interest in disclosure. There was no reason to think that the investigation file in this case was any different from the investigation file for any other home invasion as far as the agency's performance went, so there wouldn't be heightened public interest in disclosure and then again it is generally the same thing as newsworthiness by the public interest in disclosure is specifically in shedding light on how the agency is doing its job, which isn't always identical to the frustration exception.

The frustration exception allows an agency to withhold information to avoid frustration of a legitimate government function, and again this is kind of an umbrella. This exception sounds very broad. It was meant to cover situations that were actually different, more specific exception under the federal Freedom of Information Act, which was part of a model for our law. So I'm going to give you some examples of where frustration specifically applies, where you have an open, and ongoing investigation that could be a criminal investigation, or an administrative or civil investigation or internal investigation but where you have an open investigation it would be a frustration of the ability to investigate to have to open up the files partway through when the investigation is not yet complete. Now, this particular type of frustration goes away after the investigation is complete, and at that point you need to see whether there is a need to withhold.

Confidential sources, this would cover the situation where you have somebody that's giving the agency information. The information is useful for the agency to have, but the person wouldn't give the information if their identity were revealed, and there is a good reason that the person wouldn't be willing speak. So basically, you need to have both, that the information is useful to

the agency and the fact that the person for good reason is unwilling to give that information if they are identified, and again confidential source is protecting the identity of the source. It doesn't automatically protect everything the person said. You are trying to protect the identity, but only to the extent that it would identify the person.

Proprietary information, this would be copyright or trademark information. In this instance let's say that you have a Windows operating system on your government-owned computer and somebody says, "Well, I would like to get a copy of the Windows operating system because you have the information in tangible form on a government computer so it's a government record." This allows you to avoid getting dinged for copyright violation, and just say well it's proprietary information.

Another example is confidential business information. This would apply where you have trade secrets and confidential commercial and financial information that would cause substantial competitive harm if it were disclosed. So, first of all, you need to have information that the business is actually kept confidential.

This usually is pretty straightforward. You need to have a competitive market in order to cause competitive harm. Information has to be commercial and financial or financial in nature. So there are some areas where this applies fairly readily. For instance, information that would reveal a business's profit margin, that's pretty easy to protect, so profit figures, or in the case of a government contractor or where the contract price is public. Typically, overhead can be withheld because overhead figures, combined with the contract price, would reveal profit. Other types of information theoretically could be withheld but it's a little bit more speculative if you have a business saying, well this whole narrative we think is valuable or our competitors might want to simply copy our write up and use that. Those get more dubious, but again this is something that's there, and it's really a question of whether the facts are there to support a claim that disclosure would cause substantial competitive harm.

Now deliberative process privilege is another type of frustration. It probably applies to a lot of government records. Deliberative process applies when you're talking about internal e-mails or internal memoranda or draft reports. Things that are pre-decisional, the agency has actually not made a decision on whatever the policy is, or hasn't issued the report, and are deliberative in nature. So we're talking about opinion materials rather than about purely factual material, and the idea here is to allow government employees, when an agency is working towards finding a policy or working towards finding a way to approach some issue, is to allow agency staff to be able to come up with wild ideas without showing up subsequently on the front page. To allow the internal decision-making process to be a little bit less of a fishbowl, while still removing that protection once the agency has actually made its decision. Now we're through the exemptions, but I will briefly talk about interagency disclosure before we take our break.

I would suggest we go through interagency disclosure first. Here is a situation where one agency wants to disclose to another agency information that could be withheld from the general public under the UIPA exemption. So, in other words, agency "A" wants to disclose to agency "B," but agency "A" doesn't want it to be treated as a public disclosure. Now maybe agency

"A" doesn't want to waive its ability to withhold that information from the public generally, and agency "A" wants to be sure that it's going to be kept confidential. This is section 92F-19 of the Hawaii Revised Statutes. This section allows for interagency disclosure when one of a list of circumstances is present. And there's a catch-all. A state or county agency can disclose to another state or county agency information that would otherwise be confidential when the disclosure is required for the receiving agency to perform its duties. The receiving agency needs it, in other words. And disclosure is either going to be compatible with the purpose for which the information was collected, or at least reasonably consistent with the expected use.

This catch-all is not that hard to meet, if the receiving agency is able to demonstrate the need for this information. It's generally not that hard to demonstrate that it is compatible with the purpose for which the information was collected, or at least reasonably consistent with the expected use. But you certainly could come up with instances in which it would be too much of a stretch. A purely hypothetical example would be that you have a Department of Health study where it's getting medical information about people's DNA profiles, to use in a long-term study of susceptibility to disease. And then HPD (and again this is hypothetical, they haven't done this), HPD then says we would like to get the database of the DNA profiles because we can add it to our DNA database and it might help us fight crime. That example, I think, is one where we would say, okay that is both not compatible with the purpose for which it was collected, and it is also not at all consistent with the expected use, and is basically too far of a stretch, and therefore even though HPD may be able to make a case that no really we need this, it will help us fight crime more effectively, it still wouldn't fall under this catch-all category for interagency disclosure.

Some of the other situations in which interagency disclosure is specifically allowed would be disclosure to the state archives. Disclosure based on a written request for civil or criminal law enforcement activities, and this one would also apply to a request coming from the federal government or from the government of another state or possibly even a foreign country. Again, generally you need a written request, although in an emergency situation limited information could be disclosed based on an oral request. Disclosure to the legislature or to the County Council or a subcommittee thereof. Please note, this does not apply to individual legislators or County Council members. Rather, it allows sharing with the body of the legislature or council or committee. Disclosure pursuant to court order, to the auditor, LRB, the Ombudsman, DHRD. So as long as it's in one of these categories you can share without waiving your ability to withhold it from the general public. The receiving agency is to keep it confidential to the same extent as the originating agency.

We are now are going to put on our shrimp hats and act as members of the staff of the State Board of Shrimp Affairs in order to go over a record request that the Shrimp Board has received. Now the Shrimp Board is our entirely fictional board for training purposes because we find that it irritates the real agencies if we use their confidential records for training purposes. So we are going to pretend that we are staff of the Shrimp Board and we have received a UIPA request.

In your packet, we are going to review what has been found in the search as being responsive to

the request. We are going to go over the request to see if any exceptions to disclosure may apply and if there is anything in there that we need to withhold entirely or to redact some portions of the record.

So we are going to start with a report to the board from Emily Curry, the Deputy Director to the Executive Director dated May 23, 20005. She's writing here about the giant mantis shrimp in the Ala Wai canal, one of their ongoing issues to deal with. At this point let's talk about anything we might be able to withhold from this document. So if you look at the document you will see that this is mostly going to fall under the deliberative process privilege form of frustration. It would be at least redacting part of it, if not withholding the entire document. Now you can see by the highlighted area it is stressing an opinion on what the board should do about a problem that is currently facing the board. So this is both deliberative—it's an opinion rather than a statement of fact—and it is predecisional. The board has not made decision on this yet. They are still working on a policy they want to approve. So you could withhold the whole thing.

Now for this next one. This is a bit of a trick question. What are we going to do with this record? So some of you may have noticed, remember when we talked about the definition of a government record. This does not appear to be a government record. It was on the director's desk at the time. This looks like something that would not be filed or being used as part of the office's work. It is more a personal list for the director. As to the letterhead for his personal notes, this is not an OIP issue, it is an ethics issue. This is a personal to do list that will get tossed at the end of the day. So this is not a government record, it may have just come up after a search. This wouldn't be disclosed since it does not pertain to the office. The next one is an application for sick leave by a shrimp board employee. Now we can see in the highlighted portion that there is actually some medical information on there. Doctor's note would need to be redacted. The rest of it, there is no need to withhold. This just shows this employee took sick leave on such and such a date. So we will disclose this record with the redaction of the actual medical condition.

The next document we are going to look at is a memo to the staff from the shrimp board director talking about the annual report. In this case there is something that technically qualifies for the deliberative process privilege. They are deciding on what to use for the cover design, he's asking for ideas. Technically speaking this is deliberative—he's expressing his opinion, and predecisional—they haven't decided yet. So they could withhold under the deliberative process privilege. I do want to point out, in this case, the agency should really think about if there would be frustration to disclose this information. This exception to disclosure by and large is at the agency's discretion to claim or not if an exception applies. Privacy is a little bit different. Privacy is the third party's interest at stake, so we would generally advise an agency that if it thinks the privacy exception applies to not disclose it anyway or at least if they are going to disclose it anyway, do so in consultation with counsel about the implications. But the other remaining exceptions, frustration especially is one where it is a question of whether the agency's legitimate functions would be frustrated, so if the agency doesn't feel that it would be a frustration to disclose, then the agency should disclose. Information like this, even though it might be deliberative process privileged, that's when it

may be more in the agency's best interest to disclose rather than withhold and raise peoples' curiosity and have them wonder, "oh what did they not want us to see" when it was something really innocuous. So again, the agency could withhold that paragraph under deliberative process, it does qualify, but the agency might want to consider just disclosing it anyway, which the agency can do. The agency may feel that there wouldn't be any frustration to disclose.

The next one we have is a map and it has a note about the endangered shrimp hatchery site. Let's move on. Now the key thing here is that the owners of the property on shore ask that we keep the location a secret. This one actually is a little bit of a trick question. We talked about frustration generally and then we talked about some specific situations where frustration applies, but this isn't really one of those specific situations. However we can see that the information is useful for our shrimp board—they would like to know where this hatchery is located—and we can see that they are not going to get this type of information in the future if they disclose it now. So this is actually more of a general catchall type of frustration. It's not the same thing as confidential source, and the owners are not trying to keep their identity as a source confidential so much as they don't want the information passed on. And I note that though there is some similarity to the confidential business information, it appears that it was entirely voluntary that the owners gave this information. So it is not the same thing as a bidder that gives information about his business in hopes of getting a contract or a grant applicant or permit applicant that gives information in hopes of getting a grant or permit. This is a situation where the information was apparently given entirely voluntarily and it is useful to the agency and there is reason to believe that the agency won't get this type of information in the future if it is required to disclose it now. So the agency would be able to withhold the information about the endangered shrimp hatchery site and it would be based on frustration, not one of the specific types of frustration that we discussed, but rather general frustration.

The next one we are going to look at is an investigation report of the Pilau bar and grill, and when you are looking at this please look at whether the investigation is still going on and then think how you would treat it if the investigation were closed at the time this memo was written. Now this says that this is a preliminary report of an ongoing investigation so if that is still the case, then the agency would be able to withhold this entire memo because the investigation is ongoing. An agency has a pretty broad ability to withhold material from the file of an investigation that is still being conducted. Let's assume that it said that the investigation has concluded. There is still going to be some information that we are going to be able to redact. You notice that the complainant here, the guy that had the food poisoning, is a Pilau employee, so he reported his boss, it doesn't say specifically but I would guess in this situation that he requested explicitly confidentiality or there would at least been an implicit promise of confidentiality which you do need for a confidential source. So it is either an explicit or implicit promise of confidentiality. So we are in all likelihood going to redact Sam Anella, the employee that reported the incident. We are also going to redact his home address in order to protect his identity and because home addresses generally carry a significant privacy interest. Now the information about the food poisoning incident, that is medical information. However, since we are already stripping out the identity of the complainant and the other information that would identify him, we actually can leave in the fact that there was a food poisoning incident because basically it's been de-identified so we know there was a food poisoning incident, but

we don't know who has food poisoning. So because this medical information is not attributable to any identifiable person we can leave it in.

The next one we have is another of these notes on letterhead from the director of the State Board of Shrimp Affairs. It is unfortunate that the director used the letterhead but that's really the Ethics Commission's problem, not our problem. So you can call the Ethics Commission about his use of letterhead. So the director's written a note to himself, so again obviously this is a personal note. This is not work related; he really shouldn't be using the letterhead. Nonetheless, I would say that this is not a government record.

The next one we are going to look at is the last of the set. The executive director to the council's memo to the board's counsel, Nola Contendere, and he is talking about his thoughts on what the board should do regarding a litigation that the board is involved in. The key thing here is he's writing to their attorney, he is talking to the board's attorney about what to do in a lawsuit. This is something that is going to fall in the category of attorney client privilege. So the board will be able to withhold it under the litigation privilege. So the board is in fact in litigation that this relates to this memo and it is attorney client privileged.

We are going to move on to a different part of the process and we are going to talk about the obligation to respond to a request. Ten business days is the magic number here. Within 10 business days the agency has to provide either the record itself or a written notice to the requester, or at least an acknowledgement. The acknowledgement would be that the agency is giving itself an extension for a good reason, and the date that the actual notice will be sent out. A request for a government record can come in different forms, but as long as it is in a written form, identifies the records that are being sought, and gives contact information for the requester—the requester does not have to be identified, but to be a formal request it does have to give information on how the requester can be contacted—as long as it has these elements it is a formal request under the UIPA. So the 10 business days to respond will apply.

So you could have a request that looks like this, using OIP's model form, which is a convenience for requesters, but requesters are not required to use it. An agency shouldn't be trying to require the requester to use this form.

The next one is also a valid request to the Department of Health. It's the same request but made in letter form; this is also a valid request. An email request is also a valid request and is a formal request under the UIPA, and it does cause the 10 business days response time.

When you get a request in any form the first thing is to identify what is being requested. In this case it is a report prepared by DOH of restaurants inspected between June 1, 2006 and June 30, 2006. This second request is basically the same thing except that the first form we looked at had more detail, and this one simply says reports. In a case like this you can see that you can't identify what records are being requested, you will need more detail. In a situation like this, an agency can ask the requester to clarify their request and if the request then comes back with additional detail like the first example, then the clock restarts from the time you received the clarification.

The next step is to determine if the agency has the record being sought. And in some cases this is going to be obvious that you have these records, or it can be obvious that we don't have these records. Perhaps this is a type of record that another agency has this record. On your notice to requester you can let the requester know that you don't maintain the records but you believe that this other agency may have the records. Sometimes there's going to be records that you know your agency doesn't have but you don't think anyone else has it either—the crazy requester who is looking for records of an alien invasion, that sort of thing. This sort of thing you don't even need to look at your files, you know you don't have anything like that. There may be instances where maybe you do have the record, and determining whether you have the records does need to involve searching your entire office. But in some instances you may need to do a trial peek at the likely files to see whether in fact you are going to have anything responsive before you prepare your notice to requester.

The next step is then going to be making a determination whether exceptions may apply to the records. Again this doesn't mean you should pre-process the entire request but, based on your knowledge of your records, you can say based on that what exceptions are likely to apply. In another situation you might pull some of the records to see what information is in there that would be subject to an exception. Again you don't have to have processed the entire request. The exceptions are privacy, litigation privilege, frustration, law and order, and the legislative exception.

The next step, you go on to provide the notice to the requester or something else within 10 business days, you will be providing either the record itself, or either a notice or acknowledgement. Again the acknowledgement is to give your agency more time for various reasons, someone is out sick, the agency is overwhelmed with other work, or the agency needs to consult with another person: this gives you a total of 20 business days to respond. So one of these three things needs to be done within 10 business days.

The agency's notice to requester can be in different forms. The example here is OIP's model notice to requester form, but the requirement in our rules is that it be in writing and have specified information. So you can send a notice by an email or by a letter. On the notice we are going to reiterate what was requested, when the request was received, and the date the notice was sent. Then going down more, you are going to determine if it will be granted in its entirety, or that it cannot be granted, or the agency doesn't maintain the record. If you know which agency does maintain the records then you could put that down. "It cannot be granted" might be because you need clarification or the record requires a compilation or a summary not readily retrievable. These are some of the reasons why a request cannot be granted. The request will be partially granted only to certain parts, so the agency is withholding some information and needs to cite the basis for withholding.

So because as an agency we are withholding some information from the record we do have to say what it is we're withholding, what information or what records, and what our legal basis is. And in this case "significant privacy interest" is the basis for withholding personal cell phone numbers.

On the flip side, or the second page, of this we're going to let the requester know how the records are being disclosed. In this case a copy is being mailed to the requester. We're going to let the requester know when the disclosure is going to be made. And this also has provisions for incremental disclosure. Incremental disclosure is something an agency can do, as it says, because the records are voluminous and the following extenuating circumstances apply. So where you have a very large request basically the agency can disclose incrementally. Normally, however, you disclose the record all at once.

And disclosure is going to be within five business days after the notice, or within five business days after the requester has done whatever the requester is required to do, typically make some prepayment of fees, whichever is going to be later.

So estimated fees and costs, you can see that we have the breakdown set out here. There's a $30 automatic waiver for the search, review, and segregation fees for any request. For a public interest request there's a $60 waiver. Somebody would have to apply for that and provide information to support it. Basically the public interest, the higher, waiver applies where the requester has the intent and actual ability to widely disseminate the records. The records are not already readily available out in the public, and they are of core public interest. In other words, this isn't something that is of interest just to the requester. This is the type of thing that really carries out that central UIPA purpose of opening up government, making government more accountable, so having to do typically with government operations.

And then copy charges, or other legal fees, are also something an agency can charge. Copy fees are not set by the UIPA; they're actually set for state agencies in section 92-21, which is outside the UIPA, which currently provides for a minimum charge of five cents per page. So OIP, because that's outside the UIPA, we're not going to generally tell an agency what to charge for copy fees; however, if it gets so high that it begins to be an unreasonable impediment to public access, then that might get more into our territory.

Other legal fees might be something like postage, or somebody requests a DVD and the agency doesn't have the capacity to copy DVDs in-house and has to send it out, and it's going to pass on the copy fees from the third party, that would be an example of another legal fee.

Those fees that we just looked at, again, the agency can charge for search, review, and segregation, and that is the way that the agency can capture its time. The charges for search, review, and segregation are set by OIP's rules, so the agency doesn't have the ability to say, "Oh, but we had our attorney do this, and our attorney charges $125 per hour." The hourly still is set by OIP's rules. And then other lawful fees, such as copying and postage.

I mentioned prepayment. The prepayment that an agency can charge is 50% of the estimated search, review, and segregation fee, and 100% of other estimated fees. Now please note that these are estimated fees, because the agency hasn't done the search yet. So the agency may have looked at some of the records to get a sense of what's there so it can do a better estimate of search, review, and segregation fees, and a better idea of what might be withheld from the

requester. But with a large request especially we don't recommend that an agency put in a whole ton of time, not more than two hours at most, searching for all the responsive records before you send out your notice, because if it's a request where you're going to have search, review, and segregation fees and it's going to be higher than that $30 automatic waiver, if it's a large request and there are going to be substantial fees, the requester might not want to pay that. Part of the function of the notice is to put the requester on notice that it's going to cost some money, here is what it's likely to cost, so it doesn't come as an unpleasant shock to the requester when the request is already done. So for the agency, likewise, it gives the requester a chance to look at what they're likely to get from this request and what they're likely to entail in terms of search, review, and segregation fees, and decide whether they want to continue on with it, decide whether they want to make the prepayment before you, the agency, start pouring a ton of time into doing the search.

And then prepayment, you can actually ask for prepayment of 100% of the other estimated fees, such as copy charges or postage charges. Now, because this is an estimate, your estimate is probably not going to be perfect. Your estimate should be made in good faith. But if you make your estimate, and it turns out your estimate is high, and there is some money owing to the requester, obviously you're going to pay that back to the requester. If your estimate turned out to be low, you can try to settle it the other way also.

So after having finished our notice and sent our notice off to the requester, if we asked for a prepayment we will assume we got the prepayment back from the requester, or perhaps we didn't ask for a prepayment, so we are just proceeding to process the request, the next step after the notice is going to be the actual real work of search, review, and segregation of the record.

And then once you've done all of that—searched, pulled them all, reviewed, and segregated, which is to say redacted out the information that you're withholding in the situation where a record could be partially disclosed but you wanted to redact. A personal cell phone number was the example in this case, so you would be disclosing the record except for this personal cell number that was blacked out, that is segregation. In any case, the next step is to provide the record to the requester.

So that is a run-through of the mechanics of responding to a Part 2 request, a general public records request. Now we're going to move on to the last section that we're going to be talking about today, our last point, which is that personal records are treated differently. Now you remember we looked towards the beginning at our chart of government records as a whole, and then the two different sections of the UIPA that deal with them. Part 2 is what we've been talking about up till now, which is public records requests, and again those are requests by anybody in the public. It doesn't matter who, the request can be anonymous. One set of exceptions apply to those, and we've talked about the mechanics of how you respond to a request under Part 2.

Now we're going to be looking at the other type of request, personal record requests, which are requests that are made under Part 3 of the UIPA, and they have a different set of exemptions. And again, it's not that the records are different, it's a question of who the requester is. So both

public record requests and personal record requests are requests for government records. It's just that in a personal record request the record requested is about the requester.

So we're going to go over some of the important things to keep in mind when you get a request for records that are about the requester, and how it's different from a Part 2 request. So a personal record is about the requester, and that means it contains or refers to the requester by name, by social security number, or other identifying particular, which could be a fingerprint, it could be a patient number, it could be something else, but something that is making clear, that you can tell, who it's referring to. So please note this is a fairly broad definition of what is about the requester. It's enough to just have the requester's name in there. The central reason for creating the record doesn't have to be something about the requester. The requester might be named in there only kind of incidentally, it's still going to be a personal record of that requester who is named in there.

The exemptions to disclosure for a personal record request are a different set of exemptions from the exceptions that apply to a general public records request under Part 2, and the personal record exemptions are found therefore in Part 3 and we'll run over them.

The first one is actually a rather broad exemption and that applies to criminal law enforcement records, and that would be reports, for instance, or investigations of an agency that has the enforcement of the criminal laws as a primary purpose. So, for instance, PSD, the police department, the prosecutor. Now the thing to realize with this one because it is relatively broad is that when the exemption applies it's not usually going to mean that you automatically withhold the entire record.

What it's usually going to do is to bounce it back to a Part 2 exception. With a personal record request, something being a personal record carries additional rights for the person beyond just the access rights you would have under Part 2. For instance, there is a right to correct a personal record, so essentially what this broad exemption is doing is saying no, the prison or police are not going to have to go back into their records and be dealing with a request for correction by inmates or people going through the criminal justice system. Rather, they can just bounce it back and say, "make a Part 2 request," and can apply the Part 2 two exceptions, such as frustration or privacy. But because a person could always anonymously make a Part 2 request, or just make it not as a personal record request, it doesn't make sense to say you can withhold the entire record where it might be something where the record, or at least part of the record, could actually be disclosed to a member of the general public, the public at large, under Part 2. So again, criminal law enforcement records, if you're claiming that exemption, then you don't have to respond to it as a personal request, but you should still look and make sure that there is a Part 2 exception that allows you to withhold it before just automatically withholding it.

The other exemptions are all more narrow. Confidential source—that is a form of frustration from Part 2, and it basically works the same way. It's its own individual exemption for Part 3, but it basically works the same way as the confidential source we discussed under frustration.

Government examination materials—we didn't talk about this. It would fall under frustration for Part 2 also. This is to cover, for instance, where you have civil service exams. The same exams may be reused, or the same questions may be reused on future exams, so the agency doesn't want to release the past exams and have people already know the questions, and they have to rewrite it every time. So what this means is you can't, having taken a civil service exam, say, "I'd like a copy of it as my personal record. It has my name on the top." The agency can then deny that request.

Investigative reports—this is for an ongoing investigation, criminal or administrative investigation. And again, this one would be a form of frustration. We talked about it as a form of frustration under Part 2. It can be withheld under Part 3 as well, under this specific exemption.

And then the last one is for records that are protected by law, by statute, confidentiality statute, or by court order. So again, similar to the "records protected by law" exception under Part 2.

So we've seen that four of these are similar to Part 2 exceptions, things that could be withheld under Part 2. So what's the difference? Well, look at what's not there. There's no generic frustration exception, for one thing. So any type of frustration that doesn't fall under one of these categories—confidential source, government exams, or ongoing investigations—any other type of record that might otherwise fall under frustration can't be withheld from a personal record request. So that would include things that might be deliberative process privileged, for instance. That would also include confidential business information, and other types of frustration. Again, there is no generic, catch-all frustration exception.

The other thing, probably more significant, is there is no privacy exception. So, if you have two people or more mentioned in a record, and one person makes a personal record request for that record, you're not going to be redacting information that relates to the other person, the other people, based on privacy, because it's a joint personal record, it's a personal record as to each of them, and there is no privacy exemption for personal record requests. Now if you have a situation where there's something like one person's social security number, where it really has nothing to do with the requester in a joint personal record, nothing to do with the requester, very intimate to the third party, there might be some situations in which we can say you can carve that out and say that specific information isn't part of the requester's personal record. But that would be a limited situation, and again, generally speaking, if you're mentioned in the record it's your personal record as to the whole thing. If two people are mentioned, it's their joint personal record, it's a personal record of each of them, and one of them requests it, well there's no privacy exception, so you don't generally have any reason for redacting information that pertains to the other person based on the person's privacy interests.

The agency's response time for a personal records request is similar but not identical to the response time for a general records request. Ten business days is still the magic number. In the case of a personal records request, this is actually set by statute rather than by rule, and the statute requires providing access to the record within 10 business days. So notice that that's access rather than simply providing notice within 10 business days as you would for a Part 2

request. If it's a personal records request you're actually supposed to provide access to the record within those ten business days.

Like the Part 2 record request, with a personal record request you can give yourself an additional 20 business days to respond if unusual circumstances exist, and that's very similar to the extenuating circumstances under the rules applicable to Part 2. So again, 10 business days, except it's to give access to the record rather than just a notice. You can give yourself an extension, but only if unusual circumstances are present.

Now the personal records section of the UIPA also includes a right to correct a misleading or incorrect fact. There is nothing like this under Part 2. This is only personal records. So if you make a personal records request, a record that is about you, and you look at it and say this has my address wrong, or it says I'm married to this guy and I'm married to somebody else, or I'm not married, you do have the right to request the correction of a misleading or incorrect fact.

So when the agency receives this right to correct, it needs to respond within 20 days of receiving the written request by acknowledging the request and either making the requested corrections, or else informing the requester, "no we're not going to, this is our reason why, and here are our procedures for appealing that refusal." The appeal of a denial of a correction is actually internal within the agency. There is no appeal to OIP by statute for an agency's denial of somebody's request for correction. They can appeal it internally within the agency. The agency has to provide them these appeal procedures and allow this internal appeal, and then if the agency ultimately says, " no we're not going to make it," the person's appeal would be to court ultimately rather than to OIP.

One more important difference to point out between Part 3, personal records, and Part 2 is that Part 3 has liquidated damages for a knowing or intentional violation. If you violate Part 2 as an agency, what you're facing if the person takes you the court is the possibility of the person being awarded attorney's fees. Under Part 3, in addition to attorney's fees and costs, the person can get actual damages, which are set at not less than $1,000. And then if the plaintiff substantially prevails, they can also get attorney's fees.

There was an inmate about ten years ago that filed I think it was 11 different Part 3 lawsuits against government agencies that had violated, I think for the most part, by not responding in time to his personal record requests. Remember, the deadline is set right in the statute for Part 3. In five or six of them he basically automatically got his thousand dollars from each agency because they hadn't responded within 10 business days and it was a knowing violation and he got his $1,000. There were agencies that didn't fight it all. There was one that did, as I recall, Department of Tax, which gave as its reasons that the request came in on April 16 and it doesn't actually open its mail for a month at that time. So in that case it was found to be not a knowing or intentional violation, since it wasn't opening its mail. We haven't seen that since then, but it is something for agencies to bear in mind. That penalty provision, the $1,000 damages for a knowing violation, is something that is not in Part 2 but is in Part 3, and it has been used.

That concludes the PowerPoints that we were going over. The Part 3 requests were the last of them. So I just wanted to remind you that we do have our website, which is at hawaii.gov/oip, which has the laws we administer, it has our opinions, our rules, various guidance, training materials and other materials.

Check out our website and then please feel free to contact us. We have somebody assigned as the staff Attorney of the Day every day to take phone calls or e-mails looking for general advice or quick guidance. Please feel free to email us at oip@hawaii.gov or call us at 586-1400. Please feel free to visit our website, and thank you for your interest in the UIPA.