

Office of Information Practices

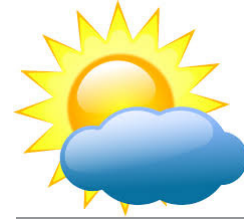
State of Hawaii

Annual Report 2015



This report to the Governor and the Legislature summarizes the activities and findings of the Office of Information Practices from July 1, 2014, to June 30, 2015, in the administration of the public records law (the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes) and the open meetings law (the Sunshine Law, Part I of chapter 92, Hawaii Revised Statutes).

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History



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

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

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

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

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

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

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

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

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

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



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

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

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

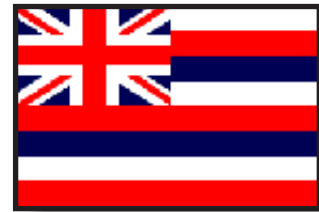
However, the Legislature also recognized that “[t]he policy of conducting government business as openly as possible must be tempered by a recognition of the right of the people to privacy, as embodied in section 6 and section 7 of Article I of the Constitution of the State of Hawaii.”

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

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

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

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



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



Executive Summary



The state Office of Information Practices (OIP) administers Hawaii's open government laws: the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), requiring open access to government records, and the Sunshine Law, Part I of chapter 92, Hawaii Revised Statutes, requiring open access to public meetings. Additionally, following the enactment of Act 263, SLH 2013 (see HRS § 27-44), OIP was charged with assisting the state Office of Information Management and Technology (now known as the Office of Enterprise Technology Services, or "ETS") to implement Hawaii's Open Data policy, which seeks to increase public awareness and electronic access to non-confidential and non-proprietary data and information available from state agencies; to enhance government transparency and accountability; to encourage public engagement; and to stimulate innovation with the development of new analyses or applications based on the public data made openly available by the state. Besides providing relevant background information, this annual report details OIP's performance for fiscal year 2015, which began on July 1, 2014, and ended on June 30, 2015.

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

With 8.5 full-time equivalent (FTE) positions, OIP performs a variety of

services. See **Figure 1**. In addition to resolving formal cases through opinions or correspondence, OIP provides same-day advice over the telephone, via e-mails, or in person through its Attorney of the Day (AOD) service. OIP prepares extensive training materials and provides in-person as well as online training programs, including continuing

OIP Service Overview FY 2011-2015					
	2011	2012	2013	2014	2015
Informal Requests (AODs)	676	940	1,050	1,109	1,074
Formal Requests Filed	142	135	177	204	233
Formal Requests Resolved	175	143	142	195	208
Live Training	11	25	16	19	11
Training Materials Added/Revised	8	14	19	23	12
Legislation Monitored	180	267	134	181	101
Lawsuits Monitored	1	4	7	17	39
Public Communications	7	48	30	35	33
Rules Adopted	0	0	0	1	0
Special Projects	-	-	14	14	15

Figure 1

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

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

Budget and Personnel

After years of budget cuts, work furloughs, pay cuts, and other restrictions, OIP fortunately received additional resources in fiscal biennium 2014-15 to fulfill its new open data responsibilities and to address the increasing number of requests it has been receiving from agency personnel, board members, and the general public. For fiscal biennium 2014-15, OIP was authorized to fill a fifth attorney position created by Act 263 to assist with open data and open government matters, and one of OIP's most senior attorneys was appointed to that position. Thus, in FY 2015, OIP operated with 8.5 full-time equivalent (FTE) positions, including 4.5 FTE attorneys.

OIP's budget allocation is the net amount that it was authorized to use of the legislatively appropriated amount minus administratively imposed budget restrictions. In FY 2015, OIP's total allocation was \$552,990, up from \$539,757 in FY 2014. See **Figure 3** on page 17. OIP's allocation in FY 2015 for personnel costs was \$507,762 and for operational costs was \$45,228. See **Figure 3** on page 17.

Legal Assistance, Guidance, and Rulings

One of OIP's core functions is responding to requests for assistance from members of the public, government employees, and board members and staff seeking OIP's guidance regarding the application of and compliance with the UIPA, Sunshine Law, and the State's Open Data policy. Requests may also be made for OIP's assistance in obtaining records from government agencies; appeals to OIP are filed following agencies' denial of access under the UIPA; and OIP's advisory opinions are sought regarding the rights of individuals or the functions and responsibilities of agencies and boards under the UIPA and the Sunshine Law. In FY 2015, OIP received 233 formal and 1,074 informal requests for assistance for a total of 1,307 requests, which is a slight decrease from 1,313 requests in FY 2014 but a 60% increase from the 818 requests in FY 2011. See **Figure 1** on page 6.

Eighty-two percent of the informal requests for assistance (1,074 requests) are typically responded to within the same day through OIP's Attorney of the Day (AOD) service. Significantly, the long-term trend shows a steady increase in AOD inquiries, which have grown 59% from 676 in FY 2011 to 1,074 in FY 2015. While AOD inquiries have been taking an increasing amount of the staff attorneys' time, agencies usually conform to this general advice given informally, which thus prevents or resolves many disputes that would otherwise lead to more labor-intensive formal cases.

Many situations, however, are not amenable to quick resolution and OIP must open formal cases, which require more time to investigate, research, review, and resolve. While most formal requests for assistance are resolved through correspondence with the parties, OIP must sometimes issue formal or informal (memorandum) opinions.

Formal opinions are usually reserved for novel or controversial legal issues, or those requiring complex legal analysis. Because OIP already

has a considerable body of precedent-setting formal opinions that have resolved many legal questions, OIP has been issuing more informal opinions that are based on prior precedent and are binding only on the parties directly involved. Additionally, because agencies find it easier to provide records, revise agendas, or re-do meetings than to engage in a protracted dispute with OIP, they will typically follow OIP's advice and will request an opinion only when there is a legitimate dispute or a need for legal clarity. Finally, where a formal opinion may be forthcoming, OIP usually obtains the agencies' cooperation and may sometimes resolve a case without a formal opinion because the agencies do not want to risk having an adverse decision rendered by OIP that would be difficult to challenge on appeal to the courts, due to the "palpably erroneous" standard of review that was incorporated into the UIPA and Sunshine Law with the passage of Act 176 in 2012. Thus, while most cases are resolved by OIP without opinions, OIP issued four formal opinions and 21 informal opinions, for a total of 25 opinions in FY 2015.

In FY 2015, OIP also resolved 6.7% more formal cases (208) as compared to the 195 cases resolved the prior year. See **Figure 1** on page 6. But because of a 14% increase in the number of formal cases (233) filed in FY 2015 as compared to the prior year (204), the number of pending cases increased to 147 in FY 2015 (versus 122 in FY 2014).

Notably, OIP succeeded in significantly reducing the age of the oldest pending cases that are not in litigation to two years. This is a substantial improvement over FY 2014 when the two oldest cases were four years old and FY 2011 when the oldest case was 12 years old.

OIP continues to receive a disproportionately large number of formal cases filed by a small number of persons. Similar to FY 2014, 23% (53) of the formal requests in FY 2015 came from one individual (20 cases), one couple (17 cases), and another individual (16 cases). While OIP cannot control the number of cases filed by repeat requesters, it has taken administrative

measures to equitably provide its services to all requesters and not just a few. For example, if OIP has resolved two cases from the same requester within the preceding 12 months, then other requesters' later-filed cases may be worked on before completing the repeat requesters' remaining cases.

Education

In addition to opinions, OIP provides training and advice on the UIPA and Sunshine Law to agencies and members of the public through videos, written guides, webinars, in-person training sessions, continuing legal education seminars, an online Sunshine Law quiz, or other means. "Quick Reviews" were initiated in FY 2013 to provide guidance and practical tips addressing questions of immediate widespread interest or which often arise in AOD inquiries. In FY 2015, OIP created or revised 12 training materials and forms, which totalled 66.

All of OIP's training materials, the UIPA and Sunshine Law statutes, administrative rules, opinions, and a subject matter index of opinions can be easily found on OIP's website at **oip.hawaii.gov**. Moreover, OIP's website links to the State Calendar, where public meeting agendas are electronically posted, and to other relevant state, county, and federal websites. By using and improving its technological resources to cost-effectively communicate and expand its educational efforts, OIP has been able to more efficiently leverage the time and knowledge of its small staff and to effectively make OIP's training and advice freely and readily available 24/7 to all members of the public, and not just to government employees or board members.

UIPA Record Request Log

The UIPA Record Request Log is part of OIP's open data efforts, which seek to increase public awareness and electronic access to non-confidential and non-proprietary data and information available from state agencies; to enhance

government transparency and accountability; to encourage public engagement; and to stimulate innovation with the development of new analyses or applications based on the public data made openly available by the state. The Log provides OIP and the public with valuable information and accountability as to how many UIPA record requests are being made, how they are being resolved, how long it takes to complete requests, and how much they are costing the government and requesters. The Log process also helps to educate the agencies on how they can use the State's open data portal at data.hawaii.gov to upload their own information online to make it more readily accessible to the public.

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

In FY 2016, the Log will also be used by the state Legislature and its agencies, the State Auditor's Office, the State Ombudsman's Office, the State Ethics Commission, and the Legislative Reference Bureau. Thus, in FY 2016, all state and county agencies subject to the UIPA should be using the Log to record and report record requests.

Based on the Log results, OIP has identified and encouraged a state agency to make more of its data openly available online, which the agency is in the process of doing.

Open Data and Communications

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

In addition to its own open data efforts, OIP participates on both the Open Data Council and the Access Hawaii Committee to encourage the creation of electronic data sets that can make government information more readily accessible to the public.

Legislation

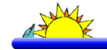
OIP serves as a resource for government agencies in reviewing their procedures under the UIPA, Sunshine Law, and Open Data policy. OIP often receives comments on these laws and makes recommendations for legislative changes to amend or clarify areas that have created confusion in application or work counter to the legislative mandate of open government. During the 2015 legislative session, OIP reviewed and monitored 101 bills and resolutions affecting government information practices, and testified on 27 of these measures. See **Figure 1** on page 6.

In FY 2015, OIP's top legislative priority was becoming a "permanent" agency and finding a new "home" for administrative, not physical, purposes. While OIP was originally created in 1988 as a permanent agency within the Department of the Attorney General (AG), it was "temporarily" moved to the Lt. Governor's office in 1998 when

the administration of the Sunshine Law was transferred to OIP from the AG. Because the Hawaii Constitution does not allow the Governor or Lt. Governor's offices to have permanent agencies attached to them, OIP advocated in FY 2015 for legislation to find a new home where it can retain its independence while being permanently attached for administrative purposes.

With the adoption of Act 92, SLH 2015, OIP's new home as of July 1, 2016 will be the state Department of Accounting and General Services (DAGS), where other open government agencies are administratively attached, namely the State Campaign Spending Commission and the Elections Commission. DAGS is also where agencies related to records creation, management, and retention are located, such as the State Archives and the Office of Enterprise Technology Services (formerly the Office of Information Management and Technology). During FY 2016, OIP will begin preparing for the administrative transfer to DAGS.

whose claims were not actually filed with the court. When the 7 cases are subtracted from the 24 new files opened, the net result is 17 new lawsuits being tracked, of which 8 were filed by inmates. All 8 of the inmates' new cases and 8 of the non-inmates' new cases concerned UIPA issues. OIP was notified of only one new court case in FY 2015 that involved the Sunshine Law, and that case is also the first judicial appeal taken from an OIP decision.

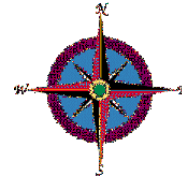


Litigation

OIP monitors litigation in the courts that raise issues under the UIPA or the Sunshine Law or that challenge OIP's decisions, and may intervene in those cases. A person filing a civil action relating to the UIPA is required to notify OIP in writing at the time of filing. See **Figure 1** on page 6. Summaries of each case are provided in the Litigation section of this report.

Although litigation cases are not counted in the total number of cases seeking OIP's assistance, they nevertheless take staff time to process and monitor. In FY 2015, the number of litigation cases monitored by OIP substantially increased to 39, primarily due to an increase in the number of cases filed by inmates. Of the 24 new litigation cases opened in FY 2015, 15 involved inmates as plaintiffs. Upon further investigation by OIP, 7 of the inmate cases were by the same person who had either filed duplicate notices to OIP or

Goals, Objectives, and Action Plan



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

OIP's Mission Statement

“Ensuring open government while protecting your privacy.”

Statement of Goals

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

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

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

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

Objectives

➤ **Legal Guidance.** Provide legal guidance to members of the public and all state and county agencies regarding their open government rights and responsibilities under the UIPA and Sunshine Law, and OIP's related administrative rules.

➤ **Investigations and Dispute Resolution.** Assist the general public, conduct investigations, and provide an informal dispute resolution process as an alternative to court actions filed under the UIPA and Sunshine Law, and resolve appeals under section 231-19.5(f), HRS, arising from the Department of Taxation's decisions concerning the disclosure of the text of written opinions.

➤ **Training and Assistance.** Train state and county agencies and their legal advisors regarding the UIPA and Sunshine Law, and assist them in creating policies and procedures to provide open data in accordance with these laws.

➤ **Records Report System.** Maintain the Records Report System (RRS) and assist agencies in filing reports for the RRS with OIP.

➤ **Legislation and Lawsuits.** Monitor legislative measures and lawsuits involving the UIPA and Sunshine Law, and provide testimony or legal intervention, as may be necessary.

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

Since FY 2011, OIP has focused its limited resources on training and communication in order to cost-effectively provide services to the greatest potential number of people and increase compliance by more government agencies. As a result, agency personnel and the general public appear to now have greater awareness and knowledge of UIPA and Sunshine Law issues. While OIP will continue its training and communication efforts, OIP's action plan for the next few years will be to focus on reducing its backlog of formal cases in a manner that is fair to all requesters. Additionally, following the enactment of Act 92, SLH 2015, OIP will be transferring for administrative purposes to the Department of Accounting and General Services (DAGS), where it can be a "permanent" state agency, effective July 1, 2016. For the long term, OIP will continue to encourage agencies to electronically post open data on data.hawaii.gov and to use the UIPA Record Request Log, so that OIP will have reliable data to consider when it revises or adopts administrative rules, which is anticipated to occur in FY 2019.

Year One:

Legal Guidance. While OIP resolved 82% of its FY 2015 cases usually on the same day through its informal AOD service, many requests for OIP's assistance require much more staff time and resources and involve the opening of formal cases. In FY 2015, OIP opened 233 formal cases at the request of government agencies, private organizations, and the public, which was 29 more than in FY 2014. Despite the increase in new cases and the loss of an experienced attorney without any net increases in staffing, OIP resolved 13 more formal cases (208) in FY 2015 than in FY 2014 (195), which amounts to a 6.7% increase in case resolution over the prior year.

While resolving more cases, OIP still ended FY 2015 with 147 pending cases, or 25 more than at the start of the year. Additionally, OIP's progress in resolving formal cases has been slowed by the need to respond daily to AOD inquiries. Although AOD inquiries decreased slightly to 1,074 in FY 2015 as compared to FY 2014, they have increased 60% since FY 2011.

Furthermore, OIP continues to receive a disproportionately large number of formal cases from the same group of persons. Similar to FY 2014, 53 (23%) of the FY 2015 formal requests came from one individual (20 cases), one couple (17 cases), and another individual (16 cases).

While the backlog continues to grow because of the increasing number of new cases, with a disproportionate number being filed by a few people, OIP has managed to set its priorities and work on cases in a manner that is fair to all requesters. OIP also succeeded in meeting its one-year goal for FY 2015 by significantly reducing the age of its oldest pending cases that are not involved in litigation and awaiting the courts' resolution. At the end of FY 2015, OIP's seven oldest pending cases were from FY 2013. Thus, over the past four years, OIP has reduced the age of its pending cases that are not awaiting judicial action from 12 years to 3 years.

For FY 2016, OIP's one-year goal will be to further reduce the age of pending cases to two years and equitably provide services to all requesters, as follows.

Action: End FY 2016 with pending formal cases that were filed no earlier than FY 2015, except for cases that are awaiting judicial action or have been filed by requesters who have had two or more cases filed in any FY resolved by OIP in FY 2016.

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

Action: Maintain current efforts to promptly and fairly complete investigations and resolve disputes, while setting priorities and utilizing OIP's resources to equitably resolve cases for all requesters.

Training and Assistance. OIP will continue its action plan to provide training videos, guides, and other written materials online at oip.hawaii.gov and will supplement its online training with customized live training for state and county government entities. Additionally, OIP will continue to promote the state's open data policy by encouraging state agencies to electronically post appropriate data sets onto data.hawaii.gov and to use the UIPA Record Request Log to record and report their record requests.

Fortunately, OIP's Open Data Attorney position, which was originally created by Act 263, SLH 2013, was incorporated into OIP's regular budget in FY 2015. Consequently, OIP can continue to promote the state's open data policy and encourage state agencies to use reasonable efforts to make appropriate data sets electronically available to the general public through the State's open data portal at data.hawaii.gov.

Consistent with the state's open data policy, OIP posts all of its opinions, training materials, reports, and What's New communications on its website at oip.hawaii.gov, which links to the State's open data portal at data.hawaii.gov. To improve access for disabled persons, OIP began in FY 2015 posting website materials that are compliant with accessibility standards.

Additionally, OIP has compiled a summary of the year-end results of the FY 2014 UIPA Record Request Log, which is posted on the Reports page at oip.hawaii.gov and shows how well the agencies are meeting their UIPA responsibilities.

In FY 2016, all state and county agencies subject to the UIPA, including the executive, judicial, and legislative branches and independent agencies such as the University of Hawaii and Office of Hawaiian Affairs, must use the Log and report their results onto the Master Log at data.hawaii.gov.

Action: Assist state and county agencies to electronically post open data, including the results of their UIPA Record Request Logs.

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

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

Legislation and Lawsuits. Since OIP's creation in 1988, it has provided legal guidance to nearly all state and county agencies and has monitored relevant legislation and lawsuits. While OIP was originally established to administer the UIPA, it was additionally given the responsibility in 1998 of administering the Sunshine Law, which had previously been enforced by the Attorney General's Office (AG). Because OIP was administratively attached to the AG at that time, it was "temporarily" moved in 1998 for administrative purposes to the Office of the Lt. Governor, where it remains today. In order to be considered a permanent agency, Article V, Section 6 of the Hawaii Constitution requires the agency to fall within a principal department.

As an action for FY 2015, OIP advocated during the 2015 legislative session for a bill that would make it a permanent agency by placing it within a principal department. OIP's efforts were successful and Act 92, SLH 2015, was enacted, which will transfer OIP for administrative purposes to the Department of Accounting and General Services (DAGS), effective July 1, 2016. Following the administrative transfer, OIP will continue to maintain its independence as a government watchdog promoting transparency and accountability through the state's open records and open meetings laws.

Action: For FY 2016, OIP will continue to monitor relevant legislation and lawsuits.

Year Two:

For its Year Two goal in FY 2014, OIP expressed interest in developing a pilot program for a web-based system to work seamlessly with the UIPA Record Request Log, which would allow the public to electronically request and track state agencies' progress in responding to UIPA requests while enabling government agencies to electronically fulfill requests and report results and would also create an electronic repository for public records provided in response to requests. After discussing this concept with various potential stakeholders, OIP has concluded that it is premature to move forward on such a pilot project. Based on OIP's Report of the Master UIPA Record Request Year-End Log for FY 2014, there appears to be limited value in implementing the pilot program at this time, in light of the relatively small number of UIPA record requests and the current timely completion of most requests. The state's resources will be better spent on converting more paper records into electronic records at the agency level and providing the technological upgrades and training that the agencies need.

The Log report, however, identified one particular agency with an extremely high number of UIPA record requests that may benefit from making its records more accessible electronically or online. OIP reached out to that agency and others who could assist in collecting the agency's data electronically and publishing open data that will be readily accessible by the public. The agency is currently in the process of designing technological and workflow improvements to place more of its data online.

Action: Encourage agencies with high numbers of UIPA record requests to work with other government agencies or private organizations to electronically collect commonly requested data and, if possible, publish data online where it can be readily accessed by the public.

Year Five:

For its Year Five goal in FY 2014, OIP stated that it will adopt administrative rules relating to personal records and revise other existing rules if necessary. OIP continues to set the end of FY 2019 as the time when it will implement new administrative rules related to the UIPA, based on its analysis of the UIPA Record Request Log data being provided by state and county agencies. At the same time, OIP will amend its existing rule numbers to reflect its administrative transfer from the Lt. Governor's Office to DAGS.

Action: Continue analyzing the UIPA Record Request Log data from state and county agencies to propose new rules relating to personal record requests or amendments to current rules. Prepare draft rules in FY 2017 for public hearings beginning in FY 2018, so that the final rules may be adopted and implemented by the end of FY 2019.



Highlights of Fiscal Year 2015

Budget and Personnel

OIP's budget allocation is the net amount that it was authorized to use of the legislatively appropriated amount, minus administratively imposed budget restrictions. In FY 2015, OIP's total allocation was \$552,990, up from \$539,757 in FY 2014. This includes the additional appropriation through Act 263, SLH 2013, to assist with open data and open government matters.

OIP's allocation for personnel costs in FY 2015 was \$507,762. The allocation for operational costs was \$45,228, which included office

modifications and equipment for an additional workstation and costs incurred for training of and by OIP personnel. See **Figure 3** on page 17.

In FY 2015, OIP had 8.5 full-time equivalent (FTE) total approved positions.

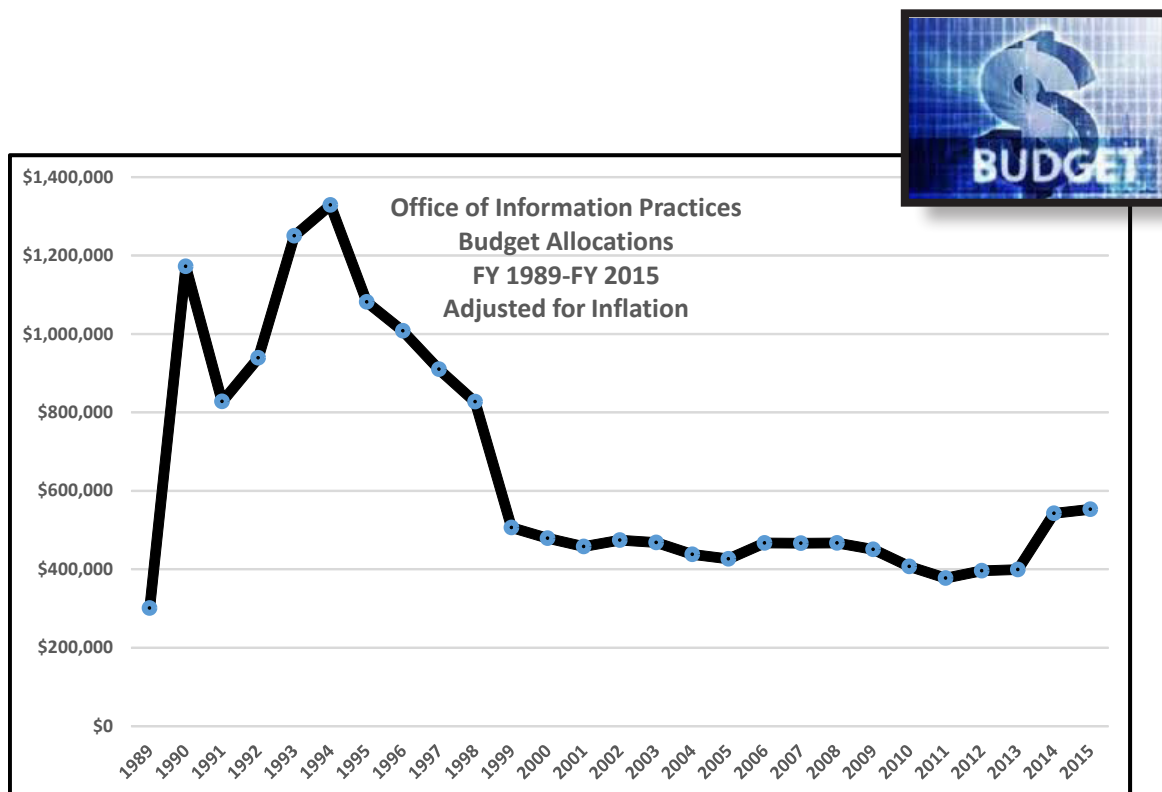


Figure 2

Office of Information Practices Budget FY 1989 to FY 2015



Fiscal Year	Operational Expense Allocation	Personnel Allocation	Total Allocation	Allocations Adjusted for Inflation**	Approved Positions
FY 15	45,228	507,762	552,990*	552,990	8.5
FY 14	88,862	450,895	539,757*	542,513	8.5
FY 13	18,606	372,327	390,933	399,303	7.5
FY 12	30,197	352,085	382,282	396,186	7.5
FY 11	42,704	314,454	357,158	377,808	7.5
FY 10	19,208	353,742	372,950	406,966	7.5
FY 09	27,443	379,117	406,560	450,919	7.5
FY 08	45,220	377,487	422,707	467,160	7.5
FY 07	32,686	374,008	406,694	466,720	7.5
FY 06	52,592	342,894	395,486	466,785	7
FY 05	40,966	309,249	350,215	426,686	7
FY 04	39,039	308,664	347,703	437,978	7
FY 03	38,179	323,823	362,002	468,133	8
FY 02	38,179	320,278	358,457	474,113	8
FY 01	38,179	302,735	340,914	458,039	8
FY 00	37,991	308,736	346,727	479,105	8
FY 99	45,768	308,736	354,504	506,317	8
FY 98	119,214	446,856	566,070	826,340	8
FY 97	154,424	458,882	613,306	909,240	11
FY 96	171,524	492,882	664,406	1,007,597	12
FY 95	171,524	520,020	692,544	1,081,282	15
FY 94	249,024	578,513	827,537	1,328,665	15
FY 93	248,934	510,060	758,994	1,249,818	15
FY 92	167,964	385,338	553,302	938,385	10
FY 91	169,685	302,080	471,765	824,185	10
FY 90	417,057	226,575	643,632	1,171,759	10
FY 89	70,000	86,000	156,000	299,350	4

*Total allocation for FY 2014 and 2015 includes the additional appropriation through Act 263, SLH 2013, to assist with open data and open government matters.

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

Figure 3



Legal Assistance, Guidance, and Rulings

Overview and Statistics

The general public and nearly all of Hawaii's state and county government agencies and boards seek OIP's assistance. The government inquiries come from the executive, legislative, and judicial branches of the state and counties, and include government employees as well as volunteer board members.

In FY 2015, OIP received a total of 1,307 formal and informal requests for assistance, compared to 1,313 requests in FY 2014.

Formal Requests

Of the total 1,307 UIPA and Sunshine Law requests for assistance, 1,074 were considered informal requests and 233 were considered formal requests. Formal requests are categorized and explained as follows. See **Figure 4**.

Formal Requests - FY 2015	
Type of Request	Number of Requests
UIPA Requests for Assistance	57
Requests for Advisory Opinion	2
UIPA Appeals	34
Sunshine Law Appeals & Requests for Opinion	31
Correspondence	64
UIPA Record Requests	44
Reconsideration Requests	1
Total Formal Requests	233

Figure 4

UIPA Requests for Assistance

OIP may be asked by the public for assistance in obtaining a response from an agency to a record request. In FY 2015, OIP received 57 such requests for assistance concerning the UIPA.

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

Requests for Legal Opinions

Upon request, OIP provides written formal or informal advisory opinions on UIPA or Sunshine Law issues. In FY 2015, OIP received 2 requests for UIPA opinions and 4 for Sunshine Law opinions.

UIPA Appeals

Prior to FY 2013, OIP provided written rulings on appeals by requesters who have been denied access to all or part of a requested record by an agency. With OIP's adoption of new administrative rules effective January 1, 2013, OIP defines "appeals" to also include the board's compliance with the Sunshine Law and the denial or granting of access to government records by the Department of Taxation. In FY 2015, OIP received 34 UIPA appeals.

Sunshine Law Appeals/Requests for Opinions

In FY 2015, OIP received 31 Sunshine Law complaints and requests for investigations and rulings concerning open meeting issues. See page 25 for further information about Sunshine Law requests.



Correspondence and UIPA Record Requests

OIP may respond to general inquiries, which often include simple legal questions, by correspondence. In FY 2015, OIP responded to 64 such inquiries by correspondence, along with 44 UIPA record requests made for OIP's records.

Types of Opinions and Rulings Issued

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

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

The full text of formal opinions are also available on OIP's website at oip.hawaii.gov. Summaries of the formal opinions are posted on OIP's website and are also found here on pages 26-28. OIP's website contains a searchable subject-matter index for the formal opinions.

Informal opinions, also known as memorandum opinions, are public records that are sent to the parties involved but are not published for distribution. Summaries of informal opinions are available on OIP's website and are also found in this report beginning on page 29.

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

AOD Inquiries

Fiscal Year	Total	Public	Government Agencies
FY 15	1,074	340	734
FY 14	1,109	280	829
FY 13	1,050	270	780
FY 12	940	298	642
FY 11	676	187	489
FY 10	719	207	512
FY 09	798	186	612
FY 08	779	255	524
FY 07	772	201	571
FY 06	720	222	498
FY 05	711	269	442
FY 04	824	320	504
FY 03	808	371	437
FY 02	696	306	390
FY 01	830	469	361

Figure 5

Informal Requests

Attorney of the Day Service (AOD)

The vast majority (82%) of the requests for assistance are informally handled through OIP's AOD service through telephone calls and e-mails. The AOD service allows the public, agencies, and boards to receive general legal advice from an OIP staff attorney, usually within that same day. Over the past 15 years, OIP has received a total of 12,508 inquiries through its AOD service, an average of 833 requests per year. In FY 2015, OIP received 1,074 AOD inquiries, thus exceeding the average by 29%. See **Figure 5**. Since FY 2011, AOD inquiries have increased 59%.

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

Of the 1,074 AOD inquiries in FY 2015, 734 (68%) came from government boards and agencies seeking guidance to ensure compliance with the UIPA and Sunshine Law, and 340 inquiries (32%) came from the public. See **Figures 6 and 7**.

Of the 340 public requests, 253 (74%) came from private individuals, 35 (10%) from media, 16 (5%) from businesses, 16 (5%) from private attorneys, 15 (5%) from public interest groups, and 5 (1%) from other types. See **Figures 7 and 8**.

AOD Inquiries from the Public FY 2015

Types of Callers	Number of Inquiries
Private Individual	253
News Media	35
Business	16
Private Attorney	16
Public Interest Group	15
Other Types	5
TOTAL	340

Figure 7

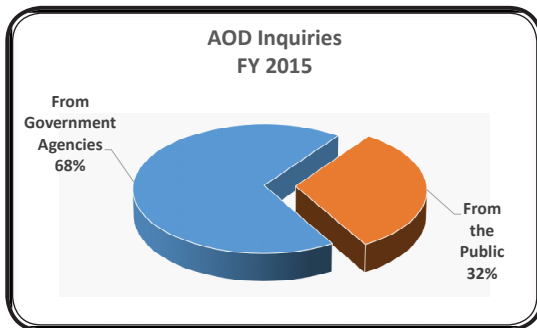


Figure 6

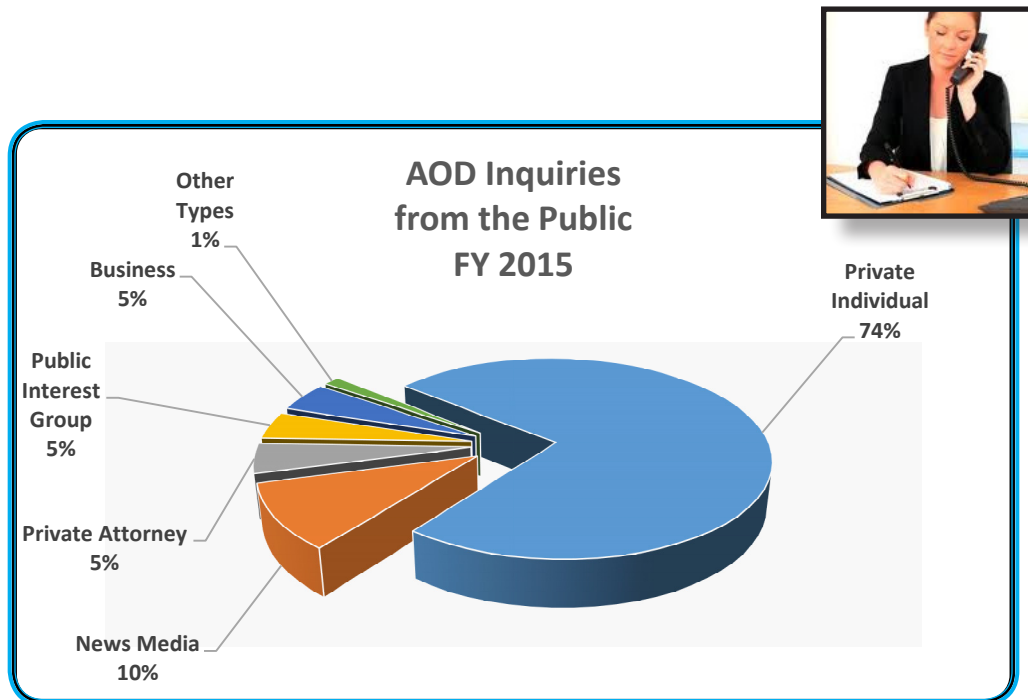


Figure 8

UIPA Requests:

UIPA AOD Inquiries

In FY 2015, OIP received 539 AOD requests concerning the UIPA from the public and the agencies themselves. The data further shows that most of the inquiries came from the agencies seeking guidance on how to comply with the laws. For a summary of the numbers and types of AOD inquiries, please see **Figures 9 to 13** that follow. A sampling of the AOD advice given starts on page 40.

State Agencies and Branches

In FY 2015, OIP received a total of 270 AOD inquiries about state agencies. About 39% of these requests concerned four state agencies: the Department of Commerce and Consumer Affairs (31), the Department of Land and Natural Resources (26), the Department of Transportation (26), and the Department of Health (22). As shown below in **Figure 9**, about 78% of these requests were made by the agencies themselves.

OIP also received 9 inquiries concerning the legislative branch and 2 inquiries regarding the judicial branch. See **Figure 9** below. These AOD requests exclude general inquiries that do not concern a specific agency.

AOD Requests About State Government Agencies FY 2015



Executive Branch Department	Requests by Agency	Requests by Public	Total Requests
Commerce and Consumer Affairs	28	3	31
Land and Natural Resources	25	1	26
Transportation	24	2	26
Health	12	10	22
Education (including Public Libraries)	12	5	17
Agriculture	14	0	14
Budget and Finance	10	1	11
Governor	9	1	10
Human Services	6	3	9
Public Safety	6	3	9
Labor and Industrial Relations	7	1	8
Lieutenant Governor (including OIP)	1	6	7
Accounting and General Services	4	2	6
Attorney General	5	1	6
Human Resources Development	6	0	6
Business, Econ Development, & Tourism	4	0	4
Tax	3	0	3
Defense	0	1	1
Hawaiian Home Lands	0	0	0
TOTAL EXECUTIVE	176	39	215
TOTAL LEGISLATURE	7	2	9
TOTAL JUDICIARY	1	1	2
University of Hawaii System	20	7	27
Office of Hawaiian Affairs	7	4	11
Unnamed Agency	0	6	6
TOTAL STATE AGENCIES	211	59	270

Figure 9

County Agencies

In FY 2015, OIP received 96 AOD inquiries regarding various county agencies and boards. Of these, 25 inquiries (40%) came from the public.

Of the 96 AOD inquiries, 39 inquiries concerned agencies in the City and County of Honolulu, up from 32 in the previous year. See **Figure 10**. As shown below, 74% of these requests were made by the agencies themselves seeking guidance to comply with the UIPA.

The largest number of requests concerned the Honolulu Police Department (9) and the Corporation Counsel (7).

OIP received 57 inquiries regarding neighbor island county agencies and boards: Hawaii County (10), Kauai County (30), and Maui County (17). See **Figures 11 to 13**.



AOD Inquiries About City and County of Honolulu Government Agencies - FY 2015

Department	Requests by Agency	Requests by Public	Total Requests
Police	5	4	9
Corporation Counsel	7	0	7
City Ethics Commission	3	0	3
Parks and Recreation	2	1	3
Board of Water Supply	2	0	2
Fire	2	0	2
Mayor	0	2	2
Medical Examiner	2	0	2
Neighborhood Commission/ Neighborhood Boards	2	0	2
City Council	1	0	1
Customer Services	0	1	1
Enterprise Services	1	0	1
Human Resources	1	0	1
Planning and Permitting	0	1	1
Prosecuting Attorney	0	1	1
Transportation Services	1	0	1
TOTAL	29	10	39

Figure 10



**AOD Inquiries About
Hawaii County
Government Agencies - FY 2015**

Department	Requests by Agency	Requests by Public	Total Requests
County Council	4	0	4
Planning	0	2	2
Water Supply	1	1	2
Corporation Counsel	1	0	1
Public Works	1	0	1
TOTAL	7	3	10

Figure 11



**AOD Inquiries About
Kauai County
Government Agencies - FY 2015**

Department	Requests by Agency	Requests by Public	Total Requests
County Attorney	8	0	8
Police	5	2	7
Planning	4	0	4
County Council	3	0	3
Unnamed Agency	3	0	3
Water	2	0	2
Finance	0	1	1
Mayor	1	0	1
Public Works	0	1	1
TOTAL	26	4	30

Figure 12

**AOD Inquiries About
Maui County
Government Agencies - FY 2015**



Department	Requests by Agency	Requests by Public	Total Requests
County Council	6	1	7
Corporation Counsel	3	1	4
Police	0	2	2
Public Works & Waste Mgmt.	0	2	2
Finance	0	1	1
Planning	0	1	1
TOTAL	9	8	17

Figure 13



Sunshine Law Requests:

Since 2000, OIP has averaged more than 264 formal and informal requests a year concerning the Sunshine Law. In FY 2015, OIP received 464 Sunshine Law requests, which is 65 fewer than in FY 2014, but 200 more than the average number of requests received each year. See **Figures 14 and 15**.

Of the total Sunshine Law requests made in FY 2015, 433 (93%) were informal AOD requests, and 31 were formal cases. See **Figure 15**.

Of the 433 AOD requests involving the Sunshine Law, 376 were requests for general advice, and 57 were complaints. Also, 78 of the 433 AOD requests (18%) involved the requester's own agency.

In FY 2015, OIP provided 7 Sunshine Law training sessions to boards and commissions as well as to other agencies and groups. See page 45 for a list of the sessions provided. OIP also continued to make its Sunshine Law video training materials available on the OIP website. These free online materials include a Power-Point presentation with a voice-over and written examples, which OIP's attorneys formerly presented in person. The videos and on-line training have enabled OIP to reduce the need for in-person basic training on the Sunshine Law

Sunshine Law Inquiries

Fiscal Year	AOD Inquiries	Formal Requests	Total
2015	433	31	464
2014	491	38	529
2013	264	27	291
2012	356	23	379
2011	166	13	179
2010	235	21	256
2009	259	14	273
2008	322	30	352
2007	281	51	332
2006	271	52	323
2005	185	38	223
2004	209	17	226
2003	149	28	177
2002	84	8	92
2001	61	15	76
2000	57	10	67

Figure 15

and to instead develop additional or more specialized training materials or live sessions, such as advanced question and answer sessions to address boards' specific needs. Moreover, the online training is not restricted to government personnel and is freely and readily accessible to members of the public.

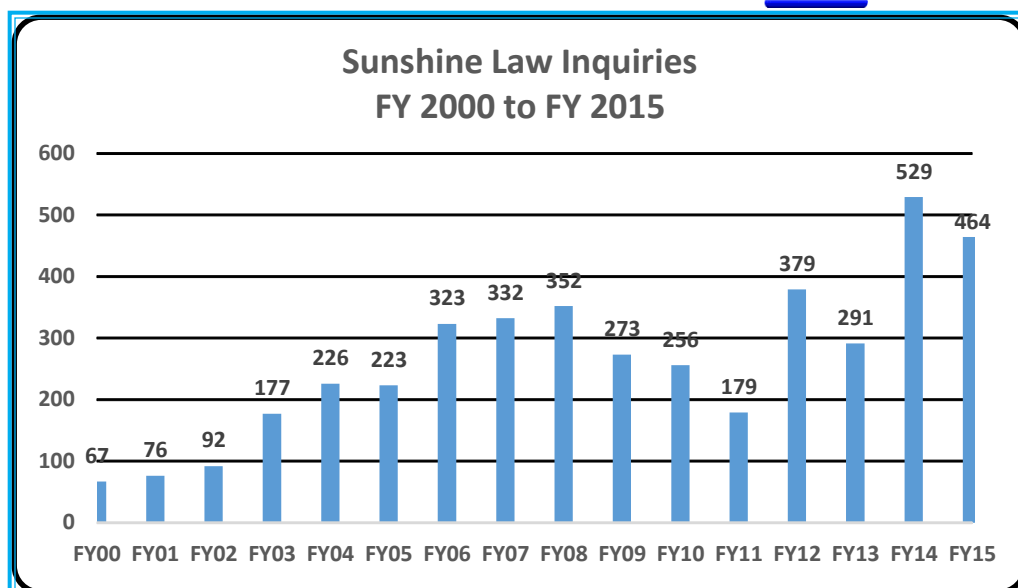


Figure 14

Formal Opinions

In FY 2015, OIP issued four formal opinions, three related to the UIPA and one related to the Sunshine Law, which are summarized below. The full text versions can be found at oip.hawaii.gov. In the event of a conflict between the full text and the summary, the full text of an opinion controls.

UIPA Formal Opinions:

Toxicology Reports

OIP Op. Ltr. No. F15-01

The Garden Island Newspaper asked whether the Kauai Police Department (KPD) properly denied its request under Part II of the UIPA for access to toxicology reports concerning two individual motorists who died in motor vehicle accidents.

OIP concluded that the toxicology reports of the deceased motorists are required to be disclosed upon request, as no exception to disclosure under the UIPA applies.

Because toxicology results are incorporated into or attached to autopsy reports, OIP's opinion letters concerning the public disclosure of autopsy reports and other records about deceased individuals are relevant. In an opinion in 1991, OIP determined that autopsy reports would not generally be protected from public disclosure by the UIPA's "privacy" exception, section 92F-13(1), HRS, because deceased individuals do not have a recognizable privacy interest. OIP Op. Ltr. No. 91-32. In an opinion in 2003, OIP reconsidered whether an agency may withhold certain records concerning deceased individuals, and adopted a test for determining whether the privacy exception to disclosure applies for information about a deceased individual. OIP Op. Ltr. No. 03-19. The

test addresses and balances the passage of time against the sensitivity of the information involved to determine how strong the remaining privacy interest is. Then, the privacy interest is weighed against the public interest in disclosure, as provided by section 92F-14, Hawaii Revised Statutes, so that the information is protected under the privacy exception when the privacy interest is found to be greater. OIP Op. Ltr. No. 03-19.

OIP applied this test in the present case and found that the public has a considerable interest in toxicology information about the presence and level of alcohol, drugs or other substances because the information in the toxicology reports sheds light on the coroner's performance of his duty to investigate pursuant to section 841-3, HRS. OIP found that this public interest outweighs the reduced but still significant privacy interests of the deceased motorists. Thus, disclosure of the toxicology reports at issue would not constitute a clearly unwarranted invasion of the personal privacy of the deceased motorists.

Additionally, OIP found that surviving family members of the deceased motorists do not have a significant privacy interest in information contained in the toxicology reports at issue. In the absence of a "significant" privacy interest, OIP need not perform the balancing test of section 92F-14(a), HRS, as long as there is at least a "scintilla" of public interest in the toxicology reports. OIP thus concluded that the toxicology reports' disclosure would not constitute a clearly unwarranted invasion of the personal privacy of the decedents' families.



Transcript and Diploma Denied

OIP Op. Ltr. No. F15-03

A graduate of the University of Hawaii (UH) asked whether UH properly denied his request, which was made under the Uniform Information Practices (Modified) (UIPA), for (1) a certified official academic transcript, and (2) his original official diploma.

UH did not maintain an official transcript of the Requester. The official transcript is not created until after UH receives a student's transcript order and signed consent and confirms that the student has no outstanding financial obligations. At that time, UH creates an official transcript printed on special security paper that is also certified with UH's embossed seal.

The UIPA requires that a Requester be allowed to inspect and obtains copies of records that an agency already maintains and does not require that a new record be created. Requester's request for a certified official transcript requires the creation of a new, original document and was not a request for a copy of an already existing record maintained by UH. Thus, UH is not required by the UIPA to create a certified official academic transcript for disclosure to the requester.

Regarding the request to obtain his diploma, Requester was not seeking to obtain a copy of his diploma, but rather he was seeking to obtain the actual original diploma that UH maintains. Because the UIPA does not require an agency to provide the original government record that it maintains, UH was not required to provide the diploma to Requester.

Names of Officers Terminated for Failed Drug Test

OIP Op. Ltr. No. F15-04

Requester asked whether the Honolulu Police Department (HPD) properly denied its request under Part II of the UIPA for the names of two officers discharged from HPD for failing HPD's drug test.

OIP found that because drug test information is confidential by law, the identity of a government employee who has failed a drug test may be withheld even when the employee was terminated for failing the test. HRS § 92F-13(4) (2012); Mandatory Guidelines for Federal Workplace Drug Testing Programs § 2.6(h), 59 FR 29908, 29924 (June 9, 1994); HRS § 329B-6 (2010).

The UIPA recognizes confidentiality laws found in other parts of the Hawaii Revised Statutes and allows an agency to withhold government records "which, pursuant to state or federal law . . . are protected from disclosure." HRS § 92F-13(4) (2012). Although HPD did not raise this as a basis for withholding the officers' names, OIP took notice of chapter 329B, HRS, Substance Abuse Testing, which sets uniform standards for substance abuse testing and is intended to (among other things) "protect the privacy rights of persons tested."

OIP found that HPD's decision to withhold the officers' names and provide the reason for their termination was reasonable under the circumstances and balanced the competing legislative intents to provide information about the terminated officers to the extent possible without actually violating the applicable confidentiality laws. Thus, OIP concluded that the HPD properly denied the request for the discharged officers' names.

Sunshine Law

Formal Opinion:

Polling Board Members/Serial Communications; Testimony on Executive Session Items

OIP Op. Ltr. No. F15-02

Six Hawaii residents asked whether (1) the Board of Trustees of the Office of Hawaiian Affairs (OHA) (OHA Board) complied with the Sunshine Law when its members (Trustees) jointly signed a letter dated May 9, 2014 (Rescission Letter), rescinding a letter dated May 5, 2014, that had previously been sent to United States Secretary of State John F. Kerry by OHA's Chief Executive Officer (CEO), Dr. Kamana'o pono Crabbe (Crabbe Letter), and (2) the OHA Board could refuse to accept oral testimony regarding an agenda item discussed in executive session during its meeting of May 19, 2014.

With respect to the first question, OHA argued that the OHA Board's decision to rescind the Crabbe Letter did not require a meeting, because the Crabbe Letter was unauthorized and had no legal effect and the Rescission Letter was consistent with previously adopted OHA policy. OIP noted that the question of whether the Trustees' decision to sign the Rescission Letter complied with the Sunshine Law depended on whether rescinding the Crabbe Letter was OHA Board business, and whether the Trustees discussed that topic.

OIP found that although the Rescission Letter had never appeared on an OHA agenda, the mere fact that the Trustees discussed and immediately acted to respond to the Crabbe Letter was sufficient to indicate that the Trustees believed the OHA Board had supervision, control, jurisdiction, or advisory power over that issue and that it was a matter pending before the OHA Board. OIP therefore concluded that the OHA Board's response to the Crabbe Letter was OHA Board business.

OIP further found that all Trustees discussed whether the OHA Board should respond to the

Crabbe Letter by sending the Rescission Letter through a series of one-on-one communications, either directly or through e-mail messages addressed to staff as mere go-betweens for board members. OIP distinguished the messages sent via staff in this instance from the more typical situations where communications with staff would not be considered communications between board members because staff may independently pass on or compile information in the course of their duties. Because the OHA Board's serial discussion among all Trustees was not permitted under any part of section 92-2.5, HRS, and did not take place in a properly noticed meeting, OIP concluded that the Trustees' communication violated the Sunshine Law.

Notably, however, the Trustees could have properly met to discuss board matters if the Sunshine Law's emergency and interactive technology meeting provisions had been invoked. OHA's argument that the Crabbe Letter was unauthorized would have provided a basis for holding an emergency meeting based on an unanticipated event as permitted by section 92-8, HRS, and such an emergency meeting could have been done by interactive technology connecting Trustees in different locations as permitted by section 92-3.5, HRS.

With respect to the second question as to the public's right to testify on an agenda item scheduled for executive session, OIP found that section 92-3, HRS, requires boards to "afford all interested persons an opportunity to present oral testimony on any agenda item," and does not make an exception for items to be heard in executive session. OIP therefore confirmed that the public has a right to present oral testimony on items to be heard in executive session, and the OHA Board's failure to allow such testimony violated the Sunshine Law.

OIP's decision in this case was appealed by OHA in *In Re OIP Opinion Letter No. 15-02*, which is discussed in the Litigation Report of Sunshine Law cases on page 61.



Informal Opinions

In FY 2015, OIP issued 14 informal opinions relating to the UIPA and 7 informal opinions relating to the Sunshine Law. Summaries of these informal opinions are provided below. In the event of a conflict between the full text and a summary, the full text of an opinion controls.

UIPA Informal Opinions:

Personal Test Records

UIPA Memo 15-1

Requester sought a decision as to whether the Department of Public Safety (PSD) properly denied, under Part III of the UIPA, a request for copies of an original written employment examination with Requester's answers, interview questions, and the interviewers' notes of Requester's answers during the interview.

OIP found that PSD may, under Part III of the UIPA, withhold copies of Requester's personal records consisting of a written examination and his answers to those questions. OIP also found that PSD may withhold from Requester copies of interview questions and the interview panel's notes of the applicant's responses to the interview questions, because the PSD will be reusing the examination and interview questions. The UIPA's Part III exemption for "testing or examination material or scoring keys . . . the disclosure of which would compromise the objectivity, fairness, or effectiveness of the testing or examination process" allows PSD to withhold these personal records from Requester. HRS § 92F-22(3) (2012).

OIP also found that PSD is not required to disclose the requested records as government records under Part II of the UIPA based on the exception to disclosure for records whose disclosure would frustrate a legitimate government function. HRS

§ 92F-13(3) (2012). Disclosure of questions and answers

would compromise the "validity, fairness or objectivity of the examination." OIP Op. Ltr. No. 94-8 at 6. Additionally, PSD need not disclose the interview panelists' notes because they fall within the "deliberative process privilege." OIP Op. Ltr. No. 91-24 at 7.



List of Nominees

UIPA Memo 15-2

Environment Hawaii asked whether the Office of the Governor is required under the UIPA to disclose lists of nominees (Lists) for two vacant positions provided to the Governor by the Nominating Committee for the Commission on Water Resource Management (CWRM). Specifically, the requester asked whether the Lists are public after the Governor has made his appointments and after confirmation by the Senate.

OIP concluded that the Governor's Office may withhold the Lists under section 92F-13(1), HRS, the UIPA's exception to disclosure for records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy. An unsuccessful applicant to a government position has a significant privacy interest in the applicant's application information, including his or her name, as set forth in section 92F-14(b)(4), HRS. This significant privacy interest must be balanced against the public interest in disclosure. HRS § 92F-14(a) (2012). Given the long-standing policy of not disclosing the applicant lists, and the absence of a public interest in evaluating the competence of persons who are not appointed, OIP concluded that the significant privacy interests of applicants to the CWRM outweigh

the public interest in the Lists, and the Governor's Office is not required to disclose the Lists.

The Governor's Office may also withhold the Lists under section 92F-13(3), HRS, the UIPA's exception for records which, if disclosed, would cause the frustration of a legitimate government function. The legitimate government function here is in obtaining a qualified pool of applicants, which could be frustrated by disclosure of the Lists because the number of applicants would likely decline if individuals knew the fact that they applied would be made public.

OIP noted, however, that the Governor's Office should disclose the names of individuals who were appointed, as well as names of unsuccessful applicants who have publicly disclosed the fact that they applied.

Judges' Birthdays

UIPA Memo 15-3

In U-Memo 15-3, OIP reconsidered its decision in U-Memo 14-11 to clarify that in most circumstances, the UIPA requires disclosure, upon request, of a sitting judge's year of birth in order to allow the public to determine whether the judge exceeds the age 70 retirement age mandated by the Hawaii State Constitution. If a judge remains on the bench in his or her final year of eligibility, then disclosure of the month and year of birth would be necessary; if in the final month of eligibility, then a sitting judge's exact date of birth must also be disclosed.

Adequacy of Search for the Name of Private Investigator

UIPA Memo 15-4

Requester had a case on appeal with the Labor and Industrial Relations Appeals Board (LIRAB), and attended a settlement conference on August 30, 2012, at 4:15 p.m. Requester believed a male private investigator (P.I.) was at the settlement conference. Requester made a request to LIRAB for the name of the P.I. LIRAB responded using the "Notice to Requester" form, and checked the boxes on the form indicating that it could not grant the record request because it does not maintain the record.

LIRAB explained that it does not maintain any records that would identify someone other than a party, or an interpreter, if one was used, who attended the settlement conference. Accordingly, LIRAB asserted that it has no records or other information as to whether a male P.I. as described by Requester attended the settlement conference, and has no records or other information that would identify the name of the P.I. Upon request by OIP, LIRAB searched documents in its file pertaining to the settlement conference. The search did not locate any records containing the name of the P.I.

When an agency claims a requested record does not exist, OIP looks at whether the agency's search for a responsive record was reasonable; *i.e.*, a search "reasonably calculated to uncover all relevant documents." OIP Op. Ltr. No. 97-8 at 5 (citations omitted). Here, based on LIRAB's assertions that it does not make notations of who attends settlement conferences other than parties, their attorneys, and interpreters, and its search of Requester's appeal file, OIP finds that LIRAB's search was reasonable.

OIP found the assertions by LIRAB that no responsive record exists were produced in good faith and further found that any additional search

of LIRAB records is not likely to uncover relevant documents. Thus, OIP found that LIRAB properly resounded to Requester's request for the name of the P.I.

911 Recordings

UIPA Memo 15-5

Requester made a request for copies of Kauai Police Department (KPD) records related to an incident in which an individual stabbed a number of people, killing one, before a KPD Officer shot and killed him. The issue in this appeal was whether the UIPA's "privacy" exception at section 92F-13(1), HRS, protects the 911 recordings of the incident from public disclosure.

OIP first recognized that, based on evolving legal trends, deceased individuals retain some privacy interests in information about them after death, and that personal contact information of deceased individuals involved in the incident need not be disclosed. Deceased victims also have privacy interest in their health information; however, OIP found that here, the deceased victim's medical information was already protected via the privacy interests of her surviving family members.

For surviving victims, because the incident was widely reported, some information that would otherwise carry significant privacy interests was found by OIP to be public. Nevertheless, OIP concluded that detailed health information about surviving victims during and after the incident as contained in the 911 recordings is protected from public disclosure under the privacy exception. Personal contact information for those involved is also protected under the privacy exception.

Finally, OIP found that the recordings of telephone calls made to the 911 operator by the adult daughter of the deceased victim are protected from disclosure under the privacy exception

when the recordings clearly conveyed the extreme distress of the daughter, who was with her dying mother. OIP was persuaded by federal law to conclude that disclosure would cause a disruption of the peace of mind of the surviving family members and would constitute a clearly unwarranted invasion of personal privacy.

Consultant Reports Protected by Attorney-Client Privilege

UIPA Memo 15-6

Requester asked whether, under Part II of the UIPA, the Professional and Vocational Licensing Division, Department of Commerce & Consumer Affairs (DCCA), properly denied access to letters (Letters) from Special Deputy Attorney General (SDAG) consultants (Consultants) reviewing the applications (Application) for registration of the Ko Olina Beach Club Vacation Ownership Program and the Marriott Vacation Club Destinations.

OIP found that the Letters were written by the Consultants in their respective capacities as SDAGs to provide legal advice to DCCA. Therefore, OIP concluded that the Consultants' Letters are protected by the attorney-client privilege and may, therefore, be withheld under the UIPA exceptions for "[g]overnment records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function" and "[g]overnment records which, pursuant to state or federal law . . . are protected from disclosure." HRS § 92F-13(3), (4) (2012).

Adequacy of Search for Wind Farm Documents

UIPA Memo 15-7

Requester sought a decision as to whether the Department of Business, Economic Development and Tourism (DBEDT) State Energy Office properly responded to four separate but related record requests seeking records about a proposed wind farm on the island of Lanai. Requesters specifically appealed DBEDT's responses to the Second and Fourth Requests.

For the Second Request, Requesters claimed that the documents provided were not responsive. DBEDT confirmed that it has no records responsive to the Second Request, and suggested that Requesters were perhaps looking at records provided in response to the Third Request when they alleged that the records provided in response to the Second Request were not responsive. OIP found that the records deemed "nonresponsive" by Requesters to the Second Request were actually provided in response to the Third Request. OIP therefore concluded that DBEDT's response to the Second Request (that it has no responsive records) was in fact a proper response to the Second Request.

Requesters also appealed the adequacy of DBEDT's search for records responsive to the Second Request. Based on the information provided by DBEDT explaining its searches for responsive records, OIP concluded that DBEDT's search was adequate as it involved a search of relevant electronic and physical files.

Additionally, Requesters appealed the adequacy of DBEDT's search for records responsive to the Fourth Request. Based on DBEDT's explanations of the searches conducted for responsive records, OIP found that the assertions by DBEDT that the records produced in response to the Fourth Request were the only responsive records found

were produced in good faith. OIP thus concluded that DBEDT's search was adequate as it involved a search of relevant electronic and physical files.

Surplus Parcel Records Containing Predecisional and Deliberative Material

UIPA Memo 15-8

Requester sought a decision whether the Department of Budget and Fiscal Services, City & County of Honolulu (BFS), properly denied a request for records concerning the designation of a remnant parcel as a surplus parcel for sale or disposition. BFS denied the record request to the extent that some of the records contained communications between various county departments and BFS that were predecisional and deliberative in nature and were thus protected from disclosure by the exception for "frustration of a legitimate government function" under section 92F-13(3), Hawaii Revised Statutes (HRS) (2012).

Following an *in camera* review, OIP agreed that the records fell within the frustration exception as they consisted of inter-agency memorandums seeking, providing, and summarizing comments by various county departments on whether the remnant parcel should be deemed a surplus parcel. HRS §92F-13(3). *See* OIP Op. Ltr. Nos. 90-8 and 04-15. The requested records also included bits of factual information, which would typically be subject to disclosure, but were "inextricably intertwined" with the deliberative content in the county departments' communication to BFS. Thus, OIP concluded that the requested records and bits of factual information were protected under the deliberative process privilege and not subject to disclosure under the "frustration" exception provided by section 92F-13(3), HRS. OIP Op. Ltr. No. 91-24.

Finally, OIP concluded that BFS had not waived its deliberative process privilege when it provided factual information to a Council Member regarding the designation of the remnant parcel as a surplus parcel, without disclosing the deliberative and predecisional information provided by the various departments to BFS.

Adequacy of Search for Certified Mail Documents

UIPA Memo 15-9

Requester asked whether the Department of the Attorney General (AG) properly responded under the UIPA when the AG stated that it does not maintain records that are responsive to Requester's request for his "discovery questions" and the envelope containing his "discovery questions," both of which Requester asserts that he sent by certified mail to the AG on May 12, 2009. The AG provided Requester with a copy of the only document received from Requester in May 2009, a three-page document titled "Praeipce" that the AG received on May 15, 2009.

Based on the evidence provided by both parties, OIP found that the AG made at least three searches "reasonably calculated to uncover all relevant documents" in the physical file created for Requester's litigation case. Its searches uncovered only the "Praeipce" document. Further, while the copy of a certified mail receipt dated May 12, 2009 and the copy of a letter from the United States Postal Service (USPS) to Requester suggested that a delivery was made of mail from Requester to the AG, it cannot be confirmed as to what was actually delivered. As it is unlikely that any additional search in the one relevant file will produce the requested records, OIP concluded that the AG's response indicating that it does not maintain the requested records was proper.

Salaries and Employment Information about Consultants' Employees

UIPA Memo 15-10

Requester asked whether the Honolulu Authority for Rapid Transportation (HART) must disclose salaries and other information about employees of HART's contracted consultants PB Americas, Inc. (PB) and InfraConsult LLC (InfraConsult) under Part II of the UIPA.

OIP found that HART properly denied access to PB's and InfraConsult's employee records because these records are maintained by the two private consultants and, therefore, are not "government records" subject to the UIPA's public disclosure requirements. Specifically, these records are not "government records" because HART has neither physical custody nor administrative control over its consultants' employee records.

OIP also found that HART does maintain its contracts with both consultants, and its consultant contracts have cost attachments listing the consultants' employees' names, position titles and respective salary information. OIP believes that the salary information in the contract attachments would be responsive, in part, to both records requests. However, because the specific consultants' employees identified by Requester are private employees and not government employees, they have a significant privacy interest in nongovernmental employment history and income records. In the absence of a larger public interest, such individually identifiable private sector employee information is not required to be disclosed under the UIPA's exception for "[g]overnment records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy." HRS § 92F-13(1) (2012).

In response to the request for salaries of all employees of PB and its subcontractors, even if the employees' names are redacted, HART is

not required to disclose this information under the exception for “[g]overnment records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function” because disclosure would reveal confidential commercial and financial information and disclosure would frustrate HART’s procurement functions. HRS § 92F-13(3) (2012).

Agency Denial of Access to Personal Records Intertwined with Confidential Source’s Identity

UIPA Memo 15-11

Requester asked whether the Department of Public Safety (PSD) properly denied him access under Part III of the UIPA to a copy of a complaint made against him (Complaint).

Part III of the UIPA (Part III) governs access to the Requester’s personal record. OIP found that since the Complaint constitutes “information about an individual,” namely Requester, the Complaint is a personal record. Applying Part III, the Complaint is exempted from disclosure because it is inextricably intertwined with the identity of a source who provided information under an implied promise of confidentiality. HRS § 92F-22(2) (2012).

Adequacy of Search for Marine Survey

UIPA Memo 15-12

Requester asked whether the Division of Boating and Ocean Resources, Department of Land and Natural Resources (DoBOR), complied with the UIPA in its response to Requester’s Request to Access a Government Record, dated May 19, 2013, for the “complete survey of Keauhou Bay in its **entirety**, performed by Sea Engineering, regarding the matter of proposed additional moorings” (Record Request) (emphasis in original). Specifically, Requester challenged the adequacy of DoBOR’s search for responsive records.

OIP found that DoBOR complied with the UIPA when, after a reasonable search of its records, it provided access to all of the requested records it maintained as of the date it responded to the Record Request. DoBOR is not required under section 92F-11(b), HRS, to respond to the Record Request as a standing or continuing request for records after having already responded to the initial request.

DHHL Lease File

UIPA Memo 15-13

Requester asked whether the Department of Hawaiian Home Lands (DHHL) properly denied access to records from a DHHL lease file under Part II of the UIPA.

The records at issue in this appeal do not include the DHHL lease itself, which is made public without exception by section 92F-12(a)(5), HRS, and the information in the records goes well beyond the information in the lease itself. OIP looked to the UIPA’s exceptions for privacy

and for frustration of a legitimate government function and concluded that DHHL properly withheld Lessee's and other addressees' personal post office box numbers, employees' non-public direct telephone numbers, information about a proposed but never completed lease transfer, financial information (with the possible exception of the balance and status of a government loan), and a specified piece of information regarding a litigant. *See* HRS § 92F-13(1) and (3) (2012). After that information is redacted, the remainder of the records must be disclosed because they do not fall under any exception to disclosure under the UIPA.

Comprehensive Personal Record Request

UIPA Memo 15-14

Starting in 2010, Requester made several record requests to different offices at the University of Hawaii at Manoa (UH) for her personal records. Because requester was not satisfied with some of UH's responses, she eventually made an "umbrella" request for all information maintained by UH regarding an incident she was involved in while she was a UH student. She thereafter appealed UH's responses.

OIP first found that UH's responses to Requester's record requests did not comply with the UIPA because, for information being denied, UH did not specify what was being denied or the statutory basis for each denial.

UH asserted that some of the requested records do not exist. Based on UH's description of the searches it conducted for records, OIP found UH's search was made in good faith and that another search would not likely locate additional responsive records. UH also asserted that it had already provided copies of some of the requested records. For records that UH asserts were already provided to Requester, but which she states she

did not receive, OIP recommended UH provide another copy at no charge.

UH is subject to the federal Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232G; and 34 CFR Part 99, which, if not complied with, would put its federal funding in jeopardy. Regardless of how the requested records might otherwise be treated under the UIPA, section 92F-4, HRS, states "[w]here compliance with any provision of this chapter would cause an agency to lose or be denied funding, services, or other assistance from the federal government, compliance with that provision shall be waived but only to the extent necessary to protect eligibility for federal funding, services, or other assistance." Based on OIP's *in camera* review and on advice from the federal Department of Education Family Policy Compliance Office which administers FERPA, OIP found that portions of the responsive records were Requester's education record under FERPA, or the joint education record of Requester and another student under FERPA, or in some instances, only the education record of one or more other students under FERPA. Requester is entitled only to those portions about her and about her and another student jointly. Portions solely about other students should be redacted prior to disclosure under FERPA, and may be redacted prior to disclosure under the UIPA.

Redactions made to the documents sent to Requester in 2010 and 2011 were not in compliance with OIP's administrative rules as portions were improperly "whited out" instead of being obviously "blacked out." OIP advised UH to re-redact those records (with the exception of one) and provide copies to Requester.

Sunshine Law **Informal Opinions:**

Sunshine Law informal opinions are written to resolve investigations and requests for advisory opinions. Overall, OIP wrote 7 informal opinions concerning the Sunshine Law in FY 2015, as summarized below.

Meeting Notice for Proposed Rules

Sunshine Memo 15-1

Act 68, 2014 Hawaii Session Laws, amended the Sunshine Law to allow boards to describe proposed rules as agenda items with statements that the rules can be reviewed in person and online in accordance with the notice provisions for rulemaking found in sections 91-3(a)(1)(A) and 91-2.6, HRS. With respect to online notice, section 91-2.6 requires state agencies to provide its proposed rules on the Office of the Lt. Governor's (OLG) website.

The Small Business Regulatory Review Board (SBRRB) asked for an opinion as to whether this Act's new notice provision applied to its review of other agencies' draft rules. OIP explained that the Sunshine Law's notice provisions, including the one added in Act 68, apply to all boards under the Sunshine Law, including SBRRB. Thus, to provide online notice in accordance with Act 68, the draft rules must be available for viewing on the OLG website. If the draft rules are not available for viewing on the OLG website, then SBRRB must follow the Sunshine Law's normal requirement to list in its agenda all of the items to be considered. To ensure that SBRRB can meet Act 68's online notice requirement without having to develop a list of all items to be considered, OIP recommended that the agencies be advised to make their rules available on the OLG website at the time that they forward draft rules for SBRRB's review.

Honolulu City Council Annual Budget Review

Sunshine Memo 15-2

The purpose of the Honolulu City Council Budget Committee's annual budget review is to receive overviews by each City agency of their proposed budgets, and for Budget Committee members to discuss general issues arising from the agencies' presentations. An anonymous requester complained that the Sunshine Law's notice requirements were violated when councilmembers discussed, on the last day of the multi-day 2013 annual budget review held by the Budget Committee, the Executive Branch's proposed fuel tax increase that had been raised during the "Administrative Overview" on the first day of the meeting.

Requester's first allegation was that the Council Chair's "closing remarks" on the fuel tax proposal, made on the last day of the meeting, were improper because they were raised after completion of the agenda item for the Legislative Branch's budget. Although the proposed fuel tax increase was not specifically on the agenda, OIP found that there was a sufficient nexus between the "Administrative Overview" agenda item heard earlier and the specific items raised by the Executive Branch as part of its budget overview to allow the discussion of the proposed fuel tax increase in general terms by the Council on the last day of the multi-day meeting. OIP found that the agenda did give notice that everything in Executive Branch's budget would be touched on and therefore it would be an extremely broad, if shallow, look at the entire budget.

OIP noted that the Sunshine Law does not restrict consideration of agenda items to the order they are listed on an agenda or prohibit reconsideration of an agenda item later in the meeting. OIP also recognized the ability of boards to dictate the course of discussion of agenda items, including taking agenda items out of order, recessing

discussion of an agenda item then returning to that discussion at a later point in the meeting, and reconsidering items in accordance with rules a board may have adopted and typical parliamentary procedure. When proper public notice of an agenda item has been given, the Sunshine Law allows that agenda item to be discussed and reconsidered at any time during the course of the noticed meeting. OIP thus concluded that the Budget Committee Chair had discretion to allow revisiting of the Administrative Overview agenda item when the Council Chair submitted “closing remarks” on the fuel tax increase after discussion of the Legislative Branch’s budget.

Requester’s second allegation was that the fuel tax was again discussed by most of the Councilmembers present during the Budget Committee’s final agenda item, “Committee Overview of Budget Presentations,” on the last day of the meeting, after all agencies had completed their budget presentations. OIP found that it was appropriate, when the last item on the annual budget review agenda was considered, for Budget Committee members to comment on the matters discussed during the prior days of agency briefings. The final agenda item was on the agenda so that the Budget Committee could discuss the “Budget Presentations.” It was the designated time set forth on the agenda for the Budget Committee members to discuss and comment on all prior presentations during the week. While it may not have been an optimal situation for members of the public, who were only interested in agenda items from previous days, to have to return on the last day for the Budget Committee’s discussion on those items, OIP did not find that those actions violated the Sunshine Law and noted that the agenda did inform the public that this would happen.

Introduction of a Resolution; Failure to Consider an Item

Sunshine Memo 15-3

Requester asked whether the Honolulu City Council (Council) violated the Sunshine Law by introducing Council Resolution 12-319 (2012) co-signed by five members and without the entire legislative packet proposed by the Hawaii State Association of Counties’ (HSAC) relating to genetically modified organism (GMO) and Public Land Development Corporation (PLDC) bills. Requester also questioned the propriety of not placing Resolution 12-319 on a meeting agenda for the full Council prior to December 6, 2012.

OIP found that the Council did not violate the Sunshine Law by introducing Resolution 12-319 that was co-signed by multiple Council members. Multiple Council members co-signing to introduce a measure does not by itself violate the Sunshine Law, and there was no evidence to indicate that the members had privately discussed the measure among themselves. Moreover, the Council was not obligated by the Sunshine Law to introduce the entire HSAC packet exactly as proposed by HSAC.

OIP also found that the Council likewise did not violate the Sunshine Law by failing to place the Resolution on a full Council meeting agenda prior to December 6, 2012. A board’s failure to consider an item or to place the item on its agenda for a particular meeting is not a Sunshine Law violation. *See* HRS § 92-7.

Limitations on Oral Testimony

Sunshine Memo 15-4

Requester asked whether the Kauai County Council (Council) violated the Sunshine Law by not allowing Requester to present oral testimony at the time that an agenda item was called during its meeting on December 18, 2013 (December Meeting) and its Budget Review Meeting on April 12, 2013 (Budget Meeting) because Requester had instead provided oral testimony during the early Public Comment period at the start of each meeting.

OIP concluded that the Council's limitations on oral testimony did not violate the Sunshine Law's requirement to afford all interested persons an opportunity to testify on any agenda item and that the Council's administration of oral testimony by rule was reasonable. *See* HRS § 92-3 (2012) (regarding testimony). Because the Council did provide an opportunity for oral testimony on every agenda item when it was called, the Council could properly restrict those speakers who elected to instead present their oral testimony during the Public Comment period at the start of each Meeting, specifically by requiring these early speakers to present all testimony on any agenda item within a time limit and restricting them from testifying a second time when the agenda items were called during each meeting.

Mailing of Notice

Sunshine Memo 15-5

Requester asked whether the Board of Agriculture (BOA) violated the Sunshine Law by failing to mail to him its notice for its November 27, 2012 meeting (first meeting) and its notice for its November 25, 2014 meeting (second meeting) at the same time when the notices were officially filed.

For the first meeting notice, OIP found that the BOA did not violate the Sunshine Law because it took reasonable and appropriate steps to mail its notice to Requester and has no duty to guarantee that the notice be received by Requester. Although the board technically violated the Sunshine Law regarding the second meeting because the November 20 postmarked date was less than six days before the November 25 meeting, OIP found that the DOA had made a good faith effort by depositing the notice in the mailbox six days in advance and that Requester actually received the notice before the meeting date. OIP warned the BOA to be more vigilant in the future about ensuring that its notice to Requester is timely deposited for mailing so that the envelope containing the notice will be postmarked on the same day that the agenda is filed.

Public Testimony Time Limits

Sunshine Memo 15-6

Requester asked whether the Board of Directors for the Hawaii Public Housing Authority (HPHA) violated the Sunshine Law by allowing him to present oral testimony on an agenda item at the beginning of its June 20, 2013 meeting (Meeting) rather than when the agenda item was being discussed.

The Sunshine Law requires a board to afford all interested persons an opportunity to present oral testimony on any agenda item and to provide for reasonable administration of the testimony by rule. HRS § 92-3 (2012). OIP found that HPHA did not violate the Sunshine Law when it required the public to provide oral testimony on all agenda items at the beginning of a meeting and limited each person's testimony to three minutes.

Amendment of Agenda

Sunshine Memo 15-7

Requester asked whether the Mililani/Waipio/Melemanu Neighborhood Board (Board) violated the Sunshine Law by amending its February 25, 2013 agenda during its meeting held on February 27, 2013, to recommend that the closure time at the Mililani Neighborhood Park be changed.

The Sunshine Law requires that boards give written public notice of meetings, which shall include an agenda listing all items to be considered. HRS § 92-7(a) (Supp. 2014). The Sunshine Law also provides that a filed agenda may be amended to add an item by a two-thirds recorded vote of all members to which the board is entitled, “provided that no item shall be added to the agenda if it is of reasonably major importance and action thereon by the board will affect a significant number of persons.” HRS § 92-7(d) (2012).

OIP found that the Board’s February agenda amendment was made in violation of the Sunshine Law because the recommendation to change the closure time at the Mililani Neighborhood Park was a matter of “reasonably major importance” and action thereon would affect a “significant number of persons.” The board, however, mitigated the harm of its violation by placing the recommendation on its subsequent April agenda and providing for community input and discussion at the April meeting. In the absence of any evidence that the Board actually voted to adopt the closure time recommendation at its April meeting, OIP concluded that the Board’s action to adopt the recommendation at its February meeting was voidable, but not voided, as no lawsuit was filed to challenge the action.



General Legal Assistance and Guidance

To expeditiously resolve most inquiries from agencies or the public, OIP provides informal, general legal guidance, usually on the same day, through the Attorney of the Day (AOD) service. AOD advice is not necessarily official policy or binding upon OIP, as the full facts may not be available, the other parties' positions are not provided, complete legal research will not be possible, and the case has not been fully considered by OIP. The following summaries are examples of the types of AOD advice provided by OIP staff attorneys in FY 2015.

UIPA Guidance:

Division Chief's Job Description Is Public

A State employee asked whether a position description specific to the division chief's position number is public, and whether staff is allowed a copy of the description upon request. OIP advised yes, because the UIPA requires, at section 92F-12(a)(14), HRS, that the following information about Hawaii state and county employees is public: name, compensation (but only the salary range for employees covered by or included in chapter 76, and sections 302A-602 to 302A-640, and 302A-701, or bargaining unit (8)), job title, business address, business telephone number, job description, education and training background, previous work experience, dates of first and last employment, position number, type of appointment, service computation date, occupational group or class code, bargaining unit code, employing agency name and code, department, division, branch, office, section, unit, and island of employment, of present or former officers or employees of the agency; provided that this paragraph shall not require the

creation of a roster of employees; and provided further that this paragraph shall not apply to information regarding present or former employees involved in an undercover capacity in a law enforcement agency.



Notification to Provider of Information

An agency employee called to see if OIP would notify a person, who provided financial information, after OIP issues an opinion that those records are not confidential and must be disclosed. While OIP will send its opinion to the parties (requester and agency, and their counsel), it does not contact the person who submitted the financial information. The agency may, but is not obligated to, inform the person who submitted the allegedly confidential information that the records must be disclosed.

Requiring Requesters to Use OIP Form

A requester made a UIPA request by e-mail, and the agency responded that he needed to fill out the "Request to Access a Government Record" form before the agency could provide the requested records.

OIP advised the agency that an e-mail request is a written request and as such is considered a formal UIPA request under OIP's rules. The "Request to Access a Government Record" form is a model form provided as a convenience to requesters who wish, but are not required, to use it.

Government Employee's Use of Private E-mail Address for Government Work

A county deputy corporation counsel inquired as to whether the UIPA's requirements would apply if a government employee uses a private e-mail address to conduct government business. The agency for whom this employee works is likely able to require its employee to provide the e-mail relating to the agency's work, even though it was sent to and from the employee's private e-mail address. OIP advised that when the agency has this ability to require the records to be provided, the agency is considered to have "administrative control" and therefore "maintains" such records that the agency can demand. Records that an agency "maintains" are "government records" and subject to the open records provisions of the UIPA. Therefore, the government employee's e-mails sent or received via the employee's private e-mail address may be subject to the UIPA's requirements.

Waiver of Fees in the Public Interest

In responding to a record request, an agency requested guidance on the criteria for waiving search, review, and segregation fees when the public interest is served. Section 2-71-32(b), Hawaii Administrative Rules, contains the criteria to apply when determining whether to waive fees. To determine whether the requester has the "actual ability to widely disseminate information from the government record to the general public at large," the agency inquired whether the use of social media would be acceptable as a means to widely disseminate information. The agency was advised that the totality of circumstances related to the social media being used must be examined on a case-by-case basis, such as whether the social media is an individual account or a public account, the number of followers, or other indicia that the account is publicly announced or known as a source of information.

UIPA and Sunshine Law Guidance:

Record Request for Draft Minutes Not Yet Finalized

When a board receives a record request for minutes that have not yet been finalized, both the Sunshine Law and the UIPA may be implicated. As explained in OIP's "Quick Review: Sunshine Law Requirements for Public Meeting Minutes," section 92-9, HRS, does not require board approval of meeting minutes and it does require that minutes be made available within 30 days after a meeting, if requested. If 30 days have passed and even if the board has not yet approved the minutes that remain in draft form or as notes, the board must provide a record of the meeting in whatever form it exists, should stamp the record as a "DRAFT," and may let the requester know that a final version will be coming later.

Under the UIPA, a request for minutes is a request for government records. Specifically, section 92F-12(a)(7), HRS, requires each agency to make available "[m]inutes of all agency meetings required by law to be public." Accordingly, the UIPA requires the board to provide the minutes that it does maintain, and OIP typically recommends that the board disclose the draft minutes or audio recordings if final minutes have not been transcribed.

Sunshine Law Guidance:

Two Board Members May Meet Privately with Other Persons to Discuss Board Business

The permitted interaction at section 92-2.5(a), HRS, allows two members of a board to meet privately to discuss board business so long as no commitment to vote is made or sought, and so long as the two members do not constitute a quorum of the board. A board's staff member asked whether two members could invoke section 92-2.5(a), HRS, to attend a meeting set up for them by someone who is not a board member, when the two members do not constitute a quorum. OIP advised that the two members may meet privately with others who are not board members to discuss board business, so long as no commitment to vote is made or sought. OIP has not interpreted section 92-2.5(a), HRS, to prohibit two board members from discussing board business outside of a properly noticed meeting with individuals who are not members of the same board.

Approval of Executive Session Minutes as an Agenda Item

A board asked whether it would need to go into executive session to approve the minutes of an executive session from a prior meeting, and thus whether its agenda should state that an executive session was anticipated.

OIP advised the board that executive session minutes can typically be approved in open session. The only reason a board would need to go into executive session to discuss executive session minutes would be if the board needed to talk about the substance of the minutes in enough detail that the public discussion would frustrate the purpose of the original executive session. In other words, there would be no need to go into

executive session for a discussion like, "There's a typo on page 3, paragraph 2, first sentence," "Which word are you looking at?" or "It should read 'last Thursday,' not 'lost Thursday.'" Thus, a board would not anticipate the need for an executive session to approve executive session minutes, so the approval of executive session minutes can ordinarily be listed as a regular public session agenda item.

Last-Minute Addition to Agenda of a Briefing on an Approaching Storm

A county council wanted to receive an update on an approaching storm, at its meeting to be held in two days' time. The briefing would be purely informational and the council did not plan to discuss possible courses of action regarding the storm. The council asked whether it was necessary for such a briefing to be listed on the agenda, and if so, if it could be added to the agenda.

OIP advised that the approaching storm was arguably of reasonably major importance and affecting a significant number of persons, which would make it unsuitable to be added as an agenda item. However, since the informational briefing would be limited to what the storm was currently doing and what it was anticipated to do in the near future, which was a matter beyond the council's authority, the briefing most likely would not be considered council business and thus would not have to be listed on the agenda in the first place. The council could nonetheless schedule the briefing for immediately before or immediately after the previously noticed meeting and invite the public to attend.

Curing a Possible Sunshine Law Violation

An attorney for a board inquired into possible remedial actions a board may take to cure potential Sunshine Law violations.

While a final action taken in violation of the Sunshine Law may be voidable upon proof of the violation, the action is not automatically void and a complainant can challenge the final action by filing a lawsuit within ninety days of the alleged violation. HRS § 92-11; *see* OIP Op. Ltr. No. 01-06 at 9. If a final action has been taken in violation of the Sunshine Law, the board could take a re-vote at its next public meeting. If the potential violation does not involve a final action, a board may mitigate the public harm and show its good faith attempt to comply with the Sunshine Law by discussing the possible violation and the proper procedures at its next public meeting. Any re-vote or discussion of a potential violation must be properly itemized on the meeting agenda.

Board Staff Attending Meeting by Teleconference

A board inquired as to whether a staff person may attend a meeting by teleconference if the staff person is unable to be physically present at the meeting. OIP advised that the Sunshine Law's open meeting requirements only apply to a board and its members, not to the board's staff. Therefore, the Sunshine Law does not govern a staff member's attendance at the meeting and does not prohibit the staff member's attendance by teleconference. If permitted by the board, a staff person may attend the meeting by teleconference.

Posting of Public Meeting Notice Online

Requester asked whether a board was required to post its notice of a public meeting and agenda on the board's website. Although there have been various unsuccessful attempts to amend the law, OIP advised requester that the Sunshine Law does not require a board to post its agenda online. Official notification of a public meeting is provided by the filing of the notice in the Lieutenant Governor's Office or the appropriate county clerk's office and mailing to persons on a mailing list maintained by the board. Pursuant to Executive Memorandum No. 11-11, state agencies are required to post public meeting notices online at the state calendar website. OIP does not administer or monitor the posting of public meeting notices on the state calendar website.



Education and Communications

Training

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

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

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

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



and training materials that help educate agency personnel on how to timely and properly fulfill UIPA requests. It also collects important information showing how agencies are complying with the UIPA. In FY 2015, OIP continued to offer online and live Log training for state agencies as well as all four counties.

In FY 2015, OIP continued posting online "Quick Reviews" that provide easy-to-read guidance and practical tips on how to comply with the UIPA and Sunshine Law. "What's New" articles informing readers of OIP's latest training materials and relevant open government information are regularly emailed to government agencies, media representatives, community organizations, and members of the public, and past articles are also posted in the What's New archive on OIP's website. The What's New articles and Quick Reviews allow OIP to more widely disseminate the advice it gives in response to Attorney of the Day (AOD) inquiries and to timely address questions of widespread interest.

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

UIPA and Sunshine Law Training

OIP provided 11 training sessions in FY 2015 on the UIPA and Sunshine Law for the following agencies and groups:

- 9/12/14 Department of Commerce and Consumer Affairs, RICO:
“UIPA”
- 9/15/14 Office of the Governor,
Innovation Task Force:
“Sunshine Law”
- 10/14/14 Department of Health,
State Council on Mental Health:
“Sunshine Law”
- 12/5/14 Department of Commerce and
Consumer Affairs, PVL:
“Sunshine Law and UIPA”
- 1/15/15 Office of Hawaiian Affairs:
“Sunshine Law”
- 1/23/15 Japanese Government Officials’
Orientation:
“Hawaii’s Sunshine Law
and UIPA Overview”
- 3/5/15 Access Hawaii Committee
meeting: “Sunshine Law”
- 3/10/15 Hawaii State Association of
Counties: “Sunshine Law:
Permitted Interaction Groups &
Guest Meeting Form”

- 6/17/15 University of Hawaii:
“Records Report System”
- 6/23/15 Department of Labor & Industrial
Relations:
“Records Report System”
- 6/27/15 Neighborhood Board Commission:
“Sunshine Law”



Publications

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

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

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

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

In FY 2015, OIP released its first **Report of the Master UIPA Record Request Year-End Log for FY 2014**, which is summarized later in this section.

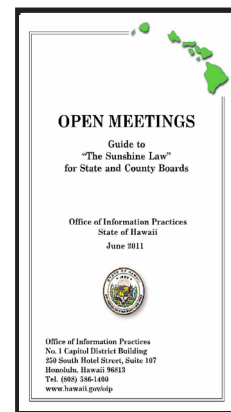


Sunshine Law Guides and Video

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

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

OIP has also created various Quick Reviews and other guidance for Sunshine Law Boards, which are posted on OIP's website and cover topics such as whom Board members can talk to and when; meeting notice and minutes requirements; and how a Sunshine Law board can address legislative issues.



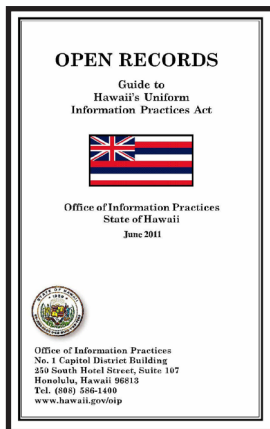
UIPA Guides and Video

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

The UIPA Guide navigates agencies through the process of responding to a record request, such as determining whether the record falls under the UIPA, providing the required response to the request, analyzing whether any exception to disclosure applies, and explaining how the agency may review and segregate the record.

The UIPA Guide includes answers to a number of frequently asked questions.

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



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

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

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

Model Forms

OIP has created model forms for the convenience of agencies and the public.

To assist members of the public in making a record request to an agency, OIP developed a "Request to Access a Government Record" form that provides all of the basic information the agency requires to respond to the request.

To assist agencies in properly following the procedures set forth in OIP's rules for responding to record requests, OIP has forms for the "Notice to Requester" or, where extenuating circumstances are present, the "Acknowledgment to Requester."

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

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

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

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

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

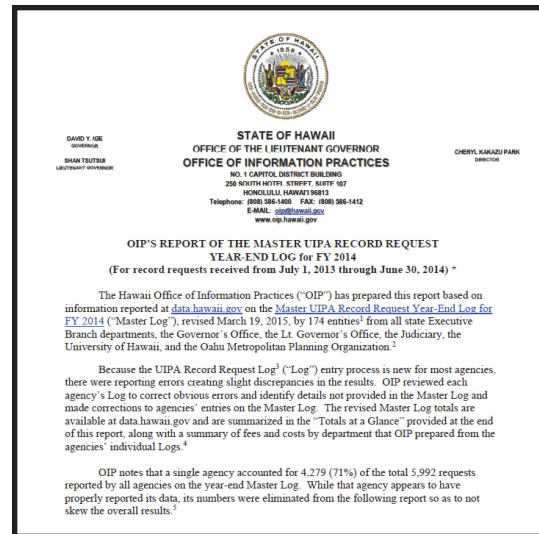
OIP's Report of the Master UIPA Record Request Year-End Log

In March 2015, the Office of Information Practices released its first year-end report based on information posted by 174 agencies on the **Master UIPA Record Request Year-End Log for FY 2014 (Master Log)**, at data.hawaii.gov. While the Log process was still new for most agencies, the collected data showed overall that the typical record request was granted in whole or in part and was completed within seven days, and the typical requester paid nothing for fees and costs.

Formal UIPA record requests constituted less than 1% of the estimated 248,060 total formal and routine record requests that agencies received in FY 2014. Excluding one agency whose results would have skewed the entire report, 173 agencies reported receiving 1,713 formal written requests requiring a response under the UIPA, of which 99% were completed in FY 2014. Of the 1,694 completed cases, 77% were granted in full or in part, and 5% were denied in full. In 18% of the cases, the agency was unable to respond to the request or the requester withdrew, abandoned, or failed to pay for the request.

After adjusting for the limitations of the data collection, agencies took less than seven work days, on average, to complete 1,573 typical and personal record requests, which is 93% of all completed cases. In contrast, it took nearly four times as many days to complete 121 complex requests.

In terms of hours worked per request, the average number of search, review and segregation (SRS) hours for a typical record request was 1.12, as compared to .43 for a personal record request and 9.94 hours for a complex record request. Although the 121 complex record requests constituted only 7% of all requests, they accounted for 41.6% (\$34,743) of the total gross fees and costs incurred by agencies (\$83,428) and 16% (\$7,163) of the total amount recovered from all requesters (\$44,098).



Agencies recovered \$44,098 in total fees and costs from 273 requesters, which is approximately 53% of the \$83,428 incurred by agencies in gross fees and costs. Eighty-six percent of completed requests were granted \$30 fee waivers, while another 6% were granted \$60 public interest waivers.

Eighty-four percent (1,421) of all requesters in completed cases paid nothing in fees or costs for their record requests. Of the 273 requesters that paid any fees or costs, 41% paid less than \$5.00 and 36% paid between \$5.00 and \$49.99. Moreover, of the 273 requesters that paid any amount for fees and or costs, just two commercial entities accounted for 56% of the total amount paid by all requesters; these two entities were charged for costs only and each paid \$12,420.47. See chart 12 in OIP's summary, which is reproduced as **Figure 16** on page 49.

For the full report and accompanying data, please go to the reports page at oip.hawaii.gov.

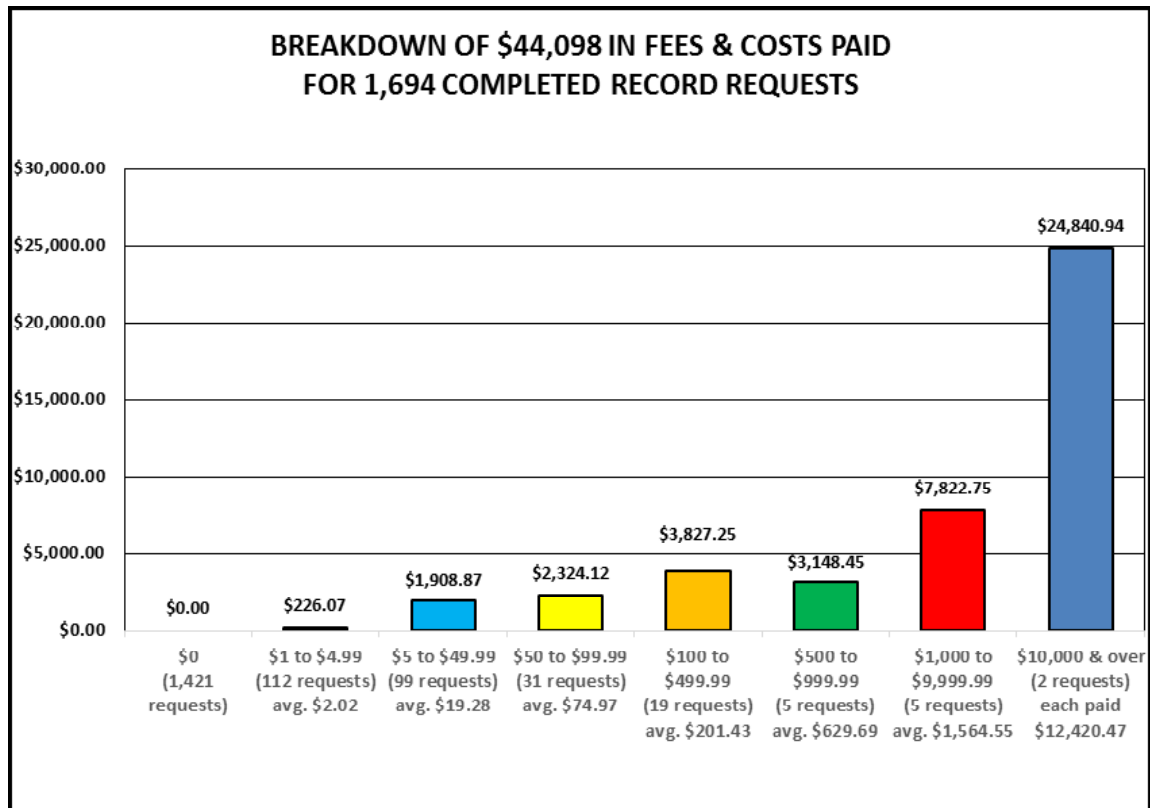


Figure 16



Communications

OIP's website at oip.hawaii.gov and the *What's New* articles that are e-mailed and posted on the website, continue to be important means of disseminating information on open government issues. In FY 2015, OIP continued its communications to the agencies and public, mainly through 32 *What's New* articles and one radio interview.

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

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



Website Features

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

"What's New"

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

"Laws/ Rules/ Opinions"

This section features these parts:

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

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

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

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

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

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

"Forms"

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

"Reports"

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

In addition, this section links to the UIPA Record Request Log Reports, where you can find OIP's reports and charts summarizing the semi-annual and year-end data submitted by all state agencies, the Judiciary, and the University of Hawaii for FY 2014.

"Records Report System (RRS)"

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

"State Calendar and Related Links"

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

"Training"

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



Legislation Report

One of OIP's functions is to make recommendations for legislative changes to the UIPA and Sunshine Law. OIP may draft proposed bills and monitor or testify on legislation to clarify areas that have created confusion in appli-



cation; to amend provisions that work counter to the legislative mandate of open government; or to provide for more efficient govern-

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

During the 2015 Legislative session, OIP reviewed and monitored 101 bills and resolutions affecting government information practices, and testified on 27 of these measures. OIP was most significantly impacted by the following legislation:

► **Act 92**, signed on June 5, 2015, enacts **H.B. 461, S.D. 2, C.D. 1**. This act transfers OIP for administrative purposes to the Department of Accounting and General Services (DAGS).

OIP was originally established in 1988 and was initially placed within the Department of the Attorney General (AG). In 1998, OIP was transferred from the AG to the Office of the Lt. Governor. To comply with the state constitutional provisions requiring permanent agencies to be placed within principal departments and allowing

the Lt. Governor's office to house only temporary agencies, OIP was established as "a temporary office . . . for a special purpose within the office of the lieutenant governor, for administrative purposes."

Act 92 establishes OIP as a permanent agency placed for administrative purposes in DAGS, where OIP will continue to retain its independence in administering Hawaii's open records and open meetings laws. The bill specifically recognizes that OIP's exercise of its functions, duties, and powers, including any quasi-judicial functions, shall not be subject to DAGS Comptroller's supervision or control and that OIP shall communicate directly with the Governor and Legislature. Although no physical transfer will take place, there are many logistics required for the administrative transfer, which is why the effective date was delayed until July 1, 2016.

Act 92 also made housekeeping changes to section 92F-42, HRS, to clarify that OIP's powers and duties under both the Uniform Information Practices Act and the Sunshine Law are consistent. These amendments were made effective upon approval on June 5, 2015.

► **Act 91**, signed on June 5, 2015, enacts **S.B. 419, S.D. 2, H.D. 2, C.D. 1**. This act amends section 92-82, HRS, (not part of the Sunshine Law) to allow more than a quorum of a neighborhood board's members to attend meetings or presentations on Oahu that are open to the public, do not charge a fee or require registration, and are not specifically and exclusively organized for or directed toward board members. At such events, board members may ask questions relating to official board business, but may not make a commitment to vote on any of the issues discussed. This law became effective on June 5, 2015.



Litigation Report

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



Under the UIPA, a person may bring an action for relief in the circuit courts if an agency denies access to records or fails to comply with the provisions of the UIPA governing personal

records. A person filing suit must notify OIP at the time of filing. OIP has standing to appear in an action in which the provisions of the UIPA have been called into question. Under the Sunshine Law, a person may file a court action seeking to require compliance with the law or prevent violations. A suit seeking to void a board's "final action" must be commenced within 90 days of the action.

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

Although litigation cases are not counted in the total number of cases seeking OIP's assistance, they nevertheless take staff time to process and monitor. In FY 2015, the number of litigation cases monitored by OIP substantially increased to 39, primarily due to an increase in the number of cases filed by inmates. Of the 24 new litigation cases opened in FY 2015, 15 involved inmates as plaintiffs. Upon further investigation by OIP, 7 of the inmate cases were by the same person who had either filed duplicate notices to OIP or whose claims were not actually filed with the court. When the 7 cases are subtracted from the 24 new files opened, the net result that OIP tracked is 17 new lawsuits, of which 8 were filed by inmates. All 8 of the inmates' new cases and 8 of the non-inmates' new cases concerned UIPA issues. OIP

was notified of only one new court case in FY 2015 that involved the Sunshine Law, and it is also the first judicial appeal taken from an OIP decision.

Summaries are provided below of the new lawsuits monitored by OIP in FY 2015 as well as updates of cases that closed by November 2015 or remain pending. The UIPA cases, which are the majority, are discussed first, followed by those involving the Sunshine Law.

UIPA Litigation:

OIP's *In Camera* Review of Agency Records

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

In a case that was previously discussed in OIP's FY 2014 Annual Report, the Maui County Corporation Counsel (Corporation Counsel) filed a lawsuit in the Second Circuit Court against OIP seeking to enjoin OIP from issuing an opinion in an appeal filed by The Maui News questioning whether the Maui County Council's Policy and Intergovernmental Affairs Committee (PIA Committee) had properly entered into an executive session closed to the public to discuss privileged matters with its attorney. After providing OIP with a mostly redacted copy of the executive session minutes, the Corporation Counsel filed a suit for injunctive relief, which challenged OIP's authority to review attorney-client privileged documents *in camera* and sought to prevent OIP from taking adverse action against Maui County. As OIP was unable to determine from the heavily redacted minutes

whether the PIA Committee had properly entered into a closed session to have a privileged discussion with its attorney, OIP vigorously contested the lawsuit.

The Corporation Counsel has since provided OIP with a minimally redacted copy of the executive session minutes for OIP's *in camera* review, which withheld only the attorney's statements and provided sufficient information for OIP to determine that the PIA Committee had properly entered into an executive session. While the lawsuit was still pending at the end of FY 2015, a stipulation to dismiss was filed and the case closed on October 27, 2015.

State Ethics Commission Financial Disclosures

Peer News LLC, dba Civil Beat v. State Ethics Commission
Civ. No. 14-1-2022-09

The Hawaii State Ethics Code, chapter 84, HRS (Ethics Code), requires that Hawaii state legislators and other elected officials, and certain high ranking government employees file annual financial disclosure statements with the Hawaii State Ethics Commission (SEC). In 2014, the Legislature amended the Ethics Code to require that members of fifteen specific State boards must also file public disclosure statements. The SEC, following the advice of the Department of the Attorney General, declined to apply the new law retroactively to disclosures already filed in 2014 by affected members of the fifteen boards prior to the effective date of the new law.

Peer News LLC, dba Civil Beat (Plaintiff) filed a complaint with the First Circuit Court against the SEC, and then filed a motion for preliminary injunction asking the Court to order the SEC to disclose 2014 financial disclosure statements for members of the University of Hawaii Board of Regents, the Board of Directors of the Agribusiness Development Corporation, and the Land Use Commission. The Court granted the motion for

injunction and ordered the SEC to disclose the financial disclosures for members of the three named boards. Both parties thereafter filed various motions. The SEC later informed members of the affected boards that they had the option of (1) filing a short form financial disclosure statement for 2015 that would incorporate by reference their 2014 long form, or (2) filing a long form in 2015. In either case, their most recently filed long forms would be public. The Court then issued an Order that Plaintiff's complaint, and the parties' respective motions for summary judgment were all moot. The parties filed a stipulation to dismiss the case with prejudice on August 10, 2015.

Police Disciplinary Records

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

As reported in OIP's FY 2014 Annual Report, Peer News LLC, dba Civil Beat (Plaintiff) asked the Honolulu Police Department (HPD) to provide information regarding 12 police officers who received 20-day suspensions due to employment misconduct from 2003 to 2012 according to HPD's annual disclosure of misconduct to the State Legislature. Plaintiff asked for the suspended employees' names, nature of the misconduct, summaries of allegations, and findings of facts and conclusions of law. HPD denied Plaintiff's records request, asserting that the UIPA's "clearly unwarranted invasion of personal privacy" exception protected the suspended police officers' identities.

Plaintiff then filed a lawsuit in the First Circuit Court, which granted Plaintiff's Motion for Summary Judgment and ordered the Defendants to disclose the requested records about the suspended police officers in March 2014. The circuit court's decision relied upon the Hawaii Supreme Court's decision in *State of Hawaii Organization of Police Officers v. Society of Professional Journalists, University of Hawaii Chapter* (SHOPO), which had concluded that

the privacy exception does not protect police officers' privacy interest in records about employment misconduct that led to suspension or discharge.

The circuit court's decision also followed OIP's Opinion Letter Number 97-1 as precedent and recognized that this OIP opinion was not erroneous. As background, OIP Opinion Letter No. 97-1 addressed the competing interests of the Supreme Court's opinion in SHOPO and the Legislature's amendment of the UIPA in 1995. While the Legislature in 1995 had recognized the police officers' privacy interest in disciplinary records resulting in suspension to be significant, OIP determined that this privacy interest was outweighed by the greater public interest in disclosure of these records, as the Supreme Court had recognized in SHOPO. Thus, the OIP Opinion concluded that the UIPA requires public disclosure of the police suspension records because the public interest outweighs the privacy interest.

An appeal was filed in this case by Intervenor State of Hawaii Organization of Police Officers (SHOPO). The Hawaii Intermediate Court of Appeals (ICA) granted a stay of judgment pending appeal (Stay Order). Plaintiff applied to the Hawaii Supreme Court for transfer of the case on appeal.

State of Hawaii Organization of Police Officers v. City & County of Honolulu
Civil No. 14-1-2625-12 KKS (1st Cir. Ct.)

Following the ICA's Stay Order referenced above, the City and County of Honolulu notified SHOPO that it intended to disclose the requested police officer discipline information after redacting the officer's name and identifying information. SHOPO then filed this lawsuit asking the First Circuit Court to declare that the ICA's Stay Order prohibited the City from publicly disclosing any police officer discipline information (even if the officer's identity is redacted) until the ICA determines the pending appeal. SHOPO's lawsuit was dismissed without prejudice.

Identity of Confidential Source

Boyd, et al. v. University of Hawaii, et al.
S.P.P. 12-1-2099-08 (1st Cir. Court)

Boyd v. University of Hawaii
No. CAAP-14-0001177
Haw. Ct. App. 2015 (Intermediate Court of Appeals)

These cases were previously discussed in OIP's Annual Reports for FY 2013 and 2014. They involve a lawsuit and an appeal from a summary judgment by the First Circuit Court in favor of defendant University of Hawaii (UH), which concluded that UH had not violated the UIPA by refusing to disclose a record that did not exist. Even if the record had existed, the court concluded that the identity of a confidential source was not required to be disclosed under Parts II and III of the UIPA.

After filing an appeal from the circuit court's judgment, the plaintiffs filed a Motion to Dismiss, which the Intermediate Court of Appeals granted on February 26, 2015.

Deliberative Process Privilege

Peer News LLC, dba Civil Beat v. City & County of Honolulu
Civ. No. 15-1-0891-05

Peer News LLC, dba Civil Beat (Plaintiff) requested from the City and County of Honolulu Department of Budget and Fiscal Services (City) "each department's narrative budget memo for Fiscal Year 2016." Plaintiff described these documents as "formal memoranda and attachments that explain the initial recommendation of the department's director concerning the monies that should be allocated to the department when the Mayor submits proposed budgets to the City Council." The City denied access to portions of the responsive records, claiming that they

were “predecisional and deliberative” and thus protected by the deliberative process privilege (DPP).

The DPP is a standard for resolving the dilemma of balancing the need for government accountability with the need for government to act efficiently and effectively. It is recognized under the “frustration exception,” which states that agencies need not disclose government records that, by their nature must be confidential in order to avoid the frustration of a legitimate government function under section 92F-13(1), HRS.

When it enacted the UIPA, the Legislature left it to OIP and the courts to develop the common law interpreting the UIPA. OIP has issued a long line of opinions since 1989 that recognize and limit the DPP. OIP has construed the DPP narrowly when determining whether internal government communications must be disclosed. The policy purposes behind the DPP are: (1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies or decisions before they are finally adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency’s action. For the DPP to apply, information to be withheld must be both predecisional and deliberative, and the privilege may be lost when a final decision chooses to expressly adopt or incorporate the information by reference.

Plaintiff filed a lawsuit on May 8, 2015, asking the court to order that OIP precedential opinions citing the DPP are palpably erroneous and to enjoin the City from invoking the privilege. The suit also sought to have the City disclose all requested documents after redaction of specific salaries.

The City, through the Department of Corporation Counsel, filed a Third Party Complaint against OIP on June 10, 2015, claiming OIP is a necessary party to the lawsuit. Soon thereafter, the Corporation Counsel offered to stipulate to

dismiss OIP as a party, and the Stipulation to Dismiss was filed on July 24, 2015.

Plaintiff filed a Motion for Summary Judgment on June 5, 2015, which was denied. The State of Hawaii, through the Department of the Attorney General, asked the court for approval to participate *amicus curiae*, which was granted. Plaintiff thereafter asked the court to allow it to appeal, or to expedite the proceeding. The court denied the request to certify the case for appeal, but granted Plaintiff’s request to expedite the case, which remains pending.

Registration Requirement for Farmers Growing Genetically Modified Crops

Doe vs. County of Hawaii
Civ. No. 14-1-0094

A Hawaii County farmer (Plaintiff) filed suit against the County of Hawaii seeking to prevent it from implementing portions of a new law requiring registration of farmers growing genetically modified crops, and potentially providing for disclosure of the registration information. One of Plaintiff’s arguments was that the disclosure provision conflicted with the UIPA and other laws. The court granted Plaintiff’s motion for a preliminary injunction against the County in July 2014. The litigation remains in the pre-trial stage.

Enrollment List of Native Hawaiians

Judicial Watch, Inc., v. Namuo
S.P. 15-1-0059 (1st Cir. Court)

During the 2011 session, the State Legislature created the Native Hawaiian Roll Commission (NHRC) to prepare and maintain a roll of Native Hawaiians. In August 2014, Judicial Watch, Inc. (Applicant) asked the NHRC for a complete enrollment list of Native Hawaiians. NHRC refused to provide a list because NHRC's work was continuing and a complete enrollment list of Native Hawaiians did not exist at the time of the request.

Subsequently, Applicant made two supplemental requests seeking a copy of the enrollment list of Native Hawaiians in existence following NHRC's receipt of Applicant's request, as well as copies of documents discussing the August 2014 reopening of the registration of Native Hawaiians. NHRC refused disclosure on the grounds that the registration was ongoing and had not been closed so that it need not be reopened and a certified enrollment list did not exist at that time.

On February 18, 2015, Applicant filed an Application for an Order Allowing Inspection of Public Records of the State of Hawaii NHRC (Application). The Court granted the Application in an Order filed on June 22, 2015. On August 31, 2015, the Court filed an Order granting the Applicant's Non-Hearing Motion for Attorney Fees and Costs.

Pono Choices Survey

Rep. Robert McDermott v. University of Hawaii
Civ. No. 15-1-0321-02 (1st Cir. Ct.)

State Representative Bob McDermott filed this lawsuit after the University of Hawaii (UH) denied his requests for access to a copy of the Pono Choices survey. Pono Choices is a sexual

education curriculum and UH is responsible for producing questions that are administered to Hawaii public school students by the Department of Education. Plaintiff seeks a declaratory judgment and preliminary and permanent injunctions ordering UH to disclose the requested records, and seeks an award of fees and costs. UH seeks dismissal of all claims, and an award of its fees and costs. This case is still in the early stages of litigation.

Academic Grievance Records at University of Hawaii

Williamson v. University of Hawaii and Doe Entities 1-10
Civil No. 14-1-1397-06

Travis Williamson (Plaintiff) asked the University of Hawaii (UH) for documents pertaining to his academic grievances against UH. Plaintiff's attorney renewed Plaintiff's records requests, but UH did not respond.

Plaintiff then asked OIP for assistance and asked that his request be treated as an appeal. UH informed OIP that Plaintiff had not fully complied with its procedures for filing grievances and thus it had no records relating to Plaintiff's alleged grievances other than what was previously provided to Plaintiff. OIP informed Plaintiff that it was not accepting his appeal because it did not appear to be a denial of access to records as the records did not exist.

Plaintiff subsequently filed a lawsuit in First Circuit Court seeking access to the requested records and a declaration that the defendant withheld records in violation of the UIPA. UH filed its response and this case is still pending.

Request for Correction of Death Certificate

*Liu vs. Department of the Medical Examiner,
City & County of Honolulu
Civ. No. 25-2-0213-02
ICA CAAP-15-0000633*

The Department of the Medical Examiner (ME) denied plaintiff's request made under Part III of chapter 92F to correct her deceased mother's death certificate, filed in 1985, by changing the cause of death from suicide to homicide. Plaintiff subsequently appealed the denial of her correction request to the court under section 92F-27, HRS. The court entered final judgment against plaintiff on July 21, 2015, and plaintiff filed a notice of appeal on September 1, 2015.

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

*Prall vs. HPD
Civil No. 13-1-1917-07 ECN*

As reported in OIP's FY 2014 Annual Report, Kyle Prall (Plaintiff), a Texas resident and principal of Citizens Information Associates LLC, and Information Freedom, LLC, filed a complaint in the First Circuit Court for declaratory judgment and injunctive relief asking the court to compel the Honolulu Police Department (HPD) and Department of Public Safety (PSD) to disclose booking photos and mug shots of all individuals booked into all of the Oahu jails and correctional facilities, and for "jail/arrest" logs. This case is still in the early pretrial stages of litigation. The only change during FY 2015 was a withdrawal and substitution of counsel.

Timely Disclosure of Records

*Rosen Bien Galvan & Grunfeld vs.
Dept. of Public Safety
Civil No. 13-1-1078-04 (1st Cir. Ct.)*

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

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

The court ordered PSD to provide all the records responsive to Plaintiff's request, on an incremental basis in accordance with a timetable set forth in the court's order. With respect to 17 categories of records to which PSD had denied access under section 92F-13, HRS, the court ordered PSD to provide Plaintiff with information regarding the specific record or parts thereof that would not be disclosed.

On October 22, 2014, a Stipulation For Dismissal With Prejudice Of All Claims and Parties (Stipulation) was filed. The stipulation provided that each party would bear any remaining cost and attorneys' fees beyond the payments made pursuant to the Settlement Agreement.

Department of Public Safety (PSD) Records

Granillo v. State of Hawaii
S.P.P. 14-1-0005(2) (2nd Cir. Court)

State of Hawaii v. Granillo
No. CAAP-14-0001387
*Haw. Ct. App. 2015 (Intermediate
Court of Appeals)*

Daniel Granillo (Plaintiff) requested that PSD provide him a copy of various unspecified PSD records. PSD denied his records request. Thereafter, on June 4, 2014, Plaintiff filed his "Motion for Emergency Order" with the Second Circuit Court. On June 6, 2014, the court ordered Plaintiff to file his supplemental petition and proof of "*in forma pauperis*." After Plaintiff failed to comply with the order, the court *sua sponte* dismissed Plaintiff's case on October 31, 2014.

On December 24, 2014, Plaintiff filed his "Notice of Appeal" with the Intermediate Court of Appeals (ICA). On June 10, 2015, the ICA dismissed Plaintiff's case for lack of appellate jurisdiction.

Kong v. Department of Public Safety
S.P.P. 12-1-0069 (1st Cir. Court)
Civ. No. 13-1-0067 (1st Cir. Court)

Kong v. Department of Public Safety
No. CAAP-14-0001334
*Haw. Ct. App. 2015 (Intermediate
Court of Appeals)*

Stanley Kong (Plaintiff) requested that PSD provide him a copy of various PSD records. PSD failed to respond to his records request. Thereafter, on December 27, 2012, Plaintiff initiated his *pro se* lawsuit. On November 25, 2014, he filed his "Notice of Appeal" with the Intermediate Court of Appeals (ICA). On June 8, 2015, the ICA dismissed Plaintiff's case for lack of appellate jurisdiction. The case has been reassigned as Civ. No. 13-1-0067 in the circuit court.

Maui Community Correctional Center (MCCC) Records

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

As reported in FY 2014, Stanley Kong (Plaintiff) requested that MCCC provide him a copy of the contract agreement and stipulations signed by him upon entering the Maui Drug Court Program in MCCC. He also requested a copy of the approval form that granted him inmate to inmate correspondence and visits at MCCC. MCCC failed to respond to his records request. Thereafter, on December 27, 2012, Plaintiff initiated his *pro se* lawsuit pursuant to the Hawaii Rules of Penal Procedure (HRPP) Rule 40. On January 4, 2013, the Court ordered that Plaintiff's complaint was to be "treated as a civil complaint not governed by HRPP Rule 40" and Plaintiff "must follow all rules outlined in the Hawaii Rules of Civil Procedure." There has been no progress since the order.

Presentence Investigation (PSI) Report

Raines v. Hawaii Paroling Authority
Civ. No. 14-1-1367-06 (1st Cir. Ct.)

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

Kong v. Department of Public Safety
Civil No. 14-1-1089-04 (1st Cir. Court)

Kong v. Department of Public Safety
No. CAAP-14-0001321
Haw. Ct. App. 2015 (Intermediate Court of Appeals)

Inmates Todd Raines and Donald Marks each filed *pro se* lawsuits against the Hawaii Paroling Authority (HPA) to obtain copies of their presentence investigation reports (PSI). PSIs are prepared by the Adult Probation Office, which is part of the Judiciary, and they are used during sentencings and setting of minimum terms for convicted individuals. Inmate Stanley Kong requested a copy of his PSI from the Department of Public Safety (PSD) and also filed a *pro se* lawsuit when his request was denied.

On September 25, 2014, Raines filed an “Ex Parte Motion to Judge K. Nakasone for Clarification and Instruction Pursuant to HRS§368 and HRS§489.” The court denied the motion in an order dated November 20, 2014, on the grounds that rules governing service of motions were not complied with, and because clarification or instruction from the court would be improper. The court issued a “Notice to All Parties Regarding the Standard of Conduct for Self-Represented Parties in the First Circuit Court of the State of Hawaii, Twenty-Second Division” on December 1, 2014. Plaintiff thereafter filed a Request for Entry of Default on January 12, 2015, which was denied by the court in an Order dated January 12, 2015. Plaintiff also filed discovery requests in May 2013. HPA does not appear to have filed any documents thus far. Raines has also appealed the denial of access to his PSI to OIP.

In Marks’ case, HPA filed an Answer to the Complaint on June 9, 2014, and Marks filed his Reply on July 22, 2014. The case remains pending.

In Kong’s case, after filing his complaint, “Notice of Appeal, and “Request for leave to File Interlocutory Appeal” in the First Circuit Court, Kong filed a “Notice of Appeal” with the Intermediate Court of Appeals, which was dismissed on July 6, 2015. The case apparently remains pending in the circuit court.

Correction of Personal Record

Raines v. Hawaii Paroling Authority
Civ. No. 15-1-0431-03 (1st Cir. Ct.)

Raines v. Hawaii Paroling Authority
Civ. No. 15-1-0432-03 (1st Cir. Ct.)

Raines v. Department of Public Safety
Civ. No. 15-1-0882-05 (1st Cir. Ct.)

Marks v. Department of Public Safety.
S.P.P 14-1-1801-08 (1st Cir. Court)

Inmates Todd Raines and Donald Marks made to the Hawaii Paroling Authority or the Department of Public Safety various requests for records under Part III of the UIPA. After being denied their requests to correct or amend their personal records, Plaintiff filed *pro se* lawsuits with the First Circuit Court, seeking attorney’s fees and costs, orders directing agencies to correct their records, and damages of not less than \$1,000, as allowed by section 92F-27, HRS. The lawsuits remain pending.

Sunshine Law Litigation:

Polling Board Members and Public Testimony on Executive Session Item

*In Re OIP Opinion Letter No. 15-02
S.P.P. No. 14-1-0543*

The Office of Hawaiian Affairs (OHA) appealed OIP's Opinion Letter No. 15-02, which concluded that OHA's Board of Trustees had violated the Sunshine Law by polling board members outside a meeting to obtain their agreement to send a letter, and by denying members of the public the right to present oral testimony on an executive session item. This appeal represents the first use of section 92F-43, which was added to the UIPA in 2012 and allows agencies to appeal OIP decisions to court based on the record that was before OIP and subject to a deferential "palpably erroneous" standard of review. OHA is in the process of serving its complaint on the members of the public who requested the OIP opinion being appealed, as required by section 92F-43(b). Thus, the litigation is still in a preliminary stage.

Access to Minutes of Closed Meetings

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

As reported in OIP's FY 2014 Annual Report, Office of Hawaiian Affairs (OHA) Trustee Rowena Akana (Plaintiff) filed a complaint for declaratory and injunctive relief against the Chairperson and other members of OHA's Board of Trustees (Defendants) for judgment finding that OHA's practices and procedures to provide the public and Co-Trustees access to records of closed executive meeting of Trustees were unreasonably cumbersome and not properly adopted by OHA's Board of Trustees. Plaintiff

sought injunctive relief to provide any trustee with unfettered access to minutes and records for closed executive meetings. Plaintiff also sought injunctive relief to provide the public with reasonable and timely access to minutes and records for closed executive meetings.

Defendants filed an Answer and a Counterclaim for injunctive relief alleging that Plaintiff breached her fiduciary duty when Plaintiff, without proper authorization, disclosed confidential, proprietary or privileged information. Plaintiff answered the Counterclaim by denying the allegations that Plaintiff had breached her fiduciary duty to OHA.

Defendants filed a Motion for Summary Judgment Establishing Plaintiff's Breach of Fiduciary Duty, which the court granted. This case remains pending.

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

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

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

that the new timeshare tax rate set forth in the Council's resolution is void due to violations of the Sunshine Law.

In August 2014, the Court denied the Defendants' Motion for Partial Summary Judgment. Plaintiff filed an amended complaint seeking a declaration that the timeshare tax rate for FY 2015 as well as for FY 2014 are void due to violations of the Sunshine Law, and discovery is ongoing. The jury trial was rescheduled for September 12, 2016.

Attorney Fees

Kanahele v. Maui County Council
2CC08-1-000115 (2nd Cir. Ct.)

This landmark case was discussed in detail in OIP's FY 2013 Annual Report and other communications. Briefly, in 2013, the Hawaii Supreme Court upheld the Intermediate Court of Appeal's (ICA) prior ruling that the Sunshine Law does not limit a continuance of a public meeting to just one time and concluded that Maui County Council (MCC) and one of its committees did not violate the Sunshine Law by continuing and reconvening their respective meetings beyond a single continuance. The Supreme Court, however, also held that memoranda sent by MCC members to all other MCC members did not fall within any Sunshine Law permitted interaction and concluded that they violated the Sunshine Law's spirit or requirements to decide or deliberate matters in open meetings.

The Supreme Court remanded the case to the Second Circuit Court for consideration of an attorney's fee award under section 92-12(c), HRS, where it remains pending.

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

Syngenta Seeds, Inc. v. County of Kauai
Civ. No. 14-00014 (U.S. 9th Cir.)

In a case previously reported in OIP's FY 2014 Annual Report, various companies engaged in the production and planting of genetically modified seeds on Kauai (Plaintiffs) filed a federal lawsuit against the County of Kauai that challenged the legality of a county legislative measure restricting the use of pesticides and the planting of genetically modified crops. Included among the plaintiff's 13 claims are alleged violations of Sunshine Law sections 92-4 (authority to conduct executive meetings) and 92-5 (matters that may be considered in executive session), HRS.

The federal District Court has issued an "Order on Preemption and Order on Various Motions" that invalidated the Kauai law because it was preempted by a comprehensive framework of state law, and "denied as moot" the alleged violations of the Sunshine Law. This case remains on appeal to the 9th Circuit.



Records Report System



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

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

OIP developed the Records Report System (RRS), a computer database, to facilitate collection of this information from agencies and to serve as a repository for all agency public reports required by the UIPA. The actual records remain with the agency.

As of FY 2015 year end, state and county agencies have reported 29,848 records. See **Figure 17**.



Records Report System

Status of Records Reported by Agencies: 2015 Update

Jurisdiction	Number of Records
State Executive Agencies	20,800
Legislature	836
Judiciary	1,645
City and County of Honolulu	3,909
County of Hawaii	947
County of Kauai	1,069
County of Maui	642
Total Records	29,848

Figure 17

RRS on the Internet

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

Key Information: What's Public

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

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

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



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

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

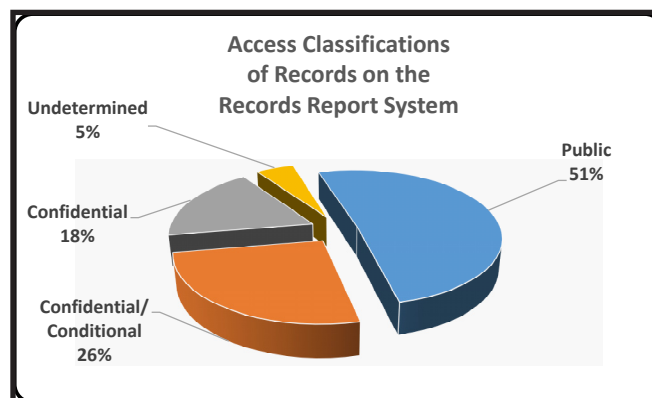


Figure 18