

Almost 83% (1,830) of all requesters in completed cases paid nothing in fees or costs for their record requests. Of the 384 requesters that paid any fees or costs, 53% paid less than \$5.00 and 32% paid between \$5.00 and \$49.99. Moreover, of the 384 requesters that paid any amount for fees and or costs, at least 35 requesters appear to represent law firms, media, or commercial or non-profit entities. Just two commercial entities accounted for 35% of the total amount paid by all requesters; these two entities were charged for costs only and paid a total of \$6,592.20. For a more detailed breakdown of the fees and costs paid by requesters, see **Figure 16** on page 52.

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

County Agencies' UIPA Record Request Log Results

FY 2016 was the second year that the counties participated in the Master UIPA Record Request Log. OIP prepared a separate report based on information posted by 79 agencies from all four counties. Each county's data was reported separately, then averaged with all counties' data. The counties' average results are summarized as follows.

Formal UIPA record requests to the counties constituted less than 1% of the estimated 151,254 total formal and routine record requests that agencies received in FY 2016. Seventy-nine county agencies reported receiving 1,080 formal written requests requiring a response under the UIPA, of which 1,045 (97%) were completed in FY 2016. Of the 1,045 completed cases, 82% were granted in full or in part, and 4% were denied in full. In 14% 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, county agencies took about nine work days, on average, to complete 961 typical and personal record requests, which is 92% of all

completed cases. It took over twice as many days (22 days) to complete 84 complex requests.

In terms of hours worked per request, the average number of search, review and segregation (SRS) hours for a typical county record request was .79, as compared to .74 for a personal record request and 7.34 for a complex record request. Although the 84 complex record requests constituted only 8% of all completed requests, they accounted for 20% (\$9,321) of the total gross fees and costs incurred by county agencies (\$46,815) and 18% (\$3,488) of the total amount recovered from all requesters (\$19,202).

County agencies recovered \$19,202 in total fees and costs from 1,045 requesters, which is almost 41% of the \$46,815 incurred by agencies in total gross fees and costs. Fifty-four percent of completed requests were granted \$30 fee waivers, while another 5% were granted \$60 public interest waivers. No fee waivers were reported in 41% of the cases, which may occur in personal record cases (because no fees may be charged for those) or when requests are denied, abandoned, or withdrawn, or the agency is unable to respond.

Over 73% (767) of all requesters in completed cases paid nothing in fees or costs for their county record requests. Of the 278 requesters that paid any fees or costs, 26.2% paid less than \$5.00 and 55% paid between \$5.00 and \$49.99. Only 52 requesters (18.7% of all paying requesters) paid \$50 or more per request, of whom at least 49 appeared to represent law firms, media, or commercial or non-profit entities. The maximum amount paid was \$4,000.00 to Hawaii County for fees. For a more detailed breakdown of the fees and costs paid by requesters, see **Figure 17** on page 53.

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

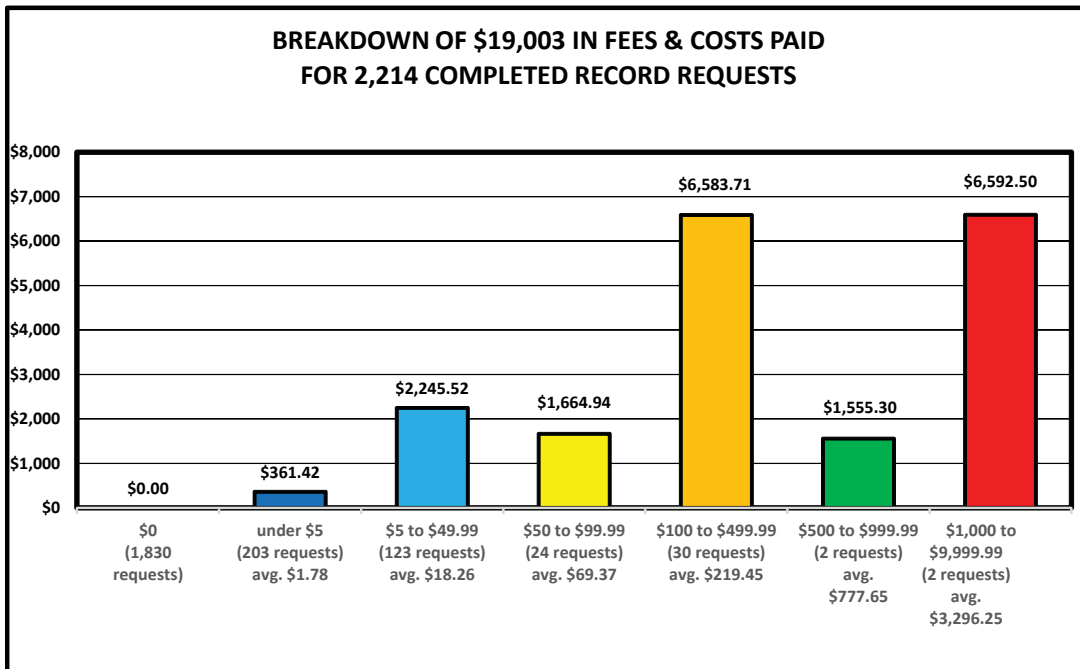


Figure 16

**STATE AGENCIES'
UIPA RECORD REQUEST LOG
RESULTS FOR FY 2016**

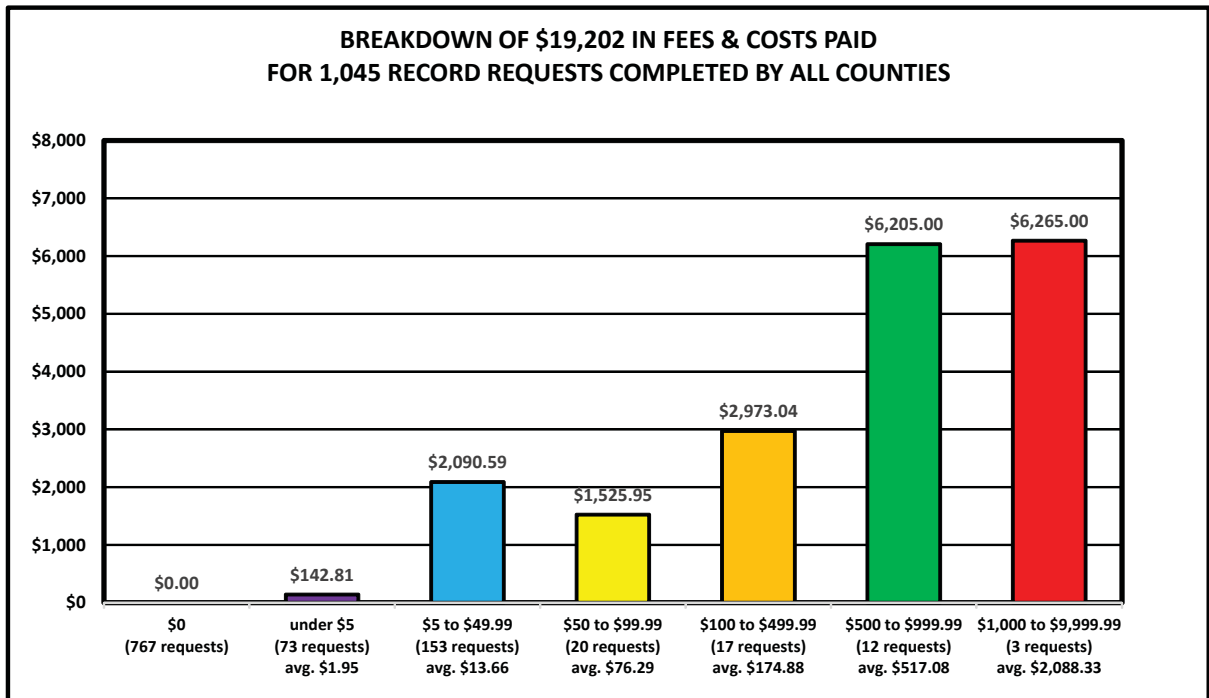


Figure 17

**COUNTY AGENCIES’
UIPA RECORD REQUEST LOG
RESULTS FOR FY 2016**

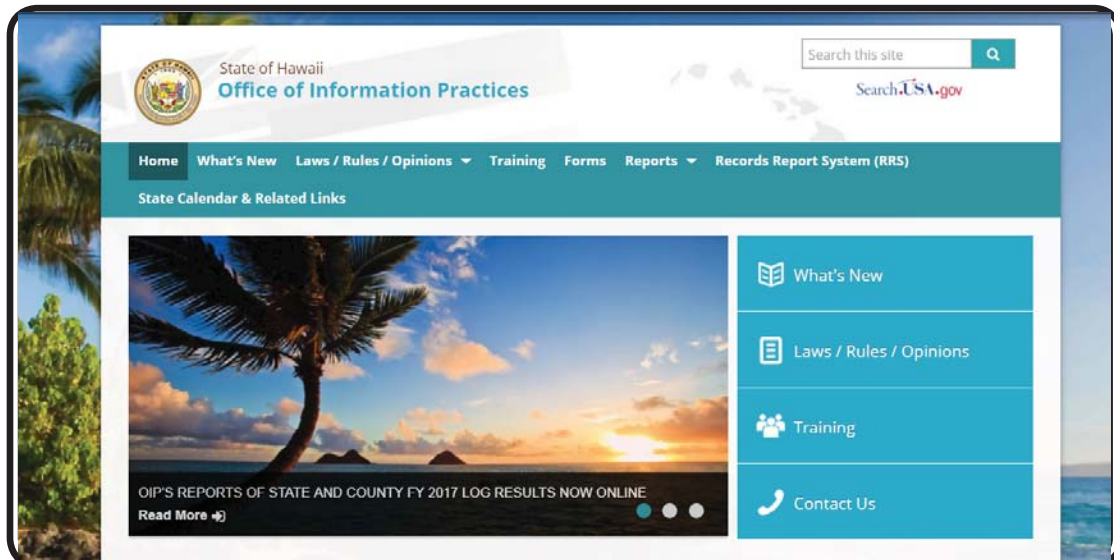


Communications

OIP's website at oip.hawaii.gov and the *What's New* articles that are emailed and posted on the website are important means of disseminating information on open government issues. In FY 2017, OIP continued its communications to the agencies and public, mainly through 22 *What's New* articles and 2 online or television interviews.

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

- The UIPA and the Sunshine Law statutes
- OIP's administrative rules
- OIP's 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 and links to the Records Report System
- *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 directly 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 current news and important information regarding OIP and open government issues, including timely updates on relevant legislation. To be added to or removed from OIP's *What's New* email list, please email 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 materials and a 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 materials and a 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. Draft and proposed rules, and informational materials, are also posted in this section.

➤ *Formal Opinions*: a chronological list of all OIP opinion letters; an updated and searchable 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.

In addition, this section links to the UIPA Record Request Log Reports, where you can find OIP's reports and charts summarizing the year-end data submitted by all state and county agencies.

“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.

“Related Links”

To expand your search, links are provided to other sites concerning freedom of information and privacy protection, organized by state and country. You can also 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 by the various departments and agencies are posted 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.



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 2017 year end, state and county agencies reported 29,893 record titles. See **Figure 18**.



Records Report System

Status of Records Reported by Agencies: 2017 Update

Jurisdiction	Number of Record Titles
State Executive Agencies	20,845
Legislature	836
Judiciary	1,645
City and County of Honolulu	3,910
County of Hawaii	946
County of Kauai	1,069
County of Maui	642
Total Record Titles	29,893

Figure 18

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 19**. 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 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 can use the RRS to determine which records contain confidential information and require special care.

Note that the RRS only lists government records by their titles 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.

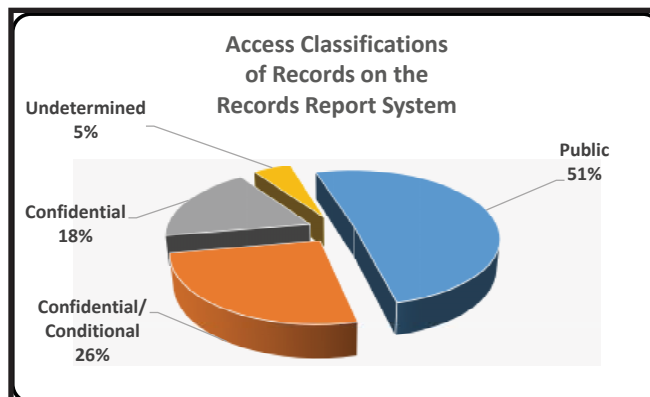


Figure 19

Legislation Report

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



to amend provisions that work counter to the legislative mandate of open government; or to provide for more efficient government as balanced

against government openness and privacy concerns. To 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 2017 legislative session, OIP reviewed and monitored 108 bills and resolutions affecting government information practices, and testified on 26 of these measures. OIP was most significantly impacted by the following legislation:

► **Act 165**, signed on July 12, 2017, enacts **S.B. 572, S.D. 1, H.D.1, C.D. 1**, which amends section 92F-26, HRS, to allow OIP to adopt additional rules regarding the UIPA that agencies must follow. The bill took effect on July 1, 2017.

The law previously allowed each agency to adopt its own rules to protect its records or prevent manifestly excessive interference with its duties. As revised, the law now allows OIP to adopt rules that will apply to all agencies, which promotes uniformity and consistency under the UIPA.

► **Act 64**, signed on June 29, 2017, enacts **H.B. 165, H.D. 1, S.D.2, C.D.1**. This act does the following:

(1) **Board packets for public inspection:** Boards must make board packets available for public inspection in the board's office at the time they are distributed to board members, to the extent that the documents are publicly disclosable under the UIPA. Disclosure is not required of executive session minutes, license applications, or other records for which the board cannot reasonably complete its redaction of non-public information in the time available before the public inspection required by the bill. Packets need not be mailed to requesters, but boards must accommodate requests for electronic access to the packet as soon as practicable.

(2) **Electronic notice of meetings:** Sunshine Law meeting notices must be posted on state and county electronic calendars, with copies to be provided for posting in a central location in paper or electronic format by the Lt. Governor's office for state boards and county clerks for county boards. Boards are still required to provide copies of the notice and agenda to the Lt. Governor's office or county clerk, but as the electronic calendar will provide the official notice required by the Sunshine Law, the failure to file timely copies of notices with the Lt. Governor's office or county clerks will not require cancellation of the meeting. At the same time that

the notice is electronically posted, boards must continue to send notices to requesters by postal mail, or electronically if so requested. The Sunshine Law will continue to require cancellation of a meeting if a board fails to comply with this amended requirement to notify requesters.

3) Meeting minutes may be kept in recorded form and must be posted online: In lieu of written minutes, a board may now keep its minutes in a digital or analog recording format (e.g., via a tape recorder) and provide a written summary that shall include: the date, time, and place of the meeting; the members of the board recorded as either present or absent, and the times when individual members entered or left the meeting; a record, by individual members, of motions and votes made by the board; and a time stamp or other reference indicating when in the recording the board began discussion of each agenda item and when motions and votes were made by the board.

Boards must post their written minutes, or minutes in recorded format with a written summary, on their website or an appropriate state or county website within forty days after the meeting.

To give boards and the posting bodies time to learn and implement the new requirements, the bill will take effect on July 1, 2018.



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.

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 2017, OIP monitored 40 litigation cases, of which 11 were new.

Summaries are provided below of the new lawsuits monitored by OIP in FY 2017 as well as updates of cases that closed by November 2017 or remain pending. The UIPA cases, which are the majority, are discussed first, followed by those involving the Sunshine Law.

UIPA Litigation:

Pono Choices Survey

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

State Representative Bob McDermott (Plaintiff) filed a 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 sought a declaratory judgment and preliminary and permanent injunctions ordering UH to disclose the requested records, and further sought an award of fees and costs. UH sought dismissal of all claims, and an award of its fees and costs. This case was dismissed by the court on February 23, 2016, based on Plaintiff's failure to file a pretrial statement. However, on April 11, 2016, the court issued an order granting Plaintiff's motion to set aside the dismissal. Plaintiff's pretrial statement was filed on April 27, 2016, and there has been no significant movement on the case since the last report in OIP's FY 2016 Annual Report.

Deliberative Process Privilege

Peer News LLC, dba Civil Beat
v. City and County of Honolulu and
Department of Budget and Fiscal Services
Civ. No. 15-1-0891-05 (1st Cir. Ct.)
CAAP-16-000114 (Intermediate Court of
Appeals)

Peer News LLC, dba Civil Beat (Plaintiff), requested from the City and County of Honolulu's Department of Budget and Fiscal Services (City) "each department's narrative budget memo for

changes to its administrative rules. Plaintiffs allege that the notice and agenda filed for the meeting did not provide sufficiently detailed notice of the proposed rule changes as required by section 92-7, HRS. Plaintiffs have asked the Second Circuit Court to invalidate the amendments to the rules that were approved by Respondent, which would have eliminated the 11 p.m. to 6 a.m. blackout on retail sales of alcohol and the cap on the number of hostess bars in Maui County. Plaintiffs also allege that Defendant violated the requirements in the Hawaii Administrative Procedures Act, chapter 91, HRS, regarding hearings for rule changes.

Note: In a Sunshine Law meeting on July 12, 2017, the Liquor Control Commission voted to reverse itself.

Access to Minutes of Closed Meetings

Akana v. Machado
Civ. 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. The Court granted the Defendants' Motion for Summary Judgment. According to media reports, the case was settled and Plaintiff wrote a letter of apology dated November 14, 2017, to Defendants.

Delegation of Authority to a Task Force and a Committee

Kauai Ferals v. Kauai County Council
Civ. No. 16-1-0142 (5th Cir. Ct.)

On Kauai, there has been disagreement between groups and individuals as to the appropriate and humane method to reduce the feral cat population and its impact on Kauai's ecology. Kauai Ferals (Plaintiff) filed a complaint in the Fifth Circuit Court for declaratory and injunctive relief against the Kauai County Council, County of Kauai and Councilmember Joann Yukimura (Defendants). Plaintiff seeks a declaratory judgment that the Council is bound by the Sunshine Law; the Feral Cat Task Force (FCTF) was a Sunshine Law board; the Council violated the Sunshine Law by improperly delegating powers and duties to the FCTF and the Feral Cat Ordinance Committee (OC); select members of the public had a privileged role in developing feral cat policy; and Councilmember Yukimura knowingly aided and abetted the FCTF and OC to violate the Sunshine Law. Plaintiff seeks an order enjoining Defendant Yukimura from introducing the draft ordinance from the FCTF and OC, and enjoining Defendants from delegating policymaking authority to any entity that does not comply with the Sunshine Law.

Defendants filed a Motion to Dismiss Complaint, which the Court denied. This case remains pending.

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*

As reported in OIP's FY 2015 Annual Report, the Office of Hawaiian Affairs (Plaintiff) appealed OIP's Opinion Letter No. 15-02, which concluded that Plaintiff'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, HRS, which was added to the UIPA in 2013 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. Plaintiff served its complaint on OIP and the members of the public who requested the OIP opinion being appealed, in many cases relying on service by publication. One of the members of the public filed an answer, as did OIP, and the court entered default against the others.

In April 2017, the court heard Plaintiff's motion for summary judgment, which it denied in an order issued May 1, 2017. Plaintiff's subsequent motion for reconsideration was denied on August 7, 2017.

Charter School Commission's Adjudicatory Function

*John Thatcher v. Hawaii State Public
Charter School Commission
15-1-1583-08 (1st Cir. Ct.)
CAAP-17-0000092 (Intermediate Court
of Appeals)*

On May 14, 2015, the Hawaii State Public Charter School Commission (Defendant) met and discussed the Department of Education's enrollment form, "SIS-10W" (Enrollment Form), and

issued a written decision regarding its use. The notice and agenda filed prior to this meeting did not include any item relating to the Enrollment Form.

Thereafter, John Thatcher (Plaintiff) filed suit on August 12, 2015, alleging that Defendant violated the Sunshine Law when, for its meeting of May 14, 2015, it "failed to give the public notice that any action, including but not limited to 'Decision Making' concerning the School's admissions form would be discussed and decided by the Defendant Commission;" actually discussed and decided on the use of the Enrollment Form; and did not accept oral and written testimony on the issue. In response, Defendant argued that, "[o]n May 14, 2015, exercising its adjudicatory function, during a closed, lunch break in its General Business Meeting, [Defendant] reviewed [the Enrollment Form and made a decision]." It also noted that prior to its May 14, 2015 meeting, Plaintiff had provided testimony during two prior meetings, February 26 and March 12, 2015.

On October 7, 2016, Defendant filed its Motion for Summary Judgment on the basis that Defendant "exercised its adjudicatory function and rendered a final decision without a public meeting – a meeting that was not required under Hawaii's Sunshine Law for the Commission's adjudicatory function," and because the Enrollment Form was an ongoing issue, Plaintiff had provided testimony at previous meetings. *See* HRS § 92-6 (a)(2) (regarding adjudicatory functions). The Court granted Defendant's Motion, and entered final judgment on February 1, 2017. Plaintiff filed a Notice of Appeal on February 23, 2017, and the appeal is pending before the Intermediate Court of Appeals.

Honolulu Police Commission

Civil Beat Law Center for the Public Interest, Inc. v. City and County of Honolulu
17-1-0142-01 (1st Cir. Ct.)

On January 4, 6, and 18, 2017, the Honolulu Police Commission (Defendant) entered into executive sessions to discuss personnel matters related to the Honolulu Chief of Police. On the relevant agendas, Defendant stated that sections 92-5(a)(2) and (4), HRS, permitted the executive sessions to “[t]o consider the hire, evaluation, dismissal, or discipline of an officer or employee or of charges brought against the officer or employee, where consideration of matters affecting privacy will be involved...” and “[t]o consult with the board’s attorney on questions and issues pertaining to the board’s powers, duties, privileges, immunities, and liabilities[,]” as related to the “Status of the [then Honolulu Chief of Police Louis Kealoha].”

The Civil Beat Law Center for the Public Interest, Inc. (Plaintiff) subsequently filed suit on January 26, 2017, alleging that Defendant had violated the Sunshine Law by “exceeding the scope of any permissible exemption” as sections 92-5(a)(2) and (4), HRS, were not applicable. Specifically, Plaintiff contended that section 92-5(a)(2), HRS, requires “an analysis of whether the personnel discussion involves private matters and a balancing of the privacy interests against the public interest in disclosure” and that the “Status of the Chief of Police” did not “pertain[] to the board’s powers, duties, privileges, immunities, and liabilities,” as required by section 92-5(a)(4), HRS, and was not “directly related” to the “consideration of matters affecting privacy.” In response, Defendant filed its Motion to Dismiss Plaintiff’s Complaint on February 16, 2017. An Order Granting Defendant’s Motion to Dismiss was filed on November 20, 2017, and Judgment was entered on November 30, 2017.

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, a homeowners’ association (Plaintiffs) filed suit in the Second Circuit Court alleging that the new Real Property Classification and Tax Rates for Timeshare Properties approved by the Maui County Council (Defendant) violated the Equal Protection clauses of the United States and Hawaii Constitutions because the rates intentionally and arbitrarily categorized and taxed non-resident timeshare owners differently from 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 rates set forth in the Defendant’s resolution were void due to violations of the Sunshine Law.

Plaintiffs filed an amended complaint seeking a declaration that the timeshare tax rates for FY 2015 as well as for FY 2014 were void due to violations of the Sunshine Law. In March 2017, the Court denied Defendant’s motion for partial summary judgment as to Plaintiffs’ Sunshine Law claims. The litigation is still pending, including the Sunshine Law claims.

