

Quick Review: Agency Disclosure Obligations During Pandemic August 28, 2020

During this COVID-19 pandemic, the media and the public have complained of not receiving complete data from government agencies. OIP encourages agencies to always be accountable and transparent, especially during these difficult times, and provides the following guidelines to help agencies and the public understand the requirements under Hawaii's public records law, particularly with respect to medical information.

First, Hawaii's public records law, the Uniform Information Practices Act (UIPA), chapter 92F, HRS, remains mostly in effect. Through a series of emergency proclamations, Governor Ige has limited the UIPA to allow government agencies to fully focus on responding to the pandemic. Most recently, the Governor issued his Twelfth Supplementary Proclamation, Exhibit G (SP12), which remains in effect until September 30, 2020, unless terminated or extended by a separate proclamation. SP12's main impact on the UIPA was suspending its deadlines.

Under SP12:

- The UIPA and its administrative rules are suspended to the extent they contain any deadlines for agencies, including deadlines for OIP, relating to requests for government records and complaints to OIP;
- **Agencies are nonetheless encouraged to respond to requests for government records during the emergency relief period, and at a minimum, must comply with these requirements:**
 - Acknowledge receipt of UIPA requests. If a request is not acknowledged, the requester may ask OIP to verify that the agency received the UIPA request;
 - Retain UIPA requests and not destroy requested records while a UIPA request is pending;
 - Respond in good faith and without substantial delay to UIPA requests that do not require redaction or substantial review of records; and
 - Prioritize responding to UIPA requests made in the public interest when the requester has the primary intent and actual ability to widely disseminate the requested information to the general public.
- Record requests not answered during the emergency relief period must be answered in a reasonable period of time (no later than ten business days) after the suspension of laws is lifted.

Despite the temporary suspension of the UIPA's deadlines, **OIP strongly encourages agencies to provide timely responses to record requests.**

Waiting until the expiration of SP12 (or subsequent orders) to respond to record requests could result in agencies having a large number of UIPA requests to fulfill, all within ten business days after the suspension of the UIPA deadlines expires. Delay in disclosure may also exacerbate misinformation and the public's mistrust of

government when reliable information and government action are needed the most to allay the public's concerns and overcome the pandemic. At the same time, the public and media should be reasonable about making requests to agencies that may be overwhelmed and understaffed during this unprecedented emergency.

As always, agencies and the public may seek OIP's Attorney of the Day (AOD) informal advice regarding their questions about record requests. During the pandemic, OIP's preferred method of communication is by email at oiip@hawaii.gov. OIP can also be reached by mail at 250 S. Hotel Street, Suite 107, Honolulu, Hawaii, 96813, or by telephone at (808) 586-1400.

Medical Information Carries Privacy Interests But De-identified Medical Information is Disclosable Under the UIPA and HIPAA

Under the UIPA, all government records are presumed public unless one of five statutory exceptions to disclosure applies. Some requesters, including the media and legislators, have complained that agency information regarding COVID-19 is not being disclosed due to privacy concerns. Protecting individual privacy¹ is a valid reason to withhold government records or portions thereof, and medical information about individuals is protected from disclosure in most instances under the UIPA's privacy exception.

The federal Health Insurance Portability and Accountability Act of 1996 (HIPAA), and the federal Department of Health and Human Services rules (Privacy Rule) promulgated under HIPAA, prohibit disclosure of medical information (termed "protected health information" or "PHI") about individuals, and information protected by HIPAA is also protected under the UIPA. HIPAA only applies to "covered entities" as defined in the Privacy Rule, which include health plans and health care providers, their business associates, and others. Government agencies falling into one of those categories can be covered entities. Agencies that are not covered entities are not subject to HIPAA or the Privacy Rule, however, they should still treat medical information similarly to how covered entities would because whether HIPAA directly applies or not, the UIPA's privacy exception generally protects medical information about individuals from disclosure.

Covered entities may disclose information about an **identifiable** patient only with written authorization from the patient or the patient's personal representative, but **once data has been de-identified, covered entities can disclose it without any limitation**. De-identified information is information that has had the patient's name and other identifying information redacted, so that the remaining information cannot be used to identify the individual patient.

¹ While entities such as corporations and nonprofit organizations may have trade secrets and other confidential business information that are protected from disclosure under the UIPA, they have no right to privacy, which is granted only to individuals.

De-identified information is no longer considered PHI and does not fall under the same restrictions as PHI.

In summary, it is important for the public to understand that agencies may withhold information that falls under the UIPA's privacy exception and that agencies have a legal obligation to protect individual privacy as required under the Hawaii Constitution, and in some cases, federal law such as HIPAA and the Privacy Rule. It is equally important for agencies to understand that they still have UIPA obligations during the pandemic and that disclosing de-identified medical information is allowed under state and federal law. **OIP advises agencies to respond to record requests as they are encouraged to do by SP12, and to disclose de-identified health information and other requested information to the extent it does not fall under one of the UIPA's exceptions,** so as to allay public fear and combat misinformation during these trying times.