

OIP UIPA Basic Training Video Transcript, Part 1 (revised November 2021) (29 minutes, 46 seconds total) (time stamps are approximate)

Please note: This transcript tracks the closed captioned UIPA Basic Training Video Part 1 and refers to the slides contained in the “all slides” handout for Part 1, which are accessed via the link to the “UIPA Basic Training Video and Materials” found on OIP’s Training page at oip.hawaii.gov. Although the video is closed captioned, this transcript may be helpful to people who prefer to read the training or keep this in lieu of taking their own notes.

Slide 1: The Uniform Information Practice Act – Part 1 (0:00:00)

Good morning, good evening, or good afternoon, depending on where you are. Welcome to the Uniform Information Practices Act. Now I'm going to be taking giving you the opportunity to take a break about halfway through this presentation, and the total presentation, including Part 2, should be about an hour and a half.

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

Slide 2: Policy (0:1:03)

But to begin with, now we're going to start with the purpose and the policy behind the Uniform Information Practices Act. Now, the statute itself says that “[I]t is state policy that the formation and conduct of public policy—the discussions, deliberations, decisions, and actions of government agencies—shall be conducted as openly as possible.” And the Uniform Information Practices Act, the state's record, carries out that policy.

Slide 3: What is the Purpose of the UIPA? (0:1:26)

So, there are several purposes to the UIPA, and we start out by talking about the policy and the purpose behind the law because those come into play whenever there's a question about either what the law requires in a given factual situation, or in those instances when it is perhaps not clear what the statute itself means--does this comma placed here mean this or that?

So again, we, OIP, are charged with interpreting when there's an ambiguity in favor of openness and a court likewise would be, and this would be these questions of either how does the law apply in a given factual setting, or what does the law mean, what does this phrase in the statute mean? So, we go over the purpose and the policy behind the law because that helps you when you're applying it to understand what the law is intended to do, and so when questions arise in your own use of this law, you have a better idea of what the answer might be.

Now, a primary purpose of the UIPA is to protect the public's interest in disclosure. The law is also intended to open up the governmental process to public scrutiny and public participation. And then the law is also intended to make the government accountable to individuals in the collection, use and dissemination of information relating to them.

So again, the law not just carries out the government interest in opening up information to the public, but also is an effort to make the government accountable to individuals for information the government has about those individuals.

Slide 4: UIPA Power Points (things to remember)(0:3:24)

I'm going to give you a road map of the topics we're going to cover during the course of this presentation. First, we're going to go over the general concept that records are presumed public. Then we're going to go over the exceptions to disclosure under the law. We're going to go over the mechanics of responding to a request. And then, finally, we're going to talk a little bit about personal records, records of record request made by an individual about that person himself or herself, and how they're treated differently.

So these are four key points that I'd like you to come away from this remembering, and they are also the four points that we're going to be covering in more detail as we go along.

Slide 5: UIPA Power Points (things to remember) (0:4:19)

And we'll start with this first point, that records are presumed public.

Slide 6: General Rule (0:4:26) – 4:51

Now the general rule behind this law is that government records are open to public inspection and copying unless restricted or closed by law. In other words, the default is that government records are open and it's up to the agency to demonstrate that no in this case there is a legal basis for withholding them.

Slide 7: General Rule (0:4:52)

And I want to emphasize that this applies to government records, because then you have the question of what is a government record. Generally speaking, a government record is any information in tangible form that is maintained by an agency. So that would include the obvious paper records.

It would also include records in electronic form. It would include video recordings. It would include pictures, photographs, again anything in tangible form. The other boundary, of course is what is "maintained." Well, the obvious would be your files that you use all the time in your office. Generally speaking, everything in your office is going to be a government record. There's not a requirement that they be part of some sort of formal system of files. But of course, there are going to be limits on it. Things like your phone bill that you stuck in your desk because you're going to pay it over lunch time doesn't become a government record just because it's stuck in your desk. And similarly there might be things like notes that you take that you're not filing anywhere, you're just throwing away after a meeting, and that something like that might not be.

But generally speaking, anything in your office. That's information stored in tangible form would be considered a government record, and "maintained" would also extend to information records that an agency has an administrative right to. For instance, an agency has a contractor performing some function of the agency and the contract provides agency shall have the right to review all records relating to the performance of this function or performance of this contract. The agency in that case would have administrative control over those records because it has a

legal right to get them whenever it wants to, and so those records relating to the performance of that contract would then also be considered records of the agency administratively controlled. So again, that's background on what a government record is, and the general presumption is that government records are open to the public. It's up to the agency to show that they are restricted or closed by law.

Slide 8: UIPA Power Points (things to remember) (0:7:16)

We're going to move to the second of the four major points that we're going over, and we're going to, having dealt with the presumption that records are public, we're now going to talk about the exceptions, the situations in which an agency can actually withhold or redact a record.

Slide 9: (Exceptions to Disclosure) (0:7:37) OK, so we're now going to go on to the five exceptions to disclosure, and I'm going to start by showing you the basic structure of the statute. You can see that the category of government records would include both the public requests and the personal requests. Basically, it's not actually two different types of records, it's two different types of record requests, so you could have the same record, and it's a public request if it's made by just anybody, it doesn't matter who in the public. It's a personal request if it's made by somebody who is referred to in that record, who the record is actually about.

So, we're talking now about Part 2, public record requests.

So, the exceptions that we're looking at and going to discuss are the exceptions that are found in section 92F-13 of the Hawaii Revised Statutes.

Slide 10: Public Records, Part II of the UIPA (0:08:31)

So again, we're talking about Part 2 of the UIPA, public record requests at this point.

Slide 11: Required Disclosure (0:8:42)

Now we said we were about to get into the exceptions to disclosure, and indeed the general rule is that records are presumed public, but there are exceptions that may apply, and the agency has the burden to establish that those exceptions do apply. However, there's an exception to that general rule, which is that there's basically a laundry list of situations. This is in section 92F-12, HRS, a laundry list of situations where specified categories of records are public, without exception. And the reason for this is these are in some instances types of records that were historically public, and the legislature wanted at the time it passed UIPA, wanted to ensure that these records would remain public, that you wouldn't have agencies saying, well, there's this new law now. So maybe land ownership records now have a privacy interest. They wanted to make sure that historically public records remained public.

There are other types of information where they had not been historically public, but the legislature had really studied the issue at the time it passed UIPA and wanted to draw a specific balance. So for instance, agency rules policy and interpretations, final opinions and orders, things that are the law of the agency, government procurement information. Although this one actually is still subject to withholding for confidential business information, land ownership, state leases, contract hires, minutes of public meetings, certified payroll records, building permit information

that some of the historically public rosters of licensees or permit holders. Government personnel information, now this isn't everything.

This isn't getting into evaluations, let's say. But for government employees, there are some types of information, salary, exact or salary range, depending on the status.

Hours worked at position, number, job description, some basic resume information that shows the person is qualified for the position. There is some information like that that is automatically public about government employees. Employee misconduct. This is for government employees that have actually been suspended or terminated, only terminated in the case of a police officer for misconduct, uhm, at that point, that information would become public. Um, information where the individual it refers to has consented or where it's already made public by law. These are some examples of information where it would be public and exceptions would not apply. And again this is kind of an exception to the exceptions. It's an exception to the general rule that records are presumed public, but exceptions may apply.

Slide 12: 5 Exceptions to Disclosure (0:11:57)

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

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

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

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

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

Slide 13: 5 Exceptions to Disclosure (0:13:45)

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

Slide 14: Privacy Exception (0:14:09)

The privacy exception applies in a situation where you have a clearly unwarranted invasion of personal privacy, if the record or the information were disclosed.

Slide 15: Privacy Exception (personal privacy) (0:14:25)

And let me emphasize the personal privacy. This is intended to protect the privacy interests of individuals, of actual persons. So it is not going to apply to, say, financial information of a corporation that might fall under frustration, in appropriate circumstances, but only actual persons, individuals, have a privacy interest that would be protected by the privacy exception.

So, to find this clearly unwarranted invasion of personal privacy you would need.

Slide 16: Privacy Exception (Significant privacy interest) (0:15:01)

First, a significant privacy interest in the information.

Slide 17: Privacy Exception (Not outweighed by public interest in disclosure) (0:15:08)

And then you would also need to find that that privacy interest was not outweighed by the public's interest in disclosure.

It's a balancing test. Generally speaking, the significant privacy, except interest, is going to be enough and generally speaking, as an agency, when you find a significant privacy interest, you will go ahead and withhold. But if OIP or court is looking at it, we've got to look at the balance. If there is a high public interest in disclosure that is strong enough to actually outweigh that significant privacy interest then the privacy exception is not going to apply.

Slide 18: Significant Privacy Interests (0:15:49)

There are some examples of significant privacy interests in the legislative history, and there are other examples that OIP has developed in the course of our opinions over the years.

So, for instance, medical information is one such, Social Security numbers, home contact information, personal contact information. This would include personal cell numbers, home addresses, home phone numbers, personal email information, financial information of an individual. The fact that someone's name shows up as part of an investigation into a criminal law issue, and this isn't just that somebody shows up as a suspect. Really, this applies whenever somebody's name comes up in connection with, even if it's as the victim or as a potential witness, there is a privacy interest. Uh. Social services, the fact that someone is a recipient of social services or of welfare benefits.

And then personnel file information. Now, please note that for government employees there was some types of personnel information that is automatically public, we discussed those, when we were talking about that laundry list, the information such as the hours kept, the general resume information, the salary or salary range.

But other types of personnel file information do carry a significant privacy interest, and then for private sector employees, personnel information about private sector employees, generally, carries a significant privacy interests.

Slide 19: Public Interest In Disclosure (0:17:39)

We then moved to the balancing test. Again, we need to balance the privacy interest against the public's interest in disclosure. Now the public interest in disclosure is, basically a question of whether the information is going to shed light on an agency's performance. Is it going to shed light on the conduct of government officials? Is it going to promote governmental accountability? And this is similar to the type of public interest we might think of in the sense that is it newsworthy, are people interested in it. But it's not identical, so I'm going to give you an example to kind of point out the differences there of 2 different home invasion situations.

Now in the first of these, the Dana Ireland, I'm sorry, not 2 different home invasions, 2 different police investigation situations. And the first of these, the Dana Ireland case on the Big Island, from somewhat over a decade ago, ah. There was a lot of interest in looking at the investigation files.

And it was because there were questions being raised about the performance of the Police Department in that case. So, it was for purposes of governmental accountability. There were questions raised about how government had performed in that situation and it was for that reason that the media was interested. So, that was a case where the newsworthiness of the information really did align with the public interest in disclosure. There was a strong public interest.

Another situation, there was a home invasion, about maybe five years ago, of the home of one of the "Lost" actors, and there was media interest in that because it was a "Lost" actor. And, of course we have to know everything they do. In that case, however, the newsworthiness would not have aligned with the public interest in disclosure. There was no reason to think that the investigation file in that case was any different from the investigation file for any other home invasion, as far as the agency's performance went, so there wouldn't be a heightened public interest in disclosure in that instance.

So again, it generally is the same thing as newsworthiness, but the public interest in disclosure is specifically in shedding light on how the agency is doing its job, which isn't always identical to newsworthiness.

Slide 20: 5 Exceptions to Disclosure (Frustration Exception) (0:20:10)

So, moving on to the frustration exception.

Slide 21: Frustration Exception (0:20:14)

The frustration exception allows an agency to withhold information to avoid frustration of a legitimate government function. And again, this is kind of an umbrella. This this exception sounds very broad. It was meant to cover situations that were actually different, more specific exceptions under the federal Freedom of Information Act, which was in part a model for our law.

Slide 22: Examples of "Frustration" (0:20:46)

So, I'm going to give you some examples of where frustration specifically applies. Where you have an ongoing investigation. That could be a criminal investigation or an administrative or civil investigation or internal investigation, but where you have an open investigation, it would frustrate the agency's ability to investigate if it had to open up the files partway through when the

investigation is not yet complete.

Now this particular type of frustration goes away after the investigation is complete. And at that point the agency would need to see whether there is still a need to withhold any part of the files for some other reason.

Slide 23: Examples of “Frustration” (Confidential Sources) (0:21:34)

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

So basically, you need to have both, that the information itself is useful to the agency, and the fact that the person for good reason, is unwilling to give that information if they're going to be identified. And again, the confidential source form of frustration is about protecting the identity of the source. It doesn't automatically protect everything the person said, you're trying to protect the identity, but you only withhold or redact the information given, to the extent that it would actually identify the person.

Slide 24: Examples of “Frustration” (Proprietary Information) (0:22:29)

Proprietary information, this would include things that are subject to copyright, for instance, or to trademark. If you, for instance, they have, yeah, well, let's say you have Windows operating system on your government owned computer and somebody says, well, I would like to get a copy of the Windows operating system because you have it, it's information in tangible form on a government computer, so it's a government record. This this would allow you to avoid getting dinged for copyright violation and to say, well, it's proprietary information, so that again, it's generally allowing you to protect copyright.

Slide 25: Examples of “Frustration” (Confidential Business Information) (0:23:16)

Another example is confidential business information.

Slide 26: Examples of “Frustration” (Confidential Business Information) (0:23:19)

This would apply where you have trade secrets or where you have confidential commercial and financial information that would cause substantial competitive harm if it were disclosed. So you need to have, well, first of all, you need to have information that the business has actually kept confidential. That's usually pretty straightforward. You need to have a competitive market in order to cause competitive harm. Information has to be commercial and financial or financial in nature. So, there are some areas where this applies fairly readily.

For instance, information that would reveal a business' profit margin that that's pretty easy to protect. So, profit figures, or in the case of a government contractor, where the contract price is public typically overhead can be withheld because overhead figures would then, combined with the contract price, reveal the profit. Other types of information theoretically could be withheld, but it's a little bit more speculative if you have a business saying well this this whole narrative, we think has value or our competitors might want to simply copy our write up and use that.

Those get more dubious but again, it's something that's there and it's really a question of whether the facts are there to support a claim that disclosure would cause substantial competitive harm.

Slide 27: Interagency Disclosure (0:24:58)

Now this, we've run through the exceptions, but I'm going to talk briefly about interagency disclosure also, before we take our pause, our brief break and it's up to you, of course. This is a video on going online, so it's up to you to take a break if you want to, but I would suggest we go through interagency disclosure first.

Slide 28: Interagency Disclosure (0:25:28)

Interagency disclosure is a situation where one agency wants to disclose to another agency information that could be withheld from the general public under the UIPA exceptions. So, in other words, Agency A wants to disclose something to Agency B, but Agency A doesn't want to have it be treated as a public disclosure and now maybe Agency A has waived its ability to withhold that information from the public generally. And agency A wants to be sure that it's going to be kept confidential. So this statute and this is section 92F-19 in the Hawaii Revised Statutes, this section allows for interagency disclosure when one of a list of circumstances is present.

And there is a catchall, which is the one that's showing on screen right now, an agency, state, or county agency can disclose to another state or county agency information that would otherwise be confidential when the disclosure is required for the receiving agency to perform its duties, the receiving agency needs it, in other words, and disclosure is either going to be compatible with the purpose for which the information was collected or at least reasonably consistent with the expected use.

This catchall is not that hard to meet. If receiving agency is able to demonstrate no, really, we do need this information, it's generally not that hard to demonstrate that it is compatible with the purpose for which it was collected, or at least reasonably consistent with the expected use. But you certainly could come up with instances in which perhaps it would be too much of a stretch. My purely hypothetical example would be, let's say that you have a Department of Health study where it's getting medical information about people's DNA profile to use in a long term study of susceptibility to disease, let's say, and then HPD, and again, this is hypothetical, they haven't done this, but then HPD, let's say then says, oh well, we would like to get the database of the DNA profiles because we can add it to our DNA database and it might help us fight crime.

That example, I think, is one where we would say OK, that is both not compatible with the purpose for which it was collected, and it is also not at all consistent with the expected use and is basically, too far of a stretch, and therefore even though HPD may be able to make a case that no really we need this, it'll help us fight crime more effectively. It still wouldn't fall under this catchall category for interagency disclosure.

Slide 29: Interagency Disclosure (0:29:25)

Some of the other situations in which interagency disclosure is specifically allowed would be disclosure to the state archives, disclosure based on a written request for civil or criminal law

enforcement activities and this one I should note would also apply for a request coming from the federal government or from the government of another state or possibly even a foreign country. Again, generally you need a written request, although in an emergency situation limited information could be disclosed based on an oral request.

Disclosure to the legislature or to the County Council or a subcommittee thereof. Please note, this does not apply to individual legislators or County Council members. Rather, it allows sharing with the body of the legislature or Council or committee. Disclosure pursuant to court order, to the auditor, LRB, the Ombudsman, DHRD. So as long as it's in one of these categories, you can share without waiving your ability to withhold it from the general public and the receiving agency is to keep it confidential to the same extent as the originating agency.

Slide 30: Break Time! (End of Part 1) (0:29:44)

Break Time!