

Office of Information Practices

State of Hawaii

Annual Report 2021



This report to the Governor and the Legislature summarizes the activities and findings of the Office of Information Practices from July 1, 2020, to June 30, 2021, 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).

Abbreviations

Abbreviations used throughout this report:

AG - Attorney General's Office

AOD - Attorney of the Day

CORR - Correspondence File

ETS - Office of Enterprise Technology Services

**FOIA - Freedom of Information Act (federal),
5 U.S.C. § 522**

FY - Fiscal Year

HAR - Hawaii Administrative Rules

HRS - Hawaii Revised Statutes

HSC - Hawaii Supreme Court

ICA - Intermediate Court of Appeals

Log - UIPA Record Request Log

OHA - Office of Hawaiian Affairs

OIP - Office of Information Practices

Open Data Law - Act 263, SLH 2013 (*see* HRS § 27-44)

RFA - Request for Assistance

RFO - Request for Opinion

RRS - Records Report System

Sunshine Law - Hawaii's open meetings law (part I of chapter 92, HRS)

UH - University of Hawaii

UIPA - Uniform Information Practices Act (chapter 92F, HRS)

*Some abbreviations defined within a specific section are
defined in that section and are not listed here.*

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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 (HRS), 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 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.

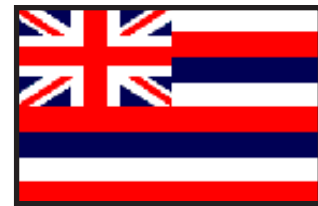
However, the Legislature also recognized that “[t]he policy of conducting government business as openly as possible must be tempered by a recognition of the right of the people to privacy, as embodied in section 6 and section 7 of Article I of the Constitution of the State of Hawaii.”

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.

The Legislature also exercised great foresight in 1988 by creating a single agency—the State Office of Information Practices (OIP)—to administer the UIPA, with broad jurisdiction over all State and county agencies, including the Legislature, Judiciary, University of Hawaii, Office of Hawaiian Affairs, and County Councils. As an independent, neutral agency, OIP promulgates the UIPA’s administrative rules and provides uniform interpretation of the law, training, and dispute resolution.

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 advance notice and 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.

Pursuant to sections 92F-42(7) and 92-1.5, HRS, this Annual Report to the Governor and the Legislature summarizes OIP’s activities and findings regarding the UIPA and Sunshine Law for fiscal year (FY) 2021, which began on July 1, 2020 and ended on June 30, 2021.



Executive Summary

OIP's mission statement is "ensuring open government while protecting individual privacy." More specifically, OIP seeks to promote government transparency while respecting people's privacy rights by fairly and reasonably administering the UIPA, which provides open access to government records, and the Sunshine Law, which provides open access to public meetings.

Additionally, following the enactment of Act 263, SLH 2013 (see HRS § 27-44) (Open Data Law), 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 FY 2021, which began on July 1, 2020, and ended on June 30, 2021.

OIP Service Overview FY 2016-2021						
	2016	2017	2018	2019	2020	2021
Total Requests for OIP's Services	1,162	1,234	1,127	1,127	1,168	874
Informal Requests (AODs)	964	956	945	963	990	719
Formal Requests Opened	198	278	182	164	178	155
Formal Requests Resolved	208	241	201	213	193	129
Formal Cases Pending	114	150	131	82	67	93
Live Training	11	9	6	11	6	0
Training Materials Added/Revised	12	6	9	14	11	1
Legislation Monitored	175	108	93	185	146	161
Lawsuits Monitored	44	40	38	40	45	45
Public Communications	30	30	25	25	26	30

Figure 1

OIP's jurisdiction extends over State, county, and independent agencies and boards in all branches of government, and thus includes the Governor, Lt. Governor, Judiciary, Legislature, University of Hawaii (UH), Office of Hawaiian Affairs (OHA), and all county councils. OIP assists the attorneys, staff, and volunteers for all government agencies and boards, as well as the general public, 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 decision maker, OIP resolves UIPA and Sunshine Law disputes through a free and informal process that is not a contested case or judicial proceeding. OIP's decisions may be appealed to the courts and are also enforceable by the courts.

Besides resolving formal cases through opinions or correspondence, OIP provides informal, same-day advice over the telephone, via mail or email, or in person through its Attorney of the Day (AOD) service. OIP prepares extensive training materials, including online training programs. During the legislative session, OIP typically monitors over a hundred bills and resolutions and provides testimony and proposals on legislation impacting open government issues. OIP also monitors lawsuits that involve the UIPA, Sunshine Law, or OIP. OIP proactively undertakes special projects, such as the UIPA Record Request Log or drafting legislative proposals, and it must occasionally review and 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.

For many years, OIP has done this work, along with many other duties, with only 8.5 full-time equivalent (FTE) authorized positions, which includes five staff attorneys. *See Figure 1.* In FY 2020, while it had its full complement of experienced employees, OIP was able to substantially reduce its backlog, complete other statutory duties, and undertake new initiatives,

such as its new Legislation webpage providing easy access to important legislative history and to new or pending legislative proposals.

OIP's successes in FY 2020, however, were short-lived because of the State's challenges resulting from the COVID-19 pandemic. On March 16, 2020, Governor David Ige issued an emergency order that suspended the UIPA in its entirety, which thus suspended all of OIP's powers and duties. On May 5, 2020, OIP's powers and duties were restored, but the UIPA deadlines were suspended throughout the remainder of FY 2021. Additionally, the Sunshine Law was suspended to allow for remotely held meetings without the requirement for an in-person public meeting.

Although OIP continued to work despite the suspension of its powers and duties, the various emergency orders limited OIP's ability to obtain timely responses in formal cases filed in FY 2021. Additionally, in early FY 2021, OIP uncharacteristically lost two experienced staff attorneys and its Administrative Assistant due to retirement and personal reasons. Because of the State's hiring freeze, OIP was restricted from filling these vacancies and operated for most of 2021 with only 65% of its authorized positions. With only three of five staff attorneys working for most of FY 2021, OIP's productivity suffered.

Nevertheless, OIP was successful in shepherding passage of Act 220 during 2021, which amended the Sunshine Law to allow remote meetings online. Therefore, even without the Governor's emergency orders, Sunshine Law boards will be able to continue providing expanded public access through online meetings when the law goes into effect on January 1, 2022. In the meantime, OIP worked to update its online training materials to prepare boards for implementation of the new law.

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

OIP's budget allocation is the net amount that it was authorized to use of the legislatively appropriated amount and any adjustments for collectively bargained increases, minus administratively imposed budget restrictions. OIP's total legislative appropriation for FY 2021 was \$769,837 and it retroactively received \$33,142 in collective bargaining increases for FY 2020-21, for a total of \$802,979. Due to budget restrictions of \$76,984, however, OIP's total allocation was \$725,995, of which \$703,671 was allocated to personnel costs and \$22,324 to other current expenses. *See Figure 3* on page 20.

Although OIP's allocated amounts increased by 3% over the prior year, OIP actually spent 6.3% less, because of its inability to fill vacancies due to the State's hiring freeze imposed during the COVID-19 pandemic. Thus, in FY 2021, OIP's actual expenditures totalled \$660,137.

As in the prior year, OIP had 8.5 FTE total approved positions in FY 2021. While this number included OIP's five staff attorney positions, two attorneys left OIP in July 2020 for retirement or personal reasons. OIP's Administrative Assistant also left OIP in October 2020 to move from Hawaii. It was not until OIP received an exemption from the hiring freeze that it was finally able to fill two of three vacant positions in late March and April, 2021. Thus, OIP operated for most of FY 2021 with only 5.5 FTE positions, which included only three of five staff attorneys.

Like the 6.3% lower expenditures compared to allocations, *Figure 3* on page 20 does not reflect OIP's uncharacteristic loss of 35% of its experienced team.

Legal Guidance, Assistance, and Dispute Resolution

OIP was hampered in FY 2021 by the emergency orders suspending its powers and deadlines, as well as the unfilled vacancies in three of its 8.5

positions for most of FY 2021. Even with its office closed for a part of the time due to the COVID-19 pandemic, OIP's employees continued to telework and performed OIP's core functions.

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 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 under the UIPA; appeals to OIP may be filed following agencies' denial of access to records; and OIP's advisory opinions are sought regarding the rights of individuals or the functions and responsibilities of State and county agencies and boards under the UIPA and the Sunshine Law.

In FY 2021, OIP received 155 formal and 719 informal requests for assistance, for a total of 874 requests, which is 294 (25%) less than the 1,168 requests received in FY 2020. *See Figure 1* on page 6. OIP resolved 828 (95%) of all formal and informal requests for assistance received in FY 2021 in the same fiscal year.

Over 82% (719) of the total requests for OIP's services are informal requests that are typically responded to within the same day through the AOD service. Nearly 83% (595) of the AOD inquiries in FY 2021 came from State and county agencies and boards seeking guidance to ensure compliance with the UIPA and Sunshine Law, while the balance (124) came from the general public. *See Figure 6* on page 26. Although AOD inquiries take a significant amount of the staff attorneys' time, agencies usually conform to this general advice given informally, which thus prevents or quickly resolves many disputes that would otherwise lead to more labor-intensive formal cases.

Many situations, however, are not amenable to quick resolution through informal advice and OIP must instead open formal cases, which require much more time to investigate, research, review, and resolve. In FY 2021, OIP opened 155 formal

cases, compared to 178 formal cases opened in FY 2020. At least 30% (46 of 155) of the formal cases were filed by repeat requesters.

Although the number of new formal cases decreased by 20% in FY 2021, OIP closed 129, or 33% less, due to the loss of two of its five staff attorneys. While OIP began the year by successfully reducing its backlog of pending cases by 18% to its lowest level in over a decade, the backlog grew from 67 to 93 cases (39% increase) by the end of the year. See **Figure 4** on page 22.

Of the 93 case backlog, 46 were filed in FY 2021 and 47 were filed in FY 2020 or earlier. OIP resolved 109 of the 155 FY 2021 new cases (70%) in the same year they were filed. When AODs are included, OIP resolved 95% (828 of 874) of all FY 2021 formal and informal requests for assistance in the same year they were filed and 82% (719 of 874) usually within the same day they were filed.

Most of the formal cases are resolved through correspondence or voluntary compliance with OIP's informal advice. Appeals and requests for opinions, however, often require more time-consuming written decisions that may be subjected to judicial review. In FY 2021, OIP issued two formal opinions and five informal opinions, for a total of seven opinions. Summaries of the opinions begin on page 33.

Education, Open Data, and Communications

OIP relies heavily upon its website to cost-effectively provide free and readily available training and general advice on the UIPA and Sunshine Law to agencies, boards, and members of the public. In FY 2021, OIP had a total of 89 training materials and forms on its website. In FY 2021, OIP revised or added one training material.

In FY 2020, OIP added a new "Legislation" page to its website, where it has compiled for easy public access the legislative history behind

the enactment of and amendments to the UIPA, Sunshine Law, and the tax statute providing for appeals to OIP in challenges regarding the disclosure of written tax opinions.

The Legislation page was updated in FY 2021 to add the final versions and legislative history of important proposed or adopted legislation concerning the UIPA, Sunshine Law, or OIP, including Act 220, SLH 2021, which amends the Sunshine Law to allow for remote, online meetings, effective January 1, 2022.

The Legislation page adds to OIP's educational and open data efforts, which include the UIPA Record Request Log (Log) that OIP developed in 2012. Today, all State, county, and independent agencies—including the Governor's Office, Lt. Governor's Office, Judiciary, Legislature, UH, OHA, and all County Mayors and Councils—use the Log to track record requests and ensure compliance with the UIPA.

The Log provides OIP and the public with easily accessible information and accountability as to how many UIPA record requests are being made, how they are being resolved, how long they take to be completed, and how much they are costing the government and requesters. 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. 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 to the internet to make it more readily accessible to the public.

Each year, OIP prepares year-end reports summarizing the data from State, county, and independent agencies, which is consolidated on the Master Log. The Master Log is posted at data.hawaii.gov and OIP's reports summarizing all agencies' year-end data are posted on its UIPA reports page at oip.hawaii.gov.

The State and county agencies' year-end Log results for FY 2020 have yielded interesting data about the impact of the pandemic and government office closures on agencies' responses to UIPA record requests. To view these reports, please go to OIP's Reports page for the log reports at **oip.hawaii.gov/uipa-record-request-log-reports/**.

In addition to promoting open data via the Log, OIP participates on both the Open Data Council and the Access Hawaii Committee to encourage online access to government services and the creation of electronic data sets that can make government information more readily accessible to the public.

OIP continues to demonstrate its commitment to the Open Data policy by making its statutes, opinions, rules, subject matter index, and training materials easily accessible on its website at **oip.hawaii.gov** for anyone to freely use. Since 2016, OIP has expanded access to its website by converting all of its previous formal opinions to, and providing new online materials in, a format accessible to people with disabilities.

OIP also communicates with the open government community primarily through What's New articles informing readers of OIP's latest training materials, legislation, and open government issues. In FY 2021, 27 What's New articles were emailed 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**. Together with OIP's Annual Report and two UIPA Log reports, OIP issued a total of 30 public communications in FY 2021.

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 the media, and not just to government employees or board members.

In FY 2022 OIP will make extensive updates to its training materials, especially regarding the Sunshine Law's amendments that are effective January 1, 2022.

Records Report System

OIP's Records Report System (RRS) is a computer database that collects from all State and county agencies information describing the records that they routinely use or maintain. While the actual records remain with the agency and are not filed with OIP, all agencies must annually report to OIP the number and titles of their records and whether the records are accessible to the public or must be kept confidential in whole or in part. By the end of FY 2021, State and county agencies reported 28,612 record titles, of which 51% were described as being accessible to the public in their entirety.

The list of all agencies' record titles and their accessibility can be found on OIP's website at **oip.hawaii.gov/records-reports-system-rrs**.

Legislation

OIP serves as a one-stop resource for government agencies and the public in matters relating to the UIPA and Sunshine Law. OIP often provides comments on these laws and makes recommendations for legislative changes to amend or clarify areas that have created confusion in application or counteract the legislative mandate of open government. During the 2021 legislative session, OIP reviewed and monitored 161 bills and resolutions affecting government information practices, and testified on 41 of these measures.

Most significantly, in FY 2021 OIP proposed an Administration-backed measure, Senate Bill 1034, to amend the Sunshine Law to allow online meetings to be conducted remotely. Ultimately, Senate Bill 1034, Senate Draft 1, House Draft 2, Conference Draft 1 was signed into law by

Governor David Ige as **Act 220, Session Laws of Hawaii 2021**. This new law becomes effective January 1, 2022, and it has been described in detail on the Legislation page of OIP's website. OIP is in the process of creating and updating training materials on its website with information on how boards could, under the new law, continue to conduct meetings online, even after the pandemic and Governor's emergency orders end.

Rules

Now that OIP has completed its transfer for administrative purposes to the Department of Accounting and General Services (DAGS), OIP must renumber its administrative rules to fall within DAGS's system. For the most part, OIP will simply renumber its rules for appeals that are made to OIP, which were adopted on December 31, 2012. More substantive changes are being proposed, however, for OIP's rules to process UIPA record requests, which were adopted in 1998, and to conform to changes made to the Sunshine Law in 2021.

In anticipation of updating its 1998 rules, OIP has been collecting objective data from State and county agencies through the UIPA Record Request Log for several years. In September 2017, OIP presented draft rules and explanatory materials on its website, at statewide informational briefings, and through 'Olelo broadcasts. After receiving public comments on the drafts, OIP revised its draft rules and submitted them for legal review by the Attorney General's (AG) office. OIP has been awaiting completion of the AG's legal review of the draft rules, which has been further delayed by pandemic-related issues. OIP will continue with the formal rulemaking process once it receives the AG's and Governor's approvals.

While much of the rulemaking process is beyond OIP's control, adoption of new administrative rules will be OIP's main priority once the formal rulemaking process can proceed. After new rules

are finally implemented, OIP will prepare updated training materials, including a new UIPA Record Request Log.

Litigation

OIP monitors litigation in the courts that raise issues under the UIPA or the Sunshine Law or that challenge OIP's decisions, and it has the discretion to intervene in those cases. Upon filing a UIPA civil action, a litigant is required to notify OIP in writing of the court case. Summaries of court cases are provided in the Litigation section of this report.

Although litigated cases are not counted in the total number of cases seeking OIP's services, they nevertheless take staff time to process and monitor. In FY 2021, OIP monitored 45 cases (including three that were related to open government issues, but were not Sunshine Law or UIPA cases). Thirteen new cases were monitored, 6 cases were closed, and 39 remained pending at the end of the fiscal year. See **Figure 1** on page 6.



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 individual privacy."

I. Goals

OIP's primary goal is to fairly and reasonably construe and administer the UIPA and the Sunshine Law in order to achieve the common purpose of both laws, 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[al] agencies—shall be conducted as openly as possible.

With the passage of the Open Data Law, OIP adopted another goal to assist the Office of Enterprise Services (ETS) 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.

II. Objectives and Policies

A. Legal Guidance and Assistance. Provide training and assistance to members of the public and all State and county agencies to promote compliance with the UIPA and Sunshine Law.

1. Provide accessible training guides, audio/visual presentations, and other materials online at oip.hawaii.gov and supplement OIP's online training with customized live training for State and county government entities.

2. Provide prompt informal advice and assistance to members of the public and government agencies through OIP's Attorney of the Day (AOD) service.

3. Adopt and revise administrative rules, as necessary.

B. Investigations and Dispute Resolution.

Assist the general public, conduct investigations, and provide a fair, neutral, and informal dispute resolution process as a free 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.

1. Focus on reducing the age and number of OIP's backlog of formal cases in a manner that is fair to all requesters.

C. Open Data. Assist ETS and encourage all State and county entities to increase government transparency and accountability by posting open data online, in accordance with the UIPA, Sunshine Law, and the State's Open Data Policy.

1. Post all of OIP's opinions, training materials, reports, and *What's New* communications at oip.hawaii.gov, which links to the State's open data portal at data.hawaii.gov.

2. Encourage State and county 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.

D. Records Report System (RRS).

Maintain the RRS and assist agencies in filing reports for the RRS with OIP.

1. Promote the use of the RRS to identify and distinguish private or confidential records from those that are clearly public and could be posted as open data on government websites.

E. Legislation and Lawsuits.

Monitor legislative measures and lawsuits involving the UIPA and Sunshine Law.

1. Provide testimony, legislative proposals, or legal intervention, as may be necessary, to uphold the requirements and common purpose of the UIPA and Sunshine Law.

III. Action Plan with Timetable

As of October 2021, when this plan was prepared, the COVID-19 pandemic continued worldwide with new variants. Although tourists had started returning and federal assistance had been received, Hawaii's economy continued to struggle and substantially lower tax revenues and have been projected for several years into the future. Due to staffing shortages, OIP's backlog increased significantly in FY 2021 and continued the uptrend in FY 2022. It is against this background, uncertainty, and constraints that OIP's Action Plan was developed.

A. Legal Guidance and Assistance

1. Past Year Accomplishments

- a. OIP received 874 total requests for assistance in FY 2021, 95% (828) of which were resolved in the same fiscal year, and 82% (719) were informal requests typically resolved the same day through OIP's AOD service.

- b. In late March-early April 2021, OIP was given an exemption from the State's hiring freeze and allowed to fill vacancies for the Administrative Assistant and one Staff Attorney.

- c. OIP successfully advocated for passage of Act 220, SLH 2021 that will allow Sunshine Law boards to conduct remote online meetings effective January 1, 2022, and therefore added a summary of the law to the training materials on OIP's website.

- d. OIP continued to add historical materials to the new "Legislation" page at oip.hawaii.gov, namely Act 220, SLH 2021, amending the Sunshine Law. Here, OIP has compiled for easy public access the legislative history leading to the enactment or amendment of the UIPA, Sunshine Law, and tax statute allowing appeals to OIP from challenges to the disclosure of written tax opinions.

2. Year 1 Action Plan

- a. Obtain approval to hire and train new employees.

- b. Continue to promptly provide general legal guidance through OIP's AOD service, so that approximately 80% of requests for OIP's assistance can be informally resolved within one workday.

- c. In light of emergency restrictions on gatherings and OIP's limited resources, focus on preparing and updating online training and communication to reflect the changes in the Sunshine Law allowing boards to conduct remote meetings online, as will become effective on January 1, 2022.

3. Year 2 Action Plan

- a. Conduct informational briefings and a public hearing to obtain agency and public input on OIP's new administrative rules and revisions to its existing rules, conditioned on the prior completion of the Attorney General's legal review of OIP's draft rules.
- b. Assuming adoption, implement OIP's new administrative rules, including the creation of new training materials and a revised UIPA Record Request Log.
- c. Update and improve OIP's online training materials, as may be necessary.
- d. Obtain sufficient funding and position authorizations to recruit, train and retain OIP staff so as to keep up with anticipated increases in OIP's workload, while reducing the formal case backlog.

4. Year 5 Action Plan

- a. Evaluate recently implemented rules and determine whether additional rules or revisions are necessary.
- b. Obtain sufficient funding and position authorizations to recruit, train, and retain legal and administrative personnel to ensure the long-term stability and productivity of OIP.

B. Investigations and Dispute Resolution

1. Past Year Accomplishments

- a. OIP received a total of 874 formal and informal requests for assistance in FY 2021, and OIP resolved 95% of them in the same year and typically resolved 82% the same day.
- b. Of the 155 formal cases opened in FY 2021, 109 (70%) were resolved in the same fiscal year.
- c. Of the 93 cases that remained pending at the end of FY 2021, 46 (49.5%) were opened in FY 2021 and 47 (50.5%) were opened in FY 2020 or earlier, one of which is still pending in litigation.

2. Year 1 Action Plan

- a. Obtain approval to hire and train new employees to fill vacancies.
- b. Strive to resolve all formal cases filed before FY 2021, if they are not in litigation or filed by requesters who have had two or more cases resolved by OIP in the preceding 12 months.

3. Year 2 Action Plan

- a. Strive to resolve all formal cases filed before FY 2021, if they are not in litigation or filed by requesters who have had two or more cases resolved by OIP in the preceding 12 months.
- b. Obtain sufficient funding and position authorizations to recruit, train, and retain OIP staff so as to keep up with anticipated increases in OIP's workload while reducing the formal case backlog.

4. Year 5 Action Plan

- a. Strive to resolve all formal cases within 24 months of filing, if they are not in litigation or filed by requesters who have had two or more cases resolved by OIP in the preceding 12 months, and provided that OIP is fully staffed and has five trained staff attorneys.
- b. Obtain sufficient funding and position authorizations to recruit, train, and retain legal and administrative personnel to ensure the long-term stability and productivity of OIP.

C. Open Data

1. Past Year Accomplishments

- a. Prepared UIPA Record Request Log reports summarizing results for FY 2020 from 199 State and 85 county agencies, including the Governor's office, Lt. Governor's office, Judiciary, Legislature, UH, OHA, all Mayors' offices, and all county councils.
- b. Distributed 27 *What's New* articles to keep government personnel and the general public informed of open government issues, including proposed legislation.
- c. Received 29,273 unique visits from Hawaii to OIP's website and 101,170 website page views (excluding OIP's and home page hits).

2. Year 1 Action Plan

- a. Obtain approval to hire and train new employees to fill vacancies.
- b. Encourage and assist State and county agencies to electronically post open data, including the results of their Logs.
- c. Complete data and prepare reports of the Log results for FY 2021 from all State and county agencies.
- d. Utilize Log data to develop and evaluate proposed OIP rules concerning the UIPA record request process and fees.
- e. Post information on OIP's website at oip.hawaii.gov to provide transparency and obtain public input on the rule-making process.

3. Year 2 Action Plan

- a. Continue to assist State and county agencies to electronically post open data and report on their results of State and county agencies' Logs.
- b. Revise the UIPA Record Request Log and related training materials, if new administrative rules are adopted.

4. Year 5 Action Plan

- a. Continue to assist State and county agencies to electronically post open data and report on the results of State and county agencies' Logs.

D. Records Report System

1. Past Year Accomplishments

- a. For FY 2021, State and county agencies reported 28,612 record titles on the RRS.

2. Year 1 Action Plan

- a. Continue to train and advise 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.

3. Year 2 Action Plan

- a. Continue to train and advise 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.

4. Year 5 Action Plan

- a. Continue to train and advise 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.

E. Legislation and Lawsuits

1. Past Year Accomplishments

- a. In FY 2021, OIP successfully obtained passage of SB 1034, SD 1, HD 2, CD 1, which was signed by Governor David Ige and enacted into law as Act 220, SLH 2021. Effective January 1, 2022, Act 220 amends the Sunshine Law to allow boards to remotely conduct online meetings. Additionally, in FY 2021, OIP reviewed and monitored 161 bills and resolutions and testified on 41 of them.

- b. In FY 2021, OIP monitored 45 cases in litigation, of which 13 were new cases.

2. Year 1 Action Plan

- a. Obtain approval to hire and train new employees to fill vacancies.

3. Year 2 Action Plan

- a. Continue to monitor legislation and lawsuits and to take appropriate action on matters affecting the UIPA, Sunshine Law, open data, or OIP.

4. Year 5 Action Plan

- a. Continue to monitor legislation and lawsuits and to take appropriate action on matters affecting the UIPA, Sunshine Law, or OIP.

IV. Performance Measures

A. Customer Satisfaction Measure
– Monitor evaluations submitted by participants after training or informational sessions as well as comments or complaints made to the office in general, and take appropriate action.

B. Program Standard Measure –
Measure the number of: formal cases and AOD inquiries received and resolved; opinions issued; lawsuits monitored; legislative proposals monitored; unique visits to OIP’s website; training materials added or revised; and public communications.

C. Cost Effectiveness Measure –
Considering the number and experience levels of OIP personnel in comparison to similar agencies, monitor the percentage of formal or informal requests for assistance resolved in the same year of the request and the number of formal cases pending at the end of each fiscal year.



Highlights of Fiscal Year 2021

Budget and Personnel



OIP's budget allocation is the net amount that it was authorized to use of the legislatively appropriated amount, including any collective bargaining adjustments, minus administratively imposed budget restrictions.

OIP's total legislative appropriation for FY 2021 was \$769,837 and it retroactively received \$33,142 in collective bargaining increases for FY 2021-21, for a total of \$802,979. Due to budget restrictions of \$76,984, however, OIP's total allocation was \$725,995, of which \$703,671 was allocated to personnel costs and \$22,324 to other current expenses. See **Figure 3** on page 20.

Although OIP's allocated amounts increased by 3% over the prior year, OIP actually spent 6.3% less, because of its inability to fill vacancies due to the State's hiring freeze imposed during the COVID-19 pandemic. Thus, in FY 2021, OIP's actual expenditures totalled \$660,137.

As in the prior year, OIP had 8.5 total FTE approved positions in FY 2021. While this number included OIP's five staff attorney positions, two attorneys left OIP in July 2020 for retirement or personal reasons. OIP's Administrative Assistant

also left OIP in October 2020 to move from Hawaii. It was not until OIP received an exemption from the hiring freeze that it was finally able to fill two of three vacant positions in late March and April, 2021. Thus, OIP operated during most of FY 2021 with 5.5 FTE positions, which included only three of five staff attorneys.

Like OIP's 6.3% lower expenditures compared to allocation, OIP's uncharacteristic loss of 35% of its experienced team is not reflected in **Figure 3** on page 20.

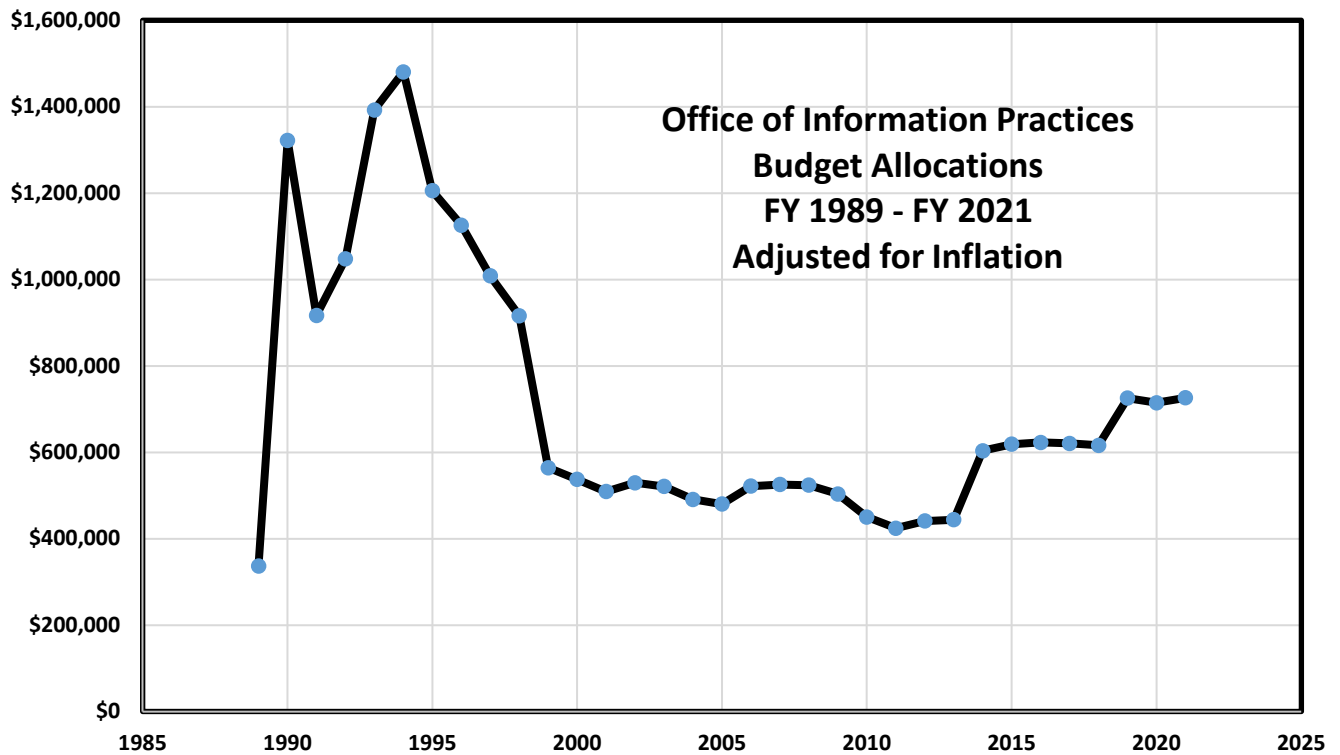


Figure 2



**Office of Information Practices
Budget FY 1989 to FY 2021**

Fiscal Year	Operational Expense Allocation	Personnel Allocation	Total Allocation	Allocations Adjusted for Inflation**	Approved Positions
FY 21	22,324	703,671	725,995	725,995	8.5
FY 20	21,682	683,171	704,853	714,719	8.5
FY 19	41,562	656,425	697,987	725,356	8.5
FY 18	22,324	561,695	584,019	616,333	8.5
FY 17	22,324	553,660	575,984	620,440	8.5
FY 16	31,592	532,449	564,041	622,764	8.5
FY 15	45,228	507,762	552,990*	618,946	8.5
FY 14	88,862	450,895	539,757*	586,995	8.5
FY 13	18,606	372,327	390,933	444,072	7.5
FY 12	30,197	352,085	382,282	441,171	7.5
FY 11	42,704	314,454	357,158	424,234	7.5
FY 10	19,208	353,742	372,950	450,220	7.5
FY 09	27,443	379,117	406,560	503,681	7.5
FY 08	45,220	377,487	422,707	523,841	7.5
FY 07	32,686	374,008	406,694	525,570	7.5
FY 06	52,592	342,894	395,486	521,694	7
FY 05	40,966	309,249	350,215	480,387	7
FY 04	39,039	308,664	347,703	491,106	7
FY 03	38,179	323,823	362,002	521,151	8
FY 02	38,179	320,278	358,457	529,451	8
FY 01	38,179	302,735	340,914	509,291	8
FY 00	37,991	308,736	346,727	537,307	8
FY 99	45,768	308,736	354,504	564,405	8
FY 98	119,214	446,856	566,070	916,297	8
FY 97	154,424	458,882	613,306	1,008,358	11
FY 96	171,524	492,882	664,406	1,125,625	12
FY 95	171,524	520,020	692,544	1,205,303	15
FY 94	249,024	578,513	827,537	1,480,634	15
FY 93	248,934	510,060	758,994	1,392,280	15
FY 92	167,964	385,338	553,302	1,048,634	10
FY 91	169,685	302,080	471,765	916,829	10
FY 90	417,057	226,575	643,632	1,321,527	10
FY 89	70,000	86,000	156,000	336,967	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 Guidance, Assistance, and Dispute Resolution

Overview and Statistics

OIP is the single statewide agency in Hawaii dedicated to providing uniform and consistent advice and training regarding the UIPA and Sunshine Law. OIP also provides neutral dispute resolution as an informal alternative to the courts. The general public and nearly all of Hawaii's State and county government agencies and boards seek OIP's services. 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 2020, the COVID-19 emergency caused substantial disruption to State and county government operations, which was addressed in emergency proclamations issued by Governor David Ige. OIP was directly affected by the Governor's first Supplementary Proclamation issued on March 16, 2020, which wholly suspended the UIPA and partially suspended the Sunshine Law "to the extent necessary to enable boards to conduct business in person or through remote technology without holding meetings open to the public." These suspensions continued until the Seventh Supplementary Proclamation (SP7) issued on May 5, 2020, in Exhibit H, where the UIPA and OIP's administrative rules were only partially suspended "to the extent they contain any deadlines for agencies, including deadlines for the OIP, relating to requests for government records and/or complaints to OIP," and with certain minimum requirements listed in Exhibit H. In other words, the UIPA was reinstated by SP7,

except for deadlines contained therein as they apply to government agencies. Additionally, the Sunshine Law was suspended "to the extent necessary to enable boards as defined in section 92-2, HRS, to conduct meetings without any board members or members of the public physically present in the same location" and with additional requirements and guidelines listed in Exhibit H. The partial suspensions of the UIPA and Sunshine Law were continued in several supplementary proclamations. The last proclamation in FY 2021 was the Twenty-First Proclamation at Exhibit F, dated June 7, 2020.

Even during the temporary suspension of all of OIP's powers and duties when it was unable to issue any opinions, OIP kept working and adjusted to teleworking. In FY 2021, OIP remained hampered in its ability to resolve cases that require responses from agencies that took advantage of the suspension of UIPA deadlines, and was extremely short-staffed with the uncharacteristic loss of two Staff Attorneys and its Administrative Assistant. Nevertheless, for FY 2021, OIP opened 155 new formal cases, closed 129 formal cases in FY 2020, resolved 95% of formal and informal cases filed in FY 2021, issued seven opinions, and ended the year with 93 pending cases.



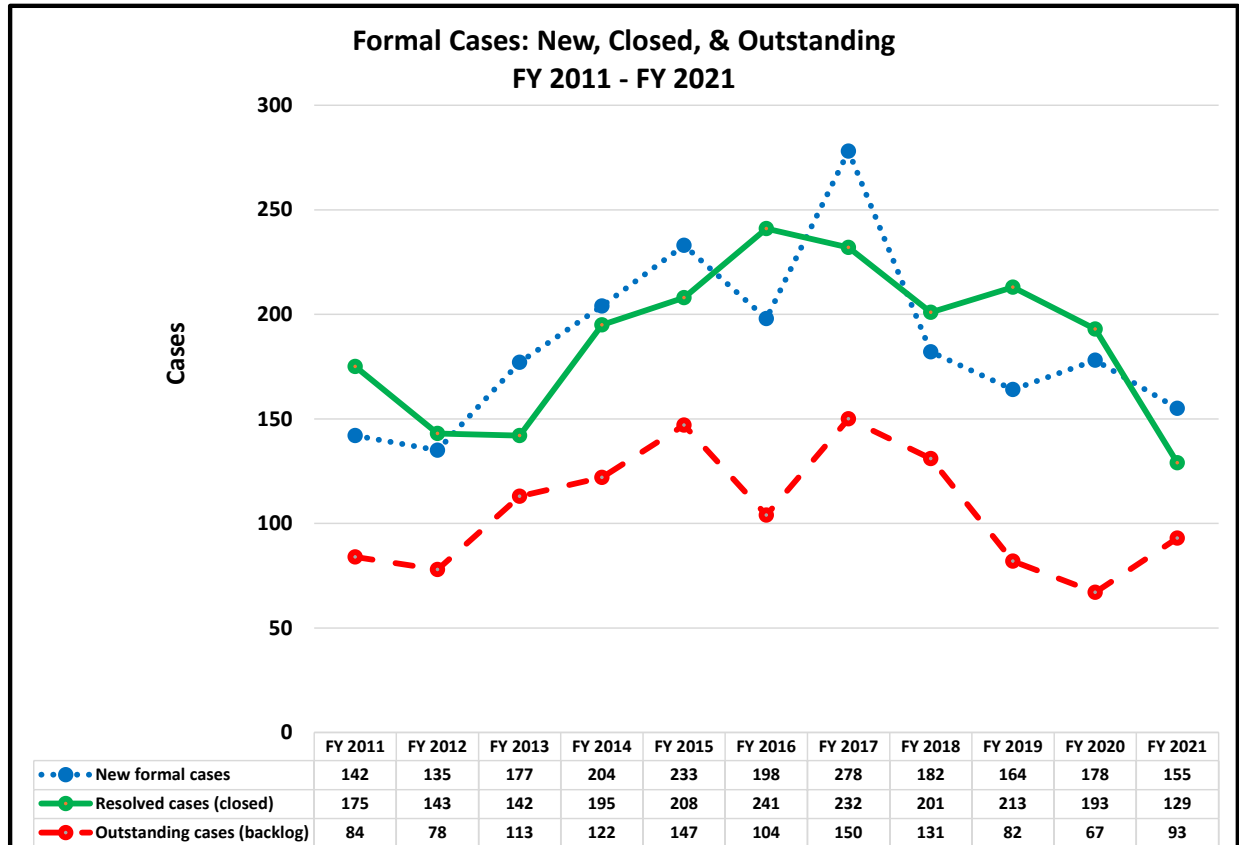


Figure 4

In FY 2021, OIP received a total of 874 formal and informal requests for OIP's services, compared to 1,168 requests in FY 2020. There were 23 (13%) fewer formal cases filed in FY 2021 (155) than in FY 2020 (178), and 271 fewer informal requests (719) than last year (990). OIP ended FY 2021 with only 93 pending formal cases, which is a more than 38% increase from FY 2020 (67 pending cases). See **Figure 1** on page 6.

What follows is a description of the different types of formal and informal requests for OIP's assistance. OIP's other duties, most of them statutorily mandated, are discussed in later sections of this report.

Formal Requests - FY 2021	
Type of Request	Number of Requests
UIPA Requests for Assistance	17
UIPA Requests for Advisory Opinion	1
UIPA Appeals	32
Sunshine Law Appeals	6
Sunshine Law Requests for Opinion	2
Correspondence	82
UIPA Record Requests	13
Reconsideration Requests	2
Total Formal Requests	155

Figure 5

Formal Requests

Of the total 874 UIPA and Sunshine Law formal and informal requests for services, 335 (38%) were categorized as relating to the UIPA and 260 (30%) concerned Sunshine Law issues, with the remainder being mostly miscellaneous informal inquiries. Moreover, of the total 874 requests, 719 (82%) were filed as informal requests and 155 (18%) were considered formal requests. **Figure 5** above shows the different types of formal requests received in FY 2021. Formal requests are further explained as follows.

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 2021, OIP received 17 such written requests for assistance (RFAs) 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. After an agency response has been received, the case is closed. Most RFAs are closed within 12 months of filing. A requester that is dissatisfied with an agency's response may file a UIPA Appeal.

Requests for Advisory Opinions

A request for an opinion (RFO) does not involve a live case or controversy and may involve only one party, and thus, will result in an informal (memorandum) opinion that has no precedential value as to legal issues regarding the UIPA or Sunshine Law. In FY 2021, OIP received one request for a UIPA opinion and two for Sunshine Law opinions.

UIPA Appeals

UIPA appeals to OIP concern live cases or controversies. Appeals may result in formal or informal opinions, but are often resolved through OIP's informal mediation and the subsequent voluntary cooperation of the agencies in providing all or part of requested records. Unless expedited review is warranted, the case is being litigated, or a requester already had two or more other cases resolved by OIP within the past 12 months, appeals and requests for opinions involving the UIPA or Sunshine Law are generally resolved on a "first in, first out" basis, with priority given to the oldest cases whenever practicable.

In FY 2021, OIP received 32 appeals related to the UIPA.

Sunshine Law Appeals

In FY 2021, OIP received 6 Sunshine Law appeals.

Correspondence

OIP may respond to general inquiries, which often include simple legal questions, by correspondence (CORR). A CORR file informally provides advice or resolves issues and obviates the need to open an Appeal or RFO. Rather than waiting for an opinion, an agency or requester may be satisfied with a shorter, more general analysis presented on OIP's letterhead, which is now considered a CORR file, and not an opinion as was done in prior fiscal years.

In FY 2021, OIP opened 82 CORR files.

UIPA Record Requests

The UIPA allows people to request government or personal records that are maintained by an agency, and OIP itself does receive UIPA requests for OIP's own records. OIP's current administrative rules require that an agency respond to a record request within 10 business days. When extenuating circumstances are present, however, the response time may be 20 business days or longer, depending on whether incremental responses are warranted.

In FY 2021, OIP received 13 UIPA record requests made for records maintained by OIP.

Reconsideration of Opinions

OIP's rules allow a party to request, in writing, reconsideration of OIP's written formal or informal opinions within 10 business days of issuance. Reconsideration may be granted if there is a change in the law or facts, or for other compelling circumstances.

Of the two requests for reconsideration received in FY 2021, one was denied and one remained pending.

Types of Opinions and Rulings Issued

OIP issues opinions that it designates as either formal or informal.

Formal opinions concern actual controversies and address issues that are novel or controversial, that require complex legal analysis, or are otherwise of broader interest to agencies and the public. Formal opinions are used by OIP as precedent for its later opinions and are posted, in full and as summaries, on OIP's opinions page at **oip.hawaii.gov**. Summaries of the formal opinions for this fiscal year are also found on pages 33-34 of this report. OIP's website contains a searchable subject-matter index for the formal opinions.

Informal opinions, also known as memorandum opinions, are binding upon the parties involved but are considered advisory in other contexts and are not cited by OIP as legal precedents. Informal opinions are public records, but are not published for distribution. Summaries of informal opinions are available on OIP's website and those issued in this fiscal year are also found in this report on pages 35-37.

Informal opinions do not have the same precedential value as formal opinions because they generally address issues that have already been more fully analyzed in formal opinions so they may provide less detailed legal discussion, or their factual bases may limit their general applicability.

Both formal and informal opinions, however, are subject to judicial review on appeal. Consequently, since 2012, OIP has been careful to write opinions that “speak for themselves” in order to avoid having to intervene and defend them in court later. With well-reasoned opinions that can withstand judicial scrutiny, parties may even be discouraged from appealing and adding to the Judiciary’s own substantial backlog of cases. Thus, unlike the short letters that OIP often wrote in the past, current OIP opinions require more attorney time to gather the facts and opposing parties’ positions; do legal research; analyze the statutes, case law, and OIP’s prior precedents; draft; and undergo multiple internal reviews before final issuance.

In FY 2021, OIP issued a total of seven opinions, consisting of 2 formal UIPA opinions and 5 informal UIPA opinions. OIP closed 122 cases without opinions.

Informal Requests

Attorney of the Day Service

The vast majority (82% in FY 2021) of all requests for OIP's services are informally handled through the Attorney of the Day (AOD) service, which allows the public, agencies, and boards to receive general, nonbinding legal advice from an OIP staff attorney, usually the same business day. Like the "express line" at a supermarket, the AOD service allows people to quickly get answers to their relatively simple questions without having to wait for more time-consuming resolution of complex issues often found in formal cases.

Through AOD calls, OIP is often alerted to trends and problems, and OIP can provide informal advice to prevent or correct them. The AOD service is also a free and quick way for members of the public to get the advice that they need on UIPA record requests or Sunshine Law questions, without having to engage their own lawyers. The AOD service helps to level the playing field for members of the public who do not have government or private attorneys to advise them on the UIPA or Sunshine Law.

Members of the public use the AOD service frequently to determine whether agencies are properly responding to UIPA record requests or 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. Examples of AOD inquiries and OIP's informal responses are provided, beginning on page 38.

The AOD service helps OIP prevent or quickly correct violations. Through AOD inquiries, OIP may be alerted to inadequate Sunshine Law notices and is able to take quick preventative or corrective action. For example, based on AOD inquiries, OIP has advised boards to cancel

improperly noticed meetings as well as make suggestions to prepare a sufficiently descriptive agenda. OIP has even had boards call for advice during their meetings, with questions such as whether they can conduct an executive session closed to the public. AOD callers may also seek UIPA-related advice, such as whether they are entitled to receive copies of certain records.

Because of the AOD service, OIP has been able to quickly and informally inform people of their rights and responsibilities, avert or resolve disputes, and avoid having small issues escalate to appeals or other formal cases that necessarily take longer to resolve.

AOD Inquiries			
Fiscal Year	Total	Public	Government Agencies
FY 21	719	124	595
FY 20	990	175	815
FY 19	963	478	485
FY 18	945	294	651
FY 17	956	370	586
FY 16	964	289	675
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 6

Of the 719 AOD inquiries in FY 2021, 595 (83%) came from government boards and agencies seeking guidance to ensure compliance with the UIPA or Sunshine Law, and 124 inquiries (17%) came from the public. See Figures 6 and 7.

Of the 124 AOD inquiries from the public in FY 2021, 90 (72%) came from private individuals, 7 (6%) from media, 7 (6%) from businesses, 9 (7%) from private attorneys, 6 (6%) from public interest groups, and 5 (4%) from other types. See Figures 8 and 9.

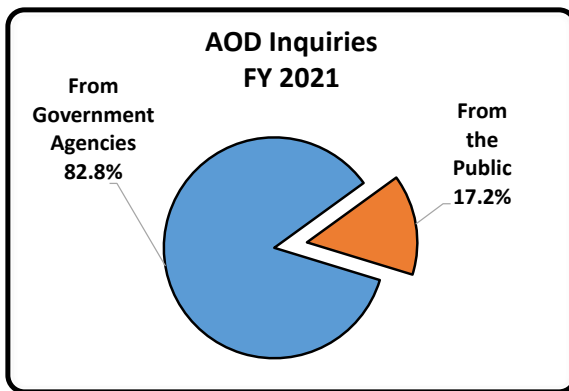


Figure 7

AOD Inquiries from the Public FY 2021

Types of Inquirers	Number of Inquiries
Private Individual	90 (72%)
Private Attorney	9 (7%)
News Media	7 (6%)
Business	7 (6%)
Public Interest Group	6 (5%)
Other Type	5 (4%)
TOTAL	124

Figure 8

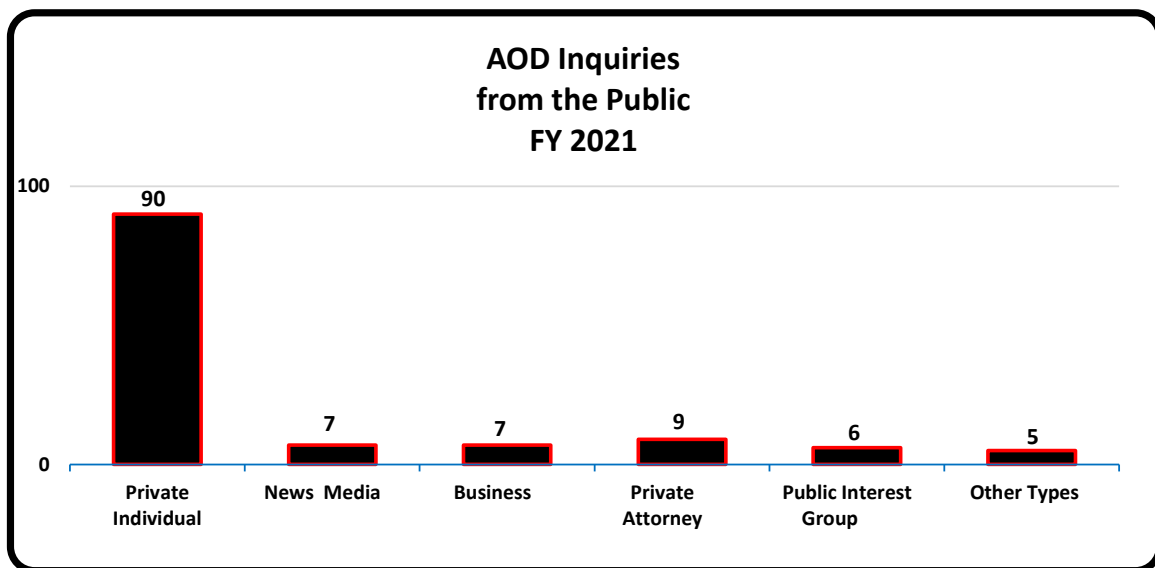


Figure 9

UIPA Inquiries:

UIPA AOD Inquiries

In FY 2021, OIP received 335 AOD requests concerning the UIPA from government agencies and the general public. As with Sunshine Law AOD inquiries, 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 UIPA AOD inquiries, please see **Figures 10 to 14** that follow. A sampling of the AOD advice given by OIP starts on page 38.

State Agencies and Branches

In FY 2021, OIP received a total of 39 AOD inquiries relating to the UIPA and concerning State agencies in the executive branch. About 56% of these requests concerned five State agencies: Department of Land and Natural Resources (5), Department of Commerce and Consumer Affairs (5), Department of Health (4), Department of Transportation (4), and Department of Education (4). As shown below in **Figure 10**, about 72% (28) of AOD requests were made by the agencies themselves.

OIP also received 1 inquiry concerning the legislative branch and 3 inquiries regarding the judicial branch. See **Figure 10** below. These AOD requests exclude general inquiries that do not concern a specific agency.


<div> <div> UIPA AOD Requests About State Government Agencies FY 2021 </div>  </div>			
Executive Branch Department	Requests by Agency	Requests by Public	Total Requests
Land and Natural Resources	5	0	5
Commerce and Consumer Affairs	4	1	5
Health	3	1	4
Transportation	3	1	4
Education (including Public Libraries)	3	1	4
Human Services	2	1	3
Accounting and General Services	2	1	3
Budget and Finance	2	1	3
Labor and Industrial Relations	2	1	3
Attorney General	2	0	2
Governor	0	1	1
Tax	0	1	1
Public Safety	0	1	1
Human Resources Development	0	1	1
Agriculture	0	0	0
Business, Econ Development, & Tourism	0	0	0
Hawaiian Home Lands	0	0	0
Lieutenant Governor	0	0	0
Defense	0	0	0
TOTAL EXECUTIVE	28	11	39
TOTAL LEGISLATURE	1	0	1
TOTAL JUDICIARY	3	0	3
University of Hawaii System	4	0	4
Office of Hawaiian Affairs	0	0	0
TOTAL STATE AGENCIES	36	11	47

Figure 10

County Agencies

In FY 2021, OIP received a total of 42 AOD inquiries regarding the UIPA and concerning various county agencies and boards. Of these, 18 inquiries (43%) came from the public in all counties.


Of the 42 AOD inquiries, 23 inquiries concerned agencies in the City and County of Honolulu, up from 19 in the previous year. *See Figure 11.* As shown below, 16 (69%) of the 23 requests to

the City were made by the agencies themselves seeking guidance to comply with the UIPA.

The largest number of requests concerned the Honolulu Police Department (12) and the Prosecuting Attorney (2).

OIP received 19 inquiries regarding neighbor island county agencies and boards: Hawaii County (9), Kauai County (7), and Maui County (3). *See Figures 12 to 14.*

UIPA AOD Inquiries About City and County of Honolulu Government Agencies - FY 2021



Department	Requests by Agency	Requests by Public	Total Requests
Police	8	4	12
Prosecuting Attorney	2	0	2
Budget and Fiscal Services	1	0	1
Fire	1	0	1
Corporation Counsel	1	0	1
Environmental Services	1	0	1
Planning & Permitting	0	1	1
Neighborhood Commission	1	0	1
Enterprise Services	1	0	1
Design & Construction	0	1	1
Customer Services	0	1	1
TOTAL	16	7	23

Figure 11



**UIPA AOD Inquiries About
Hawaii County
Government Agencies - FY 2021**

Department	Requests by Agency	Requests by Public	Total Requests
Finance	0	2	2
Unnamed Agency	0	2	2
Planning	0	1	1
Parks and Recreation	0	1	1
Mayor	0	1	1
Research & Development	1	0	1
Corporation Counsel	1	0	1
TOTAL	2	7	9


Figure 12

**UIPA AOD Inquiries About
Kauai County
Government Agencies - FY 2021**



Department	Requests by Agency	Requests by Public	Total Requests
Police	3	0	3
County Attorney	3	0	3
Unnamed Agency	0	1	1
TOTAL	6	1	7

Figure 13



Department	Requests by Agency	Requests by Public	Total Requests
Corporation Counsel	0	1	1
Police	0	1	1
Planning	0	1	1
TOTAL	0	3	3

Figure 14



Sunshine Law Inquiries:

Since 2001, OIP has averaged more than 308 formal and informal inquiries a year concerning the Sunshine Law. In FY 2021, OIP received 268 Sunshine Law inquiries, which is 108 fewer than in FY 2020, and 42 fewer than the average number of requests received each year. See Figures 15 and 16.

Of the total Sunshine Law inquiries made in FY 2021, 260 (97%) were informal AOD requests, and 8 were formal cases. See Figure 16.

Of the 260 AOD requests involving the Sunshine Law, 187 were requests for general advice, and 11 were formal complaints. Also, 70 of the 260 AOD requests (27%) involved the requester's own agency.

OIP continued to make its Sunshine Law training materials available on its website. These free online materials include a PowerPoint presentation with a voice-over, written transcripts, and examples, which OIP's attorneys formerly presented in person. The online training has reduced the need for in-person basic training on the Sunshine Law. Moreover, the online training is not restricted to government personnel and is freely and readily accessible to members of the public.

Sunshine Law Inquiries

<i>Fiscal Year</i>	<i>AOD Inquiries</i>	<i>Formal Requests</i>	<i>Total</i>
2021	260	8	268
2020	366	10	376
2019	381	11	392
2018	265	7	272
2017	337	11	348
2016	331	4	335
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

Figure 16

Sunshine Law Inquiries FY 2001 to FY 2021

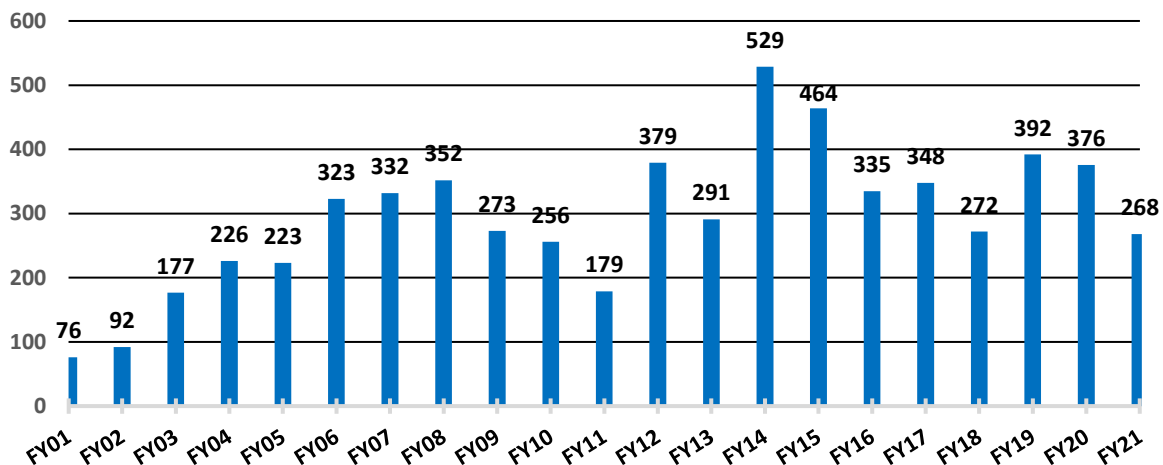


Figure 15

Formal Opinions

In FY 2021, OIP issued two formal opinions (both related to the UIPA), 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:

Closing Agreements in Tax Appeals

OIP Op. Ltr. No. F21-01

Requester made a request for the closing agreements between the Department of Taxation (TAX) and the taxpayers in two litigated cases filed in the Hawaii Tax Appeal Court. TAX denied the request in its entirety on the basis that the closing agreements contain confidentiality provisions which prohibit the taxpayer and TAX from disclosing information related to the settlement of the case. Requester then filed this appeal.

OIP first found that closing agreements are “tax return information” as that term is defined in tax laws. Tax returns and tax return information are protected from disclosure by several confidentiality statutes in Title 14, HRS, titled “Taxation,” namely, sections 237-34(b), 235-116, 237D-13, and 238-13, HRS. Section 92F-13(4), HRS, allows an agency to withhold records protected by a confidentiality statute. As the tax return information at issue falls within at least one of the confidentiality statutes claimed by TAX—presumably the general excise tax confidentiality provision at section 237-34(b) HRS—OIP found that section 92F-13(4), HRS, allows TAX to withhold them in this instance.

OIP noted that “written opinions,” which are not at issue here and which contain tax return information, are required to be disclosed by section

231-19.5(a), HRS, which states, in relevant part, “[e]xcept as provided in subsection (f), regarding the disclosure of the text of written opinions, chapter 92F shall not apply to tax returns and tax return information.” OIP examined the legislative history of this provision, which made clear that its purpose was not to remove TAX records from the category of “government records” subject to the UIPA, but rather to open TAX opinions to public disclosure under limited conditions, while maintaining confidentiality of tax return information in order to keep the tax system viable through voluntary compliance with the tax laws. Thus, OIP believes the Legislature has repeatedly set forth its intent that tax returns and tax return information remain confidential with very limited exceptions not raised here.

OIP further noted that it asked TAX twice for copies of the closing agreements for OIP’s *in camera* review. TAX declined to provide the requested closing agreements for *in camera* review because TAX was uncomfortable providing them without a court order. TAX did provide a sample draft of a typical closing agreement. For this appeal, the sample closing agreement was sufficient for OIP to determine whether closing agreements must be disclosed as a rule, and thus to meet TAX’s burden under the UIPA to justify the nondisclosure. However, in future cases, OIP may find that an agency refusing to provide *in camera* records has failed to meet its burden to demonstrate the applicability of a claimed exception, or may go to court to enforce its right to examine the records at issue.



ERS Investment Report Including Total Distribution Data for Private Equity Funds

OIP Op. Ltr. No. F21-02

The Employees' Retirement System (ERS) posted on its website a public version of a consultant-prepared report on ERS's then-current investments, which left out some measures of performance of ERS's investment in private equity funds, including the column of total distribution data found in the full version of the report. Requester asked ERS to disclose the total distribution data for private equity funds ERS invests in, and when ERS denied her request, appealed that denial to OIP. Requester noted that total distribution data had previously been published on the ERS website since 2012 and had been provided to her business, upon request, since 2011.

OIP initially considered whether to modify its approach to determining when information was confidential commercial or financial information that could be withheld under the UIPA's frustration exception to public disclosure, based on the United States Supreme Court's 2019 decision in *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356, which affected the analysis of confidential commercial or financial information under the federal Freedom of Information Act (FOIA). OIP concluded that given the significant statutory differences between the UIPA and FOIA on this issue, the analysis used in OIP's previous opinions on the subject was more consistent with the UIPA's frustration exception than the test now used for FOIA's exemption for confidential commercial or financial information. OIP therefore did not modify its existing analytical approach.

Applying that approach to the information at issue, OIP then concluded that ERS properly withheld total distribution data from public disclosure under the UIPA on the basis that it was confidential commercial and financial information whose disclosure would frustrate a legitimate government function. ERS established that

the Consultant Report and similar reports were financial information with commercial value. ERS further established that disclosure of the total distribution data would cause substantial competitive harm to Consultant and would impair ERS's own ability to obtain such information in the future.

OIP went on to address whether ERS's past disclosure of total distribution data for prior years acted as a waiver or showed that no real harm would result from disclosure and thus even if the information was confidential commercial or financial information, no ERS function would be frustrated by its disclosure. OIP found that ERS had provided evidence showing that its prior disclosures of the same type of information for previous years had resulted in ERS's partial or complete exclusion from some investment opportunities, thus frustrating its legitimate function of investing the funds entrusted to it. Based on that, OIP further concluded that ERS had established that disclosure would in fact frustrate a legitimate government function, so ERS properly withheld the information under section 92F-13(3), HRS. HRS § 92F-13(3) (2012).



Informal Opinions

In FY 2021, OIP issued 5 informal opinions, all relating to the UIPA. 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:

Video Camera Footage

UIPA Memo 21-1

Requester made a request to the Hawaii County Department of Finance (FIN-H) for a copy of security camera video footage from FIN-H's Vehicle Registration and Licensing Division in Kamuela for June 24, 2019, from 9:00 to 12 pm (Video Footage). FIN-H informed Requester that "[d]ue to unforeseen circumstances the tape is no longer available." Requester appealed FIN-H's response.

OIP first found that FIN-H's response to the record request complied with the notice provisions in section 2-71-14(c)(1), HAR. This rule requires that when an agency is unable to disclose a record because it does not have any responsive record, the agency's notice shall state that the agency is unable to disclose the record because the agency "does not maintain the record[.]"

FIN-H did initially maintain the Video Footage and it had retrieved the location within its electronic storage system containing the Video Footage, but subsequently discovered that the file containing the Video Footage was no longer stored there because the Video Footage had been overwritten for an unknown reason before a copy could be made. OIP found that FIN-H's search of the location that should have contained the Video Footage was reasonably calculated to uncover the

Video Footage, and that FIN-H established that it no longer maintains the record. OIP therefore concluded that FIN-H has no duty under the UIPA to provide access to a record it no longer maintains.

OIP then found that FIN-H made good faith attempts to copy the Video Footage, but the delay in seeking assistance of the county's Department of Information Technology may have allowed for unintentional destruction. OIP found FIN-H did not intentionally or knowingly destroy the Video Footage, and that its subsequent investigation and institution of a same-day copying policy shows FIN-H took steps to determine what happened and to prevent it from happening again, evidencing good faith.

Autopsy Report

UIPA Memo 21-2

Requester sought a copy of an autopsy report (Autopsy Report), which included a toxicology report. The Hawaii County Police Department (POLICE-H) denied access for several reasons and Requester filed this appeal. The Autopsy Report contains medical information and psychiatric information, including the presence of alcohol, drugs, or other substances. Based on the precedent set in OIP Op. Ltr. No. F15-01, the subject of the Autopsy Report (Decedent) retains a privacy interest in his medical information after death. However, based on the analysis set out in that opinion, OIP found here that the public interest in disclosure of the Autopsy Report outweighs the privacy interest of the Decedent therein, so disclosure would not constitute a clearly unwarranted invasion of Decedent's personal privacy and the Autopsy Report may not be withheld on that basis. HRS §§ 92F13(1), 92F-14(a) (2012).

Surviving family members sometimes also have privacy interests in information about a deceased individual that outweigh the public interest in disclosure of all or a portion of an autopsy or toxicology report. Here, however, the Autopsy Report does not contain graphic or similarly sensitive information that surviving family members would have a significant privacy interest in, and thus, withholding access to the Autopsy Report to protect their interests was not warranted.

Insurance Commissioner Records

UIPA Memo 21-3

Requester sought a decision as to whether the Department of Commerce and Consumer Affairs Insurance Division (DCCA-INS) properly denied her requests for a copy of records referenced in a letter to the requester from DCCA-INS under the UIPA.

The Insurance Code, chapter 431, HRS (Insurance Code), includes a confidentiality provision at section 431:2-209(e), HRS, that protects certain DCCA-INS records from disclosure for so long as the Insurance Commissioner deems prudent. Procedurally, although the responses to the requester's two record requests did cite to section 431:2-209, HRS, they should also have cited to the applicable UIPA sections allowing DCCA-INS to deny access based on the Insurance Code provision. Sections 92F-13(4) and 92F-22(5), HRS, allow agencies to withhold records that are subject to a confidentiality statute, whether they are government records subject to Part II of the UIPA or personal records subject to Part III. OIP found that under sections 92F-13(4) and 92F-22(5), HRS, DCCA-INS could withhold the records entirely rather than disclosing a redacted copy because the records as a whole are protected by the confidentiality statute at section 431:2-209(e), HRS.

Hearing Officer Notes

UIPA Memo 21-4

Requester sought a decision as to whether the Department of Labor and Industrial Relations (DLIR) properly responded under Part III of the UIPA to her record request by stating that no responsive records exist. Subsequent to the opening of this appeal, Requester twice clarified her request and DLIR responded to those clarifications by either providing records or stating that no responsive records existed.

Normally, when an agency's response to a record request states that no responsive records exist and that response is appealed, OIP assesses whether the agency's search for a responsive record was reasonable. OIP Op. Ltr. No. 95-8 at 4. A reasonable search is one "reasonably calculated to uncover all relevant documents" and an agency must make "a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Id.* at 5 (citations omitted).

DLIR explained that it followed its standard practice for responding to record requests when it received the requester's requests. DLIR described its standard practice and asserted that it "searched the only case file created for the case as well as their offices, and they did not find any notes. It was concluded that the draft notes were discarded after the final decision was rendered." OIP found, based on the description of the searches, that they were reasonable. OIP therefore concluded that DLIR has no further duty to search.

Emails; Investigation Records; Deliberative Process Privilege Rejected

UIPA Memo 21-5

This opinion consolidated two appeals from the same requester challenging responses by the Department of Education (DOE) to two separate record requests.

The first appeal asked whether DOE properly denied access to emails between a DOE employee and four individuals. Notwithstanding DOE's arguments that the emails are protected under section 92F-13(3), HRS (the UIPA's frustration exception), OIP found that the Hawaii Supreme Court has decided that decisionmaking fundamentally is not a government function that may be frustrated under section 92F-13(3), HRS. OIP therefore found that the emails must be disclosed except for personal email addresses and telephone numbers, which may be withheld under the UIPA's privacy exception at section 92F-13(1), HRS, and direct business email addresses and telephone numbers not already made public, which may be withheld under section 92F-13(3), HRS.

The second appeal asked whether DOE properly denied access to investigation records pertaining to a complaint filed by Requester against a DOE employee.

The investigation was ongoing at the time of the record request. DOE denied access to a draft investigation report and witness statements and submittals. Because the investigation was still pending, OIP found that DOE properly withheld the draft investigation report at the time of the request under sections 92F-22(4) and 92F-13(3), HRS. OIP also found that DOE was authorized to withhold the witness identities and statements and submittals to the extent necessary to protect

witness identities under sections 92F-22(2) and 92F-13(3), HRS, and because they were part of a pending investigation at the time of the request, DOE was also allowed to withhold them as a whole under section 92F-22(4), HRS.

For the second appeal, Requester also questioned DOE's assertion that it had found all responsive records. OIP found DOE's explanation of its search for responsive records reasonable and concluded that it has no further duty under the UIPA to search for records.



General Legal Guidance and Assistance

To expeditiously resolve most inquiries from agencies or the public, OIP provides informal, general legal guidance, usually on the same day, through its “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 may 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 attorneys in FY 2021.



SP16 at Exhibit F continued the prior suspension of deadlines to respond to UIPA record requests through December 31, 2020. It appeared that the agency had sent an acknowledgment of the record request as required by SP16. The agency therefore had ten business days after December 31, 2020, to respond to the record request. [Note: the UIPA suspension was continued and later modified through a series of subsequent proclamations issued by the Governor so this agency’s deadline to respond was further delayed.]

UIPA Guidance:

No Deadline to Respond to Record Requests During COVID-19 Pandemic

In June of 2020, a member of the public requested a copy of a risk assessment report and related records written by a Hawaii County Risk Management Officer and maintained by a Hawaii County agency. The requester got no response to her request and sent a “friendly reminder” to the agency in August 2020. She received a brief apology from the agency Director but not the records. Normally, agencies must respond to record requests within ten business days. The request was made during the COVID-19 pandemic when many State and county agencies were operating under emergency protocols.

OIP informed the requester that Governor Ige’s Sixteenth Proclamation Related to the COVID-19 Emergency (SP16) was in effect.

Multiple Requests for the Same Record from Different Requesters

A county agency received multiple requests for the same record zoning and land use information from different private companies. These companies apparently compile and then sell this zoning and land use information. Furthermore, a citizen would only make a limited request for very specific areas.

For government record requests, an agency cannot charge a commercial record requester more than an individual requester. In addition, if the first requester is charged fees for search and review, the agency cannot charge a second requester the same search and review fees if the agency saved the file from the first request.

Legislative History

A member of the public contacted OIP to inquire “[d]id SB74 become an Act in 2001 or thereafter.” The individual was unable to locate it in the Hawaii State Legislature’s Archives for bills and resolutions.

OIP has compiled much of the legislative history relating to the enactment and amendment of the statutes it administers. These can be found at oip.hawaii.gov/legislation.

Use of Collected Email Addresses

An agency collected email addresses from individual licensees both in the initial application for a license, and in the online renewal process. The initial application asked for email addresses without putting any conditions on their use, but the online renewal process explicitly limited the use of email addresses collected as part of that process to use for the renewal process itself. The agency asked OIP whether it could disclose email addresses to another State agency for a purpose related to the agency’s licensing function, but not to the renewal process.

OIP advised that since the initial application asked for email addresses and did not put any conditions on their use, section 92F-19(a)(1), HRS, would allow its use by another State agency under the described conditions. However, given the explicit limitations on use of the email address collected via the renewal process, the agency could not share addresses that had only been collected via the renewal process. Thus, if the agency chose to share the email addresses it had collected via the initial application, it would need to be careful not to also share any email addresses it had obtained only through their submission as part of a renewal application.

Request for Record Requests

An agency received a request from a member of the public for any record requests for death certificates made by individuals other than himself. The agency asked if it could decline to answer, citing privacy. OIP advised that in OIP Op. Ltrs. No. 90-37 and 93-23, OIP had concluded that there is generally no privacy interest in the fact that someone has requested government records, so a written request for records under the UIPA must itself be disclosed (with home address redacted) if someone else makes a request for the request. However, in so concluding OIP, also noted the possibility that in appropriate circumstances that there could be a privacy interest in having made a personal record request – for instance, if an individual requested “a copy of my welfare file,” the request could reveal that the person had a welfare file, which itself would carry some privacy interest.

In this case, there was no obvious privacy interest in having requested a copy of someone else’s death certificate. OIP therefore advised that if the question came before OIP in an appeal, OIP would likely conclude that the UIPA’s privacy exception did not cover the name of someone who requested a death certificate for a specified individual, and thus would not provide a basis for declining to answer the question of who else, if anyone, had requested a death certificate for the specified individual.

Providing Records in Format Requested

An agency had questions about its obligations in providing requested records in electronic form. OIP advised that OIP's rules require an agency to make a reasonable effort to provide a record the way the requester asked to receive it. HAR section 2-71-18(c) states, "When a requester requests that a copy of a record be transmitted by mail, telefax, or other means, the agency shall make a reasonable effort to transmit the copy of the record in the manner sought by the requester; provided that the requester pays all fees assessed under section 2-71-19 and the transmission does not unreasonably interfere with the agency's functions."

However, when an agency believes it can provide the records more easily in a different way, such as through a shared online folder instead of a physical form of electronic storage like a USB drive, the agency can certainly contact the requester to suggest that alternative. If the requester were to insist on getting it in the requested way, though, OIP's rules would require providing it that way so long as the effort required was reasonable. An agency can charge its actual costs associated with filling a record request, which can include postage and the cost of a USB drive or CD or other storage medium used to send an electronic file through the mail, if that is how the requester asked to receive the record.

An Agency Is Not Required to Create "New" Records

An agency asked whether it was required to create "new" records to respond to a large record request. OIP advised that in general, an agency is not required to create "new" records in response to a record request, unless such data can be "routinely compiled" given the agency's existing programming capabilities.

However, a requester may still be entitled to the disclosure of any existing records of the agency. If the issue is that there are a large number of records requested, then the agency can make a good faith estimate of how long such a request will take to process and how much it would have to charge the requester.

After informing the requester of that estimate in its Notice to Requester, the agency should check whether the requester still wants to proceed with the request. It is not uncommon for requesters to not proceed after obtaining a good faith estimate of costs and realizing the extent of the records they are seeking or how difficult and time consuming it would be to locate them. If the requester nevertheless wishes to proceed with a large or complex request, the agency may also consider disclosing the records in increments.

Record Requests Should Be Made Directly to the Agency that Maintains the Record

A requester sought records maintained by another agency. OIP does not maintain the records of other agencies. If a requester wishes to obtain access to a government record, the requester must request access to that record directly from the agency that maintains the record. HAR §§ 2-71-11 and -12. After the requester has done so, and if the agency does not respond to the request within the time allowed under chapter 2-71, HAR, generally 10 business days, the requester may ask OIP for assistance. HRS § 92F-42.

Sunshine Law Guidance:

Virtual Meeting Links Cannot Be Changed Less Than Six Days Before Meeting

Staff for a County Council was preparing for its organizational meeting. The meeting was noticed with a link in the agenda for video conferencing. After the notice was posted, staff experienced challenges running the platform smoothly, and concluded the problem was not with the internet connection but rather a problem with the platform itself. Staff asked OIP whether they may select a backup video conferencing application without violating the Sunshine Law so the organizational meeting can proceed on a different platform if the one on the agenda continues to malfunction. Staff also asked whether the meeting must be canceled if, during the virtual meeting, members lose connectivity, and a quorum is lost.

OIP advised that the Governor issued a series of emergency proclamations that include partial suspensions of the Sunshine Law which allow boards to meet remotely, among other things. The proclamation in effect at the time of these inquiries was the Seventeenth Proclamation Related to the COVID-19 Emergency (SP17). Based on SP17, Exhibit F, OIP was advising boards that if a meeting link is on a filed agenda, then the board cannot change the link if it is less than 6 days before the meeting. To do so would give the public less than 6 days' notice of meeting location change. SP17 required boards to hold meetings with a quorum.

OIP therefore advised that if, during the virtual meeting, members lose connectivity then the board should establish how long it will wait to restore connectivity, whether the loss of connectivity affects the board's quorum requirements,

and whether a meeting will either be terminated or be continued to a predetermined date, time, and updated internet address to be posted on the board's website. OIP suggested the Council announce this procedure at the beginning of the meeting just in case something happens.

Retention Periods for Meeting Minutes

Staff for a State board asked how long a copy of meeting minutes must be retained and specifically asked about minutes from 1983 or earlier. OIP advised that the Sunshine Law does not include retention requirements for public meeting minutes. There may be other laws that require minutes to be retained for specific periods. OIP suggested that staff first determine whether the agency's own record retention and disposition schedules address retention of public meeting minutes. If not, the next step would be to determine whether DAGS' Archives general records schedule on DAGS' website discusses retention of public meeting minutes.

Social Event for New Board Members

A Council consists of seven members. Five of the members are relatively new and the Council asked if they are permitted to meet to get to know each other.

The Council can have a social event that is not a meeting. The members should be cautioned, however, that the Sunshine Law still applies. Therefore, board members should not discuss at the event any "board business," *i.e.*, specific matters within the board's authority that are on a board's upcoming agenda or reasonably likely to appear on an agenda in the foreseeable future. See "Board Member Orientation" on page 42.

Limiting the Length of Testimony

A board may limit oral testimony by rule. OIP received an inquiry on whether a board could limit written testimony by rule, or in the alternative, if limiting written testimony is not allowed, whether the board has the discretion to require large data files to be provided by a method of the board's choosing (e.g., by asking testifier to provide a link to large files).

Both the Sunshine Law and Governor Ige's Emergency Proclamations Related to the COVID-19 Emergency are silent regarding limiting written testimony. OIP cautioned the board to be very careful about trying to place length or size limits on written testimony by rule or practice. This would open the board to legal challenge. The board must provide the public with the "opportunity" for submission of written testimony, so if a testifier chooses to submit something very long, he runs the risk of it not being read. If a testifier chooses to submit something large in electronic format, such as by email, he runs the risk that the board will not be able to open it.

Evaluating Committee

A Commission anticipated issuing a Request for Proposals under section 103D-303, HRS, for a community engagement contractor. The Commission had questioned whether there were any Sunshine Law issues if the body itself wished to act as the "evaluation committee" (HAR 3-122-45.01). These evaluation committees are required to have at least 3 "employees," which under section 103D-104, HRS, includes "an individual drawing a salary from a governmental body, whether elected or not, and any noncompensated individual performing services for any governmental body."

The Commission believed that the review of the proposals and interviews with proposers (if needed) could be done in a non-public session, either under section 92-5(a)(8), HRS or, and perhaps more on point, section 103D-105, HRS, which states that "Part I of chapter 92 shall not apply to discussions, deliberations, or decisions required to be conducted or made confidentially under this chapter."

The Commission has two options. First, they could handle this in an executive meeting under section 92-5(a)(8), HRS. Second, they could handle this as a permitted interaction group (PIG) under section 92-2.5(b), HRS. There would need to be three meetings involving the PIG. Furthermore, a PIG is limited to two or more members of the board, but less than the number of members who would constitute a quorum of the board.

Board Member Orientation

A board has an orientation process for new board members in which they meet with staff and the board's attorney to be briefed on the Sunshine Law, ethics and financial disclosure requirements, and legal and practical information regarding their service as board members. The board asked whether this orientation could be done for multiple new members at one time under section 92-2.5(e), HRS, as part of an informational briefing.

OIP advised that based on the description of the orientation process, it might not even involve discussion of "board business" and that the Sunshine Law would not be implicated in the first place. Board business, *i.e.*, discrete matters within the board's authority that are currently pending or likely to come before the board in the foreseeable future, does not typically include general information about background legal requirements such as the Sunshine Law and ethics and financial disclosure requirements, unless the discussion of those topics includes specific examples drawing from current issues that the board itself is currently in the process of considering. Similarly, background information about what the board does, the laws creating and governing it, and administrative information about office procedures would not likely be "board business" in the absence of specific examples involving current issues before the board.

If the orientation is not actually board business, then the board would not need a permitted interaction because board members' discussions are only subject to the Sunshine Law when they are discussions of "board business." However, if the new member

orientation did proceed on the basis that the orientation does not involve discussion of “board business,” those involved would need to take care that the new board members did not stray into asking questions or otherwise discussing issues involving current or upcoming board business.

Finally, for any part of the orientation that would involve board business, OIP advised that it might not qualify as an ‘informational briefing’ permitted under section 92-2.5(e), HRS, because that permitted interaction does not apply to an event that is specifically and exclusively organized for or directed toward board members as the proposed orientation would seem to be. In that case, the board could still do the portion of the orientation not involving discussion of board business as planned, and then have separate calls or videoconferences to brief each new member on the board business issues.

Testimony Time Limits

An agency asked OIP if it could adopt a rule regarding testimony time that would limit testimony to a set maximum number of minutes per individual, but provide that it could be shortened by the Chair at each meeting to accommodate as many testifiers as possible, as long as each testifier received an equal amount of time.

Instead of a maximum number of minutes, OIP recommended adopting a set minimum amount of time that will be allowed per person per agenda item, with the proviso (if the board so chose) that the Chair may give testifiers additional time if circumstances permit. OIP expressed concern that setting a maximum allowable time for testimony with no set minimum time would not give would-be testifiers any certainty that they would be permitted to speak for at least a set amount of time, and as such it might not be a reasonable regulation of testimony as permitted under the Sunshine Law.

Permitted Interaction Groups

An agency sought advice on the procedures applicable to a permitted interaction group (PIG) whose tasks had been assigned at one board meeting and which was about to present its report at a second board meeting. OIP advised that under HRS § 92-2.5(b)(1), board discussion on an investigatory PIG’s report is not allowed at the meeting where the report is presented. The second board meeting is only meant for the PIG’s presentation, and there should be no discussion by the board of the PIG’s report until the third meeting when the board can engage in deliberation and decisionmaking concerning the PIG’s report.

Any work performed by the PIG and any recommendations made by the PIG should be part of and presented with the PIG report at the second board meeting. All tasks assigned to the PIG should be completed before the PIG presents its report to the board. Once a PIG reports to the board, members of the PIG cannot continue to meet or privately discuss board business with each other absent a separate exception to the Sunshine Law or permitted interaction.

Section 92-2.5(b)(1), HRS, does not consider that a PIG might have multiple tasks and want to report multiple times. The board may want to consider creating more than one PIG if the work is too comprehensive for one PIG alone.

Posting a Meeting Notice

A requester from a State department asked if it is necessary to fax a copy of the meeting agenda to the Lieutenant Governor’s office after it has been posted on the State Calendar. OIP answered in the affirmative. Depending on whether it is a State or county board, section 92-7(b), HRS, requires the board to (1) post the meeting notice for a Board’s meeting on the State or county’s electronic calendar; (2) file a copy of the notice with the office of the Lieutenant Governor’s office or the appropriate county clerk’s office; and (3) post the notice at the meeting site whenever feasible.

Additionally, section 92-7(e), HRS, requires boards to mail or email notices of meetings to all persons who request such notices.

Minutes of Neighborhood Board Meetings and Identification of Guests in Attendance

A neighborhood board member sought advice on the adequacy of meeting minutes produced by her own board. OIP advised that neither a full transcript nor a recording of the meeting is required under the Sunshine Law, but the minutes must give a true reflection of the matters discussed at the meeting and the views of the participants. Boards can prepare written minutes, or use a recording of the meeting with a written summary. A limitation on the length of minutes would not automatically violate the Sunshine Law, but could lead to a violation if the minutes do not include the information required by section 92-9, HRS, or are otherwise not a true reflection of the matters discussed at the meeting and the views of the participants.

Additionally, OIP advised the requester that boards are not required to prepare a list of all guests at meetings, nor can a board prohibit persons who do not identify themselves from testifying. *See* OIP Op. Ltr. No. 04-09. Thus, guests may ask questions during board meetings without identifying themselves, and a list of attending guests may be incomplete.



Education, Open Data, and Communications

Education

Each year, OIP makes presentations and provides training on the UIPA and the Sunshine Law. OIP conducts this outreach effort 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 increased the number of training materials that are freely available on its website at oip.hawaii.gov on a 24/7 basis, including basic PowerPoint training and Quick Reviews regarding the UIPA and Sunshine Law, which are also accessible by members of the public with disabilities. In FY 2021, OIP had a total of 89 training materials and forms on its website, after creating or revising one of them.

Because of COVID-19 restrictions on in-person gatherings and the loss of two experienced attorneys, OIP conducted no customized training workshops for a specific agency or board in FY 2021. OIP, however, will be updating its training materials to reflect the Sunshine Law amendments that will allow remote online meetings to be conducted, beginning January 1, 2022. OIP also plans to create an accredited CLE seminar on this new law in the fall of 2021, which will be specifically geared to the government attorneys who advise the many State and county agencies, boards, and commissions on Sunshine Law or UIPA issues. By providing training for these key legal advisors, OIP can leverage its small staff and be assisted by many other attorneys to help government agencies voluntarily comply with the new Sunshine Law meeting provisions.

Legal advisors as well as the general public can now also enjoy the benefits of OIP's new Legislation page launched in FY 2021, where OIP



has compiled the legislative history behind the enactment and amendment of the UIPA, Sunshine Law, and tax statute providing for appeals to OIP from challenges regarding the disclosure of written tax opinions. The Legislation page also features significant proposed and adopted legislation concerning the UIPA, Sunshine Law, and OIP, including Act 220, SLH 2021, regarding remote meetings.

The Legislation page continues OIP's educational and open data efforts. In FY 2012, OIP developed the UIPA Record Request Log, which is now being used by all State Executive branch departments, the Governor's and Lt. Governor's offices, all four counties, the Judiciary, the Legislature, all County Mayors and Councils, the University of Hawaii, the Office of Hawaiian Affairs, 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 educate agency personnel on how to timely and properly fulfill UIPA requests. The Log also collects important information showing how agencies are complying with the UIPA, which OIP posts onto the Master Log at data.hawaii.gov and summarizes in year-end reports posted on OIP's website.

Throughout the year, OIP keeps government entities and the public informed of the open government news through timely What's New articles that are emailed as well as archived on OIP's website. In FY 2021, OIP sent out 27 What's New articles. To be added to OIP's What's New email list, please email a request to oip@hawaii.gov.

Online Training Materials, Model Forms, and Reports

OIP's online training materials, reports, and model forms help to inform the public and government agencies about the UIPA, Sunshine Law, and work of OIP. The online training has reduced the need for in-person basic training on the Sunshine Law and enabled OIP to instead develop additional or more specialized training materials for advanced question and answer sessions to address boards' specific needs, which OIP conducted in person before the pandemic. Moreover, the online training is not restricted to government personnel and is freely and readily accessible to members of the public.

All of OIP's training materials and reports are available online at oip.hawaii.gov, where they are updated by OIP as necessary. While all Annual Reports can be found on the "Reports" page of oip.hawaii.gov, other publications can be found on the "Training" page 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 presentations 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 UIPA or Sunshine Law.

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

In FY 2021, OIP released its **Report of the Master UIPA Record Request Year-End Log for FY 2020**, which is summarized later in the

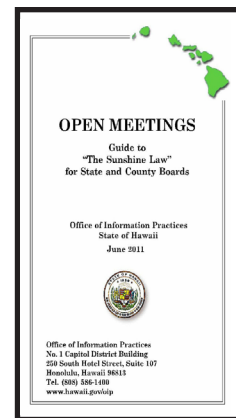


Open Data section, beginning on page 48. How to navigate OIP's website to find the various training materials, reports, and forms is described later in the Communications section beginning on page 52.

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.

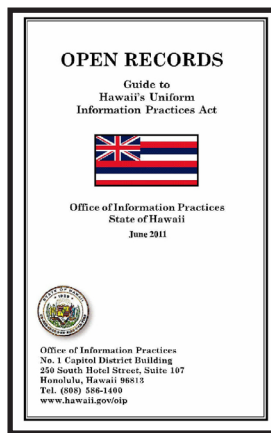
The Sunshine Law Guide uses a question and answer format to provide general information about the law and covers such topics as meeting requirements, permitted interactions, notice and agenda requirements, minutes, and the role of OIP. OIP also produced a detailed Sunshine Law PowerPoint presentation with a voice-over and full written transcript, and other training materials, which OIP formerly presented in person. The online materials make the Sunshine Law basic training conveniently available 24/7 to board members and staff as well as the general public and have freed OIP's staff to fulfill many other duties. In FY 2022, OIP will update its Sunshine Law materials to explain the revisions made in Act 220, SLH 2021, including the new remote meeting requirements.



OIP has also created various Quick Reviews and more specific 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

The *Open Records: Guide to Hawaii's Uniform Information Practices Act* (UIPA Guide) explains Hawaii's public record law and OIP's related administrative rules.



The UIPA Guide navigates agencies through the process of responding to a record request, such as determining whether a 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 detailed PowerPoint presentation with voice-over and a full written transcript of its basic training on the UIPA, which it plans to update in FY 2022.

Additionally, as discussed earlier in the "Training" section, OIP in FY 2013 implemented the UIPA Record Request Log, which is 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. While use of these forms is not required, they help agencies and the public to remember the deadlines and to provide information that is required by the UIPA.

To assist members of the public in making UIPA record requests to agencies, OIP developed a **"Request to Access a Government Record"** form that provides all of the basic information an agency requires to respond to a 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 to conduct an on-site inspection because public attendance is not practicable. Before holding a limited 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.

Open Data

Abbreviations used throughout this section:

Log - UIPA Record Request Log

Master Log - Master UIPA Record Request

Log, posted semiannually and
annually at data.hawaii.gov

To further its educational and open data objectives, and to evaluate how the UIPA is working in Hawaii, OIP has been collecting information from State and county agencies through the UIPA Record Request Log. The Log is an Excel spreadsheet created by OIP, which helps agencies track the formal UIPA record requests that they receive as well as report to OIP when and how the requests were resolved and other information.

In FY 2021, OIP released its year-end reports based on information posted by 199 State and 85 county agencies on the Master UIPA Record Request Year-End Log for FY 2020 at data.hawaii.gov. While separate reports were created for the State versus county agencies, the collected data showed overall that the typical record request was granted in whole or in part and was completed in less than ten work days, and the typical requester paid nothing for fees and costs.

The Log reports for FY 2021 will be available in FY 2022 and posted on the Reports page at oip.hawaii.gov.

State Agencies' UIPA Record Request Log Results

The 199 State agencies that reported Log results in FY 2020 came from all State executive branch departments, the Governor's office, the Lt. Governor's office, the Legislature, the Judiciary, and independent agencies, such as the OHA, UH, and the Oahu Metropolitan Planning Organization. Overall, formal UIPA record requests constituted 0.5% of the estimated 476,415 total formal and routine record requests that State agencies received in FY 2019. Excluding one agency whose

results would have skewed the entire report, 198 agencies reported receiving 2,364 formal written requests requiring a response under the UIPA, of which all but 136 were completed in FY 2020. Of the 2,364 completed cases, 77% were granted in full or in part, and 3% were denied in full. In 20% of the cases, the agency was unable to respond to the request or the requester withdrew, abandoned, or failed to pay for the request.

State agencies took 7.9 work days, on average, to complete 1,617 typical record requests, and 4.8 days to complete 422 personal record requests. In contrast, it took 22.6 days, on average, to complete a complex request (139 total), which constituted 6% of all requests.

In terms of hours worked per request, the average number of search, review and segregation (SRS) hours for a typical record request was 1.10, as compared to 0.41 hours for a personal record request and 8.84 hours for a complex record request. Although the 139 complex record requests constituted only 6% of all requests, they consumed nearly nine times as many SRS hours compared to the typical request. Complex requests also accounted for 48% (\$29,155) of the total gross fees and costs incurred by agencies (\$60,410) and 31% (\$2,389) of the total amount recovered from all requesters (\$7,973).

State agencies recovered \$7,973 in total fees and costs from 260 requesters, which is 13.1% of the \$60,410 incurred by agencies in gross fees and costs. Forty-nine percent of completed requests were granted \$30 fee waivers, while another 2% were granted \$60 public interest waivers. No fee waivers were reported in 49% 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 88% (1,968) of all requesters in completed cases paid nothing in fees or costs for their record requests. Of the 260 requesters that paid any fees or costs, 41% paid less than \$5.00 and 46% paid between \$5.00 and \$49.99. Of the 34 requesters who paid \$50 or more, at least 24 requesters (70%) were reported by State agencies as representing attorneys, media, or for-profit or nonprofit organizations. For a more detailed

breakdown of the fees and costs paid by requesters, *see* **Figure 16** on the following page.

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 2020 was the sixth year that the counties participated in the Master Log. OIP prepared a separate report based on information posted by 85 agencies from all four counties. Each county's data was reported separately, then averaged with all counties' data. All counties' average results are summarized as follows.

Formal UIPA record requests to the counties constituted 0.4% of the estimated 547,122 total formal and routine record requests that agencies received in FY 2020. Eighty-eight county agencies reported receiving 2,225 formal written requests requiring a response under the UIPA, of which 2,103 (95%) were completed in FY 2020. Of the 2,103 completed cases, 83% were granted in full or in part, and 3% 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.

County agencies averaged 8.6 work days to complete a typical request (1,467 completed requests) and 15.9 days to complete a personal record request (293 completed requests). It took 21.4 work days, on average, to complete a complex request (343 completed 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 0.94, as compared to 0.91 hours for a personal record request and 4.54 hours for a complex record request. Although the 343 complex record requests completed in FY 2020 constituted only 16% of all completed requests, they consumed about five times as many SRS hours compared to the typical request. Complex requests also disproportionately accounted for 48.5% (\$36,183) of the total gross fees and costs incurred by county

agencies (\$74,580) and 36% (\$5,772) of the total amount recovered from all requesters (\$15,763).

County agencies recovered \$15,763 in total fees and costs from 357 requesters, which is 21% of the \$74,850 incurred by agencies in total gross fees and costs. Fifty-seven percent of completed requests were granted \$30 fee waivers, while another 3% were granted \$60 public interest waivers. No fee waivers were reported in 40% 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.

Eighty-three percent (1,746) of all requesters in completed cases paid nothing in fees or costs for their county record requests. Of the 357 requesters that paid any fees or costs, 54% paid less than \$5.00 and 29.1% paid between \$5.00 and \$49.99. Only 59 requesters (16.5% of all paying requesters) paid \$50 or more per request, of whom at least 30 (61.2%) were reported by the counties as representing law firms, media, or commercial or non-profit entities. For a more detailed breakdown of the fees and costs paid by requesters, *see* **Figure 17** on page 51.

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

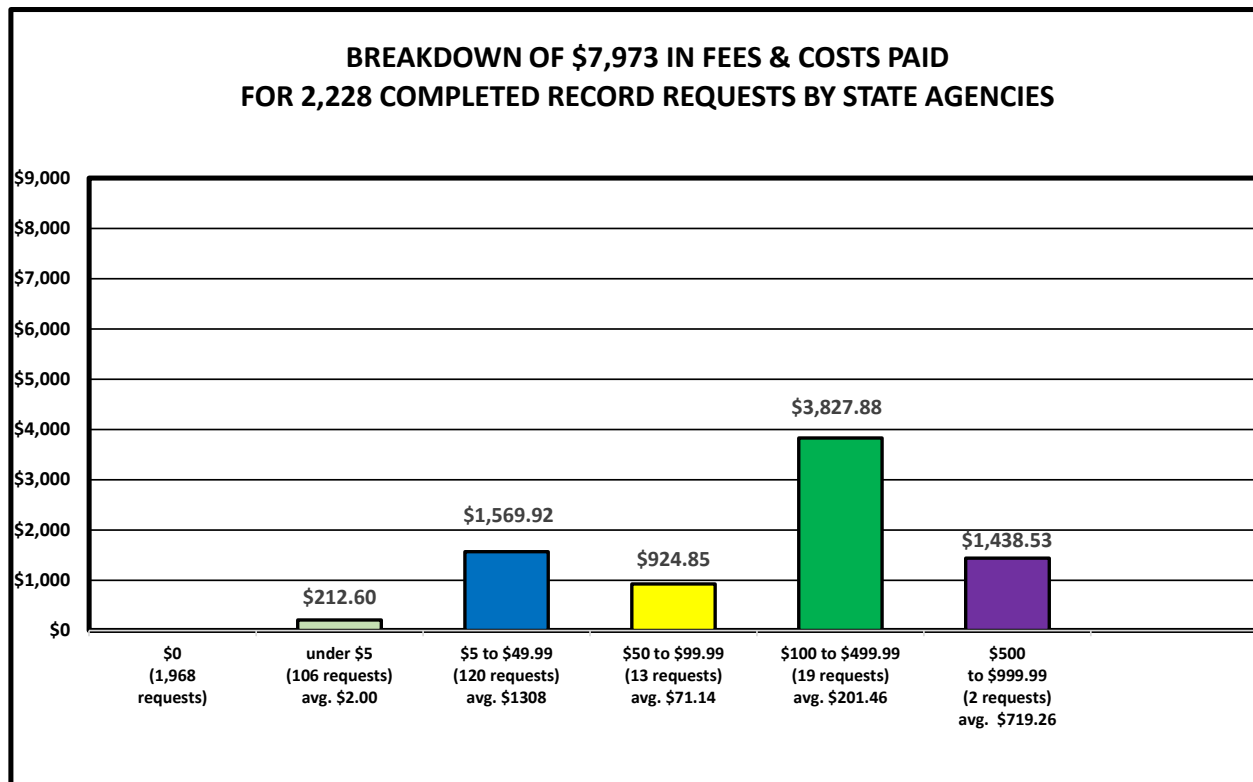


Figure 16

**STATE AGENCIES'
UIPA RECORD REQUEST LOG
RESULTS FOR FY 2020**

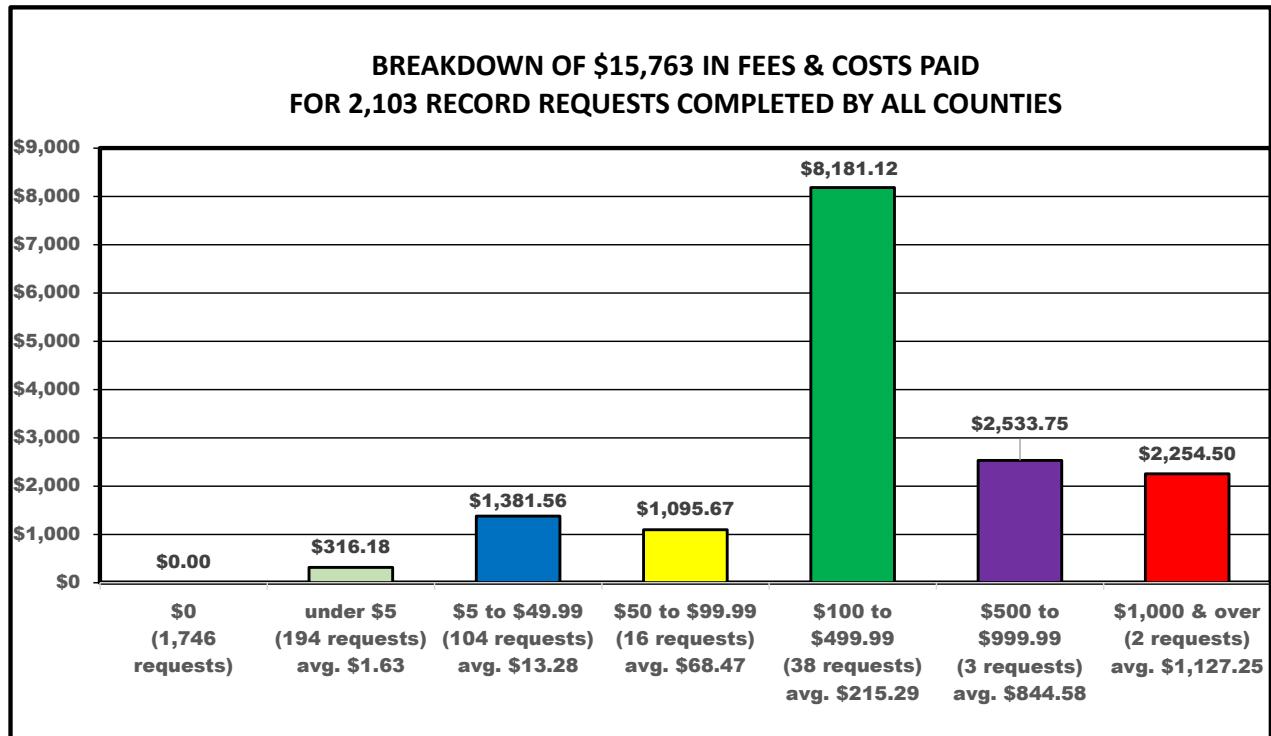


Figure 17

**COUNTY AGENCIES'
UIPA RECORD REQUEST LOG
RESULTS FOR FY 2020**

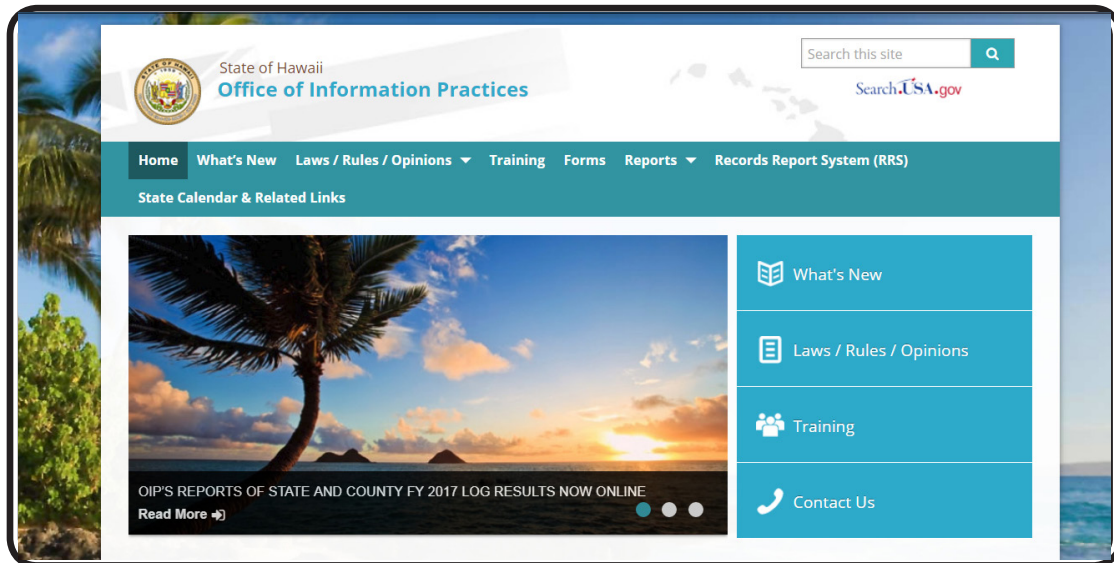


Communications

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 2021, OIP continued its communications to the agencies and public, mainly through 27 *What's New* articles, OIP's Annual Report, and two summaries of State and County Log Reports.

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
- New or proposed legislation and the legislative history of the UIPA and Sunshine Law
- 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's 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"

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.

➤ *Sunshine Law*: the complete text of the Sunshine Law, with quick links to each section.

➤ *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 opinions with precedential value; an updated and searchable subject index; a summary of each opinion; and the full text of each formal opinion.

➤ *Informal Opinions*: summaries of OIP's informal opinion letters regarding the Sunshine Law or UIPA.

"Legislation"

This new webpage, added in FY 2020, provides easy public access to important pending, recent, or proposed legislation.

Additionally, OIP has digitized the entire four-volume "Report of the Governor's Committee on Public Records and Privacy," which was published in December 1987 and formed the basis for the adoption of the UIPA in 1988.

OIP has also compiled on this webpage the legislative history relating to the enactment and amendment of the UIPA and Sunshine Law.

"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.

"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 special reports and 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.

“State Calendar and 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, and to the online calendar for each county. You can 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** and the link is on this webpage.



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).

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.

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.

As of FY 2021 year end, State and county agencies posted 28,612 record titles. *See Figure 18.*



Records Report System

Status of Records Reported by Agencies: 2021 Update

Jurisdiction	Number of Record Titles
State Executive Agencies	19,568
Legislature	836
Judiciary	1,645
City and County of Honolulu	3,910
County of Hawaii	942
County of Kauai	1,069
County of Maui	642
Total Record Titles	28,612

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.

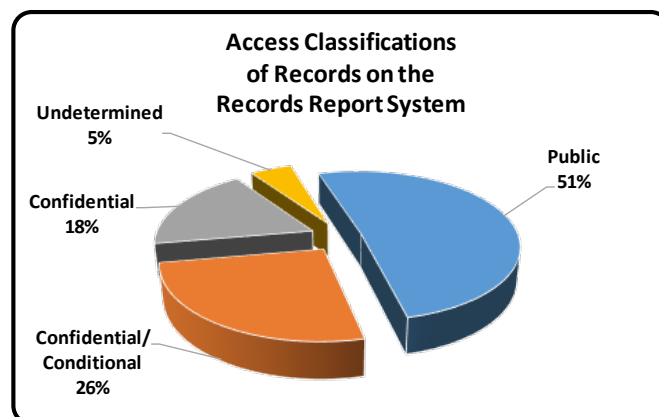


Figure 19

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.

Although legislative work is not counted in the total number of cases seeking OIP's assistance, it nevertheless takes staff time to process, monitor, respond to inquiries, and prepare and present

testimony. During the 2021 legislative session, OIP reviewed and monitored 161 bills and resolutions affecting government information practices, and testified on 41 of these measures. OIP was most significantly impacted by the following legislation:

► **Act 220**, signed on July 16, 2021, enacted **S.B. 1034, S.D. 1, H.D. 2, C.D. 1**, which amends the Sunshine Law to allow public meetings to be conducted remotely using interactive conference technology, such as Zoom. Act 220 takes effect January 1, 2022, and OIP will have new Sunshine Law training materials explaining the amendments.



Litigation Report

Abbreviations used throughout this section:

HRS - Hawaii Revised Statutes

HSC - Hawaii Supreme Court

ICA - Intermediate Court of Appeals

HRPP - Hawaii Rules of Penal Procedure

monitor. The UIPA cases, which are the majority, are discussed first, followed by those involving the Sunshine Law.



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 court 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 suit in the circuit court 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 2021, OIP monitored 45 litigation cases, of which 13 were new. Six litigation cases closed during the year, and 39 remained pending at the end of FY 2021. Three of the cases monitored by OIP concerned open government issues and were not cases directly involving the Sunshine Law or UIPA.

Summaries are provided below of the new lawsuits monitored by OIP in FY 2021 as well as updates of selected cases that OIP continues to

UIPA Litigation:

Maui Community Correctional Center Records

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

As was reported in last year's annual report, Stanley Kong (Plaintiff) requested that the Maui Community Correctional Center (Defendant) provide him a copy of the contract agreement and stipulations signed by him upon entering Defendant's Maui Drug Court Program. He also requested a copy of the approval form that granted him inmate to inmate correspondence and visits at Defendant's facility. Defendant failed to respond to his record requests. On December 27, 2012, Plaintiff filed this pro se lawsuit in the Second Circuit Court, pursuant to the Hawaii Rules of Penal Procedure (HRPP) Rule 40. On January 4, 2013, the court ordered Plaintiff's complaint to be "treated as a civil complaint not governed by HRPP Rule 40" and ordered that Plaintiff "must follow all rules outlined in the Hawaii Rules of Civil Procedure." There has been no change since the court's January 4, 2013, order, so OIP will discontinue reporting on this case unless there is a substantive change.

Department of Public Safety Records

Kong v. Department of Public Safety
Civ. No. 13-1-0067 (1st Cir. Ct.)
CAAP-14-0001334 (ICA)

Stanley Kong (Plaintiff) requested that the Department of Public Safety (Defendant) provide him a copy of various records. After Defendant failed to respond to his record request, Plaintiff filed this lawsuit on December 27, 2012. On November 25, 2014, he filed a Notice of Appeal with the ICA, even though the First Circuit Court had not issued a final judgment. On June 1, 2015, the ICA dismissed Plaintiff's case for lack of appellate jurisdiction. There was no further action and the circuit court dismissed the case on January 8, 2021, so OIP will discontinue reporting on this case.

Hawaii Paroling Authority's Minimum Decision Record

*Karagianes v. Hawaii Office of
Information Practices*
Civ. No. 18-1-2030 (1st Cir. Ct.)

Gary Karagianes (Plaintiff) made a record request to the Hawaii Paroling Authority (Defendant) for a copy of his Minimum Decision Record, and his request was denied. On October 11, 2018, OIP issued Op. Ltr. No. F19-01 (Opinion F19-01), in which OIP concluded that Defendant properly denied Plaintiff's request under the UIPA. On October 18 and 23, 2018, Plaintiff requested reconsideration of OIP's decision in Opinion F19-01. OIP denied Plaintiff's requests for reconsideration, finding that Plaintiff had not presented a basis for the reconsideration, *i.e.*, a change in the law or the facts, or other compelling circumstances. As reported in prior annual reports, on December 14, 2018, Plaintiff filed a Notice of Appeal in the First Circuit Court of OIP's decision "denying reconsideration of OIP's own prior decision." On February 21, 2019, the court filed an order denying Plaintiff's motion

for appointment of counsel. There have been no further developments since February 21, 2019, so OIP will discontinue reporting on this case unless there is a substantive change.

Employee Disciplinary Records

Honolulu Civil Beat, Inc.
v. Department of Education
Civ. No. 19-1-0191-02 BIA (1st Cir. Ct.)

On May 24, 2018, Honolulu Civil Beat (Plaintiff) made a record request to the Department of Education (DOE) for 34 closed cases of employee misconduct as of April 2018. DOE responded by providing a summary chart and denied access based on the UIPA's privacy and frustration exceptions. Later, DOE provided Plaintiff with redacted records for 5 of the cases. Plaintiff then filed this lawsuit for access to the withheld portions of disciplinary records for 5 named employees and 29 unknown employees, except for personal contact information of individuals, and identifying information about students, which Plaintiff does not seek access to. Plaintiff asked the court to expedite this case, for an order requiring DOE to disclose all requested information, and for an award of attorney's fees and all other expenses. DOE's Answer asked that the Plaintiff's Complaint be dismissed and sought attorney's fees and costs.

On November 12, 2019, the court entered an order granting Plaintiff's motion for partial summary judgment and ordered the disclosure of the requested records with redactions of personally identifying information. On February 16, 2021, Plaintiff filed a Motion for Sanctions asking the court to impose a second final deadline for DOE to produce records. The court took the matter under advisement while DOE was producing documents and the parties periodically appeared for status conferences. Status conferences were discontinued after October 4, 2021, when the court was informed that issues were resolved by the parties. OIP will therefore discontinue reporting on this case.

Ala Wai Small Boat Harbor Records

Rask v. Department of Land and Natural Resources
Civ. No. 20-0-16 (1st Cir. Ct.)

Erik Rask (Plaintiff) made two record requests to the Department of Land and Natural Resources (DLNR) dated May 23, 2019, and October 26, 2019, respectively, for copies of records pertaining to DLNR’s request for proposals (RFP) for development of the Ala Wai Small Boat Harbor, meeting minutes, documents relating to the selection committee relating to the RFP, and communications between DLNR and “qualified applicants.” DLNR partially granted and partially denied the record requests, citing the UIPA’s frustration exception as allowing it to withhold records in order to protect the integrity of the procurement process, the attorney-client privilege, and other laws.

Plaintiff thereafter filed this lawsuit seeking certain orders regarding the validity of DLNR administrative rules regarding mooring fees, liveaboard fees, harbor fees and other issues outside of the UIPA, and seeking full disclosure of responsive records under the UIPA. On July 1, 2021, Plaintiff filed a Motion for Partial Summary Judgment Regarding DLNR’s Disclosure Obligations under the UIPA. The hearing was set for September 16, 2021.

Neighborhood Commission Dismissal of Request for Sanctions Against Neighborhood Board Member

LeVasseur v. Neighborhood Commission
Civ. No. 20-0001102 (1st Cir. Ct.)

Kenneth LeVasseur (Plaintiff) filed a complaint with the City and County of Honolulu Neighborhood Commission (Defendant) against a fellow

member of a neighborhood board alleging Sunshine Law violations. Defendant dismissed the complaint and Plaintiff appealed that decision to the circuit court. The case is in the early stages of litigation.

Investigation Records

Evergreen Adult Day Care v. DHS
Civ. No. 20-0000721 (1st Cir. Ct.)

Evergreen Adult Day Care, Inc. (Plaintiff), made a record request to the Department of Human Services (Defendant) for records pertaining to allegations of fraud against it. The request was denied in its entirety and Plaintiff filed this lawsuit seeking records to which access was denied. In an order filed June 9, 2021, the court granted Plaintiff’s motion for summary judgment. Specifically, the court found that the Defendant did not meet its burden to justify nondisclosure, and ordered it to produce “some or all of the records . . . with appropriate redactions[.]” The court also ordered the parties to “confer in good faith regarding setting a framework and time frame for the review of Defendant’s files and identification of documents that can be disclosed and appropriate redaction of the documents to be produced to Plaintiff[.]” The court also awarded to Plaintiff its attorneys’ fees and costs, to be determined later. The case remains pending.

Investigation Records

Evergreen Adult Day Care v. AG
Civ. No. 20-0000723 (1st Cir. Ct.)

Evergreen Adult Day Care, Inc. (Plaintiff) made a record request to the Department of the Attorney General for records pertaining to allegations of fraud against it. The request was denied in its entirety and Plaintiff filed this lawsuit seeking records to which access was denied. The case is in the early stages of litigation.

Police Overtime Hours

Civil Beat v. HPD

Civ. No. 21-0000116 (1st Cir. Ct.)

Honolulu Civil Beat Inc. (Plaintiff) made a record request to the Honolulu Police Department (Defendant) for a spreadsheet with the names of all employees, current job titles, and total number of overtime hours for 2015-2020. Defendant denied the request and Plaintiff filed this lawsuit. Plaintiff filed a motion for summary judgment on March 10, 2021; however, court minutes for April 29, 2021, show that the motion was continued as the parties may be able to resolve the matter. A stipulation to dismiss with prejudice as to all parties and claims was filed on September 1, 2021, so OIP will discontinue reporting on this case.

After being denied its request for video footage related to the death of 16-year-old Iremamber Sykap (Minor), the Civil Beat Law Center for the Public Interest (Plaintiff) filed a lawsuit in 2021 in the First Circuit Court against the Department of the Prosecuting Attorney (Defendant), seeking the release of the Honolulu Police Department body-worn camera footage related to the Minor's death. On September 30, 2021, the court granted in part and denied in part Plaintiff's cross-motion for summary judgment. Specifically, the court denied Plaintiff's request for an order "declaring that the Prosecutor's policy to indefinitely delay access to police body-worn camera footage related to use of force against citizens is a violation of UIPA" because the court found that "[t]his language is too vague, and would create problems with predictability and meaningful enforcement."

Names of Contact Tracers

Civil Beat v. DOH

Civ. No. 21-0000284 (1st Cir. Ct.)

Honolulu Civil Beat (Plaintiff) made a request to the Department of Health (DOH) for information showing the names, job titles, and dates of employment for (1) DOH employees in the Disease Investigation Branch; (2) DOH employees whose job description includes contact tracing; and (3) contract hires by DOH for contact tracing. DOH denied the request and Plaintiff filed this lawsuit for access which is in the early stages of litigation. An order granting Plaintiff's motion for summary judgment was filed on September 13, 2021, and the parties stipulated as to attorney's fees on October 1, 2021, so OIP will discontinue reporting on this case.

The court, however, granted Plaintiff's request for an order "compelling the Prosecutor to disclose the video footage related to Iremamber Sykap's death with blurring to protect the identity of individuals who are not government employees." As to Defendant's motion for summary judgment, the court denied the motion, finding that Defendant's "Declaration of Special Counsel is insufficient because the assertion that 'disclosure would impair the investigation and could potentially poison the jury pool' is conclusory." The case is still pending.

Access to Final Investigative Reports Related to the State Auditor's Office

Civil Beat v. Department of the Attorney General

Civil No. 16-1-1743-09 KKH (1st Cir. Ct.)

CAAP-21-0000057 (Intermediate Court of Appeals)

SCAP-21-0000057 (Supreme Court)

In the spring of 2015, the Legislature requested that the Department of the Attorney General (AG) conduct an investigation of the State Auditor's Office. The AG sent its investigation report to the Legislature in the Spring of 2016. Honolulu Civil

Request for Records of HPD Body Camera Footage

Civil Beat Law Center for the Public Interest v.

Department of the Prosecuting Attorney

Civ. No. 1CCV-21-0000699

Beat Inc. (Plaintiff) requested all final investigative reports regarding the State Auditor's office from January 1, 2015, to the time of the request. The AG denied the request in its entirety, asserting the privacy exception, the deliberative process privilege (falling under the frustration exception) and the attorney-client privilege (falling under several exceptions).

Plaintiff then filed a lawsuit in the First Circuit Court. Defendant filed a Motion for Summary Judgment (MSJ) and Plaintiff filed a cross-MSJ. The only document responsive to Plaintiff's record request was the AG's Report to the Legislature in the Spring of 2016. The Circuit Court entered judgment in favor of Defendant, finding that the AG is required to provide legal services to the Legislature and any communications related to "such legal services are confidential under [Hawaii Rules of Evidence] 503 and Rule 1.6 of the [Hawaii Rules of Professional Conduct]." Notice of Entry of Final Judgment filed on June 1, 2017. A Notice of Appeal was filed by Plaintiff on July 13, 2017. The appeal remains pending before the Hawaii Supreme Court.

Access to Arbitration Decision Involving a Police Officer

State of Hawaii Organization of Police Officers v. City and County of Honolulu
Civ. No. 18-1-0823-05
ICA CAAP-19-0000450
SCAP-19-0000450

In February 2018, Honolulu Civil Beat, Inc. (Civil Beat) made a record request to the Honolulu Police Department (HPD) for a copy of an arbitration decision involving an officer. In May 2018, the State of Hawaii Organization of Police Officers (SHOPO) filed a complaint against the City and County of Honolulu in the First Circuit Court seeking an order to prohibit the records' disclosure. Civil Beat moved to intervene in the case. In April 2019, the court ordered the disclosure of the requested records in redacted form. In June 2019, SHOPO appealed the decision and

the court's judgment was stayed pending the appeal. The case was transferred to the Hawaii Supreme Court.

In December 2020, oral argument was heard before the HSC, and on December 16, 2020, the HSC stated it was clear the "UIPA mandates the disclosure of the documents at issue" and ordered the stay of the Circuit Court's judgment be lifted. The case remains pending.

Request for DOE Records

Hawaii Education Institute v. Department of Education
Civ. No. 19-1-1090-07

In March 2018, the Hawaii Education Institute (HEI) made a record request to the Department of Education (DOE) seeking access to records relating to twelve different categories of information, including budgetary data, job position data, student performance data, enrollment data, and financial data. DOE denied the request and in July 2019, HEI filed a complaint in the First Circuit Court. In March 2020, DOE filed a Motion for Summary Judgment, which was denied. In December 2020, HEI filed a Motion for Partial Summary Judgment. In February 2021, DOE filed another Motion for Summary Judgment.

In March 2021, the court granted HEI's Motion for Partial Summary Judgment in favor of HEI and against DOE with regard to HEI's request for general ledger system line items showing DOE's revenues, expenditures and encumbrances, and the parties stipulated to a partial dismissal with prejudice of HEI's claims with respect to its other requests. In April 2021, the court denied DOE's second Motion for Summary Judgment. The case remains pending in the Circuit Court.

Access to Special Management Area Permit Records

Christopher Salem v. County of Maui, et al.
Civ. No. 17-1-0208 (Second Circuit)
CAAP-18-0000105

Christopher Salem (Plaintiff) filed a Complaint in the Second Circuit Court against the County of Maui, the County Planning Director and a deputy Corporation Counsel (collectively Defendants), seeking access to records related to a Special Management Area (SMA) Permit. Plaintiff alleged that the Defendants obstructed Plaintiff's access to the records. Furthermore, Plaintiff asserts that the Defendants "manipulated and misrepresent[ed]" the existence of public records of the date of final acceptance and closure of a certain SMA permit. Defendants filed a Motion to Dismiss or, in the Alternative, for Summary Judgment (Defendants' Motion). The court granted Defendants' Motion.

The court entered Judgment in favor of Defendants on January 24, 2018. Plaintiff filed a Notice of Appeal on February 23, 2018. The appeal remains pending.

Academic Grievance Records at University of Hawaii

Travis Williamson v. University of Hawaii
Civ. No. ICC14-1-1397-06

Plaintiff asked Defendant UH for documents pertaining to his academic grievances as a UH student. Plaintiff renewed his records requests, but Defendant did not respond to either request.

Plaintiff then asked OIP for assistance and asked that his request be treated as an appeal. Defendant 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.

In June 2014, Plaintiff filed a lawsuit in the First Circuit Court seeking access to the requested records and a declaration that Defendant withheld records in violation of the UIPA. In December 2014, Defendant filed its response. In October 2017, the Circuit Court granted Plaintiff's motion to set aside the order of dismissal that the court had issued in July 2017. The case is still pending.

Personal Records of Police Officer Applicant

Ian Seely v. County of Hawaii Police Department
Civ. No. 17-1-0414

Plaintiff applied for employment as a police officer at the Hawaii Police Department (Defendant). Defendant had made, but later rescinded its conditional offer of employment to Plaintiff. Plaintiff requested Defendant to disclose his personal records from his interview by Defendant's psychiatrist. Defendant denied his personal record request because Plaintiff had signed a waiver of his right to know the results of Defendant's testing and interviews of him. Further, Defendant informed Plaintiff that its denial of his personal record request was also based upon the UIPA exception protecting testing or examination materials. In 2016, Plaintiff appealed to OIP the Defendant's denial of access to personal records, but abandoned his appeal so it was dismissed by OIP.

In 2017, Plaintiff filed in the Third Circuit Court a lawsuit against Defendant alleging disability discrimination, retaliation, and violation of the UIPA. A settlement conference was set for September 17, 2021, and a jury trial was set for October 24, 2022.

Inmate Medical Records

Hamasaki v. CoreCivic, Civ. No. 1CSP-19-0000030 (1st Cir. Ct.)

An inmate (Plaintiff) requested copies of his medical records from the Department of Public Safety. He submitted a complaint against private prison operator CoreCivic and named employees (Defendants), in the form of a letter to the court clerk, and has sought to serve Defendants via mail. Plaintiff has not successfully served Defendants as of this writing, although CoreCivic is aware of his attempts and sent him a letter, which is part of the court file, stating that proper service had not been accomplished and noting jurisdictional flaws. The case is still pending.

Police Disciplinary Records

State of Hawaii Organization of Police Officers (SHOPO) v. County of Maui, Civ. No. 2CCV-20-0000329 (3) (2nd Cir. Ct.)

SHOPO v. County of Kauai, Civ. No. 5CCV-20-0000120 (5th Cir. Ct.)

SHOPO v. County of Hawaii, Civ. No. 2CCV-20-0000432

SHOPO v. City and County of Honolulu, Civ. No. ICCV-20-0001512

Act 47 of 2020 amended the UIPA (among other things) to treat police officer disciplinary records the same as other public employees' disciplinary records, meaning that police officer suspensions, which had previously been given special protection under the UIPA, would now become public information once final. SHOPO sued all counties seeking to have Act 47 declared unconstitutional.

In the suits involving Hawaii County, Maui County, and Kauai County, the complaint has been answered, and SHOPO has filed a pre-trial statement in the Hawaii County and Kauai County litigations.

The most active litigation has been that filed against the City and County of Honolulu. In November 2020, before the City had even answered

the complaint, SHOPO sought a preliminary injunction preventing the disclosure of disciplinary records, including in response to a UIPA request by someone not party to the lawsuit. The court partially denied the injunction on December 15, 2020, and ordered SHOPO to follow the UIPA's mandates with respect to the pending request. The City answered the complaint on December 2, 2020, with the remainder of SHOPO's motion for injunction still pending, and the State of Hawaii and Civil Beat Law Center sought and were granted leave to intervene in the litigation and filed their own answers in January and February 2021.

Meanwhile, SHOPO again sought to prevent disclosure of the disciplinary records at issue through an "Objection" to their disclosure filed January 15, 2021, to which the defendant City and intervenor Civil Beat Law Center filed memoranda in opposition in February 2021. Both Civil Beat Law Center and the other intervenor, the State of Hawaii, also filed oppositions to SHOPO's still-pending motion for a preliminary injunction, which had been only partially denied. After hearing further argument, the court ultimately issued a full denial of SHOPO's motion for a preliminary injunction on April 14, 2021. On August 27, 2021, the court ordered, and the parties stipulated, that the court's December 15 and April 14 rulings had concluded as a matter of law that Act 47 was constitutional and required the City's compliance, and that those rulings fully resolved SHOPO's claim.

All cases remain pending.

Police Disciplinary Records

Peer News LLC v. City and County of Honolulu and Honolulu Police Department, Civ. No. 13-1-2981-11 (1st Cir. Ct.)

ICC 17-1-001433 (Hawaii Supreme Court)

Peer News LLC, dba Civil Beat (Plaintiff) asked the Honolulu Police Department (Defendant) to provide information regarding 12 police officers who, according to Defendant's annual disclosure

of misconduct to the State Legislature, received 20-day suspensions due to employment misconduct from 2003 to 2012. Plaintiff asked for the suspended employees' names, nature of the misconduct, summaries of allegations, and findings of facts and conclusions of law. Defendant denied Plaintiff's record 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 alleging that Defendant and the City and County of Honolulu (collectively Defendants) failed to disclose the requested records about the 12 suspended police officers as required by the UIPA and in accordance with a 1997 OIP opinion. In March 2014, the court granted Plaintiff's motion for summary judgment and ordered Defendants to disclose the requested records about the suspended police officers, which was discussed in OIP's FY 2015 Annual Report. An appeal was filed in this case by State of Hawaii Organization of Police Officers (Intervenor).

In February 2015, the Hawaii Supreme Court granted Plaintiff's application for transfer of the case on appeal. Defendants filed a notice stating that neither party was taking a position in the appeal. In June 2016, after considering Plaintiff's and Intervenor's arguments, the HSC vacated the judgment and remanded the case to the circuit court with instructions to conduct an in camera review of the police suspension records and weigh the competing public and privacy interests in the disclosure of these records on a case-by-case basis.

In August 2020, the circuit court ordered a stay of the case pending the Governor's signing of Act 47, which amended the UIPA to remove misconduct information regarding suspended officers from the category of employee information with a significant privacy interest, and thus may affect the outcome of the case. Act 47 was signed on September 15, 2020, but as of this writing the case remains pending. OIP's summary of the Supreme Court's opinion, *Peer News LLC v.*

City and County of Honolulu, 138 Haw. 53, 376 P.3d 1 (2016), can be found on OIP's website at oip.hawaii.gov/wp-content/uploads/2013/09/Peer-News-summary.pdf.

After Act 47 was signed into law, Plaintiff filed a motion for reconsideration based on the change in law it represented, which was joined by Defendants and opposed by an intervenor, the State of Hawaii Organization of Police Officers. The motion was granted in part and denied in part in a minute order dated June 29, 2021. However, as of this writing, the court and the parties had not settled on the form for a filed order reflecting that decision.

Property Appraisal Report

In Re Office of Information Practices Opinion Letter No. F19-04, Civ. No. S.P. No. 19-1-0157

In the First Circuit Court, the Department of Budget and Fiscal Services of the City and County of Honolulu (Appellant) appealed OIP's Opinion Letter Number F19-04, which concluded that the UIPA did not allow Appellant to withhold a property appraisal report. After service of the complaint and OIP's and the original record requester's answers, Appellant filed an opening brief in August 2019. In November 2019, the court granted a motion by Civil Beat Law Center for the Public Interest to file an amicus curiae brief. In June 2020, the court heard oral argument on, and ultimately denied, Appellant's appeal of OIP's Opinion Letter Number F19-04.

In July 2020, Appellant appealed that order to the ICA, and filed its opening brief November 18, 2020. The Civil Beat Law Center sought and was granted permission to file an amicus curiae brief on February 25, 2021, and the City responded on March 23, 2021. The appeal remains pending.

Land Records

Salem v. County of Maui, Civ. No. 2CCV-21-000027(1)

An individual (Plaintiff) requested records relating to a litigation and records related to a specified piece of land from the County of Maui (Defendant). Defendant asserted at various times that it did not maintain responsive records, and Plaintiff filed suit on January 29, 2021, arguing that Defendant had deliberately concealed documents it possessed. Defendant filed a Motion to Dismiss on March 1, 2021, and filed an amended version of that motion on March 25, 2021. Plaintiff opposed the motion, but it was granted by the court and Plaintiff's complaint was dismissed on May 18, 2021. However, Plaintiff subsequently moved for reconsideration, which Defendant opposed, and that motion remained pending as of this writing.

Sunshine Law Litigation:

Charter School Commission's Adjudication of a Matter Not on the Agenda

*Thatcher v. Hawaii State Public Charter
School Commission*
Civ. No. 15-1-1583-08 (1st Cir. Ct.)
CAAP-17-0000092 (ICA)

The Hawaii State Public Charter School Commission (Defendant) filed a notice for its May 14, 2015, meeting. The agenda did not include an item relating to the discussion of the Department of Education's enrollment form, "SIS-10W" (Enrollment Form). However, Defendant discussed the Enrollment Form at the meeting and issued a written decision regarding its use.

Thereafter, John Thatcher (Plaintiff) filed a lawsuit in the First Circuit Court on August 12, 2015, alleging that Defendant violated the Sunshine Law when 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." Plaintiff alleged that Defendant did not accept oral and written testimony on the Enrollment Form and discussed and decided the matter during its meeting on May 14, 2015.

In response, Defendant argued that on May 14, 2015, exercising its adjudicatory function and in a closed, lunch break during its General Business Meeting, Defendant reviewed the Enrollment Form and made its decision. Defendant also noted that prior to its May 14, 2015 meeting, Plaintiff had provided testimony during meetings on February 26 and March 12, 2015.

On October 7, 2016, Defendant filed its motion for summary judgment on the basis that it exercised its adjudicatory function and rendered a final decision without a public meeting because a meeting was not required under the Sunshine Law for Defendant's adjudicatory function, and because the Enrollment Form was an ongoing issue which Plaintiff had provided testimony on at previous meetings.

The court granted Defendant's motion, and entered its final judgment on February 1, 2017. As was reported in prior annual reports, on April 21, 2017, Plaintiff filed an appeal to the ICA, where the case remains pending.

Insufficient Notice of Rule Changes

*Committee for Responsible Liquor Control
and Madge Schaefer v. Liquor Control
Commission, Director of the Department of
Liquor Control and the County of Maui*
Civ. No. 17-1-000185(1) (2nd Cir. Ct.)

The Committee for Responsible Liquor Control and Madge Schaefer (Plaintiffs) filed a complaint on May 5, 2017, and an amended complaint on June 19, 2017, alleging that the Maui County Liquor Control Commission (Defendant) held an

improperly noticed meeting under the Sunshine Law to discuss proposed changes to its administrative rules. Plaintiffs alleged 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 asked the Second Circuit Court to invalidate the amendments to the rules that were approved by Defendant, 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 alleged that Defendant violated the requirements in the Hawaii Administrative Procedures Act, chapter 91, HRS, regarding hearings for rule changes. In a Sunshine Law meeting on July 12, 2017, Defendant voted to reverse itself.

As was reported in previous annual reports, the court issued a final judgment on October 17, 2017, in favor of Defendant and dismissed the case with prejudice. Plaintiffs appealed to the ICA on November 2, 2017. The parties have filed their respective briefs and the appeal remains pending in the ICA.

Discussions of Board Business Outside of Meeting

Heaukulani v. Hawaii County Council
Civ. No. 21-0000031 (3rd Cir. Ct.)

Charles Heaukulani (Plaintiff) filed a complaint against the Hawaii County Council (Council). The Council held a meeting during which some members were present in the Kona Council chambers and others were present in the Hilo Council chambers. Plaintiff alleged that the councilmembers in Kona discussed board business during the meeting with their microphones off, which essentially amounted to a discussion of board business outside of a properly noticed meeting. The case is in the early stages of 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 (1st Cir. Ct.)

As first reported in OIP's FY 2015 Annual Report, the Office of Hawaiian Affairs (OHA) appealed OIP's Opinion Letter No. 15-02, which concluded that Petitioner'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 the court based on the record that was before OIP and subject to a deferential "palpably erroneous" standard of review. As required by section 92F-43(b), HRS, OHA 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 First Circuit Court entered default against the others. In April 2017, the court heard OHA's motion for summary judgment, which it denied in an order issued May 1, 2017. OHA's subsequent motion for reconsideration was also denied. Although there have been no further developments, the case remains pending in the circuit court.

Permitted Interactions - Informational Meeting

*In re Office of Information Practices Opinion
Letter No. F16-01, S.P. No. 15-1-0097(1) (2nd
Cir. Ct.)
CAAP-16-0000568 (ICA)*

OIP issued Opinion Letter Number F16-01 in response to a complaint by James R. Smith (Petitioner) alleging that three members of the Maui County Council (Council) attended the Kula Community Association (KCA) community meeting in violation of the Sunshine Law, which requires (with a few exceptions) that government boards hold open meetings. OIP found their attendance was not a violation of the Sunshine Law because it qualified as a permitted interaction under section 92-2.5(e), HRS, which allows less than a quorum of a board to attend an informational meeting of another entity, so long as no commitment to vote is made or sought.

At a Council meeting held after the KCA community meeting, a Councilmember reported to the full Council on her attendance at the community meeting with two other Councilmembers, as required by section 92-2.5(e), HRS. Petitioner complained that this report was not properly noticed because it was under the “Communications” section of the agenda for the Council’s meeting. Petitioner contended it should have been under another section of the agenda listing items for the Council’s deliberation, or that the Council should have considered a motion to waive its rules to allow for deliberation on this item, as the Council does not customarily consider or take action on “communication” items. OIP previously opined that the fact that an item is on an agenda indicates that it is “before” the board and is business of that board, which may include deliberation and decision-making by that board. The Councilmember’s report was listed on the agenda, and OIP found no violation of the Sunshine Law’s notice requirements.

Petitioner further complained that because section 92-2.5(e), HRS, requires board members who attend an informational briefing to “report” back to the Council, this reporting requirement thereafter requires deliberation by the full board of the informational meeting report. OIP determined that section 92-2.5(e), HRS, contains no requirement that a board consider or take action on a report provided thereunder.

Petitioner filed a request for reconsideration of OIP’s opinion, but then withdrew his request. As reported in OIP’s FY 2018 Annual Report, Petitioner instead filed this pro se lawsuit, which asked the Second Circuit Court to reverse OIP’s opinion, to order OIP to write a reversal, and to award fees. OIP filed a motion for summary judgment, which was granted. The court’s order filed on June 16, 2016, ruled that the law does not allow individuals to appeal OIP’s Sunshine Law opinions to the court or to sue OIP for alleged Sunshine Law violations by State or county agencies. The court further concluded that Petitioner’s remedy lies in section 92-12, HRS, which allows an individual to bring a court action against the board itself, not OIP, to require compliance, prevent violations, and determine the applicability of the Sunshine Law.

Petitioner filed a notice of appeal with the ICA on August 15, 2016. After opening briefs were filed, Petitioner, on March 15, 2017, filed an Application for Transfer to the HSC. The Civil Beat Law Center, which was not a party to this proceeding, then filed a Motion for Leave to File Amicus Curiae Brief in Support of Application for Transfer. On April 18, 2017, the HSC denied Petitioner’s Application for Transfer. The ICA granted Civil Beat Law Center’s Motion for Leave to File Amicus Brief, and the Amicus Brief was filed on May 2, 2017. OIP filed a Response on June 1, 2017.

The ICA issued a Summary Disposition Order on May 31, 2019, finding that (1) the plain meaning of section 92F-27, HRS, is that it is explicitly

self-limited to Part III of the UIPA and can only be used to seek judicial review of agency actions related to disclosure of personal records; (2) there is no set of facts Petitioner presented that would raise a claim under Part III of the UIPA; (3) the circuit court did not err in finding as a matter of law that section 92F-27, HRS, does not authorize individuals to appeal OIP opinions relating solely to the Sunshine Law or to otherwise sue OIP for alleged Sunshine Law violations by agencies; (4) section 92F-42, HRS, only confers standing on agencies to challenge OIP decisions regarding both the UIPA and Sunshine Law; (5) Petitioner is an individual and has no standing under section 92F-43, HRS, to challenge an OIP decision; and (6) section 92-12(c), HRS, gives any person standing to challenge a prohibited act of a board with the courts under the Sunshine Law and Petitioner's remedy was in that section.

Petitioner filed an Application for Writ of Certiorari with the HSC on July 29, 2019, which was granted on September 27, 2019. On June 16, 2020, the HSC issued a unanimous opinion overturning the Second Circuit Court and ICA decisions in *In Re Office of Information Practices Opinion Letter No. F16-01*, 147 Hawai'i 286, 465 P.3d 733 (2020). The HSC did not address the merits of OIP's Opinion Letter No. F16-1, which was the subject of the underlying complaint, and remanded the case to the circuit court. The HSC agreed with the lower courts that only agencies, not individuals, could appeal from an OIP decision under section 92F-43, HRS. While recognizing that the case was brought by a party dissatisfied with OIP's opinion, the HSC liberally interpreted the pro se complainant's pleading as an original action for declaratory relief under section 92-12(c), HRS, rather than as an impermissible appeal under section 92F-43, HRS. Rejecting the ICA's interpretation of its own prior opinion in *County of Kaua'i v. OIP*, 120 Haw. 34, 200 P.3d 403 (App. 2009), the HSC instead allowed OIP to be sued under section 92-12(c), HRS, by a member of the public dissatisfied with an OIP opinion, even though a

separate board, not OIP, had performed the act allegedly prohibited by the Sunshine Law and addressed in the OIP opinion being challenged. Notably, the HSC held that court review of OIP opinions under any action brought under section 92-12, HRS, would be subject to the palpably erroneous standard of review, which is higher than the de novo standard, whether the action was filed by a government board or, as in this case, an individual member of the public.

Although the HSC remanded the matter to the Second Circuit Court, Petitioner apparently took no action to further pursue the matter, and thus there is no pending litigation in the Second Circuit Court or any other court at this time. OIP will therefore discontinue reporting on this matter, unless it is revived at a future time.

