



DEPT. COMM. NO. 276

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CHERYL KAKAZU PARK  
DIRECTOR

December 27, 2017

The Honorable Ronald D. Kouchi,  
President and Members of the Senate  
Twenty-Ninth State Legislature  
State Capitol, Room 409  
Honolulu, Hawaii 96813

The Honorable Scott K. Saiki,  
Speaker and Members of the Representatives  
Twenty-Ninth State Legislature  
State Capitol, Room 431  
Honolulu, Hawaii 96813

Dear President Kouchi, Speaker Saiki, and Members of the Legislature:

For your information and consideration, I am transmitting a copy of the Office of Information Practices' 2017 Annual Report as required by Section 92F-42(7), Hawaii Revised Statutes. In accordance with Section 93-16, Hawaii Revised Statutes, I am also informing you that the report may be viewed electronically at <http://oiip.hawaii.gov/reports/>.

Sincerely,

A handwritten signature in cursive script that reads "Cheryl Kakazu Park".

Cheryl Kakazu Park  
Director

Enclosure

# Office of Information Practices

State of Hawaii

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## Annual Report 2017



**This report to the Governor and the Legislature summarizes the activities and findings of the Office of Information Practices from July 1, 2016, to June 30, 2017, 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).**



# Table of Contents



<b>History .....</b>	<b>4</b>
<b>Executive Summary.....</b>	<b>6</b>
<b>Goals, Objectives, and Action Plan .....</b>	<b>12</b>

## ***HIGHLIGHTS OF FISCAL YEAR 2017***

<b>Budget and Personnel.....</b>	<b>17</b>
----------------------------------	-----------

<b>Legal Guidance, Assistance, and Dispute Resolution .....</b>	<b>19</b>
<b>Overview and Statistics .....</b>	<b>19</b>
<b>UIPA .....</b>	<b>25</b>
<b>Sunshine Law .....</b>	<b>29</b>

<b>Formal Opinions .....</b>	<b>30</b>
<b>UIPA .....</b>	<b>30</b>

<b>Informal Opinions .....</b>	<b>35</b>
<b>UIPA .....</b>	<b>35</b>
<b>Sunshine Law .....</b>	<b>39</b>

<b>General Legal Guidance and Assistance.....</b>	<b>42</b>
<b>UIPA .....</b>	<b>42</b>
<b>Sunshine Law .....</b>	<b>43</b>

<b>Education, Open Data, and Communications .....</b>	<b>46</b>
<b>Education.....</b>	<b>46</b>
<b>Training Sessions .....</b>	<b>47</b>
<b>Training Materials, Reports, and Model Forms .....</b>	<b>48</b>
<b>Open Data .....</b>	<b>50</b>
<b>Communications .....</b>	<b>54</b>

<b>Records Report System.....</b>	<b>56</b>
-----------------------------------	-----------

<b>Legislation Report.....</b>	<b>58</b>
--------------------------------	-----------

<b>Litigation Report.....</b>	<b>60</b>
-------------------------------	-----------

# 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 public notice and with the opportunity for the public to present testimony.

OIP provides legal guidance and assistance under both the UIPA and Sunshine Law to the public as well as all state and county boards and agencies. Among other duties, OIP also provides guidance and recommendations on legislation that affects access to government records or board meetings.

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 the 2017 fiscal year.



# Executive Summary



The mission statement of Hawaii's Office of Information Practices (OIP) 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 Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), which provides open access to government records, and the Sunshine Law, Part I of chapter 92, Hawaii Revised Statutes ("HRS"), which provides open access to public meetings.

Additionally, following the enactment of Act 263, SLH 2013 (see HRS § 27-44), OIP was charged with assisting the state Office of Information Management and Technology (now known as the Office of Enterprise Technology Services, or "ETS") to implement Hawaii's Open Data policy, which seeks to increase public awareness and electronic access to non-confidential and non-proprietary data and information available from state agencies; to enhance government transparency and accountability; to encourage public engagement; and to stimulate innovation with the development of new analyses or applications based on the public data made openly available by the state.

Besides providing relevant background information, this

annual report details OIP's performance for fiscal year 2017, which began on July 1, 2016, and ended on June 30, 2017.

OIP Service Overview FY 2012-2017						
	2012	2013	2014	2015	2016	2017
<b>Total Requests for OIP's Services</b>	<b>1,075</b>	<b>1,227</b>	<b>1,227</b>	<b>1,307</b>	<b>1,162</b>	<b>1,234</b>
<b>Informal Requests (AODs)</b>	<b>940</b>	<b>1,050</b>	<b>1,050</b>	<b>1,074</b>	<b>964</b>	<b>956</b>
<b>Formal Requests Opened</b>	<b>135</b>	<b>177</b>	<b>177</b>	<b>233</b>	<b>198</b>	<b>278</b>
<b>Formal Requests Resolved</b>	<b>143</b>	<b>142</b>	<b>142</b>	<b>208</b>	<b>241</b>	<b>232</b>
<b>Live Training</b>	<b>25</b>	<b>16</b>	<b>16</b>	<b>11</b>	<b>11</b>	<b>9</b>
<b>Training Materials Added/Revised</b>	<b>14</b>	<b>19</b>	<b>19</b>	<b>12</b>	<b>12</b>	<b>4</b>
<b>Legislation Monitored</b>	<b>267</b>	<b>134</b>	<b>134</b>	<b>101</b>	<b>175</b>	<b>108</b>
<b>Lawsuits Monitored</b>	<b>4</b>	<b>7</b>	<b>7</b>	<b>39</b>	<b>28</b>	<b>40</b>
<b>Public Communications</b>	<b>48</b>	<b>30</b>	<b>30</b>	<b>33</b>	<b>30</b>	<b>24</b>
<b>Rules Adopted</b>	<b>0</b>	<b>0</b>	<b>1</b>	<b>0</b>	<b>0</b>	<b>0</b>
<b>Special - Projects</b>	<b>-</b>	<b>14</b>	<b>14</b>	<b>15</b>	<b>8</b>	<b>2</b>

Figure 1

OIP's jurisdiction extends over state, county, and independent agencies and boards in all branches of government, including the Governor, Lt. Governor, Judiciary, Legislature, University of Hawaii (UH), Office of Hawaiian Affairs (OHA), and all County Councils. OIP serves 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.

With 8.5 full-time equivalent (FTE) positions, which includes five staff attorneys, OIP performs a variety of services. See **Figure 1**. In addition to 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 and presents in-person as well as online training programs, including continuing legal education programs for attorneys. During the legislative session, OIP monitors more than a hundred bills and resolutions and provides testimony and proposals on legislation impacting open government issues. OIP also monitors lawsuits that involve the UIPA or Sunshine Law. OIP proactively undertakes special projects, such as the UIPA Record Request Log, and 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.

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, minus administratively imposed budget restrictions. In FY 2017, OIP's total allocation was \$575,984, up from \$564,041 in FY 2016. See **Figure 3** on page 18. OIP's allocation in FY 2017 for personnel costs was \$553,660 and for operational costs was \$22,324. See **Figure 3** on page 17.

## **Legal Guidance, Assistance, and Dispute Resolution**

One of OIP's core functions is responding to requests for assistance from members of the public, government employees, and board members and staff seeking OIP's guidance regarding the application of and compliance with the UIPA, Sunshine Law, and the State's Open Data policy. Requests may also be made for OIP's assistance in obtaining records from government agencies 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 agencies and boards under the UIPA and the Sunshine Law.

In FY 2017, OIP received 278 formal and 956 informal requests for assistance for a total of 1,234 requests, which is a 6.2% increase from 1,162 requests in FY 2016. See **Figure 1** on page 6. As will be described further, this 6.2% increase masks a record-setting 40.4% increase in the number of formal cases opened in FY 2017. Despite these increases, OIP still resolved 93% of all formal and informal requests for assistance received in FY 2017 in the same fiscal year.

Over 77% (956) of the total requests for OIP's services are informal requests that are typically responded to within the same day through the Attorney of the Day (AOD) service. Over 61% of AOD inquiries in FY 2017 (586) came from



state and county agencies and boards seeking guidance to ensure compliance with the UIPA and Sunshine Law, while the balance (370) came from the general public. 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 more time to investigate, research, review, and resolve. In FY 2017, OIP opened 278 formal cases—80 more than in FY 2016—which was a 40.4% increase from the prior year and double the average 20% annual increases in formal cases that OIP had experienced from FY 2013 through 2015. In the last two months of FY 2017 alone, OIP opened 48 new formal cases.

Despite the huge increase in formal cases, OIP was able to close 232 cases in FY 2017, which is only 9 less than the record it set last year. See Figure 1 on page 6. Unfortunately, however, as a direct result of the 40.4% increase in new cases, and with 48 of them filed in the last two months of the fiscal year, OIP's backlog increased to 150 formal cases pending at the end of FY 2017. In contrast, OIP's backlog at the end of FY 2016 had been reduced to 104 pending cases because the 15% decrease in new formal cases that year had allowed OIP to resolve over 16% more cases. As the statistics show, OIP's backlog directly correlates with the number of new cases filed each year. See **Figure 4** on page 19.

OIP continues to receive a disproportionately large number of formal cases filed by a small number of persons, which seriously impacts its ability to timely resolve all other cases. One couple accounted for 15.1% (42 cases) of all formal requests filed in FY 2017; one individual accounted for 9% (25 cases); and another individual filed 4.7% (13 cases). These top 3 requesters filed 80 of 278 formal cases, or 29%.

While OIP cannot control the number of cases filed by repeat requesters, it has taken

administrative measures to equitably provide its services to all requesters and not just a few. For example, if OIP has resolved two or more cases from the same requester within the preceding 12 months, then other requesters' later-filed cases may be worked on before completing the repeat requesters' remaining cases. OIP will also cluster cases involving similar issues and resolve them at the same time. And, OIP may take cases out of order if they can be readily resolved.

Even with the sizeable increases in new cases, OIP still managed to keep to two years the age of the oldest pending cases that are not in litigation, so there was nothing older than FY 2015 cases at the end of FY 2017. This is a substantial improvement since FY 2011 when the oldest case was 12 years old. Additionally, nearly 70% (193 of 278) of the formal cases opened in FY 2017 were resolved in the same year. When AODs are considered, OIP resolved over 93% (1,049 of 1,234) of its FY 2017 formal and informal requests for assistance in the same year they were filed, and 77% (956 of 1,234) 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 2017, OIP issued four formal opinions and eleven informal opinions, for a total of 15 opinions. Summaries of the opinions are found beginning on page 30.

In FY 2018, OIP's main priority will be the adoption of new administrative rules and training of agencies on them, as will be further discussed on pages 10-11. Because of the extensive work required for rulemaking, OIP anticipates that it will not be able to significantly reduce its formal case backlog in FY 2018, particularly for cases involving appeals and requests for opinions. Through its AOD service, however, OIP will still provide same-day informal advice for most of the requests for assistance that it expects to receive in FY 2018.

## 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 2017, OIP had a total of 72 training materials and forms and 4 new reports on its website. Because basic training, forms, reports, and other educational materials are now conveniently available online, OIP has been able to produce more specialized in-person training workshops as well as accredited continuing legal education (CLE) seminars. In FY 2017, OIP conducted nine in-person training sessions on the UIPA and/or Sunshine Law.

As part of its educational and open data efforts, OIP developed the UIPA Record Request Log (“Log”) in 2012. By FY 2015, all state, county, and independent agencies—including the Governor’s Office, Lt. Governor’s Office, Judiciary, Legislature, University of Hawaii, and Office of Hawaiian Affairs—used 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](http://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 that is consolidated on the

Master Log. The Master Log is posted at [data.hawaii.gov](http://data.hawaii.gov) and OIP’s reports summarizing all agencies’ year-end data are posted on its UIPA reports page at [oip.hawaii.gov](http://oip.hawaii.gov).

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

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](http://oip.hawaii.gov) for anyone to freely use. In FY 2016, OIP 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 2017, 22 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](http://oip.hawaii.gov). OIP’s director also participated in one televised interview and one online interview in FY 2017 to inform the public about OIP’s duties and services.

By using and improving its technological resources to cost-effectively communicate and expand its educational efforts, OIP has been able to more efficiently leverage the time and knowledge of its small staff and to effectively make OIP’s training and advice freely and readily available 24/7 to all members of the public, and not just to government employees or board members.

## 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 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 2017, state and county agencies reported 29,893 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](http://oip.hawaii.gov/records-reports-system-rrs).

## Legislation

OIP serves as a one-stop resource for government agencies 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 2017 legislative session, OIP reviewed and monitored 108 bills and resolutions affecting government information practices, and testified on 26 of these measures. See **Figure 1** on page 6.

In FY 2017, OIP was instrumental in obtaining passage of House Bill 165, H.D. 1, S.D. 2, C.D. 1, which was signed into law by Governor David Ige as Act 64, SLH 2017. After years of disagreement, OIP was able to obtain consensus on the final bill from key stakeholders. Among other things, Act 64 revises the Sunshine Law to include provisions requiring board packets to be made available to the public, meeting notices to be filed online and sent by agencies to requesters via electronic mail, and meeting minutes to

be posted online. As an alternative to written minutes, Act 64 law also allows meetings to be recorded, so long as a written summary including the location of motions and votes on the recording is also provided. To give agencies time to implement the new law, the effective date was delayed until July 1, 2018. OIP has prepared training materials to inform agencies of this new law.

The Legislature also passed Senate Bill 572, SD 1, HD 1, CD 1, which was signed into law as Act 165, SLH 2017, by Governor Ige on July 11, 2017, and was effective upon approval. Like all other agencies covered by the UIPA, OIP has long had the authority to adopt rules that will protect its own records from theft, loss, defacement, alteration, or deterioration and to prevent manifestly excessive interference with the discharge of OIP's other lawful responsibilities and functions. For uniformity and consistency, Act 165 extends the rules that OIP may adopt to all other agencies covered by the UIPA.

## 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 numbering 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.

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 will be proposing new rules for public hearing in FY 2018.

Adoption of new administrative rules will be OIP's main priority in FY 2018. Related to this is the preparation of new training materials and a new UIPA Record Request Log in order to educate all government agencies before the rules go into effect. While much of the rulemaking process is beyond OIP's control, OIP hopes to accomplish all of this during the first half of 2018, so that agencies can be trained and begin using a revised Log before any new rules go into effect.

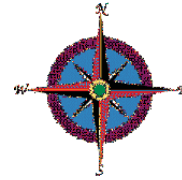
## **Litigation**

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

Although litigation 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 2017, OIP monitored 40 cases in litigation, of which 11 were new cases that OIP began monitoring. Of the 40 cases monitored in FY 2017, 34 were UIPA cases (10 of which were filed by inmates) and 6 were Sunshine Law cases.



# 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

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

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

With the passage of Act 263, SLH 2013 (see HRS § 27-44), OIP has adopted another goal

to assist the Office of Enterprise Technology 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](http://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](http://oip.hawaii.gov)**, which links to the State's open data portal at **[data.hawaii.gov](http://data.hawaii.gov)**.
2. Encourage state agencies to electronically post appropriate data sets onto **[data.hawaii.gov](http://data.hawaii.gov)** and to use the UIPA Record Request Log to record and report their record requests.

**D. Records Report System.** Maintain the Records Report System (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 or legal intervention, as may be necessary, to uphold the common purpose of the UIPA and Sunshine Law.

### III. Action Plan with Timetable

#### A. Legal Guidance and Assistance

##### 1. Past Year Accomplishments

- a. Received 1,234 total requests for assistance in FY 2017, of which 956 (77%) were informal requests typically resolved the same day through OIP's AOD service.
- b. Conducted nine live training sessions for state and county agencies and boards.
- c. Added or updated four training materials to OIP's website.
- d. Prepared all new documents and presentations on OIP's website to be accessible to disabled persons.

##### 2. Year 1 Action Plan

- a. OIP's top priority for FY 2018 will be to adopt new and revised administrative rules. Although much of the rulemaking process is beyond OIP's control, OIP will strive to 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, obtain all necessary approvals, prepare training for agencies on the new rules, and revise OIP's forms and training materials, including the UIPA Record Request Log, before the end of FY 2018.
- b. Maintain current efforts to promptly provide general legal guidance through OIP's AOD service, so that approximately 80% of all requests for OIP's assistance can be resolved by the next work day.

### **3. Year 2 Action Plan**

- a. Implement OIP's new administrative rules.
- b. Update and improve OIP's on-line training materials, as may be necessary.

### **4. Year 5 Action Plan**

- a. Evaluate recently implemented rules and determine whether additional rules or revisions are necessary.

## **B. Investigations and Dispute Resolution**

### **1. Past Year Accomplishments**

- a. OIP received a total of 1,234 formal and informal requests for assistance in FY 2017, and OIP resolved 93% of them in the same year, with most of them resolved the same day.
- b. Of the 278 formal cases opened in FY 2017, 193 (69.4%) were resolved in the same fiscal year.
- c. Despite the 40.4% increase in the number of new formal cases filed in FY 2017 (278) compared to the year before (198), OIP was able to resolve 232 formal cases and all cases filed before FY 2015.
- d. Of the 150 cases that remained pending at the end of FY 2017, 85 (57%) were opened in FY 2017, 33 (22%) were opened in FY 2016, and 32 (21%) were opened in FY 2015.

### **2. Year 1 Action Plan**

- a. Strive to resolve all formal cases filed before July 1, 2016, 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 July 1, 2017, 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.

### **4. Year 5 Action Plan**

- a. Strive to resolve all formal cases within 12 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.

## **C. Open Data**

### **1. Past Year Accomplishments**

- a. Prepared reports of the UIPA Record Request Log summarizing results for FY 2017 from 191 state and 74 county agencies, including the Governor's Office, Lt. Governor's Office, Judiciary, Legislature, University of Hawaii, and Office of Hawaiian Affairs.
- b. Distributed 22 What's New articles and participated in one televised program and one online program to keep government personnel and the general public informed of open government issues, including proposed legislation.
- c. Received 29,320 unique visits on OIP's website and 96,621 website page views (excluding OIP's and home page hits).

### **2. Year 1 Action Plan**

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

b. Prepare reports of the UIPA Record Request Log results for FY 2018 from all state and county agencies.

c. Utilize Log data to develop and evaluate proposed OIP rules concerning the UIPA record request process and fees.

d. Post information on OIP's website at [oip.hawaii.gov](http://oip.hawaii.gov) to provide transparency and obtain public input on the rulemaking 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' UIPA Record Request Logs.

### **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' UIPA Record Request Logs.

## **D. Records Report System**

### **1. Past Year Accomplishments**

a. Conducted two live trainings of the RRS.

b. For FY 2017, state and county agencies reported 29,893 record titles on the RRS.

### **2. Year 1 Action Plan**

a. Continue to train and advise other state and county agencies on how to use the access classification capabilities of the RRS to uniformly identify and protect private or confidential records,

while promoting open access to public data that may be disclosed.

### **3. Year 2 Action Plan**

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

### **4. Year 5 Action Plan**

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

## **E. Legislation and Lawsuits**

### **1. Past Year Accomplishments**

a. After years of disagreement, OIP gained consensus from key stakeholders and successfully advocated for the adoption of Sunshine Law revisions embodied in House Bill 165, House Draft 1, Senate Draft 2, Conference Draft 1, which was signed into law by Governor David Ige as Act 64 (SLH 2017). Among other things, the new law will allow public inspection of Sunshine Law boards' packets; require meeting notices to be filed on state and county electronic calendars; require postal or electronic mailings of notices to requesters; allow meeting minutes to be kept in recorded form; and require minutes to be posted online within 40 days after a board meeting.

b. OIP also successfully advocated for passage of Senate Bill 572, Senate



Draft 1, House Draft 1, Conference Draft 1, which was enacted as Act 165 (SLH 2017). It extends existing UIPA provisions allowing OIP to adopt additional administrative rules to protect agency records and to prevent manifestly excessive interference with the discharge of agencies' other lawful responsibilities and functions. Any such rules adopted by OIP will apply to all state and county agencies, and thus provide for the uniform and consistent administration of the UIPA.

c. OIP obtained legislative approval to convert its long-time "temporary" employees to permanent status.

d. In FY 2017, OIP reviewed 108 bills and resolutions and testified on 26 of them.

e. In FY 2017, OIP monitored 40 cases in litigation, of which 11 were new cases.

## **2. Year 1 Action Plan**

a. For the 2018 legislative session, OIP will continue to seek an increase of its appropriations to be able to provide competitive salaries that will help it to retain its experienced employees and preserve its institutional memory.

## **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.

b. Obtain sufficient funding and position authorizations to 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. Continue to monitor legislation and lawsuits and to take appropriate action on matters affecting the UIPA, Sunshine Law, or OIP.

b. Obtain sufficient funding and position authorizations to recruit, train, and retain legal and administrative personnel to ensure the long-term stability, efficiency, and productivity of 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; live training sessions and public presentations; 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 total numbers of requests for assistance and the numbers of state or county agencies or the general public who are assisted by OIP; the types of services provided by OIP; the number of state and county agencies submitting the UIPA Record Request Log; and the overall Log results.



# Highlights of Fiscal Year 2017

## Budget and Personnel

OIP's budget allocation is the net amount that it was authorized to use of the legislatively appropriated amount, minus administratively imposed budget restrictions. In FY 2017, OIP's total allocation was \$575,984, up 2% from \$564,041 in FY 2016.

OIP's allocation for personnel costs in FY 2017 was \$553,660. The allocation for operational costs was \$22,324. See **Figure 3** on page 18.

As in the prior year, OIP had 8.5 full-time equivalent (FTE) total approved positions in FY 2017.

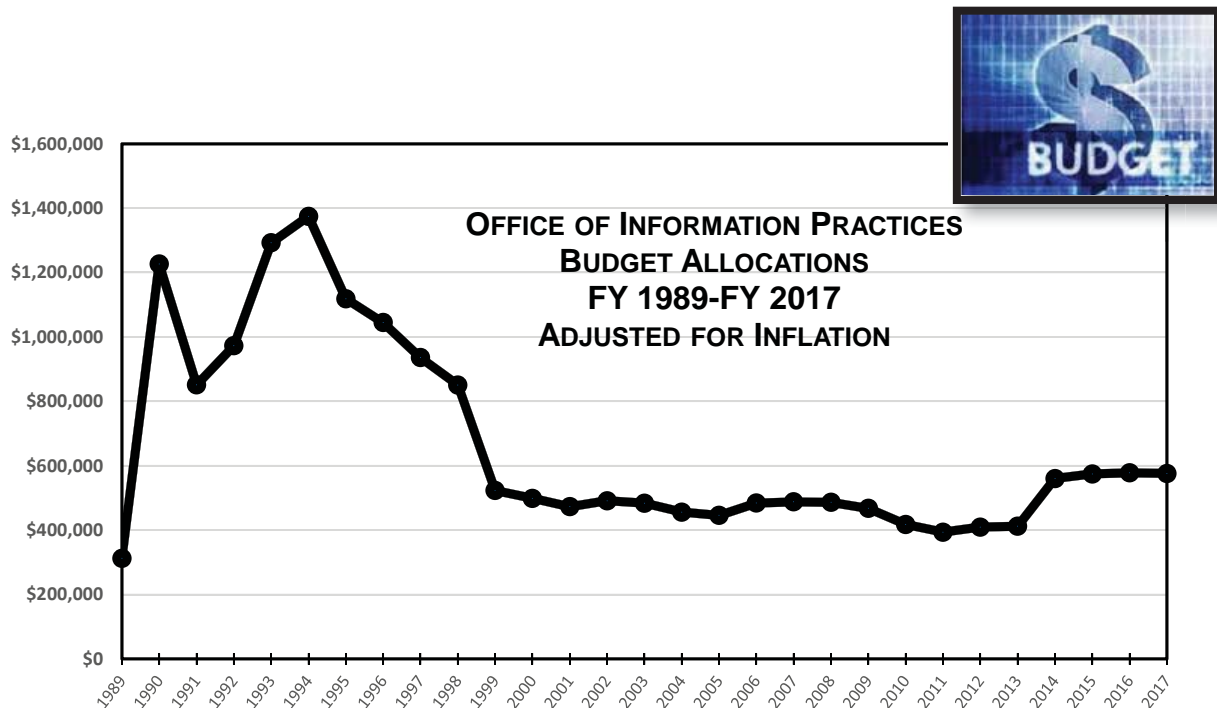


Figure 2



**Office of Information Practices  
Budget FY 1989 to FY 2017**

<b>Fiscal Year</b>	<b>Operational Expense Allocation</b>	<b>Personnel Allocation</b>	<b>Total Allocation</b>	<b>Allocations Adjusted for Inflation**</b>	<b>Approved Positions</b>
FY 17	22,324	553,660	575,984	575,984	8.5
FY 16	31,592	532,449	564,041	578,142	8.5
FY 15	45,228	507,762	552,990*	574,597	8.5
FY 14	88,862	450,895	539,757*	560,346	8.5
FY 13	18,606	372,327	390,933	412,253	7.5
FY 12	30,197	352,085	382,282	409,560	7.5
FY 11	42,704	314,454	357,158	393,836	7.5
FY 10	19,208	353,742	372,950	417,961	7.5
FY 09	27,443	379,117	406,560	467,591	7.5
FY 08	45,220	377,487	422,707	486,307	7.5
FY 07	32,686	374,008	406,694	487,911	7.5
FY 06	52,592	342,894	395,486	484,313	7
FY 05	40,966	309,249	350,215	445,966	7
FY 04	39,039	308,664	347,703	455,917	7
FY 03	38,179	323,823	362,002	483,809	8
FY 02	38,179	320,278	358,457	491,515	8
FY 01	38,179	302,735	340,914	472,799	8
FY 00	37,991	308,736	346,727	498,808	8
FY 99	45,768	308,736	354,504	523,064	8
FY 98	119,214	446,856	566,070	850,642	8
FY 97	154,424	458,882	613,306	936,106	11
FY 96	171,524	492,882	664,406	1,044,972	12
FY 95	171,524	520,020	692,544	1,118,940	15
FY 94	249,024	578,513	827,537	1,374,543	15
FY 93	248,934	510,060	758,994	1,292,519	15
FY 92	167,964	385,338	553,302	972,942	10
FY 91	169,685	302,080	471,765	851,136	10
FY 90	417,057	226,575	643,632	1,226,836	10
FY 89	70,000	86,000	156,000	312,823	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.

**Figure 3**



# Legal Guidance, Assistance, and Dispute Resolution

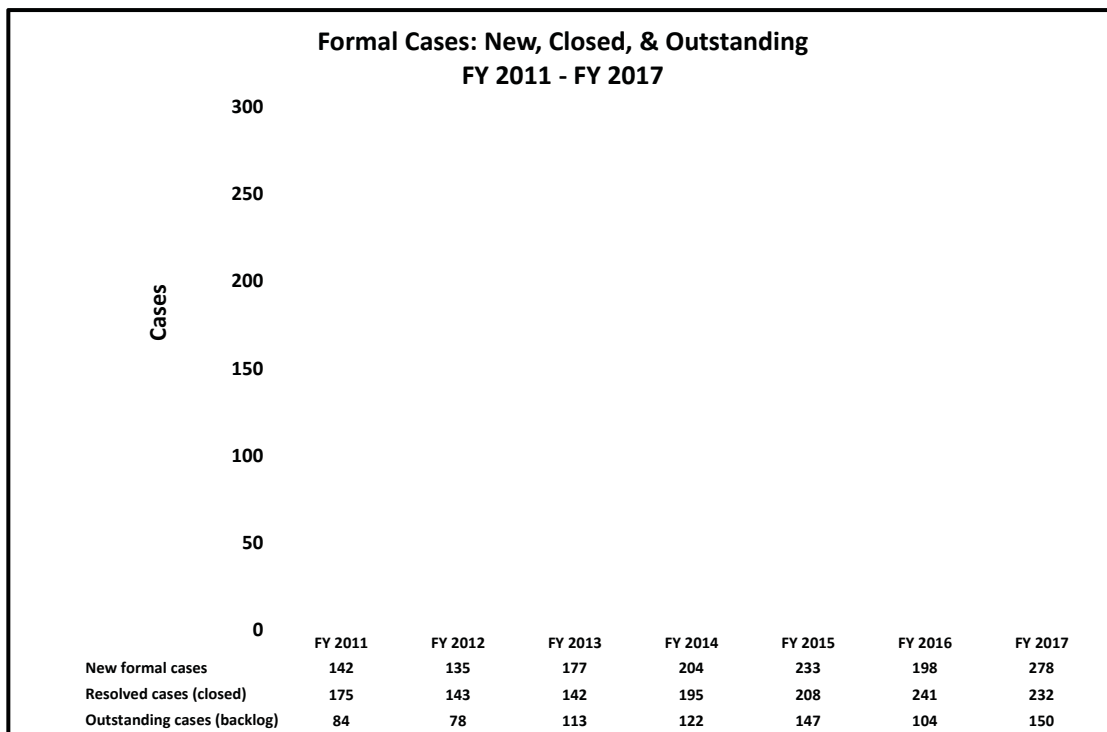
## Overview and Statistics

OIP is the single statewide agency in Hawaii that provides uniform and consistent advice and training regarding the UIPA and Sunshine Law, and OIP 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 2017, OIP received a total of 1,234 formal and informal requests for OIP's services, com-

pared to 1,162 requests in FY 2016. This 6.2% increase in the overall number of requests, however, masks the record high number of 278 new formal case filings in FY 2017, which is a 40.4% increase over the 198 cases filed in FY 2016. Notably, 48 new cases were filed in the last two months of FY 2017.

As **Figure 4** below shows, the number of new cases filed each year (represented by the blue dotted line) directly tracks the backlog, or number of outstanding cases at the end of the year (represented by the red dashed line). While the increase in case resolution (represented by the



**Figure 4**

<b>Formal Requests - FY 2017</b>	
<b>Type of Request</b>	<b>Number of Requests</b>
UIPA Requests for Assistance	82
UIPA Requests for Advisory Opinion	1
UIPA Appeals	53
Sunshine Law Appeals	11
Sunshine Law Requests for Opinion	0
Correspondence	91
UIPA Record Requests	36
Reconsideration Requests	4
<b>Total Formal Requests</b>	<b>278</b>

Figure 5

solid green line) have helped to lower the number of cases pending at year end, the backlog is directly related to the number of new cases filed each year. In FY 2016 when OIP experienced a 15% decrease in formal cases, it was able to similarly reduce the number of formal cases outstanding to 104. But as the number of new cases rose by 40.4% this past year, the number of formal cases outstanding similarly rose 44% to 150 pending cases at the end of FY 2017.

A disproportionate number of new cases filed in FY 2017 came from one couple and two individuals, who filed 80 of the 278 formal cases (29%). One couple accounted for 15.1% (42 cases) of all formal requests filed in FY 2017; one individual accounted for 9% (25 cases); and another individual filed 4.7% (13 cases).

Despite the 40.4% increase in new cases, OIP was still be able to resolve all cases filed before FY 2015, so that the age of the cases pending at the end of FY 2017 was no older than two years. Moreover, OIP resolved all 956 informal AOD requests, which constitute over 77% of total requests, typically within 24 hours of the request. OIP will continue to rely heavily upon its AOD

<b>AOD Inquiries</b>			
<b>Fiscal Year</b>	<b>Total</b>	<b>Public</b>	<b>Government Agencies</b>
FY 17	<b>956</b>	370	586
FY 16	<b>964</b>	289	675
FY 15	<b>1,074</b>	340	734
FY 14	<b>1,109</b>	280	829
FY 13	<b>1,050</b>	270	780
FY 12	<b>940</b>	298	642
FY 11	<b>676</b>	187	489
FY 10	<b>719</b>	207	512
FY 09	<b>798</b>	186	612
FY 08	<b>779</b>	255	524
FY 07	<b>772</b>	201	571
FY 06	<b>720</b>	222	498
FY 05	<b>711</b>	269	442
FY 04	<b>824</b>	320	504
FY 03	<b>808</b>	371	437
FY 02	<b>696</b>	306	390
FY 01	<b>830</b>	469	361

Figure 6

service to timely provide informal advice and assistance to the majority of requesters.

Additionally, OIP resolved 232 formal cases in FY 2017. Since 193 of the 278 formal cases filed in FY 2017 were resolved, this means that nearly 70% of formal cases were resolved in the same year they were filed. When the informal and formal completed cases for FY 2017 are combined, over 93% of them were resolved in the same year, and 77% were resolved in the same day they were filed.

OIP has also made tremendous progress in reducing the age of formal cases from 12 years in FY 2011 to 2 years in FY 2017. OIP ended FY 2017, however, with 150 pending formal cases. OIP will continue striving to reduce its backlog and resolve all formal cases within 12 months of filing, provided the cases are not in litigation or filed by requesters who have had two or more cases resolved by OIP in the preceding 12 months. OIP will also continue to give priority to requesters who have not already had two or more cases resolved by OIP in the preceding 12 months.

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

### **Formal Requests**

Of the total 1,234 UIPA and Sunshine Law requests for services, 956 (77%) were considered informal requests and 278 (23%) were considered formal requests. Formal requests are further categorized and explained as follows. *See Figure 5.*

#### **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 2017, OIP received 82 such written requests for assistance (RFA) 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 only an informal (memo) opinion that has no precedential value as to legal issues regarding the UIPA or Sunshine Law. In FY 2017, OIP received one request for a UIPA opinion and none for a Sunshine Law opinion.

### **UIPA Appeals**

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

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, giving priority to the oldest cases whenever practicable.

In FY 2017, OIP received 53 appeals related to the UIPA.

#### **Sunshine Law Appeals/Requests for Opinions**

In FY 2017, OIP received 11 Sunshine Law appeals and one request for an opinion. *See page 29 for further information about Sunshine Law requests.*

### **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 Request for Opinion. 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 2017, OIP opened 91 CORR files.



## UIPA Record Requests

The UIPA allows people to request government or personal records that are maintained by an agency. 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 2017, OIP received 36 UIPA record requests made for records maintained by OIP. Seventeen record requests (47%) came from one couple and 9 (25%) from one individual.

## Reconsideration of Opinions

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

Of four requests for reconsideration received in FY 2017, two were granted, one was denied, and one was dismissed as untimely.

## 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 that involve specific records. Formal opinions are used by OIP as precedent for its later opinions and are posted, in full and as summaries, on OIP's website at [oip.hawaii.gov](http://oip.hawaii.gov). Summaries of the formal opinions for this fiscal year are also found on pages 30-34 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 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 beginning on page 35.

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

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 2017, OIP issued a total of 15 opinions, consisting of 4 formal UIPA opinions, 8 informal UIPA opinions, and 3 informal Sunshine Law opinions.

## Informal Requests

### Attorney of the Day Service (AOD)

The vast majority (77% in FY 2017) of all requests for OIP's services are informally handled through the AOD service, which allows the public, agencies, and boards to receive general, nonbinding legal advice from an OIP staff attorney, usually within 24 hours. Like the "express line" at a supermarket, the AOD service allows

people to quickly get answers to their questions without having to wait in the more lengthy lines for 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 record requests or to determine if government boards are following the

procedures required by the Sunshine Law. Agencies often use the AOD service for assistance in responding to record requests, such as how to properly respond to requests or redact specific information under the UIPA's exceptions. Boards also use the AOD service to assist them in navigating Sunshine Law requirements. Examples of AOD inquiries and OIP's informal responses are provided, beginning on page 42.

The AOD service helps OIP prevent or quickly correct violations. Through AOD inquiries, OIP is frequently 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 on how to prepare a sufficiently descriptive agenda. OIP has even had boards call for advice during their

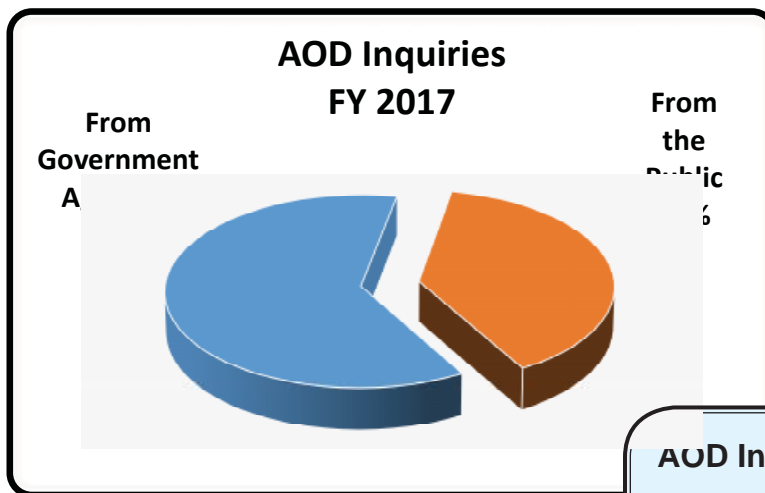


Figure 7

<b>AOD Inquiries from the Public FY 2017</b>	
<b>Types of Inquirers</b>	<b>Number of Inquiries</b>
Private Individual	328
News Media	16
Private Attorney	14
Business	10
Public Interest Group	1
Other Types	1
<b>TOTAL</b>	<b>370</b>

Figure 8



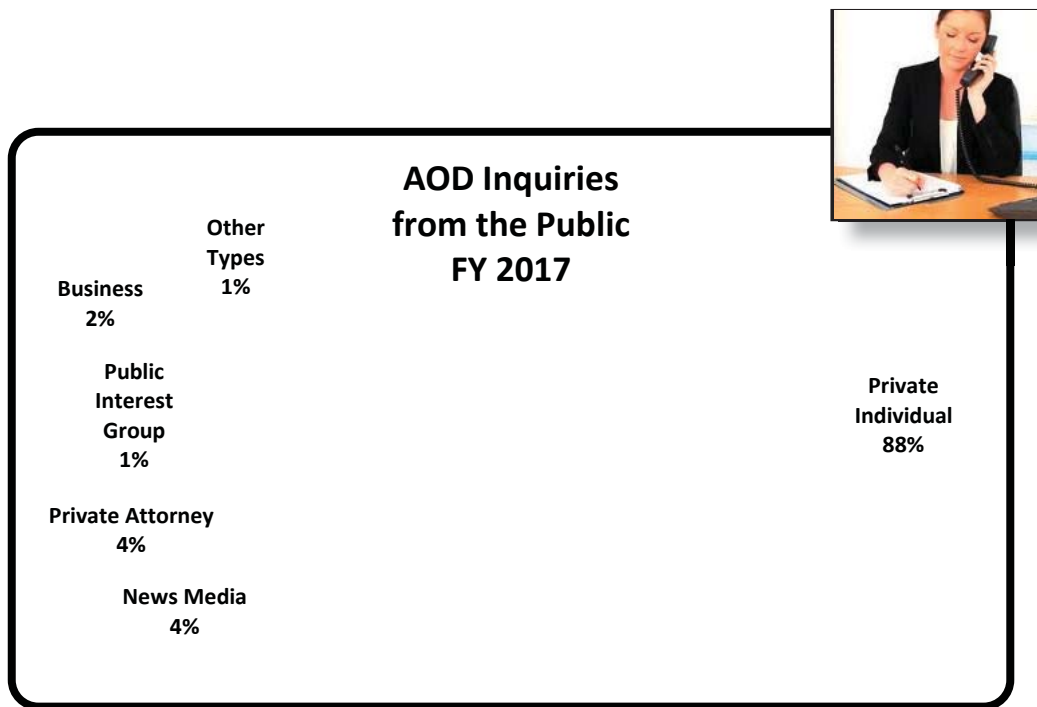


Figure 9

meetings, such as whether they can conduct a closed executive session. 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.

Over the past 17 years, OIP has received a total of 14,428 inquiries through its AOD service, an average of 849 requests per year. In FY 2017, OIP received 956 AOD inquiries. *See Figure 6* on page 20. Since FY 2011, AOD inquiries have increased 41%.

Of the 956 AOD inquiries in FY 2017, 586 (61%) came from government boards and agencies seeking guidance to ensure compliance with the UIPA and Sunshine Law, and 370 inquiries (39%) came from the public. *See Figures 7 and 8.*

Of the 370 AOD inquiries from the public in FY 2017, 328 (88%) came from private individuals, 16 (4%) from media, 14 (4%) from private attorneys, 10 (2%) from businesses, 1 (1%) from public interest groups, and 1 (1%) from other types. *See Figures 8 and 9.*

## **UIPA Requests:**

### **UIPA AOD Inquiries**

In FY 2017, OIP received 619 AOD requests concerning the UIPA from the public and government agencies. 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 AOD inquiries, please see **Figures 10 to 14** that follow. A sampling of the AOD advice given by OIP starts on page 42.

### **State Agencies and Branches**

In FY 2017, OIP received a total of 327 AOD inquiries about state agencies. About 49% of these requests concerned five state agencies: Department of Commerce and Consumer Affairs (36), Department of Health (35), Department of Education (33), Department of Transportation (31), and Department of the Attorney General (25). As shown below in **Figure 10**, about 84% of these requests were made by the agencies themselves.

OIP also received 7 inquiries concerning the legislative branch and 8 inquiries regarding the judicial branch. See **Figure 10** below. These AOD requests exclude general inquiries that do not concern a specific agency.

### **AOD Requests About State Government Agencies FY 2017**



<b>Executive Branch Department</b>	<b>Requests by Agency</b>	<b>Requests by Public</b>	<b>Total Requests</b>
Commerce and Consumer Affairs	35	1	36
Health	31	4	35
Education (including Public Libraries)	28	5	33
Transportation	24	7	31
Attorney General	23	2	25
Accounting and General Services	21	2	23
Land and Natural Resources	13	7	20
Labor and Industrial Relations	15	1	16
Governor	13	1	14
Agriculture	12	0	12
Human Services	8	2	10
Human Resources Development	6	1	7
Business, Econ Development, & Tourism	6	0	6
Public Safety	5	1	6
Budget and Finance	5	0	5
Tax	4	1	5
Hawaiian Home Lands	0	1	1
Defense	0	0	0
Lieutenant Governor	0	0	0
<b>TOTAL EXECUTIVE</b>	<b>249</b>	<b>36</b>	<b>285</b>
<b>TOTAL LEGISLATURE</b>	<b>2</b>	<b>5</b>	<b>7</b>
<b>TOTAL JUDICIARY</b>	<b>5</b>	<b>3</b>	<b>8</b>
<b>University of Hawaii System</b>	<b>11</b>	<b>5</b>	<b>16</b>
<b>Office of Hawaiian Affairs</b>	<b>06</b>	<b>2</b>	<b>8</b>
<b>Unnamed Agency</b>	<b>3</b>	<b>0</b>	<b>3</b>
<b>TOTAL STATE AGENCIES</b>	<b>276</b>	<b>51</b>	<b>327</b>

**Figure 10**

### County Agencies

In FY 2017, OIP received 69 AOD inquiries regarding various county agencies and boards. Of these, 28 inquiries (40%) came from the public.

Of the 69 AOD inquiries, 31 inquiries concerned agencies in the City and County of Honolulu, down from 42 in the previous year. *See Figure 11.* As shown below, 58% of these requests were made by the agencies themselves seeking guidance to comply with the UIPA.

The largest number of requests concerned the Honolulu Police Department (11), the Mayor (4), the Honolulu Fire Department (3), and Human Resources (3).

OIP received 38 inquiries regarding neighbor island county agencies and boards: Hawaii County (10), Kauai County (15), and Maui County (13). *See Figures 11 to 14.*



#### AOD Inquiries About City and County of Honolulu Government Agencies - FY 2017

Department	Requests by Agency	Requests by Public	Total Requests
Police	4	7	11
Mayor	4	0	4
Fire	1	2	3
Human Resources	3	0	3
City Council	2	0	2
Corporation Counsel	2	0	2
Parks and Recreation	0	2	2
Budget and Fiscal Services	1	0	1
Enterprise Services	0	1	1
Royal Hawaiian Band	1	0	1
Unnamed Agency	0	1	1
<b>TOTAL</b>	<b>18</b>	<b>13</b>	<b>31</b>

Figure 11



**AOD Inquiries About  
Hawaii County  
Government Agencies - FY 2017**

Department	Requests by Agency	Requests by Public	Total Requests
Corporation Counsel	2	0	2
Parks and Recreation	1	1	2
Public Works	0	2	2
County Council	1	0	1
Planning	1	0	1
Police	1	0	1
Prosecuting Attorney	1	0	1
<b>TOTAL</b>	<b>7</b>	<b>3</b>	<b>10</b>

Figure 12



**AOD Inquiries About  
Kauai County  
Government Agencies - FY 2017**

Department	Requests by Agency	Requests by Public	Total Requests
County Attorney	5	0	5
Police	3	0	3
Planning	0	2	2
Fire	0	1	1
Mayor	1	0	1
Personnel Services	1	0	1
Public Works	1	0	1
Unnamed Agency	1	0	1
<b>TOTAL</b>	<b>12</b>	<b>3</b>	<b>15</b>

Figure 13

**AOD Inquiries About  
Maui County  
Government Agencies - FY 2017**



Department	Requests by Agency	Requests by Public	Total Requests
Planning	0	4	4
Police	3	0	3
Corporation Counsel	1	1	2
County Council	0	1	1
Fire	0	1	1
Mayor	0	1	1
Unnamed Agency	0	1	1
<b>TOTAL</b>	<b>4</b>	<b>9</b>	<b>13</b>

Figure 14



## Sunshine Law Requests:

Since 2000, OIP has averaged more than 273 formal and informal requests a year concerning the Sunshine Law. In FY 2017, OIP received 348 Sunshine Law requests, which is 13 more than in FY 2016, and 75 more than the average number of requests received each year. See **Figures 15 and 16**.

Of the total Sunshine Law requests made in FY 2017, 337 (97%) were informal AOD requests, and 11 were formal cases. See **Figure 16**.

Of the 337 AOD requests involving the Sunshine Law, 310 were requests for general advice, and 27 were complaints. Also, 106 of the 337 AOD requests (31%) involved the requester's own agency.

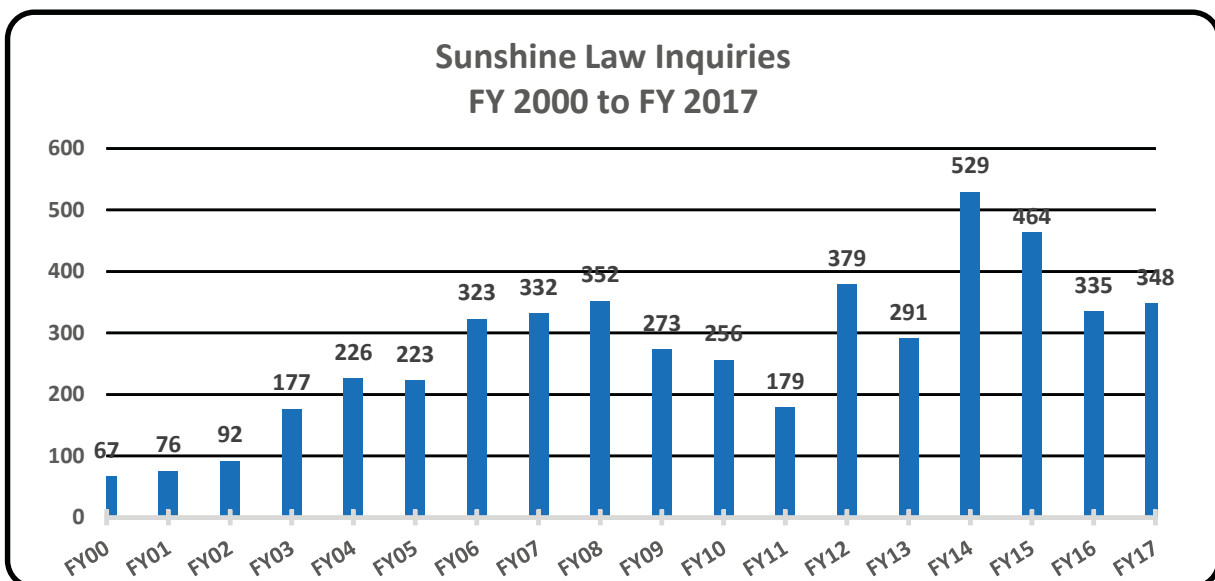
In FY 2017, OIP provided 7 Sunshine Law training sessions to boards and commissions as well as to other agencies and groups. See page 47 for a list of the sessions provided. OIP also continued to make its Sunshine Law training materials available on the OIP website. These free online materials include 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 and enabled OIP to instead develop additional or more

### Sunshine Law Inquiries

<i>Fiscal Year</i>	<i>AOD Inquiries</i>	<i>Formal Requests</i>	<i>Total</i>
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
2000	57	10	67

**Figure 16**

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



**Figure 15**

## Formal Opinions

In FY 2017, OIP issued five formal opinions, all related to the UIPA and none related to the Sunshine Law, which are summarized below. The full text versions can be found at [oip.hawaii.gov](http://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:**

#### **Collectively Bargained Workers' Compensation Agreement/ Basic Trades**

*OIP Op. Ltr. No. F17-01*

Requester, who was the prior Plan Administrator of a Collectively Bargained Workers' Compensation (CBWC) program approved by the Department of Labor and Industrial Relations (DLIR), asked OIP whether the Disability Compensation Division of the DLIR (DLIR-DCD) properly denied his request made under the UIPA for copies of attachments to the approved CBWC Addendum submitted by the Successor Plan Administrator. There were ten attachments, but the DLIR-DCD had disclosed the CBWC Addendum and only one of the attachments to Requester. The attachments that were not disclosed (Other Attachments) included a description of the group that provides oversight for this CBWC program; limited lists of service providers for independent medical evaluations, vocational rehabilitation, mediation and arbitration; a list of cases which will be handled under the statutory workers' compensation program; an explanation of the alternative dispute resolution program; and forms.



The Successor Plan Administrator asserted that the Other Attachments were protected from disclosure as being attorney work product. The attorney work product doctrine, however, only applies to documents prepared or obtained in anticipation of litigation. As the Successor Plan Administrator did not submit any facts or information to support the proposition that the Other Attachments were prepared or obtained in anticipation of litigation, OIP concluded that the attorney work product doctrine does not apply to protect the Other Attachments from disclosure.

The Successor Plan Administrator also asserted that the DLIR-DCD had the authority to deny a record request if disclosure would frustrate a legitimate governmental objective, as allowed by section 92F-13(3), HRS, because the Other Attachments were protected as confidential commercial and financial information. The agency, and not the submitter, must raise the frustration of a legitimate government function argument to exclude a record from disclosure. The DLIR-DCD did not agree with the Successor Plan Administrator's arguments for non-disclosure and did not raise the argument.

Even if the DLIR-DCD had raised the frustration argument, OIP concluded that under the facts of this case the Other Attachments did not meet the test to qualify as confidential commercial and financial information, which requires a determination as to whether disclosure would either (1) impair the agency's ability to obtain information in the future or (2) cause substantial harm to the competitive position of the submitter.



Under the impairment prong, protection from disclosure will be denied if the submitter technically provides the information voluntarily, but the submission is actually mandatory if the submitter wishes to enjoy the benefits of participation in an agency's program. In the instant case, submission of the Other Attachments was mandatory, as the DLIR stated that the CBWC Addendum would not have been approved if the Successor Plan Administrator had not submitted them. Therefore, the Other Attachments were not protected from disclosure under the impairment prong of the test for confidential commercial and financial status.

In order to be protected from disclosure under the competitive harm prong, there must be a showing of both (1) actual competition and (2) competitive harm. For the sake of argument, OIP accepted the Successor Plan Administrator's position that it faced actual competition from the Requester. As to competitive harm, however, OIP found that the Other Attachments contained no technical processes or proposals and contained no detailed information that could cause competitive harm. Therefore, the Other Attachments did not meet the second prong for competitive harm, and OIP concluded that they are not confidential commercial or financial information.

The Successor Plan Administrator further claimed that the Other Attachments were trade secrets that should not be disclosed in order to avoid the frustration of a legitimate government function. OIP again found that the DLIR-DCD did not raise the frustration argument, and thus, the Successor Plan Administrator could not raise it. Even if the agency had raised this argument, OIP found that the Successor Plan Administrator will not be able to guard the secrecy of the Other Attachments because by the terms of the CBWC Addendum, a copy of the CBWC Addendum and all of its Attachments must

be disclosed to all employee participants. Consequently, OIP concluded that the Other Attachments cannot be protected from disclosure as trade secrets.

Because the Other Attachments are not protected from disclosure as attorney work product, confidential commercial and financial information, or trade secrets, OIP concluded that they must be disclosed to Requester.

## **Public Utility Commission Applicant Records**

### *OIP Op. Ltr. No. F17-02*

Requester asked OIP whether the Public Utilities Commission (PUC) properly denied her request under the UIPA for a submittal filed in PUC Docket No. 2010-0304.

OIP considered whether the PUC's issuance of a protective order justified withholding information that does not fall within any exception to the UIPA, and concluded that it did not. Section 6-61-50, HAR, allows a party to seek a protective order by the PUC "to protect the confidentiality of information that is protected from disclosure under chapter 92F, HRS, or by law." HAR § 6-61-50. The UIPA itself protects information that is made confidential by state or federal law. HRS § 92F-13(4) (2012). Thus, because a PUC protective order is limited to information protected from disclosure under the UIPA, it may not be used to justify withholding information that does not fall within any exception to the UIPA.

OIP found that with limited exceptions, cost and overhead information submitted to the PUC could be withheld as confidential commercial and financial information under the UIPA's exception for government records that must be confidential to avoid the frustration of a legitimate government function. HRS § 92F-13(3) (2012). OIP has consistently found that disclosure of detailed



financial information such as cost and overhead information is likely to cause substantial competitive harm, especially where it could be combined with known figures such as a government contract price to estimate actual profit. *E.g.*, OIP Op. Ltrs. No. 97-4 and 94-14.

OIP found that narrative descriptions, correspondence, loan agreements, and other non-cost information submitted to the PUC could not be withheld as confidential commercial and financial information under the UIPA's exception for information which, if disclosed, would frustrate a legitimate government function. HRS § 92F-13(3). The information is, in some instances, already public knowledge and generally constitutes mundane information of a sort that is not considered confidential commercial or financial information. *See* OIP Op. Ltr. No. 92-17 at 12-13.

OIP also found that technical information and detailed information regarding the location of network infrastructure and types of equipment could be withheld to prevent compromising the physical or electronic security of critical telecommunication infrastructure under the UIPA's exception for information which, if disclosed, would frustrate a legitimate government function. HRS § 92F-13(3). Information about switch and microwave radio types by specific model, detailed network diagrams, and local-level scaled maps showing locations of network infrastructure could be used in planning either a physical or electronic disruption to the network and as such their disclosure could reasonably be expected to cause damage to the security of the network.

Finally, OIP found that direct business contact information could be withheld under the UIPA's exception for information which, if disclosed, would frustrate a legitimate government function. HRS § 92F-13(3).

## **Email Messages Protected by Attorney-Client Privilege**

*OIP Op. Ltr. No. F17-03*

Under Part III of the UIPA, Requester challenged the partial denial by the Planning Department, County of Hawaii (PLAN-H) of his request to access email messages regarding whether Requester, as a tour operator, can bring guests to enter the Kaohe Homesteads property to view the lava flow (Messages).

OIP found that the Messages constitute the Requester's personal records because they identify him by name and are about him. As OIP further found, however, five of the Messages that PLAN-H received or sent to its assigned Deputy Corporation Counsel (Attorney-Client Messages) are confidential and privileged attorney-client communications under Rule 503, Hawaii Rules of Evidence, chapter 626, HRS. Thus, OIP concluded that these Attorney-Client Messages may be withheld from Requester under the exemption in Part III of the UIPA for personal records "authorized to be so withheld by constitutional or statutory privilege." HRS § 92F-22(5) (2012).

OIP also opined that PLAN-H is required to disclose to Requester three Messages that were exchanged between PLAN-H Director and employees (Intra-agency Messages). There is no applicable exemption under Part III of the UIPA that would allow these three Intra-agency Messages to be withheld from the subject individual.

## **Minimum Decision Records**

*OIP Op. Ltr. No. F17-04*

Requesters sought a decision as to whether the Hawaii Paroling Authority (HPA) properly denied their request for their own Minimum Decision Records.

The UIPA places the burden of proof on a government agency to justify its nondisclosure of records when it claims that access to a record is restricted under the UIPA. *See* HRS § 92F-15(c) (2012). The agency is required to justify its nondisclosure when it responds to OIP's Notice of Appeal, and the agency's response must include its "explanation of its position, including the agency's justification for the denial of access or actions complained of, with citations to the specific statutory sections and other law that support the agency's position[.]" Hawaii Administrative Rules (HAR) § 2-73-14(3). If further explanation is needed, "OIP may, orally or in writing, seek any additional information from a party or any other person, and may consider input or relevant materials from any person on pending appeals." HAR § 2-73-15(e). Additionally, OIP may require any party to submit to OIP the original or a copy of one or more documents necessary for its ruling, including government records at issue in an appeal. *See* HAR 2-73-15(c); HRS § 92F-42(5), -42(9) (2012). OIP may examine the documents *in camera* as necessary to preserve any claimed exception, exemption, or privilege against disclosure. *Id.*

Here, despite numerous requests, HPA did not provide the contested records for OIP's *in camera* review, so OIP was unable to review the records to determine whether they were privileged. HPA further failed to provide any argument to justify nondisclosure and merely asserted that the Minimum Decision Records were "working papers" protected by section 92F-22(1), HRS, without explaining how such information fell within the limited categories of records, which do not explicitly protect or even refer to "working papers." OIP concluded that HPA had not met its burden to justify nondisclosure of the Minimum Decision Records under Part III of the UIPA, and thus, must disclose the requested records. Moreover, OIP's decision that HPA must disclose the Minimum Decision Records under the UIPA is consistent with the due process disclosure obligations set forth by the Hawaii Supreme Court in

*De La Garza v. State of Hawaii*, 129 Haw. 429, 302 P.3d 697 (Haw. 2013).

HPA has filed with OIP a request for reconsideration of the decision.

## Statement of Capabilities and Correspondence Related to Bids

### *OIP Op. Ltr. No. F17-05*

Requester, an unsuccessful bidder, asked whether the Department of Transportation (DOT), prior to the execution of a contract, properly denied Requester's request for copies of any Statements of Capabilities (SOC) submitted by persons submitting bids (Bidders) on a project for the Furnishing Operation and Maintenance Service for the H-1 Contra-Flow Zipper Lane (Project), and any correspondence between DOT and Lindsay Transportation Solutions, the company who manufactured the Zipper Machine and certified operators, regarding the Project (Project Correspondence).

DOT was required to disclose the SOC and Project Correspondence once DOT determined that it would be unnecessary for DOT to seek re-bids. While the specific confidentiality or disclosure requirements of chapter 103D, HRS, the Hawaii Public Procurement Code (Procurement Code), should be followed where applicable, the confidentiality provision in section 103D-310, HRS, is applicable only to information submitted under oath on a form of questionnaire prepared by the Procurement Policy Board, which the SOC and Project Correspondence were not. In the absence of a specific directive in the Procurement Code, OIP looked to the UIPA's frustration exception, section 92F-13(3), HRS, to determine whether procurement information may be withheld.

As the information in the records here would not raise the cost of government procurements or give a manifestly unfair advantage to Requester, and it was not detailed financial or commercial information that would likely cause substantial competitive harm, OIP found that it did not qualify to be withheld under the UIPA's frustration exception. *See* HRS § 92F-13(3). DOT's promise of confidentiality for the information, by itself, did not override the UIPA's requirements and provide a basis for denial of access. Thus, both the SOC and the Project Correspondence should have been disclosed, except for the personal contact information listed in the SOC, which could have been redacted based on the UIPA's privacy exception. HRS § 92F-13(1).



## Informal Opinions

In FY 2017, OIP issued eight informal opinions relating to the UIPA and three informal opinions relating to the Sunshine Law. Summaries of these informal opinions are provided below. In the event of a conflict between the full text and a summary, the full text of an opinion controls.

### **UIPA Informal Opinions:**

#### **Presentence Investigation Report**

##### *UIPA Memo 17-1*

Requester made a written request under Part III of the UIPA for a copy of his presentence investigation report (PSI). The Department of Public Safety (PSD) denied access, and Requester filed this appeal. After the appeal was opened, PSD sent a letter to Requester stating that it would provide Requester with a copy of the PSI after his payment of copying and postage fees of \$20.12. However, subsequent to receipt of Requester's payment, PSD declined to provide a copy of the PSI while it awaited advice from the Department of the Attorney General (AG).

Months after receiving the AG's advice, PSD informed OIP that Requester was "already provided PSI by AG" and did not indicate that anything had been redacted from the PSI prior to disclosure. However, Requester then informed OIP that "[t]he AG's office has provided me with nothing."

Because PSD claimed that, through its attorney, it had already provided Requester with a copy of his PSI, any argument now against disclosure would be considered waived. As Requester asserted he did not receive the copy sent by the AG, OIP concluded that PSD should provide Requester with another copy within ten business days.

PSD apparently received Requester's payment, but was unable to verify whether Requester's payment was processed or returned. Consequently, OIP advised PSD not to charge Requester for the additional copy of his PSI.



#### **Presentence Investigation Report: Failure to Provide Notice to Requester**

##### *UIPA Memo 17-2*

Requester sought a decision as to whether the Department of Public Safety (PSD) is required to provide Requester with a copy of his Presentence Investigation Report (PSI) under Part III of the UIPA.

Based on PSD's representations that it was advised by the Department of the Attorney General (AG) to provide access to PSIs and PSD's assertion that it informed Requester that it would disclose the PSI upon receipt of his prepayment, OIP found that PSD waived any argument that Requester's PSI may be withheld. *See* OIP Op. Ltr. No. 92-26 (opining that an agency may waive the deliberative process privilege by disclosing the contents of a draft report when it permits inspection and copying of the report by persons outside of the agency).

Because Requester alleged that he had never received notice of PSD's intent to release his PSI to him, OIP concluded that PSD should provide its Notice to Requester (Notice) within ten business days of its receipt of OIP's Decision. After PSD's receipt of prepayment of costs, PSD must

disclose a copy of the requested PSI to Requester. *See* Hawaii Administrative Rules (HAR) § 2-71-13(b). PSD should take steps to ensure Requester receives this second Notice.

If no prepayment is required, PSD may instead simply send Requester a copy of his unredacted PSI within ten business days of its receipt of OIP's Decision.

Whether or not prepayment is required, if PSD intends to make redactions, it should provide to Requester, within ten business days of PSD's receipt of OIP's Decision, a Notice that identifies the specific parts of the record that will not be disclosed, along with the specific legal authorities under sections 92F-13, -22, HRS, or other laws. *See* HAR § 2-71-14(b).

## **No Duty to Search for Rules that Do Not Exist**

### *UIPA Memo 17-3*

Requester sought a decision as to whether the Hawaii Criminal Justice Data Center (HCJDC) properly responded to his request for three different sets of administrative rules (Rules) by claiming the records did not exist.

Generally, agencies must make government records available for inspection and copying during regular business hours under section 92F-11(b), HRS. When an agency's response to a record request states that no responsive records exist, the issue on appeal normally is whether the agency's search for a responsive record was reasonable. However, in rare instances, when OIP finds that an agency has actual knowledge that the requested record was never created, OIP will conclude that the agency is absolved from having to conduct a search reasonably likely to produce the requested records. OIP Op. Ltr. No. F16-03.

Here, OIP found that HCJDC made three separate, credible, and good faith statements that the

requested records were never created. Taking into account the consistency of these three separate statements along with the consideration that these statements were provided by the lead individual charged with the overall administration of HCJDC, whose position reasonably requires that she have specialized knowledge of all HCJDC rules, OIP concluded that a search for responsive records was not necessary because it would have been fruitless, and HCJDC's responses to Requester's request for Rules were proper under the UIPA.

OIP also emphasized that in most cases when an agency claims a record does not exist, it must first conduct a reasonable search. The decision reached here is not intended to lessen or overrule the general requirement that agencies conduct a reasonable search for responsive records when receiving requests. In rare cases, such as here, an agency's personnel may have actual knowledge that the record requested was never created. Only in these rare cases is an agency absolved from having to conduct a search reasonably likely to produce the requested records.

## **Names of Inmates in or Awaiting Placement in Furlough or Community Custody**

### *UIPA Memo 17-4*

Requester made a request to the Department of Public Safety (PSD) for a list of all people currently on work furlough and/or community custody, or approved for such status but awaiting placement. PSD's housing unit assignment for inmates is maintained on PSD's Offendertrak System database. PSD does not maintain specific lists for furlough and community custody inmates, but the database can sort data regarding the "inmate population by housing or custody."

PSD denied access to the requested lists on the basis that the information is beyond the inmate directory information that is required



to be disclosed by section 92F-12(a)(4), HRS. PSD's denial informed Requester it would only provide a list of all inmates who are housed at correctional facilities that have work furlough programs.

OIP agreed with PSD that furlough housing assignments and community custody status of inmates under PSD's jurisdiction do not constitute "directory information" about inmates that is required to be public under section 92F-12(a)(4), HRS. However, OIP previously found that the UIPA's exception to disclosure for records that would cause the frustration of a legitimate government function, if disclosed, did not apply to an inmate's "status in the correctional system." OIP Op. Ltr. No. 01-03 at 9. As OIP's formal opinions are considered precedent, and because PSD has not met its burden to justify nondisclosure of the requested lists containing information about an inmate's status in the correctional system, OIP found that PSD must disclose lists of inmates in furlough or community custody subject to limitations. OIP recognized that there may be circumstances for which disclosure of the status of a particular inmate could raise specific and articulable security concerns. In such cases, the inmate's status as being in furlough or community custody may be segregated from a list.

OIP also found that PSD's policies are not confidentiality statutes and do not protect an inmate's furlough or community custody status from public disclosure.

Finally, OIP found that no significant privacy interest would be implicated by disclosure of a list of inmates in or awaiting placement in furlough or community custody. Inmates' minimal privacy interests, when balanced against the public interest in disclosure, do not warrant withholding the lists from public access. Thus, the UIPA exception to disclosure for records, which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy, is not applicable.

## Redacted Complaint

### *UIPA Memo 17-5*

The Department of Commerce and Consumer Affairs (DCCA) Regulated Industries Complaints Office (RICO) enforces licensing laws for various professional boards, commissions, and programs that are administratively attached to DCCA. Requesters made a record request for a redacted copy of a complaint that had been filed by someone else against a doctor with the RICO internal number MED 2013 0001L (Complaint). Requesters essentially asked RICO to publicly disclose the Complaint after redacting information that is exempt from disclosure under the UIPA. RICO denied access to the entire Complaint. Requesters asked OIP for a decision as to whether RICO's denial was proper under Part II of the UIPA.

Section 92F-14(b)(7), HRS, states that an individual has a significant privacy interest in information compiled as part of an inquiry into an individual's fitness to be granted or to retain a license, with three exceptions. The first exception at section 92F-14(b)(7)(A), HRS, did not apply to the Complaint.

The third exception at section 92F-14(b)(7)(C), HRS, provides that there is no significant privacy interest in the "record of complaints including all dispositions" for a license holder. The Complaint is not a "record of complaints including all dispositions" for the doctor complained of, and as such, the Complaint continues to carry the significant privacy interest of the doctor. The doctor's significant privacy interest in the Complaint provided by section 92F-14(b)(7), HRS, must therefore be weighed against the public interest in disclosure as required by section 92F-14(a), HRS. The public interest to be considered under the UIPA's privacy balancing test is whether the information "sheds light upon the workings of government." RICO argued that the Complaint "does little to reveal anything about RICO's performance of its statutory purpose or duties to receive, investigate, and prosecute licensing complaints." Thus, RICO

argued, the doctor's significant privacy interest in the contents of the Complaint is greater than the public's interest in disclosure.

On the balance, OIP found that the doctor's privacy interest in the Complaint outweighs the public interest in disclosure. RICO may withhold access to most of the Complaint, to avoid a clearly unwarranted invasion of personal privacy as allowed by section 92F-13(1), HRS. In accordance with the exception at section 92F-14(b)(7)(B), HRS, however, the doctor's name, business address and business telephone number are public under the UIPA. If Requesters clarify that they would like a redacted copy of the Complaint with only that information showing and prepay fees and costs in accordance with OIP's administrative rules, then RICO was advised to provide Requesters with a redacted copy of the Complaint with only these items of information left unredacted.

### **Adequacy of Search for Inmate Transfer Records**

#### *UIPA Memo 17-6*

Requester, an inmate, sought a decision as whether the Department of Public Safety (PSD) properly denied a request to access two "Internal Memorandum" (IM) documents related to Requester's transfers between correctional centers on August 25, 2009, and October 18, 2012.

PSD claimed it did not maintain any records for either of the inmate transfers and therefore was unable to disclose any transfer record as the UIPA applies only to existing records maintained by an agency. However, Requester successfully refuted PSD's assertion that no records existed for the 2012 transfer. As a result, OIP found PSD must conduct another search for any records documenting Requester's 2009 transfer.

OIP further found the October 2012 IM should be disclosed to Requester under Part III of the

UIPA because the IM is the personal record of Requester who is the subject of the IM. The IM is also a joint personal record of the other inmate who was transferred with Requester, the three Adult Corrections Officers (ACO) who handled the transfer, and the ACO who prepared the IM. As none of the exceptions under Part III of the UIPA are applicable, the entire IM must be disclosed to Requester.

### **Personal and Government Records Relating to Commuter Services and Campus Security Offices**

#### *UIPA Memo 17-7*

Requester made a long and complex record request to UH, comprising 14 categories of information for which she was seeking records. For many of those categories, her description of the records she was seeking included subclauses and was phrased in the alternative, with a description of the records she believed would have the information she was seeking but also an alternate description of other records that could be provided instead. After UH responded, Requester engaged in correspondence with UH over the next several months over various areas in which she felt that UH's response was not adequate, in the course of which she also stated that she wanted UH to send her various records that had not been included in the original response.

OIP found that in its responses to Requester's record requests for various personal and government records and follow-up questions, UH made a reasonable effort to understand what Requester was asking for and to provide all responsive records within the timeframe provided in the UIPA and OIP's administrative rules. After reviewing correspondence and records comprising several inches of paper, OIP found no evidence that UH deliberately delayed its response, ignored portions of a request, lied to Requester, or otherwise followed a pattern of bad faith denial of access that constructively denied Requester's access rights under the UIPA.

UH did redact limited information from the records it provided to Requester. UH was justified in withholding contact and insurance information of the owner of a parked vehicle under the UIPA's privacy exception, section 92F-13(1), HRS. However, UH should have disclosed photos of the vehicle, the vehicle's license plate number and registration and safety check expiration dates, and the name of the vehicle owner, as that information was either part of Requester's joint personal record or was not protected by the UIPA's privacy exception. *See* HRS § 92F-13(1); OIP Op. Ltr. No. 05-10.

## Obligation to Provide Original Records

### *UIPA Memo 17-8*

Requester made a request by email on behalf of herself and her husband to the State Ethics Commission (SEC) for the original letters written by the SEC's director to her husband dated October 24, 2014, and sent by email at 12:18 p.m. and 12:29 p.m. The SEC provided a copy of the requested letters, but declined to provide the originals. It informed Requester that "[t]he original documents are part of the agency's records and, therefore, are not available to you." Requester appealed the denial.

In response to this Appeal, the SEC asserted that section 92F-11(b), HRS, requires an agency to allow "inspection and copying" of records, but does not require an agency to provide a requester with its original records. The relevant portions of the UIPA clearly support SEC's position that the UIPA allows inspection and copying, but does not require agencies to provide original records in response to UIPA requests. *See* HRS §§ 92F-11(a), -(b), and -(d).

In addition, OIP previously ruled that, under the UIPA, there are no requirements that the original 'official' record be provided to a requester. OIP Op. Ltr. No. F15-03 at 6-7 (finding that the University of Hawaii was not required, under the UIPA, to provide a former student with certified

or original records). OIP therefore found that Part II of the UIPA does not entitle Requester to the original letters that were used for the email to her husband.

OIP noted that the responsive records are the personal records of Requester's husband. Even if Requester's husband had made a personal record request under Part III of the UIPA, the SEC would not have been required to provide the original letters to him. Section 92F-23, HRS, requires that, "[u]pon request of an individual to gain access to the individual's personal record, an agency shall permit the individual to review the record and have a **copy** made[.]" *See also* OIP Op. Ltr. No. F15-03 at 6-7 (emphasis added). Part III of the UIPA does not provide personal record requesters with the right to obtain and keep **original** agency records about them. OIP Op. Ltr. No. F15-03 at 6 (emphasis added).

## Sunshine Law Informal Opinions:

Sunshine Law informal opinions are written to resolve investigations and requests for advisory opinions. OIP wrote three informal opinions concerning the Sunshine Law in FY 2017, as summarized below.

## Notice of Board's Review of Other Agencies' Proposed Rules

### *Sunshine Memo 17-1*

As an alternative under the Sunshine Law to creating sufficiently detailed descriptions of proposed rules for meeting agendas, section 92-7(a), HRS, was amended in April 2014 by Act 68 to allow agencies to provide the full text of the proposed rules "as provided in section 91-2.6." Section 91-2.6, HRS, requires all state



agencies to provide the full texts of proposed or amended rules on the website of the Office of the Lieutenant Governor (OLG).

As agenda items for its June 2014 meeting, the Small Business Regulatory Review Board (SBRRB) listed other agencies' proposed rules and provided the links to those agencies' websites where those proposed rules could be viewed. Because the meeting notice failed to list the OLG's website as the link to view the full text of the proposed rules, OIP issued S Memo 16-4 concluding that SBRRB's June meeting notice violated the Sunshine Law's requirements to provide a sufficiently descriptive agenda.

While finding no basis under section § 2-73-19(b), and (d), HAR, (2012) to grant SBRRB's untimely motion for reconsideration, OIP nevertheless uncovered new information in its review and granted reconsideration on its own initiative. OIP rescinded S Memo 16-4 and issued in its place S Memo 17-1, which contains a revised footnote 3 explaining how SBRRB could possibly post proposed rules on the OLG's website or otherwise meet the Sunshine Law's notice requirements.

Except for concluding that SBRRB's June meeting violated the Sunshine Law by listing the wrong website on its agenda, OIP left intact the remainder of its original holdings that SBRRB did not violate the Sunshine Law for its other meetings. For its June and July 2014 meetings, SBRRB had emailed the notices without the exhibits of the proposed rules and instead informed email recipients that they could obtain the exhibits by postal mail or by viewing them online on the State calendar website. As there is no legal requirement to provide notices electronically and the emails were sent only as a courtesy to recipients, OIP concluded that SBRRB did not violate the Sunshine Law by not including the exhibits with its emailed notices. (Note: Effective July 1, 2018, Act 64, SLH 2017, amends the Sunshine Law to require agencies to provide notice electronically if requested.)

Additionally, OIP concluded that SBRRB timely mailed its September 2014 meeting notice to

Requester. Finally, OIP determined that SBRRB was not required to mail Requester the notice of its December 2015 meeting because Requester was no longer on SBRRB's mailing list after he failed to confirm his continued desire to be notified of meetings by postal mail.

## **Requiring ID from Public Meeting Attendees**

### *Sunshine Memo 17-2*

The Hawaii Civil Rights Commission (HCRC), which usually meets in a secured building, asked OIP whether it could require members of the public to present identification and sign in before entering the secured building to attend a Sunshine Law meeting.

Following the majority of states that have weighed in on this issue either through statute or administrative opinion, OIP concluded that a requirement for members of the public to identify themselves as a precondition of access to a public meeting would be contrary to the Sunshine Law's "all persons" standard, as it would have the effect of excluding those persons who did not have a driver license or other acceptable proof of personal identification on hand or who preferred to remain anonymous. Thus, any requirement that members of the public show proof of personal identification to a security guard prior to attending a meeting is not consistent with the Sunshine Law's open meeting requirement. However, OIP noted that other security procedures such as a metal detector or a bag search may not violate open meetings laws.

It is ultimately up to a board to ensure that its meetings are held at a location where members of the public will be freely admitted. OIP advised the HCRC that the most straightforward option is to hold its public meetings in a building that does not require all members of the public entering the building to present identification. If the HCRC prefers to hold its meetings in a secured building, however, OIP recommended several options for ensuring compliance with the Sunshine

Law. First, if there are non-secured portions of the building available for use, the HCRC can hold its public meetings only in those non-secured portions of the building, thus obviating the need to make special arrangements with building security. Failing that, for a meeting held in the secured area, the HCRC could inform building security guards when a public meeting will be held and instruct the guards to admit anyone who says he or she is going to the public meeting and declines to show identification, or alternatively to escort those who decline to show identification to the meeting room. So long as the guard admits those who say they are going to the public meeting without requiring them to show identification, OIP does not believe that that a security guard's initial request for identification, by itself, would violate the Sunshine Law.

### **Private Discussions by Councilmembers on Selection of Officers**

#### *Sunshine Memo 17-3*

Following a newspaper report about likely changes in the Honolulu City Council's (Council) leadership after the 2016 election, an anonymous member of the public (Requester) asked for an investigation into whether members of the Council violated the Sunshine Law by engaging in private discussions, including serial communications, to select a new Council chair.

After obtaining statements from seven of the nine sitting Councilmembers, OIP found that four members privately discussed a resolution setting leadership positions, but they did not constitute a quorum. OIP found no evidence to show that a quorum or more of Councilmembers engaged in discussions or serial communications in violation of the Sunshine Law or the spirit of the Sunshine Law. OIP concluded that the Councilmembers' discussion by less than a quorum of members was in accordance with the Sunshine Law's permitted interaction at section 92-2.5(c), HRS.

Even if there had been a quorum, OIP precedent determined that the Sunshine Law allows a quorum of elected but **not yet sworn in** Councilmembers to discuss selection of officers for their upcoming term. OIP Opinion Letter Number 02-11 (opining that councilmembers do not become subject to the Sunshine Law until their terms of office commence under their respective county charters.) In the present case, at the time the actions complained of occurred, four members of the Council were in the middle of serving a term and five Councilmembers were incumbents who had been recently reelected for a new term but not yet sworn in. Therefore, under OIP Opinion Letter Number 02-11, even if a quorum of newly reelected Councilmembers for the term commencing on January 3, 2017, had been discussing selection of officers for the upcoming term, the discussion would not have been prohibited under the Sunshine Law because they had not yet been sworn in for the upcoming term for which they were discussing selection of officers.

OIP distinguished *Right to Know Comm. v. City Council*, 117 Haw. 1, 175 P.3d 111 (2007) (*Right to Know*), and OIP Opinion Letter Number 05-15 as not being applicable to the current situation. Both *Right to Know*, and Opinion 05-11 opined on a different situation that involved a mid-term leadership reorganization where a quorum of the Council, who had already been sworn in, engaged in serial communications outside of a meeting regarding leadership for the current term. OIP found that the members' actions in that case violated the intent and spirit of the Sunshine Law, and the Hawaii Intermediate Court of Appeals in *Right to Know* agreed that engaging in a series of one-on-one conversations relating to a particular item of Council business circumvented the spirit of the Sunshine Law's open meeting requirement.



## 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 the Attorney of the Day (AOD) service. AOD advice is not necessarily official policy or binding upon OIP, as the full facts may not be available, the other parties' positions are not provided, complete legal research will not be possible, and the case has not been fully considered by OIP. The following summaries are examples of the types of AOD advice provided by OIP staff attorneys in FY 2017.

### **UIPA Guidance:**

#### **Deadline for Responding to Record Requests**

Staff for a State commission received a record request and replied with all the information they could find within the ten business day deadline for responding to record requests. They believed there might be more responsive records, but it would take additional time to find it. Staff asked OIP if there is there a deadline to provide all responsive information.

OIP advised that agencies should provide a record requester with a notice to requester (NTR) within ten business days of receipt of a record request. The NTR sets forth all the information should be given to the requester regarding a record request. Then five business days after the NTR is provided, or five days after receipt of any prepayments received, the agency should provide the records. If the responsive records are voluminous, agencies may make incremental

disclosures. Since staff had already provided the requester with some records, OIP advised sending a revised NTR indicating there are additional responsive records. For more information, OIP referred staff to OIP's training materials on its rules available on OIP's website.



#### **Disclosing the Record in the Requested Format**

Because of concerns for the security of records on an agency's computer system, the agency wanted to prohibit the download of records onto thumb drives or compact discs. The agency inquired as to whether the agency could limit disclosures to paper copies even if the requester asked for the record to be disclosed on a thumb drive or CD.

In OIP Opinion Letter Number 90-35, OIP concluded that "so long as an agency maintains the information in the form requested by a UIPA requester, the agency must generally provide a copy of that government record in the format requested." The requester must be provided the record in the format requested.

Because of security issues, the agency may choose to allow only authorized employees to download records onto thumb drives or CDs, rather than allowing requesters themselves to directly copy the records.

## **Civil Service Commission's Records About Police Recruits Who Were Terminated**

A state senator asked the Civil Service Commission (CSC) for access to minutes from the CSC's hearings concerning two named police officer recruits who had been terminated during officer training. When the CSC denied the senator's record request for the minutes, he inquired with OIP as to whether the denial was proper.

OIP informed the senator that the Sunshine Law expressly does not apply to the "adjudicatory functions" of the CSC, which would include the CSC's hearings when the CSC adjudicates appeals under the civil service laws. HRS §92-6(a)(2)(D) (2012). Consequently, while the Sunshine Law requires other boards' minutes to be available to the public, the Sunshine Law does not apply to the CSC's minutes from its hearings and, therefore, does not require them to be available to the public. Instead, the CSC's hearing minutes would generally be protected from public disclosure under the UIPA's "privacy" exception. The senator may be given access to the CSC's minutes if he provides written consent from the two terminated recruits.

The senator then asked if the UIPA requires the CSC to publicly disclose the findings of fact, conclusions of law, decision and order from its hearings about the named police recruits who had been terminated. The UIPA's "privacy" exception does not apply to these particular records when the records concern police officers who were discharged because of misconduct, or other government employees who were suspended or discharged for misconduct. HRS § 92F-14(b)(4)(B) (Supp. 2016). The UIPA's "privacy" exception still applies to the records about the terminated police recruits because the recruits were not yet police officers.

## **Sunshine Law Guidance:**

### **Staff Communications to Board Members**

A member of staff for a State board asked whether the administrator could send an email message to board members that included a discussion on relevant legislation only as an "FYI" to board members. The legislation is not on a current meeting agenda.

OIP advised that the Sunshine Law prohibits communications between board members outside of a properly noticed meeting. There is no violation of the Sunshine Law when staff communicates to board members. Legislation sent by staff to all the board members outside of a meeting would not be considered a communication between board members and is generally acceptable. However, OIP cautioned that the exception to this general rule would be where there is some indication that staff is deliberately acting or being used as a go-between to facilitate discussion among board members on board business without having the members directly communicate.

### **Retention of Recordings of Meetings**

A board inquired as to whether audio/video recordings of meetings could be deleted after minutes were prepared. The board has the recordings made solely to facilitate the preparation of minutes and it is not intended to be the official record of the meetings.

The Sunshine Law requires that the board prepare minutes, but does not establish any requirements for retention. Regarding the retention of the recordings, it would be subject to the board's record retention policy, which is not under OIP's jurisdiction. Under the UIPA, the board will need to disclose the recordings if it still maintains the recordings at the time the agency receives a record request.

## Record Request for Minutes Not Transcribed

A board received a record request for minutes for several meetings held during a specified period. However, the board did not have finalized transcribed minutes of any of the meetings. It only had draft minutes for a few of those meetings, and audio recordings of all of those meetings. The board inquired as to how to process this record request.

This record request implicates both the UIPA and the Sunshine Law. Under the UIPA, a request for minutes is a request for government records. Specifically, section 92F-12(7), HRS, states that “each agency shall make available for public inspection and duplication during regular business hours: [m]inutes of all agency meetings required by law to be public.” Accordingly, the UIPA would require the board to provide the minutes that it does maintain. In this case, OIP recommended that the board disclose the draft minutes for those few meetings and the audio recordings of all of the meetings, noting that the final minutes have not been transcribed.

Regarding the Sunshine Law, sections 92-9 (a) and (b), HRS, currently state that:

The board shall keep written minutes of all meetings. Unless otherwise required by law, neither a full transcript nor a recording of the meeting is required, but the written minutes shall give a true reflection of the matters discussed at the meeting and the views of the participants. The minutes shall include, but need not be limited to:

- (1) The date, time and place of the meeting;
- (2) The members of the board recorded as either present or absent;

- (3) The substance of all matters proposed, discussed, or decided; and a record, by individual member, of any votes taken; and

- (4) Any other information that any member of the board requests be included or reflected in the minutes.

(b) The minutes shall be public records and shall be available within thirty days after the meeting, except where such disclosure would be inconsistent with section 92-5; provided that minutes of executive meetings may be withheld so long as their publication would defeat the lawful purpose of the executive meeting, but no longer.

Consequently, for those meetings where only the audio recordings are available and no written minutes are available, it appears that the board is in violation of the Sunshine Law. Thus, OIP recommended that to comply with its Sunshine Law obligation, the board should provide the draft minutes that it does maintain and inform the requester that written minutes for the other meetings will be following shortly.

Since the Sunshine Law requires that minutes be available 30 days after each meeting, the board was already remiss in its Sunshine Law duty by not having them available to provide in response to the record request. Thus, OIP strongly recommended that the board prepare and provide those minutes as soon as possible so that the board is in compliance.

Note: Effective July 1, 2018, the Sunshine Law will be amended by Act 64, SLH 2017, as discussed in the Legislation Report on page 59.



## Possible Sunshine Law Violation

An attorney for a board informed OIP that the board might have possibly violated the Sunshine Law and inquired into possible remedial actions the board may take to cure the possible violation.

OIP explained that the Sunshine Law does not provide an explicit cure when there is an alleged violation. However, the board may mitigate the public harm by announcing and discussing the alleged violation at the next meeting. This item must be properly listed on the agenda before it may be discussed.

Moreover, any final action taken in violation of the Sunshine Law may be voidable upon proof of the violation. HRS § 92-11. However, to void a final action, a lawsuit must commence within ninety days of the alleged violation. An action taken in violation of the Sunshine Law is not automatically void. *Id.*; see OIP Op. Ltr. No. 01-06 at 9.

OIP further advised that since a person's participation and testimony at a public meeting would not carry a privacy interest, the UIPA would require disclosure of a recording of that meeting, including the person's testimony, if requested. Further, the board could not deny people the right to testify at a Sunshine Law meeting because they declined to sign a release. Thus, asking people to sign a release could be misleading, since it would suggest the recording of their testimony would not be released without consent, even though the recording would have to be released whether or not they consented.



## Videoconference Meetings

A board planning a videoconference meeting with locations on several different islands asked OIP whether the meeting could continue via teleconference if the video equipment went down during the meeting. The board also asked whether attendees should sign a release form, since the meeting, including testimony, would be recorded.

OIP advised that when a Sunshine Law meeting is held at multiple locations under section 92-3.5, HRS, it can be held as a teleconference with no video so long as any visual materials are faxed over to the other meeting sites. Thus, a meeting planned as a video meeting could be continued as an audio only meeting if the video went down during the meeting.

# 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](http://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 2017, OIP had a total of 72 training materials and forms on its website, and produced 4 reports.

Because basic training and educational materials on the UIPA and Sunshine Law are now conveniently accessible online, OIP has been able to produce more specialized training workshops that are customized for a specific agency or board, and conducted 9 in-person training sessions in FY 2017. OIP has also created accredited continuing legal education (CLE) seminars, which are specifically geared to the government attorneys who advise the many state and county agencies, boards, and commissions on Sunshine Law and UIPA issues. By training these key legal advisors, OIP can leverage its small staff and be assisted by many other attorneys to help government agencies voluntarily comply with the laws that OIP administers.



As part of its educational and open data efforts, OIP launched in FY 2013 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, 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](http://data.hawaii.gov) and summarizes in year-end reports posted on OIP’s website.



## **UIPA and Sunshine Law Training Sessions**

OIP provided nine training sessions in FY 2017 on the UIPA and Sunshine Law for the following agencies and groups:

- |           |  |
|-----------|--|
| ➤5/17/17  | City & County of Honolulu - Ethics Commission (UIPA and Sunshine Law)  |
| ➤5/23/17  | University of Hawaii (Records Report System)   |
| ➤7/14/16  | University of Hawaii (Records Report System)   |
| ➤8/30/16  | Department of Commerce and Consumer Affairs - Professional and Vocational Licensing (OIP Overview - UIPA and Sunshine Law) |
| ➤6/19/17  | Department of Land and Natural Resources - Division of Forestry and Wildlife (Sunshine Law)                                |
| ➤6/24/17  | City & County of Honolulu - Neighborhood Commission Office (Sunshine Law)  |
| ➤10/20/16 | Department of Land and Natural Resources - Aha Moku Advisory Committee (Sunshine Law)                                      |
| ➤3/16/17  | Department of Business, Economic Development and Tourism - Hawaii Tourism Authority (UIPA and Sunshine Law)                |
| ➤5/3/17   | University of Hawaii Law School - Mediation Group (Sunshine Law)   |



## Online Training Materials, Reports, and Model Forms

OIP's online training materials, reports, and model forms help to inform the public and government agencies about the UIPA, the Sunshine Law, and the work of OIP.

All of OIP's training materials and reports are available online at [oip.hawaii.gov](http://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](http://oip.hawaii.gov), other publications can be found on the "Laws/Rules/Opinions" or "Training" pages of the website and are organized under either the Sunshine Law or UIPA headings. Additionally, all of OIP's forms can be found on the "Forms" page at [oip.hawaii.gov](http://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 can be used at various points in the UIPA or Sunshine Law processes.

In FY 2017, OIP released its **Report of the Master UIPA Record Request Year-End Log for FY 2016**, which is summarized later in the Open Data section, beginning on page 50. 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 54.

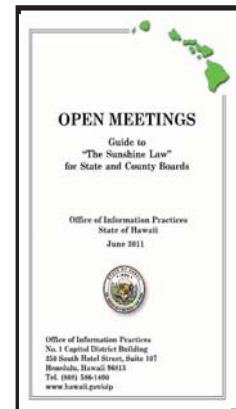


### *Sunshine Law Guides and Video*

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

The Sunshine Law Guide uses a question and answer format to provide general information about the law and covers such topics as meeting requirements, permitted interactions, notice and agenda requirements, minutes, and the role of OIP. OIP also produced a 1.5 hour Sunshine Law 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 has freed OIP's staff to fulfill many other duties.

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



## UIPA Guides and Video

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 1.5 hour long PowerPoint presentation with voice-over and a full written transcript of its basic training on the UIPA.

Additionally, as discussed earlier in the "Training" section, OIP in FY 2013 implemented the UIPA Record Request Log, which 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.

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."**

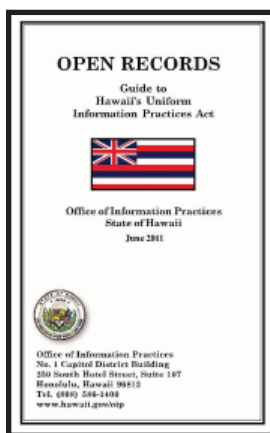
Members of the public may use the **"Request for Assistance to the Office of Information Practices"** form when their requests for government records have been denied by an agency, or to request other assistance from OIP.

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](http://oip.hawaii.gov).



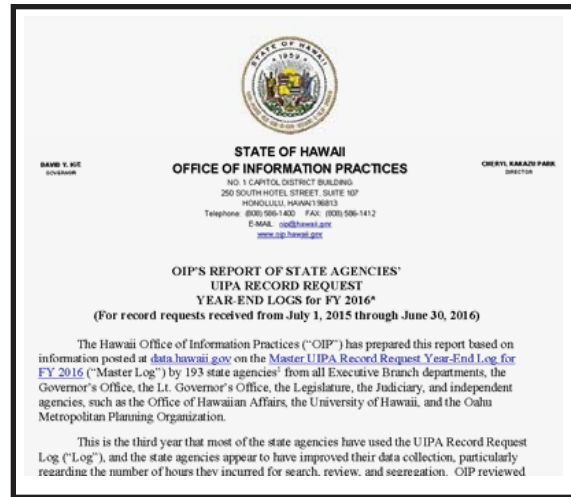

## Open Data

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 2017, OIP released its third year-end reports based on information posted by 193 state and 79 county agencies on the **Master UIPA Record Request Year-End Log for FY 2016 (Master Log)**, at [data.hawaii.gov](http://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.

### State Agencies' UIPA Record Request Log Results

The 193 state agencies that reported Log results in FY 2016 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 Office of Hawaiian Affairs, the University of Hawaii, and the Oahu Metropolitan Planning Organization. Overall, formal UIPA record requests constituted 1% of the estimated 162,602 total formal and routine record requests that state agencies received in FY 2016. Excluding one agency whose results would have skewed the entire report, 192 agencies reported receiving 2,239 formal written requests requiring a response under the UIPA, of which all but 25 were completed in FY 2016. Of the 2,214 completed cases, 79% were granted in full or in part, and 4% were denied in full. In 17% of the cases, the agency was unable to respond to



the request or the requester withdrew, abandoned, or failed to pay for the request.

After adjusting for the limitations of the data collection, state agencies took approximately eight work days, on average, to complete 2,123 typical and personal record requests, which is 95% of all completed cases. In contrast, it took nearly three times as many days to complete 91 complex requests.

In terms of hours worked per request, the average number of search, review and segregation (SRS) hours for a typical record request was 4.0, as compared to .33 for a personal record request and 7.2 hours for a complex record request. Although the 91 complex record requests constituted only 4% of all requests, they accounted for 12.1% (\$16,217) of the total gross fees and costs incurred by agencies (\$134,669) and 26.4% (\$5,027) of the total amount recovered from all requesters (\$19,003).

State agencies recovered \$19,003 in total fees and costs from 384 requesters, which is a little over 14% of the \$134,669 incurred by agencies in gross fees and costs. Fifty-eight percent of completed requests were granted \$30 fee waivers, while another 5% were granted \$60 public interest waivers. No fee waivers were reported in 37% 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.



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

For the full reports and accompanying data, please go to the Reports page at [oip.hawaii.gov](http://oip.hawaii.gov).

## County Agencies' UIPA Record Request Log Results

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

Formal UIPA record requests to the counties constituted less than 1% of the estimated 151,254 total formal and routine record requests that agencies received in FY 2016. Seventy-nine county agencies reported receiving 1,080 formal written requests requiring a response under the UIPA, of which 1,045 (97%) were completed in FY 2016. Of the 1,045 completed cases, 82% were granted in full or in part, and 4% were denied in full. In 14% of the cases, the agency was unable to respond to the request or the requester withdrew, abandoned, or failed to pay for the request.

After adjusting for the limitations of the data collection, county agencies took about nine work days, on average, to complete 961 typical and personal record requests, which is 92% of all

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

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

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

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

For the full reports and accompanying data, please go to the reports page at [oip.hawaii.gov](http://oip.hawaii.gov).

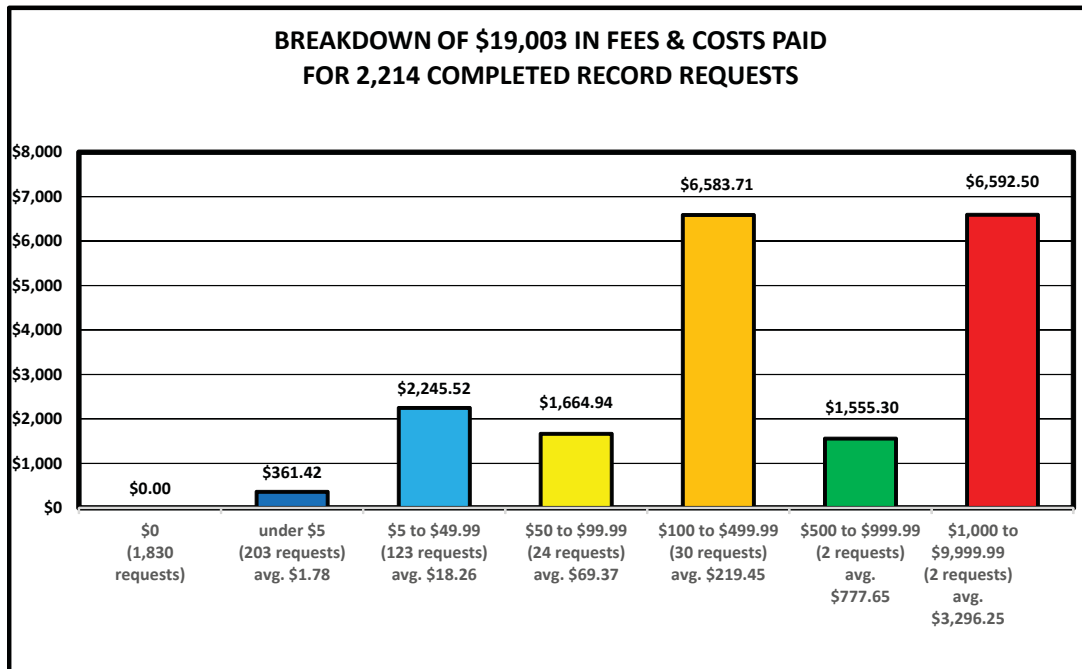


Figure 16

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

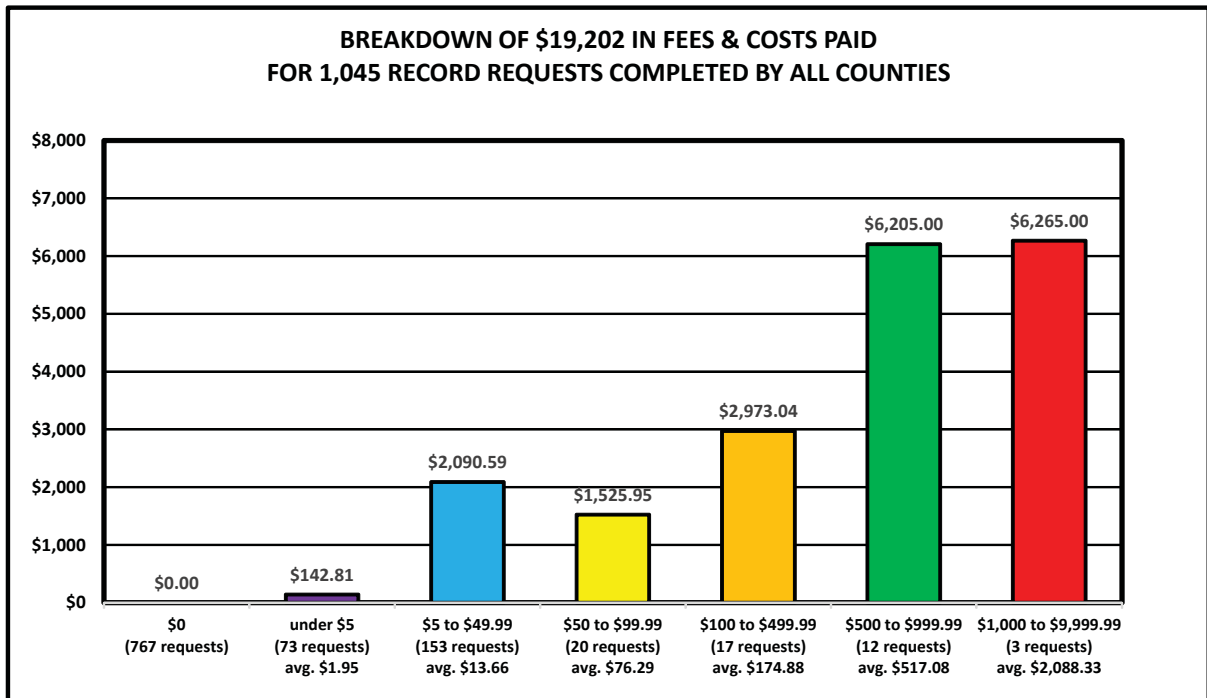


Figure 17

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



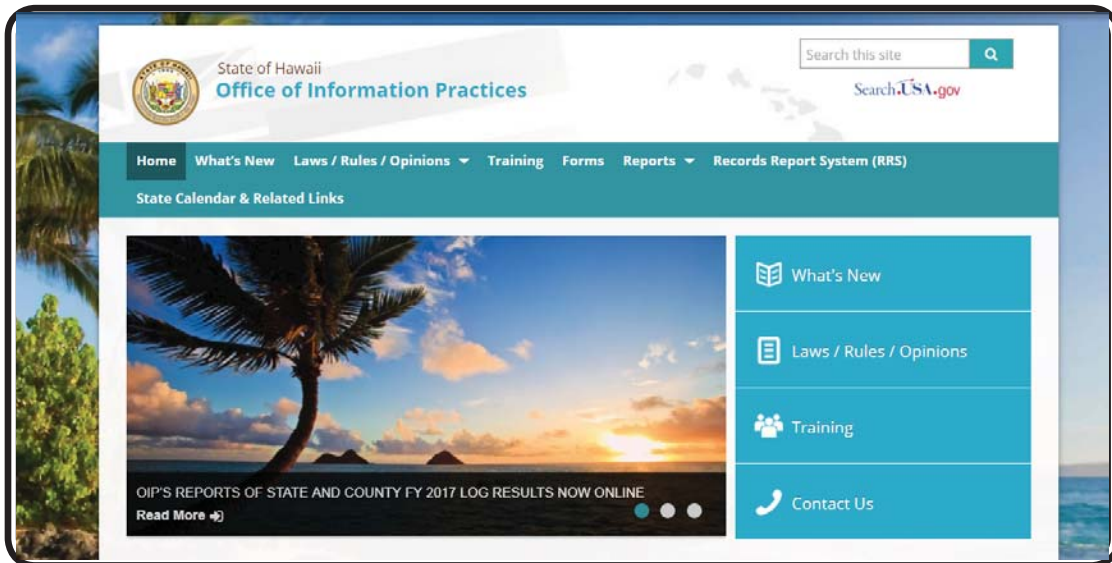


## Communications

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

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

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



## Website Features

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

### ***“What's New”***

The OIP's frequent *What's New* articles provide current news and important information regarding OIP and open government issues, including timely updates on relevant legislation. To be added to or removed from OIP's *What's New* email list, please email a request to [oip@hawaii.gov](mailto:oip@hawaii.gov).

### ***“Laws/ Rules/ Opinions”***

This section features these parts:

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

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

➤ *Rules*: the full text of OIP's administrative rules; “Agency Procedures and Fees for Processing Government Record Requests;” a quick guide to the rules and OIP's impact statement for the rules; and “Administrative Appeal Procedures,” with a guide to OIP's appeals rules and impact statement. Draft and proposed rules, and informational materials, are also posted in this section.

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

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

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

### ***“Forms”***

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

### ***“Reports”***

OIP's annual reports are available here, beginning with the annual report for FY 2000.

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

### ***“Records Report System (RRS)”***

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

### ***“Related Links”***

To expand your search, links are provided to other sites concerning freedom of information and privacy protection, organized by state and country. You can also link to Hawaii's State Calendar showing the meeting agendas for all state agencies, or visit Hawaii's open data site at [data.hawaii.gov](http://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](http://data.hawaii.gov).

### ***“Training”***

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



# Records Report System



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

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

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

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



## Records Report System

### Status of Records Reported by Agencies: 2017 Update

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

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](http://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](http://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](http://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.

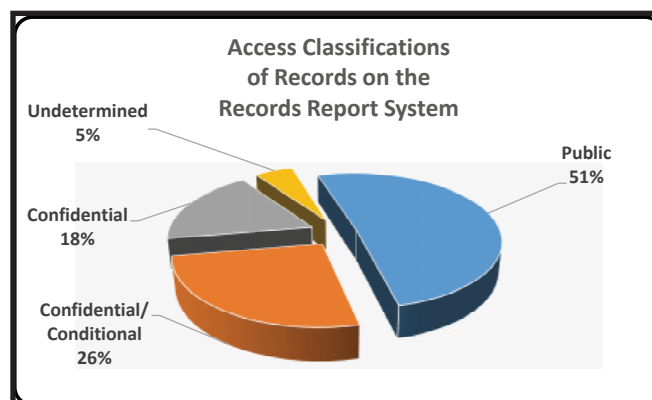


Figure 19

# 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 appli-



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

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

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

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

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

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

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

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

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

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

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

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





# Litigation Report

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



Under the UIPA, a person may bring an action for relief in the circuit courts if an agency denies access to records or fails to comply with the provisions of the UIPA governing personal records. A person filing suit must notify OIP at the time of filing. OIP has standing to appear in an action in which the provisions of the UIPA have been called into question.

Under the Sunshine Law, a person may file a court action seeking to require compliance with the law or prevent violations. A suit seeking to void a board's "final action" must be commenced within 90 days of the action.

Although litigation cases are not counted in the total number of cases seeking OIP's assistance, they nevertheless take staff time to process and monitor. In FY 2017, OIP monitored 40 litigation cases, of which 11 were new.

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

## **UIPA Litigation:**

### **Pono Choices Survey**

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

State Representative Bob McDermott (Plaintiff) filed a lawsuit after the University of Hawaii (UH) denied his requests for access to a copy of the Pono Choices survey. Pono Choices is a sexual education curriculum and UH is responsible for producing questions that are administered to Hawaii public school students by the Department of Education. Plaintiff sought a declaratory judgment and preliminary and permanent injunctions ordering UH to disclose the requested records, and further sought an award of fees and costs. UH sought dismissal of all claims, and an award of its fees and costs. This case was dismissed by the court on February 23, 2016, based on Plaintiff's failure to file a pretrial statement. However, on April 11, 2016, the court issued an order granting Plaintiff's motion to set aside the dismissal. Plaintiff's pretrial statement was filed on April 27, 2016, and there has been no significant movement on the case since the last report in OIP's FY 2016 Annual Report.

### **Deliberative Process Privilege**

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

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

Fiscal Year 2016.” Plaintiff described these documents as “formal memoranda and attachments that explain the initial recommendation of the department’s director concerning the monies that should be allocated to the department when the Mayor submits proposed budgets to the City Council.” The City denied access to portions of the responsive records, claiming that they were “predecisional and deliberative” and thus protected by the deliberative process privilege (DPP).

As was explained in OIP’s FY 2016 Annual Report, the DPP is a standard for resolving the dilemma of balancing the need for government accountability with the need for government to act efficiently and effectively. It is recognized under the UIPA’s “frustration exception,” which states that agencies need not disclose government records that, by their nature, must be confidential in order to avoid the frustration of a legitimate government function under section 92F-13(1), HRS.

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

Plaintiff filed a lawsuit on May 8, 2015, asking the First Circuit Court to order that OIP’s predecisional opinions discussing the DPP are palpably erroneous and to enjoin the City from invoking

the privilege. The suit also sought to have the City disclose all requested documents after redaction of specific salaries. The City, through the Department of Corporation Counsel, filed a Third Party Complaint against OIP on June 10, 2015, claiming that OIP is a necessary party to the lawsuit. Soon thereafter, the Corporation Counsel offered to stipulate to dismiss OIP as a party, and the Stipulation to Dismiss was filed on July 24, 2015. Plaintiff filed a Motion for Summary Judgment (MSJ) on June 5, 2015, which was denied. The State of Hawaii, through the Department of the Attorney General, asked the court for approval to participate as *amicus curiae*, which was granted. Plaintiff thereafter asked the court to allow it to appeal the denial of its MSJ, or to expedite the proceeding. The court denied the request to certify the case for appeal, but granted Plaintiff’s request to expedite the case.

In orders filed on January 13, 2016, the circuit court granted the City’s two motions for partial summary judgment and denied Plaintiff’s motion for summary judgment. Plaintiff appealed to the Intermediate Court of Appeals, arguing that the circuit court erred (1) in recognizing a DPP privilege; (2) in applying the DPP to allow the City to withhold the requested records without weighing the public interest in disclosure, and (3) in holding that the requested records are protected by the DPP, thus allowing the City to withhold even after the City conceded that portions consist entirely of factual information.

On June 13, 2016, the State filed an *amicus curiae* brief on appeal, asserting that (1) the DPP protects predecisional communications reflecting the give-and-take of agency deliberations; (2) that the DPP protects the public interest; and (3) that OIP was not palpably erroneous in finding that the DPP protects the legitimate government function of decisionmaking.

The Hawaii Supreme Court issued an Order Granting Plaintiff’s Application for Transfer in September 2016. The Supreme Court heard oral arguments on June 1, 2017. The case remains pending on appeal.

## **UH Lab Inspection Report Maintained by Federal Agency**

*Civil Beat Law Center for the Public  
Interest, Inc., v. Centers for Disease  
Control & Prevention*  
*Civ. No. 1:16-cv-00008-JMS-KSC*  
*(U.S. Dist. Ct. Haw.)*

The Civil Beat Law Center (Plaintiff) made a record request to the Centers for Disease Control & Prevention (CDC) under the federal Freedom of Information Act, 5 U.S.C. § 522 (“FOIA”), which is the federal counterpart to Hawaii’s UIPA. Plaintiff’s request was for a “show cause” letter and related inspection report for the University of Hawaii (UH). These records pertained to the use of biotoxins by a UH laboratory. The CDC denied the request on the basis that the records are exempt from disclosure because they are subject to a confidentiality statute, the federal Public Health Security and Bioterrorism Preparedness and Response Act of 2002, 42, U.S.C. § 262(h)(1)(C) and (E). Plaintiff thereafter filed this lawsuit for access.

The U.S. District Court for the District of Hawaii heard the parties’ motions for summary judgment and ruled at the end of August 2016 that the CDC’s redactions were mostly proper, but ordered re-redaction of the last page. Plaintiff appealed the decision to the Ninth Circuit.

## **Correction of Personal Record**

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

*Raines v. Department of Public Safety*  
*Civ. No. 15-1-0882-25 (1st Cir. Ct.)*

*Raines v. Department of Public Safety*  
*Civ. No. 15-1-000431- (1st Cir. Ct.)*

Todd Raines (Plaintiff) made various requests for personal records under Part III of the UIPA to the Hawaii Paroling Authority and the Department

of Public Safety. After both agencies denied his requests to correct or amend his personal records, Plaintiff filed pro se lawsuits with the First Circuit Court, seeking attorney’s fees and costs, orders directing agencies to correct his records, and damages of not less than \$1,000, as allowed by section 92F-27, HRS. Plaintiff eventually asked the court to dismiss all these cases. Dismissal orders have been entered in all cases.

## **Access to Employment Records**

*Kealoha v. City and County of Honolulu  
and Department of the Prosecuting Attorney*  
*Civ. No. 17-1-0834-05 DEO*  
*(1st Cir. Ct.)*

Katherine Kealoha (Plaintiff) filed a Complaint in the First Circuit Court for Injunctive Relief for a temporary, preliminary, and permanent injunction prohibiting the City and County of Honolulu and the Department of the Prosecuting Attorney (Defendants) from disclosing Plaintiff’s employment records to anyone, including online news organization Honolulu Civil Beat. Plaintiff also filed a Motion for Preliminary and Permanent Injunctive Relief and an Ex Parte Motion for Temporary Restraining Order. Civil Beat filed a Motion to Intervene, which the court granted.

According to a Civil Beat article of June 30, 2017, Judge Dean E. Ochiai ordered the City to turn over the records to Civil Beat. However, no Order had been filed with the Court as of July 2017.

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

*Honolulu Civil Beat Inc. v. Department of the Attorney General*  
*Civ. No. 16-1-1743-09 KKH (1st Cir. Ct.)*

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 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 was filed on June 1, 2017.

## **Request for Correction of Death Certificate**

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

The Department of the Medical Examiner of the City and County of Honolulu (ME) denied

Plaintiff Jane Liu's request made under Part III of the UIPA to correct her deceased mother's death certificate, filed in 1985, by changing the cause of death from suicide to homicide. Plaintiff subsequently appealed the denial of her correction request to the court under section 92F-27, HRS. The court entered final judgment against Plaintiff on July 21, 2015, and Plaintiff filed a notice of appeal on September 1, 2015. A merit panel was assigned to the case in the Intermediate Court of Appeals, where the case remains pending with no significant developments during the past fiscal year.

## **Registration Requirement for Farmers Growing Genetically Modified Crops**

*Doe v. County of Hawaii*  
*Civ. No. 14-1-0094 (3rd Cir. Ct.)*

As reported in OIP's FY 2015 Annual Report, a Hawaii County farmer (Plaintiff) filed suit against the County of Hawaii seeking to prevent it from implementing portions of a new law requiring registration of farmers growing genetically modified crops, and potentially providing for disclosure of the registration information. One of Plaintiff's arguments was that the disclosure provision conflicted with the UIPA and other laws. The court granted Plaintiff's motion for a preliminary injunction against the County in July 2014. The litigation remains in the pretrial stage. Nothing new was filed in the past two fiscal years.

## **Request for Senate Records Relating to Real Property**

*Continental Pacific, LLC v. Clayton Hee*  
*Civ. No. 13-1-2999-11 (1st Cir. Ct.)*

A landowner (Plaintiff) filed suit against a state senator (Defendant) who Plaintiff alleged had failed to properly respond to a record request for correspondence and other records relating to a land use project that Defendant opposed. After Defendant's motion to dismiss was filed but not heard, the parties stipulated to a dismissal without prejudice of all claims and parties.

## **Request for Records Sent by Department of Taxation to Legislature**

*Fritz v. State of Hawaii Department  
of Taxation*  
*Civ. No. 16-1-2120-11 (1st Cir. Ct.)*

The Department of Taxation denied Peter Fritz's (Plaintiff) request for its correspondence with the Legislature regarding S.B. 2925 and other tax bills during the 2016 session. Defendant argued that the records were protected by the UIPA's "frustration of a legitimate government function" exception, specifically the deliberative process privilege. Plaintiff appealed the denial directly to circuit court, where his motion for summary judgment was scheduled for hearing in August 2017.

## **Department of Health Inspection Records**

*Kokua Council for Senior Citizens  
v. Department of Health*  
*16-1-1421-07 (1st Cir. Ct.)*

The Department of Health (Defendant) is mandated to conduct regular inspections of health care facilities throughout the State to ensure

compliance with licensing and certification requirements. Along with the requirement to inspect, Defendant is also required to post the reports of these inspections on its website within five business days of the inspection. Seeing that inspection reports were not being posted, on December 14, 2015, Kokua Council for Senior Citizens (Plaintiff) requested access to all inspection reports. On January 3, 2016, Defendant responded that "[t]he available inspection reports are in the process of being posted." On January 4, 2016, Plaintiff sought OIP's assistance to obtain the records, and inspection reports were posted shortly thereafter. As it appeared that Defendant agreed to comply with its posting responsibilities, OIP dismissed the matter.

Thereafter, Plaintiff initiated its lawsuit in the First Circuit Court on July 25, 2016, seeking that the Court "[i]ssue an order compelling Defendant to disclose all inspection reports maintained by Defendant that it has not made available for public inspection." Defendant responded with its Answer to Complaint on August 15, 2016. This case is still pending.

## **Maui Community Correctional Center Records**

*Kong v. Maui Drug Court*  
*12-1-0013(2) (2nd Cir. Ct.)*

As reported in FY 2014, 2015, and 2016, 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 request.

Thereafter, on December 27, 2012, Plaintiff initiated his *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 that Plaintiff's complaint was



to be “treated as a civil complaint not governed by HRPP Rule 40” and Plaintiff “must follow all rules outlined in the Hawaii Rules of Civil Procedure.” There has been no change since the Court’s January 4, 2013 order.

## Department of Public Safety Records

*Kong v. Department of Public Safety*  
CAAP-14-0001334 (Intermediate Court of Appeals) from 13-1-0067 (1st Cir. Ct.)

Stanley Kong (Plaintiff) requested that the Department of Public Safety (Defendant) provide him a copy of various Defendant records. After Defendant failed to respond to his record request, Plaintiff initiated his *pro se* lawsuit on December 27, 2012. On November 25, 2014, he filed his “Notice of Appeal” with the Intermediate Court of Appeals (ICA), even though the Circuit Court had not issued a final judgment. On June 8, 2015, the ICA dismissed Plaintiff’s case for lack of appellate jurisdiction. This case is still pending in Circuit Court.

*Marks v. Department of Public Safety*  
14-1-1801-08 (1st Cir. Ct.)

Donald Marks (Plaintiff) requested that the Department of Public Safety (Defendant) correct his personal records. Defendant denied his request. Thereafter, on August 25, 2014, Plaintiff initiated his *pro se* lawsuit. On November 9, 2015, Defendant filed its Answer to Plaintiff’s Complaint. On April 4, 2016, Plaintiff filed his “Notice of Appeal” with the Intermediate Court of Appeals (ICA), even though the Circuit Court had not issued a final judgment. On January 26, 2017, the ICA dismissed this case with prejudice.

## Hawaii Paroling Authority (HPA) Records

*Raines v. Hawaii Paroling Authority.*  
15-1-0881-05 (1st Cir. Ct.)

Todd Raines (Plaintiff) requested that the Hawaii Paroling Authority (Defendant) correct his personal records. Defendant denied his request. Thereafter, on May 7, 2015, Plaintiff initiated his *pro se* lawsuit. On August 18, 2016, Plaintiff filed his “Motion for Voluntary Dismissal,” which the Court granted on September 9, 2016.

## Presentence Investigation Report and Minimum Decision Record

*Marks v. Hawaii Paroling Authority*  
13-1-3219-11 (1st Cir. Ct.)

As reported in FY 2016, Donald Marks (Plaintiff) requested that the Hawaii Paroling Authority (Defendant) provide him a copy of his Presentence Investigation Report and a copy of his Minimum Decision Record. Defendant denied his records request. Thereafter, on December 10, 2013, Plaintiff filed this *pro se* lawsuit. On June 9, 2014, Defendant filed its Answer to Plaintiff’s Complaint. This case is still pending.

*Kong v. Department of Public Safety*  
CAAP-14-0001321 (Intermediate Court of Appeals) from 14-1-1089-04 (1st Cir. Ct.)

Stanley Kong (Plaintiff) requested that the Department of Public Safety (Defendant) provide him a copy of his Presentence Investigation Report. Defendant denied his record request. Thereafter, on April 29, 2014, Plaintiff initiated this *pro se* lawsuit. On November 24, 2014, Plaintiff filed his “Notice of Appeal” with the Intermediate Court of Appeals (ICA), even though the Circuit Court had not issued a final judgment. On July 6, 2015, the ICA dismissed Plaintiff’s case for lack of appellate jurisdiction. The Circuit Court entered its “Order of Dismissal” on February 10, 2017.



## Personal Records About Honolulu Ethics Commission Investigation

*Doe and Roe v. Ethics Commission of the City and County of Honolulu*  
Civ. No. 15-1-1749-09 VLC (1st Cir. Ct.)  
CAAP-15-0940 (Intermediate Court of Appeals)

Two employees (Plaintiffs) of the City and County of Honolulu alleged that the Honolulu Ethics Commission (Defendant) was investigating them on its own initiative without receiving an ethics violation complaint. In September 2015, Plaintiffs filed a lawsuit seeking access to the initiating information that prompted Defendant's investigation, as well as information that Defendant obtained during its investigation. Plaintiffs also sought a declarative ruling that Defendant improperly investigated and prosecuted Plaintiffs and an injunction prohibiting Defendant's further investigation of Plaintiffs. Finally, the lawsuit sought to immediately disqualify and prohibit the Defendant's Executive Director and investigator from participating in further investigation and prosecution of Plaintiffs. Defendant filed a motion to dismiss Plaintiffs' lawsuit.

In December 2015, the Circuit Court granted in part Defendant's motion to dismiss Plaintiffs' request for the the production of records and the disqualification of the Defendant's employees, but retained Plaintiffs' claims alleging improper investigation and prosecution. The Circuit Court further ordered that the matter be stayed while Plaintiffs pursued their remaining claims through the administrative agency process. In December 2015, Plaintiffs filed an appeal to the Intermediate Court of Appeals (ICA). Although Defendant's Executive Director resigned in June 2016, the case remains pending before the ICA.

## Police Disciplinary Records

*Peer News LLC, dba Civil Beat v. City and County of Honolulu and Honolulu Police Department*  
Civ. No. 13-1-2981-11 (KKA) (Haw. Sup. Ct.)

This case was previously discussed in OIP's FY 2014 and 2015 Annual Reports. Peer News LLC, dba Civil Beat (Plaintiff) asked the Honolulu Police Department (HPD) to provide information regarding 12 police officers who received 20-day suspensions due to employment misconduct from 2003 to 2012, according to HPD's annual disclosure of misconduct to the state Legislature. Plaintiff asked for the suspended employees' names, nature of the misconduct, summaries of allegations, and findings of facts and conclusions of law. HPD denied Plaintiff's 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 HPD and the County (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. The Circuit Court's decision 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 the Intervenor's arguments, the Hawaii Supreme Court 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.

The case was remanded to the First Circuit Court where it is still pending.

OIP has prepared a summary of the Supreme Court's opinion, *Peer News LLC v. City and County of Honolulu*, 138 Haw. 53, 376 P.3d 1 (2016), which can be found on OIP's website at [oip.hawaii.gov/wp-content/uploads/2013/09/Peer-News-summary.pdf](http://oip.hawaii.gov/wp-content/uploads/2013/09/Peer-News-summary.pdf).

### **Disclosure of Hearings Officer Contract**

*Wills v. Department of Land and  
Natural Resources*  
Civ. No. 16-1-1109-06 ECN (1st Cir. Ct.)

Pursuant to the UIPA, Aaron Wills, dba Lokahi Consulting (Plaintiff), asked the Department of Land and Natural Resources (Defendant) to disclose records concerning the appointment of the hearings officer in a dispute involving the proposed Thirty Meter Telescope that was pending before the Board of Land and Natural Resources (Board). Defendant disclosed a redacted copy of its contract with the hearings officer. Defendant's attorney informed Plaintiff that the contract amount, hourly rate, and negotiated changes to the General Conditions were redacted from the contract and would be disclosed after the hearing officer's selection was final and unchallengeable.

The case was dismissed with prejudice in September 2016.

### **Academic Grievance Records at University of Hawaii**

*Williamson v. University of Hawaii*  
Civ. No. 14-1-1397-06 (1st Cir. Ct.)

Travis Williamson (Plaintiff) asked the University of Hawaii (Defendant) for documents pertaining to his academic grievances. Plaintiff renewed his record 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 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. The case remains pending in the Circuit Court.

## **Sunshine Law Litigation:**

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

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

In a case previously reported in OIP's FY 2016 Annual Report, various companies engaged in the production and planting of genetically modified seeds on Kauai (Plaintiffs) filed a federal lawsuit against the County of Kauai that challenged the legality of a county legislative measure restricting the use of pesticides and the planting of genetically modified crops. Included among the Plaintiffs' 13 claims were alleged violations of Sunshine Law sections 92-4 (authority to conduct executive meetings) and 92-5 (matters that may be considered in executive session), HRS. The federal District Court issued an "Order on Preemption and Order on Various Motions" that invalidated the Kauai law because it was preempted by a comprehensive framework of state law, and "denied as moot" the alleged violations of the Sunshine Law. On appeal, the Ninth Circuit Court affirmed on November 18, 2016, that the District Court's conclusion that State law impliedly preempted Kauai's ordinance. The Sunshine Law complaints do not appear to be addressed on appeal.

## **Permitted Interactions – Informational Meeting**

*In re Office of Information Practices*  
Opinion Letter No. F16-01  
S.P. No. 15-1-0097(1) (Second Cir. Ct.)  
CAAP-16-0000568 (Intermediate Court of Appeals)

OIP issued Opinion Letter No. 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 the 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 2016 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 Intermediate Court of Appeals (ICA) on August 15, 2016. After opening briefs were filed, Petitioner, on March 15, 2017, filed an Application for Transfer to the Hawaii Supreme Court. 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 Supreme Court denied Petitioner’s Application for Transfer. The ICA then 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 case remains pending with the ICA.

## Continuation of Meetings

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

This landmark Sunshine Law case was discussed in detail in OIP’s FY 2013 Annual Report. Briefly, in 2013, the Hawaii Supreme Court upheld the Intermediate Court of Appeal’s (ICA) decision that the Sunshine Law does not limit a continuance of a public meeting to just one time and concluded that Maui County Council (Defendant) and one of its committees did not violate the Sunshine Law by continuing and reconvening their respective meetings beyond a single continuance.

The Supreme Court, however, also held that memoranda sent by Defendant’s members to all other members did not fall within any Sunshine Law permitted interaction and concluded that they violated the Sunshine Law’s spirit or requirements to decide or deliberate matters in open meetings.

The Supreme Court remanded the case to the Second Circuit Court for consideration of an attorney’s fee award under section 92-12(c), HRS. The case was finally dismissed on December 28, 2016.

## 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 amended complaint on June 19, 2017, alleging that the Maui County Liquor Control Commission (Defendant) held a meeting under the Sunshine Law to discuss proposed

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

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

## Access to Minutes of Closed Meetings

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

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

Defendants filed an Answer and a Counterclaim for injunctive relief alleging that Plaintiff breached her fiduciary duty when Plaintiff, without proper authorization, disclosed confidential,

proprietary or privileged information. Plaintiff answered the Counterclaim by denying the allegations that Plaintiff had breached her fiduciary duty to OHA.

Defendants filed a Motion for Summary Judgment Establishing Plaintiff's Breach of Fiduciary Duty. The Court granted the Defendants' Motion for Summary Judgment. According to media reports, the case was settled and Plaintiff wrote a letter of apology dated November 14, 2017, to Defendants.

## Delegation of Authority to a Task Force and a Committee

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

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

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



## **Polling Board Members and Public Testimony on Executive Session Item**

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

As reported in OIP's FY 2015 Annual Report, the Office of Hawaiian Affairs (Plaintiff) appealed OIP's Opinion Letter No. 15-02, which concluded that Plaintiff's Board of Trustees had violated the Sunshine Law by polling board members outside a meeting to obtain their agreement to send a letter, and by denying members of the public the right to present oral testimony on an executive session item. This appeal represents the first use of section 92F-43, HRS, which was added to the UIPA in 2013 and allows agencies to appeal OIP decisions to court based on the record that was before OIP and subject to a deferential "palpably erroneous" standard of review. Plaintiff served its complaint on OIP and the members of the public who requested the OIP opinion being appealed, in many cases relying on service by publication. One of the members of the public filed an answer, as did OIP, and the court entered default against the others.

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

## **Charter School Commission's Adjudicatory Function**

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

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

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

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

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



## Honolulu Police Commission

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

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

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

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

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

In August 2013, a homeowners’ association (Plaintiffs) filed suit in the Second Circuit Court alleging that the new Real Property Classification and Tax Rates for Timeshare Properties approved by the Maui County Council (Defendant) violated the Equal Protection clauses of the United States and Hawaii Constitutions because the rates intentionally and arbitrarily categorized and taxed non-resident timeshare owners differently from similarly situated residents. Plaintiffs also alleged that Maui County Councilmembers circulated memoranda or engaged in other improper interactions or discussions, outside of public meetings, with the purpose of circumventing the spirit or requirements of the Sunshine Law. Plaintiffs sought a declaration that the new timeshare tax rates set forth in the Defendant’s resolution were void due to violations of the Sunshine Law.

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

