

# Office of Information Practices

State of Hawaii

---

## Annual Report 2018



**This report to the Governor and the Legislature summarizes the activities and findings of the Office of Information Practices from July 1, 2017, to June 30, 2018, in the administration of the public records law (the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes) and the open meetings law (the Sunshine Law, Part I of chapter 92, Hawaii Revised Statutes).**

# Abbreviations

*Abbreviations used throughout this report:*

**AOD - Attorney of the Day**

**CLE - Continuing Legal Education**

**CORR - Correspondence File**

**ETS - Office of Enterprise Technology Services**

**FTE - Full-Time Equivalent**

**HRS - Hawaii Revised Statutes**

**Log - UIPA Record Request Log**

**OHA - Office of Hawaiian Affairs**

**OIP - Office of Information Practices**

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

**RFA - Request for Assistance**

**RFO - Request for Opinion**

**RRS - Records Report System**

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

**UH - University of Hawaii**

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

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

# Table of Contents



<b>History .....</b>	<b>4</b>
<b>Executive Summary.....</b>	<b>6</b>
<b>Goals, Objectives, and Action Plan .....</b>	<b>11</b>

## ***HIGHLIGHTS OF FISCAL YEAR 2018***

<b>Budget and Personnel.....</b>	<b>16</b>
----------------------------------	-----------

<b>Legal Guidance, Assistance, and Dispute Resolution .....</b>	<b>18</b>
<b>Overview and Statistics .....</b>	<b>18</b>
<b>UIPA .....</b>	<b>24</b>
<b>Sunshine Law .....</b>	<b>28</b>

<b>Formal Opinions .....</b>	<b>29</b>
<b>UIPA .....</b>	<b>29</b>
<b>Sunshine Law .....</b>	<b>31</b>

<b>Informal Opinions .....</b>	<b>32</b>
<b>UIPA .....</b>	<b>32</b>
<b>Sunshine Law .....</b>	<b>41</b>

<b>General Legal Guidance and Assistance.....</b>	<b>45</b>
<b>UIPA .....</b>	<b>45</b>
<b>Sunshine Law .....</b>	<b>46</b>

<b>Education, Open Data, and Communications .....</b>	<b>48</b>
<b>Education.....</b>	<b>48</b>
<b>Training Sessions .....</b>	<b>49</b>
<b>Training Materials, Reports, and Model Forms .....</b>	<b>50</b>
<b>Open Data .....</b>	<b>52</b>
<b>Communications .....</b>	<b>56</b>

<b>Records Report System.....</b>	<b>58</b>
<b>Legislation Report.....</b>	<b>60</b>

<b>Litigation Report.....</b>	<b>61</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.

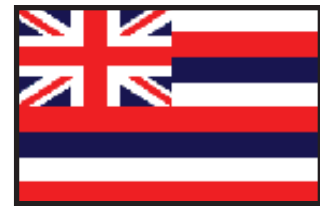
However, the Legislature also recognized that “[t]he policy of conducting government business as openly as possible must be tempered by a recognition of the right of the people to privacy, as embodied in section 6 and section 7 of Article I of the Constitution of the State of Hawaii.”

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 2018 fiscal year.



# Executive Summary



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

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

Besides providing relevant background information, this annual report details OIP's performance for fiscal year 2018, which began on July 1, 2017, and ended on June 30, 2018.

	2013	2014	2015	2016	2017	2018
<b>Total Requests for OIP's Services</b>	1,227	1,313	1,307	1,162	1,234	1,127
<b>Informal Requests (AODs)</b>	1,050	1,109	1,074	964	956	945
<b>Formal Requests Opened</b>	177	204	233	198	278	182
<b>Formal Requests Resolved</b>	142	195	142	208	241	201
<b>Live Training</b>	16	19	11	11	9	6
<b>Training Materials Added/Revised</b>	19	23	16	12	6	9
<b>Legislation Monitored</b>	134	181	101	175	108	93
<b>Lawsuits Monitored</b>	7	17	39	44	40	38
<b>Public Communications</b>	30	35	33	30	30	25
<b>Rules Adopted</b>	0	1	0	0	0	0
<b>Special Projects</b>	14	14	15	8	2	0

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 typically monitors over a hundred bills and resolutions and provides testimony and proposals on legislation impacting open government issues. OIP also monitors lawsuits that involve the UIPA 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 and any adjustments for collectively bargained increases, minus administratively imposed budget restrictions. In FY 2018, OIP's total allocation was \$584,019, up 1.4% from \$575,984 in FY 2017. *See Figure 3* on page 17. OIP's allocation in FY 2018 for personnel costs was \$561,695 and for operational costs was \$22,324. *See Figure 3* on page 17.

As in the prior year, OIP had 8.5 full-time equivalent (FTE) total approved positions in FY 2018.

## 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 state and county agencies and boards under the UIPA and the Sunshine Law.

In FY 2018, OIP received 182 formal and 945 informal requests for assistance for a total of 1,127 requests, which is an 8.7% decrease from 1,234 total requests in FY 2017. *See Figure 1* on page 6. OIP resolved 95% of all formal and informal requests for assistance received in FY 2018 in the same fiscal year.

Nearly 84% (945) of the total requests for OIP's services are informal requests that are typically responded to within the same day through the AOD service. Almost 69% of AOD inquiries in FY 2018 (651) came from state and county

agencies and boards seeking guidance to ensure compliance with the UIPA and Sunshine Law, while the balance (294) 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 2018, OIP opened 182 formal cases, which was a welcome 34.5% decrease from the prior year when OIP received a 40.4% increase in new cases, primarily filed by repeat requesters.

Over the years, OIP has received a disproportionately large number of formal cases filed by a small number of persons, which has seriously impacted its ability to timely resolve all other cases and perform other duties. The top 3 requesters in FY 2017 had accounted for 80 formal cases (29%). While one couple still opened 24 new formal cases in FY 2018 (13.2%), OIP overall had fewer cases filed by repeat requesters, which allowed it to perform other duties.

Thus, OIP was able to close 201 formal cases and reduce its backlog of pending cases to 131 by the end of FY 2018. Despite spending considerable time drafting new rules, revising training materials, and educating government agencies and the public about the draft rules and 2018 Sunshine Law revisions, OIP was able to reduce its backlog by 12.7% from the prior year, in large part due to the lower number of new cases filed in FY 2018. See **Figure 4** on page 19. OIP also 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 2016 cases at the end of FY 2018, except for one case that may be affected by pending litigation. Moreover, more than 70% (129 of 182) of the formal cases opened in FY 2018 were resolved in the same year. When

AODs are included, OIP resolved over 95% (1,074 of 1,127) of all FY 2018 formal and informal requests for assistance in the same year they were filed, and nearly 84% (945 of 1,127) 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 2018, OIP issued 3 formal opinions and 20 informal opinions, for a total of 23 opinions. Summaries of the opinions begin on page 29.

Through careful review and writing of opinions, and thanks to 2012 legislative changes establishing a high standard for judicial review of OIP's opinions, OIP has not had to expend its limited resources to defend its opinions in court since 2009. Instead of being embroiled in litigation, OIP has been able to work on reducing the age and number of pending cases and doing other statutory duties. For example, in FY 2018, OIP drafted new administrative rules and revised its training materials explaining the rules and the major legislative changes made to the Sunshine Law.

## **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 2018, OIP had a total of 80 training materials and forms, 4 new reports, and 25 older 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 2018, OIP revised or added 9 training materials, largely because of substantial changes



to the Sunshine Law that went into effect on July 1, 2018. OIP also conducted six in-person training sessions and two media interviews on the UIPA and/or Sunshine Law, and televised on ‘Olelo its informational briefing on its draft administrative rules.

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, UH, and OHA—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, which 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 online access to government services and the creation of electronic data sets that can make government information more readily accessible to the public.

OIP continues to demonstrate its commitment to the open data policy by making its statutes, opinions, rules, subject matter index, and training materials easily accessible on its website at [oip.hawaii.gov](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 2018, 23 *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 radio interview in FY 2018 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 number and titles of their records and whether the records are accessible to the public or must be kept confidential in whole or in part. By the end of FY 2018, state and county agencies reported 29,873 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 2018 legislative session, OIP reviewed and monitored 93 bills and resolutions affecting government information practices, and testified on 45 of these measures. *See Figure 1* on page 6.

## 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 submitted them for legal review by the Attorney General's (AG)

office. OIP has been awaiting completion of the AG's legal review of the draft rules and hopes to continue with the formal rulemaking process in FY 2019.

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

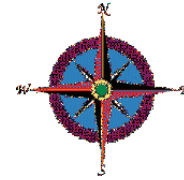
## Litigation

OIP monitors litigation in the courts that raise issues under the UIPA or the Sunshine Law or that challenge OIP's decisions, and it has the discretion to intervene in those cases. A person filing a civil action relating to the UIPA is required to notify OIP in writing at the time of filing. 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 2018, OIP monitored 38 cases in litigation, of which 7 were new cases that OIP began monitoring. *See Figure 1* on page 6. Summarized in the Litigation section of this report are 20 UIPA cases and 8 Sunshine Law lawsuits.



# 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 OIP is to fairly and reasonably construe and apply the UIPA and the Sunshine Law 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 the Open Data Law, OIP adopted another goal to assist 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 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 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 requirements and common purpose of the UIPA and Sunshine Law.

### III. Action Plan with Timetable

#### A. Legal Guidance and Assistance

##### 1. Past Year Accomplishments

- a. Received 1,127 total requests for assistance in FY 2018, of which 945 (83%) were informal requests typically resolved the same day through OIP's AOD service.
- b. Prepared drafts of new rules for personal records and revisions to OIP's existing rules, along with informational materials and public presentations.
- c. Conducted 6 live training sessions for state and county agencies and boards.
- d. Added or updated 9 training materials on OIP's website regarding changes to the Sunshine Law and OIP's new draft rules.

##### 2. Year 1 Action Plan

- a. Conduct informational briefings and a public hearing to obtain agency and public input on OIP's new administrative rules and revisions to its existing rules, 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 2019, conditioned on the completion of the Attorney General's legal review of OIP's draft rules.
- b. Maintain current efforts to promptly provide general legal guidance through OIP's AOD service, so that approximately 80% of requests for OIP's assistance can be resolved within one work day.

c. Focus OIP's limited resources on preparing and improving online training and communication to cost-effectively provide services to the greatest potential number of people and increase compliance by more government agencies and customize live presentations for advanced or special training.

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

a. Implement OIP's new administrative rules.

b. Update and improve OIP's online 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 1,127 formal and informal requests for assistance in FY 2018, and OIP resolved 95% of them in the same year, with most of them resolved the same day.

b. OIP resolved 945 AOD inquiries in FY 2018, which is over 84% of total requests for assistance (1,127) received by OIP.

c. Of the 182 formal cases opened in FY 2018, 129 (71%) were resolved in the same fiscal year.

d. Of the 131 cases that remained pending at the end of FY 2018, 53 (40%) were opened in FY 2018, 47 (36%) were opened in FY 2017, 30 (23%)

were opened in FY 2016, and one case filed before FY 2016 was still pending in litigation.

### **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 Log reports summarizing results for FY 2017 from 191 state and 74 county agencies, including the Governor's office, Lt. Governor's office, Judiciary, Legislature, UH, and OHA.

b. Distributed 23 *What's New* articles and participated in two televised or online programs, as well as one radio broadcast, to keep government personnel and the general public informed of open government issues, including proposed legislation.

c. Received 30,094 unique visits on OIP's website and 93,125 website page views (excluding OIP's and home page hits).

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

a. Encourage state and county agencies to electronically post open data, including the results of their Logs.

b. Complete data and prepare reports of the 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 rule-making process.

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

a. Continue to assist state and county agencies to electronically post open data and report on their results of state and county agencies' Logs.

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

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

## **D. Records Report System**

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

a. For FY 2018, state and county agencies reported 29,873 record titles on the RRS.

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

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

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

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

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

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

## **E. Legislation and Lawsuits**

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

a. Obtained additional appropriations to provide more competitive salaries that will help to retain OIP's experienced employees and institutional memory.

b. In FY 2018, OIP reviewed and monitored 93 bills and resolutions and testified on 45 of them.

c. In FY 2018, OIP monitored 38 cases in litigation, of which 7 were new cases.

**2. Year 1 Action Plan**

a. For FY 2019, OIP will continue to monitor legislation and lawsuits affecting the UIPA, Sunshine Law, open data, or OIP.

**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 recruit, train and retain OIP staff so as to keep up with anticipated increases in OIP’s workload while reducing the formal case backlog.

**4. Year 5 Action Plan**

a. 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 and productivity of OIP.

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.



**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.

# Highlights of Fiscal Year 2018

## Budget and Personnel



OIP's budget allocation is the net amount that it was authorized to use of the legislatively appropriated amount, including any collective bargaining adjustments, minus administratively imposed budget restrictions. In FY 2018, OIP's total allocation was \$584,019, up 1.4% from \$575,984 in FY 2017.

OIP's allocation for personnel costs in FY 2018 was \$561,695. The allocation for operational costs was \$22,324. See **Figure 3** on page 17.

As in the prior year, OIP had a total of 8.5 FTE approved positions in FY 2018.

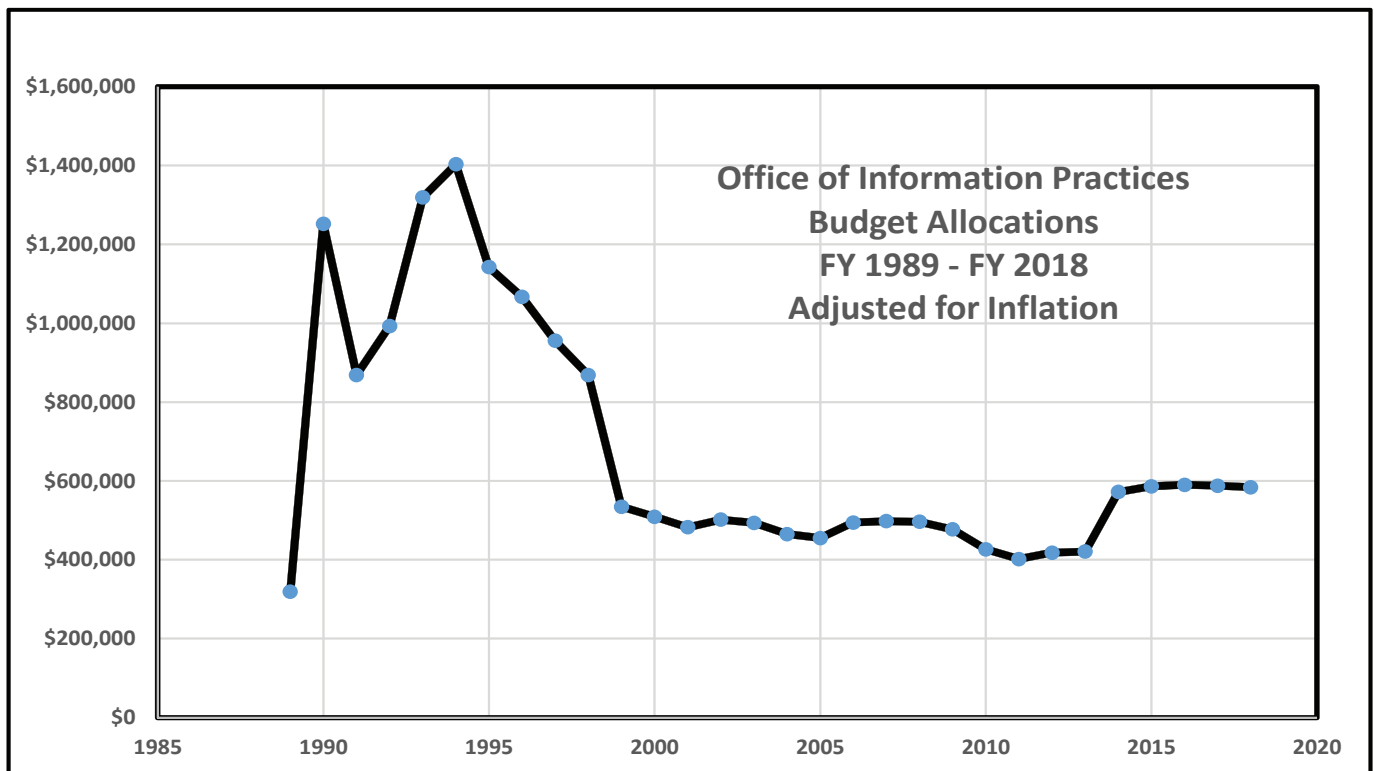


Figure 2





**Office of Information Practices  
Budget FY 1989 to FY 2018**

<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 18	22,324	561,695	584,019	584,019	8.5
FY 17	22,324	553,660	575,984	587,909	8.5
FY 16	31,592	532,449	564,041	590,112	8.5
FY 15	45,228	507,762	552,990*	586,494	8.5
FY 14	88,862	450,895	539,757*	571,948	8.5
FY 13	18,606	372,327	390,933	420,789	7.5
FY 12	30,197	352,085	382,282	418,040	7.5
FY 11	42,704	314,454	357,158	401,991	7.5
FY 10	19,208	353,742	372,950	426,615	7.5
FY 09	27,443	379,117	406,560	477,272	7.5
FY 08	45,220	377,487	422,707	496,376	7.5
FY 07	32,686	374,008	406,694	498,014	7.5
FY 06	52,592	342,894	395,486	494,341	7
FY 05	40,966	309,249	350,215	455,200	7
FY 04	39,039	308,664	347,703	465,356	7
FY 03	38,179	323,823	362,002	493,826	8
FY 02	38,179	320,278	358,457	501,692	8
FY 01	38,179	302,735	340,914	482,588	8
FY 00	37,991	308,736	346,727	509,136	8
FY 99	45,768	308,736	354,504	534,813	8
FY 98	119,214	446,856	566,070	868,255	8
FY 97	154,424	458,882	613,306	955,489	11
FY 96	171,524	492,882	664,406	1,066,608	12
FY 95	171,524	520,020	692,544	1,142,107	15
FY 94	249,024	578,513	827,537	1,403,003	15
FY 93	248,934	510,060	758,994	1,319,281	15
FY 92	167,964	385,338	553,302	993,086	10
FY 91	169,685	302,080	471,765	879,759	10
FY 90	417,057	226,575	643,632	1,252,238	10
FY 89	70,000	86,000	156,000	319,300	4

\*Total allocation for FY 2014 and 2015 includes the additional appropriation through Act 263, SLH 2013, to assist with open data and open government matters.

\*\*Adjusted for inflation, using U.S. Bureau of Labor Statistics CPI Inflation Calculator.

**Figure 3**



# Legal Guidance, Assistance, and Dispute Resolution

## Overview and Statistics

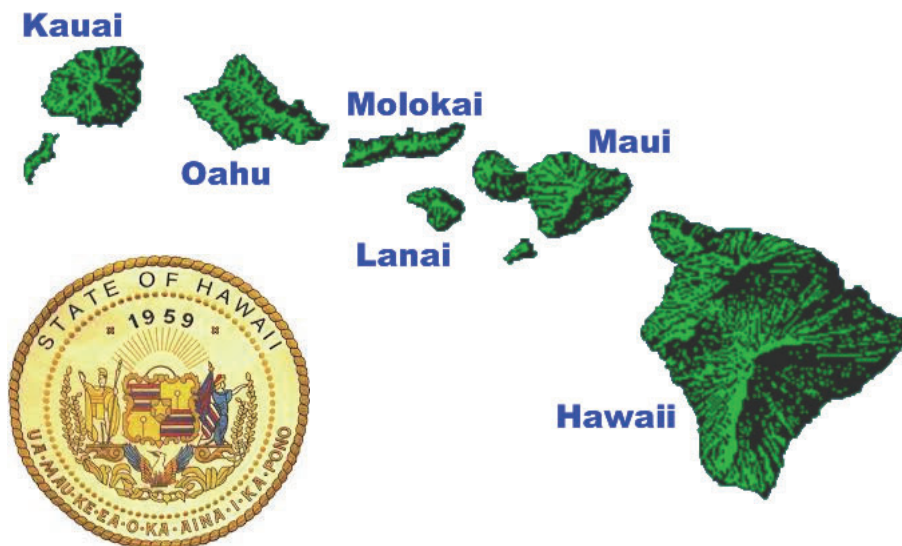


OIP is the single statewide agency in Hawaii that provides uniform and consistent advice and training regarding the UIPA and Sunshine Law, and OIP also provides neutral dispute resolution as an informal alternative to the courts. The general public and nearly all of Hawaii's state and county government agencies and boards seek OIP's services. The government inquiries come from the executive, legislative, and judicial branches of the State and counties, and include government employees as well as volunteer board members.

In FY 2018, OIP received a total of 1,127 formal and informal requests for OIP's services, compared to 1,234 requests in FY 2017. While the number of informal requests in the form of AOD inquiries remained roughly the same

as last year, there were 96 fewer formal cases filed in FY 2018 (182) than in FY 2017 (278). Notably, FY 2017 had seen a record number of new case filings as the result of 80 cases filed by one couple (42 cases) and two individuals (25 and 13 cases each). FY 2018 saw a return to the norm, which has averaged about 194 formal case filings per year over the past eight years.

Because of the spike in new cases in FY 2017 and the fact that 48 new cases were filed in the last two months of the year, OIP began FY 2018 with 150 outstanding cases. After working through the cases and drafting new administrative rules and training materials, OIP ended FY 2018 with 131 outstanding cases.



As **Figure 4** below shows, the number of new cases filed each year (represented by the blue dotted line) trends with the backlog, or number of outstanding cases at the end of the year (represented by the red dashed line). Thus, with the decrease in the number of new cases filed, there was a decrease in the number of outstanding cases. OIP resolved 192 cases in FY 2018, which is less than prior years, because it spent substantial time working on new administrative rules as well as training materials for extensive Sunshine Law revisions that took effect on July 1, 2018. OIP was still able to resolve its oldest cases, so that none of the cases outstanding at the end of FY 2018 were filed before FY 2016, except for one from FY 2015 that is in litigation and beyond OIP’s control. Moreover, OIP resolved

129, or nearly 71%, of the formal cases filed in FY 2018 in the same year. When the 945 AOD cases are counted, OIP resolved 95% (1,074) of total requests for OIP’s assistance in the same year that they were requested, and about 84% (945) on the same day.

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

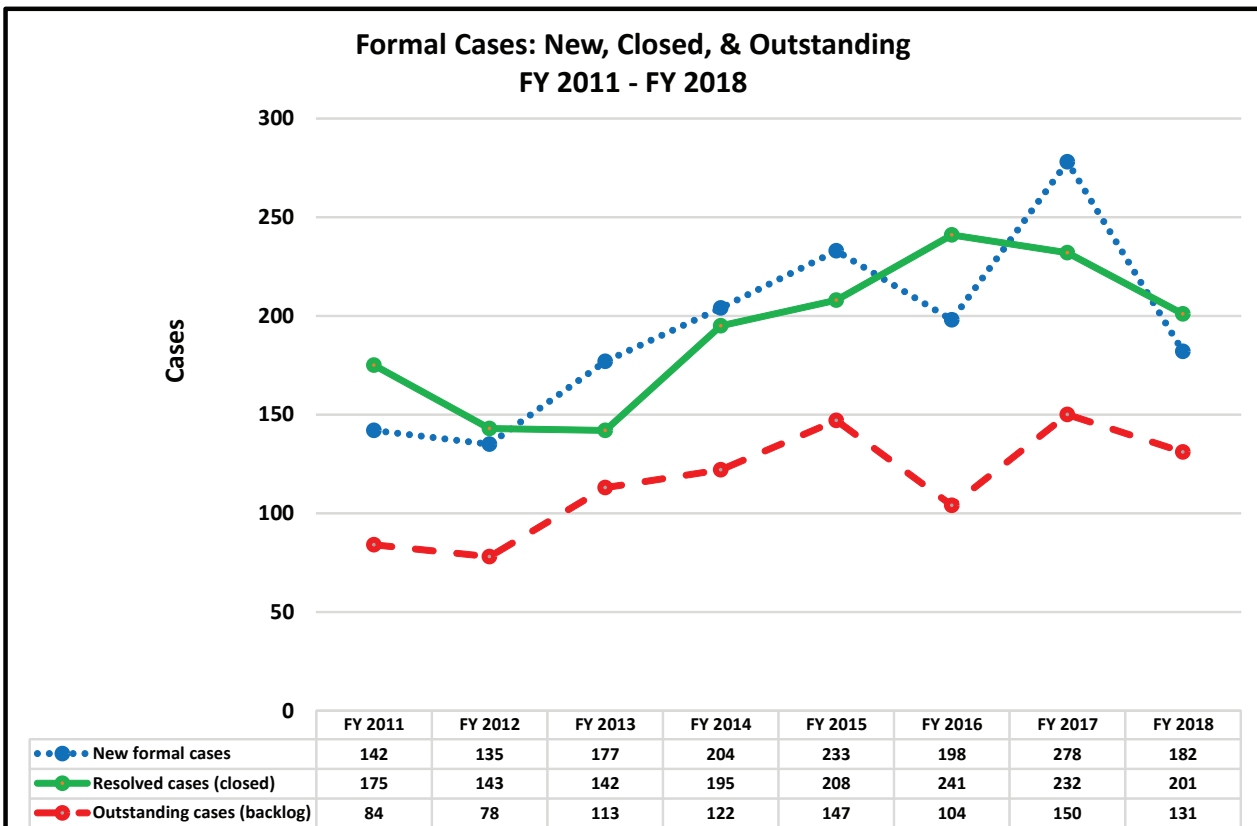


Figure 4

<b>Formal Requests - FY 2018</b>	
<i>Type of Request</i>	<i>Number of Requests</i>
UIPA Requests for Assistance	40
UIPA Requests for Advisory Opinion	1
UIPA Appeals	29
Sunshine Law Appeals	7
Sunshine Law Requests for Opinion	0
Correspondence	75
UIPA Record Requests	28
Reconsideration Requests	2
<b>Total Formal Requests</b>	<b>182</b>

**Figure 5**

### **Formal Requests**

Of the total 1,127 UIPA and Sunshine Law requests for services, 945 (84%) were filed as informal requests and 182 (16%) 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 2018, OIP received 40 such written requests for assistance (RFAs) concerning the UIPA.

In these cases, OIP staff attorneys will generally contact the agency to determine the status of the request, provide the agency with guidance as to the proper response required, and in appropriate instances, attempt to facilitate disclosure of the records. After an agency response has been received, the case is closed. Most RFAs are closed within 12 months of

<b>AOD Inquiries</b>			
<b>Fiscal Year</b>	<b>Total</b>	<b>Public</b>	<b>Government Agencies</b>
FY 18	<b>945</b>	294	651
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**

filing. A requester that is dissatisfied with an agency’s response may file a UIPA Appeal.

#### **Requests for Advisory Opinions**

A request for an opinion (RFO) does not involve a live case or controversy and may involve only one party, and thus, will result in an informal (memorandum) opinion that has no precedential value as to legal issues regarding the UIPA or Sunshine Law. In FY 2018, OIP received one request for a UIPA opinion and none for a Sunshine Law opinion.

#### **UIPA Appeals**

UIPA appeals to OIP concern live cases or controversies. Appeals may result in formal or informal opinions, but are often resolved through OIP’s informal mediation and the subsequent voluntary cooperation of the agencies in providing all or part of requested records. Unless expedited review is warranted, the case is being litigated,

or a requester already had two or more other cases resolved by OIP within the past 12 months, appeals and requests for opinions involving the UIPA or Sunshine Law are generally resolved on a “first in, first out” basis, with priority given to the oldest cases whenever practicable.

In FY 2018, OIP received 29 appeals related to the UIPA.

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

In FY 2018, OIP received 7 Sunshine Law appeals and no requests 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 RFO. Rather than waiting for an opinion, an agency or requester may be satisfied with a shorter, more general analysis presented on OIP’s letterhead, which is now considered a CORR file, and not an opinion as was done in prior fiscal years.

In FY 2018, OIP opened 75 CORR files.

### **UIPA Record Requests**

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

In FY 2018, OIP received 28 UIPA record requests made for records maintained by OIP.

### **Reconsideration of Opinions**

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

Of the two requests for reconsideration received in FY 2018, one was granted and one was denied.

### **Types of Opinions and Rulings Issued**

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

Formal opinions concern actual controversies and address issues that are novel or controversial, that require complex legal analysis, or are otherwise of broader interest to agencies and the public. Formal opinions are used by OIP as precedent for its later opinions and are posted, in full and as summaries, on OIP’s opinions page at [oip.hawaii.gov](http://oip.hawaii.gov). Summaries of the formal opinions for this fiscal year are also found on pages 29-31 of this report. OIP’s website contains a searchable subject-matter index for the formal opinions.

Informal opinions, also known as memorandum opinions, are binding upon the parties involved but are considered advisory in other contexts and are not cited by OIP as legal precedents. Informal opinions are public records, but are not published for distribution. Summaries of informal opinions are available on OIP’s website and those issued in this fiscal year are also found in this report on page 32-44.

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 2018, OIP issued a total of 23 opinions, consisting of 2 formal UIPA opinions, 1 formal Sunshine Law opinion, 14 informal UIPA opinions, and 6 informal Sunshine Law opinions.

## Informal Requests

### Attorney of the Day Service

The vast majority (84% in FY 2018) 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

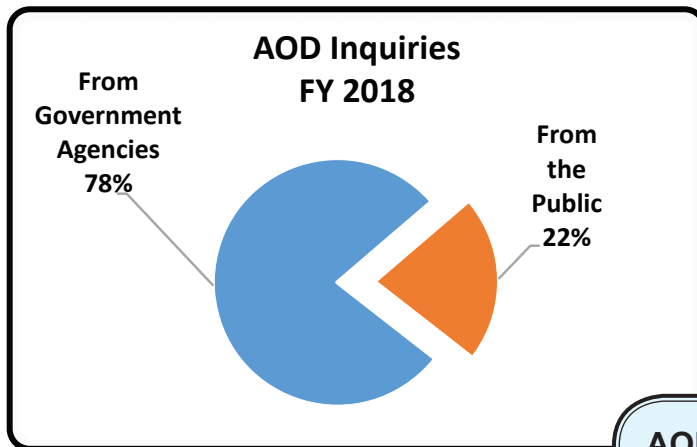


Figure 7

Types of Inquirers	Number of Inquiries
Private Individual	255
News Media	15
Private Attorney	14
Business	8
Public Interest Group	2
<b>TOTAL</b>	<b>294</b>

Figure 8

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 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 45.

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 make suggestions to prepare a sufficiently descriptive agenda. OIP has even had boards call for advice during their meetings, with questions such as whether they can conduct an executive session closed to the public. AOD callers may also seek

UIPA-related advice, such as on 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 18 years, OIP has received a total of 15,373 inquiries through its AOD service, an average of 854 requests per year. In FY 2018, OIP received 945 AOD inquiries. See **Figure 6** on page 21. Since FY 2011, AOD inquiries have increased 40%.

Of the 945 AOD inquiries in FY 2018, 651 (69%) came from government boards and agencies seeking guidance to ensure compliance with the UIPA and Sunshine Law, and 294 inquiries (31%) came from the public. See **Figures 7 and 8**.

Of the 294 AOD inquiries from the public in FY 2018, 255 (87%) came from private individuals, 15 (5%) from media, 14 (4%) from private attorneys, 8 (3%) from businesses, and 2 (1%) from public interest groups. See **Figures 8 and 9**.

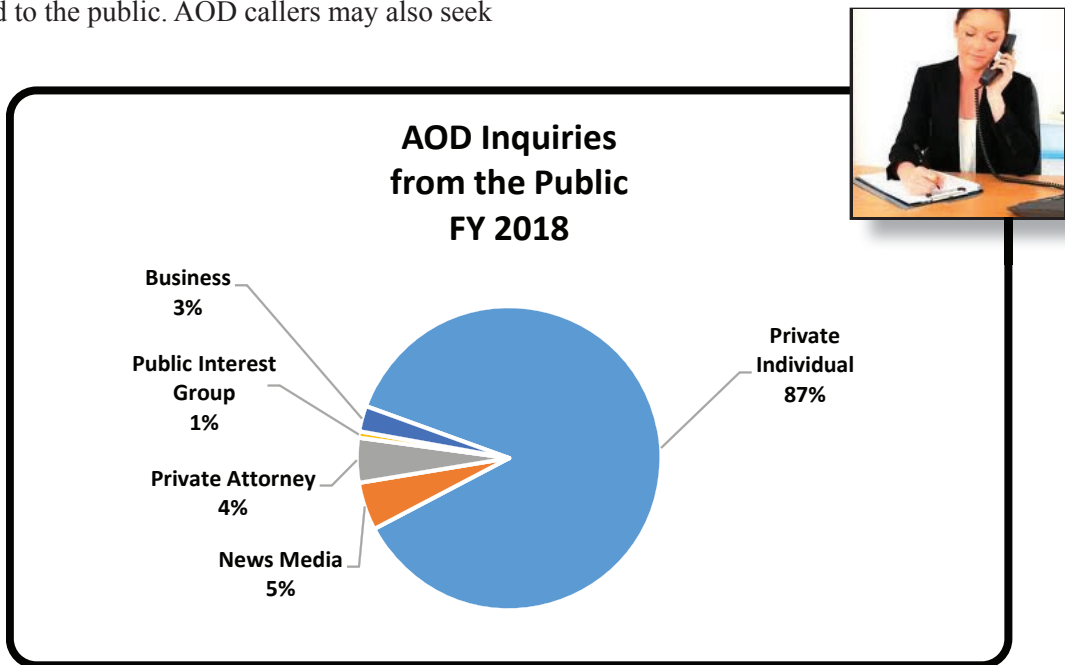


Figure 9

**UIPA Inquiries:****UIPA AOD Inquiries**

In FY 2018, OIP received 680 AOD requests concerning the UIPA from government agencies and the general public. As with Sunshine Law AOD inquiries, the data further shows that most of the inquiries came from the agencies seeking guidance on how to comply with the laws. For a summary of the numbers and types of AOD inquiries, please see **Figures 10 to 14** that follow. A sampling of the AOD advice given by OIP starts on page 45.

***State Agencies and Branches***

In FY 2018, OIP received a total of 246 AOD inquiries about state agencies in the executive branch. About 49% of these requests concerned five state agencies: Department of Education (32), Department of Commerce and Consumer Affairs (25), Department of Land and Natural Resources (25), Department of Health (24), and Department of Accounting and General Services (21). As shown below in **Figure 10**, about 50% of AOD requests were made by the agencies themselves.

OIP also received 4 inquiries concerning the legislative branch and 3 inquiries regarding the judicial branch. See **Figure 10** below. These AOD requests exclude general inquiries that do not concern a specific agency.

<b>AOD Requests About State Government Agencies FY 2018</b>			
<b>Executive Branch Department</b>	<b>Requests by Agency</b>	<b>Requests by Public</b>	<b>Total Requests</b>
Education (including Public Libraries)	20	12	32
Commerce and Consumer Affairs	16	9	25
Land and Natural Resources	7	18	25
Health	14	10	24
Accounting and General Services	10	11	21
Transportation	10	5	15
Attorney General	5	8	13
Human Services	8	4	12
Labor and Industrial Relations	7	5	12
Business, Econ Development, & Tourism	5	6	11
Agriculture	3	5	8
Budget and Finance	5	2	7
Public Safety	2	5	7
Human Resources Development	1	2	3
Defense	1	1	2
Governor	0	2	2
Tax	1	1	2
Hawaiian Home Lands	0	0	0
Lieutenant Governor	0	0	0
<b>TOTAL EXECUTIVE</b>	<b>115</b>	<b>106</b>	<b>221</b>
<b>TOTAL LEGISLATURE</b>	<b>1</b>	<b>3</b>	<b>4</b>
<b>TOTAL JUDICIARY</b>	<b>2</b>	<b>1</b>	<b>3</b>
<b>University of Hawaii System</b>	<b>6</b>	<b>10</b>	<b>16</b>
<b>Office of Hawaiian Affairs</b>	<b>0</b>	<b>2</b>	<b>2</b>
<b>TOTAL STATE AGENCIES</b>	<b>124</b>	<b>122</b>	<b>246</b>

**Figure 10**



**County Agencies**

In FY 2018, OIP received 53 AOD inquiries regarding various county agencies and boards. Of these, 9 inquiries (17%) came from the public.

Of the 53 AOD inquiries, 36 inquiries concerned agencies in the City and County of Honolulu, up from 31 in the previous year. *See Figure 11.* As shown below, 77% 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 (6), Parks and Recreation (5), Budget and Fiscal Services (4), Corporation Counsel (4) and the Honolulu Fire Department (4).

OIP received 17 inquiries regarding neighbor island county agencies and boards: Hawaii County (5), Kauai County (5), and Maui County (7). *See Figures 11 to 14.*



**AOD Inquiries About  
City and County of Honolulu  
Government Agencies - FY 2018**

Department	Requests by Agency	Requests by Public	Total Requests
Police	2	4	6
Parks and Recreation	5	0	5
Budget and Fiscal Services	2	2	4
Corporation Counsel	4	0	4
Fire	3	1	4
Human Resources	3	0	3
Liquor Commission	3	0	3
Mayor	2	0	2
City Council	0	1	1
City Auditor	1	0	1
Fire Commission	1	0	1
Prosecuting Attorney	1	0	1
Unnamed Agency	1	0	1
<b>TOTAL</b>	<b>28</b>	<b>8</b>	<b>36</b>

Figure 11



**AOD Inquiries About  
Hawaii County  
Government Agencies - FY 2018**

Department	Requests by Agency	Requests by Public	Total Requests
Corporation Counsel	4	0	4
Environmental Management	1	0	1
<b>TOTAL</b>	<b>5</b>	<b>0</b>	<b>5</b>

Figure 12



**AOD Inquiries About  
Kauai County  
Government Agencies - FY 2018**

Department	Requests by Agency	Requests by Public	Total Requests
County Attorney	4	0	4
County Council	1	0	1
<b>TOTAL</b>	<b>5</b>	<b>0</b>	<b>5</b>

Figure 13



**AOD Inquiries About  
Maui County  
Government Agencies - FY 2018**

<b>Department</b>	<b>Requests by Agency</b>	<b>Requests by Public</b>	<b>Total Requests</b>
County Council	3	0	3
Corporation Counsel	1	0	1
Personnel Services	1	0	1
Police	1	0	1
Unnamed Agency	0	1	1
<b>TOTAL</b>	<b>6</b>	<b>1</b>	<b>7</b>

Figure 14



## Sunshine Law Inquiries:

Since 2000, OIP has averaged more than 273 formal and informal inquiries a year concerning the Sunshine Law. In FY 2018, OIP received 272 Sunshine Law inquiries, which is 76 less than in FY 2017, and about the same as the average number of requests received each year. See **Figures 15 and 16**.

Of the total Sunshine Law inquiries made in FY 2018, 265 (97%) were informal AOD requests, and 7 were formal cases. See **Figure 16**.

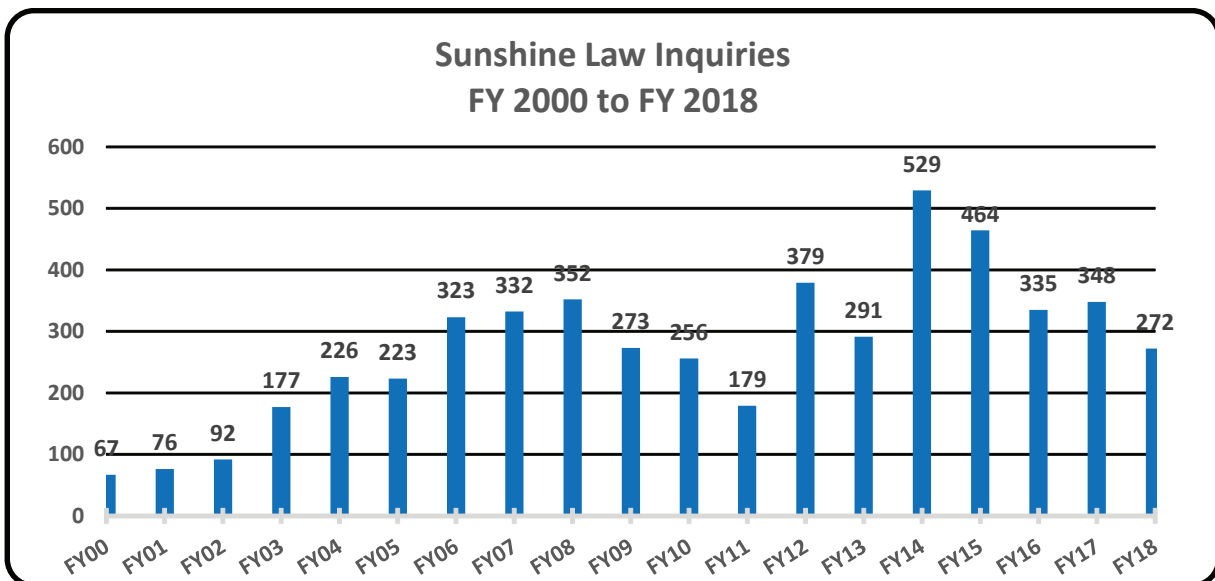
Of the 265 AOD requests involving the Sunshine Law, 229 were requests for general advice, and 36 were complaints. Also, 81 of the 265 AOD requests (30%) involved the requester’s own agency.

In FY 2018, OIP provided 5 Sunshine Law training sessions to boards and commissions as well as to other agencies and groups. See page 51 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			
Fiscal Year	AOD Inquiries	Formal Requests	Total
2018	265	7	272
2017	337	11	348
2016	331	4	335
2015	433	31	464
2014	491	38	529
2013	264	27	291
2012	356	23	379
2011	166	13	179
2010	235	21	256
2009	259	14	273
2008	322	30	352
2007	281	51	332
2006	271	52	323
2005	185	38	223
2004	209	17	226
2003	149	28	177
2002	84	8	92
2001	61	15	76
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.

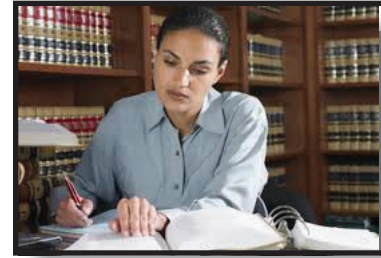


**Figure 15**

## Formal Opinions

### *Abbreviations used throughout the formal and informal opinions sections:*

AG - Department of the Attorney General  
Allocated Assessments - Assessments for land and improvements  
B&F - Department of Budget and Finance  
BOE - Board of Education  
CCA - Corrections Corporation of America  
CDD - Department of Defense, Civil Defense Division  
CWRM - Commission on Water Resource Management  
DOT - Department of Transportation  
FBI - Federal Bureau of Investigation  
FIN-K - Department of Finance, County of Kauai  
HART - Honolulu Authority for Rapid Transportation  
HPD - Honolulu Police Department  
LIQC-HON - Liquor Commission, City & County of Honolulu  
NTR - Notice to Requester  
OEO - Office of Equal Opportunity  
PLAN-K - Department of Planning, Kauai County  
PLAN-H - Planning Department, County of Hawaii  
Program Manager - Planning Program Manager, PLAN-K Enforcement Section  
PSD - Department of Public Safety  
PSI - Presentence Investigation Report  
Zoo - Honolulu Zoo



In FY 2018, LOIP issued three formal opinions, (two related to the UIPA and one 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:**

#### **Tsunami Inundation Maps**

*OIP Op. Ltr. No. F18-02*

Requester sought tsunami inundation maps, which were withheld by the State Department of Defense, Civil Defense Division (CDD), on the basis that the records were confusing to the public and must be confidential in order for the government to avoid frustration of a legitimate government function. *See* HRS § 92F-13(3) (2012).

OIP determined that even though there has been public confusion as to the difference between tsunami inundation maps, tsunami evacuation zone maps, and flood hazard zone maps, that confusion does not mean that public disclosure of the information could reasonably be expected to cause damage to public security, as was argued by CDD. *See* OIP Op. Ltr. No. 07-05 at 3. Disclosure of the tsunami inundation maps would also promote the UIPA's purposes of providing for accurate government records and enhancing governmental accountability. *See* HRS § 92F-2 (2012). While it may require time and resources on the part of CDD to respond to public questions and to educate the public as to the difference between a tsunami evacuation zone map and a tsunami inundation map, responding to questions and educating the public is one of the

functions of a government agency and does not constitute a frustration of a legitimate government function. *See* HRS § 92F-13(3). Thus, the tsunami inundation maps do not fall under the UIPA's frustration exception or any other exception to disclosure and must be disclosed.

## Corrections Corporation of America's Policies

*OIP Op. Ltr. No. F18-03*

Requester asked whether the Department of Public Safety (PSD) properly denied, under Part II of the UIPA, an inmate's request for a copy of all or portions of three policies created by the Corrections Corporation of America (CCA).

OIP concluded PSD has administrative control because PSD has the contractual right to inspect and audit all records, which have not been shown to be proprietary corporate information and have actually been provided, in part, by CCA to PSD. Thus, PSD "maintains" the requested records, whether or not they are in its physical possession. Furthermore, PSD must disclose the requested policies as disclosure would not frustrate a legitimate government function by jeopardizing the safety of the Requester, inmates, or CCA staff.

The UIPA recognizes that an agency "maintains" requested records, not in its possession but in the physical possession of its contractor, when the agency has administrative control over records due to its contractual right to obtain them. The PSD/CCA contract expressly gives PSD the right to inspect "all records," including "other operational records," associated with inmates or any charges, billing, demands, and payments. The contract also requires PSD's access to continue for a period of time after the contract terminates so that the records may be

audited by PSD. In order to determine whether CCA is properly providing and charging for its services, PSD would necessarily need access to CCA's policies, which would be part of "all records" that PSD has the right to inspect.

Although another provision in the PSD/CCA contract denies PSD access to CCA's proprietary corporate information, there is no evidence that the requested policies are proprietary corporate information, as they appear to be neither "proprietary" to CCA nor to concern CCA's corporate organization or finances. Instead, the relevant policies contain operational procedures and specifically state that they are applicable to all staff and inmates.

Consistent with its contractual obligations to provide access to records, CCA had previously provided PSD with portions of the policies.

OIP concluded that PSD has the contractual right to obtain from CCA copies of the policies, and PSD thus retains administrative control over them and "maintains" them for purposes of the UIPA. Consequently, they are "government records" that must be provided to Requester unless access is restricted or closed by law. HRS § 92F-11(a).

The CCA policies were predominantly internal, as they set forth the procedures for segregation of inmates, but OIP fails to see how their disclosure would significantly risk the circumvention of agency regulations concerning the security of the prisons or the control of inmates. They contain no sensitive information that would jeopardize the lives or safety of any inmates or staff or the security of the prison, and they merely set forth the procedures to be followed when inmates are placed into segregation, including inmates' due process rights.

OIP thus concluded that the relevant policies must be disclosed to Requester.

---

**Sunshine Law**  
**Formal Opinions:**

**Site Visits and Presentations as  
Part of Adjudicatory Functions**

*OIP Op. Ltr. No. F18-01*

Requester asked OIP whether the Commission on Water Resource Management (CWRM) violated the Sunshine Law by holding a series of site visits and presentations that were not noticed or conducted as Sunshine Law meetings, and which were attended by a majority of CWRM members.

The federal National Park Service had petitioned CWRM to designate the Keauhou Aquifer as a ground water management area pursuant to section 174C-41, HRS. After initially planning to hold a limited meeting under section 92-3.1, HRS, for a planned series of site visits in the area of the Keauhou Aquifer, CWRM concluded that the site visits were an adjudicatory function exempt from the Sunshine Law, and instead distributed “Schedules” for a series of site visits by and presentations to CWRM members to take place September 17 and October 9, 2014. Most of the locations listed on the Schedules were harbors, wells, fishponds, and other sites relevant to the Keauhou Aquifer, but two locations were meeting rooms in which CWRM would view presentations, rather than sites of interest. The Schedules made clear that the site visits and presentations would not be conducted as public meetings and although the public would be allowed to be present for some of them, no public testimony would be accepted.

CWRM argued that its activities on the relevant dates were exempted from the Sunshine Law by section 92-6, HRS, because the series of site visits and presentations comprised an “investigation” that was part of a broader statutory scheme. However, OIP concluded that CWRM’s actions on the relevant dates were not part of an adjudicatory function exempted from the Sunshine Law by section 92-6, HRS, so CWRM violated the Sunshine Law by conducting them outside a noticed meeting and without falling under any permitted interaction. OIP noted that CWRM could have conducted the site visits in essentially the same way, while complying with the Sunshine Law, if it had followed the requirements to hold a limited meeting under section 92-3.1, HRS. The public impact of the violations thus arose primarily from CWRM’s denial of public testimony at the presentations, the public’s exclusion from any discussion of board business that may have occurred during lunch or while in transit, and CWRM’s failure to subsequently prepare meeting minutes as required by section 92-9, HRS.



## Informal Opinions

*Refer to abbreviations used in the Formal Opinions section on page 29.*

In FY 2018, OIP issued 14 informal opinions relating to the UIPA and six 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:**

#### **Adequacy of Search for Records and Agency Not Required to Create Compilation**

*UIPA Memo 18-1*

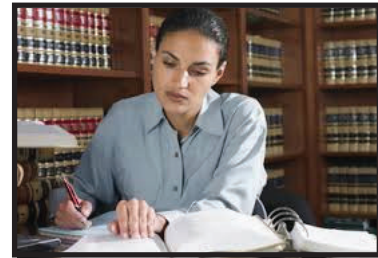
Requester made a written request under Part III of the UIPA for a copy of his presentence investigation report (PSI). PSD denied access, and Requester filed this appeal. After the appeal was opened, PSD sent a letter to Requester stating that it would provide Requester with a copy of the PSI after his payment of copying and postage fees. However, after receiving 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 had already been provided his PSI by the AG and did not indicate that anything had been redacted from the PSI prior to disclosure. 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 was 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.



#### **Agency Claim That Requested Records Do Not Exist**

*UIPA Memo 18-2*

Requester made a written request to the County of Kauai Department of Planning (PLAN-K) for a copy of a "Notice of Violation" issued to two individuals. PLAN-K's Notice to Requester stated that the request could not be granted because PLAN-K does not maintain the requested record. Requester appealed PLAN-K's response to OIP.

Agencies have affirmative disclosure responsibilities under the UIPA, which include making government records available for inspection and copying during regular business hours under section 92F-11(b), HRS. So long as an agency maintains the information in the form requested by a requester, the agency must generally provide a copy of that record in the format requested unless doing so might significantly risk damage, loss, or destruction of the original record.

Normally, when an agency's response to a record request states that no responsive records exist and that response is appealed, OIP assesses whether the agency's search for a responsive record was reasonable. OIP Op. Ltr. No. 97-8 at 4. A reasonable search is one "reasonably calculated to uncover all relevant documents[,]" and an agency must make "a good faith effort to conduct a search



for the requested records, using methods which can be reasonably expected to produce the information requested.” *Id.* at 5 (citations omitted).

Requester’s request was assigned to the PLAN-K Enforcement Section’s Planning Program Manager (Program Manager). The Program Manager has been employed by PLAN-K for approximately 25 years. In response to the request, he inquired with the four PLAN-K Enforcement Section inspectors who would have knowledge as to where a notice of violation would be maintained. All four inspectors confirmed that there is not an enforcement file under the names provided by Requester or under the tax map key number for their property. Because a Notice of Violation, if it existed, would be maintained in an enforcement file in PLAN-K’s Enforcement Section, OIP found that PLAN-K’s search for responsive records was reasonable.

OIP also noted that, 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. Based on his experience, institutional knowledge, and personal knowledge, the Program Manager asserted that a Notice of Violation was never issued to the two named individuals. OIP found these statements to be credible and made in good faith, and that a further search for responsive records would be fruitless. OIP concluded that PLAN-K’s response was proper under the UIPA.

## Assessed Real Property Values

### *UIPA Memo 18-3*

Requester asked whether the County of Kauai Department of Finance’s (FIN-K) policy of providing a single assessment of a parcel’s whole value rather than separate assessments for land and improvements (Allocated Assessments) was legal under the UIPA. OIP found that FIN-K may continue to issue single assessments in

accordance with its policy. However, because real property tax assessments are “real property tax information” that is public under section 92F-12(a)(5), HRS, when FIN-K receives UIPA requests for Allocated Assessments, it should provide them if it maintains them. If FIN-K does not maintain Allocated Assessments, it should provide them only if they are readily retrievable in the form requested.

## Complainant’s Name

### *UIPA Memo 18-4*

Requester asked the Planning Department, County of Hawaii (PLAN-H) to disclose the name of the person who filed a complaint about Requester’s property. PLAN-H denied his record request. Requester appealed PLAN-H’s denial, asserting that public disclosure of the complainant’s name would allow a property owner to “know which neighbor to speak with if an issue comes up” and noted that, “if the complainer/accuser is just a business rival with an ax to grind, it becomes more evident what the motivations are.”

In OIP Opinion Letter Number 89-12, OIP had addressed the issue of whether the UIPA required PLAN-H to disclose a complainant’s identity. OIP opined that “[m]andatory public access to information about complainants’ identities would frustrate agencies’ legitimate enforcement function because agencies would be less likely to receive incriminating information at the initiative of private citizens.” OIP Op. Ltr. No. 89-12 at 4. Therefore, OIP concluded that the complainant’s identity is protected from public disclosure by the UIPA’s exception allowing agencies to withhold information in order to avoid the “frustration of a legitimate government function.” HRS § 92F-13(3).

Also, in OIP Opinion Letter Number 89-12, OIP opined that “a complainant under the UIPA would have a significant privacy interest in the disclosure of his [or her] identity since disclosure makes the complainant an identifiable target

for retribution and harassment.” OIP Op. Ltr. No. 89-12 at 5. OIP concluded that “[i]n the absence of a countervailing public interest,” the complainant’s identity is also protected from required public disclosure by the UIPA’s “clearly unwarranted invasion of personal privacy” exception. *Id.*; HRS § 92F-13(1).

Therefore, consistent with its conclusion in OIP Opinion Letter Number 89-12, OIP determined that PLAN-H properly withheld the complainant’s name under the UIPA’s exceptions for a “clearly unwarranted invasion of personal privacy” and “frustration of a legitimate government function.” HRS § 92F-13(1), (3).

## Hippopotamus Records

### *UIPA Memo 18-5*

Requester asked OIP for a decision as to whether the Department of Enterprise Services of the City and County of Honolulu properly denied access under Part II of the UIPA to veterinary records and “all” other records of a hippopotamus named Louise owned by the Department of Enterprise Services, Honolulu Zoo (Zoo), and records pertaining to the acquisition or disposition of all hippos by the Zoo.

The UIPA requires that all state and county government records are public, unless an exception in section 92F-13, HRS, applies. Section 92F-13(4), HRS, which allows an agency to withhold records made confidential by law, is inapplicable for Louise’s veterinary records because they are not protected by a confidentiality statute.

The frustration exception at section 92F-13(3), HRS, was not invoked by the Zoo and thus is inapplicable for this request. Nonetheless, for future requests for veterinary records, OIP notes the frustration exception may permit, but not require, the Zoo to withhold the veterinary records in instances when disclosure would result in the actual frustration of a legitimate

government function. Such a determination must be made on a case-by-case basis.

The Zoo did not provide sufficient justification to withhold access to hippopotamus acquisition and disposition records, and to “all” other records about Louise the hippo. Having failed to meet its burden to justify denials of access, the Zoo is required under the UIPA to provide these records to Requester, subject to Requester’s payment for search time and copying or inspection costs.

## Superintendent’s Annual Evaluation

### *UIPA Memo 18-6*

On behalf of the Board of Education (BOE), its then Chairperson sought an opinion on whether the Superintendent of the Department of Education’s (Superintendent) annual evaluation report must be disclosed upon request, and whether the worksheets prepared by the Superintendent or the BOE or both in the course of the annual evaluation process must be disclosed upon request, under Part II of the UIPA.

Information in an agency’s personnel file carries a significant privacy interest, as do personal evaluations generally. HRS § 92F-14(b)(4) and (8). Thus, government employee evaluations, being both personal evaluations and agency personnel file information, typically can be withheld from public disclosure as there is not a public interest in disclosure strong enough to outweigh the employee’s significant privacy interest in the evaluation. For high-ranking officials with substantial responsibilities, though, the balance of interests changes. OIP has previously found a diminished privacy interest, and a heightened public interest, in the evaluation of the UH President, concluding that the evaluation could not be withheld under the UIPA’s privacy exception. OIP Op. Ltr. No. 04-07. In that opinion, OIP found that the President had a diminished privacy interest, whereas the public had a heightened interest in his

performance, due to his extensive responsibility and high compensation.

Like the UH President, the Superintendent is the head of her agency, the DOE, and she oversees a budget greater than that of UH. The Superintendent also oversees considerably more campuses than the UH president, as the DOE has 15 complex areas and 256 schools. Because the Superintendent, as the head of her agency, oversees a larger budget and organization than the UH President, although with a lesser salary, OIP finds that the balance between her individual privacy interest and public interest in disclosure regarding the Superintendent's performance is similar to that for the UH President.

Consistent with the approach taken by most other states and with OIP's prior conclusion regarding the evaluation of the UH President, OIP found that the Superintendent has a diminished privacy interest in her annual evaluation report whereas the public disclosure interest is heightened. As a result, OIP concluded that the public interest in disclosure outweighs the Superintendent's privacy interest, so the Superintendent's annual evaluation report must generally be publicly disclosed. However, if the annual evaluation report includes specific information that, by its nature, has a heightened privacy interest, such information would carry a greater privacy interest and therefore could still be redacted based on the UIPA's privacy exception. For example, redactions could include information of a purely personal nature not directly related to the Superintendent's performance, such as the details of a Superintendent's illness, substance abuse, or family problems that had affected the Superintendent's performance. If this had been the case, the detailed information about the nature of the Superintendent's medical or family situation could be redacted, while still disclosing the existence of a medical or family issue and its effect on the Superintendent's performance.

As for the final version of the worksheets prepared by the Superintendent and the BOE, which determines the ratings in the annual evaluation report based on a fixed mathematical

formula, OIP also determined that the final worksheets must also be disclosed upon request, subject to redaction of any information that by its nature has a heightened privacy interest that is not outweighed by the public interest in disclosure. However, draft or preliminary versions of those or similar worksheets, whether prepared by the full BOE or individual BOE members or the Superintendent or others, may be withheld based on the deliberative process privilege, which falls within the UIPA's frustration exception. HRS § 92F-13(3).

## Taxpayer's Audit File

### *UIPA Memo 18-7*

The Department of Taxation properly withheld the records in a taxpayer's audit file from the taxpayer under the exemption to personal record disclosure for records that are part of an open investigative file. *See* HRS § 92F-22(4) (2012); OIP Op. Ltr. No. 90-03. However, its description of the withheld records as simply "[o]ther documents in the audit file" was inadequate; while it was not required to list and describe each individual record being withheld, it should at least have listed types or categories of records that were in the file and were being withheld. *See* HAR § 2-71-14(b)(1).

## Files Relating to Police-Involved Death

### *UIPA Memo 18-8*

The Honolulu Police Department (HPD) was not justified in withholding an administrative investigation file on the basis that it was "in litigation." The UIPA's exception to disclosure for "[g]overnment records pertaining to the prosecution or defense of any judicial . . . action to which . . . any county is or may be a party," only applies "to the extent that such records would not be discoverable." HRS § 92F-13(2). Further, this exception specifically protects against the use of the UIPA to evade

privileges against discovery. *E.g.*, OIP Op. Ltr. No. 95-16 at 11. In the absence of any applicable privilege against discovery, section 92F-13(2), HRS, does not allow an agency to withhold records that are “in litigation.”

However, specific items of information in that file and another file at issue could still be withheld under the UIPA. Although a police officer does have a significant privacy interest in the information contained in internal affairs complaint files, it must be balanced against the public interest in disclosure. OIP concluded that for these files, the identities of police officers who were the subject of complaints did not fall under the UIPA’s exception for information whose disclosure would be a clearly unwarranted invasion of individual privacy, because the subject officers’ identities were already part of the public record in court files. The identities of other government employees, including the police officers who were not the subjects of the complaints, also did not fall under any exception to disclosure under the UIPA. Although nongovernment witnesses’ identities could generally be withheld, the plaintiffs who filed a lawsuit based on the same events waived their privacy interests in being named as witnesses and thus there was no basis under the UIPA to redact their identities. In addition, phrases such as “several people” or “family members” or portions of the requested records that only stated the number of people involved or present could not be withheld based on privacy because they did not identify any individuals.

OIP also determined that HPD must also disclose information contained in narrative descriptions of events and To/From statements that had already been largely made a matter of public record through its inclusion in court filings.

“Incident Recall” log entries relating to the files at hand contained information about the incident that OIP had found to be public. However, HPD properly redacted the entries showing unrelated police calls that potentially fell within the UIPA’s privacy exception. Because HPD gave no basis for redacting the blocks checked and the comments written in to certain Use of Force Reports,

those were required to be disclosed. Disclosure of Form HPD-384 with the name of the officer concerned and other identifying information redacted would not be sufficient to prevent identification of the officer with the information contained in the form, so HPD could withhold the entire form. *See* OIP Op. Ltr. No. 10-03 at 10.

Signatures do not, in and of themselves, fall under the UIPA’s privacy exception, so HPD was required to disclose the redacted signatures and handwritten initials of government employees. HPD’s own policies require disclosure of badge and identification numbers in specified instances as discussed in this opinion, HPD provided no justification for withholding the information, and OIP had already concluded that HPD must disclose the identities of all police officers and other government employees referenced, so OIP also concluded that HPD must disclose their badge and identification numbers. An identified government employee’s appointment date and division of employment are public information under the UIPA. *See* HRS § 92F-12(a)(14) (2012). The redacted image of a fingerprint might not be sufficiently high quality for it to be used to bypass biometric security, but OIP found that given the emerging technology in this area it passed the threshold of having a significant privacy interest, and in the absence of any real public interest in the image of the fingerprint, HPD properly redacted it under the UIPA’s privacy exception.

The redactions of dates of birth, personal contact information, and other personal details were justified by the UIPA’s privacy exception. However, the town and even the street where the incident giving rise a file occurred were already part of the public record through litigation filings as well as media reports, so there was no basis to redact more than the street number and unit number for the address of the scene of the incident, as well as the unit numbers for other units mentioned.

With respect to the non-government witnesses whose identities must be disclosed, their occupation information could still be redacted. With respect to the non-government witnesses whose

identities were properly withheld, their occupation information could be redacted because it could present a likelihood of actual identification of those individuals. Occupation information for police officers and other government employees must be disclosed.

Having already concluded that the identities of the police officers who were the subject of the complaints at issue must be disclosed, OIP found no reason to redact photographs of them out of concern that they could be identified by the photographs. Although most photographs of a deceased individual could not be withheld, OIP found a heightened privacy interest in specific photographs that was not outweighed by the public interest in disclosure, so those photographs were properly redacted.

HPD was required to disclose the full autopsy and toxicology reports, as well as disclosing references to those reports or information from those reports elsewhere in the file. *See* OIP Op. Ltr. No. F15-01. To the extent an Emergency Medical Services (EMS) report included information that was not reflected in the autopsy or toxicology report and was not already disclosed in the unredacted portions of, *e.g.*, accounts of events at the hospital, it could be withheld under the UIPA's privacy exception. HPD left unredacted multiple references in witness statements to a deceased individual's past use of illegal substances, so had waived its ability to make a privacy argument with respect to the individual's past use of illegal substances in other places and was required to disclose such references. *See* HRS § 92F-14(b)(1) (significant privacy interest in psychiatric or psychological history). References to another person who had an unrelated health issue were properly redacted under the UIPA's privacy exception.

HPD offered no justification for redaction of a description of an HPD code of conduct, and indeed was not even consistent in redacting this information, so OIP found that the summary did not fall under an exception to disclosure and was required be disclosed. *See* OIP Op. Ltr. No. 98-05 at 16-17; *see also* HRS § 92F-15(c). HPD

failed to justify how disclosure of information about staffing assignments would reveal internal policies regarding staffing that would render staffing procedures operationally useless, and some of the information HPD redacted included information that is mandated to be public under section 92F-12(a)(14), HRS, such as the names of employees taking vacation or personal leave or who were off duty on a specified date. HPD was required to disclose the information showing staffing assignments.

Finally, because HPD in many cases redacted either a full page or nearly a full page, OIP advised HPD that it should not do full-page redactions as a rule, unless a requester has specifically requested it do so.

## Records Listed on a Log of Redactions/Withheld Documents

### *UIPA Memo 18-9*

Requester, an inmate, asked whether PSD properly denied his request for records listed on a Log of Redactions/Withheld Documents (Log) produced in response to a subpoena.

The Requester first sought to obtain records through the State court system. Requester served PSD with the subpoena to produce Requester's "complete and entire" PSD file. The AG, on behalf of PSD, moved to quash the subpoena and submitted to the Court the Log listing all withheld records responsive to the subpoena. The Court issued two Orders that partially denied access to Requester's PSD File. Because Requester could not get the records he was seeking through discovery in his criminal case, he instead sought to obtain those records through the UIPA. Following PSD's denial of access to his record request under the UIPA, Requester appealed to OIP.

PSD argued that Requester was not entitled to the records based on sections 92F-13(4) and 92F-22(5), HRS, on the theory that the records

were made confidential by the Court's two Orders regarding the subpoena. OIP found that neither Order constituted a judicial decision that expressly required Requester's personal records to be withheld.

PSD further argued that the Court did not need to issue a protective order because the first order had granted PSD's motion to quash the subpoena, and cited OIP Opinion Letter Number 02-03, where the defendant in a Family Court matter had served a subpoena on HPD for certain police reports and complaints. However, OIP found that the records in OIP Op. Ltr. No. 02-03 had been affirmatively sealed by a Family Court order, which did not occur in the present case.

Accordingly, neither section 92F-13(4) nor section 92F-22(5), HRS, applied to the facts of this case and the records could not be withheld based on a judicial decision. Thus, Requester could potentially access records under the UIPA.

Records "about" the requester are considered personal records, which are governed by Part III of the UIPA and subject to the exemptions found in section 92F-22, HRS. In this case, several exemptions apply to permit the withholding of certain personal records sought by Requester. The emails and correspondence generated by PSD staff for internal use and the Internal Memo/ Incident Reports regarding investigations by PSD staff were reports that directly related to the facilities' concerns regarding the security, custody and rehabilitation of Requester and other inmates, and thus, could be withheld from disclosure under section 92F-22(1)(B), HRS. Certain Correspondence Control Sheet/Routing Slips may also qualify as reports that can be withheld from disclosure under section 92F-22(1)(B), HRS, depending upon the content of handwritten notes thereon.

The emails and correspondence between PSD and its attorneys were also personal records of Requester, but contain attorney-client privileged communications between PSD and its attorney. Thus, PSD could withhold them from disclosure under section 92F-22(5), HRS.

Although it was a personal record, PSD could withhold a letter about Requester written by a third party, which would reveal the identity of a confidential source under an implied promise of confidentiality. HRS §92F-22(2).

Other personal records were not subject to any Part III exemptions and must be disclosed to Requester.

The remaining requested records were considered "government" records subject to Part II of the UIPA, and the exceptions to disclosure found in section 92F-13, HRS. A State Employee Injury Medical Report and an envelope containing the home address of the writer could be withheld from disclosure under the privacy exception in section 92F-13(1), HRS.

## **HART Attorney Invoices**

### *UIPA Memo 18-10*

A reporter made a record request for attorney invoices related to the Honolulu rail project and maintained by the Honolulu Authority for Rapid Transportation (HART). HART responded to the request, indicating that it would charge copy fees and would redact the invoices to protect attorney-client privileged information. Requester appealed of HART's bases for redaction.

OIP found that subsections (2), (3), and (4) of section 92F-13, HRS, allowed HART to redact invoices provided by a law firm and invoices provided by the Hawaiian Electric Company for work done by its attorneys for payment of legal fees related to the rail project to protect information that qualifies for the attorney-client and attorney work product privileges. Names of other law firm clients contained in the invoices could be withheld under the UIPA's privacy and frustration exceptions at sections 92F-13(1) and (3), HRS, respectively. The remainder of the invoices were public.

---

---

## Background Investigation Materials

### *UIPA Memo 18-11*

Requester sought a decision as to whether PSD properly denied under Part III of the UIPA his request for his background investigation materials obtained in the course of his employment application.

OIP concluded that nearly all of the records sought in this case must be disclosed to Requester because they were considered personal records “about” Requester under Part III of the UIPA, and were not exempt from disclosure under sections 92F-22(3) or 92F-28(2), HRS. With respect to the records retrieved from the Federal Bureau of Investigation’s (FBI) identification records database, if PSD can show that the FBI records were provided to PSD only on the condition that the information remains confidential and that it would lose access to FBI assistance if the FBI information is disclosed to Requester, then PSD may withhold them under section 92F-4, HRS.

As to the information in the records that were not “about” Requester, OIP examined this information under Part II of the UIPA relating to government records. OIP found that, while the job titles and general business contact information of government employees were required to be disclosed under section 92F-12(a)(14), HRS, individuals’ direct business contact information could be withheld from disclosure under the Part II frustration exception set forth in section 92F-13(3), HRS.

With regard to any remaining issues, PSD provided only statutory citations, but no legal or factual arguments, to justify nondisclosure, and consequently, OIP concluded that PSD had not met its burden of proof under section 92F-15(c), HRS.

## Interview Materials

### *UIPA Memo 18-12*

Requester sought a decision as to whether the Department of Budget and Finance (B&F) properly denied under Parts II and III of the UIPA his request for interview materials used in the job interview process.

OIP found that some of the records sought by Requester were personal records “about” Requester under Part III of the UIPA and some of the records were government records not about Requester under Part II of the UIPA. As to those records that B&F asserted do not exist because they were never created, OIP declined to require B&F to conduct a search for such records and concluded that B&F’s response was proper.

With respect to the personal records about Requester, OIP concluded that B&F could withhold the interview questions and interviewers’ notes under section 92F-22(3), HRS. As to the government records responsive to Requester’s request for standards and procedures, OIP concluded that the other applicants’ names on the Selection Report could be withheld under section 92F-13(3), HRS, but the Guidelines for Recruitment Process, Introduction Sheet, and Interview Ratings must be disclosed as no exception in Part II of the UIPA authorizes B&F to withhold these records. Finally, any information identifying position titles, position numbers, departments, and names of government employees must be disclosed under section 92F-12(a)(14), HRS.

## Adequacy of Search for Employment Records

### *UIPA Memo 18-13*

Requester sought a decision as to whether the Director of the Office of Equal Opportunity (OEO) at UH at Hilo properly responded to his request for a successful applicant’s records under Part II of the UIPA by claiming that some of the records

were either not maintained or were not readily retrievable. Requester sought access to a search committee's written hiring recommendation for a successful applicant as well as employment cards and membership cards related to that applicant.

In response to this appeal, OEO stated that there is no requirement that a written hiring recommendation be made. When such a document was not found in the personnel file of the selected candidate in this case, OEO asserted that the chairperson of the search committee was asked if there had been a written hiring recommendation. The chairperson responded that a list of strengths and weaknesses of the three finalists had been provided to the Chancellor for decision-making. In an email message to the Requester prior to his record request, the chairperson of the search committee explained to Requester that "[a]s per the instructions of the Chancellor, the search committee did NOT recommend a person for the position, nor were the three APT applicants ranked in any order."

Because no written hiring recommendation apparently existed or could be found in the successful applicant's official personnel file, OEO justified the nondisclosure by correctly claiming on its Notice to Requester (NTR) that the record was "Not in official personnel file," but inexplicably cited section 92F-12, HRS, which requires disclosure of certain records. An agency is not required to cite statutory authority for not disclosing a record that it does not maintain, although OEO could have cited to section 92F-3, HRS, when advising Requester that it did not "maintain" the requested record. Despite OEO's incorrect statutory justification for its nondisclosure, OIP concluded that it made a good faith effort to locate any written hiring recommendation made by the search committee and found that no such record existed, so OEO's nondisclosure of a written hiring recommendation did not violate the UIPA.

OEO's NTR also claimed that OEO did not maintain any copies of employment cards and membership cards and correctly cited section

92F-3, HRS. In response to this appeal, OEO also asserted that "[i]t is not the policy of UH Hilo to maintain such a record. Review of [the successful applicant's] personnel file verifies that such a 'card' is not a part of her personnel record, which is also in accord with our practice to not maintain such documentation."

OIP found that OEO conducted an adequate search of the file and that there is a credible reason as to why the records did not exist. OIP concluded that the employment cards and membership information cards were not maintained by OEO and that its nondisclosure under section 92F-3, HRS, was proper.

## **Traffic Incidents Reported to DOT**

### *UIPA Memo 18-14*

Requesters sought copies of records of all incidents reported by the public or law enforcement for the intersection of "Saddle Road" and the entrance to Mauna Kea State Park, and sought an OIP decision as to discrepancies between information contained in the responses from the Department of Transportation (DOT). OIP concluded that while motor vehicle accident reports are protected from disclosure under Hawaii law, de-identified information maintained in the DOT's traffic accident database should be provided to requesters after segregation of information that may be withheld under the UIPA's privacy exception at section 92F-13(1), HRS, such as the names of individuals involved in traffic accidents and their home addresses, telephone numbers, and driver's license numbers.



## **Sunshine Law** **Informal Opinions:**

Sunshine Law informal opinions are written to resolve investigations and requests for advisory opinions. OIP wrote six informal opinions concerning the Sunshine Law in FY 2018, as summarized below.

### **Council Members' Attendance at Candidate Forums**

#### *Sunshine Memo 18-1*

OIP was asked for an opinion as to whether a quorum or more of Maui County Council members could attend candidate forums in compliance with the Sunshine Law.

OIP found that the best option for conducting a candidate forum as part of a Council meeting was for the Council to file notice of a guest meeting, a form of limited meeting set out in section 92-3.1(b), HRS, rather than to notice and conduct it as a regular Council meeting. Any number of Council members from less than a quorum and up to the full Council could attend a guest meeting as guests of a third-party organization. HRS § 92-3.1(b). The organization hosting the event would retain control of the schedule and the questions, and Council members would have the flexibility to attend or not attend, regardless of how many other Council members will be there.

The only permitted interaction that would allow a quorum or more of Council members to take part in a discussion of board business outside a meeting is section 92-2.5(f), HRS, allowing a board's members to discuss board business with the Governor without limitation or subsequent reporting, so long as the discussion does not relate to a matter over which the board is exercising its adjudicatory function. HRS § 92-2.5(f).

The other permitted interactions that could conceivably apply to Council members' participation

in a candidate forum would only allow less than a quorum to attend. If the number of Council members attending a candidate forum was more than two but less than a quorum, their attendance could fall within section 92-2.5(e), HRS, which permits less than a quorum of members to attend an informational meeting or presentation and report their attendance, and the Council business that was discussed, at the next Council meeting. HRS § 92-2.5(e). Alternatively, no more than two Council members could attend a candidate forum under section 92-2.5(a), HRS, the permitted interaction allowing two members to discuss board business so long as no commitment to vote is made or sought.

### **Private Conversation Prior to Open Meeting**

#### *Sunshine Memo 18-2*

Requester asked for an investigation into whether the Makakilo/Kapolei/Honokai Hale Neighborhood Board violated the Sunshine Law when the board allegedly held an improper private conversation regarding an agenda item prior to the start of its meeting held on April 22, 2015. Specifically, Requester complained that the meeting started late so that the Chair could discuss an item on the agenda.

Because the conversation at issue here was conducted by board members outside of and prior to the meeting, OIP considered whether it concerned board business. OIP has defined "board business," or interchangeably "official business," as "matters over which the board has supervision, control, jurisdiction, or advisory power that are currently before the board or that are reasonably anticipated to come before the board in the foreseeable future for discussion, deliberation, and action." OIP Op. Ltr. No. 05-15 at 1, n.1; *see also* OIP Op. Ltr. No. 04-01 at 7, n.7 (defining "official business" as "matter[s] over which . . . [a] board has supervision, control, jurisdiction, or advisory power. Such matters are those that are before a board or are reasonably expected to come before

a board”). OIP has previously noted that purely administrative matters would not be considered “board business.” OIP Op. Ltr. No. 05-02 at 4; *see also* OIP Op. Ltr. No. 04-01 at 10.

In this instance, based upon OIP’s review of an edited video provided by Requester and the Chair’s explanation, OIP found that the logistical arrangements for an award ceremony were not a matter that the board, as a board, would be considering or taking action on. Rather, the logistical arrangements were administrative details related to the substantive matter the board planned to consider, specifically, the proposed award of a Certificate of Appreciation to a deceased board member. OIP, therefore, concluded that the logistical arrangements were not board business, and there was no improper discussion, deliberation, or decision making of board business outside of a noticed meeting in violation of the Sunshine Law.

## **Sufficiency of Agenda**

### *Sunshine Memo 18-3*

Requester asked for an investigation into whether the County Council, County of Hawaii, violated the Sunshine Law because its agenda provided inadequate public notice of the Council’s consideration of Resolution 486-14, which directed the County Clerk to take necessary action to place a charter amendment proposed by Ordinance No. 14-98 on the general election ballot. Although the merits of the already adopted ordinance were not being considered, the Council’s approval of the resolution was needed to publish the full text of the proposed charter amendment prior to the election.

Prior agendas considering the ordinance itself had clearly described in its title that the proposed amendment concerned the term of the County Clerk’s appointment. The agenda being challenged, however, merely listed the resolution’s title, which contained only the ordinance number and offered no further clue about the subject

matter of the proposed Charter amendment to be included on the ballot. Consequently, OIP concluded that there was inadequate information on the agenda for a member of the public to determine what particular proposal was being considered for publication of its full text prior to being placed on the ballot.

## **Restriction on Oral Testimony**

### *Sunshine Memo 18-4*

Requester asked for an investigation into whether the Maui County Council violated the Sunshine Law at its special meeting on March 3, 2015 by not allowing him to present his oral testimony in full within the three-minute time limit set by the Council’s Rule 17. Not counting the Council’s earlier interruptions and recesses, OIP found that Requester’s testimony totaled less than the three minutes afforded under Rule 17 and that he had stopped testifying on his own accord. Despite the Council’s earlier objections to the relevancy of the testimony, OIP also concluded that the Council did not improperly restrict the content of Requester’s testimony as he was allowed to finish his testimony without further interruption. Ultimately, therefore, the Council did comply with the Sunshine Law’s mandate to afford Requester the opportunity to present oral testimony on any agenda item.

## **Public Testimony**

### *Sunshine Memo 18-5*

The Kauai County Council violated the Sunshine Law’s requirement that “all interested persons” be given “an opportunity to present public testimony” on any agenda item through a councilmember’s discussion of the agenda item prior to allowing public testimony, and through the same councilmember’s effort to prevent a member of the public from presenting testimony that he found objectionable. However, OIP’s review of the transcript of the meeting indicated

that no member of the public was ultimately prevented from presenting the oral testimony he or she wished to present, so OIP found that the violations did not significantly impair the public's ability to influence the Council's discussion of the agenda item.

## Oral Testimony for Reconsideration Hearing

### *Sunshine Memo 18-6*

Requester asked whether the Liquor Commission, City and County of Honolulu (LIQC-HON) violated the Sunshine Law at its meeting on October 16, 2014, by not taking testimony about the item listed on its agenda as "Request for Reconsideration of Commission's decision to approve application."

Section 92-6, HRS, exempts from the Sunshine Law the State judicial branch and quasi-judicial boards, including the "adjudicatory functions exercised by a board and governed by sections 91-8 and 91-9, or authorized by other sections of the [HRS]." HRS § 92-6(a). As explained in OIP Opinion Letter Number F18-01, the exemption is primarily intended to cover contested cases subject to sections 91-8 and 91-9, HRS, but its language allows for the possibility of a similar adjudicatory function for which the process is set out elsewhere in HRS.

Part IV of chapter 281, HRS, sets forth the "Procedure for Obtaining [Liquor] License" and requires LIQC-HON to conduct a public hearing before granting a license. HRS § 281-52 (2007). As the Hawaii Supreme Court opined in *E & J Lounge Operating Co. v. Liquor Comm'n of City & Cty. Of Honolulu*, 118 Haw. 320, 189 P. 3d 432 (2008), public hearings on liquor license applications held by LIQC-HON are contested case hearings subject to the requirements of HRS chapter 91. 118 Haw. at 340.

Similarly, the Hawaii Supreme Court previously considered whether a planning commission's

consideration of a motion for reconsideration was an adjudicatory function that was exempt from the Sunshine Law requirements. *Chang v. Planning Commission*, 64 Haw. 431 (1982). In *Chang*, the Court held, "the commission's closed deliberations on Makena Surf's permit application and on appellant's subsequent motion and petition were permissible under HRS § 92-6(a)(2) despite the open meeting mandate of HRS § 92-3." *Id.* at 443.

In light of the Court's decisions regarding LIQC-HON's public hearings on liquor license applications and a planning commission's consideration of a motion for reconsideration of an application, OIP opined that LIQC-HON's consideration of the reconsideration request was within the scope of its adjudicatory functions. Consequently, the Sunshine Law's open meeting requirements, including its public testimony requirement, did not apply when it was considered by LIQC-HON. HRS § 92-6(a)(2).

OIP is authorized to determine the adequacy of the notice provided for a meeting with respect to matters falling within the Sunshine Law. The law requires a board to file written public notice of any meeting at least six calendar days before the meeting, and the notice must include an agenda that "lists all of the items to be considered" at that meeting. HRS § 92-7(a), (b) (Supp. 2017). The clear purpose of the Sunshine Law's notice provisions is to give the public the opportunity to exercise its right to know and to participate in the formation and conduct of public policy. *See* HRS §§ 92-1, -3 (2012).

In this case, the agenda items listed with reasonable specificity the matters that would be considered at the meeting. Consequently, OIP concluded that there was no Sunshine Law violation as to the adequacy of the notice provided for the topics subject to the Sunshine Law and listed in LIQC-HON's agenda.

However, given that LIQC-HON planned to consider items falling within its adjudicatory function as well as items whose consideration was subject to the Sunshine Law, the agenda

contained a confusing mix of matters, with no indication as to which were meeting matters governed by the Sunshine Law and which were adjudicatory matters governed by the statutory license procedure, chapter 91, HRS, or other laws governing LIQC-HON's adjudicatory functions. OIP found this format to be confusing to the public, as people are unable to readily ascertain which items listed were subject to the Sunshine Law's testimony requirements versus adjudicatory matters subject to different testimony requirements.

While it is not a violation of the Sunshine Law for LIQC-HON to include both regular meeting and adjudicatory hearing matters on the same agenda, OIP believes that the effectiveness of the notice is substantially compromised when a mix of regular and adjudicatory matters are listed without identifying which items are subject to the Sunshine Law and which items are adjudicatory matters subject to chapter 281, HRS. OIP thus recommended that the LICQ-HON prepare its agenda with separate headings that clearly indicate whether matters are subject to the Sunshine Law or are adjudicatory matters, or it can prepare two separate agendas for Sunshine Law matters and for adjudicatory matters.



## 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 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:

#### Response to Subsequent Requests after Abandonment

A planning department deemed a record request to be abandoned because it had not received a response or a prepayment of fees within 20 days after it sent to the requester a notice providing an estimate of the record request processing fees. The department did not intend to process this or any other record requests from the same requester until the requester paid the full amount for this request and it urged OIP to advise other agencies to similarly decline to process record requests from this requester.

OIP informed the department that it was correct that it would not be required to further process the pending record request because of the apparent abandonment. HAR § 2-71-16(b). However, neither the UIPA nor OIP's rules allow an agency to withhold processing of record requests solely because the person previously abandoned a record request. In other words, under the UIPA,

an agency must still respond to any record request submitted by a person even if the person had previously abandoned a prior request. A Notice to Requester must be timely sent for a subsequent record request, and the agency may assess the requester any outstanding fees from a previous record request if the agency had actually performed the services. HAR § 2-71-19(b) (allowing an agency to require prepayment of the outstanding fees from previous requests, including abandoned requests where the requester had previously prepaid or otherwise accepted the agency's fee estimate).



#### Fees and Copy Charges for Audio Recordings

An agency asked how it could charge for providing copies of audio recordings in response to a record request. OIP advised that time spent for searching for, reviewing (such as listening to see what might need to be redacted), and redacting (such as taping no sound over a segment to be redacted) the responsive records could be charged according to the usual fee schedule set by OIP's rules. There is no fixed copy fee for audio recordings, so OIP recommended passing on the agency's actual cost, such as the cost of a blank audio tape or CD used to make a copy.

OIP also advised that since some agencies do not have the capacity to make a copy of a tape recording, an agency that needed to have a commercial provider make the copy could pass on the cost of doing so. Finally, OIP advised that when an agency is sending an emailed copy of a recording that was already in digital form, such as an MP3 file, there likely would be no copy cost for the agency to pass on.

## **Disclosing Text Messages on a Government-Issued Cell Phone**

An agency asked for the limitations and parameters regarding the disclosure of text messages on government-issued cell phones. Cell phone numbers would typically be redacted from a government record prior to public disclosure, based on the UIPA's frustration exception. HRS § 92F-13(3). To the extent that text messages included personal information, then the UIPA's privacy exception in section 92F-13(1), HRS, may be applicable. Section 92F-14(b), HRS, contains examples of information in which an individual has a significant privacy interest.

## **Disability Parking Permit Applications**

An agency asked whether applications for disability parking permits are public. OIP advised that section 92F-12(a)(13), HRS, requires that a roster of permit holders be made public upon request, which includes name, type of permit, and status of the permit. This information as it appears on the permit application is public. If a person other than the permit holder requests a copy of the permit application, the following information should be redacted: personal contact information such as personal email and home addresses and telephone numbers; birth dates; personal characteristics such as height, weight, and gender; and the entire side two of a Certification by Licensed Practicing Physician/APRN. In addition, information about vehicles can be withheld from public disclosure in certain circumstances.

## **Record Retention and Destruction Periods Not Within OIP's Jurisdiction**

A member of the public inquired as to whether OIP could intervene and halt government policies related to the retention and destruction periods of government records. OIP explained that its

jurisdiction is limited to issues concerning access to records and open meetings. As record retention periods are not related to these issues, and are thus outside of OIP's jurisdiction, OIP was unable to intervene in the matter. OIP, however, did suggest that the county's Retention and Disposition Schedule be reviewed to determine whether the complained of policy was addressed in the county's Retention and Disposition Schedule.

## **Sunshine Law Guidance:**

### **Sufficiency of Agenda When Reports are Presented to a Board**

An employee who provides administrative support to a State board asked whether certain agenda items on a meeting notice provided legally sufficient descriptions of what the board intended to discuss under the Sunshine Law. One agenda item referred to reports to be presented to the board.

OIP advised that when a board hears a report from a third party, such as an expert presenting information on a subject of general background interest to the board, the board may or may not anticipate the need to take up and consider the issues being reported on. If a board does want to be able to discuss the matters reported, it should ask the presenter to provide in advance the specific subjects that will be reported so as to include their description in the agenda. How an agenda item is framed will determine the extent of the testimony, discussion, and deliberation of that item. A broadly framed description of the issue that is the subject of a report could allow the board to discuss the issue broadly, but would also require the board to allow testimony on an equally broad range of aspects of the issue.

## Public Must Be Permitted to Physically Join Board During Audioconferenced Meetings

A board inquired as to whether it needed to have a physical location for a meeting using interactive conference technology when anyone from the board or public has equal access to the call-in number for a conference call or a link to a webinar.

OIP explained that the Sunshine Law requires that the board's notice identify "all of the locations where participating board members will be **physically** present and indicates that members of the public may **join** board members at any of the identified locations." HRS § 92-3.5(a) (emphasis added). OIP has interpreted "join" to mean to **physically** join the board member at the identified location. Thus, the requirements of section 92-3.5(a), HRS, would not be met if the board provided a webinar link or conference call line in lieu of allowing members of the public to physically join the board at a physical location.

## Adequacy of Agenda Item for Canceled Meeting

A member of the public complained to a board that an item on its agenda for a meeting that had been canceled was not adequate and thus the original agenda violated the Sunshine Law. The board sought OIP's advice as to whether the agenda item violated the Sunshine Law.

OIP advised that in this instance, the agenda item likely would not have been adequate to notify the public of what the board intended to consider. An agenda item is supposed to be sufficiently detailed to notify interested members of the public of items that a board will be considering so that they may decide whether they want to attend and testify. As such, an agenda should be comprehensible to the average person in the board's constituency, not just the board's own members and staff or those members of the public who closely follow the board. However, because the meeting was canceled and the board thus never discussed the agenda item at issue, OIP advised

that there could be no violation of the Sunshine Law. Even if the agenda item was clearly inadequate, there was no discussion of any sort due to the meeting's cancellation, so there would be no basis for finding that the board discussed an issue that it had not properly notified the public it would be considering.

## Adequacy of Agenda Item for Ex-Officio Reports

Because a board does not know beforehand whether ex-officio members will attend meetings and whether they will be providing a report, it inquired whether an agenda item for "Ex-Officio Reports" was sufficiently descriptive.

OIP advised that even if an ex-officio member is considered to be equivalent to a member of staff rather than a voting member, it is still a good practice to have the agenda specifically identify the subject matter of any report to the board, so that the board can ask questions, engage in discussion and possibly take action on the report. It would also enable the public to make a decision as to whether they would like to attend the meeting because of the agenda item and to present testimony on the agenda item. The board should advise ex-officio members that if they wish to provide a report, they should contact the board's staff well in advance and provide information on the subject matters of the report so that it can be timely placed on the agenda.

## Discussion Between Board Member and Testifier

A county office asked whether, under the Sunshine Law, board members can have a dialogue with a person who is presenting oral testimony during a meeting. Under the Sunshine Law, section 92-3, HRS, all interested persons must be given an opportunity to present oral testimony on any agenda item. The Sunshine Law neither requires nor prohibits board members from asking questions or making comments to persons who are testifying, so long as the questions or comments do not interfere with the persons' right to testify.



# 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 2018, OIP had a total of 80 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 OIP conducted 6 in-person training sessions in FY 2018. OIP has also created accredited 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 six training sessions in FY 2018 on the UIPA and Sunshine Law for the following agencies and groups:

- 9/6/17 City & County of Honolulu  
and State Agencies  
(Informational briefing on OIP's  
draft administrative rules)
  
- 9/8/17 Hawaii County  
and State Agencies  
(Informational briefing on OIP's  
draft administrative rules)
  
- 9/12/17 Kauai County  
and State Agencies  
(Informational briefing on OIP's  
draft administrative rules)
  
- 9/15/17 Maui County  
and State Agencies  
(Informational briefing on OIP's  
draft administrative rules)
  
- 9/19/17 Department of Commerce  
and Consumer Affairs -  
Professional and  
Vocational Licensing  
(Sunshine Law)
  
- 12/12/17 City & County of Honolulu -  
Medical Examiner  
(UIPA)



## 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 2018, OIP released its **Report of the Master UIPA Record Request Year-End Log for FY 2017**, which is summarized later in the Open Data section, beginning on page 52. 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 56.

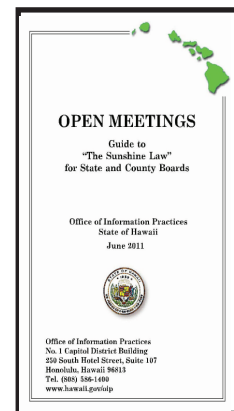


## Sunshine Law Guides and Video

*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 long 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."**

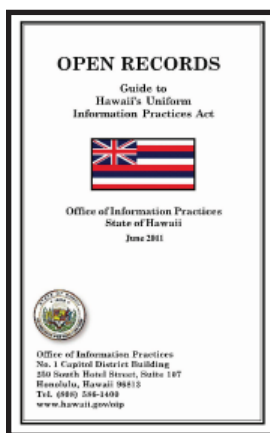
Members of the public may use the **"Request for Assistance to the Office of Information Practices"** form when their requests for government records have been denied by an agency, or to request other assistance from OIP.

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

### *Abbreviations used throughout this section:*

Log - UIPA Record Request Log

Master Log - Master UIPA Record Request

Log, posted semiannually and annually at [data.hawaii.gov](http://data.hawaii.gov)

Sunshine Law Guide - Open Meetings: Guide to the Sunshine Law for State and County Boards

UIPA Guide - Open Records: Guide to Hawaii's Uniform Information Practices Act

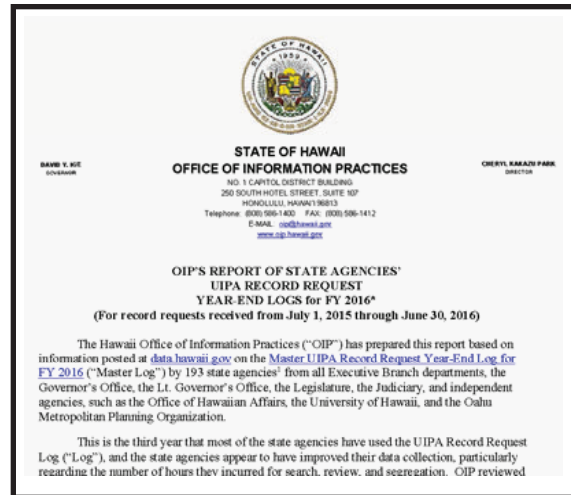
To further its educational and open data objectives, and to evaluate how the UIPA is working in Hawaii, OIP has been collecting information from state and county agencies through the UIPA Record Request Log. The Log is an Excel spreadsheet created by OIP, which helps agencies track the formal UIPA record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

In FY 2018, OIP released its year-end reports based on information posted by 192 state and 74 county agencies on the Master UIPA Record Request Year-End Log for FY 2017 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.

The Log reports for FY 2018 will be available in December 2018 and posted on the Reports page at [oip.hawaii.gov](http://oip.hawaii.gov).

### State Agencies' UIPA Record Request Log Results

The 192 State agencies that reported Log results in FY 2017 came from all state executive branch departments, the Governor's office, the Lt. Governor's office, the Legislature, the Judiciary, and independent agencies, such as the OHA, UH, and



the Oahu Metropolitan Planning Organization. Overall, formal UIPA record requests constituted 1% of the estimated 199,366 total formal and routine record requests that state agencies received in FY 2017. Excluding one agency whose results would have skewed the entire report, 191 agencies reported receiving 2,281 formal written requests requiring a response under the UIPA, of which all but 43 were completed in FY 2017. Of the 2,238 completed cases, 78% were granted in full or in part, and 6% were denied in full. In 16% 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 less than seven work days, on average, to complete 2,238 typical and personal record requests, which is 90% of all completed cases. In contrast, it took more than five times as many days to complete 220 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 2.73, as compared to 0.36 hours for a personal record request and 6.28 hours for a complex record request. Although the 230 total complex record requests constituted only 10% of all requests, they accounted for 17.8% (\$7,999) of the total gross fees and costs incurred by agencies (\$164,147) and 18.4% (\$7,999) of the total amount recovered from all requesters (\$43,298).

State agencies recovered \$43,298 in total fees and costs from 243 requesters, which is 26% of the \$164,147 incurred by agencies in gross fees and costs. Sixty-seven percent of completed requests were granted \$30 fee waivers, while another 1% were granted \$60 public interest waivers. No fee waivers were reported in 32% of the cases, which may occur in personal record cases (because no fees may be charged for those) or when requests are denied, abandoned, or withdrawn, or the agency is unable to respond.

Eighty-nine percent (1,995) of all requesters in completed cases paid nothing in fees or costs for their record requests. Of the 243 requesters that paid any fees or costs, 20% paid less than \$5.00 and 63% paid between \$5.00 and \$49.99. Moreover, of the 243 requesters that paid any amount for fees and or costs, at least 35 requesters were reported by the agencies as representing law firms, media, or commercial or non-profit entities. Only five commercial entities comprising 2% of paying requesters paid 80% of the total fees and costs recovered by State agencies from all requesters in FY 2017. For a more detailed breakdown of the fees and costs paid by requesters, *see* **Figure 16** on page 54.

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 2017 was the third year that the counties participated in the Master Log. OIP prepared a separate report based on information posted by 74 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 1% of the estimated 139,770 total formal and routine record requests that agencies received in FY 2017. Seventy-four county agencies reported receiving 1,580 formal written requests requiring a response under the UIPA, of which 1,517 (96%) were completed in FY 2017. Of the 1,517 completed cases, 81% were granted in full

or in part, and 5% 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 eight work days, on average, to complete 1,310 typical requests, and about 11 days to complete 122 personal record requests. It took approximately 26 work days to complete 85 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 0.57, as compared to 1.73 hours for a personal record request and 10.33 hours for a complex record request. Although the 103 total complex record requests constituted only 6.5% of all requests, they accounted for 40% (\$17,878) of the total gross fees and costs incurred by county agencies (\$44,400) and 26% (\$5,355) of the total amount recovered from all requesters (\$20,566).

County agencies recovered \$20,566 in total fees and costs from 728 requesters, which is 46% of the \$44,400 incurred by agencies in total gross fees and costs. Sixty-one percent of completed requests were granted \$30 fee waivers, while another 1% were granted \$60 public interest waivers. No fee waivers were reported in 38% 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.

Fifty-two percent (789) of all requesters in completed cases paid nothing in fees or costs for their county record requests. Of the 728 requesters that paid any fees or costs, 63% paid less than \$5.00 and 27.6% paid between \$5.00 and \$49.99. Only 69 requesters (9.5% of all paying requesters) paid \$50 or more per request, of whom at least 56 were reported by the counties as representing law firms, media, or commercial or non-profit entities. For a more detailed breakdown of the fees and costs paid by requesters, *see* **Figure 17** on page 55.

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

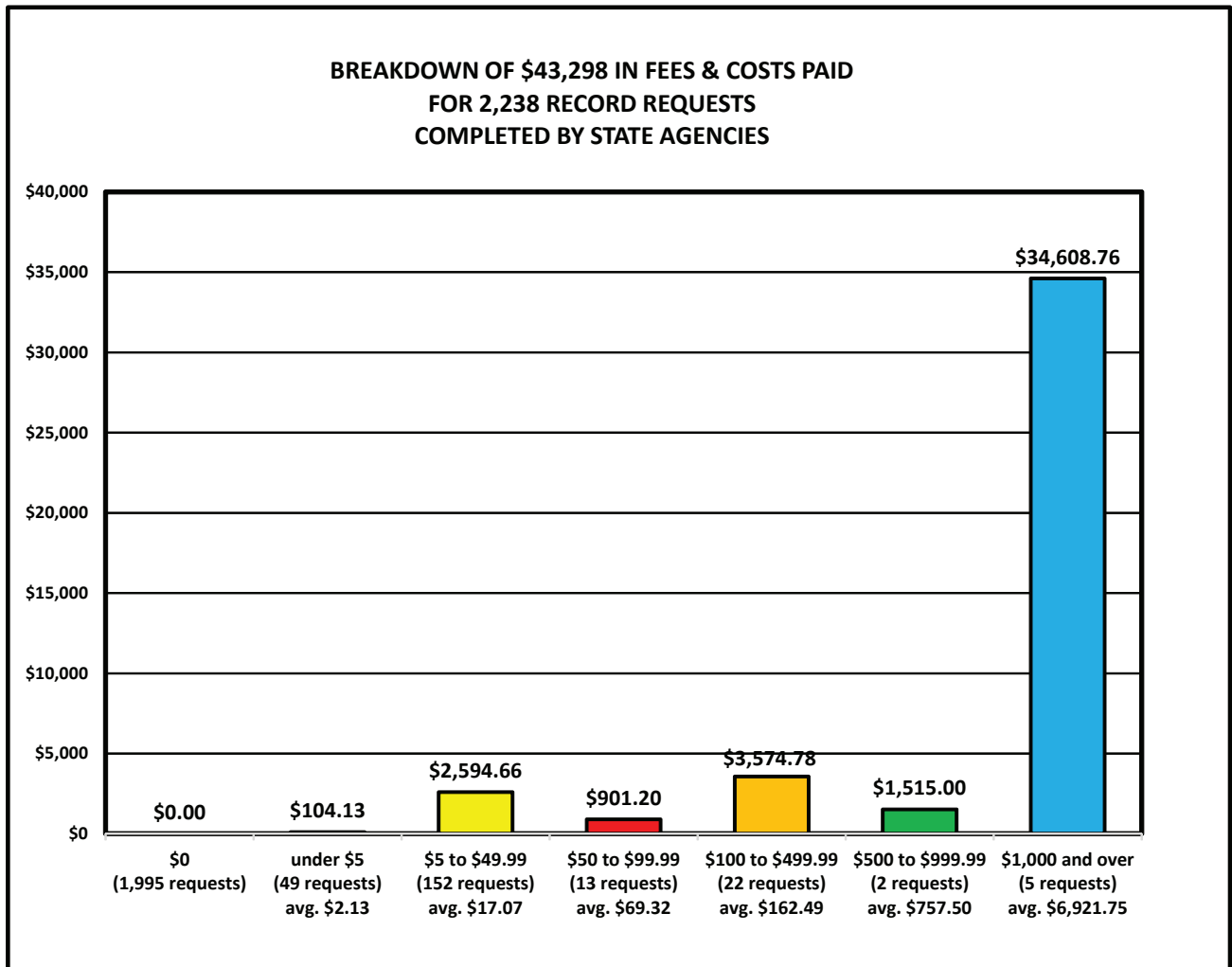


Figure 16

**STATE AGENCIES'  
UIPA RECORD REQUEST LOG  
RESULTS FOR FY 2017**

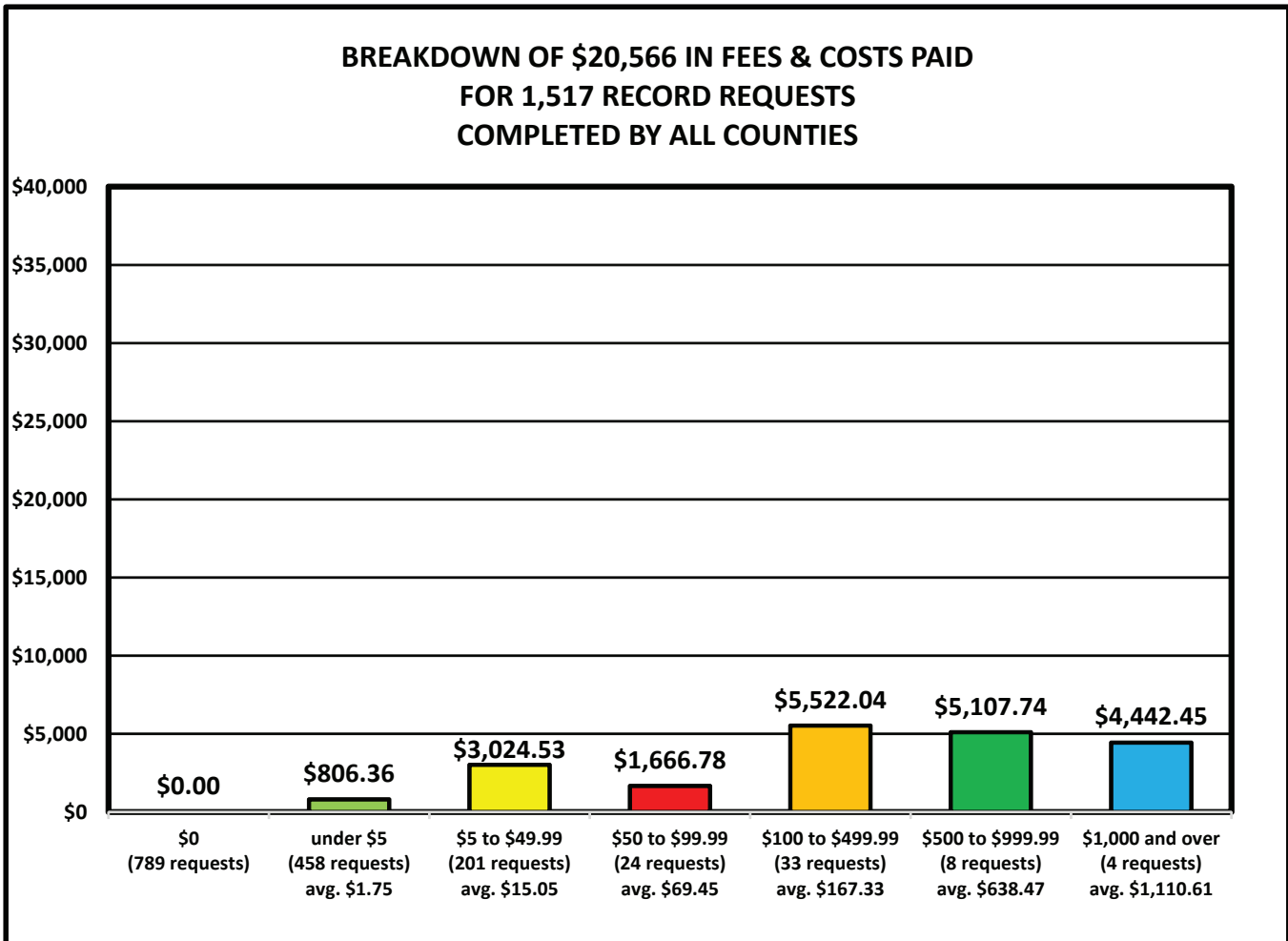


Figure 17

**COUNTY AGENCIES'  
UIPA RECORD REQUEST LOG  
RESULTS FOR FY 2017**

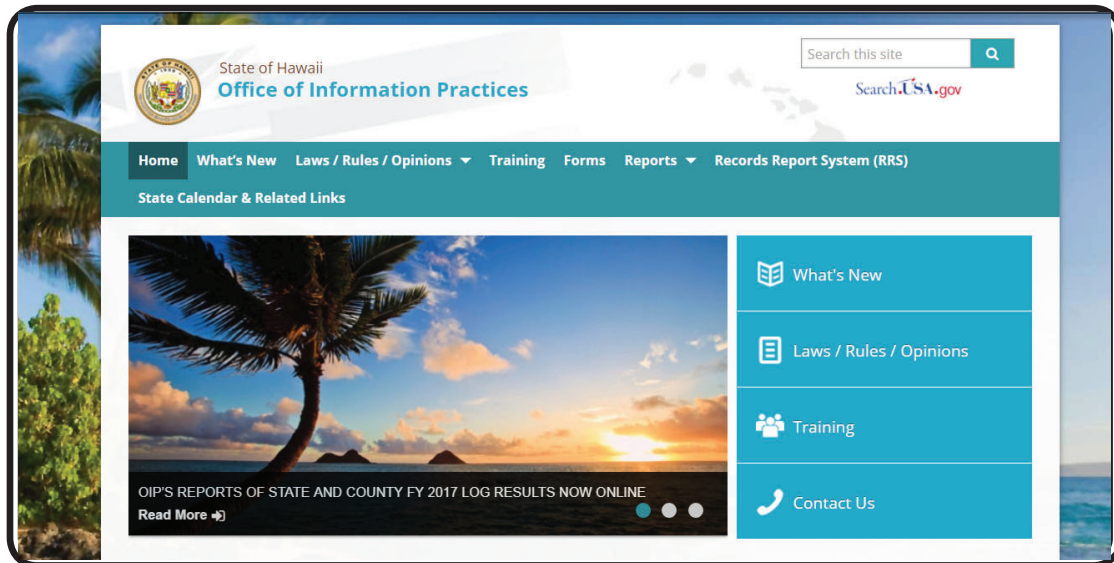


## Communications

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 2018, OIP continued its communications to the agencies and public, mainly through 23 *What's New* articles and 3 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's seal or through links in boxes located on the right of the home page (*What's New*, *Laws/Rules/Opinions*, *Training*, and *Contact Us*).

### ***“What's New”***

OIP's frequent *What's New* articles provide current news and important information regarding OIP and open government issues, including timely updates on relevant legislation. To be added to or removed from OIP's *What's New* email list, please email a request to [oip@hawaii.gov](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 2018 year end, state and county agencies reported 29,873 record titles. See **Figure 18**.



## **Records Report System**

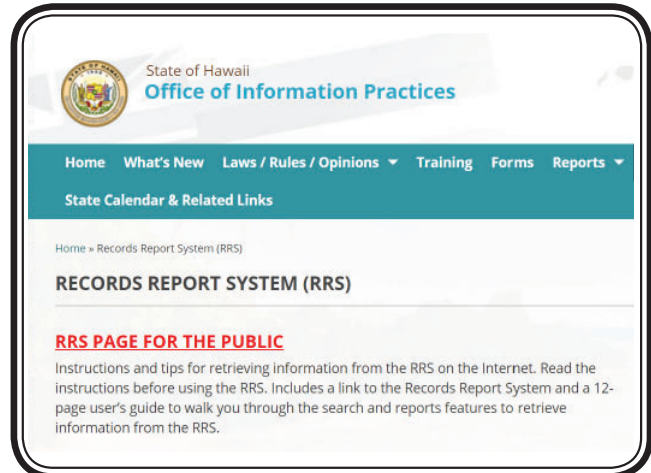
### **Status of Records Reported by Agencies: 2018 Update**

<b>Jurisdiction</b>	<b>Number of Record Titles</b>
State Executive Agencies	20,825
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>29,873</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.

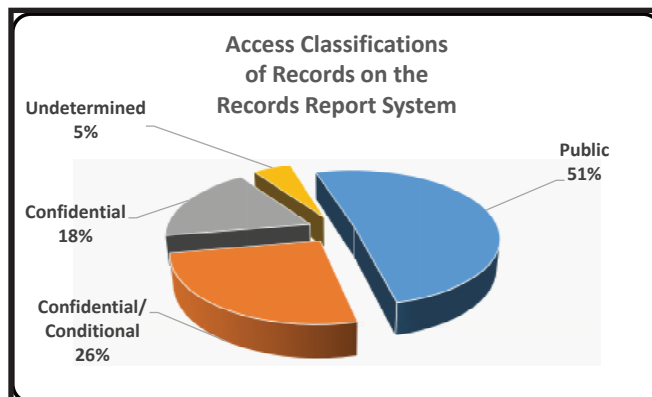


Figure 19

# 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 application; to amend provisions that work counter to the legislative mandate of open government; or to provide for more efficient government as balanced against government openness and privacy concerns.



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

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

testimony. During the 2018 legislative session, OIP reviewed and monitored 93 bills and resolutions affecting government information practices, and testified on 45 of these measures. OIP was most significantly impacted by the following legislation:

► **Act 63**, signed on June 28, 2018, enacted **S.B. 2691, S.D. 1, H.D.1, C.D. 1**, which allows boards to use electronic mail to provide a copy of a notice of public meeting to the email address that may be specified by the Lt. Governor's Office or the appropriate county clerk's office. The bill took effect on July 1, 2018.

Additionally, as previously reported in OIP's FY 2017 Annual Report, substantial changes were made to the Sunshine Law by Act 64, signed on June 29, 2017, which went into effect on July 1, 2018. During FY 2018, OIP revised or created many training materials and made several live presentations to prepare agencies for these Sunshine Law changes.



# Litigation Report

## *Abbreviations used throughout this section:*

AG - Attorney General's Office  
DPP - Deliberative process privilege  
FOIA - Freedom of Information Act (federal),  
5 U.S.C. § 522  
HAR - Hawaii Administrative Rules  
HRS - Hawaii Revised Statutes  
ICA - Intermediate Court of Appeals  
MSJ - Motion for Summary Judgment  
OE - Office of Elections

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 2018, OIP monitored 38 litigation cases, of which 7 were new.

Summaries are provided below of the new lawsuits monitored by OIP in FY 2018 as well as updates of cases that OIP continues to monitor. 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 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 First Circuit Court on February 23, 2016, based on Plaintiff's failure to file a pretrial statement. On April 11, 2016, the Court issued an order granting Plaintiff's motion to set aside the dismissal. However, the Court subsequently issued an Order of Dismissal Without Prejudice for want of prosecution on June 28, 2018, on the basis that the last case activity was on April 27, 2016. As twelve calendar days have now elapsed since issuance of the second order of dismissal, the claims cannot be reinstated. Consequently, OIP will cease coverage of this lawsuit.

## Deliberative Process Privilege

*Peer News LLC*

*v. City and County of Honolulu*

*Civ. No. 15-1-0891-05 (1st Cir. Ct.)*

*CAAP-16-0000114 (ICA)*

*SCAP-16-0000114 (Hawaii Supreme Court)*

Civil Beat (Plaintiff) requested from the City and County of Honolulu's Department of Budget and Fiscal Services (Defendant) "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." Defendant 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 2017 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(3), 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 precedential opinions discussing the DPP are palpably erroneous and to enjoin Defendant from invoking the privilege. The suit also sought to have Defendant disclose all requested documents after redaction of specific salaries. Defendant, 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 Defendant's two motions for partial summary judgment and denied Plaintiff's motion for summary judgment. Plaintiff appealed to the ICA, arguing that the Circuit Court erred (1) in recognizing a DPP privilege; (2) in applying the DPP to allow Defendant 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 Defendant to withhold even after Defendant 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) the

DPP protects the public interest; and (3) 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 and heard oral arguments on June 1, 2017.

On December 21, 2018, the Hawaii Supreme Court overruled OIP's long-standing recognition of the DPP on the basis that the DPP attempts to uniformly shield records from disclosure without an individualized determination that disclosure would frustrate a legitimate government function. As a result, OIP will no longer recognize the DPP under the UIPA's frustration exception to disclosure.

## 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 (Defendant) under the federal Freedom of Information Act, 5 U.S.C. § 522 (FOIA), which is the federal counterpart to Hawaii's open records law. Plaintiff's request was for a "show cause" letter and related inspection report regarding the use of biotoxins by a laboratory of UH. Defendant 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

Defendant's redactions were mostly proper, but ordered re-redaction of the last page. Plaintiff appealed the decision to the Ninth Circuit.

During proceedings at the Ninth Circuit, Defendant made a second, even less redacted disclosure. The parties thereafter filed respective pleadings regarding partial mootness, most recently on March 30, 2018, and that issue remains pending before the court.

Although this case does not involve a UIPA issue, but instead concerns a denial of access under FOIA to records held by a federal agency, OIP has been following it because copies of the same records are also maintained by a State agency. After the State agency denied access, an OIP appeal was opened, which has since been dismissed based on abandonment by the Requester.

## Production of Moped Vehicle Registration

*Inge v. Tuifua*  
S.P. No. 17-1-0338 (1st Cir. Ct.)

Rufus Inge (Plaintiff), while operating a moped owned by a third-party, was allegedly struck by another motorist. Plaintiff made a record request to the Department of Motor Vehicles, City and County of Honolulu (Defendant) for a copy of the moped registration. Defendant refused to disclose a copy of the moped registration to Plaintiff because Plaintiff was not the owner of the moped. Plaintiff filed in the Circuit Court motions to compel Defendant and the Division of Motor Vehicles, Licensing and Permits, Department of Customer Services, City and County of Honolulu, to produce a copy of the moped registration. After the City and County of Honolulu provided Plaintiff with a copy of the requested moped registration, Plaintiff filed a Notice of Withdrawal of Motion to Compel. Since Plaintiff filed a Notice of Withdrawal, OIP will not be covering this case in future reports.

## Access to Employment Records

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

Katherine Kealoha (Plaintiff) filed a complaint in the First Circuit Court (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 the online news organization 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.

On July 17, 2017, the Court filed an Order Denying Plaintiff's Motion for Preliminary and Permanent Injunctive Relief. Subject to additional redactions by the Court, immediate disclosure of the requested records to Civil Beat was ordered. There were no further filings with the Court by either party. Since there are no outstanding UIPA issues, OIP will not be covering this case in future reports.

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

*Civil Beat v. Department of the Attorney General*  
*Civ. No. 16-1-1743-09 KKH (1st Cir. Ct.)*  
*CAAP-17-0000480 (ICA)*

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, DPP (falling under the frustration exception), and the attorney-client privilege (falling under several exceptions).

Plaintiff then filed a lawsuit in the First Circuit Court. The AG filed an 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 the AG, 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. A Notice of Appeal was filed by Plaintiff on July 13, 2017. The appeal remains pending before the ICA.

## Request for Correction of Death Certificate

*Liu v. Department of the Medical Examiner, City & County of Honolulu*  
*Civ. No. 25-2-0213-02 (1st Cir. Ct.)*  
*CAAP-15-0000633 (ICA)*

The Department of the Medical Examiner (Defendant) 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 Defendant's denial of her correction request to the First Circuit Court under section 92F-27, HRS. The Circuit Court entered final judgment against Plaintiff on July 21, 2015, and Plaintiff filed a Notice of Appeal on September 1, 2015. On February 26, 2018, the ICA issued a Summary Disposition Order affirming the Circuit Court's judgment.



## Registration Requirement for Farmers Growing Genetically Modified Crops

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

As first reported in OIP's FY 2015 Annual Report, a Hawaii County farmer (Plaintiff) filed suit in the Third Circuit Court against the County of Hawaii (Defendant) 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 Defendant in July 2014. Based on a decision by the United States Court of Appeals for the Ninth Circuit affirming the lower court's decision in a related case, all parties agreed that Defendant would destroy all registrations and other information it had collected based on the contested law and filed a stipulated dismissal of all claims on September 14, 2017. On October 3, 2017, Defendant certified that it had destroyed the registrations and other information as required. Thus, OIP will not be covering this case in future reports.

## 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 (Defendant) 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 DPP. Plaintiff appealed the denial directly to the

Circuit Court. Plaintiff then moved for summary judgment, and Defendant moved to dismiss. At some point prior to the hearing on the motions, Defendant produced the requested records to Plaintiff. The court denied both motions on the grounds of mootness, finding that Plaintiff had prevailed due to Defendant's production of the records at issue so the only remaining issue was attorney's fees, expenses, and costs. On February 21, 2018, all parties stipulated to the dismissal of all claims with prejudice. Thus, OIP will not be covering this case in future reports.

## UIPA Appeal Based On Nonresponse to Questions

*Kim v. Suzuki*  
Civ. No. 18-1-0878-06 (1st Cir. Ct.)

A registered voter (Plaintiff) filed suit against the Attorney General (AG), the Office of Elections (OE), and U.S. Representative Colleen Hanabusa (Hanabusa) in the First Circuit Court to challenge Hanabusa's eligibility as a gubernatorial candidate on the basis that she was required to resign her federal office to run for Governor. The complaint also included a claim that the OE violated the UIPA by not responding to his request for answers to a list of questions. The OE and the AG moved to dismiss the complaint, and Hanabusa joined the motion, while Plaintiff filed a cross motion for summary judgment and moved to stay the August primary election. In addition to various arguments relevant to the candidate eligibility claim, the OE argued that Plaintiff's request for answers to his questions was not a request for existing government records, OE did not maintain any responsive records, and the UIPA did not require it to create records in response to Plaintiff's request. The Court denied Plaintiff's motion to stay the primary election in a minute order entered August 6, 2018. The court granted the AG's and OE's motion to dismiss, and denied Plaintiff's motion for summary judgment, on October 26, 2018. Thus, OIP will not be covering this case in future reports.

## Personal Records about Honolulu Ethics Commission Investigation

*Doe and Roe v. The Ethics Commission of the City and County of Honolulu*  
Civ. No. 15-1-1749 VLC (1st Cir. Ct.),  
CAAP-15-0940 (ICA)

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 its investigator from participating in further investigation and prosecution of Plaintiffs. Defendant filed a motion to dismiss Plaintiffs' lawsuit and to prevent discovery.

In December 2015, the Circuit Court granted in part Defendant's motion to dismiss Plaintiffs' request for the production of records and the disqualification of 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 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 (1st Cir. Ct)  
ICC 17-1-001433 (Hawaii Supreme Court)

Peer News LLC, dba Civil Beat (Plaintiff) asked the Honolulu Police Department (Defendant) to provide information regarding 12 police officers who received 20-day suspensions due to employment misconduct from 2003 to 2012, according to Defendant'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. Defendant denied Plaintiff's records request, asserting that the UIPA's "clearly unwarranted invasion of personal privacy" exception protected the suspended police officers' identities.

Plaintiff then filed a lawsuit in the First Circuit Court alleging that Defendant and the City (collectively Defendants) failed to disclose the requested records about the 12 suspended police officers as required by the UIPA and in accordance with a 1997 OIP opinion. In March 2014, the court granted Plaintiff's Motion for Summary Judgment and ordered Defendants to disclose the requested records about the suspended police officers. 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 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. 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 Arbitration Decision Reinstating a Terminated Police Officer**

*State of Hawaii Org of Police Officers v. City & County of Honolulu*  
Civ. No. 18-1-0823 (1st Cir. Ct.)

In May 2018, the State of Hawaii Organization of Police Officers (Plaintiff) filed in the First Circuit Court a complaint for a declaratory judgment and injunctive relief to stop the City and County of Honolulu (Defendant) from disclosing to online news organization Civil Beat a requested arbitration decision reinstating a police officer who had been terminated for misconduct. Civil Beat intervened and the Circuit Court granted in part and denied in part Civil Beat's motion for dismissal in August 2018. The Court dismissed Plaintiff's complaint that was based upon a violation of the UIPA and held that Plaintiff has no private cause of action for disclosure of government records under the UIPA. The Court agreed with Civil Beat that, with some exceptions, the UIPA requires public disclosure of government records and therefore, the UIPA only recognizes a private right of action for persons denied access to government records and not for persons seeking confidentiality. The Court did not dismiss Plaintiff's constitutional privacy claim and ordered Defendant to provide the arbitration decision to the Court for its *in camera* inspection. Thus, the case remains pending in the Circuit Court.

### **Names of Police Officers**

*State of Hawaii Org of Police Officers v. City & County of Honolulu*  
Civ. No. 17-1-1433 (1st Cir. Ct.)

In August 2017, the State of Hawaii Organization of Police Officers (Plaintiff) filed in the First Circuit Court a complaint and motion for a temporary restraining order to stop the City and County of Honolulu (Defendant) from disclosing to Civil Beat the requested identities of current and former police officers who are or were working in an undercover capacity. In October 2017, the Circuit Court granted the temporary restraining order with regard to information identifying the officers, but denied the motion with regard to requested information that did not identify the officers as government employees, specifically information limited to unnamed officers' position numbers, ranks, and salary ranges. In December 2017, Civil Beat intervened in the lawsuit. In October 2018, the Circuit Court denied Plaintiff's motion for a permanent injunction, finding that Civil Beat's request was for names of current officers only and that Defendant had agreed that it will not release the identity of any officer who was currently performing undercover work. The Court concluded that Plaintiff did not meet its burden of proof to show irreparable harm or that the disclosure of the roster of officers would constitute a clearly unwarranted invasion of personal privacy.

## Academic Grievance Records at University of Hawaii

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

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

Plaintiff then asked OIP for assistance and asked that his request be treated as an appeal. Defendant informed OIP that Plaintiff had not fully complied with its procedures for filing grievances and thus it had no records relating to Plaintiff's alleged grievances other than what was previously provided to Plaintiff. OIP informed Plaintiff that it was not accepting his appeal because it did not appear to be a denial of access to records as the records did not exist.

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

## Department of Health Inspection Records Required to be Posted on Website

*Kokua Council for Senior Citizens*  
*v. Department of Health*  
Civ. No. 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 formally dismissed the matter.

Thereafter, Plaintiff initiated its lawsuit in the First Circuit Court on July 25, 2016, asking the Court to "[i]ssue an order compelling [Defendant] to disclose all inspection reports maintained by [Defendant] that it has not made available for public inspection." On April 5, 2017, the Court dismissed Plaintiff's request to require Defendant "to post inspection reports on the website of [Defendant] within five business days after the inspection" for lack of subject matter jurisdiction. By stipulation, both parties agreed to the dismissal of Plaintiff's allegations related to the UIPA on September 11, 2017. As to Plaintiff's remaining allegations, the Court found in favor of Defendant and two separate orders were filed on July 12 and September 15, 2017. Judgment in favor of Defendant was entered on November 9, 2017. Thereafter, Plaintiff submitted its Notice of Appeal on November 24, 2017, and as a result, this case is still pending as to the non-UIPA issues. As there are no further UIPA issues pending, OIP will not be covering this litigation in future annual reports.

## Maui Community Correctional Center Records

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

Stanley Kong (Plaintiff) requested that the Maui Community Correctional Center (Defendant) provide him a copy of the contract agreement and stipulations signed by him upon entering Defendant's Maui Drug Court Program. He also requested a copy of the approval form that granted him inmate to inmate correspondence and visits at Defendant's facility. Defendant failed to respond to his record requests. 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 Circuit Court's January 4, 2013 order.

## Department of Public Safety Records

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

Stanley Kong (Plaintiff) requested that the Department of Public Safety (Defendant) provide him a copy of various records. After Defendant failed to respond to his record request, Plaintiff initiated his *pro se* lawsuit on December 27, 2012. On November 25, 2014, he filed his Notice of Appeal with the ICA, even though the Circuit Court had not issued a final judgment. On June 1, 2015, the ICA dismissed Plaintiff's case for lack of appellate jurisdiction. There has been no change since the ICA's June 1, 2015 dismissal. The case remains pending in the First Circuit Court.

## Hawaii Paroling Authority Records: Presentence Investigation Report and Minimum Decision Record

*Marks v. Hawaii Paroling Authority*  
Civ. No. 13-1-3219-11 (1st Cir. Ct.)

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 record requests. Thereafter, on December 10, 2013, Plaintiff filed a *pro se* lawsuit. On June 9, 2014, Defendant filed its Answer to Plaintiff's Complaint. This case is still pending.

## Access to a Shoreline Management Area Permit Records

*Salem v. County of Maui*  
Civ. No. 17-1-0208 (2nd Cir. Ct.)  
CAAP-18-0000105 (ICA)

Christopher Salem (Plaintiff) made requests to the County of Maui Department of Planning (Defendant) for records of the date and final acceptance and closure of a certain Shoreline Management Area Permit. Defendant informed Plaintiff there were no documents which would satisfy his request.

Plaintiff then filed a lawsuit in the Second Circuit Court against Defendant, the Director of Planning, and a Deputy Corporation Counsel (collectively Defendants) alleging that in not disclosing the requested records to him, Defendants engaged in the "falsification, distortion, and misrepresentation of public records." Defendants filed a Motion to Dismiss or in the Alternative, for Summary Judgment. On August 8, 2017, the Court granted Defendants' Motion and subsequently denied Plaintiff's additional motions challenging

its decision. The Judgment and Notice of Entry of Judgment were filed on January 24, 2018. Plaintiff filed a Notice of Appeal on February 23, 2018, which remains pending before the ICA.

## **Sunshine Law Litigation:**

### **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 (ICA)*

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

At a Council meeting held after the KCA Community Meeting, a Councilmember reported to the full Council on her attendance at the Community Meeting with 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 2017 Annual Report, Petitioner instead filed this *pro se* lawsuit, which asked the Second Circuit Court to reverse OIP’s opinion, to order OIP to write a reversal, and to award fees. OIP filed a motion for summary judgment which was granted. The Court’s order filed on June 16, 2016, ruled that the law does not allow individuals to appeal OIP’s Sunshine Law opinions to the Court or to sue OIP for alleged Sunshine Law violations by state or county agencies. The Court further concluded that Petitioner’s remedy lies in section 92-12, HRS, which allows an individual to bring a court action against the board itself, not OIP, to require compliance, prevent violations, and determine the applicability of the Sunshine Law.

Petitioner filed a notice of appeal with the ICA on August 15, 2016. After opening briefs were filed, Petitioner, on March 15, 2017, filed an Application for Transfer to the 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.

## 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 an improperly noticed 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 asked the Second Circuit Court to invalidate the amendments to the rules that were approved by Defendant, which would have eliminated the 11 p.m. to 6 a.m. blackout on retail sales of alcohol and the cap on the number of hostess bars in Maui County. Plaintiffs also alleged that Defendant violated the requirements in the Hawaii Administrative Procedures Act, chapter 91, HRS, regarding hearings for rule changes. In a Sunshine Law meeting on July 12, 2017, Defendant voted to reverse itself.

The Court issued a Final Judgment on October 17, 2017, in favor of Defendant and dismissed the case with prejudice. Plaintiffs filed a Notice of Appeal on November 2, 2017. On appeal, parties filed their respective briefs with the ICA, where the case remains pending.

## Voting on Matters Not on Agenda

*Na Papa'i Wawae 'Ula'ula, et. al. v. Board of Land and Natural Resources Civ. No. 18-1-0155 (2nd Cir. Environmental Ct.)*

On April 6, 2018, Na Papa'i Wawae 'Ula'ula, an unincorporated association, Felimon Sadang, and West Maui Preservation Association (Plaintiffs) filed an appeal with the Second Circuit Court against the Board of Land and Natural Resources (BLNR), and Association of Apartment Owners of Hololani (AOAO), which sought to build a seawall to protect its property. The court case arose out of a contested case hearing before DLNR in which Plaintiffs alleged they held protected interests in beachfront property, native Hawaiian traditional and customary practices, and environmental rights that would be aggrieved by granting of a conservation district use permit (CDUP) to the AOAO and a construction right of entry (ROE) to the AOAO. BLNR granted the CDUP and deferred the ROE.

Plaintiffs allege that decisions rendered under section 13-1-29.1, HAR, are not an adjudicatory function of the BLNR and not exempt from the Sunshine Law; BLNR violated the Sunshine Law by calling an executive session to confer with BLNR's attorney without listing that action on the agenda; and BLNR violated the Sunshine Law when voting on an item not noticed on the agenda. Plaintiffs seek a declaratory judgment that BLNR violated the Sunshine Law by making a decision on an item that was not properly agendaized and seek to void that action or determine the applicability of the Sunshine Law.

Should Plaintiffs prevail on this issue, the Court could void the final action taken by BLNR. The Court ruled on December 3, 2018, on various motions. The Orders had not yet been filed at the time of publication.

## **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 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 (collectively Defendants). Plaintiff seeks a declaratory judgment that the Council is bound by the Sunshine Law; the Feral Cat Task Force (Task Force) is a Sunshine Law board; the Council violated the Sunshine Law by improperly delegating powers and duties to the Task Force and the Feral Cat Ordinance Committee (Committee); select members of the public had a privileged role in developing feral cat policy; and Defendant Yukimura knowingly aided and abetted the Task Force and Committee to violate the Sunshine Law. Plaintiff seeks an order enjoining Defendant Yukimura from introducing the draft ordinance from the Task Force and Committee and enjoining all Defendants from delegating policymaking authority to any entity that does not comply with the Sunshine Law.

The hearing on Plaintiff's Motion for Partial Summary Judgment was held on November 13, 2018, and the Circuit Court took the matter under advisement.

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

*In Re OIP Opinion Letter No. 15-02*  
*S.P.P. No. 14-1-0543 (1st Cir. Ct.)*

As first reported in OIP's FY 2015 Annual Report, the Office of Hawaiian Affairs (Petitioner) appealed OIP's Opinion Letter No. 15-02, which concluded that Petitioner's Board of Trustees had violated the Sunshine Law by polling board members outside a meeting to obtain their agreement to send a letter, and by denying members of the public the right to present oral testimony on an executive session item. This appeal represents the first use of section 92F-43, HRS, which was added to the UIPA in 2013 and allows agencies to appeal OIP decisions to the Court based on the record that was before OIP and subject to a deferential "palpably erroneous" standard of review. As required by section 92F-43(b), HRS, Petitioner 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 Petitioner's motion for summary judgment, which it denied in an order issued May 1, 2017. Petitioner's subsequent motion for reconsideration was also denied.



---

## **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 a lawsuit in the Second Circuit Court alleging that the new Real Property Classification and Tax Rates for Timeshare Properties approved by the Maui County Council (Council) 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 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 Council’s resolution were void due to violations of the Sunshine Law.

Plaintiff 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 Council’s motion for partial summary judgment as to Plaintiffs’ Sunshine Law claims. The litigation is still pending, including the Sunshine Law claims.

## **Charter School Commission’s Adjudication of a Matter Not on the Agenda**

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

The Hawaii State Public Charter School Commission (Defendant) filed a notice for its meeting on May 14, 2015, but missing from the agenda was an item relating to the discussion and decision making of the Department of Education’s enrollment form, “SIS-10W” (Enrollment Form). Nevertheless, the Commission discussed the Enrollment Form and issued a written decision regarding the use of the Enrollment Form.

Thereafter, John Thatcher (Plaintiff) filed his lawsuit on August 12, 2015, alleging that Defendant violated the Sunshine Law when Defendant “failed to give the public notice that any action, including but not limited to ‘Decision Making’ concerning the School’s admissions form would be discussed and decided by the Defendant Commission.” Plaintiff alleged that Defendant did not accept oral and written testimony on the Enrollment Form and actually discussed and decided the matter during its May 14, 2015 meeting. 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].” See HRS § 92-6(a)(2). 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 it “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 its adjudicatory function, and because the Enrollment Form was an ongoing issue, Plaintiff

had provided testimony at previous meetings. The Court granted Defendant's Motion, and thereafter, entered its final judgment on February 1, 2017. However, this case is still pending as Plaintiff submitted his Notice of Appeal on February 23, 2017, then his Appeal on April 21, 2017. There have been no further developments since April 21, 2017.

## Honolulu Police Commission's Executive Session

*Civil Beat Law Center for the Public Interest, Inc. v. City and County of Honolulu*  
Civ. No. 17-1-0142-01 (1st Cir. Ct.)  
CAAP-17-0000899 (ICA)

On January 4, 6, and 18, 2017, the Honolulu Police Commission (Defendant) entered into executive sessions to discuss personnel matters related to the former Honolulu Chief of Police Louis Kealoha (Chief of Police). On Defendant's corresponding agendas, it stated that sections 92-5(a)(2) and 92-5(a)(4), HRS, permitted it to do so as it intended "[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 Chief of Police."

The Civil Beat Law Center (Plaintiff) subsequently filed its lawsuit on January 26, 2017, alleging that Defendant violated the Sunshine Law on January 4, 6, and 18, 2017, by "exceeding the scope of any permissible exemption" as sections 92-5(a)(2) and 92-5(a)(4), HRS, were not applicable. Specifically, Plaintiff alleged 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 in those meetings 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, which was granted on November 17, 2017.

The Court stated that, "[Defendant] followed the required procedures and properly met in executive session pursuant to Hawaii Revised Statutes (HRS) §§ 92-4, 92-5(a)(2), and 92-5(a)(4) to protect privacy interests of the Chief of Police and to preserve the attorney-client privilege between [Defendant] and its counsel. [Defendant] had the authority to and did meet in executive session to preserve its attorney-client privilege, even if [Defendant] was not required to meet in executive session to discuss the status of the Chief of Police." It also stated, "HRS Chapter 92 does not require a 'balancing of private interest against the public interest in disclosure' in deciding whether a board may properly meet in executive session. The balancing test set forth in HRS Chapter 92F applies to the 'disclosure of a government record' and not whether [Defendant] properly decided to meet in executive session." Judgment in favor of Defendant was entered on November 30, 2017. Thereafter, Plaintiff filed its Notice of Appeal on December 19, 2017. On August 27, 2018, the Supreme Court granted certiorari and has not yet scheduled oral arguments. The appeal remains pending.

