DEPT. COMM. NO. 207

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December 26, 2019

TRANSMITTAL

TO: Hawaii State Legislature

FROM: Office of Information Practices

SUBJECT: Office of Information Practices Annual Report 2019

Transmitting the Annual Report for FY 2019 from the Office of Information Practices.

Link to the Annual Report: oip.hawaii.gov/reports/

Office of Information Practices

State of Hawaii

Annual Report 2019

This report to the Governor and the Legislature summarizes the activities and findings of the Office of Information Practices from July 1, 2018, to June 30, 2019, 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
FY - Fiscal Year
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.

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History

In 1988, the Legislature enacted the comprehensive Uniform Information Practices Act (Modified) (UIPA), codified as chapter 92F, Hawaii Revised Statutes (HRS), to clarify and consolidate the State's then existing laws relating to public records and individual privacy, and to better address the balance between the public's interest in disclosure and the individual's interest in privacy.

The UIPA was the result of the efforts of many, beginning with the individuals asked in 1987 by then Governor John Waihee to bring their various perspectives to a committee that would review existing laws addressing government records and privacy, solicit public comment, and explore alternatives to those laws. In December 1987, the committee's work culminated in the extensive *Report of the Governor's Committee on Public Records and Privacy*, which would later provide guidance to legislators in crafting the UIPA.

In the report's introduction, the Committee provided the following summary of the underlying democratic principles that guided its mission, both in terms of the rights we hold as citizens to participate in our governance as well as the need to ensure government's responsible maintenance and use of information about us as citizens:

> Public access to government records ... the confidential treatment of personal information provided to or maintained by the government ... access to information about oneself being kept by the government. These are issues which have been the subject of increasing debate over the years. And well such issues should be debated as few go more to the heart of our democracy.
>
> We define our democracy as a government of the people. And a government of the people must be accessible to the people. In a democracy, citizens must be able to understand what is occurring within their government in order to participate in the process of governing. Of equal importance, citizens must believe their government to be accessible if they are to continue to place their faith in that government whether or not they choose to actively participate in its processes.
>
> And while every government collects and maintains information about its citizens, a democratic government should collect only necessary information, should not use the information as a "weapon" against those citizens, and should correct any incorrect information. These have become even more critical needs with the development of large-scale data processing systems capable of handling tremendous volumes of information about the citizens of this democracy.
>
> In sum, the laws pertaining to government information and records are at the core of our democratic form of government. These laws are at once a reflection of, and a foundation of, our way of life. These are laws which must always be kept strong through periodic review and revision.

Although the UIPA has been amended over the years, the statute has remained relatively unchanged in its essence. Experience with the law has shown that the strong efforts of those involved in the UIPA's creation resulted in a law that anticipated and addressed most issues of concern to both the public and government.

Under the UIPA, all government records are open to public inspection and copying unless an exception authorizes an agency to withhold the records from disclosure.

The Legislature included in the UIPA the following statement of its purpose and the policy of this State:

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

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

Accordingly, the Legislature instructed that the UIPA be applied and construed to:

> (1) Promote the public interest in disclosure;
>
> (2) Provide for accurate, relevant, timely, and complete government records;
>
> (3) Enhance governmental accountability through a general policy of access to government records;
>
> (4) Make government accountable to individuals in the collection, use, and dissemination of information relating to them; and
>
> (5) Balance the individual privacy interest and the public access interest, allowing access unless it would constitute a clearly unwarranted invasion of personal privacy.

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

In 1998, OIP was given the additional responsibility of administering Hawaii's Sunshine Law, part I of chapter 92, HRS, which had been previously administered by the Attorney General's office since the law's enactment in 1975.

Like the UIPA, the Sunshine Law opens up the governmental processes to public scrutiny and participation by requiring state and county boards to conduct their business as transparently as possible in meetings open to the public. Unless a specific statutory exception is provided, the Sunshine Law requires discussions, deliberations, decisions, and actions of government boards to be conducted in a meeting open to the public, with advance notice and the opportunity for the public to present testimony.

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

Pursuant to sections 92F-42(7) and 92-1.5, HRS, this Annual Report to the Governor and the Legislature summarizes OIP's activities and findings regarding the UIPA and Sunshine Law for the 2019 fiscal year (FY).

Executive Summary

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

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

Besides providing relevant background information, this annual report details OIP's performance for FY 2019, which began on July 1, 2018, and ended on June 30, 2019.

OIP Service Overview
FY 2014-2019

	2014	2015	2016	2017	2018	2019
Total Requests for OIP's Services	1,313	1,307	1,162	1,234	1,127	1,127
Informal Requests (AODs)	1,109	1,074	964	956	945	963
Formal Requests Opened	204	233	198	278	182	164
Formal Requests Resolved	195	142	208	241	201	213
Live Training	19	11	11	9	6	11
Training Materials Added/Revised	23	16	12	6	9	14
Legislation Monitored	181	101	175	108	93	185
Lawsuits Monitored	17	39	44	40	38	40
Public Communi-cations	35	33	30	30	25	25
Rules Adopted	1	0	0	0	0	0
Special Projects	14	15	8	2	0	0

Figure 1

OIP's jurisdiction extends over state, county, and independent agencies and boards in all branches of government, and thus includes the Governor, Lt. Governor, Judiciary, Legislature, University of Hawaii (UH), Office of Hawaiian Affairs (OHA), and all County Councils. OIP 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 2019, OIP's total allocation was $676,855, up 15.90% from $584,019 in FY 2018. *See* **Figure 3** on page 17. OIP's allocation in FY 2019 for personnel costs was $654,531and for operational costs was $22,324. *See* **Figure 3** on page 17.

As in the prior year, OIP had 8.5 FTE total approved positions in FY 2019.

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 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 2019, OIP received 164 formal and 963 informal requests for assistance, for a total of 1,127 requests, which is the same number of total requests as in FY 2018. *See* **Figure 1** on page 6. OIP resolved 96% of all formal and informal requests for assistance received in FY 2019 in the same fiscal year.

Some 85% (963) of the total requests for OIP's services are informal requests that are typically responded to within the same day through the AOD service. About 50% of AOD inquiries in FY 2019 (485) came from state and county agencies and boards seeking guidance to ensure compliance with the UIPA and Sunshine Law, while the balance (478) 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 2019, OIP opened 164 formal cases, compared to 182 formal cases opened in FY 2018.

Fortunately, in FY 2019, OIP did not receive a disproportionately large number of formal cases filed by a small number of persons, which had seriously impacted its ability to timely resolve all other cases and perform other duties in prior years.

Because the number of new cases decreased in FY 2019, OIP was able to work on and close 213 formal cases and reduce its backlog of pending cases. By the end of FY 2019, OIP was able to reduce its backlog by 37.4% from the prior year, from 131 to 82 pending cases. *See* **Figure 4** on page 19. OIP 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 2017 cases at the end of FY 2019. Moreover, more than 72% (119 of 182) of the formal cases opened in FY 2019 were resolved in the same year. When AODs are included, OIP resolved 96% (1,082 of 1,127) of all FY 2019 formal and informal requests for assistance in the same year they were filed, and over 85% (963 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 2019, OIP issued 5 formal opinions and 20 informal opinions, for a total of 25 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, and because of relief from repeat requesters, OIP was able in FY 2019 to work on reducing the number of pending cases and doing other statutory duties. Thus, in FY 2019, OIP also revised many of its training materials to comport with major new court decisions and legislative changes.

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 2019, OIP had a total of 81 training materials and forms, 4 new reports, and 29 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 2019, OIP revised or added 14 training materials, largely because of substantial changes to the Sunshine Law that went into effect on July 1, 2018.

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** to upload their own information to the internet to make it more readily accessible to the public.

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

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

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

OIP also communicates with the open government community primarily through *What's New* articles informing readers of OIP's latest training materials, legislation, and open government issues. In FY 2019, 21 *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**.

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 2019, state and county agencies reported 29,799 record titles, of which 51% were described as being accessible to the public in their entirety.

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

Legislation

OIP serves as a one-stop resource for government agencies and the public in matters relating to the UIPA and Sunshine Law. OIP often provides comments on these laws and makes recommendations for legislative changes to amend or clarify areas that have created confusion in application or counteract the legislative mandate of open government. During the 2019 legislative session, OIP reviewed and monitored 185 bills and resolutions affecting government information practices, and testified on 44 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 will continue with the formal rulemaking process once it receives the AG's approval.

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 court cases are provided in the Litigation section of this report.

Although litigated cases are not counted in the total number of cases seeking OIP's services, they nevertheless take staff time to process and monitor. In FY 2019, OIP monitored 40 cases in litigation that remained pending at the end of FY 2019, of which 9 were new cases that OIP began monitoring. *See* **Figure 1** on page 6.

Goals, Objectives, and Action Plan

Pursuant to Act 100, SLH 1999, as amended by Act 154, SLH 2005, OIP presents its Goals, Objectives, and Action Plan for One, Two, and Five Years, including a report on its performance in meeting previously stated goals, objectives, and actions.

OIP's Mission Statement

"Ensuring open government while protecting individual privacy."

I. Goals

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. <u>Legal Guidance and Assistance</u>. Provide training and assistance to members of the public and all state and county agencies to promote compliance with the UIPA and Sunshine Law.

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

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

3. Adopt and revise administrative rules, as necessary.

B. <u>Investigations and Dispute Resolution</u>. Assist the general public, conduct investigations, and provide a fair, neutral, and informal dispute resolution process as a free alternative to court actions filed under the UIPA and Sunshine Law, and resolve appeals under section 231-19.5(f), HRS, arising from the Department of Taxation's decisions concerning the disclosure of the text of written opinions.

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

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

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

2. Encourage state agencies to electronically post appropriate data sets onto **data.hawaii.gov** and to use the UIPA Record Request Log to record and report their record requests.

D. Records Report System. 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 2019, of which 963 (85%) were informal requests typically resolved the same day through OIP's AOD service.

b. Responded to the Attorney General's comments on drafts of new rules for personal records and revisions to OIP's existing rules, and awaiting approval to continue rulemaking process.

c. Conducted 11 live, customized training sessions for state and county agencies and boards.

d. Added or updated 14 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 2020, 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 to increase compliance by more government agencies.

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 2019, of which OIP resolved 96% in the same year and 85% the same day.

b. OIP resolved 963 AOD inquiries in FY 2019, which is over 85% of total requests for assistance (1,127) received by OIP.

c. Of the 164 formal cases opened in FY 2019, 119 (72%) were resolved in the same fiscal year.

d. Of the 82 formal cases that remained pending at the end of FY 2019, 45 (55%) were opened in FY 2019, 21 (26%) were opened in FY 2018, and 14 (17%) were opened in FY 2017. The two cases filed before FY 2017 were still pending in litigation.

2. Year 1 Action Plan

a. Strive to resolve all formal cases filed before July 1, 2018, 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, 2019, 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 2018 from 184 state and 86 county agencies, including the Governor's office, Lt. Governor's office, Judiciary, Legislature, UH, and OHA.

b. Distributed 21 *What's New* articles to keep government personnel and the general public informed of open government issues, including proposed legislation.

c. Received 27,568 unique visits on OIP's website and 87,928 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 2019 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** 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 2019, state and county agencies reported 29,799 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 2019, OIP reviewed and monitored 185 bills and resolutions and testified on 44 of them.

c. In FY 2019, OIP monitored 40 cases in litigation, of which 9 were new cases.

2. Year 1 Action Plan

a. For FY 2020, 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.

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.

IV. Performance Measures

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

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

C. Cost Effectiveness Measure – Considering the number and experience levels of OIP personnel in comparison to similar agencies, monitor the total numbers of requests for assistance and the numbers of state or county agencies or the general public who are assisted by OIP; the types of services provided by OIP; the number of state and county agencies submitting the UIPA Record Request Log; and the overall Log results.

Highlights of Fiscal Year 2019

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 2019, OIP's total allocation was $676,855, up 15.8% from $584,019 in FY 2018.

OIP's allocation for personnel costs in FY 2019 was $654,531. 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.

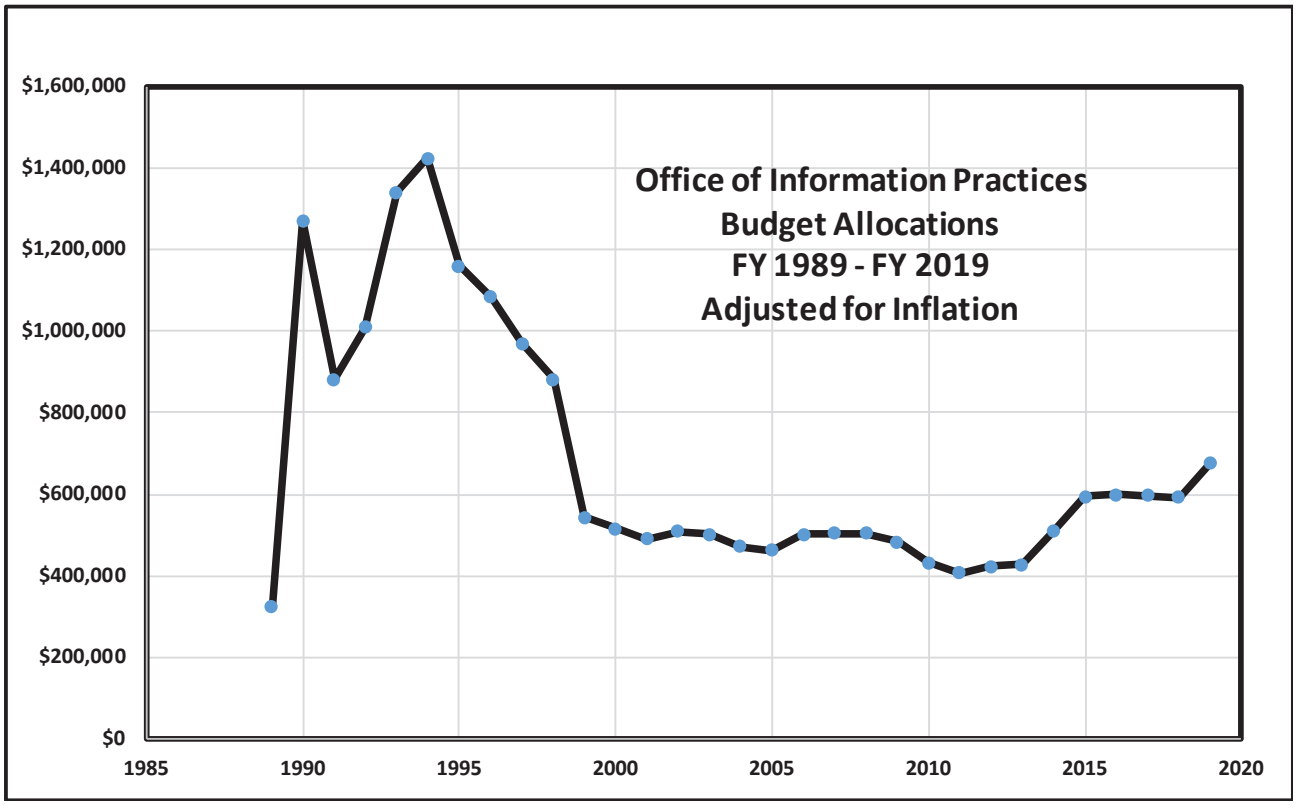


Figure 2

Office of Information Practices
Budget FY 1989 to FY 2019

Fiscal Year	Operational Expense Allocation	Personnel Allocation	Total Allocation	Allocations Adjusted for Inflation**	Approved Positions
FY 19	22,324	654,531	676,855	676,855	8.5
FY 18	22,324	561,695	584,019	593,078	8.5
FY 17	22,324	553,660	575,984	597,029	8.5
FY 16	31,592	532,449	564,041	599,266	8.5
FY 15	45,228	507,762	552,990*	595,592	8.5
FY 14	88,862	450,895	539,757*	508,820	8.5
FY 13	18,606	372,327	390,933	427.316	7.5
FY 12	30,197	352,085	382,282	424,525	7.5
FY 11	42,704	314,454	357,158	408,226	7.5
FY 10	19,208	353,742	372,950	433,233	7.5
FY 09	27,443	379,117	406,560	484,676	7.5
FY 08	45,220	377,487	422,707	504,076	7.5
FY 07	32,686	374,008	406,694	505,739	7.5
FY 06	52,592	342,894	395,486	502,009	7
FY 05	40,966	309,249	350,215	462,261	7
FY 04	39,039	308,664	347,703	472,575	7
FY 03	38,179	323,823	362,002	501,497	8
FY 02	38,179	320,278	358,457	509,474	8
FY 01	38,179	302,735	340,914	490,075	8
FY 00	37,991	308,736	346,727	517,034	8
FY 99	45,768	308,736	354,504	543,109	8
FY 98	119,214	446,856	566,070	881,724	8
FY 97	154,424	458,882	613,306	970,311	11
FY 96	171,524	492,882	664,406	1,085,153	12
FY 95	171,524	520,020	692,544	1,159,824	15
FY 94	249,024	578,513	827,537	1,424,767	15
FY 93	248,934	510,060	758,994	1,339,746	15
FY 92	167,964	385,338	553,302	1,008,492	10
FY 91	169,685	302,080	471,765	882,235	10
FY 90	417,057	226,575	643,632	1,271,663	10
FY 89	70,000	86,000	156,000	324,253	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

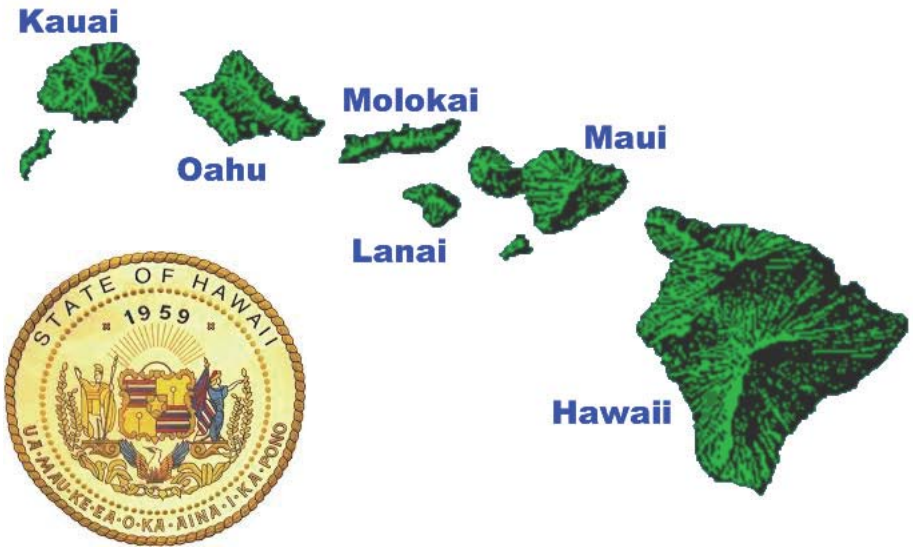
Overview and Statistics

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 2019, OIP received a total of 1,127 formal and informal requests for OIP's services, the same total as the number of requests in FY 2018. While the number of informal requests in the form of AOD inquiries increased from 945 in FY 2018 to 963 in FY 2019, there were 18 fewer formal cases filed in FY 2019 (164) than in FY 2018 (182).

In contrast to the huge spike in new cases in FY 2017 that resulted in 150 outstanding cases, OIP experienced a nearly 10% decrease in new case filings in FY 2019. With fewer new cases, OIP was able to resolve 6% more cases, leaving it with a backlog of only 82 cases at the end of FY 2019.

As **Figure 4** 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 in FY 2019, there

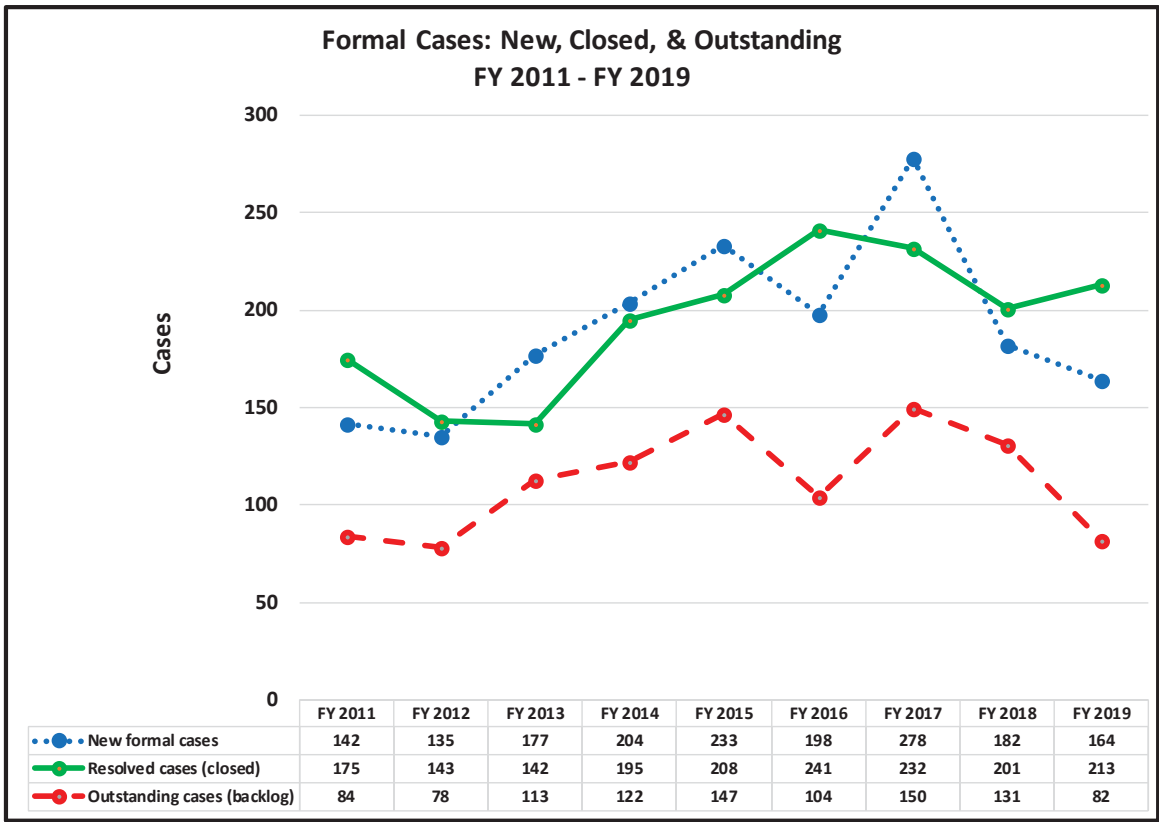


was a decrease in the number of cases outstanding at the end of the year. Despite taking time to develop new training materials on the extensive Sunshine Law revisions that took effect on July 1, 2018, OIP was still able to resolve 213 formal cases in FY 2019. OIP also resolved its oldest cases, so that none of the cases outstanding at the end of FY 2019 were filed before FY 2017, except for two that were in litigation and beyond OIP's control. Moreover, OIP resolved 119, or over 72%, of the formal cases filed in FY 2019 in the same year. When the 963 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 85% (963) 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.

Formal Requests

Of the total 1,127 UIPA and Sunshine Law requests for services, 963 (85%) were filed as informal requests and 164 (15%) were considered formal requests. Formal requests are further categorized and explained as follows. *See* **Figure 5.**



	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015	FY 2016	FY 2017	FY 2018	FY 2019
New formal cases	142	135	177	204	233	198	278	182	164
Resolved cases (closed)	175	143	142	195	208	241	232	201	213
Outstanding cases (backlog)	84	78	113	122	147	104	150	131	82

Figure 4

Formal Requests - FY 2019

Type of Request	*Number of Requests*
UIPA Requests for Assistance	53
UIPA Requests for Advisory Opinion	2
UIPA Appeals	29
Sunshine Law Appeals	11
Sunshine Law Requests for Opinion	0
Correspondence	47
UIPA Record Requests	18
Reconsideration Requests	4
Total Formal Requests	**164**

Figure 5

AOD Inquiries

Fiscal Year	Total	Public	Government Agencies
FY 19	**963**	478	485
FY 18	**945**	294	651
FY 17	**956**	370	586
FY 16	**964**	289	675
FY 15	**1,074**	340	734
FY 14	**1,109**	280	829
FY 13	**1,050**	270	780
FY 12	**940**	298	642
FY 11	**676**	187	489
FY 10	**719**	207	512
FY 09	**798**	186	612
FY 08	**779**	255	524
FY 07	**772**	201	571
FY 06	**720**	222	498
FY 05	**711**	269	442
FY 04	**824**	320	504
FY 03	**808**	371	437
FY 02	**696**	306	390
FY 01	**830**	469	361

Figure 6

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 2019, OIP received 53 such written requests for assistance (RFAs) concerning the UIPA.

In these cases, OIP staff attorneys will generally contact the agency to determine the status of the request, provide the agency with guidance as to the proper response required, and in appropriate instances, attempt to facilitate disclosure of the records. After an agency response has been received, the case is closed. Most RFAs are closed within 12 months of filing. A requester that is dissatisfied with an agency's response may file a UIPA Appeal with OIP.

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 2019, OIP received two requests 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 2019, OIP received 29 appeals related to the UIPA.

Sunshine Law Appeals/ Requests for Opinions

In FY 2019, OIP received 11 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 2019, OIP opened 47 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 2019, OIP received 18 UIPA record requests 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 four requests for reconsideration received in FY 2019, three were 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, require complex legal analysis, or are otherwise of broad interest to agencies and the public. Formal opinions are used by OIP as precedent for its later opinions and are posted, in full and as summaries, on OIP's opinions page at **oip.hawaii.gov.** Summaries of the formal opinions for this fiscal year are also found on pages 29-33 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 34-44.

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 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 2019, OIP issued a total of 25 opinions, consisting of 4 formal UIPA opinions, 1 formal Sunshine Law opinion, 16 informal UIPA opinions, and 4 informal Sunshine Law opinions.

Informal Requests

Attorney of the Day Service

The vast majority (85% in FY 2019) of all requests for OIP's services are informally handled through the Attorney of the Day (AOD) service, which allows the public, agencies, and boards to receive general, nonbinding legal advice from an OIP staff attorney, usually within 24 hours. Like the "express line" at a supermarket, the AOD service allows people to quickly get answers to their questions without having to wait in the more lengthy lines for formal cases.

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

Members of the public use the AOD service frequently to determine whether agencies are properly responding to record requests or 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

Figure 7

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 19 years, OIP has received a total of 16,336 inquiries through its AOD service, an average of 859 requests per year. In FY 2019, OIP received 963 AOD inquiries. *See* **Figure 6** on page 20. Since FY 2011, AOD inquiries have increased 47%.

Of the 963 AOD inquiries in FY 2019, 485 (50.4%) came from government boards and agencies seeking guidance to ensure compliance with the UIPA and Sunshine Law, and 478 inquiries (49.6%) came from the public. *See* **Figure 7**.

Of the 478 AOD inquiries from the public in FY 2019, 444 (93%) came from private individuals, 16 (3%) from media, 8 (2%) from businesses, 4 (0.8%) from private attorneys, 2 (0.4%) from public interest groups, and 4 (0.8%) from other types. *See* **Figures 8 and 9**.

AOD Inquiries from the Public FY 2019

Types of Inquirers	Number of Inquiries
Private Individual	444 (93%)
News Media	16 (16%)
Business	8 (2%)
Private Attorney	4 (0.8%)
Public Interest Group	2 (0.4%)
Other Type	4 (0.8%)
TOTAL	**478**

Figure 8

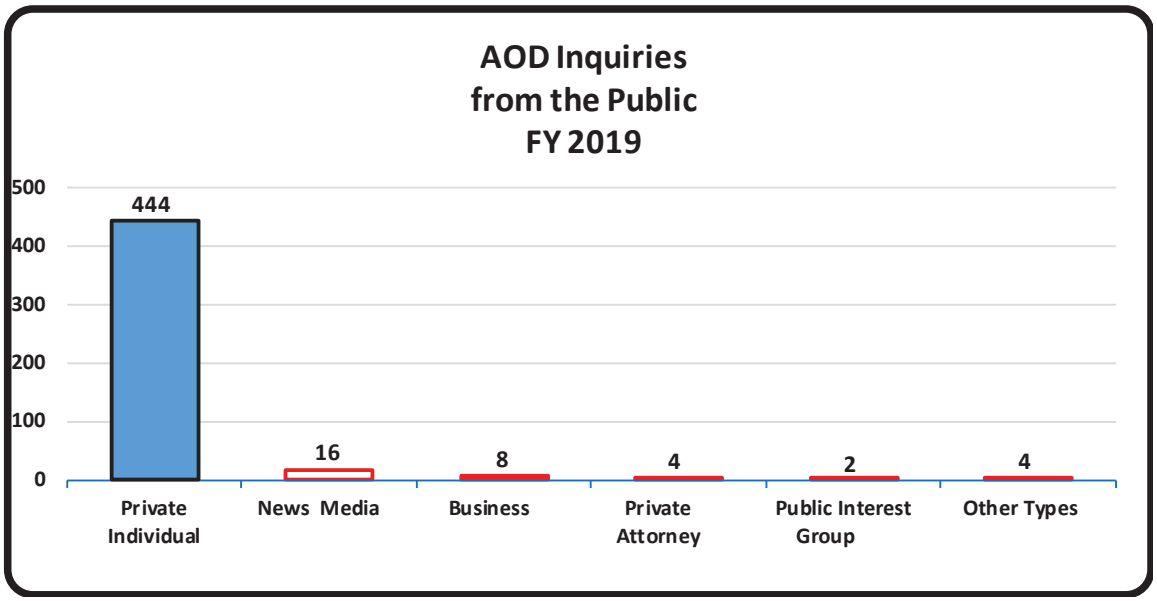


Figure 9

UIPA Inquiries:

UIPA AOD Inquiries

In FY 2019, OIP received 520 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 2019, OIP received a total of 107 AOD inquiries about state agencies in the executive branch. About 58% of these requests concerned five state agencies: Department of Education (23), Department of Land and Natural Resources (12), Department of Labor and Industrial Relations (10), Department of the Attorney General (9), and Department of Commerce and Consumer Affairs (9). As shown below in **Figure 10**, 73% of AOD requests were made by the agencies themselves.

OIP also received 3 inquiries concerning the legislative branch and no inquiries regarding the judicial branch. *See* **Figure 10** below. These AOD requests exclude general inquiries that do not concern a specific agency.

AOD Requests About

State Government Agencies

FY 2019

Executive Branch Department	Requests by Agency	Requests by Public	Total Requests
Education (including Public Libraries)	19	4	23
Land and Natural Resources	2	10	12
Labor and Industrial Relations	6	4	10
Attorney General	8	1	9
Commerce and Consumer Affairs	8	1	9
Health	7	1	8
Accounting and General Services	5	2	7
Human Services	5	1	6
Transportation	6	0	6
Public Safety	2	2	4
Agriculture	2	0	2
Business, Econ Development, & Tourism	2	0	2
Governor	2	0	2
Human Resources Development	1	1	2
Tax	2	0	2
Budget and Finance	1	0	1
Defense	0	1	1
Lieutenant Governor	1	0	1
Hawaiian Home Lands	0	0	0
TOTAL EXECUTIVE	**79**	**28**	**107**
TOTAL LEGISLATURE	**2**	**1**	**3**
TOTAL JUDICIARY	**0**	**0**	**0**
University of Hawaii System	**9**	**2**	**11**
Office of Hawaiian Affairs	**2**	**2**	**4**
TOTAL STATE AGENCIES	**92**	**33**	**125**

Figure 10

County Agencies

In FY 2019, OIP received 44 AOD inquiries regarding various county agencies and boards. Of these, 16 inquiries (36%) came from the public.

Of the 44 AOD inquiries, 28 inquiries concerned agencies in the City and County of Honolulu, down from 36 in the previous year. *See* **Figure 11**. As shown below, 57% 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 (7), Budget and Fiscal Services (4), Corporation Counsel (3), and Planning and Permitting (3).

OIP received 16 inquiries regarding neighbor island county agencies and boards: Hawaii County (3), Kauai County (5), and Maui County (8). *See* **Figures 11 to 14**.

AOD Inquiries About

City and County of Honolulu

Government Agencies - FY 2019

Department	Requests by Agency	Requests by Public	Total Requests
Police	6	1	7
Budget and Fiscal Services	4	0	4
Corporation Counsel	3	0	3
Planning and Permitting	0	3	3
City Council	0	2	2
Parks and Recreation	1	1	2
Transportation	0	2	2
Board of Water Supply	1	0	1
Civil Defense	0	1	1
Customer Services	0	1	1
Mayor	0	1	1
Prosecuting Attorney	1	0	1
TOTAL	**16**	**12**	**28**

Figure 11

AOD Inquiries About

Hawaii County

Government Agencies - FY 2019

Department	Requests by Agency	Requests by Public	Total Requests
Corporation Counsel	1	0	1
County Council	0	1	1
Police	0	1	1
TOTAL	**1**	**2**	**3**

Figure 12

AOD Inquiries About

Kauai County

Government Agencies - FY 2019

Department	Requests by Agency	Requests by Public	Total Requests
Police	2	1	3
County Council	1	0	1
Mayor	1	0	1
TOTAL	**4**	**1**	**5**

Figure 13

AOD Inquiries About
Maui County
Government Agencies - FY 2019

Department	Requests by Agency	Requests by Public	Total Requests
Corporation Counsel	2	0	2
County Council	2	0	2
Police	1	1	2
Fire Control	1	0	1
Prosecuting Attorney	1	0	1
TOTAL	**7**	**1**	**8**

Figure 14

***Sunshine Law Inquiries*:**

Since 2000, OIP has averaged more than 279 formal and informal inquiries a year concerning the Sunshine Law. In FY 2019, OIP received 392 Sunshine Law inquiries, which is 120 more than in FY 2018, and 113 more than the average number of requests received each year. *See* **Figures 15 and 16**.

Of the 392 total Sunshine Law inquiries made in FY 2019, 381 (97%) were informal AOD requests, and 11 were formal cases. *See* **Figure 16**.

Of the 381 AOD requests involving the Sunshine Law, 358 were requests for general advice, and 23 were complaints. Also, 28 of the 381 AOD requests (7%) involved the requester's own agency.

Sunshine Law Inquiries

Fiscal Year	*AOD Inquiries*	*Formal Requests*	*Total*
2019	381	11	**392**
2018	265	7	**272**
2017	337	11	**348**
2016	331	4	**335**
2015	433	31	**464**
2014	491	38	**529**
2013	264	27	**291**
2012	356	23	**379**
2011	166	13	**179**
2010	235	21	**256**
2009	259	14	**273**
2008	322	30	**352**
2007	281	51	**332**
2006	271	52	**323**
2005	185	38	**223**
2004	209	17	**226**
2003	149	28	**177**
2002	84	8	**92**
2001	61	15	**76**
2000	57	10	**67**

Figure 16

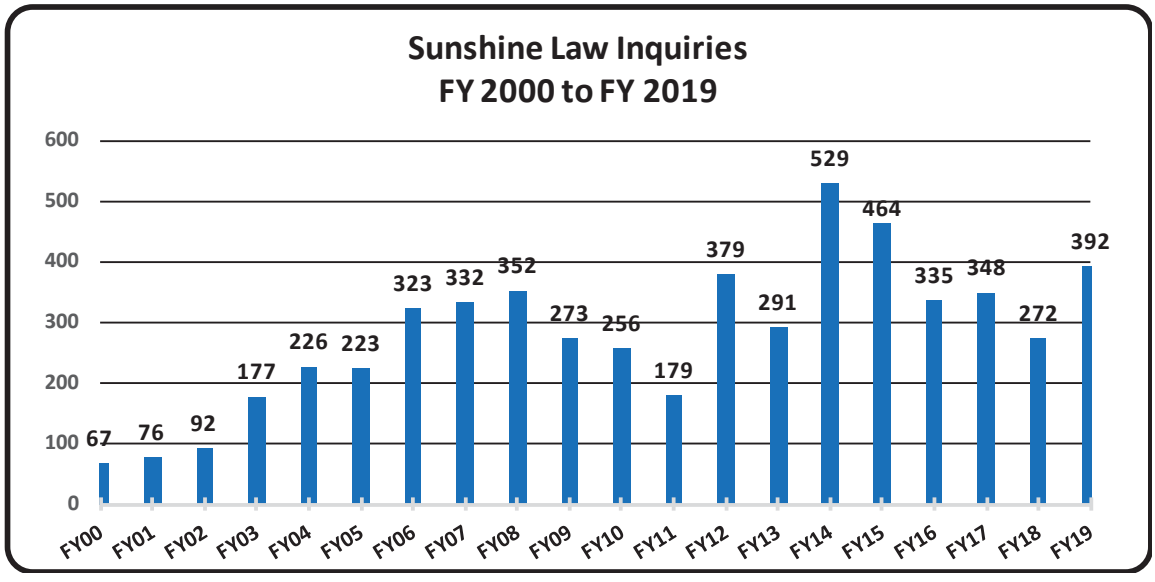


Figure 15

Formal Opinions

In FY 2019, OIP issued five formal opinions, (four 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**. In the event of a conflict between the full text and the summary, the full text of an opinion controls.

***UIPA Formal Opinions*:**

Minimum Decision Record

OIP Op. Ltr. No. F19-01

Requesters previously sought a decision as to whether the Hawaii Paroling Authority (HPA) properly denied their request for their Minimum Decision Record under the UIPA. Those requests were consolidated and resulted in the issuance of OIP Opinion Letter Number F17-04 (Opinion F17-04). The Department of the Attorney General, on behalf of HPA, made a timely request for reconsideration of Opinion F17-04, which was granted on February 22, 2018. Based on new evidence provided for OIP's *in camera* review, OIP overruled Opinion F17-04 and concluded that HPA properly denied Requesters' requests for their Minimum Decision Record under Parts II and III of the UIPA.

Under Part III of the UIPA, OIP found that the records sought by Requesters are personal records "about" each corresponding Requester but are not required to be disclosed because they fall within the exemption to disclosure set out in section 92F-22(1)(B), HRS. Specifically, OIP concluded that section 92F-22(1)(B), HRS, was broad enough to permit HPA to withhold each respective Minimum Decision Record in its entirety from Requesters as it is a report prepared during the process of criminal law enforcement.

OIP has stated that when a personal record is withheld from the requester due to a Part III exemption, an additional analysis must be conducted under Part II to determine if the personal record must still be disclosed as a government record. OIP Op. Ltr. No. 05-14 at 6-7; *accord* OIP Op. Ltr. No. 03-11 at 4, n. 6 and OIP Op. Ltr. No. 05-16 at 4.

Under Part II of the UIPA, section 92F-13(3), HRS, provides that agencies may withhold government records to avoid the frustration of a legitimate government function. The deliberative process privilege form of the frustration exception specifically protects government records that are part of the HPA's decision-making process. OIP concluded that each Requester's respective Minimum Decision Record was part of the HPA's decision-making process and may be withheld from him under the deliberative process privilege form of the frustration exception.

After this opinion was issued by OIP, however, the Hawaii Supreme Court issued its opinion in *Peer News LLC v. City and County of Honolulu*, 143 Haw. 472 (2018), which rejected the "deliberative process privilege."

Records of Meetings with Legislators

OIP Op. Ltr. No. F19-02

Requester asked the Department of Land and Natural Resources Division of Boating and Outdoor Recreation (DOBOR) for a copy of "notes for . . ., as well as any minutes from" a meeting with legislators related to DOBOR's then-ongoing work on amendments to its rules. DOBOR responded in an email that same day that the requested records were "internal working documents and we will not release at this time." Later, in response to the appeal, DOBOR asserted that it did not actually have any notes or minutes of the meeting, but also that disclosure would be a frustration of a legitimate government function. Finally, DOBOR clarified that it took no notes or minutes at the meeting but did have an agenda and handouts prepared for the meeting, which were the "internal working documents" referred to in its denial.

OIP first addressed whether the records DOBOR did have were responsive to the request. Consistent with the UIPA's requirement to interpret its provisions in favor of openness, OIP noted that it must interpret the scope of what records are responsive to a request reasonably broadly to avoid disadvantaging requesters based on their imperfect knowledge of what records an agency may have. *See* HRS § 92F-2 (2012) (requiring the UIPA to be applied and construed to promote public interest in disclosure.) It is the agency, not the requester, that has the most complete knowledge about the type and number of records the agency maintains relating to a given subject. OIP concluded that based on the facts presented, the agenda and handouts were responsive to Requester's request seeking notes for or minutes of the meeting.

OIP further found that the deliberative process privilege claimed by DOBOR under the UIPA's exception for records whose disclosure would frustrate a legitimate government function did not apply to the agenda or the meeting handouts, as they were shared outside the agency and thus were not a direct part of the agency's internal decision-making process. OIP Op. Ltrs. No. 92-26 at 5 and 04-15; *see* HRS § 92F-13(3) (2012) (allowing an agency to withhold records whose disclosure would frustrate a legitimate government function); *see also* HRS § 92F-19(a)(6) (2012) (allowing an agency to share otherwise nonpublic records with a legislative body or committee). DOBOR did not state any other basis for withholding the records or provide them for OIP's *in camera* review as required by section 92F-42(5), HRS, and section 2-73-15(d), HAR. Thus, OIP concluded that no UIPA exception applied to the agenda or the meeting handouts.

Appraisal Report for Possible Easement

OIP Op. Ltr. No. F19-04

Requester asked the Department of Budget and Fiscal Services of the City and County of Honolulu (City) (BFS) for a copy of an appraisal report prepared for it by the City Department of Design and Construction, which included market analysis and a value range, relating to an easement that Requester sought to purchase. BFS denied access to the appraisal report, arguing that it was created to provide the basis for BFS's strategy in negotiating a purchase price for the requested easement and disclosure of the range of values in the appraisal report would frustrate BFS's ability to achieve a fair purchase price for the easement.

Although appraisal reports relating to the sale of an interest in county land are not made public by statute, as appraisal reports prepared for State of Hawaii (State) lands are, OIP could not logically conclude on the basis of that distinction that disclosure of appraisal reports would provide a manifestly unfair advantage to purchasers of interests in county land when disclosure of similar reports does not provide a manifestly unfair advantage to purchasers of interests in State lands. *See* HRS § 92F-13(3) (2012) (creating a UIPA exception for records whose disclosure would frustrate a legitimate government function); HRS § 171-17(e) (Supp. 2018) (specifying that appraisal reports for State lands are public); OIP Op. Ltr. No. 91-10 (concluding it would be illogical to distinguish the effect of disclosure of appraisal reports prepared to set lease prices, made public by statute, from those prepared to set permit prices, not addressed by statute, and therefore no UIPA exception applied to either). Thus, OIP concluded that appraisal reports relating to the sale of an interest in county land do not fall under the UIPA's exception for records whose disclosure would frustrate a legitimate government function and the appraisal reports must be publicly disclosed upon request under the UIPA.

Deliberative Material for Revenue Estimates

OIP Op. Ltr. No. F19-05

Requester sought "assumptions, bases, computations, source data, and documents and analysis relied upon" for the Hawaii Department of Taxation's (TAX) revenue estimates in legislative testimony. OIP concluded that TAX could not withhold from public disclosure under the UIPA the underlying assumptions, source data and documents, and computations it uses to create revenue estimates presented in legislative testimony for the specific bills identified by Requester.

Although OIP recognizes that under HRS § 92F-13(4) a confidentiality statute could apply to source data and documents used by TAX in creating other revenue estimates, TAX did not establish that a confidentiality statute applies to information in the records at issue. Moreover, the records at issue here were created by TAX, not by a legislative committee, and therefore were not working papers of "legislative committees" that may be withheld under section 92F-13(5), HRS.

TAX asserted that disclosure of the records at issue would frustrate one of its legitimate government functions under HRS § 92F-13(3), namely its "ability to produce objective and independent revenue estimates." OIP concluded that under the UIPA, as interpreted by the Hawaii Supreme Court, deliberative and predecisional materials cannot be withheld on the basis that they would frustrate an agency's decisionmaking function, although such materials may still be withheld under the UIPA's frustration exception where some other specifically identified government function would be frustrated by disclosure. *Peer News LLC v. City and County of Honolulu*, 143 Haw. 472 (2018). OIP found that the government function TAX sought to protect was its decisionmaking function by another name, so TAX could not withhold the records at issue under the UIPA's frustration exception to protect its ability to produce objective and independent revenue estimates.

As discussed in the Litigation Report on page 67, TAX appealed OIP's decision, which the Circuit Court affirmed on November 19, 2019, and ordered TAX to comply.

Sunshine Law Formal Opinion:

Executive Sessions and Communications Outside a Meeting

OIP Op. Ltr. No. F19-03

OIP was asked whether the Hawaii Tourism Authority (HTA) properly held two executive sessions to discuss (1) ongoing negotiations for prospective contracts either under the Sunshine Law or one of the HTA-specific executive session purposes set out in section 201B-4(a)(2), HRS; and (2) its annual budget either under the Sunshine Law or for one of the HTA-specific executive session purposes set out in section 201B-4(a)(2), HRS. OIP was also asked whether all communications among HTA members outside HTA meetings complied with the Sunshine Law.

On the first question, OIP concluded that the two executive sessions in which HTA discussed ongoing negotiations for prospective contracts were justified under the HTA-specific executive session purpose allowing it to hold a closed meeting to discuss information whose confidentiality is necessary to protect Hawaii's competitive advantage as a visitor destination. *See* HRS §§ 92-5 (2012) and 201B-4(a)(2) (2017).

On the second question, OIP concluded that neither the HTA-specific executive session purpose nor the Sunshine Law's general purposes allowed HTA to go into executive session to discuss its annual budget. *See* HRS §§ 92-5 and 201B-4(a)(2).

On the third question, OIP found that in the great majority of written communications it reviewed, either the topic at hand was not HTA's board business or the discussion fell within one of the Sunshine Law's permitted interactions allowing discussion of board business outside a board meeting. In one instance, though, OIP concluded that an email from HTA's chair to its other members was a discussion of board business in violation of the Sunshine Law. *See* HRS § 92-2.5 (2012). Nevertheless, because the email's content was background information that could have properly been sent to all members by a nonmember such as an HTA employee, and no further discussion ensued, OIP noted that the public impact of this violation was minimal.

Informal Opinions

In FY 2019, OIP issued 16 informal opinions relating to the UIPA and 4 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*:**

Reasonableness of Search

UIPA Memo 19-1

Requester sought access to copies of "public records that have been sent to or received from the Federal Advisory Council on Historic Preservation" by the Kauai County Clerk. The Clerk's Office responded in a letter, which stated that a thorough review of records had been conducted but no responsive records were found and suggested that Requester contact the Kauai County Planning Department as it may have responsive records. Requester appealed.

When a requester contests an agency's response stating that no responsive records exist, OIP normally looks at whether the agency's search for responsive records was reasonable. OIP Op. Ltr. No. 97-8 at 4-6. 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). In response to this appeal, the Clerk's Office explained that the Council Services Division's Records Section conducted a thorough search of all records sent to or received from the Federal Advisory Council on Historic Preservation. The search included a word search for "Federal Advisory Council on Historic Preservation" in all electronic records,

and a manual search of all indexes related to hard copy records (those not available electronically). No responsive records were found. Based on the information provided by the Clerk's Office, it appeared that appropriate staff conducted a reasonable search for records sent to or received from the Federal Advisory Council on Historic Preservation in the locations where any responsive records were mostly likely to have been found. OIP therefore concluded that the County Clerk's search for records was reasonable, and its response to Requester's request was proper under the UIPA.

Employee Names

UIPA Memo 19-2

In U-Memo 19-2, OIP determined that the names and respective job titles of government employees are always public under section 92F-12(a)(14), HRS, even if the County had previously disclosed exact salaries, rather than salary ranges, so that the requester could ascertain the exact salary of the identified bargaining unit employees.

Section 92F-12(a)(14), HRS, requires that certain information about State and County employees is automatically public, including the name, compensation (but only the salary range for employees covered by or included in chapter 76, and sections 302A-602 to 302A-640, and 302A-701, or bargaining unit (8)), and job title. Requester made a record request to the Hawaii County Department of Human Resources (HR-H) for the names, compensation, and job titles of all full-time County employees.

HR-H explained that, for some bargaining unit 1 and 11 employees covered by or included in chapter 76, HRS (Hawaii's civil service law), there was no true salary range corresponding to those positions, but only one exact salary for each pay range. Specifically, Hawaii County's Public Workers bargaining unit 1 and Hawaii Fire Fighters Association bargaining unit 11 employees are covered by chapter 76, HRS, but for some employees, there is only one salary for a particular pay range. Thus, only the exact salaries and not the employee names were disclosed because HR-H believed disclosure of both would constitute a clearly unwarranted invasion of the personal privacy of the employees in those positions.

Requester thereafter made a second record request to HR-H for the names and respective job titles of all Hawaii County employees who filled the 96 positions on the list provided by Requester as an attachment to his record request, including those in bargaining units 1 and 11. HR-H denied access,claiming that sections 92F-12(a)(14), 92F-13(1), and 92F-14(b)(6), HRS, allowed it to withhold access.

OIP recognized that the identities and exact salaries of certain covered employees can be easily determined simply by comparing both requests. Nevertheless, there is no language in the UIPA that prohibits disclosure of names and job titles that are required to be public under section 92F-12(a)(14), HRS.

In addition, OIP found that HR-H's reliance on other sections of the UIPA as allowing it to withhold access to the names of persons in bargaining units 1 and 11 was misplaced because the information sought by Requester, *i.e.*, the names and respective job titles of specified Hawaii County employees, is always public under section 92F-12(a)(14), HRS, any other provision of the UIPA notwithstanding. The fact that HR-H previously disclosed exact salaries for bargaining unit 1 and 11 employees does not allow it to deny subsequent requests for records covered by section 92F-12(a)(14). Accordingly, OIP concluded that the information sought in the second record request should be disclosed.

Information Related to Paid Informants Not in Agency Records

UIPA Memo 19-3

Requester sought a decision as to whether the Maui Police Department (POLICE-M) properly responded when it stated that it does not maintain records that are responsive to Requester's request for information related to paid informants.

When a requester contests an agency's response to a record request stating that no responsive records exist, OIP normally looks at whether the agency's search for responsive records was reasonable. OIP Op. Ltr. No. 97-08 at 4-6. 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).

In this case, POLICE-M had conducted at least two separate searches, both of which found no responsive records. POLICE-M explained that its Criminal Investigations Division Commander, the only person who has access to confidential informant records, had searched for the requested information in the locked safe where confidential informant files are normally maintained and found no responsive records. POLICE-M also added that due to the age of the requested files, it is unable to determine whether the requested information ever existed, and if the information ever existed, it was likely disposed of in accordance with the County of Maui's Records Disposition Schedule.

Based on POLICE-M's explanation, OIP found that POLICE-M's searches were reasonable. OIP, therefore, concluded that POLICE-M's assertion that it does not maintain responsive records was proper.

No Duty to Search for Records That Do Not Exist

UIPA Memo 19-4

Requester sought a decision as to whether the Department of Public Safety (PSD) properly responded to his request for his Prescriptive Plan Update and Exception Case Form by stating that it did not have the requested documents.

Agencies are required to make any accessible personal record available to the individual to whom it pertains unless an exemption to disclosure applies. HRS § 92F-21 (2012). When an agency asserts that no responsive records exist, the issue on appeal is whether the agency's search for a responsive record was reasonable. OIP Op. Ltr. No. 97-08. However, in rare instances, when OIP finds that an agency has actual knowledge that the requested record was never created, OIP will conclude that it was reasonable for the agency to respond based on its prior knowledge, and the agency is absolved from having to conduct an actual search for requested records it knows do not exist. OIP Op. Ltr. No. F16-03.

In this case, the requested records were created. However, OIP declined to opine that PSD must conduct a search for them because PSD made credible and good faith statements that it does not have Requester's Prescriptive Plan Update and Exception Case Form. PSD explained that the records were immediately destroyed after PSD realized that they were "inadvertently created" based on an error. OIP found that because PSD had actual knowledge that the records were destroyed prior to PSD's receipt of Requester's record request, a search for responsive records was not necessary as it would have been fruitless. OIP further found that PSD did not destroy the requested records in order to avoid its disclosure obligations. Consequently, OIP concluded that PSD's response to Requester's request was proper.

Complaint of Unlicensed Practice

UIPA Memo 19-5

Requester sought records of a closed complaint to the Department of Commerce and Consumer Affairs (DCCA), Regulated Industries Complaints Office (RICO), filed by a third party, which had alleged the subject of the complaint ("Respondent") had engaged in the unlicensed practice of dentistry in Hawaii by performing independent medical examinations (IMEs) and doing medical record reviews. Requester did not seek copies of IMEs conducted on third parties or medical or dental information related to the IMEs, but rather "the complaint, the legal proceedings and negotiation, and the conclusion of the case." RICO denied the request on the basis that the complaint file was "[i]nformation compiled to determine an individual's fitness to obtain or retain a license" and as such, fell within the UIPA's exception for information whose disclosure would be a clearly unwarranted invasion of personal privacy. *See* HRS § 92F-13(1) and -14(b)(7).

OIP concluded that section 92F-14(b)(7), HRS, which recognizes a heightened privacy interest in information about a person's fitness to be granted a license, did not apply directly to the file at issue here, and should not be applied by analogy because Respondent did not have an equivalent privacy interest in allegations that his actions constituted the practice of dentistry in Hawaii. HRS § 92F-14(b)(7) (Supp. 2017). It was therefore not appropriate to withhold the entire closed complaint file on the assumption that the file as a whole carried a significant privacy

interest. Instead, the records should have been examined on an individual basis to determine whether, based on the information contained in them, they fell under one of the UIPA's exceptions to disclosure.

OIP found that a witness who filed a statement as a member of the advisory committee was a confidential source, and thus the witness' identity could be withheld under the UIPA's exception for records whose disclosure would frustrate a legitimate government function. *E.g.* OIP Op. Ltr. No. 05-16; *see also* HRS § 92F-13(3) (2012). RICO thus could withhold any information that would result in the likelihood of the witness's actual identification, which included not just the witness's name but also other identifying details such as title, contact information, and letterhead.

Correspondence reflecting settlement negotiations, including attached drafts, was properly withheld under the UIPA's frustration exception. *See* HRS § 92F-13(3). However, after redaction of the witness and patient information, the remaining correspondence and other records in the file (such as case summary printouts and closing memorandum) did not fall within the UIPA's privacy or frustration exceptions, and thus were required to be disclosed. *See* HRS § 92F-13(1) and (3).

EEOC Complaints Filed Against the City and County of Honolulu

UIPA Memo 19-6

Two Complainants had filed complaints with the federal Equal Employment Opportunity Commission (EEOC) against the City of Honolulu (City) alleging discrimination by the Ethics Commission (ETHICS-HON) (Complaints). The Complainants had provided copies of their Complaints to the Honolulu Mayor's Office, (MAYOR-HON), apparently for information purposes only, since MAYOR-HON was not the subject of EEOC's investigation. MAYOR-HON denied Requester's request under Part II of the UIPA for access to copies of the Complaints, and Requester appealed to OIP.

MAYOR-HON asserted that it was authorized to withhold the records under the exceptions set forth in section 92F-13(2), (3), (4), HRS. OIP found that the exception in section 92F-13(2), HRS, did not apply because the Complaints did not qualify for this exemption that only applies to records that are not discoverable under judicially recognized privileges. OIP found that the "frustration of a legitimate government function" exception in section 92F-13(3), HRS, did not apply because, as OIP opined, disclosure of the Complaints would not frustrate any investigative functions when the Complaints were already provided to or maintained by the subject of the investigation, namely the City. Also, OIP found that the exemption in section 92F-13(4), HRS, which covers records protected by state or federal statute, did not apply because the federal regulations cited by MAYOR-HON required only the EEOC, not MAYOR-HON, to keep records confidential. Finally, OIP found that the Complainants had waived their privacy interest in information in the Complaints that they had already intentionally disclosed to the news media, and also that other general information in the Complaints was public because the public interest outweighed the Complainants' privacy interest.

Thus, OIP opined that none of the UIPA's exceptions to public disclosure applied to allow MAYOR-HON to withhold the Complaints in their entireties. Consequently, MAYOR-HON is required to publicly disclose the Complaints after redacting the passwords provided by EEOC for the City's use when submitting its responses to the EEOC charges into EEOC's online system, and the Complainants' home addresses, telephone numbers, and birthdates.

Request for Proposal Information Designated as Confidential

UIPA Memo 19-7

The Department of Taxation (TAX) issued a request for proposals for a tax modernization project. After the proposals were opened and an award was made, the winning proposer made a record request for Revenue Solutions Inc.'s (RSI) proposal (Proposal) and related documents. RSI claimed that most of the Proposal contained confidential commercial and financial information (confidential business information, or CBI), and the Department of the Attorney General (AG), on behalf of its client TAX, prepared a version of the Proposal with fewer proposed redactions for disclosure. OIP was thereafter asked to review the unredacted Proposal and the AG's proposed redactions *in camera*.

The AG had proposed redacting all of what it deemed "résumé information," but OIP found that names and résumé information of RSI employees within the Proposal must be public as OIP has previously found that the UIPA's privacy and frustration exceptions at section 92F-13(1) and (3), HRS, do not protect this type of information in proposals for State contracts. Direct telephone numbers and email addresses of RSI employees and names and contact information of personal references, however, may be withheld in order to avoid the frustration of a legitimate government function under section 92F-13(3), HRS.

Regarding the CBI claims, prior OIP opinions have established that, in order for agencies to withhold CBI in records maintained by the agency, the agency itself must claim that disclosure would cause the frustration of a legitimate government function. In such cases, the frustration would typically be the inability to obtain accurate information in the future, or that disclosure would create unfair advantages in a competitive market. Accordingly, OIP found that all portions of the Proposal that do not have proposed redactions by the AG, and the entire Best and Final Offer, are public, as TAX is not invoking any exception to disclosure of those portions.

For the portions of the Proposal for which the AG proposed redactions, OIP found TAX again did not claim frustration of any government function if the information is disclosed. There was also no argument as to how disclosure of the information proposed for redaction would cause substantial competitive harm to RSI. The redacted information was mostly narrative, and some of it is in the public domain, so had been improperly proposed for redaction. It did not contain the type of detailed proprietary information that may be withheld under section 92F-13(3), HRS, even assuming TAX had made a frustration argument. Finally, OIP advised that detailed financial information may be redacted under the frustration exception in accordance with previous OIP formal opinions, but OIP was not provided with any detailed financial information for *in camera* review. Consequently, OIP concluded that the Proposal must be disclosed without redaction, except for the contact information of references and employees, and any detailed financial information which OIP was not given for *in camera* review.

Emails Containing Attorney-Client Privileged Information

UIPA Memo 19-8

The Maui Planning Commission (PLAN-M) partially denied a request for records to or from PLAN-M related to a petition filed by another individual to adopt a new rule requiring special management area (SMA) use permit applicants to disclose impacts of agricultural burning on the property and how the proposed use would affect or be affected by such use.

PLAN-M claimed the deliberative process privilege (DPP) applied to all the records being

withheld, and that they thus fell under the UIPA's exception to disclosure for information which, if disclosed, would frustrate a legitimate government function under HRS § 92F-13(3). The DPP, which is followed in other jurisdictions, allows government agencies to withhold predecisional and deliberative internal records. OIP had long recognized the DPP as a valid reason to withhold records under section 92F-13(3), HRS. Subsequent to the filing of this appeal, however, the Hawaii Supreme Court, in *Peer News LLC v. City and County of Honolulu*, 143 Haw. 472 (Dec. 21, 2018) (*Peer News*), invalidated the use of DPP under the UIPA to withhold certain internal records on the basis that "decision-making" was not a government function that fell within the frustration exception. OIP informed CORP CNSL-M of the *Peer News* decision and allowed time for PLAN-M to amend its position based on the Court's decision. In response, CORP CNSL-M informed OIP and Requester that PLAN-M would make available those records for which it had previously asserted that only the DPP applied.

For those records that were also withheld under the attorney-client privilege (*see* HRS § 92F-13(3) and (4)), the only remaining issue was whether they were properly withheld under the attorney-client privilege. Based on OIP's *in camera* review, OIP found the communications between PLAN-M employees and PLAN-M's attorneys at CORP CNSL-M, which PLAN-M asserted contain information covered by the attorney-client privilege, do indeed contain information covered by the attorney-client privilege and thus may be withheld from disclosure under section 92F-13(3) and (4), HRS, except for a portion of one email that OIP found should be disclosed.

Sufficiency of Search for Records

UIPA Memo 19-9

A law firm (Requester) made a request to the City and County of Honolulu Department of Facility Maintenance (MAINT-HON) for public records pertaining to any alleged or investigated law violations regarding a particular property. MAINT-HON initially denied access. MAINT-HON revised its position after this appeal was filed, conducted a search, and found four responsive documents. Requester questioned whether all responsive documents were provided. Based on the information provided by MAINT-HON, OIP found it does appear that appropriate staff conducted a reasonable search for responsive records in the locations where any responsive records were mostly likely to have been found. OIP thus concluded that MAINT-HON's search for records was reasonable, and its ultimate response providing all four responsive documents was proper under the UIPA.

Ombudsman Investigation File

UIPA Memo 19-11

Requester sought "any and all information, notes, final reports, conversations . . ., and any other . . . information" regarding his complaint to the Ombudsman and the Ombudsman's investigation of that complaint. In support of its denial of access to the requested case file, the Ombudsman argued that it was required by statute to maintain secrecy as to its investigations. OIP concluded that the UIPA allowed the Ombudsman to withhold the requested case files to maintain secrecy regarding its investigations as required by statute. HRS §§ 92F-13(4) and -22(5) (2012); HRS § 96-9(b) (2012).

Attorney-Client Privilege and Reasonable Search

UIPA Memo 19-12

OIP concluded that emails and summaries/tables between the County of Kauai's Mayor, including his policy team (MAYOR-K), and the Kauai County Attorney and a Deputy County Attorney, relating to the rendering of legal services for a County Project, were not required to be disclosed because the records contained information protected by the attorney-client privilege.

Requester also sought access to other documents referenced in the records disclosed by MAYOR-K to Requester or by another County agency, which MAYOR-K did not disclose on the basis that it did not maintain them. After reviewing the steps taken to locate the records, OIP concluded that MAYOR-K had conducted a reasonable search for those records in its office and could not locate them. An agency is not required to contact other agencies to search their records in responding to a record request. OIP therefore concluded that MAYOR-K's response that it did not maintain those records was proper.

Investigation Report Denied in Its Entirety

UIPA Memo 19-13

OIP concluded that during an investigation, the Department of Agriculture (DOA) could properly withhold all records of the investigation if: a) a law enforcement proceeding is pending or prospective, and b) disclosure of the records could reasonably be expected to cause articulable harm. However, once the investigations have concluded, Requester may make a new request for the closed investigation files. If so, then DOA may redact certain personal information falling within the privacy and frustration exceptions, such as the identity of witnesses and complainants in investigative reports, home addresses, direct work telephone numbers and email addresses, social security numbers, ethnicity, and dates of birth. and membership cards related to that applicant.

Financial Disclosure Statements

UIPA Memo 19-14

Requester made a UIPA request to the City and County of Honolulu Ethics Commission (Ethics Commission) for all financial disclosure forms or related documents filed by its former Executive Director and Legal Counsel to the Ethics Commission (Ethics Director) from 2000 to the request date. The Ethics Commission responded by denying the request based on section 3-8.4 of the Revised Ordinances of Honolulu (ROH), which provides that the financial disclosure statements for specified officials are public, and all other financial disclosure forms required by the City are confidential.

OIP agreed with the City's determination that the Ethics Director's financial disclosure forms were required by the ROH to be confidential by law, which was consistent with the State's determination for its equivalent ethics official.

OIP further concluded that although a county ordinance providing confidentiality for a record is not a "state or federal law," Article XIV of the Constitution of the State of Hawaii (Constitution) is a state law protecting records from disclosure for the purpose of section 92F-13(4), HRS. Citing OIP Opinion Letter Number 95-14, OIP concluded that Article XIV "makes confidential only the financial information disclosed by those making confidential financial disclosures," and did not apply to other associated information such as the names of individual filers and their dates of filing. Thus, based on Article XIV, the financial information in financial disclosure statements was properly withheld under the UIPA's exception for records protected by law. HRS § 92F-13(4) (2012). Of the remaining information, the names of any dependent children were properly withheld under the UIPA's privacy

exception. HRS § 92F 13(1) (2012). The filer's name, position title, and employing agency, the identity of the filer's agency personnel officer, the government salary range information included in the form, and the date of filing did not fall under an exception to the UIPA and thus must be disclosed. HRS §§ 92F-12(a)(14) and -13 (2012).

Judges' Pension Information

UIPA Memo 19-15

Requester sought records relating to two judges' "IRA's and pensions with financial institutions or national banking associations." The Employees' Retirement System (ERS) denied access and advised Requester that it did not maintain records of the judges' accounts with financial institutions or national banking associations, and the records that it did maintain—estimates of pension eligibility for one judge—were protected from disclosure under the UIPA.

OIP concluded that ERS does not offer individual retirement accounts, so ERS was not required to search for records of such accounts in order to determine that it did not maintain them. ERS's response that it did not maintain the requested records (with the exception of the estimates of service retirement benefits for one judge) was proper under the UIPA. ERS also properly withheld that judge's estimates of service retirement benefits. Because the judge had a significant privacy interest in the records that was not outweighed by the public interest in disclosure, they fell under the UIPA's privacy exception. *See* HRS §§ 92F-13(1) (2012) and -14(a) and (b)(6) (2012).

Oaths of Office

UIPA Memo 19-16

Requester asked the Judiciary for Judiciary staff attorneys' oaths of office. The Judiciary advised Requester that it did not maintain responsive records that were subject to the UIPA because the oaths of office were non-administrative court records, but it nonetheless offered to provide certified copies of the oaths to Requester subject to its court fee schedule, for a total cost of $24.00 to retrieve, copy, and certify the three oaths Requester sought.

Requester also asked the House Clerk for the oaths of office for three members of the House of Representatives and five members of the Senate. The House Clerk advised Requester that no responsive records existed, because the House Clerk did not keep records of Senators and does not issue written and signed copies of the oath of office that is orally administered to House members.

OIP concluded that the UIPA does not require an agency to provide certified copies of records it maintains, so even assuming for the sake of argument that the attorney oaths of office would otherwise be "government records" subject to the UIPA, the Judiciary properly responded that for the purpose of the UIPA it could not provide the certified copies Requester sought because it did not maintain them. *See* HRS § 92F-11 (2012). OIP further concluded that the House Clerk was not required to perform a search for records because he had actual knowledge that no responsive records existed, and he responded properly under the UIPA by advising Requester that no responsive records existed. *See* HRS § 92F-11.

Sunshine Law Informal Opinions:

Sunshine Law informal opinions are written to resolve investigations and requests for advisory opinions. OIP wrote four informal opinions concerning the Sunshine Law in FY 2019, as summarized below.

Faculty Hiring Committees

Sunshine Memo 19-1

Requester asked for an investigation into whether ad hoc hiring committees formed by the administration of the University of Hawaii (UH) to advise administrators regarding faculty or staff hiring decisions are boards subject to the Sunshine Law.

OIP concluded that an ad hoc hiring committee called together by an administrator to review applications and recommend potential candidates to that administrator is not a group created by constitution, statute, rule, or executive order, and thus such hiring committees are not "boards" subject to the Sunshine Law. HRS § 92-2(1) (2012). The circumstances in this case further showed that the hiring committees were not acting in the place of the UH Board of Regents through a delegation of that board's powers and duties, so the hiring committees were not subject to the Sunshine Law as proxies for a Sunshine Law board. *See* OIP Op. Ltr. No. 08-02 at 9 (determining that a group may be subject to the Sunshine Law where it is acting in the place of a board that is subject to the Sunshine Law through a delegation of that board's powers and duties).

Stadium Authority's Executive Session

Sunshine Memo 19-2

At its meeting on November 29, 2018, the Stadium Authority (Authority) went into executive session to consider a proposed consultant contract (Proposed Contract) and announced that the purpose of its executive session was to "consult with [its] attorney on questions and issues pertaining to [its] powers, duties, privileges, immunities, and liabilities." HRS § 92-5(a)(4) (2012). The Authority explained that the Deputy Attorney General assigned to the Board was present during the Board's executive meeting for consultation. OIP found that the Stadium's consideration of the Proposed Contract in executive session was limited to hearing a report from an employee of the Department of Accounting and General Services (DAGS) and there was no discussion by Authority members and its Deputy Attorney General. In the absence of any discussion by Authority members and its legal counsel about the Proposed Contract, OIP concluded that the executive session did not qualify for the authorized purpose of attorney consultation under section 92-5(a)(4), HRS.

The Authority's response to the appeal also asserted that "discussions of contracts in open session that haven't been fully executed would frustrate governmental processes." However, the Authority's response did not cite to any of the authorized purposes in section 92-5(a), HRS, or any other law, that would possibly apply to allow a closed meeting based upon this asserted justification. Because the Authority's consideration of the Proposed Contract, which was limited to hearing a report from a DAGS employee, did not qualify for any of the authorized purposes to hold an executive session set forth in section 92-5(a), HRS, OIP concluded that the Authority's executive session to consider the Proposed Contract was improper under the Sunshine Law.

Executive Meeting

Sunshine Memo 19-3

A member of the public (Requester) asked whether the Honolulu Authority for Rapid Transit (HART) violated the Sunshine Law by entering an executive meeting to discuss with its attorneys a presentation made by the State Legislative Auditor (Auditor) during the public portion of a meeting. The Auditor's presentation was listed as item VII on HART's public meeting agenda.

The Sunshine Law requires generally that all board meetings shall be open to the public, and persons shall be permitted to attend and be given the opportunity to provide written and oral testimony, unless the meeting is closed pursuant to sections 92-4 and 92-5, HRS. HRS § 92-3 (2012). Section 92-5(a), HRS, sets forth the purposes for which a board subject to the Sunshine Law may enter into an executive meeting closed to the public. Requester alleged that the reason for HART's executive meeting was not in accordance with any of the purposes in section 92-5(a), HRS. HART had invoked section 92-5(a)(4), HRS, which allows a board to enter into executive meeting to "consult with the board's attorney on questions and issues pertaining to the board's powers, duties, privileges, immunities, and liabilities[.]"

Based on OIP's *in camera* review of the executive meeting minutes, OIP found that HART members did discuss their legal concerns that were raised during the Auditor's presentation. The executive meeting minutes also showed there were two deputies present from City and County of Honolulu Department of the Corporation Counsel, and one of them did speak directly to HART regarding legal issues discussed by members. OIP found that HART was "consult[ing] with [its] attorney on "questions and issues pertaining to [its] powers, duties, privileges, immunities, and liabilities[.]" Thus, OIP concluded that HART's discussion of agenda item VII in executive meeting was proper under section 92-5(a)(4), HRS, and not in violation of the Sunshine Law's open meeting requirement.

Because some of HART's high level employees and board staff were also present in the executive meeting, OIP also provided guidance to HART regarding the presence of nonmembers of a board during executive meetings and how to preserve the executive character of executive meeting discussions. OIP was not asked to and did not draw a conclusion as to whether any non-attorney attendee's presence in HART's executive meeting was unnecessary or may have altered the executive character of the meeting.

Improper Discussion of Matter Not on Filed Agenda and Failure to Allow Public Testimony

Sunshine Memo 19-4

A member of the public (Requester) asked for an investigation into whether the Land Use Commission (LUC) violated the Sunshine Law by improperly discussing in executive session an item not on the agenda of its public meeting on November 14, 2018 (Meeting) and not allowing public testimony on the executive matter. After the opening of this appeal, Requester also complained that the LUC did not have the requisite number of members present to vote to amend its agenda to add the executive session item.

The LUC's response to the appeal explained that in the executive session, it discussed subpoenas with its attorney, which was not itemized on the agenda as filed. Thus, OIP concluded that the LUC improperly discussed an item not on its agenda in violation of the Sunshine Law. Further, OIP found that the LUC could not have voted to amend its agenda to add this item because it did

not have enough members present at the Meeting to amend its agenda to add an item. Assuming the LUC intended to amend its agenda to add a discussion of subpoenas, the minutes and transcript of the Meeting show it did not actually vote to do so. *See* HRS § 92-7 (Supp. 2018).

While OIP need not reach these issues after finding there were not enough members to vote to add an agenda item, OIP noted that boards may not add an item to a filed agenda if the item is of reasonably major importance affecting a significant number of persons. HRS § 92-7(d). Additionally, a discussion of the terms "Waikoloa" or "subpoenas" may have made the agenda too broad to allow a member of the public to decide whether to participate in the meeting.

Although the LUC should not have discussed an item not on its agenda, given that the LUC was evidently treating the discussion of subpoenas with its attorney in executive session as an agenda item, it should have allowed testimony on that item as would be required for any agenda item, whether or not discussed in executive session. *See* HRS § 92-3 (2012); OIP Op. Ltr. No. 15-02.

General Legal Guidance and Assistance

To expeditiously resolve most inquiries from agencies or the public, OIP provides informal, general legal guidance, usually on the same day, through its "Attorney of the Day" (AOD) service. AOD advice is not necessarily official policy or binding upon OIP, as the full facts may not be available, the other parties' positions are not provided, complete legal research 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 2019.

UIPA Guidance:

Email Addresses of Taxpayers

A State agency asked whether email addresses of taxpayers are protected by the UIPA's privacy exception, section 92F-13(1), HRS. OIP advised that it previously found in OIP Opinion Letter Number 7-11 that personal contact information such as personal email addresses can be withheld under the privacy exception. The privacy exception only applies to natural persons.

License Records

A State agency asked whether certain information contained in licenses is required to be disclosed to the public. OIP advised that section 92F-12(a)(13), HRS, of the UIPA requires disclosure of "[r]osters of persons holding licenses or permits granted by an agency that may include name, business address, type of license held, and status of the license." Thus, the licensee's name, license type, and license expiration and start dates are required to be disclosed to the public upon request. General business addresses, phone numbers and email addresses are also required to be disclosed; however, personal contact information, such as licensee's home address and personal cell number and personal email address, may be withheld under section 92F-13(1), HRS, and **direct** business contact information may be withheld under section 92F-13(3), HRS. Further, an agency may withhold a licensee's gender, ethnicity, and age under section 92F-13(1), HRS.

Records of Gross Liquor Sales Must Be Disclosed

Liquor licensees must annually report their Gross Liquor Sales (GLS) to the Liquor Commission. The Liquor Commission received a request for disclosure of the GLS for every licensee in the county and was concerned that it will be disclosing confidential financial information.

OIP concluded that the records should be disclosed to the requester. There are many factors which go into the setting of the license fee for each individual liquor licensee and there is a clear public interest in knowing if licensees are paying the correct fees.

Agency Asking Requester to Fill Out Request Form

An agency received an email requesting records and planned to ask the requester to fill out a Request to Access a Government Record form so the requester would be aware of the fees involved. The agency also planned to send an Acknowledgment to Requester form in response. The agency asked for OIP's feedback on its proposed response.

OIP advised that the email request the agency had received was already considered a formal request, and that requesters were not required to use the Request to Access a Government Record form. OIP also advised the agency that the Notice to Requester (NTR) is the form that may be used to respond to a record request and indicate whether the agency is providing the requested records, what the estimated fees are, and related information. The Acknowledgment to Requester form is a preliminary response used only when unusual circumstances allow an agency to extend its time to respond, and even then, the agency must still send a NTR by the extended response date.

Request for Records for Commercial Purpose

An agency received a request for information the agency believed would be used to build a database or mailing list. The agency asked whether it was required to provide the information given the anticipated commercial use by the requester. OIP advised that the way requested records will be used, including a commercial use, is not a basis to deny a request.

Incremental Disclosure of Government Records

An attorney sought clarification from OIP about the timing of incremental disclosure of government records according to OIP's model form "Notice to Requester" (NTR). Under the heading "Method and Timing of Disclosure," the NTR states that government records "must be disclosed within 5 business days after this notice or after receipt of any prepayment required. HAR § 2-71-13(c)." However, under the heading "For incremental disclosures," the NTR states that "each subsequent increment will be disclosed within 20 business days after" either disclosure of a "prior increment" or receipt of an incremental prepayment.

For incremental disclosure, OIP clarified that 5 business days is the time limit for the **first** increment of records to be disclosed after prepayment. OIP noted that the NTR specifically states that each **subsequent** increment (after the first increment) shall be disclosed within 20 business days after a prior increment or prepayment.

***Sunshine Law Guidance*:**

"Skipping" an Agenda Item

A City and County of Honolulu agency alleged that a board chair was "casually skipping" an agenda item at a board meeting. It asked whether this is a Sunshine Law violation.

OIP advised that the Sunshine Law does not include provisions on what to do if a board chair "skips" an agenda item. OIP would not find it a violation of the Sunshine Law if a board "skips" or officially cancels or defers an agenda item before it begins discussing the item. The issue of how to defer or cancel an agenda item would instead be governed by the board's own statutes or procedural rules, if it has any.

However, OIP has advised that once a board takes up an agenda item (*i.e.*, once it begins to take testimony or discuss the item), it would have to let all testifiers have the opportunity to present their testimony before deferring the matter. Further, OIP would not recommend that a board "skip" an agenda item without any type of notice or announcement to the public. OIP referenced OIP Opinion Letter Number 05-07 at 4, which states that section 92-7(d), HRS, limits a board's ability to change its agenda "by adding items thereto," but does not restrict a board from changing its agenda by removing items.

A board chair or other person charged with creating the agenda may cancel an individual item from the agenda. OIP recommends that a board

do so by noting the cancellation on a copy of the agenda posted outside the meeting room and announcing the cancellation of the item at the beginning of the meeting without opening the item for discussion. If the item is canceled from the board's agenda, the board must refrain from any discussion of the item beyond the announcement of its cancellation and, if appropriate, provide an announcement of when the item is expected to be rescheduled.

Permitted Interaction by Two Board Members and Serial Communications

A State board member asked whether a discussion among two board members and a State legislator concerning board business, during which no commitment to vote was either sought or made, is a violation of the Sunshine Law.

Based on the facts provided, OIP advised that the discussion was permissible under the Sunshine Law, as the two board members did not constitute a quorum of their board and no commitment to vote had been made or sought. Section 92-2.5(a), HRS, states that "[t]wo members of a board may discuss between themselves matters relating to official board business to enable them to perform their duties faithfully, as long as no commitment to vote is made or sought." (A person who is not a member of the board may be present, as that person's discussion with board members is not regulated by the Sunshine Law.) OIP did, however, caution the board to avoid improper serial communications between board members. OIP cited OIP Opinion Letter Number 05-15, which advises that a board member may not use the "permitted interaction" under section 92-2.5, HRS, to discuss board business with another board member, then use the same permitted interaction to discuss the same board business with other board members through a series of private one-on-one discussions.

County Task Force Subject to Sunshine Law

A member of the public asked if a county task force was required to comply with the Sunshine Law. Section 92-2, HRS, defines a "board" as "any agency, board, commission, authority, or committee of the State or its political subdivisions which is created by constitution, statute, rule, or executive order," with supervision, control, jurisdiction, or advisory power over specific matters, and is required to hold meetings and take official actions.

OIP has said that section must be read to refer to the equivalent county authority such as "charter, ordinance, rule or executive order." OIP Op. Ltr. 08-02. Because the task force was created by a county ordinance and met the other elements of section 92-2, OIP advised that the county task force appeared to be a "board" subject to the Sunshine Law.

Discussing Agenda Items While Waiting for Quorum

A board asked OIP whether it would be allowed to start a meeting without quorum if the first part of the agenda was updates, and the board would not take up any agenda item requiring a vote until quorum had been achieved.

OIP responded that board members waiting for quorum should not begin discussing any part of the agenda before the meeting had officially begun, because that would be a discussion of board business outside a meeting, even if the board waited until after reaching quorum to actually move or vote on anything. However, if a board is unable to reach quorum within a reasonable period of time and thus has to cancel its meeting, a permitted interaction allows the members present to hear from members of the public wanting to testify or guests invited to make a presentation,

with the caveat that the board members cannot discuss the issues being testified or presented on. The board can discuss the testimony or presentations with the other board members at the next actual meeting, at which time they can be incorporated into that meeting's minutes. HRS § 92-2.5(d).

Un-canceling a Meeting When Quorum Is Achieved After All

A board asked OIP whether, after a meeting has been canceled for lack of quorum and the members present have begun hearing public testimony and presentations under § 92-2.5(d), the meeting can be "un-canceled" if quorum is subsequently gained, and what the procedural requirements would be for doing so.

OIP advised that it was not clear whether the Sunshine Law would allow a meeting that had been canceled for lack of quorum to be un-canceled if quorum was subsequently gained, and OIP has not yet issued a formal opinion on this question. There would be a strong argument that once a meeting was canceled, it could not then be held without filing a fresh notice; but the board could argue to the contrary that in appropriate factual circumstances, a boards' members were covered by the permitted interaction when they began receiving testimony on an agenda item before actually reaching quorum and calling the meeting to order. To support such an argument, the factual circumstances would need to show that the meeting's cancellation had not been so clearly established as to, for instance, lead someone interested in attending the meeting to leave in the belief that no meeting would be held.

When a board believes it may need to cancel a meeting for lack of quorum, either because it has confirmation that no other members are coming or because the length of time it has already waited makes it unreasonable to expect people to wait longer, OIP recommended the following. Rather than immediately proceeding to hear public testimony under the permitted interaction for a canceled meeting, a board hoping to still hold the meeting should make an announcement such as, "We don't have quorum yet, so we're going to wait until 15 minutes past the meeting time, hoping to reach quorum so we can start the meeting. If we still don't have quorum at that time, the meeting will be canceled but we'll still go ahead and take any public testimony at that time, as allowed by a Sunshine Law permitted interaction."

Which Electronic Calendar to Post a Meeting Notice

A state board asked OIP if, under the Sunshine Law, it is required to post its meeting notice not only on the State's electronic calendar but also on the electronic calendar for the county where the board will be meeting.

According to statute, the board shall be advisory to a state agency. Because the board is created by a State statute and has "advisory power over specific matters," the board is, in OIP's opinion, a board of the State and is required to post its notice on the State's electronic calendar. *See* HRS § 92-2 (2012) (defining the term "board"). The board may, but is not required to, post its notice on a county's electronic calendar when the board meeting will be held in a particular county.

Education, Open Data, and Communications

Education

Each year, OIP makes presentations and provides training on the UIPA and the Sunshine Law. OIP conducts this outreach effort to inform the public of its rights and to assist government agencies and boards in understanding and complying with the UIPA and the Sunshine Law.

Since FY 2011, OIP has increased the number of training materials that are freely available on its website at **oip.hawaii.gov** on a 24/7 basis, including basic PowerPoint training and Quick Reviews regarding the UIPA and Sunshine Law, which are also accessible by members of the public with disabilities. In FY 2019, OIP had a total of 81 training materials and forms on its website, and produced 4 new 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 11 in-person training sessions in FY 2019. One of the training sessions was an accredited CLE seminar, which was 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** and summarizes in year-end reports posted on OIP's website.

UIPA and Sunshine Law Training Sessions

OIP provided 11 training sessions in FY 2019 on the UIPA and Sunshine Law for the following agencies and groups:

- ➢7/18/18 Attorney General (Sunshine Law)
- ➢7/24/18 Department of Land & Natural Resources (Sunshine Law)
- ➢8/30/18 Hawaii Tourism Authority, Board of Directors (Sunshine Law & UIPA)
- ➢9/27/18 Department of Human Resources Development (UIPA)
- ➢10/2/18 Citizens Jury Presentation (Sunshine Law & UIPA)
- ➢11/14/18 Hawaii State Senate (UIPA)
- ➢12/6/18 Hawaii Health Systems Corporation (UIPA)
- ➢1/14/19 Office of the Lieutenant Governor (UIPA)
- ➢1/15/19 Office of the Lieutenant Governor (UIPA)
- ➢5/20/19 Department of Business, Economic Development and Tourism (Sunshine Law & UIPA)
- ➢6/29/19 Neighborhood Commission Office, City & County of Honolulu (Sunshine Law & UIPA)

Online Training Materials, Model Forms, and Reports

OIP's online training materials, reports, and model forms help to inform the public and government agencies about the UIPA, the Sunshine Law, and the work of OIP. The online training has reduced the need for in-person basic training on the Sunshine Law and enabled OIP to instead develop additional or more specialized training materials for 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.

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

OIP's publications include the Sunshine Law and UIPA training guides and presentations described below, as well as the Guide to Appeals to the Office of Information Practices, which explains the administrative rules to file an appeal to OIP when requests for public records are denied by agencies or when the Sunshine Law is allegedly violated by boards. OIP also prepares Quick Reviews and other materials, which provide additional guidance on specific aspects of the UIPA or Sunshine Law.

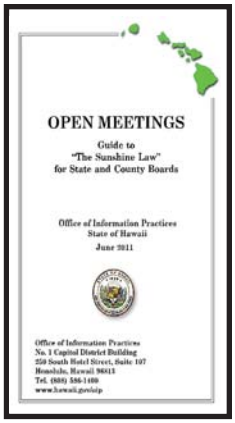
To help the agencies and the public, OIP has created model forms that may be used at various points in the UIPA or Sunshine Law processes.

In FY 2019, OIP released its **Report of the Master UIPA Record Request Year-End Log for FY 2018**, which is summarized later in the Open Data section, beginning on page 53. 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 57.

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 have freed OIP's staff to fulfill many other duties.

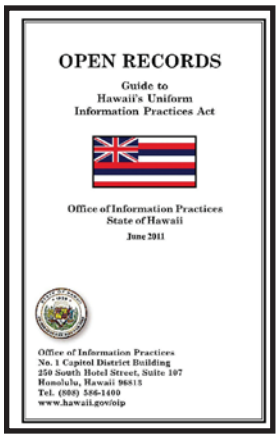
OIP has also created various Quick Reviews and more specific guidance for Sunshine Law boards, which are posted on OIP's website and cover topics such as whom board members can talk to and when; meeting notice and minutes

requirements; and how a Sunshine Law board can address legislative issues.

UIPA Guides and Video

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

The UIPA Guide navigates agencies through the process of responding to a record request, such as determining whether a record falls under the UIPA, providing the required response to the request, analyzing whether any exception to disclosure applies, and explaining how the agency may review and segregate the record. The UIPA Guide includes answers to a number of frequently asked questions.


OPEN RECORDS

Guide to Hawaii's Uniform Information Practices Act

Office of Information Practices
State of Hawaii
June 2011

Office of Information Practices
No. 1 Capitol District Building
250 South Hotel Street, Suite 107
Honolulu, Hawaii 96813
Tel. (808) 586-1400
www.hawaii.gov/oip

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. While use of these forms is not required, they help agencies and the public to remember the deadlines and to provide information that is required by the UIPA.

To assist members of the public in making UIPA record requests to agencies, OIP developed a **"Request to Access a Government Record"** form that provides all of the basic information an agency requires to respond to a request. To assist agencies in properly following the procedures set forth in OIP's rules for responding to record requests, OIP has forms for the **"Notice to Requester"** or, where extenuating circumstances are present, the **"Acknowledgment to Requester."**


REQUEST TO ACCESS A GOVERNMENT RECORD

This is a model form that may be used by a Requester to provide sufficient information for an agency to process a record request. Although the Requester is not required to use this form or to provide any personal information, the agency needs enough information to contact the Requester with questions about this request or to provide its response. This request may not be processed if the agency has insufficient information or is unable to contact the Requester.

DATE: _____

TO: _____
Agency that Maintains the Government Record

_____
Agency's Contact Information

FROM: _____
Requester's Name or Alias

_____
Requester's Contact Information

AS THE REQUESTER, I WOULD LIKE THE FOLLOWING GOVERNMENT RECORD:

Describe the government record as specifically as possible so that it can be located. Try to provide a record name, subject matter, date, location, purpose, or names of persons to whom the record refers, or other information that could help the agency identify the record. A complete and accurate description of the requested government record will prevent delays in locating the record. Attach additional pages if needed.

I WOULD LIKE: (Please check one or more of the options below, as applicable)

☐ **To inspect the government record**

☐ **A copy of the government record:** (Please check only one of the options below.) See the next page for information about fees and costs that you may be required to pay for agency services to process your record request. Note: Copying and transmission charges may also apply to certain options.

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

To assist agencies in complying with the Sunshine Law, OIP provides a **"Public Meeting Notice Checklist."**

OIP has created a **"Request for OIP's Concurrence for a Limited Meeting"** form for the convenience of boards seeking OIP's concurrence to hold a limited meeting, which will be closed to the public because the meeting location is dangerous to health or safety, or to conduct an on-site inspection because public attendance is not practicable. Before holding a limited meeting, a board must, among other things, obtain the concurrence of OIP's director that it is necessary to hold the meeting at a location where public attendance is not practicable.

A **"Notice of Continuance of Meeting"** form can be used when a convened meeting must be continued past its originally noticed date and time. A Quick Review provides more specific guidance and practice tips for meeting continuances.

All of these forms, and more, may be obtained online at **oip.hawaii.gov**.

Open Data

Abbreviations used throughout this section:
Log - UIPA Record Request Log
Master Log - Master UIPA Record Request Log, posted semiannually and annually at data.hawaii.gov
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 2019, OIP released its year-end reports based on information posted by 185 state and 86 county agencies on the Master UIPA Record Request Year-End Log for FY 2018 at **data.hawaii.gov**. While separate reports were created for the state versus county agencies, the collected data showed overall that the typical record request was granted in whole or in part and was completed in less than ten work days, and the typical requester paid nothing for fees and costs.

The Log reports for FY 2019 will be available in FY 2020 and posted on the Reports page at **oip.hawaii.gov**.

State Agencies' UIPA Record Request Log Results

The 185 State agencies that reported Log results in FY 2018 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

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DAVID Y. IGE
GOVERNOR

CHERYL KAKAZU PARK
DIRECTOR

OIP'S REPORT OF STATE AGENCIES' UIPA RECORD REQUEST YEAR-END LOGS for FY 2016*
(For record requests received from July 1, 2015 through June 30, 2016)

The Hawaii Office of Information Practices ("OIP") has prepared this report based on information posted at data.hawaii.gov on the Master UIPA Record Request Year-End Log for FY 2016 ("Master Log") by 193 state agencies[1] from all Executive Branch departments, the Governor's Office, the Lt. Governor's Office, the Legislature, the Judiciary, and independent agencies, such as the Office of Hawaiian Affairs, the University of Hawaii, and the Oahu Metropolitan Planning Organization.

This is the third year that most of the state agencies have used the UIPA Record Request Log ("Log"), and the state agencies appear to have improved their data collection, particularly regarding the number of hours they incurred for search, review, and segregation. OIP reviewed

the Oahu Metropolitan Planning Organization. Overall, formal UIPA record requests constituted 0.5% of the estimated 481,714 total formal and routine record requests that state agencies received in FY 2018. Excluding one agency whose results would have skewed the entire report, 184 agencies reported receiving 2,404 formal written requests requiring a response under the UIPA, of which all but 39 were completed in FY 2018. Of the 2,365 completed cases, 76% were granted in full or in part, and 10% were denied in full. In 13% 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 eight work days, on average, to complete a typical or personal record request (2,145 total completed requests), which are 91% of all completed cases. In contrast, it took twice as many days, on average, to complete a complex request (220 total completed requests).

In terms of hours worked per request, the average number of search, review and segregation (SRS) hours for a typical record request was 1.42, as compared to 0.35 hours for a personal record request and 4.60 hours for a complex record request. Although the 228 total complex record requests constituted only 10% of all requests, they accounted for 23.0% ($17,181) of the total gross fees and costs incurred by agencies ($74,611) and 13% ($3,328) of the total amount recovered from all requesters ($24,316).

State agencies recovered $24,316 in total fees and costs from 275 requesters, which is 32% of the $74,611 incurred by agencies in gross fees and costs. Fifty-six percent of completed requests were granted $30 fee waivers, while another 4% were granted $60 public interest waivers. No fee waivers were reported in 40% of the cases, which may occur in personal record cases (because no fees may be charged for those) or when requests are denied, abandoned, or withdrawn, or the agency is unable to respond.

Eighty-nine percent (2,090) of all requesters in completed cases paid nothing in fees or costs for their record requests. Of the 275 requesters that paid any fees or costs, 44% paid less than $5.00 and 42% paid between $5.00 and $49.99. Moreover, of the 275 requesters that paid any amount for fees and or costs, at least 30 requesters were reported by the agencies as representing law firms, media, or commercial or non-profit entities. Only two commercial entities comprising 1% of paying requesters paid 61% of the total fees and costs recovered by State agencies from all requesters in FY 2018. For a more detailed breakdown of the fees and costs paid by requesters, see **Figure 16** on page 55.

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

County Agencies' UIPA Record Request Log Results

FY 2018 was the fourth year that the counties participated in the Master Log. OIP prepared a separate report based on information posted by 86 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 0.6% of the estimated 277,595 total formal and routine record requests that agencies received in FY 2018. Eighty-six county agencies reported receiving 1,819 formal written requests requiring a response under the UIPA, of which 1,699 (93%) were completed in FY 2018. Of the 1,699 completed cases, 81% were granted in full or in part, and 6% were denied in full. In 15% 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 7.7 work days, on average, to complete a typical request (total 1,326 completed requests) and about 10.9 days, on average, to complete a personal record request (total 194 completed requests). It took 19 work days, on average, to complete a complex request (total 179 completed requests).

In terms of hours worked per request, the average number of search, review and segregation (SRS) hours for a typical county record request was 1.20, as compared to 1.45 hours for a personal record request and 2.44 hours for a complex record request. Although the 195 total complex record requests received in FY 2018 constituted only 11% of all requests, they accounted for 33.5% ($15,366) of the total gross fees and costs incurred by county agencies ($45,772) and 59.6% ($9,291) of the total amount recovered from all requesters ($15,574).

County agencies recovered $15,574 in total fees and costs from 521 requesters, which is 34% of the $45,772 incurred by agencies in total gross fees and costs. Fifty percent of completed requests were granted $30 fee waivers, while another 1% were granted $60 public interest waivers. No fee waivers were reported in 49% of the cases, which may occur in personal record cases (because no fees may be charged for those) or when requests are denied, abandoned, or withdrawn, or the agency is unable to respond.

Some 69.3% (1,178) of all requesters in completed cases paid nothing in fees or costs for their county record requests. Of the 521 requesters that paid any fees or costs, 17.9% paid less than $5.00 and 61% paid between $5.00 and $49.99. Only 61 requesters (11.7% of all paying requesters) paid $50 or more per request, of whom at least 48 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 56.

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

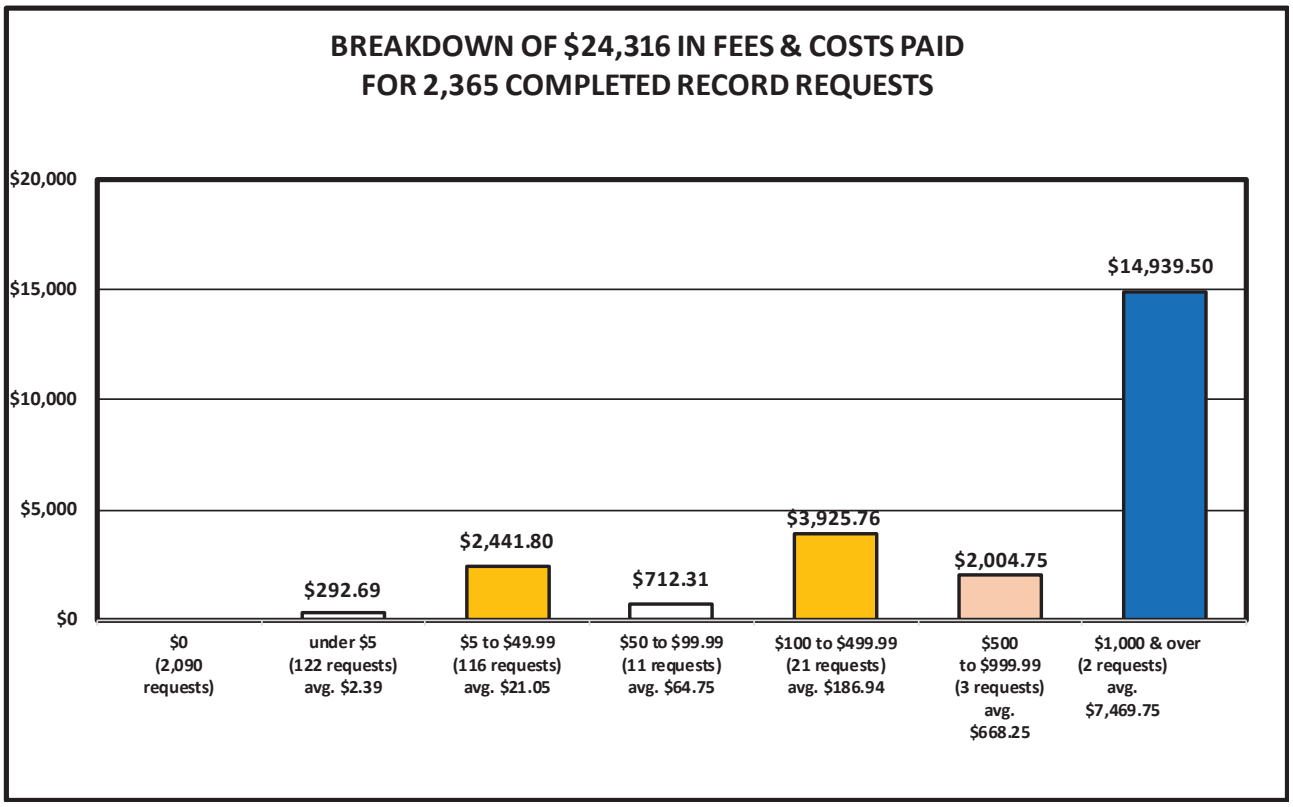


Figure 16

STATE AGENCIES'
UIPA RECORD REQUEST LOG
RESULTS FOR FY 2018

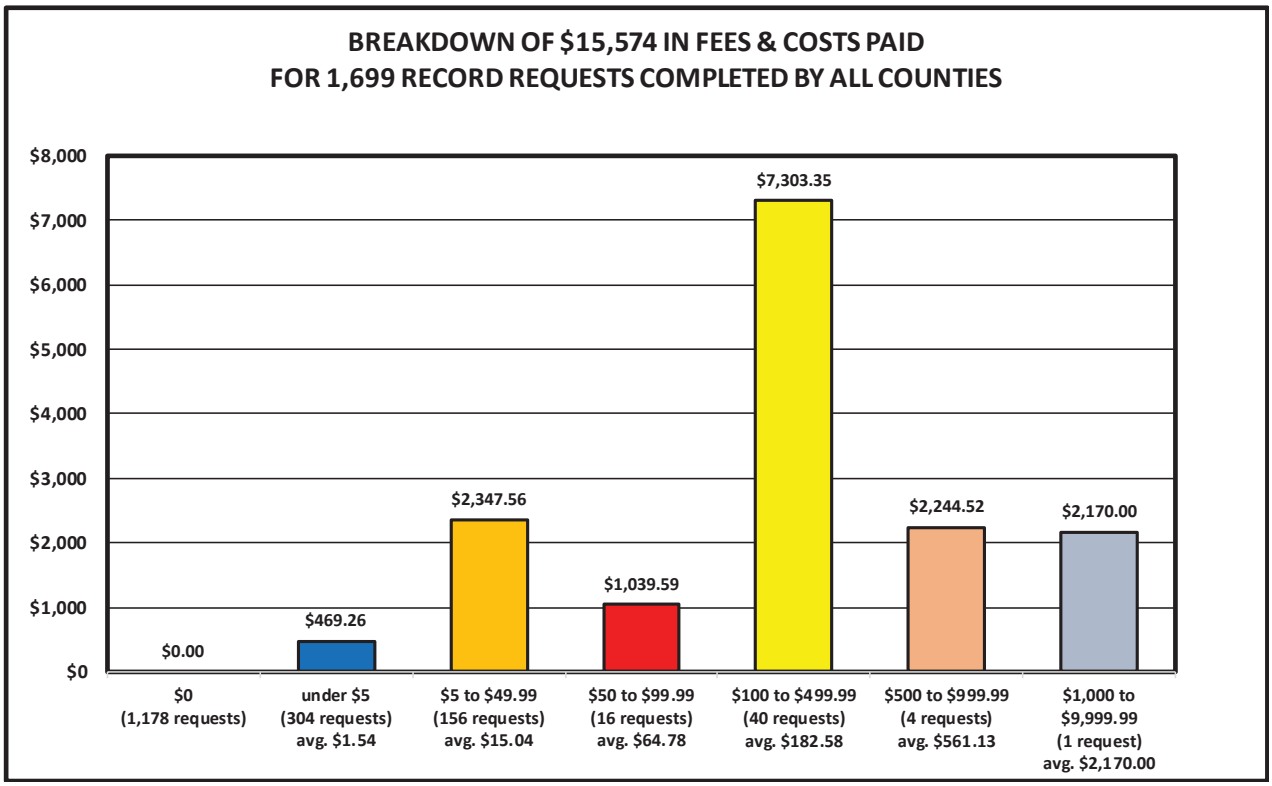


Figure 17

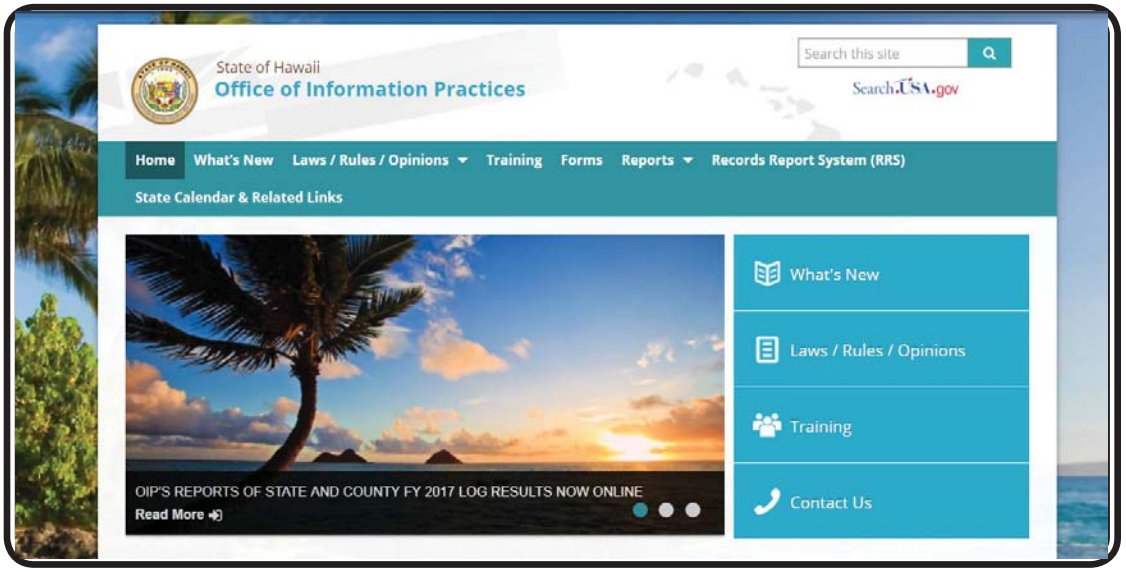
COUNTY AGENCIES'
UIPA RECORD REQUEST LOG
RESULTS FOR FY 2018

Communications

OIP's website at **oip.hawaii.gov** and the *What's New* articles that are emailed and posted on the website are important means of disseminating information on open government issues. In FY 2019, OIP continued its communications to the agencies and public, mainly through 21 *What's New* articles, OIP's Annual Report, summaries of State and County Log Reports, and special reports.

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

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



Website Features

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

"What's New"

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

"Laws/ Rules/ Opinions"

This section features these parts:

➢*UIPA:* the complete text of the UIPA, with quick links to each section; 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 opinions with precedential value; an updated and searchable subject index; a summary of each opinion; and the full text of each formal opinion.

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

➢*Legislative History*: legislative history of recent or significant 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; visit Hawaii's open data site at **data.hawaii.gov;** and see similar sites of cities, states, and other countries. The UIPA Master Record Request Log results by the various departments and agencies are posted on **data.hawaii.gov**.

"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).

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

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

As of FY 2019 year end, state and county agencies reported 29,799 record titles. *See* **Figure 18**.

Records Report System

Status of Records Reported by Agencies: 2019 Update

Jurisdiction	Number of Record Titles
State Executive Agencies	20,758
Legislature	836
Judiciary	1,645
City and County of Honolulu	3,907
County of Hawaii	942
County of Kauai	1,069
County of Maui	642
Total Record Titles	**29,799**

Figure 18

RRS on the Internet

Since October 2004, the RRS has been accessible on the Internet through OIP's website. Agencies may access the system directly to enter and update their records data. Agencies and the public may access the system to view the data and to create various reports. A guide on how to retrieve information and how to create reports is also available on OIP's website at **oip.hawaii.gov.**

Key Information: What's Public

The RRS requires agencies to enter, among other things, public access classifications for their records and to designate the agency official having control over each record. When a government agency receives a request for a record, it can use the RRS to make an initial determination as to public access to the record.

State executive agencies have reported 51% of their records as accessible to the public in their entirety; 18% as unconditionally confidential, with no public access permitted; and 26% in the category "confidential/conditional access." Another 5% are reported as undetermined. *See* **Figure 19**. OIP is not required to, and in most cases has not, reviewed the access classifications.

Records in the category "confidential/conditional access" are (1) accessible after the segregation of confidential information, or (2) accessible only to those persons, or under those conditions, described by specific statutes.

With the October 2012 launch of the State's open data website at **data.hawaii.gov**, the RRS access classification plays an increasingly important role in determining whether actual records held by agencies should be posted onto the internet. To prevent the inadvertent posting of confidential information onto **data.hawaii.gov**, agencies can use the RRS to determine which records contain confidential information and require special care.

Note that the RRS only lists government records by their titles and describes their accessibility. The system does not contain the actual records, which remain with the agency. Accordingly, the record reports on the RRS contain no confidential information and are public in their entirety.

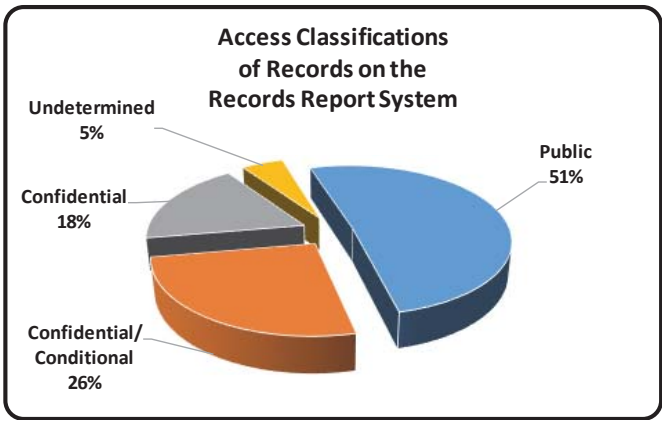


Figure 19

Legislation Report

One of OIP's functions is to make recommendations for legislative changes to the UIPA and Sunshine Law. OIP may draft proposed bills and monitor or testify on legislation to clarify areas that have created confusion in application; to amend provisions that work counter to the legislative mandate of open government; or to provide for more efficient government as balanced against government openness and privacy concerns.

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

Although legislative work is not counted in the total number of cases seeking OIP's assistance, it nevertheless takes staff time to process, monitor, respond to inquiries, and prepare and present testimony. During the 2019 legislative session, OIP reviewed and monitored 185 bills and resolutions affecting government information practices, and testified on 44 of these measures. OIP was most significantly impacted by the following legislation:

▶ **Act 244**, signed on July 2, 2019, enacted **S.B. 335, S.D. 1, H.D.1, C.D. 1**, which amended the Sunshine Law to require public meeting notices to include instructions for requesting an accommodation of disabled individuals, and it also requires boards to retain proof of filing with the Lieutenant Governor or County Clerk. The final C.D. 1 deleted the requirement for electronically posted Sunshine Law meeting notices to be in an "accessible" format. The bill went into effect upon approval, on July 2, 2019. Meeting notices should include the reasonable accommodation language suggested by the Disability Access Communication Board (DCAB) and be filed with the appropriate county clerk's or Lt. Governor's office, with proof of filing retained by the board.

▶ **S.B. 92, S.D. 1, H.D. 1**, which was vetoed by the Governor on July 9, 2019, would have amended chapter 54 to allow a surviving immediate family member to receive a copy of the final investigatory report upon conclusion of all legal proceedings involving murder in the first or second degree or manslaughter.

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

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

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

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

Although litigation cases are not counted in the total number of cases seeking OIP's assistance, they nevertheless take staff time to process and monitor. In FY 2019, OIP monitored 40 litigation cases, of which 9 were new.

Summaries are provided below of the new lawsuits monitored by OIP in FY 2019 as well as updates of selected 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:

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)

As was reported in OIP's 2018 annual report, 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).

The DPP is a federal standard for resolving the dilemma of balancing the need for government accountability with the need for government to act efficiently and effectively. It was recognized by OIP since 1989 under the UIPA's "frustration" exception at section 92F-13(3), HRS, 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.

OIP was not a party in the lawsuit that Plaintiff filed on May 8, 2015, asking the First Circuit Court to order that OIP's opinions discussing the DPP were all 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. 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. 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, a 3-2 majority of the 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. Thereafter, the Supreme Court issued an order partially granting Plaintiff's request for attorney fees and costs in the amount of $737.19. The case was also remanded to the circuit court for further proceedings.

OIP has posted a detailed analysis of the *Peer News* decision, which can be found at *oip.hawaii.gov/laws-rules-opinions/opinions/*. In accordance with the majority decision, 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 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 University of Hawaii laboratory. 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) (BRPA). As reported in last year's annual report, 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 an 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 Court of Appeals. During proceedings at the Ninth Circuit, Defendant made a second, even less redacted disclosure. The parties thereafter filed respective pleadings regarding partial mootness. The Ninth Circuit, on July 10, 2019, dismissed as moot the part of the appeal pertaining to disclosure of specific regulatory violations and vacated those portions of the District Court's order. The Ninth Circuit affirmed the partial grant of summary judgment as to the withholding of the identity and contact information of CDC employees involved in the UH biolab inspection. The Ninth Circuit reversed the grant of summary judgment to CDC on the BRPA public endangerment exemption and remanded the case back to District Court for further proceedings consistent with the Ninth Circuit's decision.

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 as abandoned by the Requester. Thus, OIP will discontinue coverage of this case.

Employee Disciplinary Records

Honolulu Civil Beat Inc. v. DOE
Civ. No. 19-1-0191-02 BIA (1st Cir. Ct.)

On May 24, 2018, Civil Beat (Plaintiff) made a record request to DOE for 34 closed cases of employee misconduct as of April 2018. DOE responded by providing a summary chart, and denied access based on the UIPA's privacy and frustration exceptions. Later, DOE provided Plaintiff with redacted records for 5 of the cases. Plaintiff filed this lawsuit on February 4, 2019, for access to the withheld portions of disciplinary records for 5 named employees and 29 unknown employees, with the exception of personal contact information, and identifying information about students. Plaintiff asked the court to expedite this case, for an order requiring DOE to disclose all requested information, and for an award of attorney's fees and all other expenses. DOE's Answer filed February 27, 2019, asked that the Plaintiff's Complaint be dismissed and sought attorney's fees and costs.

On November 12, 2019, the court entered an order granting Plaintiff's Motion for Partial Summary Judgment and ordered the disclosure of the requested records with redactions of personally identifying information.

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 a 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 records requests. Thereafter, on December 10, 2013, Plaintiff filed a *pro se* lawsuit. On February 26, 2019, the First Circuit Court issued its Order for Dismissal Without Prejudice for Failure to Prosecute the case. Therefore, OIP will discontinue coverage of this case.

Hawaii Paroling Authority's Minimum Decision Record

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

Gary Karagianes (Plaintiff) requested that the Hawaii Paroling Authority (HPA) provide him a copy of his Minimum Decision Record. HPA denied his record request. On October 11, 2018, OIP issued its Opinion Letter Number F19-01 (Opinion F19-01), in which OIP concluded that HPA properly denied Plaintiff's request for his Minimum Decision Record under the UIPA.

On October 18 and 23, 2018, Plaintiff requested reconsideration of OIP's decision in Opinion F19-01. OIP denied Plaintiff's requests for reconsideration, as OIP found that Plaintiff had not presented a basis for the reconsideration, that is, a change in the law or the facts, or other compelling circumstances.

Thereafter, on December 14, 2018, Plaintiff filed a Notice of Appeal in the Circuit Court. Plaintiff appeals the decision of OIP "denying reconsideration of OIP's own prior decision." On February 21, 2019, the court issued an order denying Plaintiff's motion for appointment of counsel. There have been no further developments since February 21, 2019.

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

Civil Beat vs. Department of the Attorney General
Civil No. 16-1-1743-09 KKH (1st Cir. Ct.)
CAAP-17-0000480 (Intermediate Court of Appeals)
SCAP-17-0000480 (Supreme Court)

In the Spring of 2015, the Legislature requested that the Department of the Attorney General (AG) conduct an investigation of the State Auditor's Office. The AG sent its investigation report to the Legislature in the Spring of 2016. Honolulu Civil Beat Inc. (Plaintiff) requested all final investigative reports regarding the State Auditor's office from January 1, 2015, to the time of the request. The AG denied the request in its entirety, asserting the privacy exception, the deliberative process privilege (falling under the frustration exception) and the attorney-client privilege (falling under several exceptions).

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

2017. A Notice of Appeal was filed by Plaintiff on July 13, 2017. The appeal remains pending before the Hawaii Supreme Court.

Access to Special Management Area Permit Records

Salem v. The County of Maui
Civil No. 17-1-0308 (2nd Cir. Ct.)
CAAP-18-0000105 (Intermediate Court of Appeals)

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

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

Access to Law School Examination Outlines and Answers

Young v. The University of Hawaii System
Civil No. 19-1-0553-04 (1st Cir. Ct.)

Stephen Young (Plaintiff) was a law student who received a grade of "F" for a Torts class while attending the William S. Richardson School of Law (Law School). Plaintiff made a record request to the University of Hawaii and Law School (UH) for access to the following related to the Torts class: all midterm outlines, all final exam multiple choice answers, and all final exam essay responses. UH denied Plaintiff's request in its entirety and cited to the exemptions and exceptions in the UIPA and federal law.

Plaintiff filed a complaint in the First Circuit Court based on UH's denial of his record request. He filed an Ex Parte Motion to Waive Filing Fees and Surcharge (Motion), which was denied. Plaintiff filed for reconsideration of the denial of the Motion and the reconsideration was denied. Subsequently, the court entered an Order Dismissing the Case for Non-Payment of the Filing Fee. Therefore, OIP will discontinue coverage of this case.

Records of Nonprofit Corporations Controlled by Agency

Walden v. Hi'ilei Aloha LLC
S.P. No. 18-1-0301

Andrew Walden (Plaintiff) made a UIPA request to three limited liability companies (Defendants), subsidiaries of OHA, for check registers and income and expense statements. The Defendants declined to respond to the requests, asserting that they were not "agencies" subject to the UIPA. Plaintiff subsequently filed a special proceeding in the First Circuit Court seeking an order directing Defendants to produce the requested records. In findings of fact and conclusions of law filed on June 25, 2019, the court found that because Defendants were corporations owned, operated, or managed by OHA, each Defendant was an "agency" for the purpose of the UIPA. The court further concluded that the records at issue did not fall under an exception to disclosure under the UIPA. Based on its findings and conclusions, the court ordered Defendants to produce the requested records, and awarded Plaintiff reasonable attorneys' fees to be determined through a future non-hearing motion. No final judgment has been entered yet, so the case remains pending.

Property Appraisal Report

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

The Department of Budget and Fiscal Services of the City and County of Honolulu (Appellant) appealed to the First Circuit Court OIP's Opinion Letter Number F19-04, which concluded that the UIPA did not allow Appellant to withhold a property appraisal report. After service of the complaint and OIP's and the original record requester's answers, Appellant filed an opening brief in August 2019.

Documents Used to Generate Revenue Estimates

In Re OIP Opinion Letter No. F19-05
S.P.P. No. 19-1-0191

The State of Hawaii Department of Taxation (Appellant) appealed to the First Circuit Court OIP's Opinion Letter Number F19-05, which applied the *Peer News* decision rejecting the deliberative process privilege and concluded that the UIPA did not allow Appellant to withhold records used to produce revenue estimates for use in legislative testimony. On November 19, 2019, the Circuit Court entered its Order affirming OIP's decision and ordered Appellant to comply with it.

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. Because Plaintiffs were subsequently convicted of various crimes, OIP will discontinue coverage of this case.

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, according to Defendant's annual disclosure of misconduct to the State Legislature, received 20-day suspensions due to employment misconduct from 2003 to 2012. Plaintiff asked for the suspended employees' names, nature of the misconduct, summaries of allegations, and findings of facts and conclusions of law. Defendant

denied Plaintiff's 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, which was discussed in OIP's FY 2015 Annual Report. An appeal was filed in this case by State of Hawaii Organization of Police Officers (Intervenor).

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

The case remains pending in the Circuit Court. 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*.

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 judgement 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 Honolulu Police Department's (HPD) employee who had been terminated for misconduct. Civil Beat intervened, and, in its decision in August 2018 (CC Order I), the Circuit Court granted in part and denied in part Civil Beat's motion for dismissal. The CC Order I was discussed in OIP's FY 2018 Annual Report. Defendant asked the Circuit Court to also review *in camera* the underlying police investigation material regarding the reinstated police officer in addition to the arbitration decision about his reinstatement.

Later, in September 2018, the Circuit Court issued an order regarding Plaintiff's Motion to Clarify its previous order (CC Order II), but then, in January 3, 2019, the Circuit Court, *sua sponte*, re-examined its CC Order II and decided to partially overrule it (CC Order III). In CC Order III, the Circuit Court explained that it incorrectly held in CC Order II that Plaintiff was only entitled to constitutional privacy protections and acknowledged "the legislature's ability to create or enlarge statutory privacy exceptions to the UIPA's broad disclosure requirements." CC Order III then allowed the parties to submit supplemental briefs about "balancing the statutory privacy interests under the UIPA." CC Order III retained the ruling in CC Order I that Plaintiff has no private cause of action under the UIPA.

In April 2019, the Circuit Court issued a Further Order regarding CC Order I and CC Order II (CC Order IV). In CC Order IV, the Circuit Court

"carefully considered and applied the UIPA's heightened privacy protections for police officers (e.g. disciplinary records)" and "reviewed in camera the misconduct at issue to 'determine whether the public interest in disclosure of such conduct outweighs the privacy interests of a particular officer,'" citing the Hawaii Supreme Court's 2016 decision in *Peer News LLC v. City and County of Honolulu*. With regard to the redacted arbitration decision, the Circuit Court found that the public interest in disclosure "far outweighs" the privacy interests and also found that disclosure of the arbitration decision is mandated by section 92F-12(a)(2), HRS, as a "final adjudication award" after redaction of portions protected by privacy. The Circuit Court also ordered the release of a redacted version of HPD's closing report and found that HPD's disclosure is "not clearly unwarranted" because it "is plainly trying to be transparent regarding the disciplinary investigation of the officer who was discharged and then reinstated, while balancing the privacy interests of everyone involved." With regard to the full investigative file, the Circuit Court ordered the disclosure of only HPD's "policies procedures and rules applicable to the incident in question" because the "Court sees no privacy interest in these documents, and disclosure is in the public interest because they will help the public evaluate HPD's standards and investigate process for the incident in question." Plaintiff appealed, and the Circuit Court granted Plaintiff's motion for stay upon appeal.

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.

The Circuit Court dismissed Plaintiff's complaint. Upon Plaintiff's motion, the Circuit Court ordered that defendant cannot disclose the police officers' names until conclusion of Plaintiff's appeal. Plaintiff appealed to the ICA, but the ICA dismissed this appeal because Plaintiff had belatedly filed its appeal after the time limit for filing had expired. After Plaintiff asked the ICA for reconsideration, the ICA reaffirmed its dismissal of the appeal. Plaintiff appealed, but withdrew its writ of certiorari to the Supreme Court. OIP will discontinue coverage of this case.

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.

Personal Records of Police Officer Applicant

Seely v. County of Hawaii Police Department
Civ. No. 17-1-414 (3rd Cir. Ct.)

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

In 2017, Plaintiff filed in the Third Circuit Court a lawsuit against Defendant alleging disability discrimination, retaliation, and violation of the UIPA. The lawsuit is ongoing.

Sunshine Law Litigation:

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.)

As reported last year, 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 alleged 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 sought a declaratory judgment that BLNR violated the Sunshine Law by making a decision on an item that was not properly agendized and sought to void that action or determine the applicability of the Sunshine Law.

On April 22, 2019, parties filed a stipulation for dismissal with prejudice as to all claims and parties. Therefore, OIP will discontinue coverage of this case.

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.

On February 26, 2019, the court filed an Order granting Plaintiff's Motion for Voluntary Dismissal Without Prejudice. Therefore, OIP will discontinue coverage of this case.

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 Circuit 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. Although there have been no further developments, the case remains pending in the Circuit Court.

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

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

The Hawaii State Public Charter School Commission (Defendant) filed a notice for its May 14, 2015 meeting. Missing from the agenda, however, was an item relating to the discussion of and decision making for 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 a 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 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, the [Defendant] reviewed [the Enrollment Form]" and made its decision. *See* HRS § 92-6 (a)(2). It also noted that prior to its May 14, 2015 meeting, Plaintiff had provided testimony during meetings on February 26 and March 12, 2015.

On October 7, 2016, Defendant filed its Motion for Summary Judgment on the basis that it "exercised its adjudicatory function and rendered a final decision without a public meeting – a meeting that was not required under Hawaii's Sunshine Law for [Defendant's] adjudicatory function[,]" and because the Enrollment Form was an ongoing issue, Plaintiff had provided testimony at previous meetings. The Circuit Court granted Defendant's MSJ, and thereafter, entered its final judgment on February 1, 2017. On April 21, 2017, Plaintiff filed an Appeal to the ICA, where the case remains pending.

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) held executive sessions to discuss personnel matters related to the former Honolulu Chief of Police Louis Kealoha (Chief of Police or Kealoha). Defendant's agendas 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, which was granted on November 17, 2017.

The First Circuit Court stated that "[Defendant] followed the required procedures and properly met in executive session pursuant to [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 Hawaii Supreme Court (Court) issued an order that granted transfer of the case and heard oral arguments on January 17, 2019.

On June 27, 2019, the Court affirmed the Circuit Court decision in part, vacated in part and remanded for further proceedings. The Court held that the Sunshine Law "does not require that meetings related to personnel matters be closed to the public" and does not "subject board members to criminal penalties for holding an open meeting." The Court explained that to properly invoke the personnel-privacy exception permitting a board to go into a closed executive session to discuss "the hire, evaluation, dismissal, or discipline of an officer or employee or of charges brought against the officer or employee," it was necessary also to show that the "consideration of matters affecting privacy will be involved." HRS § 92-5(a)(2). Recognizing, however, that "the proverbial bell cannot be 'unrung' with regard to protecting individual privacy interests," the Court determined that boards may properly decide before its deliberations to close a meeting in order to avoid risking the invasion of fundamental privacy rights.

The Court rejected the use of the balancing test weighing the individual's privacy interest against the public interest as set forth in the UIPA, to determine whether the personnel-privacy exception of the Sunshine Law was applicable. Instead, the Court discussed various factors to be considered on a case by case basis that may establish a legitimate expectation of privacy.

Because the case was remanded to the Circuit Court for factual determinations, the Court provided additional guidance and instructed the lower court to first examine the executive meeting minutes to "determine to what extent the Commission's discussions and deliberations were 'directly related to' the purpose of closing the meeting pursuant to the personnel-privacy exception." If portions of the executive meeting minutes fell outside the scope of the personnel-privacy exception, or if the personnel-privacy exception was not properly invoked, then the lower court should alternatively consider the attorney-client exception under section 92- 5(a)(4), HRS.

Notably, the Court distinguished the attorney-client exception under the Sunshine Law from the attorney-client privilege, and it limited the exception found at section 92-5(a)(4), HRS, to communications relating only to "questions and issues pertaining to the board's powers, duties, privileges, immunities, and liabilities." The Court noted that "an attorney is not a talisman, and consultations in executive sessions must be purposeful and unclouded by pretext." Further, the Court discussed the potential remedies and instructed the Circuit Court to order the Commission to release the applicable executive meeting minutes, either in full or in redacted form, if a violation is found.

Additionally, the Court interpreted the penalty provisions of section 92-11, HRS, of the Sunshine Law, which states that "[a]ny final action taken in

violation of sections 92-3 and 92-7 may be voidable upon proof of violation." The Court determined that deliberations conducted in violation of the executive meeting exceptions in section 92-5, HRS, also violate the open meetings requirement of section 92-3, HRS. Consequently, discussions and deliberations that are not "directly related" to a permissible exception under section 92-5(b), HRS, could be voided. Therefore, the Court concluded that "so long as Kealoha is joined as a party, if the circuit court finds that [Defendant] violated the Sunshine Law's open meeting provision at the January 18, 2017 meeting, the [circuit] court may void [Defendant's] retirement agreement with Kealoha." But if Kealoha cannot be joined, the Circuit Court shall determine whether in equity and good conscience the action may proceed in any form among Plaintiff and appellees (Honolulu Police Commission and City and County of Honolulu), or whether it must be dismissed.

The case remains pending on remand to the Circuit Court.

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 alleged that the notice and agenda filed for the meeting did not provide sufficiently detailed notice of the proposed rule changes as required by section 92-7, HRS. Plaintiffs asked the Second Circuit Court to invalidate the amendments to the rules that were approved by Defendant, which would have eliminated the 11 p.m. to 6 a.m. blackout on retail sales of alcohol and the cap on the number of hostess bars in Maui County. Plaintiffs also alleged that Defendant violated the requirements in the Hawaii Administrative Procedures Act, chapter 91, HRS, regarding hearings for rule changes. In a Sunshine Law meeting on July 12, 2017, Defendant voted to reverse itself.

As was reported in last year's annual report, 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.

Permitted Interactions - Informational Meeting

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

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

At a Council meeting held after the KCA Community Meeting, a Councilmember reported to the full Council on her attendance at the Community Meeting with two other Councilmembers,

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

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

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

Petitioner filed a notice of appeal with the ICA on August 15, 2016. After opening briefs were filed, Petitioner, on March 15, 2017, filed an Application for Transfer to the 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 granted Civil Beat Law Center's Motion for Leave to File Amicus Brief, and the Amicus Brief was filed on May 2, 2017. OIP filed a Response on June 1, 2017.

The ICA issued a Summary Disposition Order on May 31, 2019, finding that (1) the plain meaning of section 92F-27, HRS, is that it is explicitly self-limited to Part III of the UIPA and can only be used to seek judicial review of agency actions related to disclosure of personal records; (2) there is no set of facts Petitioner presented that would raise a claim under Part III of the UIPA; (3) the Circuit Court did not err in finding as a matter of law that section 92F-27, HRS, does not authorize individuals to appeal OIP opinions relating solely to the Sunshine Law or to otherwise sue OIP for alleged Sunshine Law violations by agencies; (4) section 92F-42, HRS, only confers standing on agencies to challenge OIP decisions regarding both the UIPA and Sunshine Law; (5) Petitioner is an individual and has no standing under section 92F-43, HRS, to challenge an OIP decision; and (6) section 92-12(c), HRS, gives any person standing to challenge a prohibited act of a board with the courts under the Sunshine Law and Petitioner's remedy was in that section.

Petitioner filed an Application for Writ of Certiorari with the Supreme Court on July 29, 2019, which was granted on September 27, 2019.

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.)

This case was discussed in OIP's FY 2018 Annual Report. In 2017, the Second Circuit Court had ruled in favor of the Plaintiffs on their other counts, but did not address the Plaintiff's allegations that the Maui County Council had violated the Sunshine Law. In December 2018, Defendant appealed the Court's decision to the ICA (Appeal). In footnote 5 of its brief for the Appeal, the Defendant asserted that the Plaintiffs "have consistently been unable to show any good faith or reasonable factual basis for [their Sunshine Law] claims" and noted that "the bogus [Sunshine Law] claims inextricably remain, never having been disposed of." OIP will discontinue coverage of this case.