

**OIP UIPA Basic Training Video Transcript, Part 2 (revised November 2021)
(45minutes, 38 seconds total) (time stamps are approximate).**

Please note: This transcript tracks the closed captioned UIPA Basic Training Video Part 2 and refers to the slides contained in the “all slides” handout for Part 2, which are accessed via the link to the “UIPA Basic Training Video and Materials” found on OIP’s Training page at oip.hawaii.gov. Although the video is closed captioned, this transcript may be helpful to people who prefer to read the training or keep this in lieu of taking their own notes.

Slide 1: The Uniform Information Practices Act – Part 2 (0:00:00)

The Uniform Information Practices Act – Part 2

Slide 2: State Board of Shrimp Affairs (0:0:05)

To start out this second half of the UIPA training we are all going to put on our shrimp hats. We're going to play the role of the staff of the State Board of Shrimp Affairs, which is an entirely fictional board that OIP uses for training purposes since we find it upsets the real agencies less that way than when we use their actual confidential records.

So, the State Board of Shrimp Affairs has received a UIPA request. We, the staff, have gathered together the responsive records and now we're going to sit down to review them and determine what must be disclosed and what, if anything, can be withheld under the UIPA.

There is a handout that is the set of these records which, if you didn't previously print it out or open it up, you should do so now because the slides are going to show images of each record, but if you want to see the full record that we're looking at, the handout is the easier way to do that. And when I introduce each one, you can go ahead and pause to take a look at the record and think about what you think should be done with it, and then restart the video when you're ready to move on and hear how we're going to handle that record.

So, the first one we're looking at here is an application for a leave of absence for sick leave for a Shrimp Board employee, so go ahead and either move on if you're ready or pause to take a look at it, and then we'll continue on to discuss what we're going to do with this record.

Slide 3: Record (Application for Leave of Absence) (0:1:42)

Now we can see in the highlighted portion that there is actually, a little bit of medical information on here, that doctor’s note “allergy is better, I'm not contagious,” we would redact that little handwritten note, but the rest of it, there's no reason to withhold, the rest of it is just showing that this employee took X number of hours of sick leave on such and such a date and so, the rest of this we're going to disclose. So, we're going to disclose the record with the redaction, redacting the handwritten note about the actual medical issue.

Slide 4: Record (Letter) (0:2:27)

The next record we're looking at is from a member of the public, Jack Scooter Montgomery, to the executive director of the State Board of Shrimp Affairs, and Mr. Montgomery is writing to express his concerns about the giant mantis shrimp in the Ala Wai Canal, which are a real problem in the version of Hawaii the Shrimp Board lives in.

So again, go ahead and pause if you need to take some time to look at, and think about this letter, and then continue the video, and we will talk about what we're going to do with it.

Slide 5: Record (Letter) (0:3:02)

So, what we have here is a letter from a member of the public, giving his thoughts on an issue that the Shrimp Board is currently dealing with, and that is something that people absolutely do have the right to do, but it's not usually sent in confidence. It's not usually something that an agency can withhold. Now there may be specific information in such a letter that falls under an exception to disclosure and can be withheld, but the correspondence an agency gets from the public saying, well, here's what I think about this, as a whole, is not something you would withhold.

Now in this letter, we're not going to withhold it for the most part, but there is one particular part that would fall under an exception to disclosure, and that's the home address that I just highlighted. Home addresses, home contact information, do generally fall under the UIPA's privacy exception, as it would here. So, we will redact that home address, and the remainder of that letter we're going to disclose.

Slide 6: Record (To Do List) (0:4:08)

Now for this next one, I will warn you that it's a bit of a trick question, so if you need to look at it, pause right now, and then when you're done, start up again and we'll go on and talk about whether or what we're going to do with this record.

Slide 7: Record (To Do List) (0:4:27)

OK, so some of you may have noticed that I said it was a trick question. Remember way back at the beginning when we talked about the definition of a government record. This doesn't really look like it's probably a government record. I don't know how it got swept up in the search. Maybe it was on the director's desk at the time, but this looks like it's not something that is going to be filed or something that others in the office would know how to find, if the director were out, let's say it doesn't look like it's something that's being used as part of the office's work. It looks like it's more a personal list that the director does, and as far as the director's use of the board letterhead for his handwritten personal notes, well, that's not OIP's issue, that's ethics' issue. But it does look like, we can see that "called the school, anniversary tomorrow," it does look like this is probably a personal "To Do List" that was just going to get tossed at the end of the day. So, I think there's a good chance that this is not actually a government record, but rather something that just got swept up in the search. So, this may be something where we wouldn't even include it in the responsive records at all, and this wouldn't be disclosing or withholding because it's really not a record of the office.

Slide 8: Record (Map) (0:5:46)

The next one we have is a map and it has a note on it about the endangered shrimp hatchery site. So, if you've taken a look at that, let's move on.

Slide 9: Record (Map) (0:6:02)

Now the key thing here is that the owners of the property on shore asked that we keep the location a secret. This one also actually is a little bit of a trick question because we talked about

frustration, generally frustration of a legitimate government function, and then we talked about some specific situations where frustration applies, but this isn't really one of those specific situations. However, we can see that this is information that is useful for our Shrimp Board. They would like to know where there is a shrimp hatchery, and we can see that they're not going to get this type of information in the future if they disclose it now, so this is actually more of a kind of general catch-all type of frustration.

It's not the same thing as confidential source, because it's not that the owners are trying to keep their identity as a source confidential, so much as that they don't want the information passed on. In other words, they don't want to have the hatchery site become public, but their identity is kept secret, they just aren't going to pass on information about endangered shrimp hatcheries they may run across, nor will other people if the agency is disclosing. So, this actually is kind of a catch-all frustration, and I would note that there was also some similarity to the confidential business information situation, but an important distinction here is that it appears that it was entirely voluntary that the owners gave this information.

So, it is not the same thing as a bidder, let's say, that gives information about the business in hopes of getting a contract, or a grant applicant or permit applicant that gives information in hopes of getting a grant or a permit. This is a situation where the information apparently was given entirely voluntarily, it is useful to the agency, and there's reason to believe that the agency won't get this type of information if it is required to disclose it now. So the agency would be able to withhold the information about the endangered shrimp hatchery site and it would be based on frustration, not one of the specific types of frustration we discussed, but rather just general frustration.

Slide 10: Record (Investigation Report) (0:8:26)

The next one we're going to look at is an investigation report of the Pilau Bar and Grill, and when you're looking at this, please think first how you would treat it if the investigation is still ongoing, and then think how you would treat it if the investigation has closed in the time since this memo was written.

So, if you've looked at it, let's continue.

Slide 11: Record (Investigation Report) (0:8:56)

Now, this does say it's a preliminary report of an ongoing investigation, so if that's still the case, if it's still an ongoing investigation, it hasn't closed yet. I know this is dated 2005, so it seems like it should have closed by now, but if it is an ongoing investigation, then the agency would be able to withhold really this entire memo because the investigation is ongoing. An agency has a pretty broad ability to withhold material from the file of an investigation that is still being conducted.

OK, but let's assume instead, that the investigation has in fact concluded since this. So let's, let's assume that we're looking at something from a concluded investigation now. There still going to be some information that we're going to be able to redact. You notice, for instance, that the complainant here, the guy who had the food poisoning, is a Pilau employee, so he reported his boss. It doesn't say specifically, but I would guess that in this situation, he would have requested

either requested explicitly, confidentiality, or there would at least have been an implicit promise of confidentiality, which you do need for confidential source, explicit or implicit promise of confidentiality for a good reason. So, I think we are going to in all likelihood be redacting anything that would identify Sam Anella, the Pilau employee who reported the food poisoning incident. Now we also are going to redact his home address, both to protect his identity and because home addresses generally carry a significant privacy interest.

Now, the information about the food poisoning incident, that's medical information. However, since we are already stripping out the identity of Sam Anella, the complainant, and stripping out the other information that would identify him, we actually can leave in the fact that there was a food poisoning incident because basically it's been de-identified. We know there was a food poisoning incident, but we don't know who had food poisoning. So, because this medical information is naturally attributable to any identifiable person, we can leave it in.

Slide 12: Record (Notes)(0:11:24)

The next one we have to look at is another of these notes on letterhead from the director of the State Board of Shrimp Affairs. Ah, you know it is, it is unfortunately, director's use of letterhead, but that's really the Ethics Commission's problem, not our problem. So, you can call them and ask about his use of letterhead. Kidding, don't bug the ethics, ah, don't bug the Ethics Commission about our fake shrimp records.

So, the director has written a note to himself "Stop at Foodland on the way home--buy 5 pounds of jumbo shrimp." So if you're ready, let's move on and about what we're going to do with it.

Slide 13: Record (Notes) (0:12:05)

Well, OK, again, obviously, this is a, this is a personal note. This one doesn't even appear to be mixed with work related things, so although he really shouldn't be using the letterhead, and although it apparently was on his desk at the time that somebody was doing the search for this request, nonetheless I would say that this isn't a government record because there's, there's no reason to think that this was going to be available to others in his office that any this was for the offices use and in doing its work as an agency, ah, it appears in fact to be something he was going to take away with him at the end of the day.

Slide 14: Record (Memorandum) (0:12:46)

The next one we're going to look at, and I believe this is the last of the set, is a memorandum from the Executive Director to their Counsel, Nola Contendere, Esq., and he's talking about his thoughts on what the board should do regarding a litigation the board is involved in. So, when you have had an opportunity to look at this, go ahead and we will move to talking about what to do with it.

Slide 15: (Record Memorandum) (0:13:20)

The key thing here is he is writing to their attorney. He is talking to the board's attorney about what to do in a lawsuit. This is something that is going to fall under the attorney client privilege and so the board is going to be able to withhold it under the litigation privileges because it is attorney client privilege so, it is privileged against discovery and the board is in fact in a

litigation that this relates to. Lucky for him also, if you read the memo, that this is not going to get out.

Slide 16: UIPA Power Points (things to remember) (0:14:01)

So, having done our job, as a Shrimp Board and gone over the exceptions to disclosure, ah, we're now going to move on to a different phase of the process, and we're going to talk about the obligation to respond to a request in 10 business days, and the mechanics of how you recognize a request, how you respond, and so forth.

Slide 17: Within 10 Business Days (0:14:29)

So, ten business days is really the magic number here. Within 10 business days, the board, or rather the agency, has to provide either the record itself, or a written notice to requester. And we will go over what the notice has to contain. Or at least an acknowledgement, the acknowledgement would be an acknowledgement that the board is or the agency is giving itself an extension for a good reason, and here is the good reason, and here is the date by which the actual notice will be sent out.

Slide 18: Request to Access A Government Record (OIP's Model Form) (0:15:08)

Now a request to access a government record can come in different forms, but as long as it is in a written form, identifies the record that is being sought, and gives contact information for the requester, the requester doesn't have to be identified; but to be a formal request the request, does have to give information on how the requester can be contacted. So, as long as it has those elements, it is a formal request to access a government record, under the UIPA and the rules on the 10 business day response time, giving a notice and so forth will apply.

So, you could have a request that looks like this, this is using OIP's model request form for requesters, which we provide as a convenience for requesters, but it is not something that requesters are required to use, and agencies shouldn't be trying to require requesters to use this form.

Slide 19: Request to Access A Government Record (Letter) (0:16:12)

This is also a valid request. This is the same request but made in letter form.

Slide 20: Request to Access A Government Record (Email) (0:16:20)

This is also a valid request, an email request is written, it has contact information so that is a formal request under the UIPA and it does cause the 10 business day response deadline, the notice requirement, and so forth to kick in.

Slide 21: Step 1 (0:16:39)

So, when you get a request for a record in any form, the first step is to identify what it is that's being requested.

Slide 22: Request to Access A Government Record (0:16:51)

So, in this case, it's reports prepared by DOH of restaurant inspections between June 1st and June 30th of 2006.

Slide 23: Request to Access A Government Record (0:17:06)

Now let's look at this second request to access a government record, which is basically the same thing, except where the first one we looked at had more detail, this one simply says reports for what government record is being asked for. So, in a case like this, you can see that you can't determine what records are being requested. You're going to need more detail, and what an agency can do in this situation, where you can't determine what's being requested, you need more detail, is, you can ask the requester to clarify the request. And if the request then comes back with additional detail, maybe something like the first example, where you look and say oh, OK, yes, we can tell what they're looking for now. Then the clock basically restarts from the time that you received the clarification, and so you're back through the process of, OK, we've got 10 business days. We've just determined what it is being sought and let's move to the next step.

Slide 24: Step 2 (0:18:12)

So, the second step then is determining whether you, the agency, actually have the record being sought, and in some cases, this is going to be obvious. Yeah, we know we have these records, or it can be obvious, no, we definitely don't have these records. Perhaps this is the type of records that such and such an agency keeps, or this division keeps, in which case your notice to requester which we'll get to, can let them know, you don't maintain the records and here's the name of the agency that does. Sometimes they're going to be records that you know you don't have, but you don't think anyone else has either. You know the crazy requester who is looking for records of alien invasion, or this sort of thing. Yeah, this sort of thing, yes, you can look and say no, I don't even need to look at our files, I'm quite sure we don't have anything like that. But then there are going to be instances where, maybe you do. Maybe you have these records. So, determining whether you have the record, it doesn't need to involve searching your entire office, but in some instances, you may need to do a trial peek at the likely files to see whether in fact you're going to have anything responsive before you prepare your notice to the requester.

Slide 25: Step 3 (0:19:34)

The next step, step three, is then going to be making a determination of whether exceptions are likely to apply to the records. Again, as with step two, this doesn't mean that you should preprocess the entire request, but, you would be perhaps based on your knowledge of these records, you know intimately what is in these records, and so you can say based on that what exceptions are likely to apply. In another situation, you might pull some of the records as kind of a sample to see what exceptions, what information is in there and whether it's likely to be subject to an exception, so that you can put it down on the notice. Again, you don't have to have processed the entire request, but you should, either from knowledge you already have or from looking, perhaps at a sample of likely responsive records, that you should be able to put down on the notice, what exceptions you expect to claim.

Slide 26: 5 Exceptions to Disclosure (0:20:38)

And those exceptions again are the Part 2 exceptions to disclosure for a general public record request. The privacy exception. The litigation privilege exception covering, attorney client, or work product, frustration exception, the exception for a confidentiality statute or court order, and the legislative working papers exception.

Slide 27: Step 4 (0:21:03)

So, the next step after having done that mostly mental process to determine, do we have responsive records, and are we going to be withholding some portion of them? Is that then you go on to provide the notice to the requester or something else within 10 business days you will be providing something. Again, either the record itself, that would be for a straightforward request, perhaps something that's clearly public and it's readily available.

The notice to request her, that's the written notice. That is what you will typically be providing, or in some cases and acknowledgement. The acknowledgement would be the situation where you're giving yourself an extension because of unusual circumstances. Our office is flooded, and we can't get to any of the papers, or we need to talk to somebody who retired last year and it's living in Nevada now, so it'll take us a little bit longer and something like that. There's a list of circumstances that allow you to basically give yourself this extension, and the extension can give you up to a total of 20 business days, to respond. So, one of these 3 things within 10 business days.

Slide 28: Notice to Requester (0:22:23)

The agency's notice to requester can be in different forms. The example here uses OIP's model Notice to Requester form, but the requirement in our rules is that it be in writing and have contain specified information. So, you can send a notice by an email or by a letter.

Slide 29: Notice to Requester (0:24:43)

On the notice, we are going to reiterate what was requested, when the request was received, and the date the notice was sent.

Slide 30: Notice to Requester (0:24:46)

Then going down further, you are going to tell the requester if it will be granted in its entirety, denied in whole or in part, or that it cannot be granted, maybe because the agency doesn't maintain the record. If you know which agency does maintain the records, then you could put that down. "It cannot be granted" might also be because you need clarification, or the record requires a compilation or a summary not readily retrievable. Here, the request will be partially granted only as to certain parts, so the agency is withholding some information and needs to cite the basis for withholding.

Slide 31: Notice to Requester (0:24:27)

So, because the agency is withholding some information from the record it does have to say what it's withholding, what information or what records, and what the legal basis is. And in this case "significant privacy interest" is the basis for withholding personal cell phone numbers.

Slide 32: Notice to Requester (0:24:49)

On the second page of this form, we're going to let the requester know how the records are being disclosed. In this case, a copy is being mailed to the requester. We're going to let the requester know when the disclosure is going to be made. And this form also has optional provisions for incremental disclosure. Incremental disclosure is something an agency can do, as the form says, when the records are voluminous, and one of the listed extenuating circumstances applies. So, where you have a very large request, basically the agency has the option to disclose

incrementally. Normally, however, you disclose the record all at once. And disclosure is going to be within five business days after the notice, or within five business days after the requester has done whatever the requester is required to do, typically make some prepayment of fees, whichever of these options is going to be later.

Slide 33: Notice to Requester (0:28:30)

So, estimated fees and costs, you can see that we have the breakdown set out here on this form. There's a \$30 automatic waiver for the search, review, and segregation fees, and that's for any request. For a public interest request, there's a \$60 waiver. Somebody would have to apply for that specifically, and provide information to support it. Basically, the higher public interest waiver applies where the requester has the intent and actual ability to widely disseminate the records. The records are not already widely available out in the public, and they are of core public interest. In other words, this isn't something that is of interest just to the requester. This is the type of thing that really carries out that central UIPA purpose of opening up government, making government more accountable, so something having to do typically with government operations.

And then copy charges, or other legal fees, are also something an agency can charge. Copy fees are not set by the UIPA; they're actually set for state agencies in section 92-21, which is outside the UIPA, which currently provides for a minimum charge of five cents per page. So, because that's outside the UIPA, at OIP, we're not going to generally tell an agency what to charge for copy fees; but we do recommend that fees higher than the minimum be set by administrative rule, as many agencies have done. And if a copy fee gets so high that it becomes to be an unreasonable impediment to public access, then that might get more into our territory. Other legal fees might be something like postage or messenger fees, third party fees of that sort also.

Slide 34: Fees (0:28:34)

We just looked at fees as set out on the Notice form, and again, the agency can charge for search, review, and segregation, and that's the way that the agency can capture its time. The charges for search, review, and segregation are set by OIP's rules, so the agency doesn't have the ability to say for instance, "Oh, but we had our attorney do this part, and our attorney charges \$200 per hour." The hourly still is set by OIP's rules. And then are the other lawful fees, such as copying and postage.

Slide 35: Fees (0:29:07)

I mentioned prepayment, the prepayment that an agency can require is 50% of the estimated search, review, and segregation fee, and 100% of other estimated fees. Now please note again, that these are estimated fees because the agency hasn't done the search yet, so the agency may have looked at some of the records to get a sense of what's there, so that it can do a better estimate of search, review, and segregation fees, and a better idea of what might be withheld from the requester. But especially with a large request, we really don't recommend that an agency put a whole ton of time, into, I mean, don't spend more than a couple hours at most, maybe. Don't spend a whole ton of time searching for all the responsive records before you've sent out your notice. Because if it is a request where you're going to have search, review, and segregation fees, and it's going to be higher than that \$30 automatic waiver, because if it's lower than \$30, you're not charging for it because you waived it. But if it's a large request and there's

going to be some substantial fees, the requester might not want to pay that. Part of the function of the notice is to put the requester on notice that this is going to cost them money, here is what it's likely to cost, so it doesn't come as an unpleasant shock to the requester when the request is already done. So, for the agency, likewise, give the requester a chance to look at what they're likely to get from this request, and what they're likely to entail in terms of search, review, and segregation fees and decide whether they want to continue on with it. Decide whether they want to do the pre-payment before you, the agency, start pouring a ton of time into doing the search.

And then prepayment, you can actually ask for prepayment of 100% of the other estimated fees such as copy charges or postage charges. Now, because this is an estimate, your estimate is probably not going to be perfect. Your estimate should be made in good faith, but if your estimate ends up, if you make your estimate and it turns out that it's high, and there was some money left owing to the requester, obviously you're going to pay that back to the requester. If your estimate turned out to be low, then you know you can try to settle it the other way also.

Slide 36: Step 5 (0:31:45)

So, having finished our notice and sent our notice off to the requester, then you know if we ask for prepayment, we'll assume we got the prepayment back from the requester, or perhaps we didn't ask for prepayment. So, we're just proceeding to process the request.

The next step after the notice is going to be the actual real work of search, review, and segregation of the records.

Slide 37: Step 6 (0:32:15)

And then once you've done all of that, you searched, pulled the responsive records, reviewed, and segregated, which is to say you've redacted out the information that you're withholding, in the situation where a record could be partially disclosed, but you wanted to redact. A personal cell phone number was the example in this case, so you would be disclosing the record except for this personal cell number that was redacted. In any case, the next step is to actually provide the record to the requester.

Slide 38: UIPA Power Points (things to remember) (0:32:53)

So, that was a run-through of the mechanics of responding to a Part 2 request, a general public records request. Now, we're going to move on to the last section that we're going to be talking about today. Our last point, which is that personal records are treated differently.

Slide 39: Personal Record Requests (0:33:19)

Now you remember we looked towards the beginning at our chart of government records as a whole, and then the two different sections of the UIPA that deal with them. Part 2 is what we've been talking about up till now, which is public record requests and again those are requests by anybody in the public. It doesn't matter who the request can be anonymous, and there was one set of exceptions that apply to those. And we've talked about the mechanics of how you respond to our request under Part 2.

Now we're going to be looking at the other type of request, personal records requests, which are requests that are made under part three of the UIPA, and they have a different set of exemptions.

And again, it's not that the records are different, it's a question of who the requester is. So, both public record requests and personal record requests are requests for government records. It's just that in a personal record request, it's a request for records that are about the requester. So, we're going to go over some of the important things to keep in mind when you get a request for records that are about the requester, and how it's different from a Part 2 request.

Slide 40: "Personal Record" (0:34:37)

So, a personal record is about the requester.

Slide 41: "Personal Record" (0:34:43)

And that means that it contains or refers to the requester by name, by Social Security number or other identifying particular, which could be a fingerprint, it could be a patient number, it could be something else, but something that is making clear that, oh, we, you can tell who it's referring to.

So, it's not. Please note that this is a fairly broad definition of what is "about the requester." It's enough to just have the requester's name in there. The central reason for creating the record doesn't have to be something about the requester, the requester might be named in there only kind of incidentally. It's still going to be a personal record of that requester, who is named in there. Hmm, it's being sluggish. Let me try clicking again.

Slide 42: Personal Record Exemptions (0:35:37)

The exemptions to disclosure for a personal record request are a different set of exemptions from the exceptions that apply to a general public records request under Part 2. The personal record exemptions are found in Part 3, with the other personal record provisions, and we'll run over them.

The first one is actually a rather broad exemption that applies to criminal law enforcement records, and that would be reports, for instance, or investigations from an agency that has the enforcement of the criminal laws as a primary purpose. So, for instance, PSD, the police department, the prosecutor. Now, the thing to realize with this one, because it is relatively broad, when this exemption applies, it's not usually going to mean that you automatically withhold the entire record. What it's usually going to do is to bounce it back to a Part 2 exception. With a personal record request, something being a personal record carries additional rights for the person, beyond just the access rights you would have under Part 2. For instance, there is a right to correct a personal record, so essentially, what this broad exemption is doing is saying, no, the prison or police are not going to have to go back into their records and potentially be dealing with a request for correction by inmates or by people going through the criminal justice system. Rather, they can just bounce it back to Part 2, and apply the Part 2 exceptions, such as frustration or privacy. But it wouldn't make sense to say you can withhold the entire record from a person named in it in a situation where the record, or at least part of the record, could actually be disclosed to a member of the general public, the public at large, under Part 2. So again, criminal law enforcement records, if that exemption applies, then you don't have to respond to it as a personal record request, aside from just claiming the exemption, but you should still look and make sure that there is a Part 2 exception that allows you to withhold it before you just go ahead

and automatically withholding it. The other exemptions are all more narrow, and if one of those applies, it would have a Part 2 counterpart that also applies.

Confidential source, that is a form of frustration under Part 2, and it basically works the same way for personal records. It's its own individual exemption for Part 3, but it does basically work the same way as the confidential source we discussed previously under frustration.

Government examination materials, we didn't talk about this earlier. It would fall under frustration though for Part 2 also. This is to cover, for instance, where you have civil service exams. The same exams may be reused, or the same questions may be reused on future exams, so the agency doesn't want to release the past exams, such that people already know the old questions, and the agency has to write a new exam every time. So, what this one means is that you can't, having taken a civil service exam, say, "I'd like a copy of that exam as my personal record. It does have my name on the top." The agency can then deny that request.

Investigative reports, this is for an ongoing investigation, criminal or administrative investigation. And again, this one would also be a form of frustration under Part 2. We talked about it when we were talking about frustration under Part 2. It can be withheld under Part 3 as well, under this specific exemption. And then the last one is for records that are protected by law, by statute, confidentiality statute, by court order. So again, similar to the "records protected by law" exception under Part 2. We've seen that four of these are similar to Part 2 exceptions, things that could be withheld under Part 2. So, what's the difference between these Part 3 exemptions and the Part 2 exceptions? Well, look at what's not there. There's no generic frustration exception, for one thing. So, any type of frustration that doesn't fall under one of these categories, confidential source, government exams, or ongoing investigations, any other type of record that might otherwise fall under frustration for a Part 2 request can't be withheld from a personal record request. That would include confidential business information, for instance, and other types of frustration. Again, there is no generic, catch-all frustration exemption to personal record disclosure. The other thing, probably more significant, is there is no privacy exception. So, if you have two people or more that a record is "about," say an account of an incident involving both of them, and one person makes a personal record request for that record, you're not going to be withholding it from person 1 based on person 2's privacy, because it's a joint personal record, it's a personal record as to each of them, and there is no privacy exemption for personal record requests. Now, if you have a situation where there's something like one person's social security number, where it really has nothing to do with the requester in a joint personal record, and is only "about" that third party, you can carve that out and say that specific information isn't part of the requester's personal record so you potentially can apply the privacy exception. But that would be a limited situation, and again, generally speaking, if you're mentioned in the record, it's your personal record and if two people are mentioned, it's their joint personal record, it's a personal record for each of them.

Slide 43: Agency's Response (0:42:06)

The agency's response time for a personal records request is similar, but not identical to the response time for a general records request. 10 business days is still the magic number. In the case of personal records requests, this is actually set by statute rather than by rule, and the statute

requires providing access to the record within 10 business days. So, notice that that's access, rather than simply providing notice within 10 business days, as you would for a Part 2 request. If it's a personal records request, you're actually supposed to provide access to the record within those 10 business days.

Like the Part 2 record requests, with a personal record request, you can give yourself an additional 20 business days to respond, if unusual circumstances exist, and that's very similar to the extenuating circumstances under Part 2, the rules applicable to Part 2. So again, 10 business days, except it's to give access to the record, rather than just a notice. You can give yourself an extension, but only if unusual circumstances are present.

Slide 44: Right to Correct (0:43:23) Now, the Personal Records section of the UIPA also includes a right to correct a misleading or incorrect fact. There is nothing like this under Part 2. This is only Personal Records. So, if you make a personal records request, a request for records that are about you, and you look at it and say, well, this has my address wrong, or you know, this says I'm married to this guy, I'm actually married to somebody else, or I'm not married. You do have the right to request a correction of a misleading or incorrect fact.

Slide 45: Right to Correct (0:44:00)

So, when the agency receives this right to correct, it needs to respond within 20 days of receiving the written request, by acknowledging the request, and either making the requested correction, or else informing the requester, no, we're not going to. This is our reason why, and here are our procedures for appealing that refusal. The appeal of a denial of a correction is actually internal within the agency. There is no appeal to OIP by statute for an agency's denial of somebody's request for correction, they can appeal it internally within the agency.

The agency has to provide them these appeal procedures and allow this internal appeal, and then, if the agency ultimately says, no, we're still not going to make it, the person's appeal would actually be to court, ultimately, rather than to OIP.

Slide 46: Penalties (0:45:00)

One more important difference to point out between Part 3, Personal Records, and Part 2, is that Part 3 has liquidated damages for a knowing or intentional violation. Under Part 2, if you violate Part 2 as an agency, what you're facing, if the person takes you to court, is the possibility of the person being awarded attorney's fees. Under Part 3, in addition to attorney's fees and costs, the person can get actual damages, which are set at not less than \$1,000. And then, if the complainant substantially prevails, they can also get the attorney's fees. Uhm.

There was an inmate about 10 years ago that filed, I think it was 11 different Part 3 lawsuits against government agencies that had violated, I think, for the most part by simply not responding to his personal record requests. Not responding in time, I mean, because remember the deadline is set right in the statute for Part 3. And in five or six of them, he basically automatically got his \$1,000 from each agency because they hadn't responded within 10 business days, and it was a knowing violation, and he got his \$1,000. The ones where the agency really bothered to fight it at all, I mean there were others where he didn't. One of them I recall was Department of Tax which gave as its reason, that it doesn't actually, the request came in on April

16th, and it doesn't actually open its mail for a month at that time of year, as I recall. So in that case, it was found to be not a knowing or intentional violation since it wasn't opening its mail. But that is, we haven't seen that since then. So it maybe it was a one off, but it is something for agencies to bear in mind. That that penalty provision, the \$1,000 damages for a knowing violation, is something that is not in Part 2 but is in Part 3 and has been used.

Slide 47: Office of Information Practices Website (0:47:14)

Personal records was the last of the Power Points covered in this presentation, so that concludes our basic training on the UIPA. I just wanted to remind you that we do have our website, at oip.hawaii.gov. The website has the laws we administer, it has our opinions, our rules, various guidance, training materials, other materials. So please check it out.

Slide 48: Need Help? (0:47:47)

And then please feel free to contact us. We have somebody assigned as the staff attorney of the day, every day, to take phone calls or emails, looking for general advice or quick guidance. So please feel free to email us at OIP@hawaii.gov or call us at 586-1400. Please feel free to visit our website and thank you for your interest in the UIPA.