

Office of Information Practices

State of Hawaii

Annual Report 2020



This report to the Governor and the Legislature summarizes the activities and findings of the Office of Information Practices from July 1, 2019, to June 30, 2020, in the administration of the public records law (the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes) and the open meetings law (the Sunshine Law, Part I of chapter 92, Hawaii Revised Statutes).

Abbreviations

Abbreviations used throughout this report:

AG - Attorney General's Office

AOD - Attorney of the Day

CORR - Correspondence File

ETS - Office of Enterprise Technology Services

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

FY - Fiscal Year

HAR - Hawaii Administrative Rules

HRS - Hawaii Revised Statutes

HSC - Hawaii Supreme Court

ICA - Intermediate Court of Appeals

Log - UIPA Record Request Log

OHA - Office of Hawaiian Affairs

OIP - Office of Information Practices

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

RFA - Request for Assistance

RFO - Request for Opinion

RRS - Records Report System

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

UH - University of Hawaii

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

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

Table of Contents



History	4
Executive Summary.....	6
Goals, Objectives, and Action Plan	11

HIGHLIGHTS OF FISCAL YEAR 2020

Budget and Personnel.....	16
Legal Guidance, Assistance, and Dispute Resolution	18
Overview and Statistics	18
UIPA	26
Sunshine Law	30
Formal Opinions	31
UIPA	31
Sunshine Law	33
Informal Opinions	36
UIPA	36
Sunshine Law	43
General Legal Guidance and Assistance.....	47
UIPA	47
Sunshine Law	49
Education, Open Data, and Communications	52
Education.....	52
Training Sessions	53
Training Materials, Model Forms, and Reports	54
Open Data	56
Communications	60
Records Report System.....	63
Legislation Report.....	65
Litigation Report.....	66

History

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

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

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

Public access to government records ... the confidential treatment of personal information provided to or maintained by the government ... access to information about oneself being kept by the government. These are issues which have been the subject of increasing debate over the years. And well such issues should be debated as few go more to the heart of our democracy.

We define our democracy as a government of the people. And a government

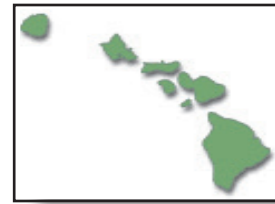
of the people must be accessible to the people.

In a democracy, citizens must be able to understand what is occurring within their government in order to participate in the process of governing. Of equal importance, citizens must believe their government to be accessible if they are to continue to place their faith in that government whether or not they choose to actively participate in its processes.

And while every government collects and maintains information about its citizens, a democratic government should collect only necessary information, should not use the information as a "weapon" against those citizens, and should correct any incorrect information. These have become even more critical needs with the development of large-scale data processing systems capable of handling tremendous volumes of information about the citizens of this democracy.

In sum, the laws pertaining to government information and records are at the core of our democratic form of government. These laws are at once a reflection of, and a foundation of, our way of life. These are laws which must always be kept strong through periodic review and revision.

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



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

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

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

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

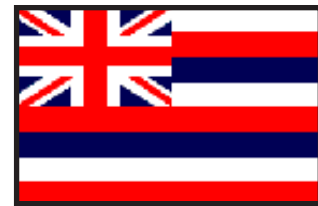
Accordingly, the Legislature instructed that the UIPA be applied and construed to:

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

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

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

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



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

Pursuant to sections 92F-42(7) and 92-1.5, HRS, this Annual Report to the Governor and the Legislature summarizes OIP’s activities and findings regarding the UIPA and Sunshine Law for fiscal year (FY) 2020, which began on July 1, 2019 and ended on June 30, 2020.



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 2020, which began on July 1, 2019, and ended on June 30, 2020.

OIP Service Overview FY 2015-2020						
	2015	2016	2017	2018	2019	2020
Total Requests for OIP's Services	1,307	1,162	1,234	1,127	1,127	1,168
Informal Requests (AODs)	1,074	964	956	945	963	990
Formal Requests Opened	233	198	278	182	164	178
Formal Requests Resolved	142	208	241	201	213	193
Formal Cases Pending	147	114	150	131	82	67
Live Training	11	11	9	6	11	6
Training Materials Added/Revised	16	12	6	9	14	11
Legislation Monitored	101	175	108	93	185	146
Lawsuits Monitored	39	44	40	38	40	45
Public Communications	33	30	30	25	25	26

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.

OIP does this work, along with many other duties, with only 8.5 full-time equivalent (FTE) authorized positions, which includes five staff attorneys. *See Figure 1.* In 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. During the legislative session, OIP typically monitors over a hundred bills and resolutions and provides testimony and proposals on legislation impacting open government issues. OIP also monitors lawsuits that involve the UIPA, Sunshine Law, or OIP. OIP proactively undertakes special projects, such as the UIPA Record Request Log or drafting legislative proposals, and it must occasionally review and revise its administrative rules. Throughout the year, OIP shares UIPA, Sunshine Law, and Open Data updates and information with interested groups and members of the public, State and county government agencies, board members and staff, and the media.

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 erroneously reported the legislatively appropriated amount, which has now been corrected in this FY 2020 Annual Report. OIP's total budget allocation for FY 2019 was \$697,987, of which \$652,928 was allocated to personnel costs and \$45,059 for other current expenses (including new computer equipment). While OIP received \$21,132 in collective bargaining increases in FY 2019, it received nothing in FY 2020. Thus, in FY 2020, OIP's total allocation was \$704,853, up \$6,866 or less than 1% from FY 2019. OIP's allocation in FY 2020 for personnel costs was \$685,166 and for operational costs was \$19,687. *See Figure 3* on page 17.

As in the prior year, OIP had 8.5 FTE total approved positions in FY 2020. While this number included OIP's five staff attorney positions, two attorneys left OIP in July 2020 for retirement or personal reasons. OIP's Administrative Assistant also left OIP in October 2020 to move from Hawaii. OIP has not yet received approval to hire their replacements as of the publication of this report, due to the hiring freeze imposed as a result of the economic fallout from the COVID-19 pandemic. Therefore, OIOP has been operating with only 5.5 FTE positions to date in FY 2021.

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 2020, OIP received 178 formal and 990 informal requests for assistance, for a total of 1,168 requests, which is 41 (3.6%) more than the number of total requests in FY 2019. *See Figure 1* on page 6. OIP resolved 96% of all formal and informal requests for assistance received in FY 2020 in the same fiscal year.

Nearly 85% (990) of the total requests for OIP's services are informal requests that are typically responded to within the same day through the AOD service. Over 82% (815) of AOD inquiries in FY 2020 came from state and county agencies and boards seeking guidance to ensure compliance with the UIPA and Sunshine Law, while the balance (175) 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 much more time to investigate, research, review, and resolve. In FY 2020, OIP opened 178 formal cases, compared to 164 formal cases opened in FY 2019. At least 29% (51 of 178) of the formal cases were filed by repeat requesters.

Although the number of new cases increased by 8.5% in FY 2020, OIP was able to work on and close 193 formal cases and reduce its backlog of pending cases. By the end of FY 2020, OIP was able to reduce its backlog by 18.3% from the prior year, from 82 to 67 pending cases, which is half of what the backlog was two years ago (131 in FY 2018). *See Figure 4* on page 19. OIP had only 17 pending cases filed before FY 2020, with the oldest one still in litigation in court and the next oldest case awaiting responses from the parties. Moreover, 73% (130 of 178) of the formal cases opened in FY 2020 were resolved in the same

year. When AODs are included, OIP resolved 96% (1,120 of 1,168) of all FY 2020 formal and informal requests for assistance in the same year they were filed and 85% (990 of 1,168) usually within the same day they were filed.

Most of the formal cases are resolved through correspondence or voluntary compliance with OIP's informal advice. Appeals and requests for opinions, however, often require more time-consuming written decisions that may be subjected to judicial review. In FY 2020, OIP issued 5 formal opinions and 19 informal opinions, for a total of 24 opinions. Summaries of the opinions begin on page 31.

While it had its full complement of 8.5 FTE employees, OIP was able in FY 2020 to substantially reduce its backlog, complete other statutory duties, and undertake new initiatives, such as its new Legislation webpage providing easy access to important legislative history and to new or pending legislative proposals.

OIP's successes in FY 2020, however, may be short-lived because of the State's challenges resulting from the COVID-19 pandemic. Unfortunately, in early FY 2021, OIP lost two experienced staff attorneys and its Administrative Assistant due to retirement and personal reasons, and these positions have not yet been filled due to the State's hiring freeze. Without sufficient attorneys to work on formal cases that continue to be filed, or staff to assist the attorneys, the number of pending cases has been steadily increasing in FY 2021. Until new staff and attorneys can be hired and trained, OIP's formal case backlog will inevitably grow again.

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 2020, OIP had a total of 86 training materials and forms 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 2020, OIP revised or added 11 training materials.

In FY 2020, OIP added a new “Legislation” page to its website, where it has compiled for easy public access the legislative history behind the enactment of and many amendments to the UIPA, Sunshine Law, and tax statute providing for appeals to OIP in challenges regarding the disclosure of written tax opinions. The Legislation page will also contain important proposed or adopted legislation concerning the UIPA, Sunshine Law, or OIP.

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

The Log provides OIP and the public with easily accessible information and accountability as to how many UIPA record requests are being made, how they are being resolved, how long they take to be completed, and how much they are costing the government and requesters. Besides helping agencies to keep track of record requests and costs, the Log provides detailed instructions and training materials that educate agency personnel on how to timely and properly fulfill UIPA requests, and the Log collects important open data information showing how agencies are complying with the UIPA. The Log process also helps to educate the agencies on how they can use the state’s open data portal at **data.hawaii.gov** to upload their own information to the internet to make it more readily accessible to the public.

Each year, OIP prepares year-end reports summarizing the data from State, county, and independent agencies, which is consolidated on the Master Log. The Master Log is posted at **data.**

hawaii.gov and OIP’s reports summarizing all agencies’ year-end data are posted on its UIPA reports page at **oip.hawaii.gov**.

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 2020, 26 *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 the media, and not just to government employees or board members.

Records Report System

OIP’s Records Report System (RRS) is a computer database that collects from all state and county agencies information describing the records that they routinely use or maintain. While the actual

records remain with the agency and are not filed with OIP, all agencies must annually report to OIP the 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 2020, State and county agencies reported 29,726 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 2020 legislative session, OIP reviewed and monitored 146 bills and resolutions affecting government information practices, and testified on 25 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 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 and Governor's approvals.

While much of the rulemaking process is beyond OIP's control, adoption of new administrative rules will be OIP's main priority once the formal rulemaking process can proceed. 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 2020, OIP monitored 45 cases (including three that were related to open government issues, but were not Sunshine Law or UIPA cases). Eleven new cases were monitored, 14 cases were closed, and 31 remained pending at the end of the fiscal year. See **Figure 1** on page 6.



Goals, Objectives, and Action Plan

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

OIP's Mission Statement

"Ensuring open government while protecting individual privacy."

I. Goals

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:

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

With the passage of the Open Data Law, OIP adopted another goal to assist the Office of Enterprise Services (ETS) to properly implement Hawaii's Open Data policy, which seeks to increase public awareness and electronic access to non-confidential and non-proprietary data and information available from State agencies; to enhance government transparency and accountability; to encourage public engagement; and to

stimulate innovation with the development of new analyses or applications based on the public data made openly available by the State.

II. Objectives and Policies

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

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

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

3. Adopt and revise administrative rules, as necessary.

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

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

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

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

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

D. Records Report System (RRS). Maintain the RRS and assist agencies in filing reports for the RRS with OIP.

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

E. Legislation and Lawsuits. Monitor legislative measures and lawsuits involving the UIPA and Sunshine Law.

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

III. Action Plan with Timetable

As of December 2020 when this plan was published, the COVID-19 pandemic continued to devastate Hawaii's economy, resulting in substantially lower tax revenues being projected for several years into the future. State budget cuts and employee furloughs were anticipated but not yet finalized and a general hiring freeze was in place. Uncharacteristically, OIP had three vacancies due to retirement and personal reasons, which it sought approval to fill. Despite OIP's success in FY 2020 in reducing its formal case backlog to the lowest level in over a decade, OIP's backlog increased significantly as new cases continued to be filed. It is against this background and uncertainty

that OIP's Action Plan was developed.

A. Legal Guidance and Assistance

1. Past Year Accomplishments

- a. OIP received 1,168 total requests for assistance in FY 2020, 96% of which were resolved in the same fiscal year, and 85% (990) were informal requests typically resolved the same day through OIP's AOD service.

- b. Conducted 6 in-person training sessions for State and county agencies and boards before the COVID-19 pandemic restricted in-person gatherings.

- c. Added or updated 11 training materials on OIP's website regarding changes to the laws that OIP administers, including guidance on "virtual" online meetings allowable under the Governor's emergency proclamations during the COVID-19 pandemic.

- d. Created a new "Legislation" page at oip.hawaii.gov, where OIP compiled for easy public access the legislative history leading to the enactment or amendment of the UIPA, Sunshine Law, and tax statute allowing appeals to OIP from challenges to the disclosure of written tax opinions.

2. Year 1 Action Plan

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

- b. Continue to promptly provide general legal guidance through OIP's AOD service, so that approximately 90% of requests for OIP's assistance can be informally resolved within one work day.

- c. Focus OIP's limited resources on preparing and improving online

training and communication to cost-effectively provide services to the greatest potential number of people and increase compliance by more government agencies, particularly because in-person events may continue to be restricted by the COVID-19 pandemic.

d. 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, before the end of FY 2021, conditioned on the completion of the Attorney General's legal review of OIP's draft rules and the Governor's approval.

3. Year 2 Action Plan

a. Assuming adoption, implement OIP's new administrative rules, including the creation of a revised UIPA Record Request Log and training materials.

b. Obtain sufficient funding and position authorizations to recruit, train and retain OIP staff so as to keep up with anticipated increases in OIP's workload while reducing the formal case backlog.

c. Update and improve OIP's online training materials and forms, as may be necessary.

4. Year 5 Action Plan

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

b. Obtain sufficient funding and position authorizations to recruit, train, and retain legal and administrative personnel to ensure the long-term stability and productivity of OIP.

B. Investigations and Dispute Resolution

1. Past Year Accomplishments

a. OIP received a total of 1,168 formal and informal requests for assistance in FY 2020, and OIP resolved 96% of them in the same year and typically resolved 85% the same day.

b. Of the 178 formal cases opened in FY 2020, 130 (73%) were resolved in the same fiscal year.

c. Despite the temporary suspension of OIP's powers and duties due to COVID-19 emergency proclamations, OIP reduced its formal case backlog by over 18% to 67 pending cases, which is the lowest level in more than a decade.

d. Of the 67 cases that remained pending at the end of FY 2020, reduced the age of pending cases: 48 (72%) were opened in FY 2020, 16 (24%) were opened in FY 2019, 1 was opened in FY 2018. One was opened in FY 2017 and resolved at the beginning of FY 2020, and one case filed in FY 2015 was still pending in litigation.

e. Issued 24 formal and informal opinions.

2. Year 1 Action Plan

a. Obtain approval to hire and train new employees to fill legal or administrative vacancies.

b. Strive to resolve all formal cases filed before FY 19, if they are not in litigation or filed by requesters who have had two or more cases resolved by OIP in the preceding 12 months.

3. Year 2 Action Plan

a. Strive to resolve all formal cases filed before FY 2020, if they are not

in litigation or filed by requesters who have had two or more cases resolved by OIP in the preceding 12 months.

b. Obtain sufficient funding and position authorizations to recruit, train and retain OIP staff so as to keep up with anticipated increases in OIP's workload while reducing the formal case backlog.

4. Year 5 Action Plan

a. Strive to resolve all formal cases within 24 months of filing, if they are not in litigation or filed by requesters who have had two or more cases resolved by OIP in the preceding 12 months and provided that OIP has at least five staff attorneys.

b. Obtain sufficient funding and position authorizations to recruit, train, and retain legal and administrative personnel to ensure the long-term stability and productivity of OIP.

C. Open Data

1. Past Year Accomplishments

a. Prepared UIPA Record Request Log reports summarizing results for FY 2019 from 188 State and 88 county agencies, including the Governor's office, Lt. Governor's office, Judiciary, Legislature, UH, OHA, all Mayors' offices, and all county Councils.

b. Distributed 26 *What's New* articles to keep government personnel and the general public informed of open government issues, including proposed legislation.

c. Received 29,678 unique visits from Hawaii to OIP's website and 87,892 website page views (excluding OIP's and home page hits).

2. Year 1 Action Plan

a. Obtain approval to hire and train new employees to fill legal or administrative vacancies.

b. Encourage and assist State and county agencies to electronically post open data, including the results of their Logs.

c. Complete data and prepare reports of the Log results for FY 2020 from all State and county agencies.

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

e. Post information on OIP's website at oip.hawaii.gov to provide transparency and obtain public input on the rulemaking process.

3. Year 2 Action Plan

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

b. Revise UIPA Record Request Log and related training materials, if new administrative rules are adopted.

4. Year 5 Action Plan

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

D. Records Report System

1. Past Year Accomplishments

a. For FY 2020, State and county agencies reported 29,762 record titles on the RRS.

2. Year 1 Action Plan

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

3. Year 2 Action Plan

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

4. Year 5 Action Plan

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

E. Legislation and Lawsuits

1. Past Year Accomplishments

- a. In FY 2020, OIP reviewed and monitored 146 bills and resolutions and testified on 25 of them.
- b. In FY 2020, OIP monitored 45 cases in litigation, of which 11 were new cases.

2. Year 1 Action Plan

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

- b. Propose amendments to the Sunshine Law to allow boards to conduct remote online meetings, popularly referred to as “virtual” meetings.

3. Year 2 Action Plan

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

4. Year 5 Action Plan

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

IV. Performance Measures

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

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

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



Highlights of Fiscal Year 2020

Budget and Personnel



OIP's budget allocation is the net amount that it was authorized to use of the legislatively appropriated amount, including any collective bargaining adjustments, minus administratively imposed budget restrictions. OIP had incorrectly reported its legislatively appropriated amounts in its Annual Report for FY 2019. The correct allocated amounts in FY 2019 were \$656,425 for personnel costs and \$41,562 for other current expenses (including new desktop computer

equipment), for a total allocation of \$697,987, up 19.5% from \$584,019 in FY 2018.

In FY 2020, OIP's total allocation was \$704,853, of which \$683,171 was for personnel costs and \$21,682 for other current expenses. *See Figure 3 on page 17.*

As in the prior year, OIP had a total of 8.5 FTE approved positions in FY 2020.

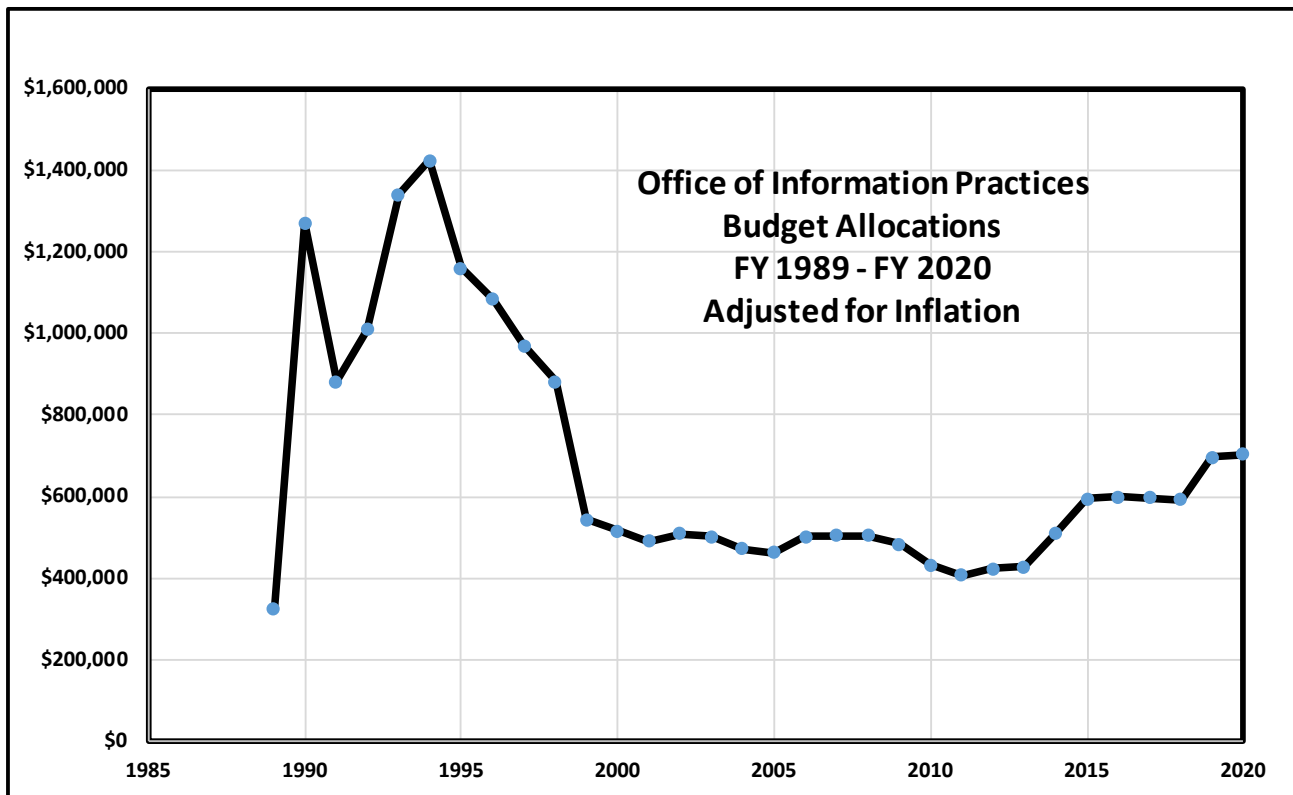


Figure 2



**Office of Information Practices
Budget FY 1989 to FY 2020**

Fiscal Year	Operational Expense Allocation	Personnel Allocation	Total Allocation	Allocations Adjusted for Inflation**	Approved Positions
FY 20	21,682	683,171	704,853	704,853	8.5
FY 19	41,562	656,425	697,987	704,869	8.5
FY 18	22,324	561,695	584,019	600,641	8.5
FY 17	22,324	553,660	575,984	609,667	8.5
FY 16	31,592	532,449	564,041	607,342	8.5
FY 15	45,228	507,762	552,990*	600,368	8.5
FY 14	88,862	450,895	539,757*	586,995	8.5
FY 13	18,606	372,327	390,933	433,616	7.5
FY 12	30,197	352,085	382,282	432,334	7.5
FY 11	42,704	314,454	357,158	409,610	7.5
FY 10	19,208	353,742	372,950	443,242	7.5
FY 09	27,443	379,117	406,560	489,155	7.5
FY 08	45,220	377,487	422,707	497,916	7.5
FY 07	32,686	374,008	406,694	505,882	7.5
FY 06	52,592	342,894	395,486	503,542	7
FY 05	40,966	309,249	350,215	464,386	7
FY 04	39,039	308,664	347,703	475,661	7
FY 03	38,179	323,823	362,002	510,033	8
FY 02	38,179	320,278	358,457	515,694	8
FY 01	38,179	302,735	340,914	497,640	8
FY 00	37,991	308,736	346,727	519,891	8
FY 99	45,768	308,736	354,504	551,003	8
FY 98	119,214	446,856	566,070	898,708	8
FY 97	154,424	458,882	613,306	990,082	11
FY 96	171,524	492,882	664,406	1,096,485	12
FY 95	171,524	520,020	692,544	1,176,648	15
FY 94	249,024	578,513	827,537	1,444,849	15
FY 93	248,934	510,060	758,994	1,361,884	15
FY 92	167,964	385,338	553,302	1,020,363	10
FY 91	169,685	302,080	471,765	897,465	10
FY 90	417,057	226,575	643,632	1,278,878	10
FY 89	70,000	86,000	156,000	324,917	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 2020, the COVID-19 emergency caused substantial disruption to State and county government operations, which was addressed in emergency proclamations issued by Governor David Ige. OIP was directly affected by the Governor's first Supplementary Proclamation issued on March 16, 2020, which wholly suspended the UIPA and partially suspended the Sunshine Law "to the extent necessary to enable boards to conduct business in person or through remote technology without holding meetings open to the public." These suspensions continued until the Seventh Supplementary Proclamation (SP7) issued on May 5, 2020, in Exhibit H, where the UIPA and OIP's administrative rules were only partially suspended "to the extent they contain any deadlines for agencies, including deadlines for the OIP, relating to requests for government records and/or complaints to OIP," and with certain minimum requirements listed in Exhibit H. In other words, the UIPA was reinstated by SP7, except for deadlines contained therein as they

apply to government agencies. Additionally, the Sunshine Law was suspended "to the extent necessary to enable boards as defined in Section 92-2, to conduct meetings without any board members or members of the public physically present in the same location" and with additional requirements and guidelines listed in Exhibit H. The partial suspensions of the UIPA and Sunshine Law described in Exhibit H were continued in the Ninth Supplementary Proclamation issued on June 10, 2020, and subsequently in Exhibit G of the Tenth Supplementary Proclamation issued on July 17, 2020. (Additional proclamations were issued in FY 2021. As of publication, the Sixteenth Supplementary Proclamation was in effect).

The effect of the first Supplementary Proclamation was to suspend all of OIP's powers and duties, which are found in section 92F-42, HRS. Nevertheless, during the period from March 16 to May 4, 2020, OIP continued to work and adjusted to teleworking. OIP was unable, however, to issue any opinions until after its powers and duties were reinstated with SP7 on May 5, 2020. While OIP has been hampered in its ability to resolve cases that require responses from agencies that have taken advantage of the suspension of UIPA deadlines, OIP resolved 178 formal cases in FY 2020, issued a total of 24 opinions, and reduced the backlog of pending cases to its lowest level (67) in over a decade.



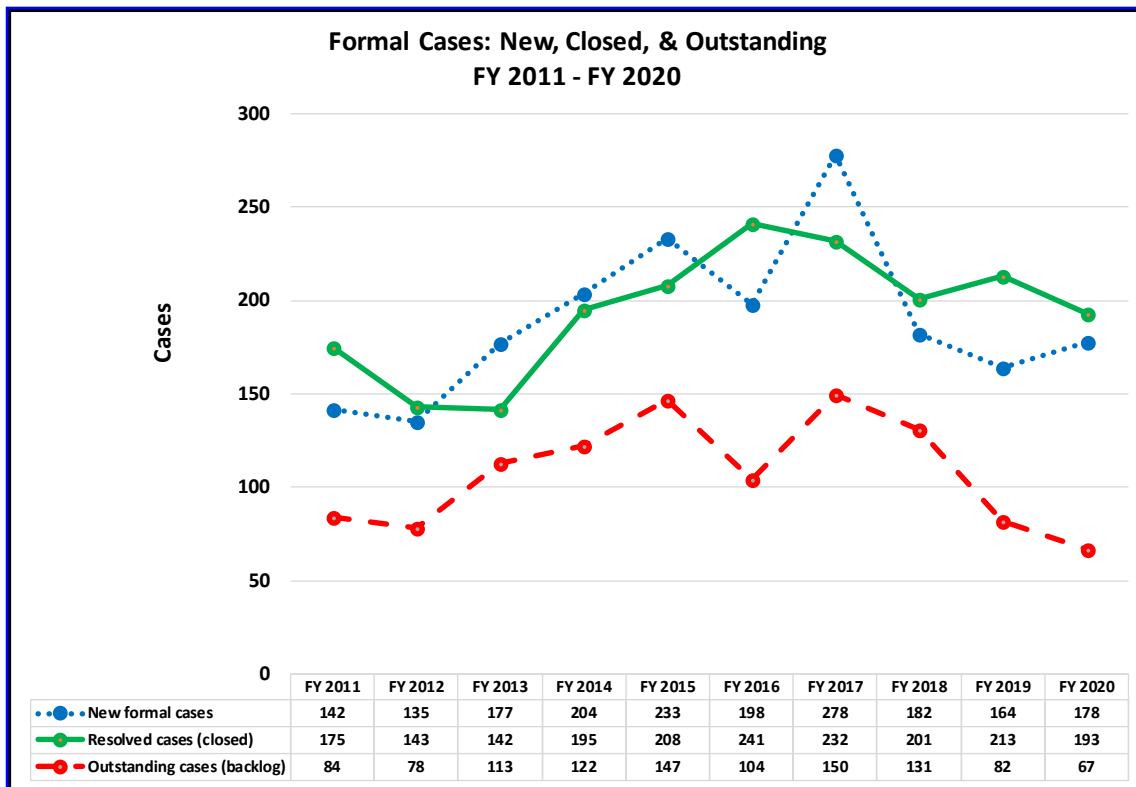


Figure 4

OIP achieved these successes, despite the emergency proclamations and increases in new requests for OIP's services. In FY 2020, OIP received a total of 1,168 formal and informal requests for OIP's services, compared to 1,127 requests in FY 2019. There were 14 (8.5%) more formal cases filed in FY 2020 (178) than in FY 2019 (164), and 27 (2.8%) more informal requests (990) than last year (963). Nevertheless, OIP ended FY 2020 with only 67 pending formal cases, which is a more than 8% decrease from FY 2019 (82 pending cases) and a 49% decrease since FY 2018 (131 pending cases). See **Figure 1** on page 6.

OIP's extraordinary performance in FY 2020 has led to an anomaly in **Figure 4** above, which shows the number of new, closed, and outstanding formal cases. Normally, 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 2012, FY 2016, FY 2018, and FY 2019, there was a corresponding decrease in the number of outstanding cases. In FY 2020, however, OIP had an increase of 14 new formal cases, yet still lowered its backlog to 67 pending cases at the end of the fiscal year.

OIP was also able to resolve more of its oldest cases, so that none of the cases outstanding at the end of FY 2018 were filed before FY 2016, except for one from FY 2015 that is in litigation and beyond OIP's control. Moreover, OIP resolved in the same year 130, or 73%, of the formal cases filed in FY 2020. When the 990 AOD cases are added to 130 formal cases filed and resolved in FY 2020, OIP resolved 96% (1,120) of total requests (1168) for OIP's assistance in the same year that they were requested, and about 85% (990) on the same day. See **Figure 1** on page 6.

Although OIP closed 20 fewer (-9.4%) formal cases in FY 2020 (193) than in FY 2019 (213), it closed 11 (9.2%) more in the same year they were filed. Also in FY 2020, OIP reduced the number of older cases in its backlog by 48.6%, based on the number of pending formal cases filed in the prior fiscal year or earlier, which was lowered from 37 to 19 cases. Of the 19 pending cases that had been filed before FY 2020, 16 were filed in FY 2019. Only three other cases were filed before FY 2019, and remain pending due to events beyond OIP's control, as one continues to be in litigation and two were awaiting agency responses that have been delayed by the COVID-19 emergency suspension of deadlines.

Unfortunately, OIP's impressive accomplishments in FY 2020 may not be sustained for long because of the loss of two of its five staff attorneys and its Administrative Assistant in early FY 2021. Due to retirement and personal reasons, OIP has lost over 35 years of institutional memory with the loss of three valued employees who had contributed to OIP's successes in prior years. With the hiring freeze and budgetary restrictions, OIP

was not been able to replace the three vacancies for several months and anticipates lower productivity until it is able to fill these vacancies and fully train newly hired employees.

Finally, OIP notes that an experimental program that it conducted during the first five months of FY 2020 had little, if any, impact on its results for the year. This program was conducted in response to H.R. 104, Regular Session of 2019, where the Hawaii House of Representatives requested that OIP conduct an alternative appeal resolution pilot program and prepare "short, informal, unenforceable guidance" within two weeks of receiving the agency's final response for the files randomly assigned to the alternative appeal resolution track. As OIP preliminarily concluded in its report, which is posted on its website, the issuance of such early guidance had mixed results in resolving cases and will not be made a universal practice at this time. Instead, OIP will carefully assess each file once the parties' submissions appear to be complete. After obtaining any additional information from the parties that may be required OIP will issue early guidance in those UIPA files where the issues are relatively simple, and in those Sunshine Law appeals where guidance would allow the parties to timely act to address an apparent violation even if the guidance itself is not likely to resolve the dispute. However, OIP has not yet been able to fully implement this practice because the suspension of OIP's powers, and subsequently of its ability to set deadlines under the UIPA, disrupted OIP's ability to open files and to obtain submissions from parties while the Governor's emergency orders remain in place.

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

Formal Requests - FY 2020	
Type of Request	Number of Requests
UIPA Requests for Assistance	55
UIPA Requests for Advisory Opinion	1
UIPA Appeals	47
Sunshine Law Appeals	9
Sunshine Law Requests for Opinion	1
Correspondence	38
UIPA Record Requests	23
Reconsideration Requests	4
Total Formal Requests	178

Figure 5

Formal Requests

Of the total 1,168 UIPA and Sunshine Law formal and informal requests for services, 527 (45.12%) were categorized as relating to the UIPA and 376 (32.19%) concerned Sunshine Law issues. Moreover, of the total 1,168 requests, 990 (85%) were filed as informal requests and 178 (15%) were considered formal requests. **Figure 5** above shows the different types of formal requests received in FY 2020. Formal requests are further explained as follows.

UIPA Requests for Assistance

OIP may be asked by the public for assistance in obtaining a response from an agency to a record request. In FY 2020, OIP received 55 such written requests for assistance (RFAs) concerning the UIPA.

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

Requests for Advisory Opinions

A request for an opinion (RFO) does not involve a live case or controversy and may involve only one party, and thus, will result in an informal (memorandum) opinion that has no precedential value as to legal issues regarding the UIPA or Sunshine Law. In FY 2020, OIP received one request for a UIPA opinion and one 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 2020, OIP received 47 appeals related to the UIPA.

Sunshine Law Appeals

In FY 2020, OIP received 9 Sunshine Law appeals.

Correspondence

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

In FY 2020, OIP opened 38 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 2020, OIP received 23 UIPA record requests made for records maintained by OIP.

Reconsideration of Opinions

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

Of the four requests for reconsideration received in FY 2020, two were granted in whole or in part, one was denied, and one remained pending.

Types of Opinions and Rulings Issued

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

Formal opinions concern actual controversies and address issues that are novel or controversial, that require complex legal analysis, or are otherwise of broader interest to agencies and the public. Formal opinions are used by OIP as precedent for its later opinions and are posted, in full and as summaries, on OIP's opinions page at **oip.hawaii.gov**. Summaries of the formal opinions for this fiscal year are also found on pages 31-35 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 36-46.

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

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

In FY 2020, OIP issued a total of 24 opinions, consisting of 3 formal UIPA opinions, 2 formal Sunshine Law opinions, 13 informal UIPA opinions, and 6 informal Sunshine Law opinions. OIP closed 169 cases without opinions.

Informal Requests

Attorney of the Day Service

The vast majority (85% in FY 2020) of all requests for OIP's services are informally handled through the Attorney of the Day (AOD) service, which allows the public, agencies, and boards to receive general, nonbinding legal advice from an OIP staff attorney, usually the same business day. Like the "express line" at a supermarket, the AOD service allows people to quickly get answers to their relatively simple questions without having to wait for more time-consuming resolution of complex issues often found in formal cases.

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

Members of the public use the AOD service frequently to determine whether agencies are properly responding to UIPA record requests or if government boards are following the procedures required by the Sunshine Law. Agencies often use the AOD service for assistance in responding to record requests, such as how to properly respond to requests or redact specific information under the UIPA's exceptions. Boards also use the AOD service to assist them in navigating Sunshine Law requirements. Examples of AOD inquiries and OIP's informal responses are provided, beginning on page 47.

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

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

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

AOD Inquiries			
Fiscal Year	Total	Public	Government Agencies
FY 20	990	175	815
FY 19	963	478	485
FY 18	945	294	651
FY 17	956	370	586
FY 16	964	289	675
FY 15	1,074	340	734
FY 14	1,109	280	829
FY 13	1,050	270	780
FY 12	940	298	642
FY 11	676	187	489
FY 10	719	207	512
FY 09	798	186	612
FY 08	779	255	524
FY 07	772	201	571
FY 06	720	222	498
FY 05	711	269	442
FY 04	824	320	504
FY 03	808	371	437
FY 02	696	306	390
FY 01	830	469	361

Figure 6

Of the 990 AOD inquiries in FY 2020, 815 (82.3%) came from government boards and agencies seeking guidance to ensure compliance with the UIPA or Sunshine Law, and 175 inquiries (17.7%) came from the public. See **Figures 6 and 7.**

Of the 175 AOD inquiries from the public in FY 2020, 139 (79.4%) came from private individuals, 12 (6.9%) from media, 8 (4.6%) from businesses, 10 (5.7%) from private attorneys, 1 (0.5%) from public interest groups, and 5 (2.9%) from other types. See **Figures 8 and 9.**

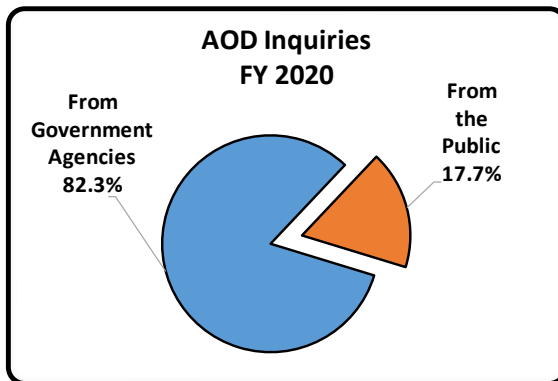


Figure 7

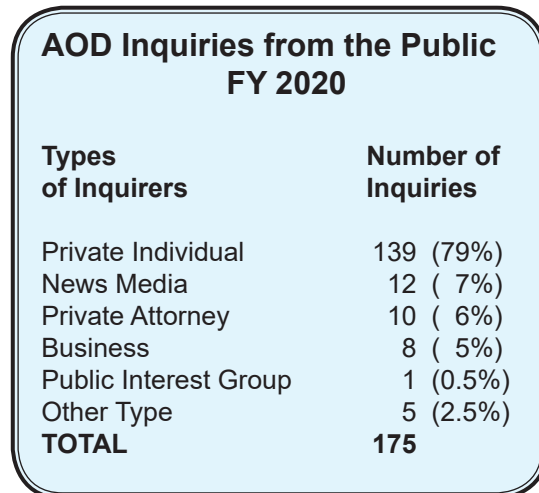


Figure 8

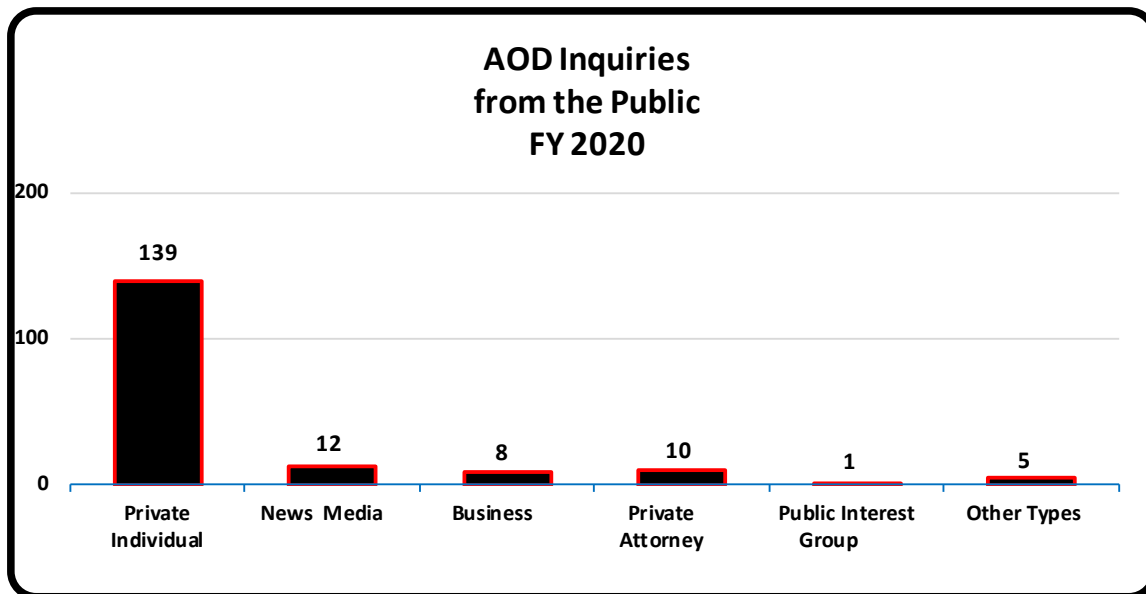


Figure 9

UIPA Inquiries:**UIPA AOD Inquiries**

In FY 2020, OIP received 401 AOD requests concerning the UIPA from government agencies and the general public. As with Sunshine Law AOD inquiries, the data further shows that most of the inquiries came from the agencies seeking guidance on how to comply with the laws. For a summary of the numbers and types of UIPA AOD inquiries, please see **Figures 10 to 14** that follow. A sampling of the AOD advice given by OIP starts on page 47.

State Agencies and Branches

In FY 2020, OIP received a total of 118 AOD inquiries relating to the UIPA and concerning State agencies in the executive branch. About 49% of these requests concerned five State agencies: Department of Land and Natural Resources (15), Department of Commerce and Consumer Affairs (15), Department of Health (10), Department of Human Services (9), and Department of Transportation (9). As shown below in **Figure 10**, about 86% (112) of AOD requests were made by the agencies themselves.

OIP also received 6 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.

**UIPA AOD Requests About
State Government Agencies
FY 2020**


Executive Branch Department	Requests by Agency	Requests by Public	Total Requests
Land and Natural Resources	14	1	15
Commerce and Consumer Affairs	14	1	15
Health	9	1	10
Human Services	5	4	9
Transportation	7	2	9
Agriculture	7	1	8
Education (including Public Libraries)	7	0	7
Labor and Industrial Relations	6	1	7
Attorney General	6	0	6
Accounting and General Services	5	1	6
Business, Econ Development, & Tourism	4	1	5
Hawaiian Home Lands	1	2	3
Governor	2	0	2
Tax	1	1	2
Budget and Finance	1	0	1
Lieutenant Governor	1	0	1
Public Safety	1	0	1
Defense	0	0	0
Human Resources Development	0	0	0
TOTAL EXECUTIVE	102	16	118
TOTAL LEGISLATURE	6	0	6
TOTAL JUDICIARY	0	0	0
University of Hawaii System	3	1	4
Office of Hawaiian Affairs	1	1	2
TOTAL STATE AGENCIES	112	18	130

Figure 10

County Agencies


In FY 2020, OIP received a total of 56 AOD inquiries regarding the UIPA and concerning various county agencies and boards. Of these, 9 inquiries (16%) came from the public in all counties.

Of the 56 AOD inquiries, 19 inquiries concerned agencies in the City and County of Honolulu, down from 28 in the previous year. *See Figure 11.* As shown below, 14 (74%) of the 19 requests

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

The largest number of requests concerned the Honolulu Police Department (4), Budget and Fiscal Services (3), and the Honolulu Fire Department (3)

OIP received 37 inquiries regarding neighbor island county agencies and boards: Hawaii County (5), Kauai County (7), and Maui County (25). *See Figures 12 to 14.*



Department	Requests by Agency	Requests by Public	Total Requests
Police	2	2	4
Budget and Fiscal Services	2	1	3
Fire	3	0	3
Mayor	1	1	2
City Council	0	1	1
City Ethics Commission	1	0	1
Corporation Counsel	1	0	1
Environmental Services	1	0	1
Parks and Recreation	1	0	1
Transportation	1	0	1
Prosecuting Attorney	1	0	1
TOTAL	14	5	19

Figure 11



**UIPA AOD Inquiries About
Hawaii County
Government Agencies - FY 2020**

Department	Requests by Agency	Requests by Public	Total Requests
Planning	2	1	3
Parks and Recreation	0	1	1
Mayor	0	1	1
TOTAL	2	3	5

Figure 12

**UIPA AOD Inquiries About
Kauai County
Government Agencies - FY 2020**



Department	Requests by Agency	Requests by Public	Total Requests
Police	2	0	2
County Attorney	2	0	2
Human Resources	1	0	1
Planning	1	0	1
Water	1	0	1
TOTAL	7	0	7

Figure 13

**UIPA AOD Inquiries About
Maui County
Government Agencies - FY 2020**



Department	Requests by Agency	Requests by Public	Total Requests
County Council	11	0	11
Corporation Counsel	9	0	9
Police	2	0	2
Planning	0	1	1
Water Supply	1	0	1
Unnamed Board	1	0	1
TOTAL	24	1	25

Figure 14



Sunshine Law Inquiries:

Since 2000, OIP has averaged more than 283 formal and informal inquiries a year concerning the Sunshine Law. In FY 2020, OIP received 376 Sunshine Law inquiries, which is 16 fewer than in FY 2019, and 93 more than the average number of requests received each year. See **Figures 15 and 16**.

Of the total Sunshine Law inquiries made in FY 2020, 366 (97%) were informal AOD requests, and 10 were formal cases. See **Figure 16**.

Of the 366 AOD requests involving the Sunshine Law, 354 were requests for general advice, and 12 were formal complaints. Also, 49 of the 366 AOD requests (13%) involved the requester's own agency.

In FY 2020, OIP provided 5 Sunshine Law training sessions to boards and commissions as well as to other agencies and groups. See page 53 for a list of the sessions provided. OIP also continued to make its Sunshine Law training materials available on its website. These free online materials include a PowerPoint presentation with a voice-over, written transcripts, and examples, which OIP's attorneys formerly presented in person. The online training has reduced the need for in-person basic training on the Sunshine Law 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.

Sunshine Law Inquiries

<i>Fiscal Year</i>	<i>AOD Inquiries</i>	<i>Formal Requests</i>	<i>Total</i>
2020	366	10	376
2019	381	11	392
2018	265	7	272
2017	337	11	348
2016	331	4	335
2015	433	31	464
2014	491	38	529
2013	264	27	291
2012	356	23	379
2011	166	13	179
2010	235	21	256
2009	259	14	273
2008	322	30	352
2007	281	51	332
2006	271	52	323
2005	185	38	223
2004	209	17	226
2003	149	28	177
2002	84	8	92
2001	61	15	76
2000	57	10	67

Figure 16

Sunshine Law Inquiries FY 2000 to FY 2020

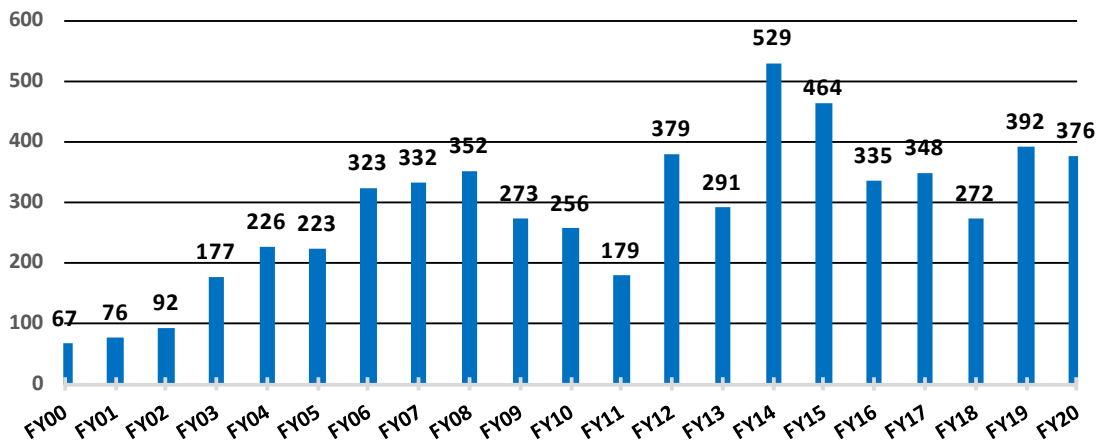


Figure 15

Formal Opinions

In FY 2020, OIP issued five formal opinions, (three related to the UIPA and two 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:

Transcript and Audio Recording of Executive Meeting

OIP Op. Ltr. No. F20-01

Requester requested a transcript and audio recording of a Maui County Council (Council) executive session discussing a resolution to appoint staff to the Maui Office of Council Services (OCS), which OCS had originally denied in its entirety. After Requester's appeal to OIP, OCS disclosed the majority of the transcript, redacting primarily portions of the Council's (1) discussions about the possible hire of Requester and other employees, including their past performance, and (2) consultations with its attorney regarding OCS management issues. *See* HRS §§ 92-9(b), 92F-13(4), and 92F-22(5) (2012) (allowing an agency to withhold records protected by another law in response to either a general government record or a personal record request, and allowing a board to withhold executive session minutes to the extent disclosure would frustrate the purpose of the executive session); *Civil Beat Law Center for the Public Interest v. City & County of Honolulu*, 144 Haw. 466, 445 P.3d 47 (Haw. 2019) (discussing the personnel-privacy and attorney consultation executive session purposes).

Part I of chapter 92, HRS, (the Sunshine Law), allows a board to hold an executive session closed to the public for a limited list of purposes. HRS §§ 92-4, -5 (2012). The minutes of such an executive session may be withheld so long as necessary to prevent frustration of the executive session, but no longer. HRS § 92-(9)(b); *see also* HRS §§ 92F-13(4), -22(5) (both allowing an agency to withhold information protected by statute in response to UIPA requests). OIP found that most of the discussion in the redacted portions of the transcript fell within permitted executive session purposes, one allowing a closed meeting to consider the "hire, evaluation, dismissal, or discipline" of a government employee where matters affecting individual privacy are concerned (personnel-privacy purpose) and the other allowing a closed meeting for a board to consult with its attorney regarding "the board's powers, duties, privileges, immunities, and liabilities" (attorney-consultation purpose). HRS § 92-5(a)(2) and (4). However, a small portion of the redacted discussion would not frustrate the purpose(s) of the executive session if disclosed, and OIP concluded that OCS must therefore disclose to Requester certain portions concerning Requester's employment that did not qualify for the personnel-privacy purpose, including the name and approximate salary of another employee identified in the discussion. OCS must also disclose a redacted version of the requested audio recording, redacting the same portion of the discussion as for the written transcript.



Withholding of Personal and Government Records in an Ethics Investigation

OIP Op. Ltr. No. F20-02

OIP determined that a confidentiality statute in the State Ethics Code (Ethics Code) required the State Ethics Commission (SEC) to withhold access to a redacted copy of an investigation (Investigation) of a complaint filed with the SEC by the record requester (Requester). The UIPA therefore allowed the SEC to withhold access to both government records under Part II and personal records under Part III of the UIPA.

Requester had filed a complaint with the SEC against two former State employees. Requester later made a request for a redacted copy of the Investigation. The SEC denied access under the UIPA's Part II, citing section 92F-13(4), HRS, which states that government agencies are not required to disclose "[g]overnment records which, pursuant to a state . . . law . . . are protected from disclosure[.]"

In relevant part, the Ethics Code states that "[t]he commission shall investigate all charges on a confidential basis, having available all the powers herein provided, and proceedings at this stage shall not be public." HRS § 84-31(b). Section 84-31(b), HRS, is a confidentiality statute intended to protect SEC investigations from disclosure prior to the commencement of contested case proceedings or as otherwise agreed to by the SEC and a party. OIP concluded that section 92F-13(4), HRS, which was invoked by the SEC, allowed it to withhold the Investigation.

Because Requester lodged the complaint that is part of the Investigation, OIP also applied Part III of the UIPA, which requires agencies to disclose personal records to the individual to whom they pertain, unless an exemption in section 92F-22, HRS, applies. OIP found that Part III of the UIPA applies to at least a portion of the Investigation because Requester initiated the complaint. As such, the portion of the Investigation that is

"about" Requester is the joint personal record of Requester and others identified therein.

Under the analysis set forth in OIP Opinion Letter Number F13-01, OIP found that the Investigation is partly Requester's joint personal record subject to the UIPA's Part III and partly a government record subject to Part II. However, OIP was not required to determine which specific portions of the Investigation are subject to Part II and Part III because the confidentiality statute at section 84-31(b), HRS, controls either way and requires the SEC to withhold access to the entire Investigation.

OIP concluded that under Part II of the UIPA, section 92F-13(4), HRS, allows the SEC to withhold any portion of the Investigation that is not Requester's personal record from public disclosure. With respect to the portion that is Requester's personal record, section 92F-22(5), HRS, states that agencies are not required to grant an individual access to personal records when they are "[r]equired to be withheld from the individual to whom it pertains by statute[.]" Consequently, OIP concluded that section 92F-22(5), HRS, allows the SEC to withhold any portion of the Investigation that is her personal record from Requester.

Finally, the fact that Requester explicitly sought a redacted copy of the Investigation is irrelevant because the confidentiality statute at section 84-31(b), HRS, applies to the entire Investigation, and as discussed above, protects both government records and personal records from disclosure.

Disclosure of Police Reports and Reasonableness of Search for Records

OIP Op. Ltr. No. F20-04

A requester appealed the Kauai Police Department's (KPD) denial of access to two police reports, and assertion that it did not maintain a third. With respect to the first report, which

was for an incident that was not currently under investigation at the time of the request and that did not involve the requester, OIP concluded that the UIPA did not allow KPD to fully withhold the police report to avoid an unwarranted invasion of the personal privacy of an individual named in the report, and that KPD must disclose the report after redaction of information that would result in the likelihood of actual identification of the victim, which includes the victim's name, address, cell phone number, date of birth, and photographs.

With respect to the second report, which was for an incident that did involve the requester, OIP found that KPD had provided enough information to establish that the report was part of a pending investigation at the time of the request, and that the UIPA allowed KPD to withhold it on that basis. Because the investigation has since closed, though, KPD would be required to disclose the report in response to a newly made request after redaction of information that would result in the likelihood of actual identification of individuals named therein.

With respect to the report KPD asserted it did not have, OIP found that KPD had responded properly to the request by performing a reasonable search based on the information provided to it at the time of its search. *See* OIP Op. Ltr. No. 97-08 at 5. Even though KPD's search turned up a report that was not the one Requester was seeking, KPD had no notice that the report it had identified was the wrong one until after this appeal was filed, and thus KPD had no obligation to do a new search in the absence of any clarification to the request.

Sunshine Law **Formal Opinions:**

Amending an Agenda by Addendum

OIP Op. Ltr. No. F20-03

Requester complained that the City Council, City and County of Honolulu (COUNCIL-HON), violated the Sunshine Law when COUNCIL-HON's Committee on Budget (Committee) added Bill 3 (2019), entitled "A BILL FOR AN ORDINANCE RELATING TO REAL PROPERTY TAX EXEMPTIONS" (Bill 3), as an item for discussion to its agenda during the Committee's meeting on February 27, 2019 (February Meeting). The Committee had filed its Agenda for its February Meeting on February 21, 2019 and sought to add Bill 3 to this already filed Agenda by filing an addendum to its Agenda (Addendum) on February 22, 2019.

OIP opined that the Sunshine Law does not allow a board to amend its agenda by filing an addendum to a previously filed meeting agenda. *See* HRS § 92-7(d) (providing criteria that a board must meet before adding an item to its agenda at the meeting). Even if the Addendum had been a revised agenda intended to fully replace the previously filed Agenda, the Committee would have still acted improperly in filing it late, in violation of the requirement in section 92-7(b), HRS, that a notice be filed no later than six calendar days before a meeting. Thus, OIP concluded that the Committee's posting of the Addendum five days prior to its February Meeting was not sufficient to add Bill 3 to the Agenda and violated section 92-7, HRS.

Bill 3 proposed to reduce the real property taxes to be paid by homeowners by increasing the exemption amounts that may be subtracted from the homeowners' estimated property values that are subject to taxation. The Mayor's veto message asserted that Bill 3 would result in an overall

\$10.3 million real property tax revenue loss and may impair the City's ability to fulfill its financial obligations. The Real Property Assessment Division of the Department of Budget and Fiscal Services provided data to the Committee showing that in 2019 there were 256,737 residential parcels, many of which are occupied by homeowners who pay real property taxes. In view of the Mayor's veto message and BFS' data, OIP found that Bill 3 was clearly of major importance and the Committee's approval of Bill 3 affected a significant number of persons. Thus, under these criteria, Bill 3 did not qualify as a topic that could be added to the Agenda under section 92-7(d), HRS. HRS § 92-7(d) (allowing a board to add an item to its filed agenda at a meeting by a "two-thirds recorded vote of all members to which the board is entitled; provided that no item shall be added to the agenda if it is of reasonably major importance and action thereon by the board will affect a significant number of persons"). Therefore, OIP concluded that the Committee violated the Sunshine Law by improperly voting to add Bill 3 to its Agenda at its February Meeting and then voting to approve Bill 3.

OIP noted that COUNCIL-HON took measures to mitigate the public harm from the violations when COUNCIL-HON referred Bill 3 back to the Committee and the Committee properly noticed Bill 3 on its agenda for its meeting on April 3, 2019, and voted on Bill 3 at this meeting.

Board Members' Email Communications

OIP Op. Ltr. No. F20-05

Requester asked OIP whether the Makakilo/Kapolei/Honokai Hale Neighborhood Board No. 34 (Board) violated the Sunshine Law when Board members exchanged email communication about Board business.

In his complaint, Requester attached copies of (1) an email, dated March 29, 2019, which the Board Chair (Chair) received from a then-member of the Board with the subject, "Regarding Noise from Race Track next to a[n] airport," and (2) Chair's reply email on the same date and on the same subject matter (collectively, Racetrack Emails). Two other Board members were listed as "cc" recipients of the Racetrack Emails, one of whom is referred to here as Member D. An email on the same thread as the Racetrack Emails was sent by Member D as both the sender and the sole recipient, and addressed presumably to the Chair, who was not shown as a recipient. Requester later supplemented his complaint by adding a copy of an earlier email, dated September 7, 2018, showing Member D again as the sender and the Chair as the sole recipient. Requester asserted that he received the March and September emails (collectively, Member D's Emails) from another Board member who did not want to be identified and was not listed as a recipient of either email, but who had directly received both emails from Member D. It appears, therefore, that both emails were blind copied to the unidentified Board member, who, along with the Chair, would have been at least a second recipient of Member D's Emails concerning the proposed racetrack.

OIP reviewed the Board's notice for the meeting on April 24, 2019, and it included an agenda item for "Discussion on Racetrack as Identified in City Council Resolution 18-2655[.]" OIP therefore found that the Racetrack Emails concerned "board business" because the proposed racetrack was a subject the Board expected to consider at an upcoming meeting.

In light of OIP's conclusion in OIP Opinion Letter Number F19-03 that "an email from one board member to all other board members about board business is a 'discussion' for the purpose of the Sunshine Law," OIP found that the exchange of the Racetrack Emails was a discussion of the Board's business by three or more Board

members outside of a public meeting, and that no permitted interaction in section 92-2.5, HRS, allowed such a discussion. OIP concluded that the Board's discussion by its exchange of Race-track Emails violated the Sunshine Law's open meeting requirement. HRS § 92-3.

OIP noted this Board had a history of improperly using emails to discuss Board business outside of meetings. Based on the number of instances where this Board and certain individual members had used emails to discuss Board business, OIP advised the Board that it may refer to the appropriate authorities any future instances.

OIP further found substantial evidence that Member D's Emails were sent to other Board members as blind copies. OIP concluded that sending emails as blind copies did not in any way reduce the resulting Sunshine Law violations as an email directly sent to a recipient as a blind copy, or an email directly sent to a recipient as a "cc," is still a direct communication from the sender to the recipient for the purpose of determining whether there has been a discussion under the Sunshine Law. OIP concluded that Member D's sending of emails to more than one other Board member, even as blind copies, constituted an improper discussion of board business outside of a public meeting in violation of the Sunshine Law. OIP Op. Ltr. No. F19-03 at 10.

Finally, OIP found Member D's continued use of emails in what appeared to be a deliberate circumvention of the Sunshine Law sufficiently concerning that OIP referred his actions to the Commission's Executive Secretary for the filing of a complaint under section 2-18-101, Rules and Procedures of the Neighborhood Commission (2017).



Informal Opinions

In FY 2020, OIP issued 13 informal opinions relating to the UIPA and 6 informal opinions relating to the Sunshine Law. (Due to the consolidation of two cases, Sunshine Memo 20-6 also resolved a UIPA issue and is described on pages 45-46.) 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:

Tax Worksheets for Legislative Testimony

UIPA Memo 20-1

Requester sought “the worksheets, assumptions, estimates, and calculations for tax revenue estimates” used by the State Department of Taxation (TAX) in its legislative testimony. The recently issued OIP Opinion Letter Number F19-05 had concluded that under the UIPA, TAX could not withhold the underlying assumptions, source data and documents, and computations that it used to create revenue estimates presented in legislative testimony on the grounds that its disclosure would frustrate TAX’s legitimate function of producing objective and independent revenue estimates or on the grounds that the records were inchoate and draft working papers of a legislative committee. *See* HRS § 92F-13(3) and (5). In this new appeal involving similar records, TAX argued that since it had appealed OIP Opinion Letter Number F19-05 to the First Circuit Court, disclosure of similar records would be inappropriate.

As TAX asserted in its position statement, the request in this appeal was “substantially similar” to the request addressed by OIP Opinion Letter



Number F19-05. OIP’s *in camera* review of the records at issue likewise indicated no significant differences that would distinguish them from the records previously addressed by OIP. OIP concluded that TAX’s pending appeal of OIP Opinion Letter Number F19-05 to the First Circuit Court did not bar OIP from following that opinion as its precedent and reaching the same conclusion. Thus, OIP followed its precedent and concluded that TAX could not withhold the underlying assumptions, source data and documents, and computations that it used to create revenue estimates presented in legislative testimony on the grounds that its disclosure would frustrate TAX’s legitimate function of producing objective and independent revenue estimates or on the grounds that the records were inchoate and draft working papers of a legislative committee. *See* HRS § 92F-13(3) and (5).

Water Records Not Readily Retrievable

UIPA Memo 20-2

Requester sought from the Honolulu Board of Water Supply (BWS-HON) a list of addresses for residential properties within seven zip codes that did not have water service for a specific time period. BWS-HON denied his request as being not readily retrievable and cited section 92F-11(c), HRS, in support of its position.

There is no UIPA exception allowing an agency to withhold a record on the basis that responding to a UIPA request will be burdensome to the

agency. Here, however, BWS-HON's argument was not that it can withhold existing records based on the administrative burden of disclosure, but rather that there is no existing record responsive to Requester's request, and the UIPA does not require BWS-HON to create one. OIP found that BWS-HON was not attempting to use section 92F-11(c), HRS, to avoid responding to a burdensome record request.

The UIPA requires that all government records are public unless restricted or closed by law, and specifically requires agencies to disclose "[w]ater service consumption data maintained by the boards of water supply[.]" HRS §§ 92F-11(a) and (b); 92F-12(a)(12). However, the UIPA also provides that "[u]nless the information is readily retrievable by the agency in the form in which it is requested, an agency shall not be required to prepare a compilation or summary of its records." HRS § 92F-11(c). This law clarifies that an agency's duty is generally limited to providing access to existing records; an agency does not have to create "new" records for the convenience of a requester. OIP Op. Ltr. No. 92-7 at 23. When a request is for a compilation or summary of information in an agency database, the agency is not required to create such a report unless the data can be "routinely compiled" given an agency's existing programming capabilities.

BWS-HON's response to this appeal stated that in order to provide the requested information, it would have to "write a program to query the data fields within its customer information system and apply logic to output the desired information[.]" as well as performing several additional steps including possibly reconciling data between two different software applications. Based on BWS-HON's explanation of the steps required to respond to the record request, OIP found that BWS-HON could not respond using its existing programming capabilities and was not able to readily retrieve the requested information. BWS-HON is therefore not required to provide the

requested information because doing so would require preparation of a compilation or summary of information that is not readily retrievable. HRS § 92F-11(c).

Requester has the option to request the underlying records containing the requested information, *i.e.*, the portion of the relevant databases covering the areas and period of interest to Requester. BWS-HON may charge fees and costs for processing the record request in accordance with chapter 2-71, HAR. If a subsequent record request would again require compilation or summary of information that is not readily retrievable, BWS would not be required to provide such compilation or summary.

Corporate Taxpayer's Audit File

UIPA Memo 20-3

OIP concluded that the Department of Taxation (TAX) properly withheld the records in a corporate taxpayer's audit file under the exception to disclosure of records, which by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function. *See* HRS § 92F-13(3) (2012). The disclosure of such records would frustrate TAX's ability to perform its tax compliance function as the records were prepared in anticipation of civil litigation. However, TAX's description of the withheld records as simply "those that fall within the exception to the government records disclosure provision set forth in section 92F-13(3), HRS" was inadequate. While it was not required to list and describe each individual record being withheld, TAX should at least have listed types or categories of records that were in the file and were being withheld. *See* HAR § 2-71-14(b)(1).

Tax Worksheets for Legislative Testimony Partially Disclosable

UIPA Memo 20-4

In U Memo 20-4, OIP partially reconsidered its decision in U Memo 20-1 based on the belated discovery by the Department of Taxation (TAX) that the data base was small enough to significantly increase the likelihood that the data could be associated with or attributed to specific taxpayers, and that section 235-116, HRS, would require redaction of part of the responsive records. While affirming its substantive holding that TAX improperly denied access to the worksheets assumptions, estimates, and calculations for tax revenue estimates on which TAX's testimony to the Legislature had been based, OIP concluded in U Memo 20-4 that TAX could withhold a small portion of a spreadsheet containing confidential taxpayer information protected under section 92F-13(4), HRS, as it is protected under the confidentiality provisions of section 235-116, HRS.

Kalaupapa Names Disclosable

UIPA Memo 20-5

The Department of Health (DOH) asked OIP whether the Omnibus Public Land Management Act of 2009, Public Law 111-11 (2009) (PL 111-11) made the names of individuals sent to Kalaupapa public by law and thus partially overturned OIP Opinion Number 03-19 (Opinion 03-19). Among other things, Opinion 03-19 had concluded that depending on which agency maintained the names, the names of individuals sent to Kalaupapa fell within the UIPA's exceptions for records whose disclosure would be a clearly unwarranted invasion of personal privacy and for records protected by State or federal law, sections 92F-13(1) and (4), HRS. DOH also asked whether, if the names were public information, each individual's date of admission to Kalaupapa, gender, and age at admission would also be considered public information.

Since OIP issued its Opinion 03-19, the law had changed with the passage of PL 111-11, and an amendment to the definition of protected health information under 45 C.F.R. Parts 160 and 164, which are the medical privacy rules promulgated under the Administrative Simplification subtitle of the Health Insurance Portability and Accountability Act of 1996, Public Law 104-191 (HIPAA rules). Based on these changes to the law, OIP reconsidered its conclusions in Opinion 03-19 with respect to the disclosure of the names of individuals sent to Kalaupapa through 1969.

After reconsideration, OIP concluded that the names and other information regarding individuals sent to Kalaupapa must be disclosed under the UIPA. Disclosure of the names was now required by federal law and is therefore both authorized by the HIPAA rules and required by the UIPA. See PL 111-11, C.F.R. § 164.512(a) (2016), and HRS § 92F-12(b)(2) (2012). Disclosure of the other information – date of birth, age at admission, and gender – was required under the UIPA because in this specific instance, the individuals' significant privacy interest in that information does not outweigh the public interest in its disclosure. See HRS §§ 13(1), -14 (2012).

Redaction of Investigation Records and Attorney-Client Privilege

UIPA Memo 20-6

OIP determined that the Department of Health (DOH) properly redacted the names of complainants from records relating to its investigation of an environmental complaint to avoid the frustration of its legitimate government function of enforcement of environmental laws, as the disclosure of complainant's identities could have a chilling effect on DOH's ability to receive complaints of alleged illegal activity. OIP advised the DOH, however, to make its future redactions apparent to the reader by blacking out or striking information to be redacted. OIP further concluded that the

DOH properly withheld two emails on the basis that they contained attorney-client privileged communications.

More specifically, the DOH Solid and Hazardous Waste Branch's mission includes enforcement of environmental laws and regulations. A member of the public (Requester) made a request to DOH for "all records pertaining to NOYO Docket #155-SHW-SWS 006 concerning James Nutter, Island Recycling From March 2015 Jan 2017." DOH sent a Notice to Requester (NTR) which indicated that it would withhold access to the portions of the requested records containing "Attorney-client privileged Doc" and "complainant id." DOH cited "92F" as justification for its partial denial, and Requester appealed.

OIP first found that DOH's NTR did not include specific legal authority for its denial, and that DOH's initial response to the record request was not in compliance with chapter 2-71, HAR.

In response to this appeal DOH stated that it withheld the names of complainants from the copy of the complaint it provided Requester on the basis that disclosure would have a "chilling effect on the program as no one will want to report illegal activity" and invoked section 92F-13(3), HRS, which allows an agency to withhold records when disclosure would frustrate a legitimate government function. Based on existing precedent, OIP found that disclosure of complainants' identities for complaints alleging violations of environmental law could have a chilling effect on DOH's ability to receive such complaints, thus frustrating its ability to conduct investigations of alleged illegal activity. OIP concluded that DOH properly invoked section 92F-13(3), HRS, for redaction of complainants' identifying information.

DOH also withheld two email strings which it asserted contained attorney-client privileged communications between it and its attorneys regarding DOH's defense in a pending litigation.

DOH claimed it could withhold attorney-client privileged communications under section 92F-13(2), HRS, which allows an agency to withhold access to government records "pertaining to the prosecution or defense of any judicial or quasi-judicial action to which the State or any county is or may be a party, to the extent that such records would not be discoverable." *See also* OIP Op. Ltr. No. F14-01 at 6 (citing OIP Op. Ltr. No. 91-23 at 8-9).

The Department of the Attorney General provides legal counsel to DOH, and the two email strings reviewed *in camera* were found to be communications between DOH employees and several deputies Attorney General about a litigation. OIP therefore concluded the emails are covered by the attorney-client privilege and that DOH properly withheld them under section 92F-13(2), HRS.

Confidentiality of Ethics Investigation

UIPA Memo 20-7

In accordance with the decision in OIP Opinion Letter Number F20-02 (Opinion F20-02), OIP found in U Memo 20-7 that the Hawaii State Ethics Commission (SEC) properly denied a request for a copy of records that "pertain to the State Ethics complaint" submitted by Requester. In Opinion F20-02, OIP had concluded that the SEC properly denied a request for a redacted copy of the investigation file that pertained to that requester's complaint to the SEC, because the State Ethics Code, chapter 84, HRS, includes a confidentiality provision that protects SEC investigation files from disclosure, and, therefore, the requested records, whether government or personal records, may be withheld under the UIPA. HRS § 84-31(b) (2012); HRS §§ 92F-13(4), -22(5) (2012).

Cesspool Data Not Readily Available

UIPA Memo 20-8

Requester asked DOH for “a) physical addresses and b) mailing addresses associated with all known active cesspools on all islands of the State of Hawaii,” and subsequently amended the request to be for “a) TMK numbers and/or physical addresses associated with all known active cesspools on all islands of the State of Hawaii.” DOH advised Requester that it did not maintain a list of tax map keys (TMKs) or addresses associated with active cesspools and explained why it did not have and could not readily produce such a list. However, DOH did direct Requester to the location online of a record of TMKs associated with active cesspools maintained by another agency.

OIP found that DOH met its burden under the UIPA to demonstrate that it did not maintain the requested records, was not required to create a list or summary because the information was not readily retrievable, and had directed Requester to where he could obtain a record maintained by another agency that might contain the information he sought. *See* HRS § 92F-11 (2012) (setting out agency’s affirmative response obligations under the UIPA); HAR § 2-71-14(c) (1998) (allowing an agency that does not maintain a requested record to respond that it cannot produce the requested record, and if applicable direct the requester to another agency that may). Thus, DOH’s response to Requester was consistent with the UIPA’s requirements.

Records Not Maintained by Agency

UIPA Memo 20-9

The Department of the Corporation Counsel, County of Maui (CORP CNSL-M) denied access to two different records requested by the same Requester. Requester appealed to OIP, and OIP consolidated Requester’s two appeals because the appeals were from the same Requester about the same agency. HAR § 2-73-15. OIP concluded that CORP CNSL-M properly denied access to the requested government records in both appeals because CORP CNSL-M does not maintain them and is not required by the UIPA to create government records.

In his first appeal, Requester requested CORP CNSL-M to disclose a procurement report about a law firm’s potential conflicts of interests (Procurement Report). CORP CNSL-M informed Requester that it did not create and does not maintain a Procurement Report responsive to Requester’s specific record request. OIP opined that the UIPA does not require CORP CNSL-M to search for the Procurement Report when CORP CNSL-M credibly asserted that it never created this Procurement Report. OIP opined that, under the UIPA, CORP CNSL-M properly responded to Requester’s request for the Procurement Report by informing him that it did not maintain the Procurement Report, regardless of Requester’s belief that CORP CNSL-M should have created it.

In his second appeal, Requester sought from CORP CNSL-M the first date of when CORP CNSL-M supposedly produced and disclosed a permit file (First Production Date). CORP

CNSL-M informed Requester that it did not maintain a record responsive to his request for the First Production Date. As OIP found, the permit file was the same government record for which Requester filed a Circuit Court complaint for production of records (State Lawsuit), which the court ultimately dismissed because the record did not exist. Like the Circuit Court, OIP finds credible CORP CNSL-M's assertion that the same file considered in both the State Lawsuit and in the present appeal before OIP cannot be produced because it does not exist. Consequently, OIP opined that CORP CNSL-M properly responded to the request for the First Production Date by informing Requester that it does not maintain this record.

City Cannot Charge Search Fees for Record Request

UIPA Memo 20-10

A member of the public appealed the fees charged by the City Department of Planning and Permitting (DPP-HON) for processing his request for copies of records pertaining to a complaint he filed. OIP's administrative rules at chapter 2-71, HAR, authorize agencies to charge search, review, and segregation (SRS) fees to process government record requests under the UIPA's Part II, but no rules authorize agencies to charge SRS fees for personal record requests made under the UIPA's Part III. Requester made a personal record request under Part III, so DPP-HON was not authorized to charge SRS fees for his request.

Charges for copying and other costs governed by laws outside the UIPA do not violate the UIPA, and the copy fees assessed by DPP-HON appear to be lawful under section 92-21, HRS. However, DPP-HON should not have charged a search fee set forth in a City ordinance for processing a record request, because fees for an agency's time spent searching and otherwise processing a UIPA request are only allowed as set forth in chapter 2-71, HAR.

HART Records Disclosable After Redaction of Identifying Information

UIPA Memo 20-11

HART denied access to a copy of a claim that was referenced in a HART Board of Directors meeting agenda. Requester was willing to accept the record with individual names and identifying information redacted, but HART had withheld the entire record.

OIP concluded that HART was not entitled to fully withhold the requested claim to protect the privacy of individuals named therein or protect the identity of a confidential source, because their names and other identifying information were reasonably segregable from the record as a whole. HART was required to disclose the claim after redaction of the names and other identifying information for the claimant and two HART employees.

Sufficiency of Search for Records

UIPA Memo 20-12

Requester sought a copy of his personnel file from Kanuikapono Public Charter School (KPCS), which included records for the school years 2010-11 and 2018-19. KPCS has not yet provided a copy of the 2018-19 school year records it acknowledges it maintains, in violation of the UIPA's Part III. Because there appears to be some question as to whether Requester seeks a copy of his entire file, KPCS and Requester should communicate in writing to set a new appointment to inspect to determine what Requester specifically wants copies of. KPCS may charge copy costs but may not charge any other fees to process requests under Part III.

KPCS did not show that it made a reasonable search for responsive records pertaining to the 2010-11 school year. It therefore failed to meet its burden under the UIPA to justify its partial denial of access to records on the basis it did not maintain them. HRS § 92F-15(c). OIP found KPCS should conduct a reasonable search and should inform Requester of the results of the search within a reasonable time. There are statutory time limits for responding to Part III record requests, but the Governor's temporary suspension of the UIPA's time limits in light of the COVID-19 pandemic allows a reasonable time to respond. If responsive records are found, KPCS should provide access to Requester in accordance with Part III of the UIPA within a reasonable time.

There is no evidence to substantiate that Requester made a request for an accommodation asking that he not be alone with KPCS's Human Resources (HR) Clerk during inspection of his personnel file. KPCS's response to this appeal indicated that KPCS's Executive Director (ED) will allow inspection with the ED or a member of "HR staff." To avoid future issues, OIP found KPCS should allow Requester to schedule inspection with someone other than the HR Clerk.

Investigative File Partially Disclosable as Personal Records

UIPA Memo 20-13

Requester appealed the Department of Transportation's (DOT) denial of access to his "complete complaint and investigative file" (Investigative File). OIP found that a majority of the Investigative File was Requester's personal record, because the subject matter was the investigation of Requester's complaint and Requester was identified throughout. OIP concluded that Part III of the UIPA, which governs access by individuals to their personal records, allowed DOT to withhold

only those portions of the Investigative File that identified or could allow actual identification of interviewees who were promised confidentiality, under section 92F-22, HRS.

OIP further found that limited portions of the Investigative File were not Requester's personal records as they were not "about" Requester, and, therefore, were subject to the public disclosure requirements and exceptions to disclosure set forth in Part II of the UIPA. OIP determined that DOT improperly denied access to those government records, as none of the exceptions to disclosure under Part II apply. *See* HRS § 92F-13 (2012).

Sunshine Law **Informal Opinions:**

Sunshine Law informal opinions are written to resolve investigations and requests for advisory opinions. In FY 2020, OIP wrote six informal opinions concerning the Sunshine Law (one also concerned the UIPA), as summarized below.

Meeting of Councilmembers-Elect

Sunshine Memo 20-1

The permitted interaction at section 92-2.5(c), HRS, allows discussions between two or more members of a board, but less than the number of members that would constitute a quorum for the board, concerning the selection of the board's officers in private without limitation or subsequent reporting. Here, all seven of newly elected, but not yet sworn in, members of the Kauai County Council (COUNCIL-K), four of whom were incumbents, discussed leadership for the upcoming term in a publicly noticed meeting held after the general election but before they were sworn in. OIP found that these members-elect did not violate the Sunshine Law when they met publicly to discuss and take "straw votes" on leadership for the upcoming term because they were not yet sworn in for the upcoming term of office, and therefore, were not subject to the Sunshine Law for that term.

OIP's decision here was based on OIP Opinion Letter Number 02-11 (Opinion 02-11), in which four incumbents and three "new-comers" elected to COUNCIL-K in the 1998 election met twice in a closed "caucus" before they were sworn in. Opinion 02-11 noted the Sunshine Law is silent on how to treat a quorum of board members who have not yet officially taken office and wish to meet privately to discuss selection of board officers. OIP concluded in Opinion 02-11 that the Sunshine Law creates an inadvertent loophole: between the time that councilmembers are

elected and the time they take office in accordance with a county charter, there is no requirement that they comply with the Sunshine Law. OIP Op. Ltr. No. 02-11 at 12. Such a scenario would clearly not be allowed once the councilmembers officially take office. *Id.*, at 14.

Notwithstanding this recognized loophole, OIP has strongly recommended, based on the spirit and intent of the Sunshine Law, that a quorum consisting of members-elect of a board not meet privately prior to officially taking office to discuss selection of board officers. *Id.* Here, COUNCIL-K implemented OIP's recommendation and met in a publicly noticed meeting, even before they were subject to the Sunshine Law. In addition, the apparent failure of COUNCIL-K's email notice system and the procedures for testimony were also not Sunshine Law violations as they pertained to the same meeting on leadership. Consequently, OIP found no Sunshine law violations for COUNCIL-K's meeting.

Adequate Notice on Agenda

Sunshine Memo 20-2

The Kauai County Council (Council) voted to approve the Kauai Salary Commission's (Commission) Resolution setting forth the maximum annual salaries that the Commission established for nine County executive positions and for the Council Chair and Councilmembers (Salary Resolution). Requesters represented a Councilmember and, on her behalf, asked for an investigation into whether the Council violated the Sunshine Law by considering and voting on the Salary Resolution when the Council's agenda for this Meeting (Agenda) had not indicated that the Council would act on the Salary Resolution listed on the Agenda.

OIP found that the Agenda did provide notice of the Council's consideration of the Resolution because attached to the Agenda were copies of the Resolution and the Commission's Cover Letter

stating that the Resolution was being “[t]ransmitted herewith **for consideration** by the County Council.” (Emphasis added). Furthermore, even if the Commission’s Cover Letter had not been attached, OIP had previously opined in OIP Opinion Letter No. 07-06 that the Sunshine Law does not require an agenda to state what action, if any, a board may take on an item. Therefore, OIP concluded that the Agenda provided sufficient public notice as required by the Sunshine Law and allowed the Council to consider and vote on the Salary Resolution.

Special Management Area Permit Hearing Is Not Subject to Sunshine Law

Sunshine Memo 20-3

An individual asked for an investigation into whether the Hana Advisory Committee to the Maui Planning Commission (HAC) violated the Sunshine Law by failing to provide adequate public notice of its discussion of a request for a special management area (SMA) permit.

The Sunshine Law does not apply to “adjudicatory functions exercised by a board and governed by sections 91-8 and 91-9[, HRS.]” HRS § 92-6(a) (2012). Because the SMA permit hearing was an exercise of HAC’s adjudicatory function and was governed by section 91-9, HRS, OIP concluded that it was exempt from the Sunshine Law’s requirements. Thus, even if HAC had failed entirely to give any kind of notice of the SMA permit hearing, that failure could not violate the Sunshine Law, because the Sunshine Law does not apply to such hearings.

Items Improperly Added to Agenda

Sunshine Memo 20-4

A member of the public asked for investigations into whether the Honolulu City Council (COUNCIL-HON) violated the Sunshine Law by adding items to the filed agendas at a regular meeting and a committee meeting in November 2017. Specifically, the items added to the agendas were: (1) a resolution accepting a gift to include electrical work and lighting of a tree at a City and County of Honolulu (City) park; (2) a developer’s request for an extension for COUNCIL-HON to act on a resolution to approve a development project; (3) a resolution urging the City administration to implement sponsorship programs at City facilities; and (4) a resolution asking the City administration and other agencies to conduct a workforce study.

The Sunshine Law requires that boards give written public notice of any meeting, which shall include an agenda that lists all the items to be considered at the meeting. HRS § 92-7(a). Further, the Sunshine Law provides that a filed agenda may be amended to add an item by a two-thirds recorded vote of all members to which the board is entitled, “provided that no item shall be added to the agenda if it is of reasonably major importance and action thereon by the board will affect a significant number of persons.” HRS § 92-7(d).

OIP found that COUNCIL-HON violated the Sunshine Law by improperly amending the filed agendas, and considering and acting on items improperly added to the agendas, because the items added were of reasonably major importance and action thereon by the Council will affect a significant number of persons. HRS § 92-7(d).

Helicopter Noise Roundtable Is Not a Sunshine Law Board

Sunshine Memo 20-5

OIP concluded that the State Department of Transportation did not violate the Sunshine Law by failing to provide public notice of a meeting of the State of Hawaii Helicopter Noise Roundtable because the Roundtable had not been established by the constitution, statute, rule, executive order or other legal authority, and thus, did not meet the definition of a “board” subject to the Sunshine Law.

Unanticipated Executive Meeting and Disclosure of Executive Meeting Minutes

Sunshine Memo 20-6

OIP consolidated two appeals that arose out of the same meeting and were brought by the same individual (Requester), one alleging Sunshine Law violations, and the other asking for a decision on a denial of records under the UIPA.

First, Requester asked whether the Board of Land and Natural Resources (BLNR) violated the Sunshine Law during its public meeting on December 8, 2017 (Meeting). He specifically asked whether BLNR inappropriately entered an executive session (Executive Session) because it was not noticed on the Meeting agenda (Agenda). Requester also complained that the Agenda contained inappropriately vague boilerplate language regarding executive sessions; and asked that whether the underlying subject matter that BLNR went into the Executive Session for, *i.e.*, deliberation and taking action on the request for a contested case, violated the Sunshine Law.

Second, Requester sought a decision as to whether the Department of Land and Natural Resources (DLNR) properly withheld access under the UIPA to a copy of the Executive Session minutes (Executive Minutes).

Meeting agendas must list executive sessions anticipated in advance, but the Sunshine Law allows boards to enter executive sessions not anticipated in advance when the Sunshine Law’s procedures in section 92-4, HRS, are followed. During BLNR’s public discussion at the Meeting of Agenda item D-4 (Item D-4), sections 92-4, 92-5(a)(4), and 92-7(a), HRS, allowed it to vote to enter the Executive Session to discuss with its attorney both Item D-4 and a request for a contested case made during the public discussion on Item D-4, even though the Executive Session was not listed on the Agenda, because the Executive Session had not been previously anticipated. However, the minutes of the Meeting (Minutes), which OIP must treat as an accurate reflection of what happened at the Meeting, showed that BLNR failed to announce the purpose of the Executive Session prior to its vote, which was a violation of section 92-4, HRS.

The generic language at the end of the seven-page Agenda indicating that BLNR might enter an executive session did not violate the notice provisions of the Sunshine Law because it was not an Agenda item, and BLNR did not rely upon it as such. Rather, it was instructive in nature and served to inform the public of the possibility that BLNR could hold an unanticipated executive session to discuss an item that the Agenda indicated would be discussed in public session only.

The Executive Minutes contain attorney-client privileged communications. DLNR was therefore authorized to withhold the Executive Minutes by section 92-9(b), HRS, of the Sunshine Law, which allows minutes of executive meetings to be

withheld so long as their publication would defeat the lawful purpose of the executive meeting, but no longer, and section 92F-13(3), HRS, of the UIPA, which allows agencies to withhold records to avoid the frustration of a legitimate government function. Here the legitimate government function would be protecting attorney-client privileged communications.



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 attorneys in FY 2020.

UIPA Guidance:

Effect of Governor’s Emergency Orders on UIPA

A number of callers asked about the effect of the Governor’s COVID-19 emergency proclamations on the UIPA.

On March 16, 2020, Governor David Ige’s Supplemental Memorandum suspended chapter 92F, HRS (the UIPA), in its entirety. Because OIP’s powers and duties are found in Part IV of chapter 92F, OIP was unable, among other things, to open new cases or issue opinions during this time. This Supplemental Memorandum was extended until May 31, 2020 by the Governor’s Sixth Supplementary Proclamation dated April 25, 2020.

On May 5, 2020, the Governor’s Seventh Supplementary Proclamation for COVID-19 (SP7) at Exhibit H restored OIP’s powers and duties found in part IV of the UIPA, except that the UIPA and OIP’s rules “are suspended to the extent they contain any deadlines for agencies,

including deadlines for the OIP, relating to requests for government records and/or complaints to OIP.” (The partial suspension of the deadlines was continued in subsequent proclamations in FY 2021, most recently as Exhibit F of the Governor’s Sixteenth Supplementary Proclamation issued on November 23, 2020, and effective through December 31, 2020.)

With the substantial restoration of its powers and duties, OIP began in May 2020 to open certain new cases and issue opinions again. However, OIP still cannot accept appeals based on causes of action dependent on alleged violations of the portions of the UIPA and Sunshine Law that are suspended and therefore not in effect. Moreover, because agencies are currently not required to follow the deadlines for responses to OIP’s inquiries, case resolution may be delayed until after the laws and deadlines are fully reinstated.

Despite the suspension of the UIPA’s deadlines, all supplemental proclamations after SP7 clearly state that “[a]gencies must acknowledge receipt of UIPA requests. If a request is not acknowledged, the requester may ask the Office of Information Practices to verify that the agency received the UIPA Request.” OIP may open a case to verify agency receipt of a record request, but requesters should still be aware that OIP does not maintain the records of other agencies and all deadlines for OIP and agencies have been suspended until the Governor’s further action. Therefore, requesters still may not receive the government records they are seeking from the agencies until a later date when the suspension of UIPA deadlines is lifted.



Personal Record Request Made on Behalf of an Individual

People have asked whether a request for records about an individual that was made on his or her behalf by a guardian or attorney would be considered a personal record request.

Yes, such requests would be considered personal record requests. The agency should obtain evidence of the authority of the requester to make a personal record request on behalf of the individual.

Audio Recording Retained in the Cloud

In response to a request for an audio recording of a meeting, an agency was willing to provide the requester access to the recording that was on an online platform (*e.g.*, Google drive) and asked if the audio recording could be destroyed after the written minutes were approved, as was its practice.

OIP advised that the agency could provide the requester with a reasonable time to access the audio recording that was on the online platform and need not maintain it at that site indefinitely.

Certified Payroll Records of a Private Nonprofit Contractor for a Government Project

A nonprofit organization and a private contractor receiving state and county funds to construct a building were asked for certified payroll records.

The UIPA only applies to state and county agencies, and not to the nonprofit organization or contractor who are not governmental entities. If, however, a government agency has a copy of the certified payroll records or has administrative control over it, the requester could seek the

records from the agency. Although the nongovernmental entities could technically ignore the request, the better course of action would be to forward it to the State or county agency overseeing their work.

Death Certificate is Not a Record Disclosable to All Persons

A reporter asked whether a death certificate is a public record.

A death certificate is not a public record allowing anyone to request the death certificate of any deceased person. In OIP Opinion Letter Number 20-23, OIP stated that the Department of Health can restrict access to a death certificate to those people who have a “relationship” as listed in section 338-18(b), HRS, to the deceased person.

Redaction of Suggestion Box Records

An agency was asked for all submissions made in its suggestion boxes, which included complaints about particular employees’ conduct, such as tardiness, dress code violations, and failure to wear face masks. The agency was concerned that making such information public would discourage employees from utilizing the suggestion box in the future.

OIP advised that complaints about specific employees need not be disclosed if the employee was not suspended or discharged, per section 92F-14(b)(4), HRS.

Sunshine Law Guidance:

Effect of Governor's Emergency Orders on Sunshine Law

A number of callers asked about the effect of the Governor's COVID-19 emergency orders on the Sunshine Law.

On March 16, 2020, Governor David Ige's Supplemental Memorandum partially suspended Part I of chapter 92, HRS, which is the Sunshine Law. (See also the effect of this emergency order upon the UIPA and OIP's powers and duties in the previous discussion of UIPA Guidance on page 47.) This March 16 Supplemental Memorandum suspended the Sunshine Law

to the extent necessary to enable boards to conduct business in person or through remote technology without holding meetings open to the public. Boards shall consider reasonable measures to allow public participation consistent with social distancing practices, such as providing notice of meetings, allowing submission of written testimony on agenda items, live streaming meetings, and posting minutes of meetings online. No board deliberation or action shall be invalid, however, if such measures are not taken.

The Sunshine Law's partial suspension was continued by the Governor's Sixth Supplementary Proclamation dated April 25, 2020.

On May 5, 2020, the Governor's Seventh Supplementary Proclamation for COVID-19 (SP7) at Exhibit H, partially suspended the Sunshine Law

to the extent necessary to enable boards as defined in Section 92-2, to conduct meetings without any board members or members of the public physically present in the same location. The physical locations of the board members need not be listed on the agenda.

Boards are discouraged from meeting during the emergency disaster relief period and should only be meeting as necessary to comply with a law, operational necessity, or in furtherance of emergency responses to COVID-19.

Exhibit H included additional guidelines for boards to hold online meetings. Exhibit H was subsequently renamed as Exhibit F and incorporated into subsequent proclamations (including the Sixteenth Supplementary Proclamation issued on November 23, 2020, and made effective through December 31, 2020).

The general effect of these proclamations have been to allow boards to hold online meetings that would otherwise not be permitted by the Sunshine Law. However, SP7 and subsequent proclamations do not suspend other provisions of the Sunshine Law, such as the requirements for notice, minutes, amendments to agendas, and executive sessions.

Amendment of Meeting Notice

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.

Removing People from Mailing List

A board asked if it could properly remove people from its postal mailing list.

OIP advised that it would be appropriate for the board to write to people on the mailing list to determine their interest in receiving agendas by email or to update their mailing address if they still wanted physical copies of the agenda. If there is no response, OIP suggested a follow-up letter before eliminating the person from the postal mailing list.

Removing a “Zoombomber” From a Virtual Meeting

A board asked whether a “zoombomber” who is disrupting a virtual meeting can be removed. OIP advised that the Sunshine Law permits boards to remove a person who willfully disrupts a meeting to prevent and compromise the conduct of the meeting. HRS § 92-3.

Under the Governor’s emergency meeting orders, a board could consider allowing public testimony only by telephone to eliminate its video exposure to visual zoombombing.

Time Limits for Testimony

Boards asked whether time limits for testimony may be established by simply placing it on an agenda without prior adoption by the board.

OIP advised that reasonable time limits on testimony by the public may be imposed if a rule setting such

time limits has been previously adopted by the board at a meeting and is fairly applied, citing OIP Op. Ltr. No. 02-02. A notice of time limits placed on a meeting agenda does not substitute for a board’s adoption of such a rule. Where a board has previously established time limits, those limits must be applied in an evenhanded manner and cannot be used to improperly restrict the testimony of some testifiers and not others.

Board Quorum Requirements

A board asked about the quorum requirements under the Sunshine Law and whether they were affected by the Governor’s Supplemental Proclamations.

The Governor’s supplemental proclamations did not suspend quorum requirements. Section 92-25, HRS, states that if the quorum is not specified in the law or ordinance and due notice has been given, then “a majority of all the members to which the board or commission is entitled shall constitute a quorum to do business and the concurrence of a majority of all the members to which the board or commission is entitled shall be necessary to make any action of the board or commission valid.”

Permitted Interaction Group Requirements Not Suspended by Emergency Proclamations

A board asked if a permitted interaction group (PIG) could make an interim recommendation and still continue its authorized work without dissolving.

OIP advised that the Supplemental Proclamations did not suspend or change the PIG requirements, so the PIG should only provide its final recommendation and avoid making an interim recommendation that could possibly lead to a challenge of any final decision that the board may make, citing OIP Op. Ltr. No. 06-02 (opining that a PIG will undertake an investigation of defined and limited scope and will make a single report back to its board).

Allowing Public Participation Via Interactive Conference Technology

Even after the Governor’s emergency proclamations are lifted, a board was considering whether to continue accommodating requests made by members of the general public to participate remotely by:

- Allowing testifiers to call in from home;
- Allowing testifiers’ participation via audio- or videoconferencing from a location not listed on the notice; or
- Setting up audio- or videoconferencing at a location where no board member will be present, such as a “courtesy” location listed as such on the notice and not guaranteed to remain open for the whole meeting.

The board was concerned, however, as to whether the meeting must be discontinued if the technology failed at these remote locations or visual aids could not be provided.

OIP advised that the Sunshine Law’s limitations on the use of audio- or videoconferences apply only to board members and to the locations where board members are participating by interactive conference technology. For people who are not board members, the Sunshine Law does not restrict their remote participation in a meeting from any location. Accordingly, if a board allows the public to provide remote oral testimony by one or more of the means listed above from locations other than where a board member is located, then with respect those locations:

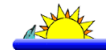
- The meeting may continue if communication with some or all of the remote testifiers is lost;
- If a location established for remote oral testimony becomes unavailable, the location may be canceled or shut down early and the meeting may proceed, whether or not the cancellation is more or less than six days from the meeting date; and

- Copies of visual aids used at the meeting need not be provided to the locations where the remote oral testimony is being delivered.

Note, however, that in Open Meetings Guide to “The Sunshine Law” for State and County Boards, OIP has stated

[i]f the notice lists one or more courtesy locations for the convenience of members of the public who cannot make it to the public meeting location(s), the notice must make clear the distinction between the noticed public meeting location(s) and the listed courtesy location. A courtesy site may be cancelled or shut down early while the meeting continues at the public meeting locations listed on the filed notice.

Additionally, OIP has prepared a draft proposal for the 2021 legislative session, which would amend the Sunshine Law and promote public participation by giving boards the option and greater leeway to conduct public meetings online.



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 2020, OIP had a total of 86 training materials and forms on its website, after creating or revising 11 of them. OIP also posted on its website a copy of a March 2020 Hawai'i Bar Journal article written by its Director regarding the Hawaii Supreme Court's decision disallowing the use of the deliberative process privilege under the UIPA.

Because basic training and educational materials on the UIPA and Sunshine Law are now conveniently accessible online, OIP has been able to produce more specialized training workshops that are customized for a specific agency or board, and OIP conducted 6 in-person training sessions in FY 2020, before the COVID-19 pandemic reached Hawaii's shores. In prior years, OIP has also created accredited CLE seminars, which are specifically geared to the government attorneys who advise the many State and county agencies, boards, and commissions on Sunshine Law or UIPA issues. By providing training for these key legal advisors, OIP can leverage its small staff and be assisted by many other attorneys to help government agencies voluntarily comply with the laws that OIP administers.



Legal advisors as well as the general public can now also enjoy the benefits of OIP's new Legislation page launched in FY 2020, where OIP has compiled the legislative history behind the enactment and amendment of the UIPA, Sunshine Law, and tax statute providing for appeals to OIP from challenges regarding the disclosure of written tax opinions. The Legislation page will also feature significant proposed and adopted legislation concerning the UIPA, Sunshine Law, and OIP.

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

Throughout the year, OIP keeps government entities and the public informed of the open government news through timely What's New articles that are emailed as well as archived on OIP's website. In FY 2020, OIP sent out 26 What's New articles. To be added to OIP's What's New email list, please email a request to oip@hawaii.gov.

UIPA and Sunshine Law Training Sessions

OIP provided 6 training sessions in FY 2020 on the UIPA (1) or Sunshine Law (5) for the following agencies and groups:

- 9/20/19 Department of Health/
Disability & Communication
Access Board
(Sunshine Law)

- 10/11/19 Department of Commerce
& Consumer Affairs,
Professional Vocational
Licensing Boards &
Commissions
(Sunshine Law)

- 11/22/19 Neighborhood Commission
Office, City & County
of Honolulu
(Sunshine Law & UIPA)

- 3/10/20 State Council on
Mental Health
(Sunshine Law)

- 3/22/20 City & County of Honolulu,
Department of Facilities
Management, Stormwater
Advisory Board
(Sunshine Law)



Online Training Materials, Model Forms, and Reports

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

All of OIP's training materials and reports are available online at oip.hawaii.gov, where they are updated by OIP as necessary. While all Annual Reports can be found on the "Reports" page of oip.hawaii.gov, other publications can be found on the "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 2020, OIP released its **Report of the Master UIPA Record Request Year-End Log for FY 2019**, which is summarized later in the Open Data section, beginning on page 56. How



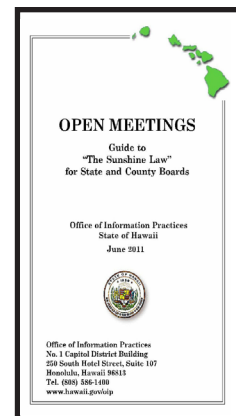
to navigate OIP's website to find the various training materials, reports, and forms is described later in the Communications section beginning on page 60.

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.

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."**

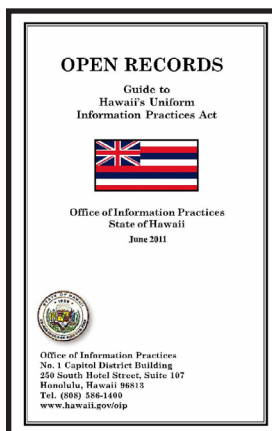
Members of the public may use the **"Request for Assistance to the Office of Information Practices"** form when their requests for government records have been denied by an agency, or to request other assistance from OIP.

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

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

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

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



Open Data

Abbreviations used throughout this section:

Log - UIPA Record Request Log
Master Log - Master UIPA Record Request Log, posted semiannually and annually at data.hawaii.gov

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

In FY 2020, OIP released its year-end reports based on information posted by 188 State and 88 county agencies on the Master UIPA Record Request Year-End Log for FY 2019 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 2020 will be available in FY 2021 and posted on the Reports page at oip.hawaii.gov.

State Agencies' UIPA Record Request Log Results

The 188 State agencies that reported Log results in FY 2019 came from all state executive branch departments, the Governor's office, the Lt. Governor's office, the Legislature, the Judiciary, and independent agencies, such as the OHA, UH, and the Oahu Metropolitan Planning Organization. Overall, formal UIPA record requests constituted 0.3% of the estimated 708,479 total formal and

routine record requests that state agencies received in FY 2019. Excluding one agency whose results would have skewed the entire report, 187 agencies reported receiving 2,241 formal written requests requiring a response under the UIPA, of which all but 57 were completed in FY 2019. Of the 2,184 completed cases, 83% were granted in full or in part, and 8% were denied in full. In 9% of the cases, the agency was unable to respond to the request or the requester withdrew, abandoned, or failed to pay for the request.

State agencies took 7.4 work days, on average, to complete 1,614 typical record requests, and 6.4 days to complete 425 personal record requests. In contrast, it took 21.7 days, on average, to complete a complex request (154 total), which constituted 7% of all requests.

In terms of hours worked per request, the average number of search, review and segregation (SRS) hours for a typical record request was 1.39, as compared to 0.72 hours for a personal record request and 8.25 hours for a complex record request. Although the 154 complex record requests constituted only 7% of all requests, they consumed nearly six times as many SRS hours compared to the typical request. Complex requests also accounted for 26% (\$18,630) of the total gross fees and costs incurred by agencies (\$69,824) and 10% (\$2,343) of the total amount recovered from all requesters (\$22,050).

State agencies recovered \$22,050 in total fees and costs from 224 requesters, which is 31.6% of the \$69,824 incurred by agencies in gross fees and costs. Fifty-nine percent of completed requests were granted \$30 fee waivers, while another 3% were granted \$60 public interest waivers. No fee waivers were reported in 38% of the cases, which may occur in personal record cases (because no fees may be charged for those) or when requests are denied, abandoned, or withdrawn, or the agency is unable to respond.

Almost 90% (1,960) of all requesters in completed cases paid nothing in fees or costs for their record requests. Of the 224 requesters that paid any fees or costs, 40% paid less than \$5.00 and 45% paid between \$5.00 and \$49.99. Of the

33 requesters who paid \$50 or more, at least 25 requesters (75%) were reported by state agencies as representing attorneys, media, or for-profit or nonprofit organizations. For a more detailed breakdown of the fees and costs paid by requesters, see **Figure 16** on the following page.

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

County Agencies' UIPA Record Request Log Results

FY 2019 was the fifth year that the counties participated in the Master Log. OIP prepared a separate report based on information posted by 88 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 0.7% of the estimated 347,486 total formal and routine record requests that agencies received in FY 2019. Eighty-eight county agencies reported receiving 2,335 formal written requests requiring a response under the UIPA, of which 2,205 (94%) were completed in FY 2019. Of the 2,205 completed cases, 86% were granted in full or in part, and 4% were denied in full. In 10% of the cases, the agency was unable to respond to the request or the requester withdrew, abandoned, or failed to pay for the request.

County agencies averaged 7.8 work days to complete a typical request (1,611 completed requests) and 12.7 days to complete a personal record request (254 completed requests). It took 11.7 work days, on average, to complete a complex request (340 completed requests).

In terms of hours worked per request, the average number of search, review and segregation (SRS) hours for a typical county record request was 0.99, as compared to 0.73 hours for a personal record request and 3.03 hours for a complex record request. Although the 358 complex record requests received in FY 2019 constituted

only 15% of all requests, they consumed more than three times as many SRS hours compared to the typical request. Complex requests also disproportionately accounted for 31.7% (\$25,770) of the total gross fees and costs incurred by county agencies (\$56,392) and 31.7% (\$3,852) of the total amount recovered from all requesters (\$12,123).

County agencies recovered \$12,123 in total fees and costs from 443 requesters, which is 21% of the \$56,392 incurred by agencies in total gross fees and costs. Forty-five percent of completed requests were granted \$30 fee waivers, while another 17% were granted \$60 public interest waivers. No fee waivers were reported in 38% of the cases, which may occur in personal record cases (because no fees may be charged for those) or when requests are denied, abandoned, or withdrawn, or the agency is unable to respond.

Some 79.9% (1,762) of all requesters in completed cases paid nothing in fees or costs for their county record requests. Of the 443 requesters that paid any fees or costs, 45.3% paid less than \$5.00 and 43.5% paid between \$5.00 and \$49.99. Only 49 requesters (11% of all paying requesters) paid \$50 or more per request, of whom at least 37 (75.5%) 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 59.

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

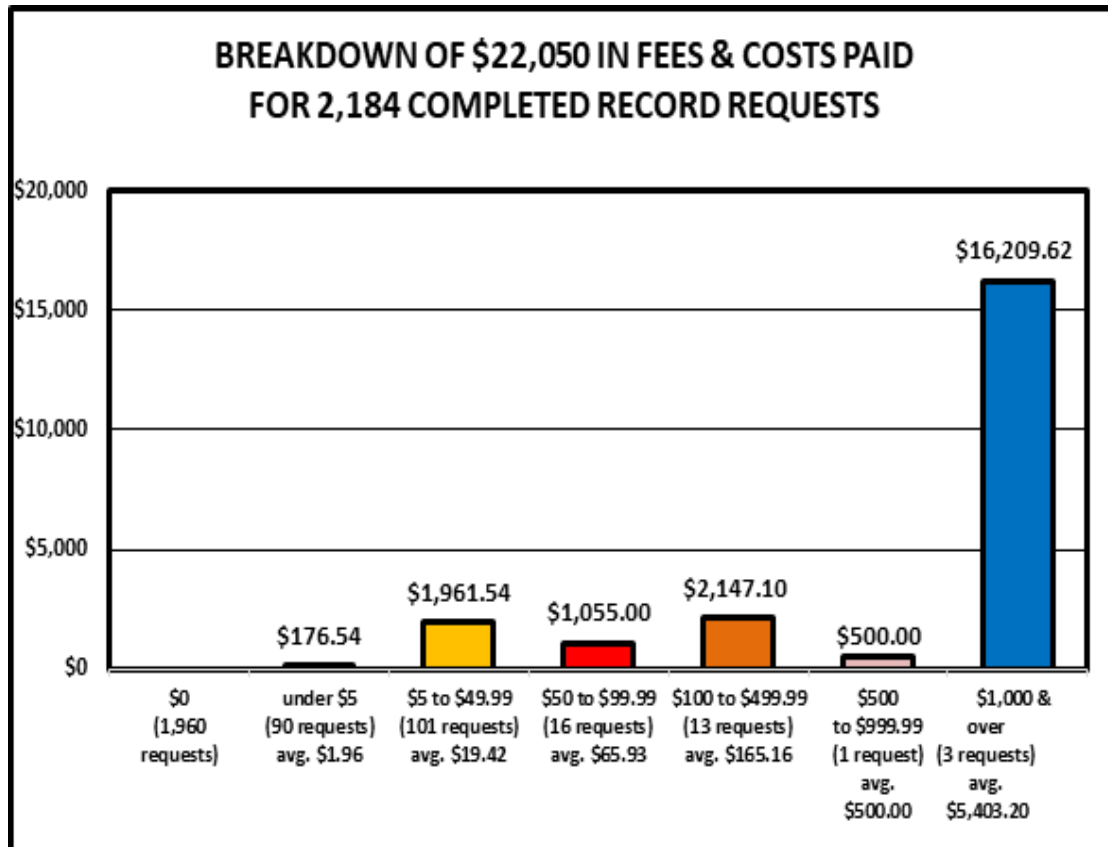


Figure 16

**STATE AGENCIES'
UIPA RECORD REQUEST LOG
RESULTS FOR FY 2019**

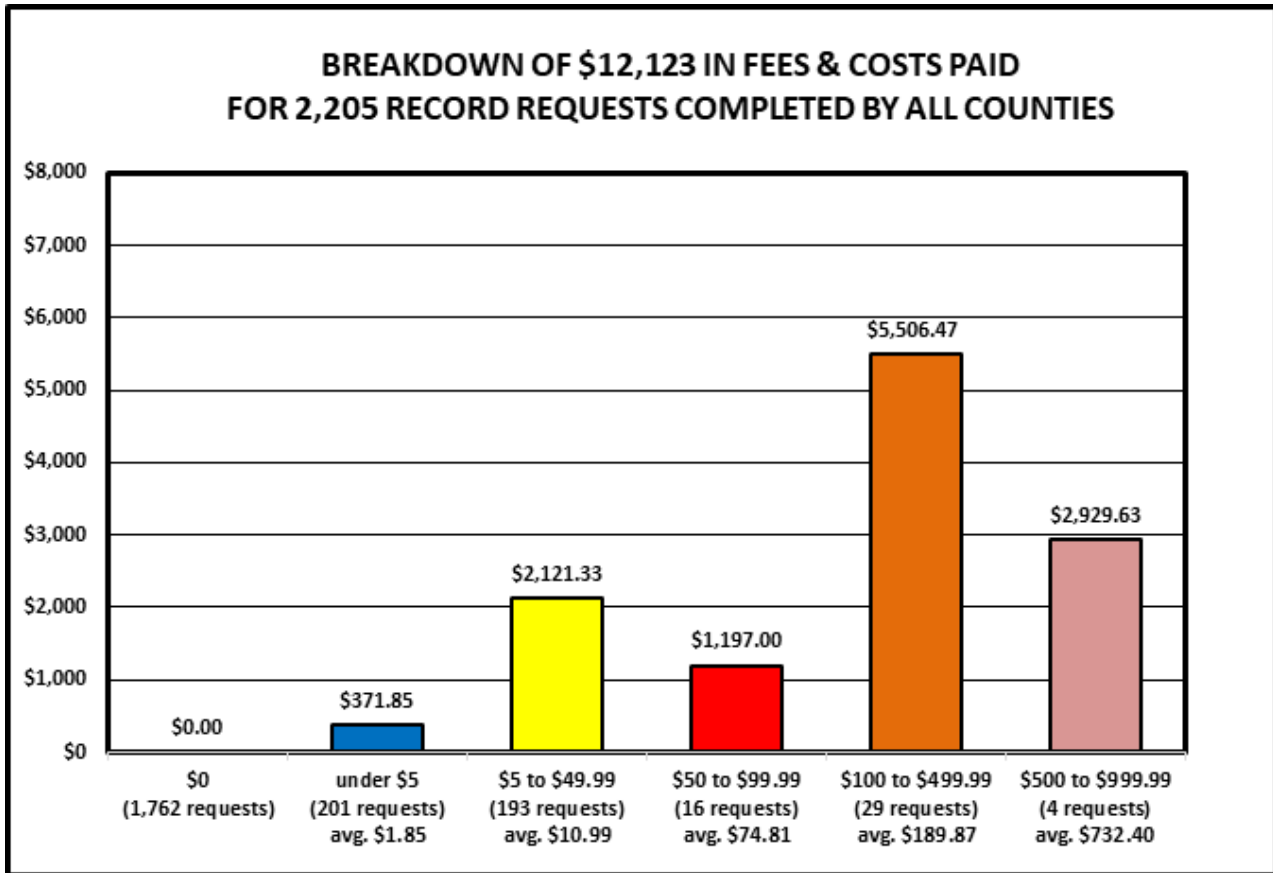


Figure 17

**COUNTY AGENCIES'
UIPA RECORD REQUEST LOG
RESULTS FOR FY 2019**

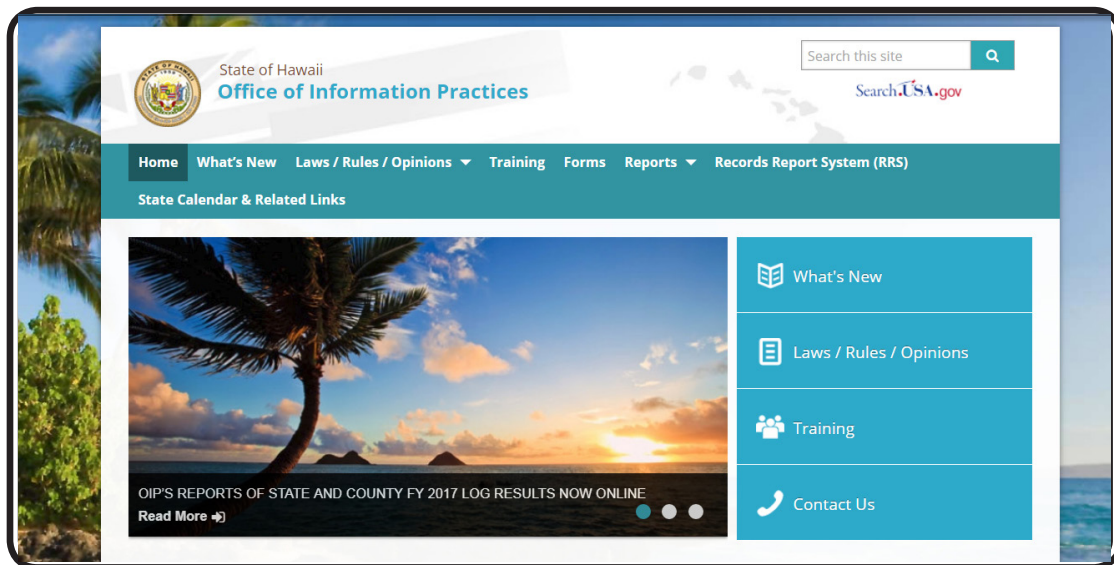


Communications

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 2020, OIP continued its communications to the agencies and public, mainly through 26 *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
- New or proposed legislation and legislative history of the UIPA and Sunshine Law
- Training guides, presentations, and other materials for the UIPA, Sunshine Law, and Appeals to OIP
- General guidance for commonly asked questions
- Guides and links to the Records Report System
- *What's New* at OIP and in open government news
- State Calendar and Related Links



Website Features

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

"What's New"

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

"Laws/ Rules/ Opinions"

This section features these parts:

➤ *UIPA*: the complete text of the UIPA, with quick links to each section; 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.

"Legislation"

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

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

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

"Training"

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

"Forms"

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

"Reports"

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

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

“Records Report System (RRS)”

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

“State Calendar and Related Links”

To expand your search, links are provided to other sites concerning freedom of information and privacy protection, organized by state and country. You can also link to Hawaii’s State Calendar showing the meeting agendas for all State agencies, and to the online calendar for each county. You can visit Hawaii’s open data site at **data.hawaii.gov** and see similar sites of cities, states, and other countries. The UIPA Master Record Request Log results by the various departments and agencies are posted on **data.hawaii.gov** and the link is on this webpage.



Records Report System

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

OIP developed the Records Report System (RRS), a computer database, to facilitate collection of this information from agencies and to serve as a repository for all agency public

reports required by the UIPA. The actual records remain with the agency.

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

As of FY 2020 year end, state and county agencies reported 29,726 record titles. *See Figure 18.*



Records Report System

Status of Records Reported by Agencies: 2020 Update

Jurisdiction	Number of Record Titles
State Executive Agencies	20,682
Legislature	836
Judiciary	1,645
City and County of Honolulu	3,910
County of Hawaii	942
County of Kauai	1,069
County of Maui	642
Total Record Titles	29,726

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.

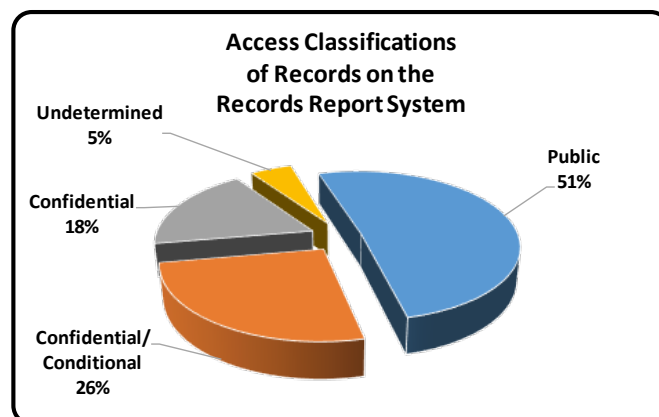


Figure 19

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 2020 legislative session, OIP reviewed and monitored 146 bills and resolutions affecting government information practices, and testified on 25 of these measures. OIP was most significantly impacted by the following legislation:

► **Act 97**, signed on September 15, 2020, enacted **H.B. 285, H.D. 1, S.D.3, C.D. 1**, which amends section 92F-14(b)(4), HRS, of the Uniform Information Practices Act (UIPA) to remove the special exemption from disclosure of suspended county police officers' disciplinary records. The law treats suspended county police officers like other public employees whose suspension or discharge records are open to public disclosure. Disclosure of misconduct records for county police officers, however, cannot occur before 90 days have elapsed following the issuance of a written decision sustaining the suspension or discharge in the highest nonjudicial grievance adjustment procedure, as compared to 30 calendar days for other public employees. The law also authorizes the Law Enforcement Standards Board to revoke the certification of law enforcement officers for misconduct or failure to meet qualifying standards and gives the board until December 31, 2021 to finalize its standards and certification process.



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

HSC - Hawaii Supreme Court

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 2020, OIP monitored 45 litigation cases, of which 11 were new. Three of the cases monitored by OIP concerned open government issues and were not cases directly involving the Sunshine Law or UIPA.

Summaries are provided below of the new law-suits monitored by OIP in FY 2020 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 Hawaii Intermediate Court of Appeals (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 (HSC) 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 HSC 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 HSC 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 and there have been no new developments.

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.

Employee Disciplinary Records

Honolulu Civil Beat, Inc.

v. Department of Education

Civ. No. 19-1-0191-02 BIA (1st Cir. Ct.)

On May 24, 2018, Civil Beat (Plaintiff) made a record request to Hawaii's Department of Education (DOE) for 34 closed cases of employee misconduct as of April 2018. DOE responded by providing a summary chart and denied access based on the UIPA's privacy and frustration exceptions. Later, DOE provided Plaintiff with redacted records for 5 of the cases. Plaintiff filed this lawsuit on February 4, 2019, for access to the withheld portions of disciplinary records for 5 named employees and 29 unknown employees, except for personal contact information of individuals, and identifying information about students, which Plaintiff does not seek access to. Plaintiff asked the court to expedite this case, for an order requiring DOE to disclose all requested information, and for an award of attorney's fees and all other expenses. DOE's Answer 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. There have been no substantive developments since then.

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 First Circuit Court had not issued a final judgment. On June 1, 2015, the ICA dismissed Plaintiff's case for lack of appellate jurisdiction. There has been no change since the ICA's June 1, 2015 dismissal. The case remains pending in the circuit court.

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 First Circuit Court. Plaintiff appealed 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 Attorney General's Office (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 First 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 to the HSC was filed by Plaintiff on July 13, 2017.

On March 11, 2020, the HSC filed its opinion, which held that the AG had failed to meet its burden of proof that it was acting within a lawyer-client relationship when the report was prepared. As a result, the HSC vacated the circuit court's final judgment and remanded the case for determinations of "whether disclosure of this record would 'constitute a clearly unwarranted invasion of personal privacy[.],' HRS [section] 92F-13(1), and whether the record, 'by [its] nature, must be confidential in order for the government to avoid the frustration of a legitimate government function [.]' HRS [section] 92F-13(3). The case remains pending in the circuit 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 (ICA)

Christopher Salem (Plaintiff) filed a complaint in the Second Circuit Court against the County of Maui, the County Planning Director and a deputy Corporation Counsel (collectively Defendants), seeking access to records related to a Special Management Area (SMA) Permit. Plaintiff alleged that the Defendants obstructed Plaintiff's access to the records. Furthermore, Plaintiff asserts that the Defendants "manipulated and

misrepresent[ed]' the existence of public records of the date of final acceptance and closure of a certain SMA permit. Defendants filed a Motion to Dismiss or, in the Alternative, for Summary Judgment (Defendants' Motion). The court granted Defendants' Motion.

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

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. Final judgment was entered on October 30, 2019. Thus, OIP will discontinue coverage of this case.

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. In November 2019, the court granted a motion by Civil Beat Law Center for the Public Interest to file an amicus curiae brief. In June 2020, the court heard oral argument on, and ultimately denied, Appellant's appeal of OIP's Opinion Letter Number F19-04. In July 2020, Appellant appealed that order to the ICA where it remains pending.

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 HSC's *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 First Circuit Court entered its Order affirming OIP's decision and ordered Appellant to comply with it. Final judgment was entered on December 20, 2019. Thus, OIP will discontinue coverage of this case.

Police Disciplinary Records

*Peer News LLC v. City and County of Honolulu
and Honolulu Police
Department
Civ. No. 13-1-2981-11 (1st Cir. Ct.)
ICC 17-1-001433 (Hawaii Supreme Court)*

Peer News LLC, dba Civil Beat (Plaintiff) asked the Honolulu Police Department (Defendant) to provide information regarding 12 police officers who, according to Defendant's annual disclosure of misconduct to the State Legislature, received 20-day suspensions due to employment misconduct from 2003 to 2012. Plaintiff asked for the suspended employees' names, nature of the misconduct, summaries of allegations, and findings of facts and conclusions of law. Defendant denied Plaintiff's record request, asserting that the UIPA's "clearly unwarranted invasion of personal privacy" exception protected the suspended police officers' identities.

Plaintiff then filed a lawsuit in the First Circuit Court alleging that Defendant and the City and County of Honolulu (collectively Defendants) failed to disclose the requested records about the 12 suspended police officers as required by the UIPA and in accordance with a 1997 OIP opinion. In March 2014, the court granted Plaintiff's motion for summary judgment and ordered Defendants to disclose the requested records about the suspended police officers, which was discussed in OIP's FY 2015 Annual Report. An appeal was filed in this case by State of Hawaii Organization of Police Officers (Intervenor).

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

In August 2020, the circuit court ordered a stay of the case pending the Governor’s signing of Act 47, which amended the UIPA to remove misconduct information regarding suspended officers from the category of employee information with a significant privacy interest, and thus may affect the outcome of the case. Act 47 was signed on September 15, 2020, but as of this writing the case remains pending. OIP’s summary of the Supreme Court’s opinion, *Peer News LLC v. City and County of Honolulu*, 138 Haw. 53, 376 P.3d 1 (2016), can be found on OIP’s website at oip.hawaii.gov/wp-content/uploads/2013/09/Peer-News-summary.pdf.

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 (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, on January 3, 2019, the court, on its own, 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 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 HSC’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 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 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. The appeal was initially before the ICA. However, an

Order Granting Application for Transfer to the HSC was filed on October 24, 2019. On July 15, 2020, the HSC granted a joint Motion to Postpone Oral Argument and the appeal remains pending.

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 record requests, but Defendant did not respond to either request.

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

In June 2014, Plaintiff 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 court granted Plaintiff's motion to set aside the order of dismissal that the court had issued in July 2017. On December 30, 2019, the court filed a Supplemental Order of Assignment from the 10th Division to the 9th Division. 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 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 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.

On October 25, 2019, OIP dismissed Plaintiff's appeal to OIP. Plaintiff had not responded to OIP's letter to him stating that it was dismissing his appeal because he had filed a lawsuit in court regarding the same subject matter of his OIP appeal; and the Court's decision would take precedence over an OIP decision.

Ala Wai Request for Proposal Records

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

Erik Rask (Plaintiff) made two record requests to the Department of Land and Natural Resources (DLNR) dated May 23, 2019, and October 26, 2019, respectively, for copies of records pertaining to DLNR's request for proposals (RFP) for development of the Ala Wai Small Boat Harbor, meeting minutes, documents relating to the selection committee relating to the RFP, and communications between DLNR and "qualified applicants." DLNR partially granted and partially denied the record requests, citing section 92F-13(3), HRS, the UIPA's "frustration" exception, as allowing it to withhold records in order to protect the integrity of the procurement process, the attorney-client privilege, and other laws. Plaintiff thereafter filed this lawsuit seeking certain orders regarding the validity of DLNR administrative rules, and seeking full disclosure of responsive records under the UIPA.

Department of Education Records

Hawaii Education Institute v. Kishimoto and Department of Education
Civ. No. 19-1-1090-07 (1st Cir. Ct.)

The Hawaii Education Institute dba Education Institute of Hawaii (Plaintiff) had made a record request to the Department of Education (DOE) for records consisting of the general ledger system, audit and budget, unidentifiable job positions, unidentifiable student performance, enrollment, Charter Schools, employee post-employment benefits, payments made by other agencies on behalf of DOE, accounting manual,

financial statement information and weighted student formula. Plaintiff asserted that DOE refused to provide many of the requested items. DOE claimed that it was not obligated to disclose certain records because Plaintiff sought individual salaries, medical payments and personal identifiable information, the information was not "readily retrievable," and the documents that Plaintiff disclosed were sufficient.

On July 11, 2019, Plaintiff filed suit in the First Circuit Court seeking disclosure of the records and naming DOE and the Superintendent of DOE. The case remains pending.

Production of Records

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

On May 19, 2017, Christopher Salem (Plaintiff) filed a Complaint for Production of Public Records in the Second Circuit Court against the County of Maui; William Spence, Director of Planning; and Deputy Corporation Counsel Brian Bilberry (Defendants). Plaintiff asserted that the Defendants failed and refused to produce public records of the date of the final acceptance and closure of a permit. On August 8, 2017, the circuit court filed an Order Granting Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment with Prejudice. Judgment was filed on January 24, 2020. Plaintiff filed a Notice of Appeal to the ICA on February 23, 2018, where the appeal remains pending.

Arbitrator's Provisional Order Staying Disclosure of Misconduct Records

*United Public Workers, AFSCME, Local 646,
AFL-CIO v. State of Hawaii,
Department of Public Safety
ICSP-20-0000079 (Special Proceeding)
(1st Cir. Ct.)*

In 2019, the Honolulu Star-Advertiser made requests to the Department of Public Safety (Petitioner) for access to (1) the names of employees who were suspended or discharged for misconduct and (2) written decisions to discharge for three specific employees. Petitioner disclosed the requested records. On June 18, 2019, the United Public Workers, AFSCME Local 646, AFL-CIO (Respondent) filed a class grievance on behalf of its bargaining unit that Petitioner's disclosure breached provisions of the collective bargaining agreement. As part of the arbitration, the Respondent filed a motion for provisional remedies to prohibit any further disclosure of such information to any media outlets until completion of the arbitration. The Arbitrator granted the Respondent's Motion. On March 12, 2020, Petitioner filed in the First Circuit Court a Special Proceeding to vacate the Arbitrator's order. On July 10, 2020, the court filed its Order Denying Motion to Vacate Provisional Remedies. OIP will discontinue coverage of this case.

Arrestees Home Addresses

*Mott v. City and County of Honolulu
Civ. No. 18-1-0829 (1st Cir. Ct.)
CAAP-18-0000867 (ICA)
SCWC-18-0000867 (SC)*

Karen Mott (Plaintiff) had made a record request to the Honolulu Police Department for the home addresses of persons listed in certain arrest logs. After Plaintiff's request was denied, she filed a lawsuit against the City and County of Honolulu (Defendant). The First Circuit Court dismissed her complaint on the ground that the public inter-

est in disclosure did not outweigh the arrestees' personal privacy interest in their home addresses.

Plaintiff appealed the circuit court's dismissal. On January 20, 2020, the ICA filed its opinion affirming the circuit court's dismissal of the Plaintiff's complaint. The ICA stated that the HSC and OIP had long recognized that individuals have a significant privacy interest in protecting their home addresses from public disclosure.

On August 10, 2020, the Plaintiff filed an Application for Writ of Certiorari, which was denied by the HSC on October 7, 2020. Therefore, OIP will discontinue coverage of this case.

Sunshine Law Litigation:

Polling Board Members and Public Testimony on Executive Session Item

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

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

service by publication. One of the members of the public filed an answer, as did OIP, and the First Circuit Court entered default against the others. In April 2017, the court heard OHA's motion for summary judgment, which it denied in an order issued May 1, 2017. OHA's subsequent motion for reconsideration was also denied. Although there have been no further developments, the case remains pending in the circuit court.

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 in the First Circuit Court 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. 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 court granted Defendant's motion, 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 in the First Circuit Court 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 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 in the ICA on December 19, 2017. On August 27, 2018, the HSC issued an order that granted transfer of the case and heard oral arguments on January 17, 2019.

On June 27, 2019, the HSC affirmed the circuit court decision in part, vacated in part and remanded for further proceedings in *Civil Beat Law Center for the Public Interest, Inc. v. City & Cty. of Honolulu*, 144 Haw. 466, 445 P.3d 47 (2019). The HSC 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 HSC 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 HSC 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 HSC 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 HSC 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 HSC 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 HSC 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 HSC noted that “an attorney is not a talisman, and consultations in executive sessions must be

purposeful and unclouded by pretext.” Further, the HSC 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 HSC 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 HSC 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 HSC 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.

After remand, the Defendant disclosed the executive session minutes, and the parties stipulated to dismissal of the case. Therefore, OIP will discontinue coverage of this case.

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 previous annual reports, 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 with the ICA on November 2, 2017. The parties have filed their respective briefs and the appeal remains pending in the ICA.

Permitted Interactions - Informational Meeting

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

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

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

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

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

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

The ICA issued a Summary Disposition Order on May 31, 2019, finding that (1) the plain meaning of section 92F-27, HRS, is that it is explicitly self-limited to Part III of the UIPA and can only

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

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

prohibited by the Sunshine Law and addressed in the OIP opinion being challenged. Notably, the HSC held that court review of OIP opinions under any action brought under section 92-12, HRS, would be subject to the palpably erroneous standard of review, which is higher than the *de novo* standard, whether the action was filed by a government board or, as in this case, an individual member of the public.

The matter remains pending in the Second Circuit Court on remand.

Improper Amendment of Honolulu City Council Agenda

Civil Beat Law Center v. Honolulu City Council
Civ. No. 19-1-1695-10 (1st Cir. Ct.)

Under the Sunshine Law, agendas may be amended less than six days after filing only when the topic of discussion is not "of reasonably major importance" and would not affect a significant number of persons. A committee of the Honolulu City Council amended a meeting agenda with less than six days' notice to discuss the Honolulu Police Department's involvement in the protests at Mauna Kea. Civil Beat Law Center (CBLC) filed a complaint in the First Circuit Court and argued that the protests at Mauna Kea have significant importance to the people of the City & County of Honolulu. On April 2, 2020, the court granted CBLC's motion for partial summary judgment and found that the Council violated the Sunshine Law by adding a Mauna Kea discussion to a committee agenda. As the Sunshine Law issue was resolved by the court, OIP will discontinue coverage of this case.

BOE Action Taken Outside of Meeting

Unga v. Department of Education
ICCV 20-576 (1st Cir. Ct.)

Sunny Rainbows Kim Unga (Plaintiff) sent a petition to the Board of Education (BOE) asking that it adopt a new administrative rule to require the DOE to hold school community meetings regarding proposed developments near a public school or library. BOE denied the petition and Plaintiff filed a lawsuit in April 2020, alleging that BOE's decision was held outside of a publicly noticed meeting as required by the Sunshine Law. After Plaintiff filed her motion for summary judgment, she and the BOE settled the lawsuit in September 2020, and BOE agreed to rehear her petition in a public meeting. Therefore, OIP will discontinue coverage of this case.

Writ of Mandamus

Disappeared News v.
Maui Planning Commission
SCPW-20-0000386 (SC)

On May 21, 2020, Disappeared News, The Hawaii Independent and Victor Gregor Limon (Petitioners) filed a Writ of Mandamus with the HSC, which challenged an order of the Maui Planning Commission and its Hearing Officer (Respondents) that allegedly closed to the public certain contested case proceedings on a special management area permit application as a result of governmental emergency orders and sought to have the contested case proceedings opened to the public. On June 24, 2020, the HSC entered an Order Denying Without Prejudice Petition for Writ of Mandamus and stated that there may have been alternative means for Petitioners to seek relief. OIP will discontinue coverage of this case.

