

OPEN RECORDS

GUIDE TO HAWAII'S UNIFORM INFORMATION PRACTICES ACT

**This handbook is a publication of the
Office of Information Practices**

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guidelines, forms, newsletters, announcements,
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I. INTRODUCTION

All political power of this State is inherent in the people and the responsibility for the exercise thereof rests with the people. All government is founded on this authority.

Hawaii State Constitution, article I, section 1

In 1988, the Hawaii State Legislature enacted the Uniform Information Practices Act (Modified) (“UIPA”) based upon the premise that a democracy vests the people with the ultimate decision-making power and government exists only to aid the people in the exercise of that power.

Recognizing public scrutiny and participation to be essential to the exercise of that power, the Legislature declared it to be the policy of this state to conduct government as openly as possible, tempered by the right of the people to privacy as embodied in our state constitution. To that end, the UIPA mandates that all government records be open to public inspection unless access is specifically restricted or closed by law.

The Office of Information Practices (“OIP”) was also created in 1988 to implement the UIPA and to serve as a resource for both the public and government agencies in interpreting and applying the law’s provisions.

We are pleased to provide you with this UIPA handbook, which is intended to provide the public and the non-lawyer agency official with a better understanding of the UIPA and a step-by-step guide for application of that law. We also remain available to assist the public and the agencies in ensuring and protecting our open government.

Cheryl Kakazu Park
Director

II. OVERVIEW OF THE UIPA

THE STATUTE

The UIPA is codified as chapter 92F of the Hawaii Revised Statutes (“HRS”). The UIPA governs both (1) the public’s right to access government records and (2) the individual’s right to access and correct his or her personal records maintained by the government.

The UIPA is divided into four parts:

Part I. General Provisions and Definitions.

This part contains the general provisions and definitions applicable to all parts of the UIPA.

Part II. Freedom of Information. This part governs general public access to government records.

Part III. Disclosure of Personal Records.

This part governs an individual’s access to his or her own personal records that are maintained by the government.

Part IV. Office of Information Practices; Duties.

This part establishes the Office of Information Practices (“OIP”) and sets forth the powers and duties of OIP. This part also sets forth procedures for any agency to appeal an OIP decision to the courts.

THE ADMINISTRATIVE RULES

In 1998, OIP enacted administrative rules setting forth agency procedures and fees for processing government record requests under Part II of the UIPA. These rules are contained in Title 2, subtitle 7, chapter 71 of the Hawaii Administrative Rules (“HAR”) and may be accessed on OIP’s website at *hawaii.gov/oip*. A step by step description of the agency procedures for processing record requests is found in Part IV of this guide, beginning on page ____.

In 2012, OIP also enacted administrative rules for the processing of appeals filed with OIP. These rules are found in Title 2, subtitle 7, chapter 73, HAR, and may also be accessed on OIP’s website, where you will also find a guide summarizing the appeals rules.

III. THE STATUTE – CHAPTER 92F

PART I. GENERAL PROVISIONS

How Should the UIPA Be Interpreted?

The Legislature pronounced that it is the policy of this state to conduct government business as openly as possible while protecting the right of privacy embodied in our state constitution.

Thus, Part I of the UIPA requires that the UIPA be applied and construed to promote its underlying purposes and policies, which are:

- (1) To promote the public interest in disclosure;
- (2) To provide for accurate, relevant, timely, and complete records;
- (3) To enhance government accountability;
- (4) To make government accountable to individuals in the collection, use, and dissemination of information relating to them; and
- (5) To balance the individual privacy interest and the public interest, allowing access unless disclosure would constitute a clearly unwarranted invasion of personal privacy.

Given this direction that the UIPA be interpreted to promote open government, any doubt regarding disclosure of a record should likely be resolved in favor of access.

Which Organizations Does the UIPA Cover?

All agencies of the state and county governments must comply with the UIPA.

“Agency” is defined broadly to encompass all state and county government units, including corporations or other establishments owned, operated, or managed by or on behalf of the state or any county. It covers the executive, legislative, and judicial branches of state and county government, but specifically excludes the nonadministrative functions of the Judiciary. This means that court records related to the adjudication of a legal matter are not subject to the UIPA — access is governed by court rules instead.

FAQ:

I want to get the transcript of a hearing in my divorce case. I was referred to a court reporter who told me I need to pay \$120 to get a copy. Shouldn't I be able to get it for less under the UIPA?

A court hearing is part of the Judiciary's nonadministrative functions and, therefore, access to records maintained by the Judiciary as part of that hearing, including a transcript and any documents filed with the court, is governed by the court's rules and not the UIPA.

What Records Does the UIPA Cover?

The UIPA requires agencies to disclose all “government records.” This term is defined broadly to include any information maintained by an agency that is recorded in any physical form.

OIP has interpreted “maintained” to mean information physically possessed or administratively controlled by an agency. An agency has administrative control over a record

where it has the right to gain access to the record. For example, where an agency contracts with a private company and has the right to review the records held by the company under the contract, those records would be considered government records, even if they are not physically in the agency's office.

A record physically in the agency's office, however, may not be considered a "government record" where it is held or controlled by an employee personally and not in his or her capacity as an employee of the agency, e.g., a personal calendaring system used solely by the employee. See FAQ below.

Note that an agency is not required to comply with the UIPA to the extent necessary to protect an agency's eligibility to receive federal funding, services, or other assistance.

FAQ:

I am a state employee. Is my personal calendar considered a "government record" under the UIPA?

We addressed this question in OIP Op. Ltr. No. 04-17 with respect to the calendars of various city officials. The answer depends on the totality of circumstances surrounding the creation, maintenance and use of the calendar. Generally, the UIPA governs records "maintained" by the agency, not by the individual. Determination of whether an individual maintains a record, as opposed to the agency, depends on whether the individual holds the record in his or her personal capacity versus his or her official capacity.

FAQ:

I have a cell phone that I use partly for work calls. I pay the phone myself, but the agency I work for gives me a monthly allowance toward my cell phone bill. Are my cell phone bills "government records" under the UIPA?

We addressed this question in OIP Op. Ltr. No. 05-08, and addressed a related question in OIP Op. Ltr. No. 93-17. If you are required to submit your cell phone bills to the agency to receive the monthly allowance, then the copies of your cell phone bills held by the agency would be government records (although exceptions to disclosure may still apply). If the allowance is automatic and you are not required to provide invoices to support it, then the agency will not have copies of your cell phone bills so the bills would not be considered government records.

FAQ:

My agency received a request for a copy of a letter in Word form. We have no problem with releasing the letter, but the Word version has metadata showing all the edits, which is what the requester is trying to get. Is the metadata also considered a "government record" subject to the UIPA?

Metadata associated with an electronic file, such as an e-mail or an Excel or a Word file, is still a "government record" under the UIPA. However, the metadata associated with an electronic file may fall under an exception to disclosure even when the basic content of the file does not. Word's record of previous edits to a final document, for instance, would typically meet the "deliberative process privilege" test and fall under the frustration exception. Thus, despite the general rule that a requester is entitled to get a document in the form requested, it may be appropriate for an agency to provide a PDF copy of a letter instead of a Word copy as a way of redacting metadata that falls under an exception to disclosure.

Who Can Make a Request?

“Any person” may make a request for government records under Part II, the Freedom of Information section of the UIPA. “Person” is defined broadly to include an individual, government agencies, partnerships, and any other legal entities.

Under Part II, a government agency generally may not limit access to public records based on who the requester is or the proposed use of the record.

No. In the absence of a statute authorizing selective disclosure, access to the data may not be restricted to a limited set of requesters who intend to use the information for certain purposes.

Note, however, that another statute, HRS 27G-2, allows agencies to “charge for value added electronic services” provided through the state’s internet portal.

FAQ:

May I ask the requester why he is requesting a government record?

The agency may ask the requester why he or she is seeking access for certain purposes. For example, where the requester has made a broadly worded request rather than requesting a specific record, knowing the purpose of the request may assist the agency in determining what records are responsive to the request. But the purpose of the request should not have any bearing on the agency’s decision to disclose or withhold the record.

FAQ:

Our agency has created a compilation of data regarding businesses in this state for the agency’s use in providing services. A private company from another state has requested a copy of this data that it intends to sell to the possible detriment of businesses in this state. May the agency selectively disclose the data to only Hawaii businesses?

PART II. FREEDOM OF INFORMATION

Part II of the UIPA contains the provisions that govern the general public's right to access government records while Part III governs an individual's right to access his or her personal records.

When an individual makes a request for a personal record under Part III, the agency must also analyze the request under Part II for any part of the record that is not required to be disclosed under Part III.

Disclosure Provisions

General Rule of Disclosure

All government records are open to the public unless access is restricted or closed by law.

The UIPA generally requires an agency to make a government record available for inspection and copying, unless the agency can show that an exception to disclosure under HRS § 92F-13 authorizes the agency to restrict or deny access to that record.

An agency, however, is not required to respond to a record request if it has already properly responded to the same or a substantially similar request from the same person within the last year.

An agency should make the information available in the form requested if it is readily retrievable in that form. An agency is not required to prepare a compilation or summary of its records, unless it is readily able to do so.

However, an agency may, with the requester's consent, choose to create a compilation or summary where it would be more efficient to do so.

Agency Records that Must Always Be Disclosed (HRS § 92F-12)

The Legislature created a list of specific categories of records that must always be disclosed. An exception only applies where it is referred to in that list. These categories of records are:

- (1) Agency rules and general policies;
- (2) Final opinions and adjudicated orders (except as protected by HRS § 92F-13(1));
- (3) Government purchasing information, including all bid results (except as prohibited by HRS § 92F-13);
- (4) Pardons and commutations, and directory information for inmates;
- (5) Land ownership, transfer and lien records, including real property tax information and state land leases;
- (6) Environmental test results;
- (7) Agency meeting minutes required by law to be public;
- (8) State/county loan program information;
- (9) Certified payroll records on public works contracts, without social security numbers;
- (10) Agency contract hires and consultants' contracts, without social security numbers;
- (11) Building permit information;
- (12) Water service consumption data maintained by the boards of water supply;
- (13) Rosters of licensee or permit holders;

- (14) General employment information for present and former agency officers and employees (except undercover law enforcement employees);
- (15) Information collected for the purpose of making information available to the public; and
- (16) Information from the transcript, minutes, report, or summary of a public proceeding.

Agencies must also disclose:

- (1) Any record for which the requester has obtained the prior written consent of all individuals to whom the record refers;
- (2) Records expressly authorized by federal or state law to be disclosed to the person requesting access;
- (3) Records showing compelling circumstances affecting the health or safety of any individual;
- (4) Records requested by court order;
- (5) Records subpoenaed by either house of the state legislature; and
- (6) Information from the motor vehicle registration files when the requester has a legitimate reason.

The Exceptions to Disclosure (HRS § 92F-13)

For any record that does not fall into a category that must always be disclosed, the UIPA provides that it is a public record unless one of the five exceptions to disclosure under Part II applies. If an exception only applies to a portion of a record, the agency must provide access to the remaining portion of the record.

When a record falls within an exception, an agency may withhold the record, but is not prohibited by the UIPA from disclosing it. When an agency wants to disclose a record that could be withheld, the agency should consult with its attorney as to whether the record should or must be withheld because of another law or the state or federal constitutions.

The five exceptions to disclosure for Part II are set forth in § 92F-13. In summary, the five exceptions to the general rule requiring disclosure of government records are as follows:

Exception 1 – The Privacy Exception (HRS § 92F-13(1))

An agency may withhold access to a record if disclosure of the record would constitute a “clearly unwarranted invasion of personal privacy[.]” To withhold a record under this exception, an agency must be able to show that:

- (1) An individual has a **significant privacy interest** in the information contained in the record; and
- (2) The significant privacy interest is not outweighed by the **public interest in disclosure**.

An agency must balance the significant privacy interest against the public interest in disclosure of the information. If the public interest is found to outweigh the individual privacy interest, the agency must disclose the information. When an agency cannot identify a significant privacy interest, the slightest public interest in disclosure will require the agency to disclose the record.

What is a significant privacy interest?

(HRS § 92F-14)

The UIPA lists some specific examples of the types of information in which an individual has a significant privacy interest. The list includes information about an individual's

- (1) Medical history, condition, and treatment.
- (2) Criminal law investigation, except where disclosure is necessary to prosecute or continue the investigation.
- (3) Eligibility for social services or welfare benefits.
- (4) Public employment personnel file type information, except (a) information required to be disclosed under § 92F-12(a)(14) and (2) employee misconduct information if the employee is suspended or discharged, or if a county police officer is discharged.
- (5) Nongovernmental employment history, except when information qualifies a government employee for his or her position.
- (6) Financial information of that individual.
- (7) Professional and vocational licensee qualifications, **except**:
 - (a) certain discipline information;
 - (b) current employment information and required insurance coverage; and
 - (c) complaints and dispositions.
- (8) Personal recommendations or evaluations.
- (9) Social security numbers.

OIP has further recognized that an individual has a significant privacy interest in his or her home contact information, date of birth, and ethnicity.

What is the public interest in disclosure?

The public has an interest in obtaining official information that sheds light on **an agency's performance of its statutory purpose and the conduct of government officials, or which otherwise promotes governmental accountability.**

Illustration: Balancing of Interests

A former University President had a significant privacy interest in the Board of Regents' evaluation of his job performance. The public had a strong interest in scrutinizing the work of the Board of Regents as well as the President's performance as a high level government official. Although the two rights were closely balanced, OIP found that the public interest outweighed the employee's privacy interest.

Exception 2 – The Litigation Privilege Exception

(HRS § 92F-13(2))

An agency may withhold access to a record if a litigation privilege protects that same information in a lawsuit or quasi-judicial administrative act involving the state or any county. This exception prevents a party in an action against the state or a county from using the UIPA in order to gain an unfair advantage.

For example, an agency's communication with its attorney to seek legal advice is generally protected from disclosure in a litigation context by the attorney-client privilege. Exception 2 would similarly protect this communication from disclosure under the UIPA. The rationale is that if a person suing the state or a county has the right to consult with his or her attorney in confidence, then the government should have that same right to confidentially consult with its attorney.

Exception 3 – The Frustration Exception

(HRS § 92F-13(3))

An agency may withhold access to records that, by their nature, must be confidential in order for the agency to avoid frustration of a legitimate government function. To withhold a record under this exception, an agency must identify a legitimate government function of the agency and show how disclosure of the record would frustrate the agency's ability to perform that function. Examples of records that might be included under this exception are:

- (1) **Law enforcement records**, where disclosure could reasonably be expected in some particular, discernable way to interfere with pending enforcement proceedings.
- (2) **Examination materials**, if disclosure would compromise the validity, fairness, or objectivity of the examination.
- (3) **Government purchasing information** that, if disclosed, would raise the cost of government procurements or give a manifestly unfair advantage to any person proposing to enter into a contract or agreement with an agency.
- (4) **Land acquisition information** identifying or pertaining to real property under consideration for future public acquisition.
- (5) **Proprietary information**, such as research methods, records and data, computer programs, software, and other types of information manufactured or marketed by persons under exclusive legal right, owned by an agency or entrusted to it.
- (6) **Confidential business information**, which includes trade secrets or confidential commercial and financial information where there is a

likelihood of substantial competitive harm. For example, information may be withheld if disclosure would allow competitors to selectively underprice, estimate profit margins, or determine market and supply weaknesses.

- (7) **Inter-agency or intra-agency memoranda or correspondence** used in the agency's decision-making that falls under the "**deliberative process privilege**." This privilege allows an agency to withhold recommendations, draft documents, proposals, suggestions, and other opinion materials that comprise part of the process by which the agency formulates its decisions and policies. It protects the quality of agency decisions by encouraging the uninhibited exchange of ideas, recommendations, and opinions within an agency.

To withhold a record, an agency must show that the record is:

- (a) **Predecisional**, meaning that the record must be received by the decision-maker prior to the time the agency decision or policy is made **and**
- (b) **Deliberative**, meaning that the record consists of a recommendation or opinion on agency matters that was a direct part of the decision-making process.

A record protected by this privilege may lose this protection where the agency later expressly adopts or incorporates the record into its final decision or policy.

ENFORCEMENT PROVISIONS

Illustration: *Records or Information Compiled for Law Enforcement in a Pending or Prospective Law Enforcement Proceeding*

Access to investigative records before an investigation is concluded could frustrate a legitimate government function where (1) the target of the investigation could obtain premature access to the government's case; (2) witnesses could be subject to reprisal or harassment; (3) evidence could be destroyed; or (4) witnesses could become unwilling to provide information to the agency.

Exception 4 – The Law or Order Exception (HRS § 92F-13(4))

An agency may withhold access to records that are protected from disclosure by a state or federal law or by a court order, such as tax return information required to be kept confidential by statute. The term “law” does not include administrative rules, county charter provisions, or mayoral orders.

Exception 5 – The Legislature Exception (HRS § 92F-13(5))

Legislative committees may withhold their draft working papers and work product; legislative investigating committees may withhold their records or transcripts protected by legislative rule; and legislators may withhold their personal files.

Appeal of an Agency Denial of Access to Government Records (HRS §§ 92F-15, -15.3 & -15.5)

An individual who has been denied access to a government record may appeal that denial in two ways. The requester may:

- (1) Appeal to the OIP; **and/or**
- (2) Bring a legal action against the agency in circuit court within 2 years of the agency's denial of access.

An individual does not need to appeal to OIP before bringing an action in court, but may choose to do so first then later appeal to the court, if necessary. If OIP determines that the record must be disclosed, “the agency shall make the record available.” HRS § 92F-15.5(b). An appeal to the court is considered on an expedited basis. The person filing an appeal to the court must give notice to OIP of the written filing.

If the court orders the agency to disclose a record that the agency denied access to, the court must order the agency to pay the requester his or her reasonable attorney's fees and all other expenses reasonably incurred in the litigation.

If a requester files a lawsuit to compel disclosure by an agency that failed to make a record available after OIP issued a decision that the agency should disclose (and the agency has not appealed OIP's decision), OIP's decision is not be subject to challenge by the agency in the action to compel disclosure.

OIP's formal opinions are admissible in court as precedent unless found to be palpably erroneous. In an action to compel disclosure brought by a person after OIP upheld the agency's denial, the opinion or ruling upholding the agency's denial of access shall be reviewed de novo.

Agency Appeals of OIP Decisions

Effective January 1, 2013, an agency may appeal an OIP decision to the courts in accordance with section 92F-42, HRS. An agency appeal must be filed within thirty days of OIP's decision, and notice must be given to OIP and the person who requested the decision. OIP and the person who requested the decision are not required to participate in the proceeding, but may intervene.

The court's review is limited to the record that was before OIP, unless the court finds that extraordinary circumstances justify discovery and admission of additional evidence. The circuit court must uphold an OIP decision unless it concludes the decision was palpably erroneous.

For more information, see OIP's Guide to Appeals to the Office of Information Practices, available on OIP's website at www.hawaii.gov/oip.

Criminal Penalties (§92F-17)

The UIPA imposes criminal penalties upon:

- (1) A government worker who intentionally discloses a government record or information, despite being aware that a statute specifically makes that record or information confidential; and
- (2) Anyone who uses false pretense, bribery, or theft to intentionally access a government record or information that he or she knows is confidential.

The UIPA specifically provides immunity from civil or criminal liability to an employee who discloses a record or denies access to a record in good faith.

INTERAGENCY SHARING OF RECORDS

An agency may share non-public records with another agency under certain circumstances listed in HRS § 92F-19.

Generally, a specific need or legal authority must be shown for records to be shared with another agency.

For example, the statute allows a prosecutor to share with the Department of Corrections information related to an adult corrections officer's arrest on drug related offenses because the department is, by statute and through its administrative rules, authorized and required to continuously monitor an officer's character, reputation, and suitability to serve in that capacity.

The agency receiving the records must treat the records in the same manner as the agency that originally had the records. In other words, the receiving agency cannot disclose a record publicly if the originating agency could not.

Agencies are generally not authorized to share records protected by a specific confidentiality statute. For example, HRS § 235-116 specifically prohibits disclosure of income tax return information.

PART III. PERSONAL RECORDS

The UIPA has a separate section that deals with an individual's right to access and correct his or her own "personal records."

A "**personal record**" is a government record that contains information "about" the individual who is requesting the record. This includes an individual's educational, financial, or medical records, or items that reference the individual by name or otherwise.

Because "personal records" are also "government records," they may also be requested by others under Part II of the UIPA, the general public access section.

An agency is only required to provide access under Part III to an "accessible" personal record, which generally means one that is filed by the person's name or other identifying information, or which the agency can otherwise readily find.

Joint Personal Records

A joint personal record is a record that contains more than one individual's name or other identifying particular. A joint personal record is generally assumed to be entirely accessible to the requester where no Part III exception allows the agency to withhold the record from the requester.

However, a portion of the record that is clearly "about" someone else and **not** "about" the requester may be segregated from the record because it would not be the requester's "personal record." Instead, that portion would be analyzed as a general records request under Part II so the privacy exception could apply to protect that information.

Illustration: Joint Records

*A UH Campus Security report of an alleged sexual assault included a campus security officer's written report, the alleged assailant's photograph, and witness statements. The report was a joint personal record. It was a personal record of the alleged victim, and it was also a personal record of the alleged assailant and each of the witnesses. In response to a request made by the alleged victim, the report should generally be disclosed to her because no personal records exception applied. However, some personal information, such as home contact information, was only "about" the other individuals and **not** "about" her. That information was not subject to disclosure as her personal record and had to be analyzed as a general records request.*

DISCLOSURE PROVISIONS

An agency must provide an individual access to his or her personal record within 10 working days after receiving a request unless an exception under Part III allows the agency to withhold the record from that requester.

The agency may extend its response period for an additional 20 working days if, within the initial 10 day period, the agency provides the individual with a written explanation of “unusual circumstances” causing the delay.

The Exemptions from Disclosure (HRS § 92F-22)

The personal records section of the UIPA contains its own set of exceptions, which differ from those for general government records requests.

Generally, these personal records exceptions protect from disclosure:

- (1) Criminal law enforcement agency records;
- (2) Confidential source records;
- (3) Government exam records;
- (4) Investigative materials; and
- (5) Records protected by law.

Exemption 1 – Criminal Law Enforcement Records (HRS § 92F- 22(1))

Agencies with a principal function of crime prevention, control, or reduction may withhold access to:

- (1) Information or reports prepared or compiled for criminal intelligence or investigation; and
- (2) Reports prepared or compiled during any stage of the criminal law enforcement process.

Exemption 2 – Confidential Source Records (HRS § 92F-22(2))

An agency may withhold records when necessary to protect the identity of a source who furnished information to the agency under an express or implied promise of confidentiality.

Exemption 3 – Government Exam Records (HRS § 92F-22(3))

An agency may withhold examination materials that it uses solely for government hiring or promotions or for licensing or academic testing, if disclosure would compromise the objectivity, fairness, or effectiveness of the process.

Exemption 4 – Investigative Materials (HRS § 92F-22(4))

An agency may withhold investigative reports and materials related to an **uncompleted** civil, criminal, or administrative proceeding against the individual requesting the records.

Exemption 5 – Records Protected by Law (HRS § 92F-22(5))

An agency may withhold records (1) required to be withheld from the individual by statute or court decision or (2) authorized to be withheld by constitutional or statutory privilege. This allows agencies to withhold records such as records sealed by a court order, communications between the agency and its attorney, and records found to be privileged in litigation.

CORRECTION OF PERSONAL RECORDS

An individual has a right to correct or amend factual errors, misrepresentations, or misleading entries in his or her personal record. Part III sets out the procedures for correction.

ENFORCEMENT PROVISIONS

Appeal from Agency Denial of Access to Personal Records (HRS §§ 92F-27 and -27.5)

An individual who has been denied access to his or her personal record may appeal that denial in two ways. The requester may:

- (1) Appeal to the OIP; **and/or**
- (2) Bring a legal action against the agency in circuit court within 2 years of the denial of access (or when applicable, receipt of a final OIP determination).

If OIP determines that the record must be disclosed, “the agency shall make the record available.” HRS § 92F-27.5.

An individual does not need to appeal to OIP before bringing an action in court, but may choose to do so first and then later appeal to the court, if necessary.

OIP’s formal opinions are admissible in court as precedent unless found to be palpably erroneous. An OIP opinion or ruling upholding the agency’s denial of access shall be reviewed de novo, and the court may examine the record at issue to determine whether any part of it may be withheld.

An individual may also appeal to the circuit courts from an agency’s failure to correct or amend his or her personal record. This action must be brought within 2 years.

Penalties

If the court finds that the agency knowingly or intentionally violated a provision under Part III, the agency is liable for:

- (1) Actual damages of not less than \$1,000; and
- (2) Costs and reasonable attorney’s fees.

The court may also assess attorney’s fees and costs against the agency when the complainant bringing the action substantially prevails; or against the complainant when the charges brought against the agency are frivolous.

PART IV. OFFICE OF INFORMATION PRACTICES

This part sets forth OIP's functions and duties in administering the UIPA. These functions and duties include:

- Providing guidance to the public on rights granted under the UIPA
- Providing guidance to agencies on agency functions and responsibilities under the UIPA
- Providing assistance to the public in making UIPA requests and in obtaining records from agencies
- Providing assistance to agencies in complying with the UIPA
- Providing education and training for agencies' officers and employees
- Receiving complaints and investigating possible violations by agencies
- Reviewing and ruling on agency denials of access
- Recommending legislative changes
- Monitoring UIPA-related litigation
- Reporting to the Governor and Legislature on OIP's activities and findings

OIP provides guidance and assistance through a variety of means. It issues advisory opinions and rulings. It provides direct assistance on general matters to both government agencies as well as to members of the public through its "Attorney of the Day" legal advice program. OIP provides advice on specific matters through a more formal request process for assistance, investigation, or opinion.

OIP continually provides training sessions; publishes resource materials and an informational newsletter; and maintains a website providing access to the statute, rules, forms, and all formal opinions.

IV. OIP'S ADMINISTRATIVE RULES

THE MECHANICS OF PROCESSING REQUESTS BY AGENCIES UNDER PART II

Upon receiving a general request for access to a government record and unless an exception applies, an agency must make the requested record available for inspection and copying during regular business hours.

OIP's administrative rules in Title 2, subtitle 7, chapter 71, HAR, contain the procedures for, and other provisions related to, the agency's processing of a request made under Part II.

Informal Request

When an agency receives an oral request for a record, OIP's administrative rules provide that the agency can:

- (1) Provide access to a disclosable record in a reasonably timely manner (if the agency is going to charge more than \$15.00 in fees, it must inform the requester before processing the request);
- (2) Deny access (if the requester disagrees with the denial, the agency must tell the requester that he or she can submit a formal request);
- (3) Inform the requester that the agency does not maintain the record; **or**
- (4) Ask that the requester submit a **formal** request.

Formal Request

An agency may require that a formal request be submitted. A formal request must be made in writing and must include the following information:

- (1) Contact information for the requester;
- (2) A reasonable description of the requested record to enable the agency to locate the record with reasonable effort;
- (3) Any request for a waiver of fees in the public interest and facts to support the waiver; and
- (4) A request to inspect records or a request to obtain a copy and the desired means of transmission.

AGENCY GUIDELINE TO RESPOND TO A FORMAL REQUEST

Agencies may use the following general guideline to respond to a formal request:

Step 1 – Determine Whether the Agency Has the Requested Record

A. Identify the Record.

If a request is unclear, the agency may request more information in its notice to requester, explained below, or may simply contact the requester informally and ask.

FAQ:

Our agency received a request for X. I believe that the requester is really seeking Y. May I contact the requester to see which record he wants?

Yes. The agency may formally ask for clarification in the required notice, but the agency generally should attempt to clarify the request before sending the required notice in order to expedite the agency's response.

B. Determine if the Agency or a Unit of the Agency Maintains the Record.

The agency must make an initial determination of whether any unit or division of the agency “maintains” the requested record. As explained above, an agency “maintains” a government

record if the record is in the physical possession of the agency and/or under its administrative control.

Under OIP's administrative rules, if one unit or division receives a request for a record that is maintained by another unit or division within the agency, then it must forward the request to the appropriate unit or division. The time for response to the request will then begin to run once the request is received by the unit or division that maintains the record. See HAR § 2-71-13(d).

Step 2 – Determine If an Exception Applies

A record, or a portion of the record, may be withheld if it falls within one of the five exceptions to disclosure listed under HRS § 92F-13:

- (1) The Privacy Exception
- (2) The Litigation Privilege Exception
- (3) The Frustration Exception
- (4) The Law or Order Exception
- (5) The Legislature Exception

An exception applies if the answer is “yes” to any of the following questions:

- Would disclosure constitute a clearly unwarranted invasion of an individual's personal privacy?
- Would the record be privileged against discovery in a judicial or quasi-judicial action involving the State or any county?
- Must the agency keep the record confidential in order to avoid the frustration of one of its legitimate functions, i.e., in order to do its job?

- Is the record protected by state or federal law or by court order?
- Is the record a draft document of a legislative committee or contained in the personal file of a legislator?

When an agency denies access to a record, the agency has the burden of justifying its withholding under an applicable exception.

Must the record (or information) be withheld if an exception applies?

In certain instances, the agency must withhold records, such as where the record is made confidential by state or federal law or is information protected by the individual's right to privacy under the state or federal constitutions.

Does the agency have the discretion to disclose the record, even if an exception applies?

Unless it is required by another law or court order to maintain the confidentiality of a record, the agency can choose to disclose a record that falls under an exception. For example, an agency may choose to disclose a preliminary document on a project prior to making a final decision, even though the agency could have withheld the record under the “frustration” exception.

Step 3 – Provide the Required Response

Within ten business days of receipt of a request, the agency must respond to the requester. Depending upon the circumstances, the agency must:

- A. Make the record available; **OR**
- B. Provide a “Notice to Requester” or an “Acknowledgment to Requester”

Fees

OIP's administrative rules allow an agency to charge certain fees. *See* Haw. Admin. R. § 2-71-19. These rules also allow an agency to require prepayment of 50% of the agency's estimated fees to search for, review, and segregate the requested records, plus 100% of the agency's estimate of other lawful fees, such as copying or mailing costs, as detailed below.

Note that the agency must waive the first \$30 in fees for search, review, and segregation. Alternatively, the agency must waive the first \$60 in fees where the agency finds that the requester has met the requirements under OIP's administrative rules for a public interest waiver, as detailed below.

"Allowable fees." An agency may charge fees as follows:

- (1) Fees for search, review, and segregation of the record(s), with the first \$30 of the total waived, calculated as follows:
 - (a) For search: \$2.50 per 15 minutes or fraction thereof; and
 - (b) For review/segregation: \$5 per 15 minutes or fraction thereof.
- (2) Any other lawful fees.

"Search" means to look for a government record, including page-by-page or line-by-line identification of a government record, manually or by computer using existing retrieval or programming capabilities.

"Review" means to examine a record in order to determine which portions, if any, may be exempt from disclosure, but does not include the time spent by the agency or another person to resolve issues of general law or policy regarding the applicability of exceptions to disclosure under the UIPA.

"Segregate" means to prepare the record for disclosure by excising any portion of the record exempted from disclosure. If information is reasonably segregable from a requested record, the agency is required to provide access to the portions of the record that are required to be disclosed. *OIP recommends that a copy be made; that the agency black-out the exempted information; and that the agency then make a copy of that redacted copy to be furnished to the requester. Note that the agency may only charge for one copy of the record.*

"Other lawful costs" include photocopying costs pursuant to HRS § 92-21, the actual cost of a CD or videotape used to copy a record, and the actual charge for postage or other transmission.

"Public interest waiver." The agency is required to waive \$60 of the total fees for search, review, and segregation if it finds that the public interest would be served because (1) the record is not readily available to the public and (2) the requester intends and has the actual ability to widely disseminate the information to the public.

"Prepayment." Based upon the agency's **good faith estimate** of the above fees, the agency may require the requester to prepay:

- (1) 50% of the estimated allowable fees for search, review, and segregation; **and**
 - (2) 100% of the estimated costs to prepare and transmit the record.
-

A. Make the Record Available

If the record is listed under HRS § 92F-12 (records that are always public) or is a record available for public access in its entirety (i.e., it is clear no exception applies to any portion of the record and there is no need to search for the record), then the agency must disclose the record within a reasonable time not to exceed 10 business days or upon prepayment of fees, if required by the agency.

When a record is easily accessible, the agency should not delay its disclosure. In such a case, disclosure on the tenth day, absent other circumstances, would likely not be reasonable.

----- **OR** -----

B. Provide Notice or Acknowledgment to the Requester

For a record not listed under HRS § 92F-12 or that is not publicly available in its entirety, the agency must provide a written response to the requester within 10 business days.

1. Notice to Requester

The Notice to Requester provides information required by OIP's administrative rules about how the agency will provide access to the requested record, including when and to what extent the records will be made available.

** OIP has created a "Notice to Requester" form that the agency may use. It is available in Word and pdf format on the OIP website. A copy is attached to this handbook as Appendix B.*

The Notice to Requester must include the following information as applicable:

- (1) When the agency **will disclose all or part of the record**, the notice must include:
 - (a) Where or how the record or copies will be made available;
 - (b) A good faith estimate of **"allowable fees,"** grant of **"public interest waiver,"** and any **"prepayment"** required;
 - (c) Instructions for any necessary, additional arrangements;
 - (d) When the record will be available; and
 - (e) Whether **"incremental disclosure"** will be made and the justification for such disclosure.
- (2) When the agency is **denying access to all or part of a record**, the notice must identify:
 - (a) The specific record or part that will not be disclosed; **and**
 - (b) The HRS § 92F-13 exception that allows withholding (and any other applicable laws) and a brief explanation of why the agency cited that exception.
- (3) When the agency is **unable to disclose all or part of the record**, the notice must state that:
 - (a) The agency does not maintain the record;

- (b) The agency requires a further description or clarification of the requested record to identify and search for the record; **or**
- (c) The request requires the agency to create a summary or compile information not readily retrievable.

2. Acknowledgment to Requester

When “**extenuating circumstances**” exist, the agency may provide the requester with **written acknowledgment*** of the request within 10 business days, but must then provide the Notice to Requester within 20 business days from the agency’s receipt of the request. *See* Haw. Admin. R. § 2-71-13(c).

* *OIP has created an “Acknowledgment to Requester” form that the agency may use. It is available in Word and pdf format on the OIP website. A copy is attached to this handbook as Appendix A.*

“**Extenuating circumstances**” exist when:

- (1) The agency must consult with another person (not including OIP or the agency’s counsel) to determine whether the record is exempt from disclosure under the UIPA;
 - (2) The request requires extensive search, review, segregation, or preparation;
 - (3) The agency requires additional time to respond in order to avoid an unreasonable interference with its other statutory duties and functions; or
 - (4) A natural disaster or other situation beyond the agency’s control prevents a response.
-

Incremental Disclosure

Disclosure may be made in increments when:

- (1) “Extenuating circumstances” are present; **and**
- (2) The requested records are voluminous.

When incremental disclosure is to be made, the agency may require (1) one prepayment of fees prior to any disclosure **or** (2) incremental prepayment of fees prior to each incremental disclosure.

If one prepayment is required: Each increment of records must be disclosed within 20 business days of the prior incremental disclosure.

If incremental prepayment is allowed: Each increment of records must be disclosed within 20 business days after the prepayment made for that increment of records.

Step 4 - Search, Review, and Segregate

For records not immediately accessible, the agency must:

- (1) Locate the requested record; **and**
- (2) When the agency has identified possible exceptions to disclosure, the agency must review and segregate the information it will withhold.

Rather than withholding the entire record, information that may be withheld must be segregated if it may reasonably be removed from the record. Segregation must be done in a way that makes it reasonably apparent that information has been deleted from the record.

When an agency requires a prepayment of fees, OIP recommends that the agency delay its search, review, and segregation until receipt of the prepayment in order to avoid wasted effort in the event the requester chooses to narrow or abandon the request.

Step 5 - Provide the Record in the Manner Requested

A record to be disclosed must be disclosed within 5 business days after the agency provides notice or, when applicable, after receiving prepayment of allowable fees.

The agency must make reasonable efforts to provide access to the record in the manner requested by the requester.

ACKNOWLEDGMENT TO REQUESTER

To: _____
From: _____
(Agency and name & telephone number of contact person at agency)

DATE REQUEST RECEIVED: _____
DATE OF ACKNOWLEDGMENT: _____

GOVERNMENT RECORDS YOU REQUESTED (attach copy of request or provide brief description below):

1. _____
2. _____
3. _____
4. _____
5. _____

This acknowledgment is provided in accordance with section 2-71-13, Hawaii Administrative Rules ("HAR"), because the following extenuating circumstance(s) exist:

- Agency must consult with another person to determine whether the record is exempt from disclosure under chapter 92F, HRS.
- Request requires extensive agency efforts to search, review, or segregate the records, or otherwise prepare the records for inspection or copying.
- Agency requires additional time to respond to the request in order to avoid an unreasonable interference with its other statutory duties and functions.
- A natural disaster or other situation beyond the agency's control prevents the agency from sending a notice or responding to the request within ten business days.

Due to these extenuating circumstances, the agency will send you the written notice required by section 2-71-14, HAR, within a reasonable time not to exceed twenty business days following the date when the agency received your request. Among other things, this notice will inform you whether the agency intends (1) to disclose the record; (2) to deny access to all or part of the information in the requested record, identifying the portions that will not be disclosed and justifying the nondisclosure; or that the agency is unable to disclose the record for the reasons given. The notice will also include the agency's good faith estimate of all fees that will be charged to the requester under section 2-71-19, HAR and the amount of prepayment required by the agency, if any.

If the agency is providing access to records, the agency will then:

- (1) Disclose the requested records within five business days after providing notice or, when applicable, after receiving a prepayment as provided for under section 2-71-19, HAR.

or

- (2) Disclose the requested records in increments because the requested records are voluminous. See HAR § 2-71-15. Each increment will be disclosed within twenty business days after either (A) the prior incremental disclosure (if one prepayment of fees is required and received) or (B) receipt of each incremental prepayment required.

For questions about the agency's acknowledgment, please contact the person named above. Questions regarding compliance with the UIPA may be directed to the Office of Information Practices at 808-586-1400.

APPENDIX A

NOTICE TO REQUESTER

(Use multiple forms if necessary)

TO: _____
FROM: _____
(Agency/name & telephone number of contact person at agency)

DATE REQUEST RECEIVED: _____
DATE OF THIS NOTICE: _____

GOVERNMENT RECORDS YOU REQUESTED (attach copy of request or provide brief description below):

- 1. _____
- 2. _____
- 3. _____
- 4. _____

NOTICE IS PROVIDED TO YOU THAT YOUR REQUEST:

- Will be granted in its entirety.
- Cannot be granted because
 - Agency does not maintain the records. Agency believed to maintain records: _____
 - Agency needs a further description or clarification of the records requested. Please contact the agency and provide the following information: _____
 - Request requires agency to create a summary or compilation from records not readily retrievable.
- Is denied in its entirety
- Will be granted only as to certain parts based upon the following exemption provided in HRS § 92F-13 and/or § 92F-22 and other laws cited below (portions of records that agency will not disclose should be described in general terms).

RECORDS OR INFORMATION WITHHELD	APPLICABLE STATUTES	AGENCY JUSTIFICATION
_____	_____	_____
_____	_____	_____
_____	_____	_____

REQUESTER'S RESPONSIBILITIES:
You are required to (1) pay any lawful fees assessed; (2) make any necessary arrangements with the agency to inspect, copy or receive copies as instructed below; and (3) provide the agency any additional information requested. If you do not comply with the requirements set forth in this notice within 20 business days after the postmark date of this notice or the date the agency makes the records available, you will be presumed to have abandoned your request and the agency shall have no further duty to process your request. Once the agency begins to process your request, you may be liable for any fees incurred. If you wish to cancel or modify your request, you must advise the agency upon receipt of this notice.

METHOD & TIMING OF DISCLOSURE:
Records available for public access in their entireties must be disclosed within a reasonable time, not to exceed 10 business days, or after receipt of any prepayment required. Records not available in their entireties must be disclosed within 5 business days of this notice or after receipt of any prepayment required. If incremental disclosure is authorized by HAR § 2-71-15, the first increment must be disclosed within 5 business days of this notice or after receipt of any prepayment required.

(continued on next page)

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Method of Disclosure:

- Inspection at the following location: _____.
- Copy will be provided in the following manner:
 - Available for pick-up at the following location: _____.
 - Will be mailed to you.
 - Will be transmitted to you by other means requested: _____.

Timing of Disclosure: All records, or first increment where applicable, will be made available or provided to you:

- On: _____.
- After prepayment of fees and costs of \$ _____ (50% of fees + 100% of costs, as estimated below). Payment may be made by: cash personal check other _____.

For incremental disclosures, each subsequent increment will be disclosed within 20 business days after:

- The prior increment (if one prepayment of fees is required and received).
 - Receipt of each incremental prepayment required.
- Disclosure is being made in increments because the records are voluminous and the following extenuating circumstances exist:
- Agency must consult with another person to determine whether the record is exempt from disclosure under HRS chapter 92F.
 - Request requires extensive agency efforts to search, review, or segregate the records or otherwise prepare the records for inspection or copying.
 - Agency requires additional time to respond to the request in order to avoid an unreasonable interference with its other statutory duties and functions.
 - A natural disaster or other situation beyond agency's control prevents agency from responding to the request within 10 business days.

ESTIMATED FEES & COSTS:

The agency is authorized to charge you certain fees and costs to process your request (even if no record is subsequently found to exist), but must waive the first \$30 in fees assessed for general requesters and the first \$60 in fees when the agency finds that the request made is in the public interest. See HAR §§ 2-71-19, 31 and -32. The agency may require prepayment of 50% of the total estimated fees and 100% of the total estimated costs prior to processing your request. The following is the estimate of the fees and costs that the agency will charge you, with the applicable waiver amount deducted:

Fees:	Search	Estimate of time to be spent: _____	\$ _____
		(\$2.50 for each 15-minute period)	
	Review & segregation	Estimate of time to be spent: _____	\$ _____
		(\$5.00 for each 15-minute period)	
	Fees waived	<input type="checkbox"/> general (\$30) <input type="checkbox"/> public interest (\$60)	<\$____>
	Other	_____	\$ _____
		(Pursuant to HAR §§ 2-71-19 & 2-71-31)	
	Total Estimated Fees:		\$ _____
Costs:	Copying	Estimate of # of pages to be copies: _____	\$ _____
		(@ \$____ per page)	
	Other	_____	\$ _____
	Total Estimated Costs:		\$ _____

For questions about this notice, please contact the person named above. Questions regarding compliance with the UIPA may be directed to the Office of Information Practices at 808-586-1400 or oip@hawaii.gov.

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APPENDIX B

APPENDIX C

Chapter 92F, Hawaii Revised Statutes UNIFORM INFORMATION PRACTICES ACT (MODIFIED)

The following is an unofficial copy of chapter 92F, Hawaii Revised Statutes, which is current through the 2012 legislative session. Amendments may have been made to the Law after publication of this manual. To view any amendments, please visit OIP's website at www.hawaii.gov/oip and look under Laws/Rules/Opinions.

CHAPTER 92F UNIFORM INFORMATION PRACTICES ACT (MODIFIED)

PART I. GENERAL PROVISIONS AND DEFINITIONS

Section

- 92F-1 SHORT TITLE
- 92F-2 PURPOSES; RULES OF CONSTRUCTION
- 92F-3 GENERAL DEFINITIONS
- 92F-4 FUNDING, SERVICES, AND OTHER FEDERAL ASSISTANCE

PART II. FREEDOM OF INFORMATION

- 92F-11 AFFIRMATIVE AGENCY DISCLOSURE RESPONSIBILITIES
- 92F-12 DISCLOSURE REQUIRED
- 92F-13 GOVERNMENT RECORDS; EXCEPTIONS TO GENERAL RULE
- 92F-14 SIGNIFICANT PRIVACY INTERESTS; EXAMPLES
- 92F-15 JUDICIAL ENFORCEMENT
- 92F-15.3 NOTICE TO THE OFFICE OF INFORMATION PRACTICES
- 92F-15.5 ALTERNATIVE METHOD TO APPEAL A DENIAL OF ACCESS
- 92F-16 IMMUNITY FROM LIABILITY
- 92F-17 CRIMINAL PENALTIES
- 92F-18 AGENCY IMPLEMENTATION
- 92F-19 LIMITATIONS ON DISCLOSURE OF GOVERNMENT RECORDS TO OTHER AGENCIES

PART III. DISCLOSURE OF PERSONAL RECORDS

Section

- 92F-21 INDIVIDUAL'S ACCESS TO OWN PERSONAL RECORD
- 92F-21.5 REPEALED
- 92F-22 EXEMPTIONS AND LIMITATIONS ON INDIVIDUAL ACCESS
- 92F-23 ACCESS TO PERSONAL RECORD; INITIAL PROCEDURE
- 92F-24 RIGHT TO CORRECT PERSONAL RECORD;
INITIAL PROCEDURE
- 92F-25 CORRECTION AND AMENDMENT; REVIEW PROCEDURES
- 92F-26 RULES
- 92F-27 CIVIL ACTIONS AND REMEDIES
- 92F-27.5 ALTERNATIVE METHOD TO APPEAL A DENIAL OF ACCESS
- 92F-28 ACCESS TO PERSONAL RECORDS BY ORDER IN JUDICIAL OR
ADMINISTRATIVE PROCEEDINGS; ACCESS AS AUTHORIZED
OR REQUIRED BY OTHER LAW

PART IV. OFFICE OF INFORMATION PRACTICES; DUTIES

- 92F-41 OFFICE OF INFORMATION PRACTICES; ESTABLISHED
- 92F-42 POWERS AND DUTIES OF THE OFFICE OF INFORMATION
PRACTICES
- 92F-43 AGENCY APPEAL OF A DECISION BY THE OFFICE OF
INFORMATION PRACTICES

PART 1. GENERAL PROVISIONS AND DEFINITIONS

[§92F-1] Short title. This chapter shall be known and may be cited as the Uniform Information Practices Act (Modified). [L 1988, c 262, pt of § 1]

[§92F-2] Purposes; rules of construction. 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.

The 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.

This chapter shall be applied and construed to promote its underlying purposes and policies, which are 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. [L 1988, c 262, pt of §1]

[§92F-3] General definitions. Unless the context otherwise requires, in this chapter:

"Agency" means any unit of government in this State, any county, or any combination of counties; department; institution; board; commission; district; council; bureau; office; governing authority; other instrumentality of state or county government; or corporation or other establishment owned, operated, or managed by or on behalf of this State or any county, but does not include the nonadministrative functions of the courts of this State.

"Government record" means information maintained by an agency in written, auditory, visual, electronic, or other physical form.

"Individual" means a natural person.

"Person" means an individual, corporation, government, or governmental subdivision or agency, business trust, estate, trust, partnership, association, or any other legal entity.

"Personal record" means any item, collection, or grouping of information about an individual that is maintained by an agency. It includes, but is not limited to, the individual's education, financial, medical, or employment history, or items that contain or make reference to the individual's name, identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph. [L 1988, c 262, pt of §1]

[§92F-4] Funding, services, and other federal assistance. Where compliance with any provision of this chapter would cause an agency to lose or be denied funding, services, or other assistance from the federal government, compliance with that provision shall be waived but only to the extent necessary to protect eligibility for federal funding, services, or other assistance. [L 1992, c 118, §1]

PART II. FREEDOM OF INFORMATION

[§92F-11] Affirmative agency disclosure responsibilities. (a) All government records are open to public inspection unless access is restricted or closed by law.

(b) Except as provided in section 92F-13, each agency upon request by any person shall make government records available for inspection and copying during regular business hours; provided that an agency shall not be required to make government records available or respond to a person's subsequent duplicative request, if:

- (1) After conducting a good faith review and comparison of the earlier request and the pending request, the agency finds that the pending request is duplicative or substantially similar in nature;
- (2) The pending request has already been responded to within the past year; and
- (3) The agency's response to the pending request would remain unchanged.

(c) Unless 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.

(d) Each agency shall assure reasonable access to facilities for duplicating records and for making memoranda or abstracts.

(e) Each agency may adopt rules, pursuant to chapter 91, to protect its records from theft, loss, defacement, alteration, or deterioration and to prevent manifestly excessive interference with the discharge of its other lawful responsibilities and functions. [L 1988, c 262, pt of §1]

§92F-12 Disclosure required. (a) Any other provision in this chapter to the contrary notwithstanding, each agency shall make available for public inspection and duplication during regular business hours:

- (1) Rules of procedure, substantive rules of general applicability, statements of general policy, and interpretations of general applicability adopted by the agency;
- (2) Final opinions, including concurring and dissenting opinions, as well as orders made in the adjudication of cases, except to the extent protected by section 92F-13(1);
- (3) Government purchasing information, including all bid results, except to the extent prohibited by section 92F-13;
- (4) Pardons and commutations, as well as directory information concerning an individual's presence at any correctional facility;
- (5) Land ownership, transfer, and lien records, including real property tax information and leases of state land;
- (6) Results of environmental tests;
- (7) Minutes of all agency meetings required by law to be public;
- (8) Name, address, and occupation of any person borrowing funds

from a state or county loan program, and the amount, purpose, and current status of the loan;

(9) Certified payroll records on public works contracts except social security numbers and home addresses;

(10) Regarding contract hires and consultants employed by agencies:

(A) The contract itself, the amount of compensation,

(B) The duration of the contract, and

(C) The objectives of the contract, except social security numbers and home addresses;

(11) Building permit information within the control of the agency;

(12) Water service consumption data maintained by the boards of water supply;

(13) Rosters of persons holding licenses or permits granted by an agency that may include name, business address, type of license held, and status of the license;

(14) The name, compensation (but only the salary range for employees covered by or included in chapter 76, and sections 302A-602 to 302A-640, and 302A-701, or bargaining unit (8)), job title, business address, business telephone number, job description, education and training background, previous work experience, dates of first and last employment, position number, type of appointment, service computation date, occupational group or class code, bargaining unit code, employing agency name and code, department, division, branch, office, section, unit, and island of employment, of present or former officers or employees of the agency; provided that this paragraph shall not require the creation of a roster of employees; and provided further that this paragraph shall not apply to information regarding present or former employees involved in an undercover capacity in a law enforcement agency;

(15) Information collected and maintained for the purpose of making information available to the general public; and

(16) Information contained in or compiled from a transcript, minutes, report, or summary of a proceeding open to the public.

(b) Any provision to the contrary notwithstanding, each agency shall also disclose:

(1) Any government record, if the requesting person has the prior written consent of all individuals to whom the record refers;

(2) Government records which, pursuant to federal law or a statute of this State, are expressly authorized to be disclosed to the person requesting access;

(3) Government records pursuant to a showing of compelling circumstances affecting the health or safety of any individual;

(4) Government records requested pursuant to an order of a court;

(5) Government records pursuant to a subpoena from either house of the state legislature; and

(6) Information from the motor vehicle registration files, provided that the person requesting such files shall have a legitimate reason as determined by rules. [am L 1996, c 89, §8; am L 2000, c253, §150; am L 2004, c 92, §3; am L 2005, c 85, §1; am L 2007, c 14, §1]

§92F-13 Government records; exceptions to general rule. This part shall not require disclosure of:

(1) Government records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy;

(2) 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;

(3) Government records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function;

(4) Government records which, pursuant to state or federal law including an order of any state or federal court, are protected from disclosure; and

(5) Inchoate and draft working papers of legislative committees including budget worksheets and unfiled committee reports; work product; records or transcripts of an investigating committee of the legislature which are closed by rules adopted pursuant to section 21-4 and the personal files of members of the legislature. [L 1988, c 262, pt of §1; am L 1993, c 250, §1]

§92F-14 Significant privacy interest; examples. (a) Disclosure of a government record shall not constitute a clearly unwarranted invasion of personal privacy if the public interest in disclosure outweighs the privacy interests of the individual.

(b) The following are examples of information in which the individual has a significant privacy interest:

(1) Information relating to medical, psychiatric, or psychological history, diagnosis, condition, treatment, or evaluation, other than directory information while an individual is present at such facility;

(2) Information identifiable as part of an investigation into a possible violation of criminal law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

(3) Information relating to eligibility for social services or welfare benefits or to the determination of benefit levels;

(4) Information in an agency's personnel file, or applications,

nominations, recommendations, or proposals for public employment or appointment to a governmental position, except:

- (A) Information disclosed under section 92F-12(a)(14); and
- (B) The following information related to employment misconduct that results in an employee's suspension or discharge:

- (i) The name of the employee;
- (ii) The nature of the employment-related misconduct;
- (iii) The agency's summary of the allegations of misconduct;
- (iv) Findings of fact and conclusions of law; and
- (v) The disciplinary action taken by the agency; when the following has occurred: the highest non-judicial grievance adjustment procedure timely invoked by the employee or the employee's representative has concluded; a written decision sustaining the suspension or discharge has been issued after this procedure; and thirty calendar days have elapsed following the issuance of the decision; provided that this subparagraph shall not apply to a county police department officer except in a case which results in the discharge of the officer;

- (5) Information relating to an individual's nongovernmental employment history except as necessary to demonstrate compliance with requirements for a particular government position;
- (6) Information describing an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;
- (7) Information compiled as part of an inquiry into an individual's fitness to be granted or to retain a license, except:
 - (A) The record of any proceeding resulting in the discipline of a licensee and the grounds for discipline;
 - (B) Information on the current place of employment and required insurance coverages of licensees; and
 - (C) The record of complaints including all dispositions;
- (8) Information comprising a personal recommendation or evaluation; and
- (9) Social security numbers. [L 1988, c 262, pt of §1; am L 1993, c 191, §1; am L 1995, c 242, §1; am L 2004, c92, §4]

§92F-15 Judicial enforcement. (a) A person aggrieved by a denial of access to a government record may bring an action against the agency at any time within two years after the agency denial to compel disclosure.

- (b) In an action to compel disclosure the circuit court shall hear the

matter de novo; provided that if the action to compel disclosure is brought because an agency has not made a record available as required by section 92F-15.5(b) after the office of information practices has made a decision to disclose the record and the agency has not appealed that decision within the time period provided by 92F-43, the decision of the office of information practices shall not be subject to challenge by the agency in the action to compel disclosure.

Opinions and rulings of the office of information practices shall be admissible and shall be considered as precedent unless found to be palpably erroneous, except that in an action to compel disclosure brought by an aggrieved person after the office of information practices upheld the agency's denial of access to the person as provided in section 92F-15.5(b), the opinion or ruling upholding the agency's denial of access shall be reviewed de novo. The circuit court may examine the government record at issue, in camera, to assist in determining whether it, or any part of it, may be withheld.

- (c) The agency has the burden of proof to establish justification for nondisclosure.

- (d) If the complainant prevails in an action brought under this section, the court shall assess against the agency reasonable attorney's fees and all other expenses reasonably incurred in the litigation.

- (e) The circuit court in the judicial circuit in which the request for the record is made, where the requested record is maintained, or where the agency's headquarters are located shall have jurisdiction over an action brought under this section.

- (f) Except as to cases the circuit court considers of greater importance, proceedings before the court, as authorized by this section, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way. [L 1988, c 262, pt of §1; am L 1989, c 192, §3; am L 2012, c 176, §4]

§92F-15.3 Notice to the office of information practices. When filing a civil action that is under, related to, or is affected by this chapter, a person shall notify the office of information practices in writing at the time of the filing. The office of information practices may intervene in the action. [L 1998, c 82, §1]

§92F-15.5 Alternative method to appeal a denial of access. (a) When an agency denies a person access to a government record, the person may appeal the denial to the office of information practices in accordance with rules adopted pursuant to section 92F-42(12). A decision to appeal to the office of information practices for review of the agency denial shall not prejudice the person's right to appeal to the circuit court after a decision is made by the office of information practices.

- (b) If the decision is to disclose, the office of information practices shall notify the person and the agency, and the agency shall make the record available. If the denial of access is upheld, in whole or in part, the office of information practices shall, in writing, notify the person of the decision, the

reasons for the decision, and the right to bring a judicial action under section 92F-15(a). [L 1989, c 192, §1]

[§92F-16] Immunity from liability. Anyone participating in good faith in the disclosure or nondisclosure of a government record shall be immune from any liability, civil or criminal, that might otherwise be incurred, imposed or result from such acts or omissions. [L 1988, c 262, pt of §1]

[§92F-17] Criminal penalties. (a) An officer or employee of an agency who intentionally discloses or provides a copy of a government record, or any confidential information explicitly described by specific confidentiality statutes, to any person or agency with actual knowledge that disclosure is prohibited, shall be guilty of a misdemeanor, unless a greater penalty is otherwise provided for by law.

(b) A person who intentionally gains access to or obtains a copy of a government record by false pretense, bribery, or theft, with actual knowledge that access is prohibited. or who intentionally obtains any confidential information by false pretense, bribery, or theft, with actual knowledge that it is prohibited [by] a confidentiality statute, shall be guilty of a misdemeanor. [L 1988, c 262, pt of §1]

§92F-18 Agency implementation. (a) Each agency shall:

- (1) Issue instructions and guidelines necessary to effectuate this chapter; and
- (2) Take steps to assure that all its employees and officers responsible for the collection, maintenance, use, and dissemination of government records are informed of the requirements of this chapter.

(b) Each agency shall compile a public report describing the records it routinely uses or maintains using forms prescribed by the office of information practices. The public reports shall be filed with the office of information practices on or before December 31, 1994. The public reports shall include:

- (1) The name and location of each set of records;
- (2) The authority under which the records are maintained;
- (3) The categories of individuals for whom records are maintained;
- (4) The categories of information or data maintained in the records;
- (5) The categories of sources of information in the records;
- (6) The categories of uses and disclosures made of the records;
- (7) The agencies and categories of persons outside of the agency which routinely use the records;
- (8) The records routinely used by the agency which are maintained by:
 - (A) Another agency; or
 - (B) A person other than an agency;
- (9) The policies and practices of the agency regarding storage,

retrievability, access controls, retentions, and disposal of the information maintained in records;

(10) The title, business address, and business telephone number of the agency officer or officers responsible for the records;

(11) The agency procedures whereby an individual may request access to records; and

(12) The number of written requests for access within the preceding year, the number denied, the number of lawsuits initiated against the agency under this part, and the number of suits in which access was granted.

(c) Each agency shall supplement or amend its public report, or file a new report, on or before July 1 of each subsequent year, to ensure that the information remains accurate and complete. Each agency shall file the supplemental, amended, or new report with the office of information practices, which shall make the reports available for public inspection. [L 1988, c 262, pt of §1; am L 1989, c 192, §4; am L 1991, c 167, §2; am L 1992, c 118, §2; am L 1993, c 57, §1]

§92F-19 Limitations on disclosure of government records to other agencies.

(a) No agency may disclose or authorize disclosure of government records to any other agency unless the disclosure is:

(1) Necessary for the performance of the requesting agency's duties and functions and is also:

- (A) Compatible with the purpose for which the information was collected or obtained; or
- (B) Consistent with the conditions or reasonable expectations of use and disclosure under which the information was provided;

(2) To the state archives for the purposes of historic preservation, administrative maintenance, or destruction;

(3) To another agency, another state, or the federal government, or foreign law enforcement agency or authority, if the disclosure is:

(A) For the purpose of a civil or criminal law enforcement activity authorized by law; and

(B) Pursuant to:

- (i) A written agreement or written request, or
- (ii) A verbal request, made under exigent circumstances, by an officer or employee of the requesting agency whose identity has been verified, provided that such request is promptly confirmed in writing;

(4) To a criminal law enforcement agency of this State, another state, or the federal government, or a foreign criminal law enforcement agency or authority, if the information is limited to an individual's name and other identifying particulars, including present and past places of employment;

(5) To a foreign government pursuant to an executive agreement,

- compact, treaty, or statute;
- (6) To the legislature, or a county council, or any committee or subcommittee thereof;
- (7) Pursuant to an order of a court of competent jurisdiction;
- (8) To authorized officials of another agency, another state, or the federal government for the purpose of auditing or monitoring an agency program that receives federal, state, or county funding;
- (9) To the offices of the legislative auditor, the legislative reference bureau, or the ombudsman of this State for the performance of their respective functions;
- (10) To the department of human resources development, county personnel agencies, or line agency personnel offices for the performance of their respective duties and functions, including employee recruitment and examination, classification and compensation reviews, the administration and auditing of personnel transactions, the administration of training and safety, workers' compensation, and employee benefits and assistance programs, and for labor relations purposes; or
- (11) Otherwise subject to disclosure under this chapter.

(b) An agency receiving government records pursuant to subsection (a) shall be subject to the same restrictions on disclosure of the records as the originating agency. [L 1988, c 262, pt of §1; am L 1993, c 250, §2; L 1994, c 56, §21]

PART III. DISCLOSURE OF PERSONAL RECORDS

Note

Part heading amended by L 1989, c 192, §5.

[§92F-21] Individual's access to own personal record. Each agency that maintains any accessible personal record shall make that record available to the individual to whom it pertains, in a reasonably prompt manner and in a reasonably intelligible form. Where necessary the agency shall provide a translation into common terms of any machine readable code or any code or abbreviation employed for internal agency use. [L 1988, c 262, pt of §1]

§92F-21.5 REPEALED. L 1990, c 250, §4.

§92F-22 Exemptions and limitations on individual access. An agency is not required by this part to grant an individual access to personal records, or information in such records:

- (1) Maintained by an agency that performs as its or as a principal function any activity pertaining to the prevention, control, or reduction of crime, and which consist of:

- (A) Information or reports prepared or compiled for the purpose of criminal intelligence or of a criminal investigation, including reports of informers, witnesses, and investigators; or
- (B) Reports prepared or compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through confinement, correctional supervision, and release from supervision.

- (2) The disclosure of which would reveal the identity of a source who furnished information to the agency under an express or implied promise of confidentiality.
- (3) Consisting of testing or examination material or scoring keys used solely to determine individual qualifications for appointment or promotion in public employment, or used as or to administer a licensing examination or an academic examination, the disclosure of which would compromise the objectivity, fairness, or effectiveness of the testing or examination process.
- (4) Including investigative reports and materials, related to an upcoming, ongoing, or pending civil or criminal action or administrative proceeding against the individual.
- (5) Required to be withheld from the individual to whom it pertains by statute or judicial decision or authorized to be so withheld by constitutional or statutory privilege. [L 1988, c 262, pt of §1; am L 1993, c 250, §3]

[92F-23] Access to personal record; initial procedure. Upon the request of an individual to gain access to the individual's personal record, an agency shall permit the individual to review the record and have a copy made within ten working days following the date of receipt of the request by the agency unless the personal record requested is exempted under section 92F-22. The ten-day period may be extended for an additional twenty working days if the agency provides to the individual, within the initial ten working days, a written explanation of unusual circumstances causing the delay. [L 1988, c 262, pt of §1; am L 2000, c 254, §1]

[§92F-24] Right to correct personal record; initial procedure. (a) An individual has a right to have any factual error in that person's personal record corrected and any misrepresentation or misleading entry in the record amended by the agency which is responsible for its maintenance.

(b) Within twenty business days after receipt of a written request to correct or amend a personal record and evidence that the personal record contains a factual error, misrepresentation, or misleading entry, an agency shall acknowledge receipt of the request and purported evidence in writing and promptly:

- (1) Make the requested correction or amendment; or

(2) Inform the individual in writing of its refusal to correct or amend the personal record, the reason for the refusal, and the agency procedures for review of the refusal. [L 1988, c 262, pt of §1]

§92F-25 Correction and amendment; review procedures. (a) Not later than thirty business days after receipt of a request for review of an agency refusal to allow correction or amendment of a personal record, the agency shall make a final determination.

(b) If the agency refuses upon final determination to allow correction or amendment of a personal record, the agency shall so state in writing and:

(1) Permit, whenever appropriate, the individual to file in the record a concise statement setting forth the reasons for the individual's disagreement with the refusal of the agency to correct or amend it; and

(2) Notify the individual of the applicable procedures for obtaining appropriate judicial remedy. [L 1988, c 262, pt of §1; am L 1989, c 192, §6]

§92F-26 Rules. The office of information practices shall adopt rules, under chapter 91, establishing procedures necessary to implement or administer this part, which the agencies shall adopt, insofar as practicable, in order to ensure uniformity among state and county agencies. [L 1988, c 262, pt of §1; am L 1989, c 192, §7]

§92F-27 Civil actions and remedies. (a) An individual may bring a civil action against an agency in a circuit court of the State whenever an agency fails to comply with any provision of this part, and after appropriate administrative remedies under sections 92F-23, 92F-24, and 92F-25 have been exhausted.

(b) Opinions and rulings of the office of information practices shall be admissible and shall be considered as precedent unless found to be palpably erroneous, except that the opinion or ruling upholding the agency's denial of access to the aggrieved person shall be reviewed de novo. The circuit court may examine the record at issue, in camera, to assist in determining whether it, or any part of it, may be withheld.

(c) In any action brought under this section the court may order the agency to correct or amend the complainant's personal record, to require any other agency action, or to enjoin such agency from improper actions as the court may deem necessary and appropriate to render substantial relief.

(d) In any action brought under this section in which the court determines that the agency knowingly or intentionally violated a provision of this part, the agency shall be liable to the complainant in an amount equal to the sum of:

(1) Actual damages sustained by the complainant as a result of the failure of the agency to properly maintain the personal record, but

in no case shall a individual complainant entitled to recovery receive less than the sum of \$1,000; and

(2) The costs of the action together with reasonable attorney's fees as determined by the court.

(e) The court may assess reasonable attorney's fees and other litigation costs reasonably incurred against the agency in any case in which the complainant has substantially prevailed, and against the complainant where the charges brought against the agency were frivolous.

(f) An action may be brought in the circuit court where the complainant resides, the complainant's principal place of business is situated, or the complainant's relevant personal record is situated. No action shall be brought later than two years after notification of the agency denial, or where applicable, the date of receipt of the final determination of the office of information practices. [L 1988, c 262, pt of §1; am L 1989, c 192, §8; am L 2012, c 176, §5]

§92F-27.5 Alternative method to appeal a denial of access. (a) When an agency denies an individual access to that individual's personal record, the individual may appeal the denial to the office of information practices in accordance with rules adopted pursuant to section 92F-42(12). A decision to appeal to the office of information practices for review of the agency denial shall not prejudice the individual's right to appeal to the circuit court after a decision is made by the office of information practices.

(b) If the decision is to disclose, the office of information practices shall notify the individual and the agency, and the agency shall make the record available. If the denial of access is upheld, in whole or in part, the office of information practices shall, in writing, notify the individual of the decision, the reasons for the decision, and the right to bring a judicial action under section 92F-27. [L 1989, c 192, §2]

[§92F-28] Access to personal records by order in judicial or administrative proceedings; access as authorized or required by other law. Nothing in this part shall be construed to permit or require an agency to withhold or deny access to a personal record, or any information in a personal record:

(1) When the agency is ordered to produce, disclose, or allow access to the record or information in the record, or when discovery of such record or information is allowed by prevailing rules of discovery or by subpoena, in any judicial or administrative proceeding; or

(2) Where any statute, administrative rules, rule of court, judicial decision, or other law authorizes or allows an individual to gain access to a personal record or to any information in a personal record or requires that the individual be given such access. [L 1988, c 262, pt of §1]

PART IV. OFFICE OF INFORMATION PRACTICES; DUTIES

§92F-41 Office of information practices; established. (a) There is established a temporary office of information practices for a special purpose within the office of the lieutenant governor for administrative purposes.

(b) The governor shall appoint a director of the office of information practices to be its chief executive officer and who shall be exempt from chapter 76.

(c) All powers and duties of the office of information practices are vested in the director and may be delegated to any other officer or employee of the office.

(d) The director may employ such other personnel as are necessary, including but not limited to attorneys and clerical staff without regard to chapter 76. [L 1988, c 262, pt of §1; am L 1989, c 192, §9; am L 1998, c 137, §4; am L 2000, c 253, §150]

§92F-42 Powers and duties of the office of information practices. The director of the office of information practices:

- (1) Shall, upon request, review and rule on an agency denial of access to information or records, or an agency's granting of access; provided that any review by the office of information practices shall not be a contested case under chapter 91 and shall be optional and without prejudice to rights of judicial enforcement available under this chapter;
- (2) Upon request by an agency, shall provide and make public advisory guidelines, opinions, or other information concerning that agency's functions and responsibilities;
- (3) Upon request by any person, may provide advisory opinions or other information regarding that person's rights and the functions and responsibilities of agencies under this chapter;
- (4) May conduct inquiries regarding compliance by an agency and investigate possible violations by any agency;
- (5) May examine the records of any agency for the purpose of paragraph (4) and seek to enforce that power in the courts of this State;
- (6) May recommend disciplinary action to appropriate officers of an agency;
- (7) Shall report annually to the governor and the state legislature on the activities and findings of the office of information practices, including recommendations for legislative changes;
- (8) Shall receive complaints from and actively solicit the comments of the public regarding the implementation of this chapter;
- (9) Shall review the official acts, records, policies, and procedures of each agency;

(10) Shall assist agencies in complying with the provisions of this chapter;

(11) Shall inform the public of the following rights of an individual and the procedures for exercising them:

- (A) The right of access to records pertaining to the individual;
- (B) The right to obtain a copy of records pertaining to the individual;
- (C) The right to know the purposes for which records pertaining to the individual are kept;
- (D) The right to be informed of the uses and disclosures of records pertaining to the individual;
- (E) The right to correct or amend records pertaining to the individual; and
- (F) The individual's right to place a statement in a record pertaining to that individual;

(12) Shall adopt rules that set forth an administrative appeals structure which provides for:

- (A) Agency procedures for processing records requests;
- (B) A direct appeal from the division maintaining the record; and
- (C) Time limits for action by agencies;

(13) Shall adopt rules that set forth the fees and other charges that may be imposed for searching, reviewing, or segregating disclosable records, as well as to provide for a waiver of such fees when the public interest would be served;

(14) Shall adopt rules which set forth uniform standards for the records collection practices of agencies;

(15) Shall adopt rules that set forth uniform standards for disclosure of records for research purposes;

(16) Shall have standing to appear in cases where the provisions of this chapter are called into question;

(17) Shall adopt, amend, or repeal rules pursuant to chapter 91 necessary for the purposes of this chapter; and

(18) Shall take action to oversee compliance with Part I of chapter 92 by all state and county boards including:

- (A) Receiving and resolving complaints;
- (B) Advising all government boards and the public about compliance with chapter 92; and
- (C) Reporting each year to the legislature on all complaints received pursuant to section 92-1.5. [L 1988, c 262, pt of §1; am L 1989, c 192, §10; am L 1998, c 137, §5]

§92F-43 Agency appeal of a decision by the office of information practices.

(a) An agency may not appeal a decision by the office of information practices made under this chapter or part I of chapter 92, except as provided in this section. Within thirty days of the date of the decision, an agency may seek judicial review of a final decision rendered by the office of information practices under this chapter or part I of chapter 92, by filing a complaint to initiate a special proceeding in the circuit court of the judicial circuit in the State where:

- (1) The request for access to a record was made;
- (2) The act the office determined was prohibited under part I of chapter 92 occurred; or
- (3) The agency's principal place of business is located.

(b) The agency shall give notice of the complaint to the office of information practices and the person who requested the decision for which the agency seeks judicial review by serving a copy of the complaint on each; provided that the office of information practices and the person who requested the decision shall not be required to participate in the proceeding; and provided further that the court shall proceed to review the decision pursuant to the rules applicable to a special proceeding, upon the expiration of time that an answer to the complaint would otherwise need to be filed under the rules of court by the office of information practices or the person upon whom the complaint was served. The office of information practices or the person who requested the decision may intervene in the proceeding.

(c) Within thirty days of service of the complaint, the office of information practices shall file a certified copy of the record that it compiled to make its decision in the circuit court and mail a copy of the index to that record to the appealing agency. The circuit court's review shall be limited to the record that was before the office of information practices when it rendered the decision, unless the circuit court finds that extraordinary circumstances justify discovery and admission of additional evidence. The circuit court shall uphold a decision of the office of information practices, unless the circuit court concludes that the decision was palpably erroneous. [L 2012, c 176, §1]