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State of Hawaii ♦ Office of Information Practices

# Summaries of Recent OIP Opinion Letters

## ➤ *Records of Deceased Persons*

A State legislator asked the OIP for an opinion on "whether living or deceased persons' names may be obtained from State records and put on public display" on a monument to the memory of victims of Hansen's disease to be erected in Kalaupapa.


Soon thereafter, a chief of police and a news reporter wrote to the OIP concerning the reporter's request for access to the records of deceased police officers.

The OIP reconsidered the treatment of information about deceased persons, which it had addressed in many previous opinions: OIP Op. Ltr. Nos. 90-13, 90-18, 90-26, 91-32, 95-21, and 97-2.

Those previous opinions were issued before the appearance of 45 C.F.R. Parts 160 and 164, the medical privacy rules promulgated under the Administrative Simplification subtitle of the Health Insurance Portability and Accountability Act of 1996, Public Law 104-191 ("HIPAA rules"), and before several recent Freedom of Information Act cases showing a trend toward recognizing a privacy interest for deceased persons.

Section 92F-13(4), Hawaii Revised Statutes, allows an agency to withhold records that are protected from disclosure pursuant to federal law. Thus, under the UIPA, an agency may withhold health information about either living or deceased persons, when HIPAA rules bar disclosure. The HIPAA rules' protection of the privacy of health information continues after a person's death, for as long as a health provider holds the information.

The OIP concluded that agencies that are not directly regulated by the HIPAA rules should also withhold health information about deceased persons under the UIPA's privacy exception to disclosure, because the HIPAA rules set a new standard for privacy of medical records.

For health records older than those the HIPAA rules were intended to apply to, though, the OIP concluded that the privacy exception required balancing the deceased person's remaining privacy interest (which would diminish over time) against the public interest in the records. Eventually, historical health records become public.

The OIP also concluded that deceased persons retain some privacy interest in non-health information, but that privacy interest diminishes over time. For non-health records, as for older health records, the privacy exception requires balancing the passage of time against the sensitivity of the records to determine the remaining privacy interest, and then balancing the remaining privacy interest against the public interest in disclosure. *[OIP Op. Ltr. No. 03-19, December 16, 2003]*

## ➤ *Oversight Committee for the First Circuit Family Court*

A member of the public asked the OIP for an opinion on the Judiciary's denial of his request for records relating to the Oversight Committee for the First Circuit Family Court ("Oversight Committee").

A portion of the Oversight Committee's work involved issues relating to court rules and other matters that control the conduct of litigation and regulate the interaction between litigants and the courts. That work was a non-administrative function of the Judiciary, and hence not subject to the UIPA. See Haw. Rev. Stat. § 92F-3 (1993). Nonetheless, the OIP assumed without deciding that some part of the Oversight Committee's work involved issues relating to administrative functions of the Judiciary.

The Judiciary is not required to hold open meetings under Part I of chapter 92, Hawaii Revised Statutes, and the Oversight Committee meetings were closed. Thus, minutes of the meetings were not required to be made available as minutes of a meeting open to the public. See Haw. Rev. Stat. § 92F-12(a)(7).

The Oversight Committee records as a whole were predecisional and fell within the deliberative process privilege. In addition, some portions of the records would disclose the identity of confidential sources. Thus, the records could be withheld because their release would frustrate a legitimate government function. See Haw. Rev. Stat. § 92F-13(3) (1993). *[OIP Op. Ltr. No. 03-20, December 17, 2003]*

## ➤ *Records Pertaining to Kahana Valley State Park Interpretive Leases*

Residents living in Kahana prior to its condemnation for a State park negotiated a "living park" concept to be able to continue living in the Kahana Valley State Park ("Park").

The General Leases between the DLNR and each Lessee states that, for consideration of a Lessee's participation in the Park interpretive program, the Lessee is given a residential lease to a

*See* **OIP Opinions**, *p. 2*

## OIP Opinions *(from p. 1)*

specific lot for 65 years. Thus, Lessees pay for their leases with in-kind services rather than monetary rent.

General Leases, and exhibits and addenda attached thereto, are public under section 92F-12(a)(5), HRS. In a typical lease, the dollar amount paid as lease rent is set forth in the lease itself and, thus, is public.


With the General Leases, the activities performed as rent for the leases are not set forth because the specific activities to be performed were agreed upon at a later date and are memorialized in subsequent agreements or other records. Thus, because of the unique method of payment of the General Leases, rent amounts were not included in the lease documents at the time they were executed.

While Lessees have privacy interests in records showing the activities performed and hours earned, these interests are diminished by the fact that compensation for leases are generally set forth within lease documents which are public and the Lessees, at the time they entered into the General Leases, could not have reasonably believed that the activities to be performed in lieu of rent would be confidential; the sole purpose of the interpretive programs are for the education of the public; Lessees were aware at the time they negotiated their leases that public education was a part of their payment obligation; and in many cases Lessees fulfill their lease obligations in full view of the public.

Information on lease payment amounts and activities performed opens the DLNR's administration and management of the Park, including the rent for leases of State land, to public scrutiny.

Balancing the public interest against the Lessees' privacy interests, we found that the public interest in disclosure is greater than the Lessees' privacy interests, and records showing specific activities conducted and hours earned as payment of rent for General Leases of State land are public because disclosure would not be a clearly unwarranted invasion of personal privacy under section 92F-13(1), HRS. *[OIP Op. Ltr. No. 03-21, December 29, 2003]*

### ➤ *Oahu Island Burial Council*

The Department of Land and Natural Resources State Historic Preservation Division Oahu Island Burial Council convened an executive meeting on March 12, 2003 under section 92-5(a)(4), HRS, which allows a board subject to the Sunshine Law to have executive meetings to consult with the board's attorney on the board's powers, duties, privileges, immunities, and liabilities.

The meeting was improper because no attorney was present. In addition, the Burial Council should have allowed individuals present at a meeting to testify, even though they had testified at prior meetings because boards are required by section 92-3, HRS, to allow written and oral testimony on all agenda items for public meetings. *[OIP Op. Ltr. No. 03-22, December 30, 2003]*

### ➤ *Views of Non-Board Members Included in Minutes*

A State legislator asked the OIP to investigate the Landfill Selection Committee's ("Committee") compliance with part I of chapter 92, Hawaii Revised Statutes ("HRS") ("Sunshine Law").

The Committee is an advisory board established by the City and County of Honolulu ("City") to assist in the selection of Oahu's future landfill. According to the City, the Committee is subject to the Sunshine law. The legislator alleged that, outside of a properly noticed meeting, a Committee member solicited and obtained signatures on documents related to the decision making function of the Committee.

The OIP opined that the general rule is that discussion among board members concerning matters over which the board has supervision, control, jurisdiction or advisory power and that are before or are reasonably expected to come before the board, outside of a duly noticed meeting, violates the Sunshine Law. However, that is not the case if the discussion is authorized as a permitted interaction under the Sunshine Law. See Haw. Rev. Stat. § 92-2.5 (Supp. 2003).

Upon a review of the record, the OIP noted that members had voted, via e-mail, concerning matters over which the board has supervision, control, jurisdiction or advisory power and that were before or were reasonably expected to come before the board. Section 92-5(b), HRS, states that electronic communications cannot be used to circumvent the spirit or requirements of the Sunshine law or to make a decision upon a matter concerning official board business.

The OIP therefore found that the e-mail violated the Sunshine Law. Nevertheless, the OIP noted that it believes that using e-mail for routine, administrative matters such as scheduling purposes may be permissible under the Sunshine Law. *[OIP Op. Ltr. No. 04-01, January 13, 2004]*

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