

Office of Information Practices

State of Hawaii

Annual Report 2003



This report to the Governor and the Legislature describes the work of the Office of Information Practices in implementing the State of Hawaii's public records law, known as the Uniform Information Practices Act (Modified), and the open meetings law, Part I of chapter 92, Hawaii Revised Statutes, from July 1, 2002, to June 30, 2003.

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Director's Message

Aloha,

In FY 2003, the Office of Information Practices ("OIP") saw the number of inquiries and requests from members of the public and from government agencies continue to increase. This report presents the OIP's accomplishments in addressing the numerous and diverse issues involving government records and public meetings.



OIP Director Les Kondo

During the year, the OIP initiated 14 investigations into the actions of government agencies, provided general guidance through the OIP's attorney-of-the-day telephone service to 808 public and government callers, opened 84 files in response to requests for assistance and 41 opinion request files, and issued 19 formal opinions.



As a consequence of previous budget cuts and reduced staffing, over the past several years, the number of pending investigations, requests for assistance, and requests for opinions has increased significantly. At the beginning of FY 2003, the OIP had over 200 pending investigations and requests for assistance and requests for opinions from both members of the public and government agencies, some initiated over 10 years ago.

During FY 2003, the OIP embarked on an aggressive effort to significantly reduce the number of pending matters, with the goal of eliminating the backlog of pending investigations and requests by the end of FY 2005.

Given its present resources, the OIP must continue to develop new and creative solutions to resolve issues relating to the State's government records law and open meetings law.

In the near term future, the OIP will continue its efforts to provide more meaningful and timely assistance to members of the public and government agencies.

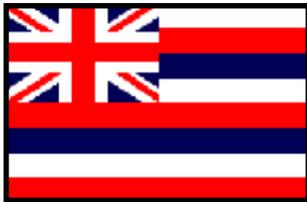
As part of that effort, the OIP will also look to

increase the number and types of training programs to better educate both the public and government agencies, continue to expand the OIP's web site, migrate the records report system, a system on which government agencies report the types of records they maintain, from a Wang computer-based system to an Internet-based system, and develop more user-friendly informational materials.



The OIP is optimistic that such efforts will result in more transparency, will provide

greater guidance to the public and government agencies, and will reduce the number of issues that are referred to the OIP.



The OIP is committed to protecting the public's right to know. The OIP is confident that, with the innovative changes intended to reduce the pending backlog, and with a dedicated staff, it will be able to meet the challenge of continuing to ensure, as mandated by the Legislature, that "the formation and conduct of public policy – the discussions, deliberations, decisions, and action of government agencies – [are] conducted as openly as possible."

Leslie H. Kondo
Director



Executive Summary



The Office of Information Practices (“OIP”) was created by the Legislature in 1988 to administer Hawaii’s new public records law, the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes (“UIPA”). The UIPA, which took effect on July 1, 1989, applies to all branches of State and county government, including the executive and legislative branches, as well as the administrative functions of the judiciary.

The UIPA promotes open government by making government records public unless one of the five exceptions in section 92F-13 applies. The law also balances an individual’s constitutional right to privacy against the public’s right to open government.

In 1998 the Legislature gave the OIP the additional responsibility of administering the open meetings law, Part I of chapter 92, Hawaii Revised Statutes (“Sunshine Law”). Outside of certain exceptions, the law requires all meetings of boards and commissions subject to the Sunshine Law to be announced and open to public attendance and participation. The law details strict requirements regarding meeting notices, agendas, testimony, and minutes.

Information about the funding of the OIP over the years is discussed and charted on pages 9-10.

Enforcement

The OIP opened 14 new investigations into the actions of government agencies in FY 2003 (see pages 12-16). Some of these were opened following complaints made by members of the public and others were opened at the OIP’s initiative.

The OIP tracks litigation to monitor the issues and concerns under the UIPA and the Sunshine Law that are not resolved through the OIP. In certain circumstances, the OIP may intervene in the lawsuit.

In FY 2003, the OIP tracked five new cases relating to access to government records in the courts, and six continuing cases. The OIP also monitored three cases related to the Sunshine Law (see pages 17-21).

Implementation

The OIP assists members of the public and government agencies regarding the UIPA and the Sunshine Law. A majority of the requests for assistance come through the “Attorney of the Day” program, where the OIP staff attorneys provide the caller with general advice.

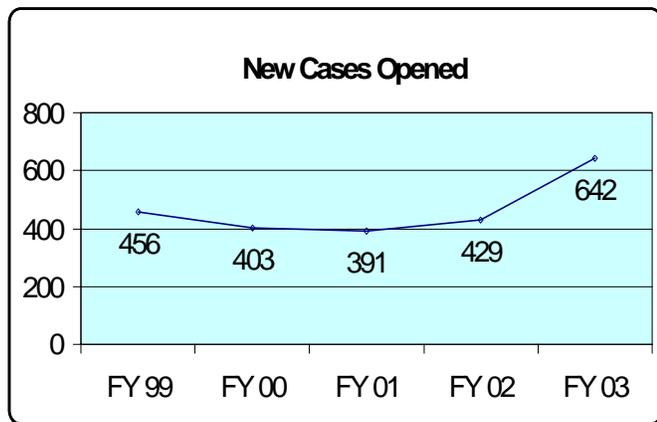


Chart 2

During the past five years, the OIP received a large number of requests for assistance and opened an average of 464 new cases per year. In FY 2003, the OIP staff opened 642 new cases and reviewed and closed 666 pending assignments.

In FY 2003, the OIP received 808 telephone inquiries. Information about these inquiries – who’s calling and which government agencies are involved – appears on pages 22-31. Summaries of 11 of these telephone inquiries, beginning on page 33, are a representation of the types of calls received by the OIP and of how the OIP provides assistance.

“In the 2003 session of the Legislature, the OIP reviewed and monitored 279 legislative initiatives affecting government’s information practices, public access to government records and meetings, and the privacy rights of individuals.”

In FY 2003, the OIP issued 19 formal opinion letters. Of these, 12 involved UIPA issues and seven involved Sunshine Law issues. Summaries of the OIP’s formal opinion letters for FY 2003 begin on page 38.

In the 2003 session of the Legislature, the OIP reviewed and monitored 279 legislative initiatives affecting government’s information practices, public access to government records and meetings, and the privacy rights of individuals.

The OIP staff attorneys and Director appeared frequently at the Legislature to testify about bills insofar as they related to these subjects (see pages 48-51).

Another part of the UIPA, section 92F-18(b), Hawaii Revised Statutes, mandates a public report of records maintained by all agencies. State and county agencies have reported 33,649 sets of records on the Records Report System (“RRS”) (see pages 52-53).

The RRS was developed as a Wang computer-based system at a time when Wang computers were common in State agencies. The OIP, with substantial assistance from the Information and Communications Services Division of the

Department of Accounting and General Services, began work in 2003 to migrate the RRS to an Internet-based system, accessible to government agencies and members of the public.

As of July 1, 2003, the OIP was beginning to test the new system and prepare it for State and county agencies to update their reports.

Informing the Community

The OIP’s publications play a vital role in the agency’s ongoing efforts to inform the public and government agencies about the UIPA, the open meetings law, and the work of the OIP (see pages 54-57).

In FY 2003, the OIP continued its traditional print publications, including the monthly *Openline* newsletter and the *Office of Information Practices Annual Report 2002*. In addition, the OIP expanded and improved the web site that it launched on the Internet in April 1998. The site has grown into a major source of information regarding access to State and county records, as well as the Sunshine Law.

The OIP has also prepared, and makes available, model forms that agencies and members of the public may use to follow the procedures set forth in the OIP’s rules for making, and responding to, record requests (see page 57).

Each year, the OIP makes presentations and provides training in information practices and the Sunshine Law. The OIP conducts this outreach effort as part of its mission to inform the public of its rights and assist government agencies in complying with the law. For details of the OIP’s work in this area, see pages 58-59.



Budget

The OIP's annual budget has stabilized at a streamlined level of about \$350,000 per year since Fiscal Year 1999, as reflected in **Chart 1** below and **Table 1** on the next page.

During Fiscal Year 2003, the OIP operated with personnel costs of \$312,483 and operational costs of \$38,179.

The OIP's largest budget year was Fiscal Year 1994, when the annual budget was \$827,537, with a staff of 15 positions. The OIP's budget was most deeply affected in 1998, when the Legislature decreased the agency's overall budget by \$216,766 and eliminated three positions.

Today, although the OIP has 8 positions, it is functioning with only 6.5 filled positions.

The OIP's current staffing is a director, two full-time staff attorneys and one half-time staff attorney, and three other staff members. Although there is an additional staff attorney position, the OIP does not have the funds to fill this position.

The OIP continues to look for ways to cut its operational costs while increasing the productivity of its employees.

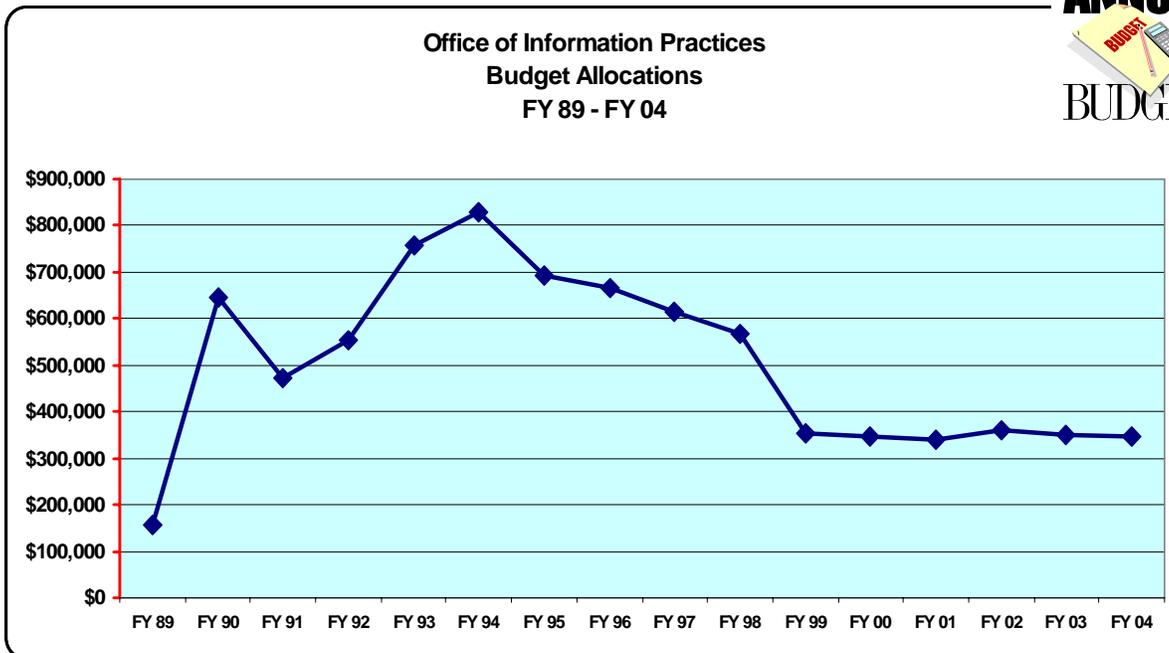


Chart 1



Office of Information Practices
Budget FY 1989 to FY 2004

Fiscal Year	Operational Costs	Personnel Costs	Allocations	Positions
FY 04	35,220	312,483	347,703	8
FY 03	38,179	312,483	350,662	8
FY 02	38,179	320,278	358,457	8
FY 01	38,179	302,735	340,914	8
FY 00	37,991	308,736	346,727	8
FY 99	45,768	308,736	354,504	8
FY 98	119,214	446,856	566,070	8
FY 97	154,424	458,882	613,306	11
FY 96	171,524	492,882	664,406	12
FY 95	171,524	520,020	692,544	15
FY 94	249,024	578,513	827,537	15
FY 93	248,934	510,060	758,994	15
FY 92	167,964	385,338	553,302	10
FY 91	169,685	302,080	471,765	10
FY 90	417,057	226,575	643,632	10
FY 89	70,000	86,000	156,000	4

Table 1

Highlights of the OIP's Work in Fiscal Year 2003



Enforcement

Investigations of Government Agencies

The OIP opened 14 new investigations into the actions of government agencies in FY 2003. Some of these were opened following complaints made by members of the public.



Some of the requests for investigations were subsequently withdrawn by the requester. But where the OIP determined that there appeared to be merit to the allegations, the OIP continued the investigation.

Upon completion of the investigation, should the OIP find there was a violation, the OIP will recommend either training or discipline of the employees involved.

R *UIPA Investigations:*

Neighborhood Board

A member of the public complained that her home address was improperly disclosed to the public by the Ewa Neighborhood Board (“Board”) from a mailing list. The complainant alleged that her name and address were published in a flyer by proponents of a project that the complainant opposed.

The complainant also alleged that her contact information was illegally taken from voter registration records. Because her allegations were vague and unclear, the complainant was asked repeatedly to reduce her allegations to writing, audiotape, or e-mail, but failed to do so.

Due to a lack of evidence, the OIP could not ascertain that the Board mailing list contained the complainant’s address and could find no other evidence of wrongdoing by the Board. The OIP was also unable to determine that contact information was illegally taken from voter registration records.

Department of Transportation

A reporter asked the Department of Transportation (“DOT”) for records pertaining to consultant contract files for design of the Kaipapau Stream Bridge replacement project. DOT allowed the reporter to inspect the records. During his inspection, however, the reporter alleged that the records were incomplete. He was later provided with access to most of what he requested, and thereafter asked the OIP to investigate DOT’s handling of his record request.

The OIP found that DOT’s notice in response to the record request, which is required by section 2-71-14, Hawaii Administrative Rules, was inadequate. The OIP also found that access was withheld to an email and this was not stated in the notice.

Further, the OIP found that DOT had improperly segregated the records without advising the reporter at the time he first inspected the records, and that an adequate search for records was not conducted until after the OIP contacted DOT.

Housing and Community Development Corporation of Hawaii

A reporter asked the Department of Business, Economic Development, and Tourism’s Housing and Community Development Corporation of Hawaii (“HCDCH”) for records pertaining to consultant contracts.

The HCDCH allowed the reporter to inspect the records. The reporter alleged that five of the contract files were incomplete and asked the OIP to investigate.

This investigation took longer than expected due to the OIP’s inability to receive timely responses, if any, from the HCDCH. The HCDCH did provide the OIP with copies of the five consultant contract files in question, and, despite the HCDCH’s assertions to the contrary, the OIP found that all five files were missing documents required by the Procurement Code and its administrative rules.

The HCDCH confirmed that it had given all of its records relating to the requested files to the requester. This ended the OIP’s involvement.

Hawaii County Finance Department

Two members of the public complained that the Hawaii County Finance Department violated chapter 2-71, Hawaii Administrative Rules (“HAR”), by responding to their record request beyond the time limits allowed by the rules.

The OIP’s investigation found that the Finance Department did not maintain some of the requested records, and the delay in response was caused by its attempt to obtain the requested information from the agency that does maintain it.

The OIP found that although the Finance Department did violate the response time limits in section 2-71-13, HAR, the delay was based

on the good intention of the Department to attempt to obtain records elsewhere, which goes beyond the requirements of the UIPA and HAR.

The OIP advised the Finance Department that it need not make attempts in the future to produce records it does not maintain when responding to record requests, and found that the Department’s actions did not warrant discipline.

State Senator: Timely Response

This investigation was instituted due to an alleged failure to respond to a record request within ten business days, as required by section 2-71-13, Hawaii Administrative Rules.

The investigation concluded that a senator responded by the tenth business day of receipt of the record request. From the statements in the record request, it appeared as though the record requesters were seeking access to a letter they believed was on a desk awaiting signature.

Thus, the OIP explained that rather than a denial of the record request on the basis that the agency did not maintain the record, the denial should have been on the basis that the record was both predecisional and deliberative. (The senator ultimately sent the record,



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section . . .

- Neighborhood Board*
- Department of Transportation*
- Housing and Community Development Corporation*
- Hawaii County Finance Department*
- State Senator: Timely Response*
- State Senator: Record Request*
- Hawaii Public Employees Health Fund*
- State Foundation on Culture and the Arts*
- Hawaii Tourism Authority*
- Department of Human Resources Development*
- Board of Trustees of the Deferred Compensation Plan*
- Core Government Functions Advisory Commission*
- Neighborhood Board*
- Vision Teams*

and the predecisional, deliberative record was not kept, as is the agency's practice.)

At the OIP's recommendation, the senator's staff assigned to be custodians of records were trained on compliance with the UIPA and the administrative rules adopted thereunder.

State Senator: Record Request

A senator received a record request for the dates of all public hearings of a particular resolution. The senator replied that no hearings were scheduled on that resolution, and that he would advise the requester when a public hearing was scheduled.

The OIP concluded that the senator had interpreted the request as asking for the dates of hearings that would take place after the date of the request. Thus, the request was not a request for a "government record" as defined by the UIPA.

A record, or information contained in a record, is subject to the UIPA only if it is maintained by a government agency in some physical form. The UIPA applies only to existing records and government agencies cannot be compelled to create a record.

R *Sunshine Investigations:*

Hawaii Public Employee Health Fund

The State Auditor's Report 99-20, entitled "Actuarial Study and Operational Audit of the Hawaii Public Employee Health Fund," criticized the Board of Trustees of the Hawaii Public Employee Health Fund's ("Board") taking of minutes.

A public interest group asked the OIP to investigate whether the Board had improved

its minute-keeping practices after the issuance of the Auditor's Report. The OIP found that the Board had made efforts to come into compliance with the Sunshine Law's provisions on minutes.

State Foundation on Culture and the Arts

A Commissioner with the State Foundation on Culture and the Arts ("SFCA") filed a complaint alleging improper and inaccurate keeping of minutes, failure to keep minutes, and failure by the Chair to hear motions. The complaint also raised questions about requests for records.

The OIP asked the complainant to submit evidence she claimed to have and to answer certain questions. Thereafter, the complaining party's term as a Commissioner ended, and none of the evidence she had previously promised to forward to the OIP was ever received.

The OIP declined to investigate her complaint further. Based on information received from various sources, however, the OIP opened its own investigation *sua sponte* and found that, during the time period reviewed: (1) the SFCA violated its legal duty to file timely notices of meetings, and (2) the SFCA did not complete minutes within 30 calendar days, as required by the Sunshine Law.

Hawaii Tourism Authority

Three members of the public complained that the Hawaii Tourism Authority ("HTA") was conducting executive meetings in violation of the "Sunshine Law" at Part I of chapter 92, Hawaii Revised Statutes ("HRS"), and that notices and agendas for these meetings were insufficient.

The OIP found that the HTA's actions were not in violation of the Sunshine Law and

concluded that the level of specificity and detail required for an agenda of an executive meeting is different from that required for an agenda of a public meeting.

This notwithstanding, the OIP recommended that the HTA's agendas, at a minimum, recite the specific subsections of 92-5, HRS, or other laws, which allow it to enter an anticipated executive meeting, and that the HTA provide as much specificity as possible on agendas.

Department of Human Resources Development

The attorney for a company that unsuccessfully bid on the Request for Proposal for a third party administrator of the Deferred Compensation Plan requested an OIP investigation and alleged UIPA and Sunshine violations by the Department of Human Resources Development ("DHRD") and the Board of Trustees of the Deferred Compensation Plan ("Board").

The OIP met with representatives of DHRD and the Board to discuss the issues. DHRD eventually made available documents responsive to the record request, which it claimed were protected from disclosure prior to completion of procurement processes. In addition, certain matters were reheard by the Board after it admitted violations of the Sunshine Law.

Because of the lack of any evidence of willful or intentional violations of the laws, the OIP did not recommend discipline, but did recommend that employees be trained by the OIP.

Board of Trustees of the Deferred Compensation Plan

A participant in the Deferred Compensation Plan alleged that the Board of Trustees ("Board") violated the Sunshine Law: (1) by not properly approving or amending minutes,

and (2) when a Department of Human Resources Development ("DHRD") employee "switched" the order of items on a Board agenda.

The Participant also asked whether the Board can "keep information from participants [on] who they chose [as third party administrator] and announce it when they feel it is necessary[.]" The Board admitted not completing minutes in a timely manner and explained that it had developed procedures to complete past minutes and to complete future minutes in a timely manner.

The OIP found that the Sunshine Law contains no provisions on amendment of minutes, but does require that the minutes be a "true reflection" of matters discussed. As no specific allegations regarding the accuracy of minutes were alleged, the OIP did not opine on this matter.

The OIP found that taking agenda items out of order does not violate the Sunshine Law, but that, to further the law's intent, agenda items should be taken in order when possible. Further, the Procurement Code and section 92F-13, Hawaii Revised Statutes, allowed the Board to withhold certain information while the procurement processes were ongoing.

Core Government Functions Advisory Commission

The issue of whether the Core Government Functions Advisory Commission ("Commission") was required to comply with the Sunshine Law was the subject of an investigation instituted at the request of a member of the public who was not permitted to present oral testimony at a Commission meeting.

The Commission was a temporary commission, established by Act 247 of the 2002 legislative session to determine which state programs implement "core government

functions” and to recommend elimination, reorganization, or redistribution of State programs.

The Commission was established within the Legislature for administrative purposes, and it had conducted its meeting procedures in accordance with the rules and procedures of the Senate and the House of Representatives, and not the Sunshine Law. (Pursuant to section 92-10, HRS, the Legislature’s open meeting requirements are set by rules adopted by the Senate and House of Representatives.)

The OIP concluded that the Commission was subject to the Sunshine Law. This conclusion was based on the fact that the Sunshine Law’s exclusion of the Legislature and its members refers to the Legislature as a body and its members as individuals, not to boards or commissions placed within the Legislature for administrative purposes.

Neighborhood Board

Three members of a neighborhood board discussed, at an informally organized community meeting, the placement of a traffic signal light at King Intermediate School.

Under the Sunshine Law, board members are not authorized to gather to discuss official business without providing notice and the opportunity for public comment, unless they follow the procedures set out in section 92-2.5 for “permitted interactions.”

As the Revised Charter of the City and County of Honolulu authorizes neighborhood boards to advise concerning land use matters, the OIP concluded that the discussion violated the Sunshine Law. The OIP concluded that the violation was unintentional, as the board adopted motions concerning the community meeting which indicated that there was no attempt to keep official business from the public.

Vision Teams

The OIP received a request that it investigate the Vision Teams’ compliance with the Sunshine Law’s requirements concerning public notice and minute-keeping.

First, the complainant made a UIPA request to the City and County of Honolulu for copies of notices and agendas, and minutes of meetings of the 19 Vision Teams from May 3, 2001, through March 27, 2002.

Next, the complainant asked the OIP to review those records to determine if the Vision Teams had complied with the OIP’s Opinion Letter Number 01-01, advising the Vision Teams to provide public notice of meetings and keep minutes under the Sunshine Law.

Based on its review of the documents provided to it by the complainant, the OIP concluded that: (1) each of the 19 Vision Teams failed, to some degree, to meet the minimum requirements established by the Sunshine Law; and (2) none of the minutes reviewed included a record, by individual member, of votes taken, as required by section 92-9(a)(3), HRS.

The OIP suggested that the Sunshine Law’s provision regarding recording members’ votes be complied with by having Vision Team meeting attendees who intend to vote sign a roster and then recording, by individual member, any vote taken.



Litigation Report

Any person who requests a government record and is denied access has two courses of action, as stated in sections 92F-15 and 92F-15.5, Hawaii Revised Statutes. The person may appeal to the OIP for assistance, or bring suit in the circuit courts to compel disclosure of the record. The OIP has standing to appear in any action in which the provisions of the UIPA have been called into question. Civil actions and remedies regarding personal records are covered in sections 92F-27 and 92F-27.5.

The OIP tracks litigation to monitor the issues and concerns under the UIPA that are not resolved through the OIP. The OIP reviews and assesses each case to determine whether to intervene actively or simply monitor the litigation's progress. Cases monitored in FY 2003 follow. A report on litigation concerning the Sunshine Law begins on page 20.

R New UIPA Cases:

Denial of Access to Government Records

In **Alvarez v. Department of Public Safety**, Civ. No. 02-1-2765-11 (1st Cir. Haw., filed Nov. 26, 2002), an inmate alleges that he was denied access to government records concerning asbestos containing material, video recordings, records of investigations, and information concerning the inmate's transfer within the institution. The inmate seeks a declaratory ruling that the UIPA was knowingly and/or intentionally violated, damages, injunctive relief, and attorneys fees and costs.

Medical Privacy

In **University of Hawaii v. Stewart**, S.P. No. 02-1-0034 (3rd Cir. Haw., filed August 8, 2002), the University of Hawaii ("UH") brought suit to enforce a subpoena for the medical records of an employee receiving ongoing payments based on a workers' compensation claim against UH.

The employee fought the subpoena, arguing that it violated his right to medical privacy under the Hawaii Constitution and other laws.



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section . . .

- Denial of Access to Government Records*
- Medical Privacy*
- Failure to Respond Properly to Records Request*
- Access to Videotape*
- Return of Documents in Clean Water Enforcement Action*
- Access to Presentence Reports*
- Access to Personal Records*
- Fiscal and Audit Reports Submitted by a Non-Profit Corporation to a State Agency*
- Submission and Consideration by Entire Board of E-Mail Testimony*
- Sunshine Law Consent Decree*
- Closed Meeting to Determine Chief of Police Selection Process*

After a hearing, the court ordered the complete medical records to be released to the court for *in camera* inspection, following which the court would order the release of records as appropriate.

Failure to Respond Properly to Records Request

The plaintiff in **Johnny Miller v. State of Hawaii**, Civ. No. 03-1-0195-01 (1st Cir. Haw., filed Jan. 28, 2003), filed a complaint for damages, injunctive relief, and litigation expenses.

The plaintiff alleged that the Department of Public Safety Hawaii Paroling Authority (“HPA”) failed to respond properly to his request for copies of his parole records by denying access, and by responding later than 10 business days as required by chapter 2-71, Hawaii Administrative Rules. The plaintiff thus far has failed to serve the defendant with a copy of his complaint.

Access to Videotape

In **William B. Simendinger v. State of Hawaii Department of Health, et al.**, Civ. No. 03-1-1158-06 (1st Cir. Haw., filed June 3, 2003), the plaintiff seeks access to a videotape of a presentation made by Marcel Moreau Associates in 1998 to the Department of Health (“DOH”) pertaining to underground storage systems inspection.

All other records pertaining to Moreau that were requested by the plaintiff in April, 2003, were provided by DOH. DOH will not disclose the video absent Moreau’s consent, and has invoked section 92F-13(3), HRS, to withhold disclosure.

Return of Documents in Clean Water Enforcement Action

State of Hawaii v. Earthjustice, et al., Civ. No. 03-1-1203-06 (1st Cir. Haw., filed June 9, 2003), raises a novel issue. In this case, the Department of Health Clean Water Branch (“DOH”) obtained six boxes of documents from James Pflueger and associated entities in connection with an enforcement action for violations on Kauai of clean water laws.

DOH asserts that in February 2003 it mistakenly allowed the defendants to inspect and copy the Pflueger documents. DOH seeks return of the copies made by defendants of the Pflueger records by way of an injunction. Earthjustice counter-claimed seeking to retain its copies, and claims the documents pertain directly to a lawsuit it is involved in.

The parties have stipulated that certain records filed with the court will remain under seal except for any records the court finds Earthjustice entitled to keep. Both parties filed motions for summary judgment.

R Continuing Cases:

Access to Presentence Reports

In **Kong v. Department of Public Safety**, Civ. No. 02-01-1271-05 (1st Cir. Haw., filed May 24, 2002), an inmate alleged that certain documents dating from 1988, 1993, and 1994 are missing from his Department of Public Safety (“PSD”) file, that he made a request for documents to which he did not receive a response, and that he was denied access to presentence reports.

Thereafter, the plaintiff made various discovery requests, and filed an amended complaint. Pursuant to an order entered May 8, 2003, the Court ordered defendants to produce discovery regarding a PSD form, regarding a consent to release information and policies (unless exempted by sections 92F-13 and 92F-22, HRS.)

Pursuant to an order entered May 13, 2003, the Court ordered Defendant to produce discovery regarding a PSD policy, and a document concerning access to PSD confidential information. Defendants have moved to dismiss plaintiff's amended complaint for failure to comply with the Hawaii Rules of Civil Procedure, and for failure to state a claim.

Access to Personal Records

In the case of **Daniel A. Johnson v. State of Hawaii, et al.**, Civ. No. 99-231 (3rd Cir. Haw., filed May 11, 1999), the plaintiff sued the Department of Human Services ("DHS") for responding to his March 19, 1999, request for records on April 30, 1999, when the UIPA requires responses generally within 10 working days. Johnson filed a motion for summary judgment.

DHS filed a countermotion for summary judgment on the basis that it did not receive Mr. Johnson's record request until April 28, 1999, thus its response was well within the UIPA's time limits. No further pleadings were filed by the plaintiff, and the case was ordered dismissed on July 30, 2001.

Another case filed by Johnson, **Daniel A. Johnson v. County of Hawaii, et al.**, Civ. No. 99-297 (3rd Cir. Haw., filed June 23, 1999), involved a personal record request for "personal property records" maintained

by the County of Hawaii Police Department. Section 92F-23, HRS, requires that personal record requests be responded to in 10 working days. The County's response was 28 days after receipt of Plaintiff's record request and the county did not invoke the "unusual circumstances" provision of section 92F-23, HRS, which would have provided it with an additional 20 working days to respond.

The County was ordered to pay \$1,000 in damages pursuant to section 92F-27, HRS, for failure to properly respond to a personal record request. A Satisfaction of Judgment was filed on May 28, 2003.

Fiscal and Audit Reports Submitted by a Non-Profit Corporation to a State Agency

In **Yuen v. State of Hawaii**, S.P. 00-1-0004 (1st Cir. Haw., filed Jan. 3, 2000), the plaintiff filed a lawsuit seeking an order under the UIPA to allow inspection of fiscal reports and annual reports submitted by AlohaCare, Inc., to the Department of Human Services, Med-Quest Division.

The motion was granted, and remains in effect. Thereafter, AlohaCare intervened in the lawsuit, and filed a motion seeking an order denying the plaintiff access to the documents. That motion was denied.

Thereafter, the State settled the lawsuit with the plaintiff. In January 2003, AlohaCare filed a motion to dismiss the case for lack of prosecution, which was granted.

Other Cases

The OIP continues to track several cases that are awaiting decision by the Hawaii Supreme Court: **State v. Epps** (No. 22452), **State v. Guidry** (No. 22727), and **Foytik v. Department of Human Services** (No. 24052). There were no new developments in these cases during the past fiscal year.

R *Sunshine Litigation Report:*

Submission and Consideration by Entire Board of E-Mail Testimony

In **Vannatta v. Kunimoto**, Civ. No. 03-1-1058-05 (1st Cir. Haw., filed May 20, 2003), the plaintiff seeks a declaratory judgment that the Board of Agriculture's vote to authorize transfer of a male orangutan from the Honolulu Zoo to a temporary facility at Kualoa Ranch, Kaneohe on February 20, 2003, is void.

The lawsuit arose from the failure of the Board of Agriculture to distribute testimony submitted by e-mail before voting to approve the transfer. (See OIP Opinion Letter Number 03-06, which opined that e-mail testimony should have been distributed to all of the members of the Board before it voted.)

Although the Board later considered the e-mailed testimony at its April 17, 2001, meeting, it reaffirmed its decision, the Plaintiff seeks a declaratory judgment that the decision not to void its earlier decision violates the Sunshine Law.

Sunshine Law Consent Decree

Smith v. Apana, Civ. No. 97-0536 (2nd Cir. Haw., filed July 7, 1997), concerns alleged violations of the Sunshine Law by the Maui County Planning Commission and the Land Use Committee of the Maui County Council.

In November 1999, the parties entered into a consent decree, the court retaining jurisdiction over the matter. In October 2001, the plaintiff sought enforcement of the consent decree.

In March 2002, the defendants were ordered to retain Professor Jon Van Dyke to prepare standard compliance criteria to advise all board and commission members and support staff of the Maui boards of the requirements of the Sunshine Law. The Court also appointed Hon. Boyd P. Mossman (Ret.) as the Special Master to mediate, monitor, direct, and report on the Defendants' compliance with the consent decree.

Pursuant to the Order Regarding County of Maui's Compliance with the Court's Order Adopting Special Master's Recommendations, filed April 21, 2003, Special Master Mossman indicated that the County was in compliance with the terms of the consent decree, specifically with the Special Master's recommendations as adopted by the court.

Closed Meeting to Determine Chief of Police Selection Process

Jack Brunton v. County of Hawaii Police Commission, et al., Civ. No. 00-1-0197K (3rd Cir. Haw., filed Nov. 1, 2000), involved a complaint for injunction and declaratory relief alleging that the Hawaii County Police Commission had illegally held a closed meeting on October 17, 2000, to determine the Chief of Police selection process.

The plaintiff filed a motion for an order to restrain the Police Commission from having any further meetings concerning development of the selection process and criteria for the Chief of Police, and to take no further action on the alleged illegal meeting. This motion was denied as the court found no “irreparable injury” would occur if the motion was not granted.

Thereafter, the County filed a motion for summary judgment, which was granted. The plaintiff then filed a motion for reconsideration of the order denying his motion requesting injunctive relief, but before the motion to reconsider was heard, the plaintiff withdrew it. No further action was had on the case after February 2001.



Implementation

Legal Assistance



Each year, the OIP receives numerous requests for legal assistance from members of the public and employees of government agencies. A majority of the requests come through the “Attorney of the Day” service, where the OIP staff attorneys give the person who phones, sends e-mail, or walks in definitive legal advice within one or two days.

About one third of the requests for legal assistance require the OIP staff attorneys to provide clarification, mediation, or other legal assistance. In these instances, the staff attorneys conclude their assistance within three to four months.

“Over the past five years, the OIP has received a total of 3,941 requests for Attorney of the Day services.”

A very small, but growing, percentage of the requests for assistance ask for formal legal opinions. The OIP will handle these on a first-come, first served basis, unless the case falls within a priority category.

For these priority cases, the staff attorney will attempt to resolve the issues as rapidly

as possible, given the attorney’s workload. Because of the large budget cuts that the OIP has suffered in recent years, it can take years to resolve some of these issues.

Attorney of the Day – Quick Legal Advice

The OIP’s Attorney of the Day (“AOD”) service continues to be a valuable resource for our community. It is the fundamental OIP legal resource used by government agencies and the public. Rather than struggle with uncertainty regarding a record request, the agencies phone the OIP early in the process to ask for guidance and assistance in responding to the request. Members of the public call the AOD to determine whether agencies are responding properly.

All of the legal questions are answered within one or two days, saving everyone time and ensuring a timely response to requests. Often the OIP works with both the requester and the agency to resolve issues inherent in the request.

Over the past five years, the OIP has received a total of 3,941 requests for Attorney of the Day services. See **Table 3** on page 23. The yearly average of AOD requests over that period is 788 requests.

As can be seen from **Chart 3** and **Table 3** on this page, the number of requests to the Attorney of the Day vary from year to year. This fiscal year, the OIP received 808 requests to the Attorney of the Day service, an increase of 112 requests.

For numerical summaries of the telephone calls received by the OIP staff attorneys, please see pages 23-26. Case summaries of some of these calls begin on page 33.

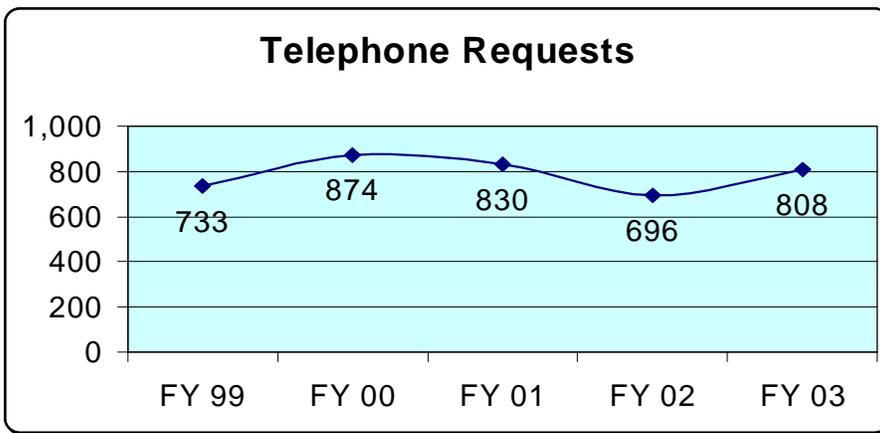


Chart 3

Fiscal Year	Total	Public	Government Agencies	Government Attorneys
FY 03	808	371	331	106
FY 02	696	306	304	86
FY 01	830	469	214	147
FY 00	874	424	232	218
FY 99	733	336	314	83

Table 3

Who Is Seeking Legal Assistance – The Requesters

The Public Caller — When a member of the public phones the OIP’s Attorney of the Day, the caller is usually seeking assistance because that person believes a government agency is improperly withholding access to a public record and wants to know what his or her rights are.

Of the 808 requests for Attorney of the Day assistance, 46% of the requests came from the public; this is a change from FY 2002, when 44% of the requests for Attorney of the Day service were from the public. See **Charts 4 and 5** on this page.

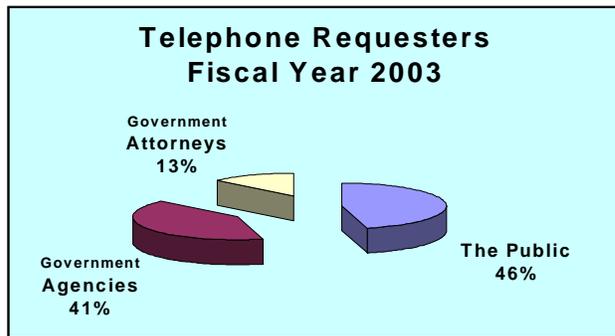


Chart 4

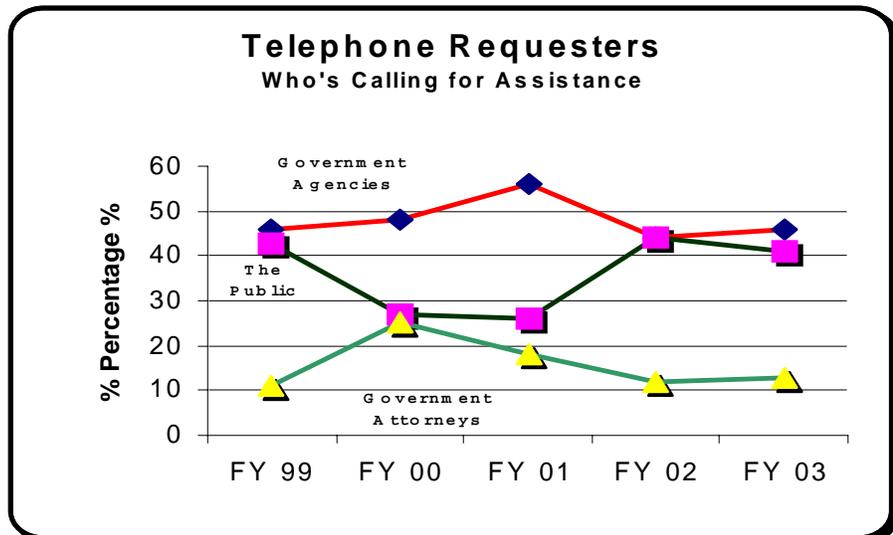


Chart 5

Of the 371 calls from the public, 63% came from private individuals (235 calls), 13% came from the news media, 9% from businesses, 6% from private attorneys, and 6% from public interest groups. See **Table 4** and **Chart 6** on this page.

The Government Caller — When government employees use the Attorney of the Day service they want immediate assistance so that they can respond appropriately and within the time limits imposed by OIP rules. In FY 2003, 41% of the requests for assistance from the Attorney of the Day came from government agencies, and 13% from government attorneys, as shown in **Chart 4** on page 24.



Telephone Requests from the Public FY 2003

Types of Callers	Number of Calls
Private Individual	235
Business	34
Newspaper	46
Private Attorney	21
Public Interest Group	24
Television	1
Health Provider	5
Magazine	1
Other	4
TOTAL	371

Table 4

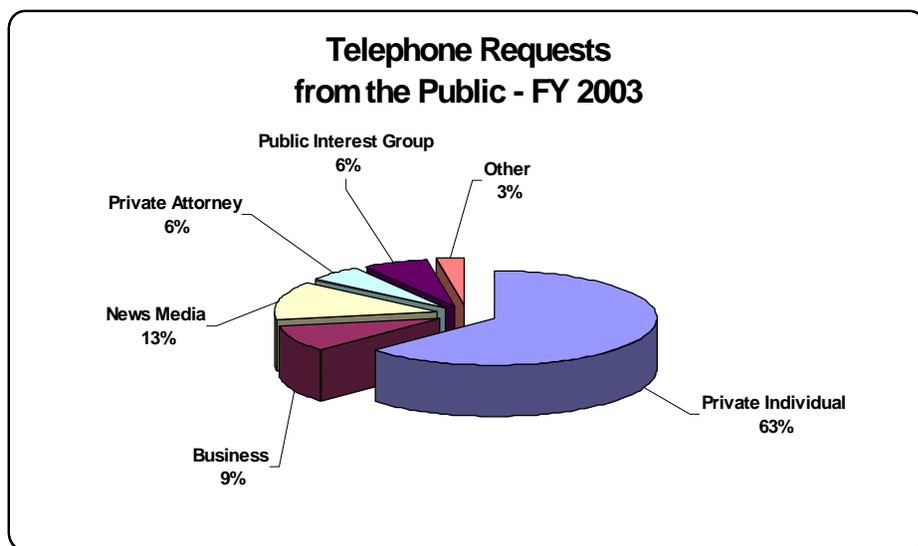


Chart 6



Government Agencies' Calls to the OIP FY 2003

<i>Jurisdiction</i>	<i>Number of Calls</i>
State Executive	241
State Legislature	22
State Judiciary	13
County Executive	34
County Council	10
Federal Agency	0
Unspecified Agency	11
TOTAL	331

Which government agencies called the OIP for assistance during FY 2003? Government agencies from the State Executive branch of government made 241 calls, or 73% of the 331 calls from government agencies. Government agencies from the County Executive branches of government made 34 calls, or 10%. For a breakdown of telephone requests from government agencies received in FY 2003, see **Table 5** and **Chart 7** on this page.

Table 5

Government Agencies' Calls to the OIP - FY 2003

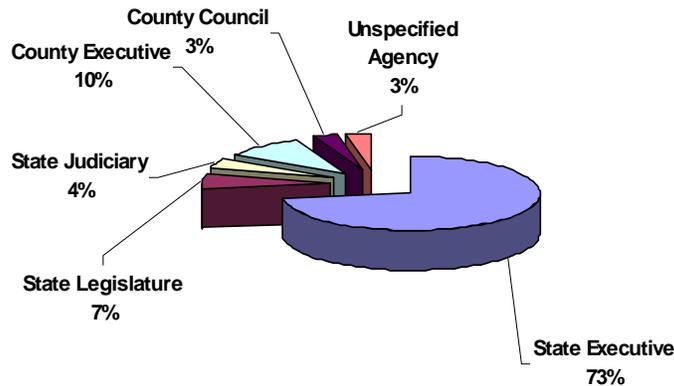


Chart 7

Which Government Agencies Are the Callers Concerned With?

In addition to tracking the type of requester, the OIP also monitors which government agencies are involved when callers need assistance. This helps the OIP evaluate problems with access to government records.

State Executive Agencies

In FY 2003, the OIP received a total of 545 telephone inquiries concerning State agencies, up from 445 inquiries in FY 2002.

Almost half of this year's calls concerned just seven state agencies: the Department of Land and Natural Resources (45), Department of Commerce and Consumer Affairs (43), Department of Business, Economic Development, and Tourism (42), Department of Education (37), Department of Labor and Industrial Relations (33), Department of Health (32), and the Office of Information Practices (32).

Most of the 32 calls relating to the OIP were inquiries about the OIP's work. For the complete list, please refer to **Table 7** on page 29.

Other State Agencies

The OIP received 22 calls about the legislative branch of State government, 42 calls about the judicial branch, and six calls about the Office of Hawaiian Affairs.

County Agencies

The OIP received 139 calls to the Attorney for the Day for assistance with county government agencies. Some 44% of these calls (61) concerned government agencies in the City and County of Honolulu. Of

these, the largest number of requests (12) concerned the City Council, while 10 concerned the Honolulu Police Department.

The OIP received 77 calls for assistance regarding the other three Hawaii counties: 31 calls about Maui County agencies, 24 about Kauai County agencies, and 22 about Hawaii County agencies. Refer to **Tables 8-11** on pages 30-31 for details.

Of the 139 calls regarding county agencies, 50, or more than a third, concerned county councils. Most of these calls were about meetings and the Sunshine Law.

Requests for Assistance — RFAs

In FY 2003, the OIP received 84 requests for assistance that required more involved legal assistance. In these cases, the OIP is asked to provide assistance to the public in a records request dispute.

The staff attorneys will contact the parties to determine the status of the request, review whether the request needs clarification and whether there has been an actual denial of the request, and most times review whether the denial was proper.

In some instances, the OIP is asked to review whether the fees charged by government were proper or were excessive. In quite a few cases, the OIP staff attorneys become involved simply because the government agency has failed to respond to the requester.

“The OIP received 139 calls to the Attorney of the Day for assistance with county government agencies.”

Requests for Legal Opinions – RFOs

In FY 2003, the OIP received 41 requests for legal opinions. When asked, the staff attorneys will render their opinion on an issue within the jurisdiction of the OIP. Legal issues can fall within the UIPA or the Sunshine Law. See **Table 6** on this page.

Employees whose actions were taken in good faith are immune from liability under section 92F-16, Hawaii Revised Statutes.

Where the OIP is faced with a novel or controversial issue, it will issue a formal opinion letter, and will publish and distribute the opinion letter widely. Formal published opinion letters are distributed to:

- Holders of the UIPA Reference Manual,
- WestLaw,
- Michie, for annotation in the Hawaii Revised Statutes,
- The Hawaii State Bar Association, for posting on the HSBA web site,
- The OIP's web site, and
- Anyone else requesting copies.

The OIP also publishes summaries of the formal opinion letters in the OIP's monthly newsletter, *Openline*, as well as on the OIP's web site at www.hawaii.gov/oip. Summaries of the formal opinion letters are found in this report on page 38.

Where the issue before the OIP has already been addressed in a prior formal published opinion letter, the OIP will issue an informal opinion letter. Informal opinion letters are sent to the parties, and maintained as public records at the OIP's office. Summaries of some of the informal opinion letters are found beginning at page 33.



<i>Type of Request</i>	<i>Number of Requests</i>
Request for Assistance	84
Request for Legal Opinion	41
Total Written Requests	125

Table 6

**Calls to the OIP About
State Government Agencies
FY 2003**



Executive Branch Department	Requests
Land and Natural Resources	45
Commerce and Consumer Affairs	43
Business, Economic Development, and Tourism	42
Education (including Public Libraries)	37
Labor and Industrial Relations	33
Health	32
Office of Information Practices	32
University of Hawaii System	28
Public Safety	25
Accounting and General Services	24
Transportation	24
Attorney General	23
Human Services	19
Agriculture	16
Human Resources Development	11
Lieutenant Governor	11
Governor	10
Taxation	10
Hawaiian Home Lands	6
Budget and Finance	4
Defense	0
TOTAL EXECUTIVE	475
TOTAL LEGISLATURE	22
TOTAL JUDICIARY	42
Office of Hawaiian Affairs	6
TOTAL STATE AGENCIES	545

Table 7



**Calls to the OIP About
City and County of Honolulu
Government Agencies - FY 2003**

Department	Requests
City Council	12
Police	10
Budget and Fiscal Services	7
Corporation Counsel	6
Mayor	5
Neighborhood Commission	5
Design and Construction	3
Prosecuting Attorney	3
Board of Water Supply	2
Planning and Permitting	2
Enterprise Services	1
Environmental Services	1
Human Resources	1
Liquor Commission	1
Parks and Recreation	1
Transportation Services	1
TOTAL	61

Table 8



**Calls to the OIP About
Hawaii County
Government Agencies - FY 2003**

Department	Requests
Police	7
County Council	6
Finance	2
Mayor	2
Corporation Counsel	1
Fire	1
Housing & Community	1
Planning	1
Prosecuting Attorney	1
TOTAL	22

Table 9

**Calls to the OIP About
Kauai County
Government Agencies - FY 2003**



Department	Requests
County Council	13
Public Works	4
County Attorney	3
Police	3
Planning	1
TOTAL	24

Table 10

**Calls to the OIP About
Maui County
Government Agencies - FY 2003**



Department	Requests
County Council	19
Corporation Counsel	3
Police	3
Planning	2
Water Supply	2
Finance	1
Liquor Control	1
TOTAL	32

Table 11

Sunshine Report

In 1998, the OIP assumed jurisdiction over the State’s open meetings law, Part I of chapter 92, Hawaii Revised Statutes (“Sunshine Law”). Since then, the OIP has seen steady increases each year in the number of requests related to the law. See **Chart 8** below.

Of the requests to the Attorney of the Day service in FY 2003, 149 were inquiries regarding the Sunshine Law and its application, a 77% increase over the total in FY 2002. In addition, the OIP opened 28 case files in response to written requests for assistance. See **Table 12** below.

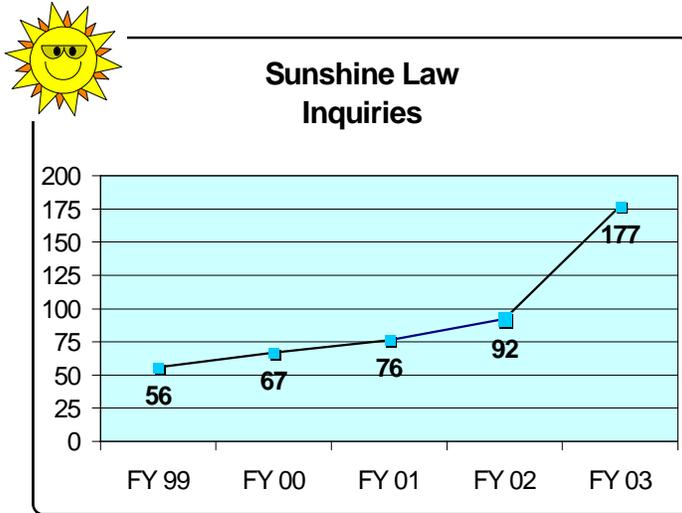


Chart 8

The continued rise in requests for assistance indicates that while the public has increased its awareness of the Sunshine Law and its requirements, some board and commission members have failed to keep pace, prompting increased demand for the OIP’s assistance.

To help government understand the complexities of the Sunshine Law, the OIP continues to provide annual training to newly appointed board and commission members and their staffs.



<i>Fiscal Year</i>	<i>Telephone Inquiries</i>	<i>Written Inquiries</i>	<i>Total</i>
2003	149	28	177
2002	84	8	92
2001	61	15	76
2000	57	10	67
1999	51	5	56

Table 12

Case Summaries and Opinion Letters



The following are selected summaries of legal assistance provided by the OIP staff attorneys through the Attorney of the Day service and informal opinion letters. Summaries of formal published opinion letters begin on page 38.

Report of Potential Workplace Violence

A caller assisted a government agency in investigating a report of potential workplace violence. The agency issued a report that includes verbatim comments from witnesses and summaries of the agency's findings. The caller was concerned that the subject of the complaint might request a copy of the report, and that his reaction could actually result in workplace violence.

The OIP explained that the UIPA's exception at section 92F-13(3), HRS, protects information which, if disclosed, would cause the frustration of a legitimate government function. The "frustration" exception protects information such as identities of witnesses and investigatory techniques.

Autopsy Reports

A caller asked whether autopsy reports are public. OIP Opinion Letter Number 91-32 advises that whether an autopsy report should be made public depends upon the contents of the report. For example, while the UIPA generally does not attach privacy

interests to deceased persons, privacy interests of living relatives of the deceased may be implicated.

In addition, if an investigation or litigation is pending, it may be appropriate not to disclose an autopsy report publicly for a period of time.



**in
this
section . . .**

*Report of Potential Workplace Violence
Autopsy Reports*

*Disclosure of Names of Minors on
a List of Attendees*

*Difference Between a "Meeting" and
a "Hearing"*

*Supervisor's Access to an Employee's
Personnel File*

*Request to Access "Future"
Government Records*

*Disclosure of Identities of Complainants
Written Public Notice of Executive
Meetings*

*Allowing a Record Requester to
Search for Records*

*Release of Information a Business
Considers Confidential*

*Requests for Information that Can Be
Found in Government Records*

Further, since the issuance of Opinion 91-32, the federal Department of Health and Human Services has adopted 45 C.F.R. Parts 160 and 164, the medical privacy rules, as required by the Administrative Simplification subtitle of the Health Insurance Portability and Accountability Act of 1996, Public Law 104-191 (“HIPAA”).

Agencies affected by HIPAA and its rules should be aware that these laws attach a privacy interest to medical information belonging to deceased persons.

Disclosure of Names of Minors on a List of Attendees

A State agency asked whether it should disclose the names on a list of attendees of a function hosted by the agency. The list includes names of minors.

The OIP advised that minors do not have any greater or lesser privacy interests than adults do under the UIPA, so if disclosure of the names of adults who attended is not a clearly unwarranted invasion of personal privacy, then generally speaking, it should also be permissible to disclose the names of minors in attendance.

Difference Between a “Meeting” and a “Hearing”

A county agency employee asked what the difference is between a hearing and a meeting. A “meeting” refers to “boards” that are required to meet in accordance with the “Sunshine Law” at Part I of chapter 92, HRS. A “hearing” comes under the Hawaii Administrative Procedures Act, chapter 91,

HRS (“HAPA”), and can include contested case hearings, and public hearings on adoption of administrative rules.

Meetings and hearings have different notice and procedural requirements. While the OIP has jurisdiction over the Sunshine Law, it does not have jurisdiction over HAPA, and HAPA questions should be directed to the agency’s attorney.

Supervisor’s Access to an Employee’s Personnel File

After the 2002 gubernatorial election, the State executive agencies were directed by the out-going Governor to prepare transition statements for the new administration.

Last November, a reporter asked the Governor’s Office for copies of the transition statements, and was advised that the statements had already been forwarded to Governor-elect Lingle on diskette, and the Governor’s office did not retain copies. The reporter asked whether it was legal for the Governor’s Office not to retain copies of the transition statements it requested from executive agencies.

The OIP advised that records retention is not within the OIP’s jurisdiction, and suggested that he consult with the Archives Division of the Department of Accounting and General Services (“DAGS”).

The General Records Schedule, which lists retention periods for various types of documents, is also available on the DAGS web site at www.hawaii.gov/dags/archives. In addition, the OIP suggested that the caller contact each executive agency individually for a copy of its transition statement.

Request to Access “Future” Government Records

An individual made a record request for “any and all” documents concerning a particular topic “until the present time, and continuing until further notice.”

The OIP advised the agency that the UIPA requires that government records be made available, but does not contain language that implies a duty to disclose prospective future documents. In other words, if an agency does not maintain a record at the time that the request is made, the agency is not bound to disclose the record when it receives the record.

The OIP advised the caller that she can respond by indicating that the requester is free to write periodically and ask for records, and that the agency will reply and produce records as required by the UIPA.

Disclosure of Identities of Complainants

An agency asked whether the UIPA authorizes an agency to withhold access to names of complainants or information which would reveal the identity of a complainant.

The OIP replied, that, under Part II of the UIPA (the “freedom of information” section), an agency is authorized to withhold access to information identifying a complainant, when its legitimate government function requires that it resolve complaints, and when disclosure of information that would identify the complainant would make

it less likely that future complainants would come forward to report law violations, or when informants express fear of retaliation.

Under Part III of the UIPA (the “personal records” section), an agency is authorized to withhold access to information provided under an implied promise of confidentiality. This is the case even where the information is contained in an unsolicited complaint so long as the complaint contains information that permits an inference that the information would not have been conveyed without an implied promise of confidentiality.

Written Public Notice of Executive Meetings

A member of the public asked if a board is required to give written public notice of executive meetings separately from open meetings, when the executive meeting is anticipated in advance.

The OIP replied that the the first sentence of section 92-7(a), HRS, as it pertains to executive meetings, means that boards are required to notice executive meetings when the board knows at the time the notice is filed that it is going to hold an executive meeting.

The Sunshine Law does not speak as to whether or not a separate notice, and accompanying agenda, must be filed for an executive meeting when anticipated in advance, and the OIP has not interpreted the Sunshine Law to require such separate notice.

The OIP notes that many board meetings are conducted partly as executive meetings and partly as open meetings. Moreover, the OIP notes that there are times when a specific issue comes up between the time when an agenda is posted and the date of the meeting which could cause an item previously posted as an “open meeting” item to become an “executive meeting” item.

Allowing a Record Requester to Search for Records

A record requester wanted to look at permit applications from a particular person. The agency kept the applications in chronologically ordered boxes.

To save staff time, the agency wanted to allow the requester to flip through the boxes himself to find the records he was interested in. However, the applications included home telephone numbers and addresses.

The OIP therefore advised the agency that to avoid disclosing information, where disclosure would be an unwarranted invasion of personal privacy, a government employee needed to do the searching. If the boxes had not contained private information, the agency could have allowed the requester to search through them for the desired records.

Release of Information a Business Considers Confidential

An agency received a request for records containing information submitted by a contractor, which the contractor considered confidential and proprietary. The agency did not agree that the information was confidential or proprietary to the contractor. However, the agency was concerned about the possibility that the business would sue after the release of information it claimed as proprietary.

The OIP advised the agency that although the UIPA does not require an agency to give a business advance warning about the disclosure of business information maintained by the agency, the UIPA does not prevent an agency from doing so either.

If the agency is aware that a business does not want the information released, the agency may notify the business of an anticipated release. That way the business has a pre-disclosure opportunity to go to court, if it thinks it has a basis to, seeking to prevent the disclosure.

Requests for Information that Can Be Found in Government Records

A member of the public asked an agency whether one public employee's pay was at the same rate as another's. The agency asked the OIP whether the information was public.

The OIP advised the agency that the UIPA requires agencies to respond to record requests, but does not address requests for information. However, the OIP encourages agencies to respond to requests for information found in government records when appropriate.

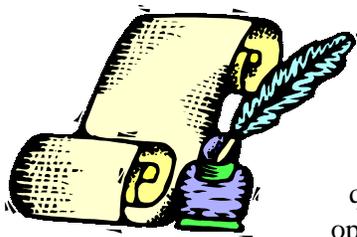
In determining whether requested information is public, the OIP recommends looking at whether the information would be publicly available in the context of a record request.

In the case of the two employees' salaries, if the question could be answered by simply comparing two public records, then the answer could be considered public information. If the answer required salary information beyond what would be publicly available under the UIPA, then the answer would probably not be public information.



OIP Opinions 2002-2003

The OIP issued 255 formal opinion letters from 1989 through the end of June 2003. In Fiscal Year 2003, the OIP issued 19 formal opinion letters.



These summaries are designed to serve only as a quick guide to locate an OIP opinion letter relating to a certain subject. To fully understand an opinion, it is necessary to read the full text of the opinion.

OIP Opinion Letter No. 02-05: Agency Maintenance of Records Submitted by Private Entity

An individual asked the OIP whether an agency subject to the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes (“UIPA”), may maintain information about an individual that is generated and submitted by a private entity.

The question applies to the policy of the Department of Public Safety (“PSD”) of incarcerating Hawaii inmates in private mainland prisons. These mainland prisons are alleged to provide the PSD with disciplinary infractions or other detrimental information.

The OIP opined that an agency may maintain such information. The UIPA does not impose affirmative obligations on agencies to maintain records. Collection and maintenance of records may be governed by laws outside the UIPA and by the agencies’ policies.

[OIP Op. Ltr. No. 01-05, July 30, 2002]

OIP Opinion Letter No. 02-06: Withholding of Minutes of a Public Meeting

OIP Opinion Letter Number 02-06 discusses a board’s discretion, under the UIPA and the Sunshine Law, to withhold tapes, transcripts, notes, and minutes of meetings open to the public.

The OIP opined that audiotape recordings made by boards of meetings open to the public are public records. Likewise, when a full transcript is made of a meeting, that transcript is a public record.

Notes taken by an individual assigned to record the minutes of a meeting are public records, but while in the editorial process these notes may be withheld until put in a form suitable for submission to a board.

Once they are in a form suitable for submission, however, these draft minutes are public records, inasmuch as they reflect events that took place in full view of the public at the open meeting and are essentially a summary of those events, even though unapproved by a board and considered to be a “draft.”

Approval of minutes of open meetings must take place at open meetings, as approval of minutes is not listed in the Sunshine Law as a purpose for which a board is authorized to hold a meeting closed to the public, or as an activity which a board is authorized to conduct outside of a meeting open to the public.

The OIP noted that there is no requirement in the Sunshine Law that a board approve minutes, and therefore boards do not have discretion to withhold minutes from the

public based on whether or not the minutes have been approved by a board. Although boards may elect to formally approve minutes, if minutes have not been approved by 30 days after the date of the meeting, minutes, in some form, must be made available to the public.

The OIP therefore encourages boards that wish to formally approve minutes to do so within 30 days of the date of the meeting. This will ensure that the public has access to minutes that have been reviewed for accuracy and completeness. The OIP also suggests that, when disclosing unapproved minutes, the board stamp or mark the minutes "DRAFT" so that the public is on notice that the minutes may be corrected or amended at a later date.

[OIP Op. Ltr. No. 01-05, August 23, 2002]

OIP Opinion Letter No. 02-07: Schedule of Maximum Allowable Medical Fees

Schedules of maximum allowable medical fees ("Fee Schedules") that are required by statute to be submitted to the Department of Labor and Industrial Relations ("DLIR") by health care plan contractors ("Contractors"), may be withheld from public disclosure.

Section 386-21.5, Hawaii Revised Statutes, requires Contractors to provide Fee Schedules to the DLIR, and requires the DLIR to use Fee Schedules to establish prevalent charges. Despite this statutory requirement, Contractors have refused to submit Fee Schedules, or have submitted them too late to be included in survey compilations.

Because there are only 15 Contractors who are required by law to submit Fee Schedules, late submittals or non-submittals compromise the validity of the DLIR's survey. The DLIR asserted that it has no power to force Contractors to comply with the statutory requirement of submitting Fee Schedules.



**in
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*Agency Maintenance of Records Submitted
by Private Entity*

Withholding of Minutes of a Public Meeting

Schedule of Maximum Allowable Medical Fees

'Olelo: The Corporation for Community

Television and Ho'ike: Kauai

Community Television, Inc.

Actions on Bills and Resolutions Without Notice

Adjudicative Records of the Judiciary,

Administrative Driver's License

Revocation Office

Meetings of Councilmembers Who Have

Not Yet Officially Taken Office to

Discuss Selection of Officers

FAMIS Access

Attorney Client Privilege

Charter School Boards and the Sunshine Law

Disclosure of Records of the Crime Victim

Compensation Commission

Judicial Selection Commission List of Nominees

'Olelo Board Member's Resume

HIPAA and Part II of the Uniform

Information Practices Act

Electronic Transmission of Testimony

Voting in Executive Meetings

Kauai Planning Commission and Subdivision

Committee Meetings

Police Department Mug Shots

Charter Schools and the UIPA

When information is required to be submitted to an agency, there is a presumption that because the information is required to be submitted, the agency would suffer no frustration of its government function if it disclosed the records. In this case, the DLIR overcame this presumption by

showing that disclosure of the Fee Schedules would impair the DLIR's ability to obtain similar information in the future because statements and actions of Contractors indicate a reluctance to submit Fee Schedules if they will be made public, and because the DLIR is unable to enforce submittal in a timely manner.

This impairment of the DLIR's ability to obtain Fee Schedules in the future would frustrate its statutory duty of creating prevalent charges. Thus, the DLIR has discretion to withhold disclosure of Fee Schedules as disclosure would frustrate its legitimate government function.

The OIP also adopts the federal test for administrative effectiveness as appropriate for an agency's invocation of the frustration exception. Protecting the DLIR's governmental interest in administrative effectiveness is satisfied by the facts presented. The DLIR's interest in administrative effectiveness would be frustrated if it was unable to obtain accurate and timely Fee Schedules from Contractors. The frustration exception therefore allows the DLIR to withhold disclosure of Fee Schedules.

[OIP Op. Ltr. No. 02-07, August 27, 2002]

***OIP Opinion Letter No. 02-08:
'Olelo: The Corporation for
Community Television and Ho'ike:
Kauai Community Television, Inc.***

The Community Television Producers Association asked the OIP to determine whether 'Olelo: The Corporation for Community Television ("Olelo") is a state agency or a quasi public body. In addition, The League of Women Voters of Kauai asked the OIP to reconsider its opinion that Ho'ike: Kauai Community Television, Inc. ("Ho'ike") is not subject to the requirements of the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA").

The OIP found that 'Olelo and Ho'ike are corporations owned, operated, or managed by or on behalf of this State as set forth under section 92F-3 of the Hawaii Revised Statutes, and are, therefore, required to follow the UIPA. To the extent that this opinion is in conflict with OIP Op. Ltrs No. 93-18, No. 94-23, and No. 94-24, those opinions are rescinded by this opinion.

The Director ("Director") of the Department of Commerce and Consumer Affairs ("DCCA") has required, as the local franchising authority, the cable franchisee to set aside public, education, and governmental access channels ("PEG access channels"). Both 'Olelo and Ho'ike were originally created by the DCCA, notwithstanding their current corporate form, and are funded almost entirely through funds allocated pursuant to the Director's authority under the Hawaii Cable Communications Systems Law, chapter 440G, Hawaii Revised Statutes (1993) ("HCCSL").

The OIP concluded that although the DCCA has not exercised close control over the administration of the PEG access channels, the DCCA does have significant and direct control over 'Olelo and Ho'ike through its appointment and removal power of the majority of appointees on the boards of those corporations. The OIP concluded that the DCCA exercises indirect control over the existence of 'Olelo and Ho'ike through the contractual agreements designating both as the Director's designee and terminating their corporate existence when that designee status ends.

The HCCSL and the contractual provisions together set forth a clear State policy to have the DCCA administer, through the Director's designees, cable channels for use by the public and for educational and governmental uses. The OIP concluded that the DCCA performs a government function by providing for PEG access channels, and that the administration of such channels, but not editorial control over the public portion

of PEG access channels, is a government function performed by 'Olelo and Ho'ike by or on behalf of the DCCA.

Finally, as the DCCA has used its power to require payments of money by the Cable Operator to support the PEG access channels, given the financing arrangements between the DCCA, the Cable Operators, and the Public Access Organizations, and the federal case law treating similar funding arrangements as public funding, the OIP found that these monies paid to the Public Access Organizations are public funding.

As a matter of public policy, the Legislature declared that the formation and conduct of public policy — the discussions, deliberations, decisions, and actions of government agencies — be conducted as openly as possible. Haw. Rev. Stat. § 92F-2 (1993). The OIP is required to construe the UIPA to promote the chapter's purposes and policies, which include enhancing governmental accountability through access to government records.

Therefore, because 'Olelo and Ho'ike are owned, operated, or managed on behalf of this State, their records are also subject to this policy as set forth in the UIPA. When the records of 'Olelo and Ho'ike are accessible to the public, government can be held accountable for its actions, even when government's actions are carried out by separate entities.

[OIP Op. Ltr. No. 02-08, September 6, 2002]

OIP Opinion Letter No. 02-09: Actions on Bills and Resolutions Without Notice

A committee of the County Council for the County of Maui ("Maui County Council"), may not act on a proposed bill or resolution that is not specifically mentioned in the meeting agenda. Chapter 92, Hawaii Revised Statutes ("Sunshine Law") requires

that notices and agendas be posted six days prior to meeting dates, and that such agendas list, among other things, all items to be considered at the meeting. Haw. Rev. Stat. § 92-7(a) (Supp. 2001). Accordingly, items that are not listed on agendas should not be discussed at meetings.

The OIP acknowledges, however, that there may be unforeseen circumstances in which a discussion at a meeting results in the decision to draft a bill or resolution to address an agenda item. So long as there is a sufficient nexus between what was noticed and what the discussed resulted in, there would be no violation of the Sunshine Law. This must be determined on a case-by-case inquiry. This nexus should be reflected in the meeting minutes, and voting on such a bill or resolution should take place at a future meeting that is properly noticed.

An existing or proposed bill or resolution that is already drafted, and which is not specifically listed in an agenda but is discussed at a meeting, would likely violate the Sunshine Law if it could have been foreseen that discussed on the bill or resolution would be had. It is possible that discussed of an existing bill or resolution may be unforeseen prior to the meeting yet still be a natural consequence of the committee's discussion on a listed agenda item.

Thus, it is possible in some circumstances that the Sunshine Law would not be violated by an unforeseen discussion of an existing bill or resolution, so long as there was a sufficient nexus to what was listed on the agenda. Such a determination must be made on a case-by-case inquiry.

[OIP Op. Ltr. No. 02-09, September 24, 2002]

***OIP Opinion Letter No. 02-10:
Adjudicative Records of the
Judiciary, Administrative Driver's
License Revocation Office***

The Judiciary, Office of the Administrative Director of the Courts, Administrative Driver's License Revocation Office ("ADLRO") requested an opinion concerning whether the government records it maintains concerning its adjudicative functions are subject to the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA").

The OIP informed the ADLRO that only the ADLRO's administrative records are subject to the UIPA. The OIP looked to the UIPA's definition of agency, which excludes the "non-administrative functions of the courts of this state." Haw. Rev. Stat. §92F-3 (1993).

The OIP also looked to the recommendations of the Governor's Committee on Public Records and Privacy, relied upon by the Legislature in drafted the UIPA, which recommended that the UIPA only apply to the administrative records of the Judiciary. The Legislative history of the UIPA also indicates that the UIPA is only to apply to the administrative records of the Judiciary.

As the Hawaii Supreme Court has previously determined that the tasks of the ADLRO are "clearly judicial in nature," the OIP therefore determined that the ADLRO performs an adjudicative function. Therefore, its non-administrative, adjudicatory records (those records associated with the review of evidence and decision-making) are not subject to the UIPA.

[OIP Op. Ltr. No. 02-10, October 23, 2002]

***OIP Opinion Letter No. 02-11:
Meetings of Councilmembers
Who Have Not Yet Officially
Taken Office to Discuss
Selection of Officers***

Members of county councils are not subject to the Sunshine Law prior to officially taking office when they meet to discuss selection of officers. In accordance with section 11-155, Hawaii Revised Statutes, and the State Constitution, the counties have each set dates later than the official close of the polls on election day for councilmembers' terms of office to commence. Once a councilmember's term of office officially begins under the charter, he or she becomes subject to the Sunshine Law.

Section 92-2.5(c), Hawaii Revised Statutes, states "[d]iscussions between two or more members of a board, but less than the number of members which would constitute a quorum for the board, concerning the selection of the board's officers may be conducted in private without limitation or subsequent reporting."

Thus, less than a quorum of a board may meet privately and without limitation or subsequent reporting to discuss selection of board officers, regardless of whether or not board members have officially taken office. Whether board members have officially taken office is irrelevant, so long as the meeting is restricted to less than the number of members that would constitute a quorum.

It is not illegal for a quorum of newly elected members of a council to meet to discuss selection of officers prior to commencement of their terms of office. However, a loophole in the Sunshine Law allows such an assemblage, which would be prohibited after council-members officially take office.

Therefore, the OIP **strongly recommends** that a quorum of members-elect of a board not assemble prior to officially taking office to discuss selection of board officers, in keeping with the spirit of the Sunshine Law. [OIP Op. Ltr. No. 02-11, November 14, 2002]

OIP Opinion Letter No. 02-12: FAMIS Access

Hawaii's Fiscal Accounting and Management System ("FAMIS") is a government record as defined by section 92F-3, Hawaii Revised Statutes. As a government record, FAMIS is subject to the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"). Under the UIPA, the public is entitled to access information contained in FAMIS that is not protected from disclosure by section 92F-13, Hawaii Revised Statutes.

The Department of Accounting and General Services ("DAGS") may withhold information from the public that is contained in FAMIS if it fits into one of the exceptions at 92F-13, Hawaii Revised Statutes. The OIP did not review the contents of FAMIS, however, it appears that at least some of the information contained therein may be protected from disclosure under section 92F-13(1), (4), Hawaii Revised Statutes.

DAGS has no obligation under the UIPA to provide information contained in FAMIS that is not readily retrievable. Haw. Rev. Stat. § 92F-11(c) (1993).

The OIP was also asked whether the language in Section 189 of House Bill 1220 ("H.B. 1220") introduced in 1995 to the Eighteenth Legislature, which would have allowed the "legislature" read-only access to FAMIS, refers to the Legislature as a body, or to each individual Legislator. The Attorney General interpreted the term "legislature" as used in H.B. 1220 to apply to the Legislature as a body. The OIP did

not opine on this issue as H.B. 1220 did not pass and the issue is moot. [OIP Op. Ltr. No. 02-12, November 22, 2002]

OIP Opinion Letter No. 02-13: Attorney Client Privilege

A letter from the Maui County Office of the Prosecuting Attorney ("Maui Prosecutor") to the Chair of the Department of Land and Natural Resources ("DLNR") written in response to a question from the Chair regarding possible violations of the law by a non-government entity is not protected by the attorney-client privilege.

The DLNR and the Maui Prosecutor do not have an attorney-client relationship under Rule 503, Hawaii Rules of Evidence, Chapter 626, Hawaii Revised Statutes. Further, the Maui Prosecutor has no authority under the Maui County Charter to act as an attorney representing the DLNR, thus, no attorney-client privilege can attach to information shared between them.

To be protected from public disclosure under the UIPA, a government record has to fall into one of the exceptions to disclosure at section 92F-13, Hawaii Revised Statutes. [OIP Op. Ltr. No. 02-13, December 31, 2002]

OIP Opinion Letter No. 03-01: Charter School Boards and the Sunshine Law

New Century Charter Schools and their boards are not subject to the "Sunshine Law" at chapter 92, Hawaii Revised Statutes, because section 302A-1184, Hawaii Revised Statutes, states that charter schools "shall be exempt from all applicable state laws" except for those concerning collective bargaining, discriminatory practices, and health and safety requirements. [OIP Op. Ltr. No. 03-01, February 5, 2003]

***OIP Opinion Letter No. 03-02:
Disclosure of Records of the
Crime Victim Compensation
Commission***

Two exceptions to disclosure authorize the Crime Victim Compensation Commission (“Commission”) to withhold access to information contained in its files concerning applicants for assistance from the Commission. The first involves privacy rights of applicants; the second involves the Commission’s legitimate government function of assisting crime victims.

Unless disclosure of information to which privacy rights attach would shed light on how the Commission is aiding victims of criminal acts, the Commission can withhold access based on the exception permitting non-disclosure of information contained in governments records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy.

Given that some of the Commission’s programs include information about individuals involved in witness protection programs, and given that the Commission is only authorized to award compensation because of certain violent crimes, the OIP held that disclosure could cause frustration of the Commission’s legitimate government function, and that withholding of access was therefore authorized.

As to personal records, section 92F-22(2), Hawaii Revised Statutes, for withholding access to records such as victim statements, and section 92F-22(4), Hawaii Revised Statutes, allows withholding of access to records such as police reports, to the extent that those records would not be disclosed by the originating agency.

[OIP Op. Ltr. No. 03-02, February 7, 2003]

***OIP Opinion Letter No. 03-03:
Judicial Selection Commission
List of Nominees***

The Governor and the Chief Justice are not required to make public the list of six nominees selected by the Judicial Selection Commission (“JSC”) to fill judicial vacancies (“List of Nominees”) after the list is delivered to them and prior to confirmation of their respective appointments by the Senate.

While a nominee has a significant privacy interest in being nominated under section 92F-14(b)(4), Hawaii Revised Statutes, when weighed against the importance of a judicial appointment, the public interest in opening up the workings of government is greater, and disclosure would not be a clearly unwarranted invasion of personal privacy under section 92F-13(1), Hawaii Revised Statutes.

However, the importance of the judicial appointment process necessitates the conclusion that the appointing authority may withhold disclosure of the List of Nominees before the Senate confirms appointment of an individual from the List of Nominees.

If a List of Nominees is made public before the appointing authority makes his or her selection, the possibility that interested groups will “lobby” the appointing authority, either in favor of or against a nominee, and that the selection process will be manipulated to circumvent the appointing authority’s appointment power is sufficiently serious.

Such conduct would frustrate a legitimate government function. Thus, the appointing authority may withhold disclosure of the List of Nominees to the public under Section 92F-13(3), Hawaii Revised Statutes.

[OIP Op. Ltr. No. 03-03, April 1, 2003]

**OIP Opinion Letter No. 03-04:
'Olelo Board Member's Resume**

The resumé of a member of the board of 'Olelo: The Corporation For Community Television ("Olelo") maintained by the Department of Commerce and Consumer Affairs Cable Television Division ("DCCA") may be disclosed publicly under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA") after segregation of certain information.

'Olelo is not an "agency" under the UIPA other than for the purpose of responding to record inquiries under the UIPA. Therefore, information about 'Olelo employees and officers is not subject to mandatory disclosure under section 92F-12(a)(14), Hawaii Revised Statutes. Thus, the privacy interest of the board member must be balanced against the public interest in disclosure under section 92F-14(a), Hawaii Revised Statutes.

Disclosure of certain information contained in an 'Olelo board member's resumé would shed light on the workings of government, as the DCCA's director appoints a majority of 'Olelo's board members, and the DCCA exerts both direct and indirect control of 'Olelo. Therefore, the public interest in 'Olelo's directors and the criteria used in the DCCA's appointment of 'Olelo's directors is high.

However, the public interest in disclosure is not greater than the board member's personal privacy interest in information unrelated to qualifications to sit on the board because disclosure does not shed light on the workings of government. Thus, the DCCA may redact home contact information and other information that does not directly relate to suitability for appointment on 'Olelo's board, as disclosure would be a clearly unwarranted invasion of personal privacy.
[OIP Op. Ltr. No. 03-04, April 8, 2003]

**OIP Opinion Letter No. 03-05:
HIPAA and Part II of the Uniform
Information Practices Act**

There is no conflict between Part II of the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), and 45 C.F.R. Parts 160 and 164, the medical privacy rules ("HIPAA rules") promulgated by the federal Department of Health and Human Services as required by the Administrative Simplification subtitle of the Health Insurance Portability and Accountability Act of 1996, Public Law 104-191 ("HIPAA").

The UIPA does not require public disclosure of information that is protected from unauthorized disclosure by the HIPAA rules: such information will fall under one or more UIPA exceptions to public disclosure. The exception for information protected by federal laws will always apply to information that is protected under the HIPAA rules. In most instances the information will also fall within the UIPA exception for information whose disclosure would be an unwarranted invasion of personal privacy.

HIPAA does not have provisions comparable to the response deadlines and other procedural requirements for responding to UIPA requests for government records. An agency should follow the procedures set forth in the UIPA and chapters 2-71, Hawaii Administrative Rules, when responding to a request for government records that involves "protected health information" as defined in the HIPAA rules.

HIPAA does have provisions regarding a patient's access to the patient's own medical records, which are comparable to a person's right of access to personal records under Part III of the UIPA. The OIP did not discuss the interplay between the HIPAA rules and Part III of the UIPA in this opinion.
[OIP Op. Ltr. No. 03-05, April 11, 2003]

***OIP Opinion Letter No. 03-06:
Electronic Transmission of
Testimony***

The OIP was asked whether a board violated the Sunshine Law by not accepting e-mail testimony. The OIP concluded that the Sunshine Law must be liberally construed to afford the public the opportunity to submit written testimony. Given the widespread use of e-mail and facsimile transmission, where possible, boards must allow testimony to be submitted by those means.

In addition, the Sunshine Law does not require that the word “testimony” be included in written submissions concerning agenda items. Where a written submission relates to a matter on a board’s agenda and reasonably appears to have been intended for consideration by the board, the board should consider the submission to be written testimony and distribute copies of the testimony to each board member.

The testimony in question related to a request before the board to revise a permit to allow the transfer of a male orangutan named Rusti from the Honolulu Zoo to a temporary facility at Kualoa Ranch, Kaneohe, pending completion of a planned facility at Kualoa Ranch.

[Note: On May 20, the requester filed suit in Circuit Court, as authorized by section 92-11, Hawaii Revised Statutes, asking the court to void the board’s decision to allow Rusti to be transferred to Kualoa Ranch. *[OIP Op. Ltr. No. 03-06, May 2, 2003]*

***OIP Opinion Letter No. 03-07:
Voting in Executive Meetings***

Boards subject to the Sunshine Law may vote in executive meetings. To require an open vote on matters discussed in executive meetings would, in many circumstances, defeat the purpose of going into an executive meeting.

Committees of boards subject to the Sunshine Law are also subject to the Sunshine Law and may enter executive meetings in accordance with sections 92-4 and 92-5, Hawaii Revised Statutes. Those committees may also vote in executive meetings when necessary to avoid defeating the lawful purpose of the executive meeting.

Boards and committees may vote in a closed meeting on matters involving expenditures of public funds. Hawaii’s Procurement Code states that boards need not comply with the Sunshine Law for certain procurement matters. In other circumstances, boards may vote in closed meetings on expenditures of public funds only when such votes properly fall into one of the exceptions to open meetings at section 92-5, Hawaii Revised Statutes.

Votes taken in executive meetings need not be disclosed to the public because the Sunshine Law allows minutes of executive meetings to be withheld so long as their publication would defeat the lawful purpose of the executive meeting, but no longer. Once disclosure of votes taken in executive meetings does not defeat the lawful purpose of holding an executive meeting, the votes should be disclosed.

Members of the Honolulu Police Commission did not violate the Sunshine Law by not disclosing how they voted on whether to approve a police officer’s request that the City pay for the legal defense of his criminal indictment until the officer and his attorney had been informed of the decision.

The Commission’s hearing was a contested case hearing under the Hawaii Administrative Procedures Act, chapter 91, Hawaii Revised Statutes (“HAPA”). Thus, the decision of members of the Commission to delay disclosing how they voted was not subject to the Sunshine Law.

[OIP Op. Ltr. No. 03-07, May 28, 2003]

**OIP Opinion Letter No. 03-08:
Kauai Planning Commission and
Subdivision Committee Meetings**

Written reports of the Subdivision Committee of the Kauai Planning Commission containing the Committee's recommendations to the Commission on subdivision applications need not be available to the public at the time that the Commission provides notice of the public meeting at which the subdivision applications are to be considered.

The "Sunshine Law" does not require that records relating to items on an agenda be available to the public at the time the notice and the agenda are filed.

The UIPA requires that agency records that are open for public inspection and copying be available upon request; thus the written reports should be made public once they are completed. Haw. Rev. Stat. § 92F-11(b) (1993). As the reports are not yet in existence at the time an agenda is posted, they need not be created in order to satisfy a record request. Haw. Rev. Stat. § 92F-11(c) (1993).

[OIP Op. Ltr. No. 03-08, June 18, 2003]

**OIP Opinion Letter No. 03-09:
Police Department Mug Shots**

In OIP Opinion Letter Number 94-12, the OIP opined that a Hawaii Police Department mug shot must be made available for public inspection and copying under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"). Thereafter, the Honolulu Police Department asked the OIP to address related issues concerning the disclosure of mug shots. The OIP opined as follows.

When an arrest is expunged, there is no longer any public record of the arrest. The OIP determined that Police Department

mug shots of arrests that have been expunged by order of the Attorney General are protected from public inspection and copying under section 92F-13(4), Hawaii Revised Statutes ("HRS"). Nevertheless, the UIPA does not authorize the withholding of access to mug shots due to the possibility that an expungement order may be obtained in the future.

Chapter 846, HRS, which covers disclosure of criminal history record information, does not restrict the disclosure of mug shots if the arrest is less than one year old, if active prosecution of the charge remains pending, or if a conviction results. Juvenile records can only be disclosed as authorized by section 846-12, HRS.

If the mug shot is disclosable, state identification numbers and dates of arrest contained on mug shots are to be disclosed as well.

Mug shots cannot be categorically withheld from public access based on considerations that disclosure would place an individual in physical danger or reveal a part of a confidential investigation.

Likewise, public disclosure of mug shots cannot be withheld based on concerns that an arrested person's mug shot could lead to the inadmissibility of the results of a photographic or other lineup identification procedure.

[OIP Op. Ltr. No. 03-09, June 26, 2003]

**OIP Opinion Letter No. 03-10:
Charter Schools and the UIPA**

Section 302A-1184, Hawaii Revised Statutes, exempts new century charter schools from most State laws, including the UIPA. Therefore, charter schools need not comply with record requests in accordance with the UIPA.

[OIP Op. Ltr. No. 03-10, June 30, 2003]



Legislation

The OIP is required to review legislation and make recommendations to the Legislature. One of the goals of the UIPA



is to provide for uniform legislation in the area of government information practices.

To further this goal, the OIP monitors proposed legislation that may

have an impact on the UIPA and on government's practices in the collection, use, maintenance, and dissemination of information, as well as on the Sunshine Law.

Work in the 2003 Legislative Session

In 2003, the OIP reviewed and monitored 279 legislative initiatives as they progressed through the Legislature. These bills affected government's information practices, public access to government records and meetings, or the privacy rights of individuals. The OIP staff attorneys and Director appeared frequently at the Legislature to testify on bills as they related to these subjects.

Consultation

The OIP consulted with several government agencies and elected officials in the drafting of proposed bills. Highlights of the OIP's efforts in this regard are also discussed in the following sections.

Funding of the OIP (HB 200)

HB 200, the major budget bill, which became Act 200, included general funding for the OIP for fiscal year 2004, but reduced by about one percent.

Social Security Numbers and Certified Payroll Records (HB 1098)

This bill, introduced as part of the administration package, would have amended the UIPA by requiring the redaction of social security numbers from certified payroll records. Under the UIPA, certified payroll records are public in their entirety. The bill was passed out of its first committee and did not receive further hearings. The companion, SB 1382, was not heard by the Senate.

Social Security Numbers and Privacy Interest (HB 1099)

This bill was introduced as part of the administration package and would have amended the UIPA by attaching a significant privacy interest to social security numbers. The OIP has issued many opinions advising that SSNs carry significant privacy interests, and this bill would have ensured such treatment of SSNs by government agencies. The bill was passed out of its first committee but did not receive further hearings. The companion, SB 1383, was not heard by the Senate.

New Board Members and Sunshine (HB 1101 and SB 1385)

These bills, introduced as part of the administration package, would have amended the Sunshine Law by requiring that newly elected or appointed, but not yet sworn in, members of a "board" subject to the Sunshine Law be subject to the Sunshine Law upon election or appointment.

The bills arose out of an OIP opinion which found that due to an apparent loophole in the Sunshine Law, newly elected or appointed, but not yet sworn in, members of a board could

meet privately with quorum to discuss issues they could not discuss privately after taking office. These bills did not receive hearings and the OIP asked the Legislature that they be withdrawn pending an opinion from the Department of the Attorney General.

Hawaii Tourism Authority (SB 41)

The original version of this bill would have revised Hawaii's Procurement Code at chapter 103D, Hawaii Revised Statutes, by requiring that subcontracts and partnership agreements entered into by a contractor using public funds be subject to the UIPA.

The OIP supported the original version because it ensured accountability in the use of public funds. However, the OIP opposed the final version of the bill (SB 41 HD 1 CD 1), which amended chapter 201B, HRS, governing the Hawaii Tourism Authority ("HTA"), as it would have allowed the contractor and/or the subcontractor and not the HTA to decide whether contracts, subcontracts, or other information acquired by the HTA are public.

Governor Lingle vetoed this bill. *See* Statement of Objections to Senate Bill No. 41, dated June 20, 2003.

Social Security Numbers and Poll Books at Voting Locations (SB 685)

This bill, which became Act 23, requires that poll books at voting locations not contain social security numbers. The OIP monitored this Act through its legislative hearings because it ensures protection of social security numbers from identity theft.

Information Practices Commission (SB 1212)

This bill would have established an Information Practices Commission with the duties of appointing the OIP's director, making

recommendations to the Legislature on where to house the OIP, making legislative recommendations for changes to the UIPA, making recommendations on new technology issues, soliciting public comment on information practices, and adopting rules. This bill also included a provision allowing the OIP to declare a person a vexatious record requester. SB 1212 died without a hearing.

Social Security Numbers and Commercial Driver's Licenses (SB 1406)

This bill, which became Act 15, requires that commercial driver's licenses issued not include the issuee's social security number. The OIP monitored this bill through its legislative hearings because it ensures protection of social security numbers from identity theft.

Sunshine Law and Quorum Requirements (SB 1447)

This bill attempted to amend section 92-15, HRS, which contains the Sunshine Law's quorum requirements, with language stating that quorum requirements do not apply to informational briefings or workshops that do not require a vote. This bill died without a hearing.

OIP's Agency Status (SB 1499)

This bill would have changed the OIP's current status from a temporary to a permanent agency administratively attached to the Office of the Lieutenant Governor.

It also would have established a temporary information practices appointment panel consisting of seven members appointed by the Governor which would meet from time to time to appoint the OIP's director. SD 1 proposed to transfer the OIP to the Office of the Auditor. The OIP opposed this bill, which died after only one hearing.

Agency Compliance (SB 1605)

This bill would have required each agency to designate a person to be responsible for that agency's compliance with the UIPA, required that employees be trained, and required each agency to obtain a certification from the OIP that its practices are in compliance with the UIPA.

This bill also would have required the OIP's director to train agency personnel on the UIPA and Sunshine Law upon request, and to certify that an agency's information practices comply with both the UIPA and Sunshine Law.

The OIP opposed portions of this bill requiring agencies to obtain certification due to the adverse impact it would have on agencies' limited financial and human resources. The OIP supported the portions of the bill requiring designation of an agency employee responsible for compliance, and the language on training, as the OIP already conducts many trainings each year on both the UIPA and the Sunshine Law upon request by agencies. This bill died after one hearing.

Public Utilities Commission (HB 473)

This bill would have required the Public Utilities Commission to maintain a web site that includes all decisions and order, listings of open dockets, upcoming meetings and other information.

The OIP testified in favor of clarifying the bill's language so that it would conform to the disclosure provisions of the UIPA, so that information not required to be disclosed pursuant to the UIPA would be exempt from the web site publication requirement.

Hawaii Sports Hall of Fame (HB 662)

This bill, which became Act 102, designates the Hawaii Sports Hall of Fame as the State of Hawaii Museum of Sports History. As originally enacted, the bill would have made the Hawaii Sports Hall of Fame a state board

subject to the Sunshine Law. Subsequently, the original bill was amended to ensure that the history of Hawaii's outstanding local sports figures be preserved by means of the official state designation.

Crime Victim Compensation (HB 1003)

This bill, which was vetoed, originally provided that the records of the Crime Victim Compensation Commission were exempt from disclosure under the UIPA. This bill was amended by the House Committee on Judiciary to delete those references, and the OIP thereafter testified in favor of the bill, as amended. *See* OIP Opinion Letter Number 03-02, concerning public access to the records of the Crime Victim Compensation Commission.

Unclaimed Property (HB 1155)

This bill, which became Act 74, authorizes the annual notice of unclaimed property to be published in a statewide publication or on the State of Hawaii Budget and Finance web site. *See* www.ehawaii.gov/bf/ucp/html.

Public Agency Meetings (SB 314)

The OIP opposed this bill, which would have amended the Sunshine Law to exclude all county agencies, boards, commissions, authorities, or committees of every county from the Sunshine Law. If the amendment had been adopted, county boards could refuse to accept testimony, refuse to hold meetings open to the public, and refuse to keep minutes of meetings.

Education (SB 339)

This bill would have established a council to develop "educational data and accountability indicators," with access to "relevant and

appropriate department of education and University of Hawaii data.”

The OIP’s testimony suggested that the bill be amended to ensure that privacy concerns, particularly with respect to social security numbers, be addressed by adding a paragraph to the bill requiring that data collected not contain information in a form which would identify any individual and to ensure that the student data be identified by means other than a social security number.

The OIP also suggested that the bill be amended to clarify that the council is subject to the Sunshine Law, and that disclosure of the council’s reports is governed by the UIPA.

Government Records (SB 427)

This bill would have provided for access to government records by remote electronic means, recouping of the actual cost for information technology supplies from record requesters, recouping of labor costs incurred by agencies in supplying information from government records via electronic means, and safeguards to prevent unauthorized remote electronic access or alteration.

The OIP’s testimony focused on technical issues to ensure compliance with the OIP’s rules regarding access to government records.

Nonprofit Corporations (SB 1229)

This bill set out the circumstances under which nonprofit corporations are subject to the Sunshine Law and the UIPA. The OIP testified that it has found that hybrid public-private organizations — groups with both governmental and non-governmental qualities — raise difficult questions about whether the UIPA and the Sunshine Law apply.

In the past, the OIP has looked specifically at public, educational, and governmental

access channels (“PEG access channels”). The OIP testified that it was concerned that the bill may have been overbroad in its application, and suggested it be limited to PEG access channels.

Simplified Tax Administration (SB 1397)

SB 1397, which became Act 173, authorizes Hawaii to enter into agreements for collection of state tax by a private entity. This Act requires a uniform policy that protects the privacy of consumers and maintains the confidentiality of tax information.

Videoconference Testimony (SB 1449)

The OIP testified in favor of this bill, which would have required that notices of meetings by videoconference specify that testimony by videoconference format will be available to members of the public wishing to present testimony at the meeting.

Peer Support Counseling Sessions (SB 1469)

This bill, which became Act 25, provides for the confidentiality of any communication made by a participant or counselor in a peer support counseling session, including a critical incident stress management session, conducted by a law enforcement agency or by an emergency services provider.

The OIP did not object to the confidentiality of communications made in peer support counseling sessions. The OIP did recommend that the bill be amended to clarify its intent, and the bill was amended accordingly.



Records Report System



Under section 92F-18(b), Hawaii Revised Statutes, each agency of the State and county executive, legislative, and judicial (administrative functions only) branches of government is required to “compile a public report describing the records it routinely uses or maintains using forms prescribed by the office of information practices.” The UIPA requires that these reports be open to public inspection and be updated annually.

To automate the collection of this information, the OIP developed the Records Report System (“RRS”). The RRS is a computerized database designed to collect the public report of each agency, and serves as a repository for all the public reports.

Status of Records Report

Since the beginning of 1994, when the first record report was added to the system by the Office of the Ombudsman, State and county agencies have reported 33,649 sets of records (as of July 1, 2003). Each “set” of records is generally a record title, and may be a form or other record. The OIP received no new reports in the past year. For a summary, see **Table 13** on page 53.

Moving the RRS to the Internet

The RRS was developed as a Wang system at a time when Wang computers were common in State agencies. The State, led by the Information and Communications Services Division of the Department of Accounting and General Services, and the OIP, began work in 2003 to migrate the RRS to make it an Internet-based system accessible to government agencies and members of the public. As of July 1, 2003, the OIP was beginning to test the new system and prepare it for State and county agencies to update their reports in 2004.

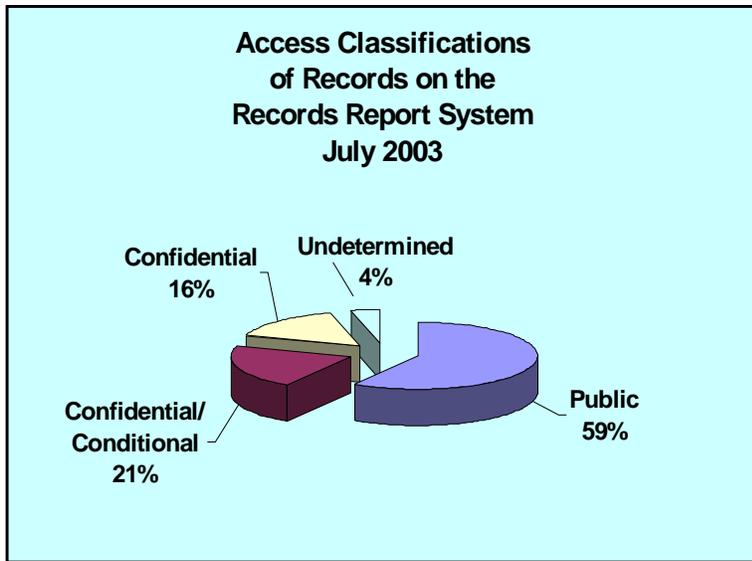


Chart 10

Key Information: What's Public

When a government agency receives a request for a record, it can use the RRS to make an initial determination as to the record's classification. The RRS also allows a statistical look at State and county government records.

Although in most cases the OIP has not reviewed the access classifications, agencies themselves report that only 16% of

their records are unconditionally confidential, with no public access permitted. By contrast, roughly three out of four records are available to the public in whole or in part (see **Chart 10** on page 52).

Of all the records reported on the RRS, 59% are accessible to the public in their entirety.

Another 21% are in the category “confidential/conditional access,” as displayed in **Chart 10**. Most records in this category are accessible after the segregation of confidential information (14% of the total records).

The other records in this category are accessible only to those persons, or under those conditions, described by specific statutes (7% of the total records).

The record reports themselves, which only describe government records, contain no confidential information and are completely public.



Records Report System	
Status of Records Reported by Agencies: 2003 Update	
Jurisdiction	Number of Records
State Executive Agencies	24,169
Legislature	816
Judiciary	1,645
City and County of Honolulu	4,433
County of Hawaii	976
County of Kauai	861
County of Maui	749
Total Records	33,649*

* This total includes 30,147 “live” records that can be browsed by all users, 105 records on disk awaiting upload, and 3,397 records still being edited by agencies and accessible only to those agencies, as of July 1, 2003.

Table 13

Informing the Community

Publications and Web Site

The OIP's publications play a vital role in the agency's ongoing efforts to inform the public and government agencies about the UIPA, the open meetings law, and the work of the OIP.



OpenLine

In FY 2003, the OIP continued its traditional print publications, including the monthly *Openline* newsletter and the *Office of Information Practices Annual Report 2002*. In addition, the OIP continued to expand the web site that it launched on the Internet in April 1998. In April 2003 the site took on a new look, making it easier to use and navigate.

Openline

The *Openline* newsletter, which originated in March 1989, has always played a major role in the OIP's educational efforts. This past year, the OIP distributed over 4,000

copies of each issue of the *Openline*. The newsletter goes out to all State and county agencies, including boards and commissions and libraries throughout the state.

Current and past issues of *Openline* are also available on the OIP's web site. Recent articles have covered such topics as OIP guidance on open meetings, open records agencies in other states, OIP training, bills in the Legislature affecting information practices, and using the OIP's new web site. The *Openline* also publishes summaries of recent OIP opinion letters.

The OIP's Web Site

The OIP's web site, at www.hawaii.gov/oip, has become the agency's primary means of publishing information. It plays a major role in educating and informing government agencies and citizens about access to State and county government records and meetings.

With a decreased budget in the past few years, and consequently limited resources for training, the OIP views the site as an even more valuable educational tool.

Visitors can access the State's public records law and Sunshine Law, read the OIP's current and past *Openline* newsletters, study the agency's most recent annual report, look at the administrative rules, print

the model forms “Request to Access a Government Record” and “Notice to Requester,” view the OIP’s formal opinion letters, read summaries of the opinion letters, browse the subject index for the opinion letters, and receive general guidance for commonly asked questions.

The OIP site also serves as a gateway to web sites on public records, privacy, and informational practices in Hawaii, the USA, and the international community.

The OIP developed its original site in-house, with the technical assistance of the State Information and Communications Services Division of the Department of Accounting and General Services, and the Campaign Spending Commission.

Web Site Revised: Easier to Use

In April 2003, the OIP unveiled a new look for its web site. The site is loaded with even more content than before, and it has been simplified and made easier to navigate.

The OIP developed the new site with the help of the Hawaii Information Consortium (“HIC”), which has been assisting State agencies in making more information and services available on the Internet. For more about HIC, see www.ehawaii.gov/aboutgov/html/faq.

Take a minute to check out the home page, reproduced below. Then go online and explore. You will see links to a great deal of information about State government, as well as general information about Hawaii.

The screenshot shows the homepage of the Office of Information Practices. At the top left is the 'ehawaii.gov' logo. Next to it are two navigation buttons: 'State Online Services' and 'Hawaii Information Link Index'. Below these are several small image thumbnails. The main header features the Hawaiian flag on the left, the text 'Office of Information Practices' in the center, and 'Last updated April 23, 2003' on the right. A large banner on the right side of the page reads 'Ensuring open government while protecting your privacy'. On the left side, there is a vertical menu with links for 'Laws / Rules / Opinions', 'Forms', 'Openline / Guidance', 'Reports', 'Related Links', 'Search', and 'What's New'. The main content area includes a map of Hawaii, a welcome message 'Aloha! Thank you for visiting the Office of Information Practices ("OIP").', and a paragraph explaining the OIP's role in administering Hawaii's open records law. At the bottom, there is a 'Contact the OIP' link and a footer with copyright information.

link to the State home page: State government agencies and information about Hawaii

link to the State's many online services

link to important Hawaii information, alphabetized

find out when the site was last updated

main menu: link to laws, rules, opinions, forms, guidance, reports

contact information

As before, you will find the text of Hawaii's public records law and Sunshine Law, the OIP's administrative rules and opinion letters, model forms for requesting access to State and county government records and responding to such requests, guidance letters, and answers to frequently asked questions.

Features

The web site is updated weekly. For those unfamiliar with the OIP, the home page gives a quick overview of the agency. The site features a menu at the left on each page to help visitors navigate the following sections.

“Laws/ Rules/ Opinions”

This section features three major legal sections:

- *Laws*: the complete text of the UIPA and the Sunshine Law, with quick links to each section; with an Internet browser, a user can perform a key word search of the law.
- *Rules*: the full text of the OIP's administrative rules (“Agency Procedures and Fees for Processing Government Record Requests”), along with a quick guide to the rules and the OIP's impact statement for the rules.
- *Opinions*: a chronological list of all OIP opinion letters, now with a summary of each letter, an updated subject index, and a link to the full text of each letter.

“Forms”

Visitors can view and print the two model forms created by the OIP to help implement the administrative rules: “Request to Access a Government Record” and “Notice to Requester.” The newest OIP form is also here, the “Public Meeting Notice Checklist,” to help agencies comply with the Sunshine Law.

“Openline/ Guidance”

The monthly *Openline* newsletter is available online. Back issues, beginning with the November 1997 newsletter, are archived here and easily accessed.

Online guidance includes FAQs (basic Q&A on access to government records), practical help for frequently asked questions from government agencies and members of the public.

What types of records are public? What are the guidelines for inspecting government records? What are agencies' responsibilities to individuals? What are the possible responses to your record request? What are an individual's rights if denied a record? Answers to these and other questions are available online 24 hours a day, seven days a week.

Additional guidance appears in this section on disclosure of personnel records and disclosure of agency records and information to auditors. This section also includes announcements from the OIP.

“Reports”

Beginning with the annual report for FY 2000, the OIP's annual reports are available here for viewing and printing. Other reports include reports to the Legislature on the commercial use of personal information, and medical privacy. This is also the place to read about the Records Report System.

“Related Links”

To expand a search, visit the growing page of links to related sites: Hawaii government, freedom of information, privacy, and agencies in the United States, Canada, and elsewhere responsible for freedom of information and privacy protection.

Model Forms

The OIP has prepared, and makes available, model forms that agencies and members of the public may use to follow the procedures set forth in the OIP's rules for making, and responding to, record requests.

To make a request to an agency, members of the public may use the OIP's model form "Request to Access a Government Record." Agencies may respond to a record request using the OIP's model form "Notice to Requester."

The model forms may be obtained online at www.hawaii.gov/oip.



REQUEST TO ACCESS A GOVERNMENT RECORD

DATE: _____

TO: _____

FROM: _____
NAME OF AGENCY
CITY/STATE/ZIP

Although you are not required to provide any personal information, you should provide enough information to allow the agency to contact you about this request. The processing of this request may be stopped if the agency is unable to contact you. Therefore, please provide any information that will allow the agency to contact you (name or alias, telephone or fax number, mailing address, e-mail address, etc.).

I WOULD LIKE THE FOLLOWING GOVERNMENT RECORD:

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

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

To inspect the government record.

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

Pick up at agency (date and time): _____
 Mail _____
 Fax (toll free and only if available) _____
 Other, if available (please specify): _____

If the agency maintains the records in a form other than paper, please advise in which format you would prefer to have the record.
 Electronic Audio Other (please specify): _____

Check this box if you are attaching a request for waiver of fees in the public interest (see waiver information on back).

SEE BACK FOR IMPORTANT INFORMATION

OP-1 (rev. 9/12/01)

NOTICE TO REQUESTER

DATE: _____

TO: _____

FROM: _____
Department Name, Name & Telephone Number of Contact Person at Agency

ACCESS TO THE GOVERNMENT RECORD YOU REQUESTED (copy of request attached or brief description below)

will be granted in its entirety.

cannot be granted because:

agency does not maintain the requested record.
 agency needs a further description or clarification of the requested record. Please contact the agency within _____ days or your request will be considered abandoned.
 The request would require the agency to create a summary or compilation from records that are not readily retrievable.

is denied in its entirety or will be granted only to certain part(s) of this government record. Denial of access to this or portions of this government record is based upon the following subsections of section 92F-13, Hawaii Revised Statutes, or other laws as cited below. The portions of the record that the agency will not disclose are described in general terms:

STATUTE _____ RECORD OR SERVICES WITHHOLD _____

METHOD AND DATE OF DISCLOSURE:

Inspection at the following location: _____ On (date/time): _____

Copy provided to you:

available for pick-up at the agency on (date/time) _____
 to be mailed _____
 transmitted by other means as requested _____

Incremental Disclosures: The record will be disclosed in increments. (The agency must attach a description of extenuating circumstances that support its intention to disclose incrementally. See 52-71-15 H.A.R.) The first increment will be available on _____.

See Back for Information on Fees

Should you have questions about the agency's response, you may contact the person named above. If you are not satisfied with the agency's response, you may call the Office of Information Practices at 888-386-5888.

OP-2 (rev. 1/2000)



Each year, the OIP makes presentations and provides training in information practices and the Sunshine Law. The OIP conducts this outreach effort as part of its mission to inform the public of its rights and assist government agencies in complying with the law.

Following the substantial budget cutback and staff reduction at the beginning of FY 1999, the OIP reduced its formal educational program and refocused much of its educational and training efforts on the OIP web site. For more information about this resource, please see the section beginning on page 54.

“In FY 2003, the OIP expanded its training to a dozen sessions.”

In spite of the reduced budget, the OIP continues to train agencies and the public each year. In FY 2003, the OIP expanded its training to a dozen sessions.

Boards and Commissions

In October 2002, the OIP gave its annual presentation on information practices and the Sunshine Law to new members of the *State’s Boards and Commissions*. It is critical to train newly appointed members in the laws that most directly affect the operations of a board or commission.

UIPA Training

The OIP also provided training sessions on the **UIPA** for the following agencies:

- Department of Accounting and General Services;
- City and County of Honolulu: Real Property Assessment Division;
- Office of Senator Lorraine Inouye;
- Department of Human Services: Office of Youth Services;

- Department of Business, Economic Development and Tourism: Housing and Community Development Corporation of Hawaii;
- Department of Business, Economic Development and Tourism: Natural Energy Laboratory of Hawaii Authority.

Sunshine Training

The OIP trained the following agencies in the **Sunshine Law**:

- Department of Business, Economic Development and Tourism: Housing and Community Development Corporation of Hawaii;
- Department of Business, Economic Development and Tourism: Natural Energy Laboratory of Hawaii Authority;
- Maui County;
- Honolulu City Council;
- Department of Agriculture: Board of Agriculture.

Speaking Appearances

The OIP's Director also made a number of speaking appearances during the year, including the following:

- *Council on Governmental Ethics Laws (COGEL)*, at its annual conference in Ottawa, Canada, September 29, 2002, to October 2, 2002;
- *Privacy in the Information Age Meeting*, hosted by the Computer Science and Telecommunications Board (CSTB)/ National Research Council of the National Academies, in Washington, D.C., October 3, 2002.

