



Office of Information Practices

State of Hawaii

Annual Report 2004

This report to the Governor and the Legislature summarizes the activities and findings of the Office of Information Practices in the administration of the public records law, the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes, and the open meetings law, Part I of chapter 92, Hawaii Revised Statutes, from July 1, 2003 to June 30, 2004.

Table of Contents

Director’s Message 5

Executive Summary 7

Budget..... 9

Highlights of the OIP in Fiscal Year 2004

Enforcement

Investigations of Government Agencies..... 12

Litigation Report..... 17

Implementation

Legal Assistance..... 20

Case and Opinion Letter Summaries..... 29

Legislation..... 45

Agency Public Reports 48

Education

Publications and Website..... 50

Training..... 54



Director's Message

"Eternal vigilance is the price of liberty."

Attributed to John Philpot Curran



OIP Director Les Kondo

Compliance with our open government laws, without question, places a considerable burden on those who make our state and local governments run and on our limited financial resources. Democracy, however, is based upon the premise that only with an informed citizenry can it survive and prosper.

In times such as these, when people around the world struggle and fight for the liberty we possess, we are working to foster a culture in which this "burden" is viewed instead as a commitment and a contribution that each of us makes to protect our chosen form of government.

In carrying out this mission of ensuring open government, we must also be mindful of the legislature's intent that open government laws not be allowed to abridge the fundamental right to privacy we each hold unless outweighed by the interest of the public. In this post 9/11 era, we must further deal with the complexities created by the heightened issue of public safety. But in so doing, we must be cognizant of, and remain vigilant in, protecting our open government laws against unnecessary and dangerous erosion in the name of that safety.

In this past year, the Office of Information Practices ("OIP") has attempted to foster a culture of open government by increasing its training programs for government employees and board members who serve on the front line in interpreting and applying our open government laws.

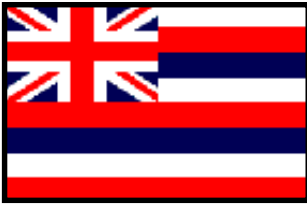
The OIP has also remained committed to its goal of providing meaningful and timely assistance. We have actively encouraged use of our "Attorney of the Day" service, through which agencies and the public can get general advice from an OIP attorney without delay. We have also continued to explore ways of reducing the backlog of requests for written advisory opinions caused by staff restrictions.

The OIP has also continued to expand its website, providing both agencies and the members of the public with easy online access to open government laws and administrative rules, the OIP interpretations of those laws and rules, the educational materials and model forms created by the OIP, and the records report system, containing a comprehensive listing of the records maintained by each government agency and information concerning access to those records.

Two years ago, the OIP embarked on a more aggressive mission to make agencies and board members aware of, and better educated on, the

Democracy ... is based upon the premise that only with an informed citizenry can it survive and prosper.

requirements imposed by the open government laws. The thought was that better education would result in a reduction in the number of



requests for assistance and, therefore, lessen the demand placed upon the limited resources of this office. An increased awareness has to the

contrary brought a greater number of requests, but also what we believe to be greater compliance with the open government laws.

It is the goal of this office to continue to build upon this awareness and to foster a commitment by our government employees and board members to a culture that remains vigilant to the protection of open government, providing the fullest possible disclosure while also safeguarding interests of personal privacy and public safety.

Aloha,

Leslie H. Kondo
Director



Executive Summary



The Office of Information Practices was created by the legislature of the State of Hawaii (the “Legislature”) in 1988 to administer Hawaii’s new public records law, the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes (“HRS”) (the “UIPA”), which took effect on July 1, 1989. The UIPA applies to all government agencies except the non-administrative functions of the judiciary.

Under the UIPA, all government records are public and must be made available for inspection and copying unless an exception provided for in the UIPA authorizes an agency to withhold the records from disclosure. Recognizing that “[t]he policy of conducting governmental business as openly as possible must be tempered by a recognition of the right of the people to privacy, as embodied in . . . the Constitution of the State of Hawaii[,]” the Legislature created one exception to disclosure that balances an individual’s constitutional right to privacy against the public’s right to open government.

In 1998, the OIP was given the additional responsibility of administering the open meetings law, Part I of chapter 92, HRS (the “Sunshine Law”). The Sunshine Law requires government boards to conduct their business as openly as possible in order to open up the governmental processes to public scrutiny and participation.

The law thus requires that, unless a specific statutory exception is provided, the discussions, deliberations, decisions and actions of governmental boards must be conducted in a meeting open to the public, with public notice and with the opportunity for the public to present testimony.

Due to budget cuts, the OIP has decreased in size over the years from a high of 15 staff members to its current staff of 6.5 members.

Despite this decrease, the OIP has received positive indications that the office is successfully providing the public and government entities with a continually growing awareness and knowledge of both the rights granted by, and the requirements imposed under, the open government laws of this state.

Enforcement

The UIPA authorizes the OIP to conduct inquiries regarding compliance by government agencies and to investigate possible violations. In FY 2004, the OIP opened 11 new investigations resulting from complaints made by members of the public or based upon the OIP’s own initiative (see pages 12-16).

The OIP also tracks litigation in the state courts that raise issues concerning provisions of the UIPA or the Sunshine Law (see pages 17-19). Under certain circumstances, the OIP may intervene in the lawsuit. In FY 2004, the OIP tracked two new cases and continued to track three ongoing cases involving UIPA issues. The OIP also continued to monitor one ongoing case involving Sunshine Law issues.

Implementation

The OIP provides guidance and assistance to members of the public and government entities by a variety of means. In the past fiscal year, the OIP received over 1,200 inquiries and requests for assistance or advisory opinions from members of the public and government agencies.

In FY 2004, the OIP received 824 requests for assistance or guidance through its “Attorney of the Day” program, through which the OIP staff attorneys provide both the public and the government with general guidance on UIPA

and Sunshine Law issues (see pages 20-28). Where the OIP attorney deems appropriate, a person requesting assistance or advice is asked to submit a more complete and specific request in writing.

In FY 2004, the OIP opened 417 case files: 114 case files in response to requests for assistance; 61 files in response to requests for opinions; and 242 files in response to limited requests for assistance. Of these case files, 23 resulted in the issuance of a formal OIP advisory opinion letter. Of these opinions 15 concerned UIPA issues and the remaining 8 opinions concerned Sunshine Law issues (see summaries on pages 34-44).

The OIP also recommends legislative changes to the statutes under its administration and reviews and monitors legislation introduced by other agencies that affect the government's information practices, public access to government records and meetings, and the privacy rights of individuals. In the 2004 legislative session, the OIP introduced 5 bills and reviewed, monitored and/or testified on 164 other legislative initiatives (see pages 45-47).

The OIP is directed by statute to receive and make publicly available reports of records that are to be maintained by all agencies. These reports are maintained on the Records Report System ("RRS"), which was converted from a Wang computer-based system to an Internet system in FY 2003. In FY 2004, the OIP assisted state agencies in updating their records reports and made access to the RRS available through its website.

The OIP also developed new materials to facilitate data entry by the agencies and a guide to be used by both the public and the agencies to locate records, to retrieve information, and to generate reports from the RRS. All of these materials were posted on the OIP's website for easy access by agencies and the public. To date, state and county agencies have reported over 30,000 records on the RRS (see pages 48-49).

Education

The OIP continually makes presentations and provides training on the UIPA and the Sunshine Law as part of its mission to educate government agencies regarding the open government laws and to assist them with compliance with those laws (see pages 54-55).

In FY 2004, the OIP continued to step up its educational efforts, responding to requests for training by providing 10 UIPA training sessions and 10 Sunshine Law training sessions. This included the training given to new members of state boards and commissions annually. Attendees to all training sessions are informed of and encouraged to use the resources provided by the OIP, including the AOD service, the OIP website, and the various written materials published.

In FY 2004, the OIP produced its traditional print publications, including the monthly *Openline* newsletter and the *Office of Information Practices Annual Report 2003*. The OIP also continued to expand its website launched in April 1998 (see pages 52-53), which provides a major source of information and guidance in an economical and easily accessible format. For example, the OIP has prepared, and made available on the website, 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 pages 50-51).



Budget

The OIP's largest budget year was FY 1994, when the annual budget was \$827,537, funding a staff of 15 positions. In FY 1998, the Legislature sharply cut the OIP's budget and eliminated three positions. Since FY 1999, the OIP's annual budget has been approximately \$350,000 per year. During FY 2004, the OIP had personnel costs of \$312,483 and operational costs of \$35,220 for a total allocation of \$347,703.

Although the OIP has 8 approved positions, due to budget limitations, the OIP in FY 2004 functioned with 6.5 filled positions. This included the director, two full-time staff attorneys and

one half-time staff attorney, and three staff members.

Although there is an additional staff attorney position, the OIP does not have the funds to fill this position.

Recognizing the budgetary constraints on the State, the OIP will continue to look at ways to best utilize its limited resources to provide effective and timely assistance to the public and to government agencies and boards.

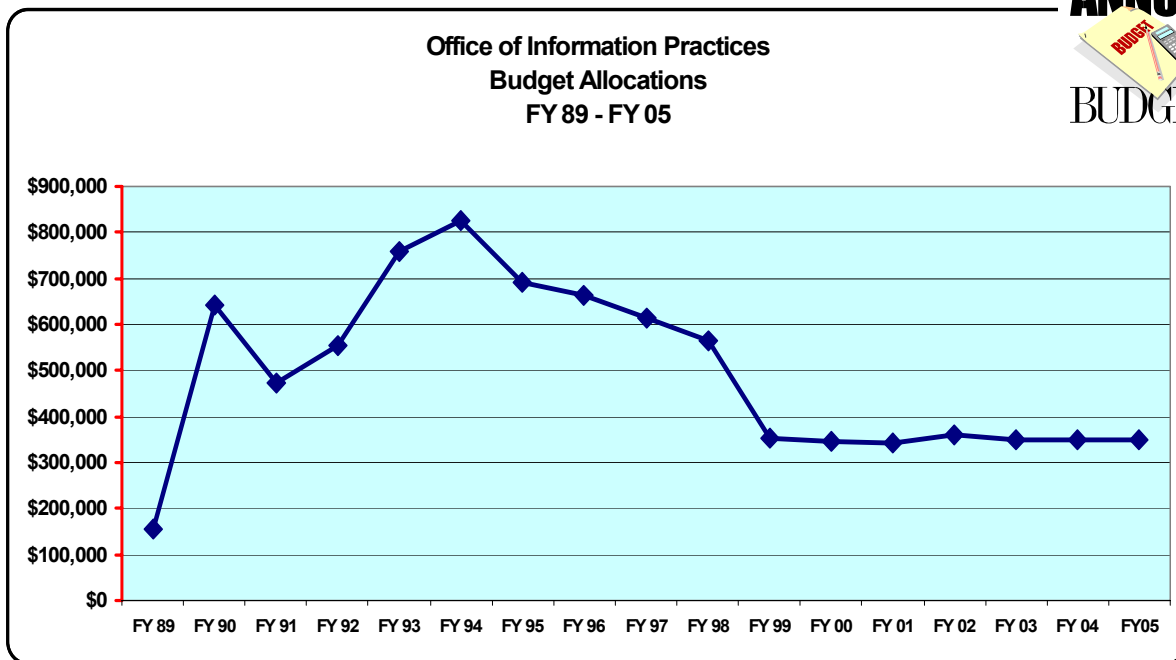


Chart 1



**Office of Information Practices
Budget FY 1989 to FY 2005**

Fiscal Year	Operational Costs	Personnel Costs	Allocations	Approved Positions
FY 05	35,220	314,995	350,215	8
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 in Fiscal Year 2004



Enforcement

Investigations of Government Agencies

The OIP opened 11 new investigations into the actions of government agencies in FY 2004 following complaints made by members of the public or on the OIP's initiative.



Where the OIP determines that a violation has occurred, the OIP will recommend either training or discipline of the employees involved.

The following is a summary of the results of 9 completed investigations.

❖ *UIPA Investigations:*

Harassment Charges Against Vexatious Requester

The Department of the Attorney General investigated harassment complaints from various state agencies, including the OIP, as well as state legislators regarding a member of the public. The complaints involved abuse of the UIPA procedures for requesting government records, abusive conduct during telephone conversations, and inundation of government fax machines.

Upon acceptance of a plea to all four counts of harassment, the district court sentenced the defendant to six months probation with special conditions that limited his communication with certain state offices and individuals.

Sunshine Investigations:

Neighborhood Board Petition to Remove Officer

A member of a neighborhood board asked the OIP to investigate an alleged Sunshine Law violation. The board member contended that a petition to remove her as board secretary was circulated among the Board's members and that a majority of the board members signed the petition.

The OIP advised the neighborhood board that, because the selection and removal of a board member as an officer is official board business, it must take place in accordance with the Sunshine Law. Although the Sunshine Law authorizes board members to discuss the selection of officers outside of an open meeting, such discussion is expressly limited to "less than the number of members which would constitute a quorum." Haw. Rev. Stat. § 92.2.5(c) (Supp. 2003).

Landfill Selection Committee

In a letter dated November 26, 2003, Representative Cynthia H. Thielen requested that the OIP investigate the Landfill Selection Committee's ("Committee") compliance with the Sunshine Law.

The Committee was established to assist the City and County of Honolulu ("City") to make a decision concerning the location of a future

sanitary landfill on Oahu. The City advised the OIP that it “is of the opinion that the Landfill Selection Committee is subject to the Sunshine Law.”

Representative Thielen alleged that, outside of a properly noticed meeting, a committee member solicited and obtained signatures from eight other committee members on two documents related to official Committee business.

One committee member acknowledged that he discussed official Committee business outside of a Committee meeting and that he sought signatures on documents concerning official Committee business.

Since no party involved invoked an exception to section 92-3, HRS, which would allow the Committee, or members thereof, to meet outside of an open, duly noticed meeting, the OIP concluded that the discussions and the obtaining of signatures concerning official business violated the Sunshine Law.

The OIP also addressed the issue of back-to-back meetings by one member of the board with more than one other member the board, concluding that such maneuvering violates the Sunshine Law.

Likewise, the OIP concluded that voting by e-mail was not permitted, as the Sunshine Law explicitly states that electronic communications cannot be used to circumvent the spirit or requirements of the Sunshine Law or to make a decision upon a matter concerning Official Business.



**in
this
section . . .**

UIPA:

*Harassment Charges Against
Vexatious Requester*

SUNSHINE:

*Neighborhood Board Petition to
Remove Officer*

Landfill Selection Committee

*Executive Meetings of Board of Water
Supply*

Board of Education

Publication of Meeting Minutes

*Briefing on Contested Cases; Executive
Session to Protect Privacy*

‘Olelo and the Sunshine Law

*Alleged Executive Meeting of Board
of Water Supply*

Executive Meetings of Board of Water Supply

The Maui County Board of Water Supply (“Board”) held executive meetings with its attorney to discuss matters concerning strategy and negotiation concerning pending litigation, as well as legal issues regarding a joint venture agreement, as authorized by section 92-5(a)(4), HRS.

An allegation was made that, because the Board possesses only advisory authority (see Maui County Charter § 8-11.3) and lacks the authority to approve legal settlements or take any legally effective action, the executive meetings were not authorized under the Sunshine Law.

Noting that the Sunshine Law contains no limitation on a board's authority to enter into executive meetings based on whether a board is a decision-making board or acts in a purely advisory capacity, the OIP opined that advisory boards are not precluded from convening executive meetings. The OIP reviewed the transcript of the open meetings and concluded that the board convened the meetings as required by section 92-4, HRS.

The OIP also reviewed the transcripts of the executive meetings and concluded that the board's discussion stayed within the ambit of what is authorized to be discussed in a meeting held to consult with the Board's attorneys concerning the Board's powers, duties, privileges, immunities, and liabilities and did not discuss matters not directly related to the purposes specified in the transcript of the open meeting. The OIP thus concluded that there was no violation of the Sunshine Law by the Board.

Board of Education

The OIP received a request from a member of the public for an investigation into whether the Board of Education ("BOE") violated the Sunshine Law when (1) it failed to list the specific section of section 92-5, HRS, under which a meeting was closed to the public, and (2) when the BOE's Committee of the Whole on Special Programs ("Committee") met to discuss the *Felix* lawsuit despite the fact that the BOE is not named in the lawsuit, although the Department of Education ("DOE") is named in the lawsuit.

Noting that the Sunshine Law, specifically section 92-7(b), HRS, requires that an agenda list the purpose of an executive meeting and that it had recently opined that, "at a minimum, an executive agenda must refer to the specific subsection of section 92-5(a), HRS, which is the basis for the executive meeting," the OIP concluded that the failure to list the specific section authorizing the executive meeting was a violation of the Sunshine Law.

The OIP concluded, however, that the BOE was authorized by section 92-5(a)(4), HRS, to meet in an executive meeting to discuss the *Felix* lawsuit because section 26-12, HRS, provides that the DOE is headed by the BOE, and it is logical for the BOE to consult with its attorney to direct the course of litigation. The BOE's attorney indicated that a portion of the meeting consisted of the presentation of information that is public knowledge, which information was presented as background to enable the Committee to consult with its attorney.

The OIP advised that, when executive meeting items concern matters already of public record, such matters should be discussed in an open meeting, in accord with the Sunshine Law's policies of ensuring that the provisions requiring open meeting be liberally construed and that the exceptions to the open meeting requirements be strictly construed against closed meetings.

Publication of Meeting Minutes

A requester complained that a neighborhood board was not making minutes of its board meetings (including committee meetings) available to the public within thirty days after a meeting, as required by the Sunshine Law.

An individual board member argued, regarding the minutes of committee meetings, that the substance of committee meetings was reflected in the minutes of the full board meetings.

However, the OIP advised that a summary of committee findings and recommendations in the minutes of the full board's meeting is not a substitute for the minutes of the committee meeting itself. The board acknowledged that minutes had been late and expressed its intent to ensure that future minutes were available within 30 days of each meeting.

Briefing on Contested Cases; Executive Session to Protect Privacy

The OIP was asked to investigate two actions by a board: (1) the board met with its staff and attorney, with no public notice, for a briefing on contested cases before the board; and (2) the board held an executive session to hear information about personal problems of an alleged violator.

Regarding the first action, the OIP concluded that the briefing was an "adjudicatory function" of the board and thus not subject to the Sunshine Law. Regarding the second action, the OIP concluded that concern for the alleged violator's privacy did not, under the circumstances, provide a basis under the Sunshine Law for holding an executive session.

The board also violated the Sunshine Law by going into executive session without announcing the reason for doing so.

'Olelo and the Sunshine Law

The OIP received a complaint that 'Olelo Public Television ("Olelo") had violated the Sunshine Law by failing to post an agenda for a board meeting.

After investigating the complaint, the OIP advised that there is a pending request with the OIP for an opinion as to whether the Board of Directors of 'Olelo is a "board" as that term is defined in the Sunshine Law.

If the Board falls within the definition, the Board must comply with the requirements of the Sunshine Law. Until the OIP determines whether 'Olelo's Board is subject to the Sunshine Law, the OIP does not, and would not, advise 'Olelo or any member of the public that the Board is statutorily required to comply with the Sunshine Law.

Alleged Executive Meeting of Board of Water Supply

The OIP received a complaint that the Board of Water Supply ("BWS") had violated the Sunshine Law by convening an executive meeting without voting to do so during a public meeting immediately preceding the executive meeting. The complainant also alleged that the BWS did not announce any reason for the need to convene an executive meeting.

The OIP contacted the Deputy Corporation Counsel responsible for advising the BWS during its meetings. The Deputy Corporation Counsel advised the OIP that no executive meeting was held as part of the public meeting or after the public meeting was adjourned.

Accordingly, based on the Deputy Corporation Counsel's explanation and in the absence of any additional information, the OIP advised the complainant that there did not appear to be any violation by the BWS of section 92-4, HRS, at its meeting.



Litigation Report

Under the UIPA, where an agency denies access to records or fails to comply with the provisions of the UIPA governing personal records, a person may bring an action for relief in the circuit courts. The OIP has standing to appear in any action in which the provisions of the UIPA have been called into question.

The OIP monitors litigation that raise issues under the UIPA and the Sunshine Law. The OIP reviews and assesses each case to determine whether to intervene. The following summarizes the cases monitored in FY 2004.

❖ *New UIPA Cases:*

Access to Personal Records

In the case of **Crane v. State of Hawaii**, Civ. No. 03-1-1699-08 (1st Cir. Haw., filed August 21, 2003), the plaintiff alleged that the State knowingly and intentionally failed to provide him access to his time served credit sheet and to respond to his request to make corrections to that record as required by sections 92F-23 and 24, HRS.

The plaintiff sought an order compelling release and change of records, monetary damages and costs. The court has denied plaintiff's motion for summary judgment.

Access to Agricultural Records

In the case of **Center for Food Safety v. Department of Agriculture, State of Hawaii**, Civ. No. 03-1-1509-07 (1st Cir. Haw., filed July 23, 2003), the plaintiff seeks to compel the Department of Agriculture to provide access under the UIPA to records related to ongoing field tests of genetically engineered pharmaceutical-producing plant varieties in Hawaii.

The Department of Agriculture notified the plaintiff that it was withholding the records, which it received on behalf of the United States Department of Agriculture ("USDA"), pending a USDA determination regarding disclosure.



**in
this
section . . .**

- Access to Personal Records*
- Access to Agricultural Records*
- Access to Parole Records*
- Return of Documents in Clean Water Enforcement Action*
- Access to Records*
- Submission and Consideration by Entire Board of E-mail Testimony*

Specifically, the Department of Agriculture asserts that the records contain certain confidential business information and might contain information subject to the Uniform Trade Secrets Act. The plaintiff filed this action prior to any determination by the USDA.

❖ *Continuing Cases:*

Access to Parole Records

The plaintiff in **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 in violation of section 2-71, Hawaii Administrative Rules.

The plaintiff failed to serve the defendant with a copy of his complaint, and the court ultimately dismissed the lawsuit.

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 on Kauai for violations of clean water laws.

DOH asserted, *inter alia*, that it inadvertently allowed Earthjustice to inspect and copy certain confidential documents protected from disclosure by state and federal law. DOH seeks the

return or destruction of the copies made by Earthjustice.

Earthjustice filed a motion seeking to retain and use the documents, including select tax returns and return information, in related proceedings involving the parties. Due to ongoing settlement discussions in the related proceedings, the parties agreed to stay the proceedings.

Thus finding that it did not need to determine the merits at this time, the court denied Earthjustice’s motion to retain and use the documents without prejudice, to allow the refiling of the motion should the information at issue become relevant to a genuine dispute in the related proceedings. Earthjustice was ordered to continue to maintain the disputed documents in a sealed and inaccessible condition until further order of the court.

Access to Records

In **Alvarez v. Department of Public Safety**, Civ. No. 02-1-2765-11 (1st Cir. Haw., filed Nov. 26, 2002), an inmate sought access to records concerning material containing asbestos, the Department of Public Safety’s policy concerning the retention and maintenance of video recordings, the investigation concerning an incident in which he was involved, and information concerning his transfer to a high security unit.

On February 11, 2004, the court filed a motion to dismiss the case pursuant to Rule 12(q) of the Rules of the Circuit Courts of the State of Hawaii, which authorizes the dismissal of a case for want of prosecution after a ten day period to file objections showing good cause for not proceeding with the action. The case was dismissed on June 24, 2004, as the plaintiff did not file a response to the Rule 12(q) notice of proposed dismissal.

 **Sunshine Litigation Report:**

**Submission and Consideration by
Entire Board of E-mail Testimony**

Vannatta v. Kunimoto, Civ. No. 03-1-1058 (1st Cir. Haw., filed May 20, 2003) concerned the failure of the Chairperson of the Department of Agriculture to distribute the plaintiff's e-mailed testimony to all the members of the Board of Agriculture prior to hearing the agenda item which was the subject of the e-mailed testimony.

The agenda item concerned a request before the Board to revise a permit to allow the transfer of a male orangutan, Rusti, from the Honolulu Zoo to a temporary facility at Kualoa Ranch, Kaneohe, pending completion of a planned facility at Kualoa Ranch.

The OIP, in OIP Opinion Letter Number 03-06, concluded that the Chairperson's action in not recognizing the plaintiff's e-mail to be testimony and not distributing the e-mail violated the Sunshine Law. The lawsuit sought to void the Board's action approving the permit to move Rusti from the Honolulu Zoo to Kualoa Ranch.

Subsequently, after the Board cancelled its permit for the transfer of Rusti from the Honolulu Zoo to Kualoa Ranch, a stipulation for dismissal of the complaint, with prejudice, was filed on May 10, 2004.



Implementation

Legal Assistance



Each year, the OIP receives numerous requests for legal assistance from members of the public, employees of government agencies, and government board members.

In FY 2004, the OIP received over 1,200 requests for assistance. This included requests for general advice and guidance regarding application of,

and compliance with, the UIPA and Sunshine Law; requests for assistance in obtaining records from government agencies; requests for investigations of actions of government agencies; requests for review of actions and policies of agencies and boards for violations of

the Sunshine Law, the UIPA, or the OIP's administrative rules; requests for information and forms; requests to resolve complaints; and requests for advisory opinions regarding the rights of individuals or the functions and responsibilities of the agencies and boards under the UIPA and the Sunshine Law.

Attorney of the Day Service – Timely Legal Advice

The OIP's "Attorney of the Day" ("AOD") service continues to be a valuable and effective resource used by the public and by government agencies and boards.

Agency employees often use the service to assist them in responding to records request, in particular when addressing issues such as whether the agency has the discretion to redact information based upon privacy concerns. Agency employees and board members also frequently use the service to assist them in navigating Sunshine Law requirements.

Members of the public use the service frequently to determine whether agencies are properly responding to record requests or to determine if government boards are following the procedures set forth by the Sunshine Law.

Telephone Requests

Fiscal Year	Total	Public	Government Agencies
FY 04	824	320	504
FY 03	808	371	437
FY 02	696	306	390
FY 01	830	469	361
FY 00	874	424	450
FY 99	733	336	397

Table 2

The AOD service allows the public and the agencies and boards to receive general legal advice from an OIP staff attorney normally that same day or the following day. AOD requests are received by telephone, facsimile, e-mail, or in person.

Where the issues involved are factually or legally complex, where mediation by OIP between the public and the agency or board is required, or where more specific advice or a more formal response is desired, requesters are instructed to submit a written request and a case file is opened.

A majority of the requests to the OIP come through its AOD service. Over the past six years, the OIP has received a total of 4,765 requests through its AOD service. See **Table 2**.

In FY 2004, the OIP received 824 AOD requests. Of the 824 AOD requests received, 320 requests, or 39%, came from the public. Of those, 65% came from private individuals, 11% from news media, 9% from businesses, 8% from private attorneys, and 4% from public interest groups. See **Table 3** and **Chart 2**.



Telephone Requests from the Public FY 2004

Types of Callers	Number of Calls
Private Individual	209
Business	29
Newspaper	33
Private Attorney	25
Public Interest Group	14
Television	4
Other	6
TOTAL	320

Table 3

Telephone Requests from the Public - FY 2004

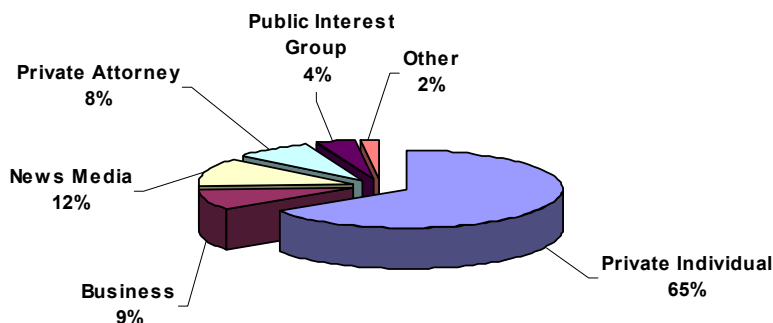


Chart 2

Of the 824 AOD requests received, 61% came from government agencies and boards. See **Chart 3 and Chart 4**. Approximately 17% of those requests came from county agencies and boards.

State Agencies

In FY 2004, the OIP received a total of 538 AOD requests concerning state agencies, compared to 545 inquiries in FY 2003.

Over half of these requests concerned six state agencies: the Department of Commerce and Consumer Affairs (87), the Department of Business, Economic Development, and Tourism (46), the Department of Education (44), the Department of Health (44), the University of Hawaii (41), and the Department of Land and Natural Resources (37).

The OIP received 25 requests concerning the legislative branch, 15 calls concerning the judicial branch, and five calls concerning the Office of Hawaiian Affairs. See **Table 4**.

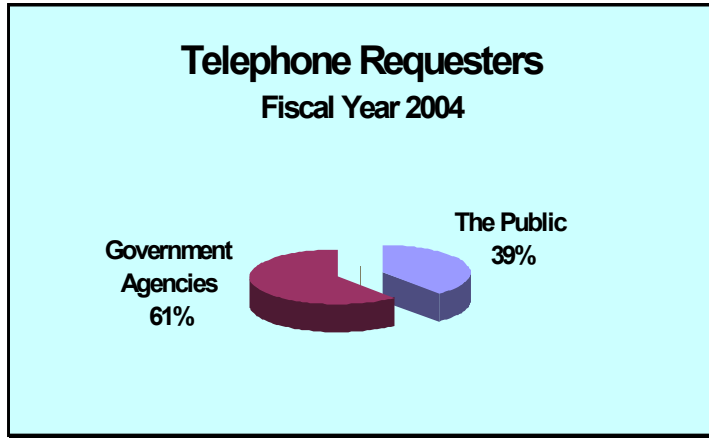


Chart 3

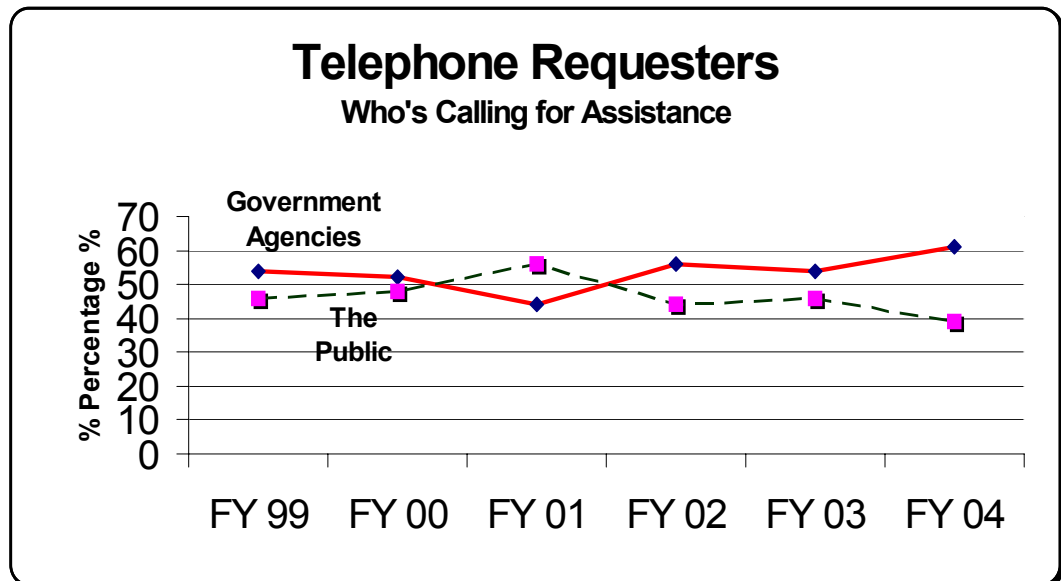


Chart 4

**Calls to the OIP About
State Government Agencies
FY 2004**



Executive Branch Department	Requests
Commerce and Consumer Affairs	87
Business, Economic Development, and Tourism	46
Education (including Public Libraries)	44
Health	44
University of Hawaii System	41
Land and Natural Resources	37
Labor and Industrial Relations	31
Public Safety	30
Attorney General	19
Budget and Finance	19
Accounting and General Services	17
Office of Information Practices	16
Governor	13
Transportation	13
Agriculture	12
Human Services	10
Human Resources Development	5
Taxation	5
Hawaiian Home Lands	2
Lieutenant Governor	2
Defense	0
TOTAL EXECUTIVE	493
TOTAL LEGISLATURE	25
TOTAL JUDICIARY	15
Office of Hawaiian Affairs	5
TOTAL STATE AGENCIES	538

Table 4

County Agencies

The OIP received 173 AOD requests regarding county government agencies, up from 139 requests in FY 2003. About a third of these requests (61) concerned government agencies in the City and County of Honolulu. Of these, the largest number of requests (23) concerned the Honolulu Police Department, while 11 concerned the City Council.

The OIP received 112 requests regarding agencies and boards in the remaining counties: Maui County agencies (42), Hawaii County (40), and Kauai County (30). See **Tables 5-8** on pages 24-26.

Of the 173 requests regarding county agencies, 34, or about one in five, concerned the county councils. Most of these requests concerned Sunshine Law issues.



**Calls to the OIP About
City and County of Honolulu
Government Agencies - FY 2004**

Department	Requests
Police	23
City Council	11
Board of Water Supply	6
Budget and Fiscal Services	6
Neighborhood Commission	6
Prosecuting Attorney	4
Corporation Counsel	2
Design and Construction	2
Enterprise Services	2
Environmental Services	2
Information Technology	2
Planning and Permitting	2
Customer Services	1
Emergency Services	1
Liquor Commission	1
Mayor	1
Medical Examiner	1
Transportation Services	1
TOTAL	61

Table 5

**Calls to the OIP About
Hawaii County
Government Agencies - FY 2004**

Department	Requests
Police	16
County Council	3
Finance	1
Mayor	2
Corporation Counsel	2
Fire	2
Housing & Community Planning	3
Prosecuting Attorney	1
Water Supply	3
Research & Development	1
Public Works	1
Parks & Recreation	1
County Physicians	1
TOTAL	40



Table 6

**Calls to the OIP About
Kauai County
Government Agencies - FY 2004**

Department	Requests
Police	12
County Council	7
Planning	3
Public Works	2
Finance	1
Liquor Control Commission	1
Mayor	1
Personnel Services	1
Prosecuting Attorney	1
Water	1
TOTAL	30



Table 7



**Calls to the OIP About
Maui County
Government Agencies - FY 2004**

Department	Requests
County Council	13
Police	10
Planning	9
Mayor	4
Public Works	4
Finance	1
Personnel Services	1
TOTAL	42

Table 8

Requests for Assistance

In FY 2004, the OIP received 114 formal requests, up 35% from the 84 requests in FY 2003. In these instances, the OIP is generally asked to provide assistance to the public in a records request dispute.

The staff attorneys will in these cases contact the parties to determine the status of the request, will attempt to facilitate disclosure of the records, and will generally review whether a denial, if made by the agency, was proper.

Requests for Legal Opinions


Upon request, the OIP provides written advisory opinions on issues under the UIPA and the Sunshine Law. In FY 2004, the OIP received 61 requests for advisory opinions, up 48% from 41 requests in FY 2003.

The OIP issues formal opinion letters, which are published and distributed, where the opinion has broad application and will therefore provide useful guidance on interpretation and application of the UIPA and the Sunshine Law. Formal published opinion letters are distributed to:

- Holders of the UIPA Reference Manual,
- WestLaw,
- Michie, for annotation in the Hawaii Revised Statutes,
- The OIP's website, and
- Anyone 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 website at www.hawaii.gov/oip. The website also contains an index for the formal opinion letters. Summaries of the formal opinion letters issued in FY 2004 are found in this report beginning on page 34.

The OIP issues informal opinion letters where an issue raised has already been addressed in a prior formal published opinion letter or the opinion letter has limited application. Informal opinion letters are sent to the parties involved and are maintained as public records at the OIP. Summaries of some of the informal opinion letters issued in FY 2004 are found in this report beginning on page 29.



<i>Type of Request</i>	<i>Number of Requests</i>
Request for Assistance	114
Request for Legal Opinion	61
Total Written Requests	175

Table 9

Sunshine Law Report

The OIP assumed jurisdiction over the Sunshine Law in 1998. Since then, the OIP has seen increases each year in the number of requests and complaints to this office concerning this law. In the past two years, the annual number of requests has jumped from 92 to 226. See **Chart 5**.

Of the 825 AOD requests made in FY 2004, 209 involved the Sunshine Law and its application, a 40% increase over the total in FY 2003. The OIP opened 17 case files in response to written requests for assistance or opinions regarding the Sunshine Law. See **Table 10**.

The rise in requests appears to be due in large part to a heightened awareness by both the public and government boards of the Sunshine Law's requirements as well as more diligent efforts by boards to comply with those requirements.

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, as well as other training sessions throughout the year. See pages 54-55 for a list of these sessions.

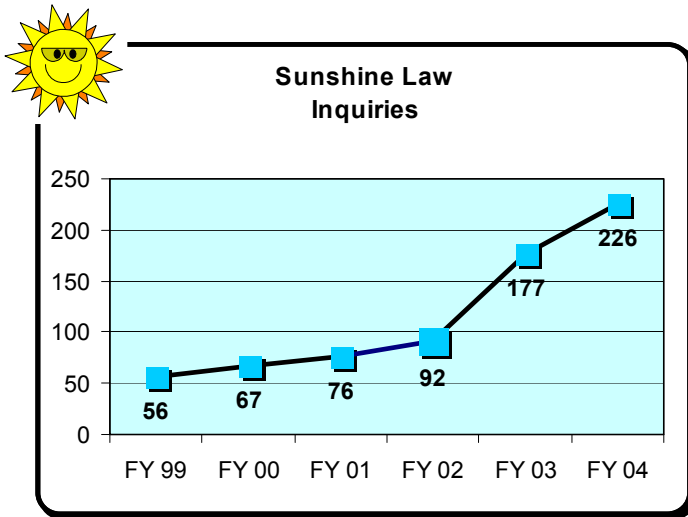


Chart 5



<i>Fiscal Year</i>	<i>Telephone Inquiries</i>	<i>Written Inquiries</i>	<i>Total</i>
2004	209	17	226
2003	149	28	177
2002	84	8	92
2001	61	15	76
2000	57	10	67
1999	51	5	56

Table 10



Case and Opinion Letter Summaries

The following summaries exemplify the type of legal assistance provided by the OIP staff attorneys through the AOD service through informal opinion letters and through formal opinion letters. Summaries of the formal opinion letters begin on page 34.

Legal Assistance and Informal Opinion Letter Summaries

Is Government E-mail Government Property?

An employee of the Department of Health (“DOH”) asked whether it was a violation of the UIPA if someone tried to access her DOH e-mail without permission and if that e-mail is considered to be government property.

The OIP advised the employee that the UIPA does not apply to the **attempt** to access her DOH e-mail. If her e-mail had been accessed and subsequently disclosed, then a possible violation of the UIPA may have occurred depending upon the nature of the e-mail. The UIPA contains criminal penalties for the intentional disclosure of government records or information when the disclosing party has actual knowledge that disclosure is prohibited.

With respect to whether DOH e-mail is considered government property, the OIP directed the caller to the General Records Schedule, section 11.7. According to this section, senders’ and

recipients’ versions of electronic mail messages that meet the definitions of government records as defined by section 92F-3, HRS, shall be evaluated for information content. Section 92F-3, HRS, defines government record as “information maintained by an agency in written, auditory, visual, electronic, or other physical form.”



in
this
section . . .

Is Government E-mail Government Property?

Privacy Interest in Board Member’s Resignation Letter

Length of Time Spent Searching for a Requested Record

E-mail Addresses of Board Members

Background Check to Employee

Retention of Records by Former Mayor

Request for Mug Shot

Government Purchasing Information

Privacy Rights of the Deceased

The General Records Schedule indicates that records transmitted through e-mail systems have the same retention period as the same records in other formats. However, the Schedule states that e-mail not deemed a government record may be deleted from the e-mail system when no longer needed for operational purposes.

Hence, the OIP informed the employee that e-mail messages are considered government property if a government agency maintains the record, which means that it has “administrative control” of the record or the authority to release the record.

Privacy Interest in Board Member’s Resignation Letter

A DBEDT employee inquired if a copy of a resignation letter of a member of the Small Business Regulatory Review Board outlining the member’s reasons for resigning can be disclosed to the public.

The OIP suggested that DBEDT contact the board member to ask if the letter was intended only to be seen by the other board members or could be made public. Upon inquiry, the former board member stated that the letter was not meant for public release.

Personnel file information that does not fall under section 92F-12(a)(14), HRS, carries a significant privacy interest. Thus, because the letter as a whole indicates the reason for resignation, the letter carries a significant privacy interest.

While it is possible that there is a public interest in disclosure of the reason for the board member’s resignation expressed in the letter, it is questionable whether that interest is strong enough to outweigh the significant privacy interest of the employee. As a result, the OIP informally opined that the agency would be justified in withholding the letter and citing the privacy exception.

The requester could challenge the agency’s decision, either through the OIP or the court, to obtain a legal opinion on whether the public interest outweighed the privacy interest.

Length of Time Spent Searching for a Requested Record

A caller claimed that, in response to his record request, a state agency advised him weekly that it has not been able to locate the record and that its search is continuing. The caller, who is a member of the public, questioned how long the agency can continue searching.

The OIP told the caller that the answer depended on the search that the agency was conducting. If, for instance, the agency was looking at one document a week, such a search would not be sufficient to justify the delay in responding to the request. If, however, the agency was spending four hours each week looking for the record, perhaps such search was reasonable and justified the agency’s response.

The OIP suggested that, if the response continued for what the caller believed to be an unreasonable length of time, the caller could ask the OIP to investigate. If so requested, the OIP would likely ask the agency to explain the search it was conducting, including the time spent searching for the record.

E-mail Addresses of Board Members

A state agency asked if it is required to disclose the e-mail addresses of board members.

The OIP advised the agency that section 92F-12(a)(14), HRS, requires that business addresses and telephone numbers of present or former officers be made publicly available and that the OIP would probably interpret that to include business e-mail addresses. Under section 92F-13(1), HRS, however, if the e-mail

addresses are home addresses, those addresses may be protected by the privacy exception.

The OIP advised the agency that so long as it gives an e-mail address where board members can receive e-mail, the OIP would most likely find compliance with the UIPA.

Background Check to Employee

A state agency told the OIP that a state employee had asked for a copy of the employee's criminal history and background check.

This check is conducted by the Department of the Attorney General for new hires. It includes not just the criminal record information, but also potential material for a background investigation. The caller asked if the agency can disclose the record to the employee.

The OIP advised the caller that a personal record must be disclosed unless an exception applies. The OIP briefly reviewed the possible exceptions to disclosure with the caller and advised the caller that the agency should determine whether an exception applies to withhold all or part of the record.

Retention of Records by Former Mayor

A reporter called to advise that a former county mayor had either destroyed or put into storage all records without indexing the records and making them accessible. The caller asked if state law or the UIPA require preservation of documents. The caller also advised that he has been granted access to the records and will be going to the storage place to review them.

The OIP advised the caller that retention of records is outside the OIP's jurisdiction. The OIP advised that on the state level, the General

Records Schedule, available on the web site of the Department of Accounting and General Services, applies to the retention of records by state executive and legislative agencies.

The OIP further advised the caller that chapter 2-84 of the Maui County Charter governs retention of Maui County records and that, if policies have been adopted to administer that chapter, he could make a record request for those policies.

Request for Mug Shot

An employee of a private business made a complaint to the Honolulu Police Department ("HPD") regarding threats against her by an individual with a criminal history, including a conviction and a later arrest not resulting in conviction.

The private business requested a mug shot from HPD so that staff could be aware of the man's appearance in case he showed up at the complainant's workplace. HPD responded that the mug shot relating to the conviction was disclosable but in fact could not be found. The mug shot from the later request could not be publicly disclosed because it had been more than a year after the arrest with no active prosecution or conviction. The caller wanted to confirm whether HPD's response was correct.

The OIP confirmed that a mug shot that is part of a nonconviction arrest record is not public after a year, even though the individual may have another mug shot that would be public. It is the result of the arrest from which the particular mug shot relates that is significant, not the existence of other criminal history. The caller said that she believed that HPD's search was adequate and she did not wish to challenge it.

The OIP advised the caller that the limitation on obtaining nonconviction history applies to public requests for the information. In this case, the

employer may have a special interest in the mug shot because of the safety concerns. The OIP suggested that the employer might ask the police officers assigned to investigate the complaint whether it would be possible to get a copy of the suspect's photo to protect the employees. The caller said that they are already working on that approach.

Government Purchasing Information

A member of a public interest group called the OIP seeking all bids submitted concerning a non-profit concession to be let at Kuhio Beach. The City and County of Honolulu sets the rent and the amounts the bidders can charge.

The caller stated that Kuhio Beach concession contracts are exempt from the bidding process; all eligible applicants are placed in a pool and the "winning" bid is by lottery. The caller wanted access to the record of all applicants.

The OIP advised the caller that government purchasing information is required to be made available to the public under section 92F-12(a)(3), HRS, except to the extent prohibited by section 92F-13, HRS. The UIPA's legislative history indicates that records may be withheld by an agency if disclosure would raise the cost of government procurements or give a manifestly unfair advantage to any person proposing to enter into a contract or agreement with an agency. Generally, this exemption no longer applies after a contract is let or a purchase is made.

The OIP advised the caller that the OIP could give only general advice over the telephone. The OIP further advised the caller that if the agency determines not to disclose, the agency must provide a reason, most likely under section 92F-13(3), HRS.

The OIP discussed timelines for disclosure contained in HAR 2-71-13 and extenuating circumstance when an agency determines it

must consult with another person to determine whether a record is exempt from disclosure under chapter 92F, HRS. (HAR 2-71-15(a)). The OIP advised the caller that the caller may contact the OIP if there is no disclosure or notice within ten business days.

Privacy Rights of the Deceased

A news reporter interested in looking at the personnel records of deceased police officers wanted to investigate to what extent substance abuse problems that ultimately hastened death were addressed by the department. The caller wanted to know whether the OIP has opinions saying that privacy rights end with an individual's death.

The OIP told the caller that it has opined that privacy rights end with death, but there is a big question mark over whether the opinions are still good because HIPAA rules may have changed the state of the law on privacy enough to make the OIP reconsider. Although HIPAA rules directly affect only medical records as held by covered entities, it is a major new law, and the OIP's opinion was originally based on the whole legal landscape of privacy at that time, so a major change to that legal landscape may have an effect. The caller said that he would make his request for the records.

Subsequently, the OIP received a call from the Honolulu Police Department ("HPD") looking for guidance. HPD had received a request from the reporter for medical information (including counseling and treatment) and misconduct/disciplinary information on three deceased officers that the reporter listed by name. The collective bargaining agreement requires that investigations be confidential and chapter 89, HRS, may be relevant.

The OIP explained that while it has past opinions stating that privacy rights extinguish upon death, there seems to be a trend away from

that, and also HIPAA requires that privacy rights to medical records extend beyond death for covered entities. The OIP thus advised the caller HPD may be justified in withholding the information based on the evolution of the law, and that the OIP would have to look at the issue of deceased privacy rights anew.

The OIP told the caller about the applicability of the frustration exception and the fact that sometimes surviving family members have privacy rights regarding information on their deceased loved ones. Regarding the collective bargaining agreement, the OIP advised that its position is that a statute would override a collective bargaining agreement.

The OIP subsequently issued a formal opinion on the issue raised by this inquiry. (OIP Op. Ltr. No. 03-19 (Dec. 16, 2003)). See summary of this opinion at pages 36-37.



OIP Formal Opinion Letter Summaries



The OIP has issued 274 formal advisory opinion letters from 1989 through the end of June 2004. In Fiscal Year 2004, the OIP issued 23 formal opinion letters.

The following summarizes these formal opinion letters. The summaries should be used only as a broad reference guide. To fully understand an opinion, it is necessary to read the full text of the opinion.

In addition, state agencies are not required to obtain consent by employees named in government records before disclosure to the Auditor. The UIPA's mandatory disclosure provisions are to be read in the disjunctive, i.e., as expressing alternative categories of documents that must be disclosed as a matter of law. Therefore, if one of the categories of records listed in section 92F-12(b), HRS, requires disclosure, an agency must disclose the records, as a matter of law.

[OIP Op. Ltr. No. 03-14, July 17, 2003]

❖ UIPA:

Evidence from Pending Police Investigation File

Section 92F-22(1)(A), HRS, allows police departments to deny personal record requests for evidence that was originally submitted by the requester and is part of a pending police investigation file.

[OIP Op. Ltr. No. 03-11, July 8, 2003]

Grievance File to the Office of the Legislative Auditor

Under the UIPA, state agencies are required to disclose government records where there is a state law that authorizes disclosure. As disclosure to the Office of the Legislative Auditor ("Auditor") is authorized by state law, agencies must disclose government records to the Auditor, any law to the contrary notwithstanding.

UH Animal Care Advisory Committee

Records of the University of Hawaii's Animal Care Advisory Committee ("ACAC") are subject to the UIPA. The University of Hawaii ("UH") is a government agency subject to the UIPA; thus, records pertaining to the ACAC maintained by UH are subject to the UIPA. UH has research facilities that use live animals. In order to receive federal grants for research, schools conducting live research are required to create committees like UH's ACAC which are tasked with monitoring the research facilities and reporting to the federal agency providing the funding.

The ACAC is also an agency subject to the UIPA because, although federal law requires the creation of the ACAC in order for UH to receive federal funding for research projects, it was UH's choice to accept federal money and thus to subject itself to the federal Animal Welfare Act and other laws. Therefore, records maintained by the ACAC must be disclosed unless any UIPA exceptions to disclosure apply. Names of ACAC members are also public.

At the time of the opinion, it had not yet been determined and the OIP had not been asked to decide whether the ACAC is required to comply with the Sunshine Law. For boards that are subject to the Sunshine Law, sections 92-9 and 92F-12, HRS, require that meeting minutes be public. Section 92F-12, HRS, would not authorize UH or the ACAC to withhold from disclosure any part of the minutes of public meetings if the ACAC is ultimately deemed subject to the Sunshine Law. Until that issue is determined, past minutes of the ACAC meetings should be available to the public, subject to the exceptions to disclosure in section 92F-13, HRS. [OIP Op. Ltr. No. 03-15, August 7, 2003]

University's Contract with Head Football Coach

The 1998 contract between the University of Hawaii ("UH") and Head Football Coach June Jones must be publicly disclosed. Certain information about the contract has already been disclosed by UH and Coach Jones and has been reported by the media. There is no reasonable basis to withhold the portions of the contract containing information that has previously been made public.

The OIP also found that, because of the public nature of his position and the fact that he is one of the highest paid State employees, if not the highest, Coach Jones' privacy interests relating to the contract are outweighed by the public's right to know.

Lastly, based upon the information provided by UH, the OIP could not conclude that disclosure of the contract will frustrate a legitimate government function, i.e., UH's ability to maintain morale in the athletic department or to negotiate contracts with its coaches. For those reasons, the contract, in its entirety, was deemed disclosable.



in
this
section . . .

UIPA:

*Evidence from Pending Police Investigation File
Grievance Files to the Office of the Legislative Auditor
UH Animal Care Advisory Committee
University's Contract with Head Football Coach
Closed Investigation of Deputy Attorney General
Records of Deceased Persons
Oversight Committee for the First Circuit
Family Court
Records Pertaining to Kahana Valley State Park
Interpretive Leases
Office of Disciplinary Counsel and Disciplinary Board
Tourism Data
Honolulu Police Commission Records
Court Abstracts
Evaluation and Expectations of University of
Hawaii President
List of Voters
Personal Information of Petition and Nominating
Paper Signatures*

SUNSHINE:

*Attendance at Executive Meetings by Parties Other
Than Council or Board Members
Views of Non-Board Members Included in Minutes
Attorneys' Presence - Required to Accomplish the
Essential Purposes of an Executive Meeting
Oahu Island Burial Council
Board Members Discussion of Official Business
Outside of a Duly Noticed Meeting; E-mail
Communication
Board Decisionmaking Outside of Open
Meetings
Anonymous Testimony and Liability for Disclosure of
Records Containing Defamatory Statements
Right to Testify on Agenda Items*

The OIP also stated that, absent extraordinary circumstances, disclosure of UH's new (second) contract with Coach Jones, once executed, should be in accordance with this opinion.

[OIP Op. Ltr. No. 03-16, August 14, 2003]

Closed Investigation of Deputy Attorney General

Two individuals filed a complaint with the Attorney General against an employee. They later requested a redacted copy of the investigation conducted on the employee.

Under Part II of the UIPA, the employee who is the subject of the investigation has a significant privacy interest in "personnel" type information under section 92F-14(b)(4), HRS, which outweighs any public interest in the record.

Thus, under Part II of the UIPA, the requesters are not entitled to a redacted version of the investigation, and the Attorney General may withhold it from public disclosure.

However, because the investigation refers to the employee as well as one of the complainants, it is a joint personal record, i.e., it is both the employee's and the complainant's personal record. Under Part III of the UIPA, the complainant is entitled to access information about him that is maintained by government.

This opinion sets forth an important policy with regard to joint personal records. If a record and/or information contains an individual's name or other identifying particular, there is a presumption that it is a personal record entirely accessible to the requester (subject to the exemptions in section 92F-22, HRS). However, this presumption can be rebutted if it can be shown that certain information is not "about" the requester, but is "about" someone else, and in the interest of protecting personal privacy, it would be a violation of Part II of the UIPA to disclose the other person's information to the requester.

Due to the unique circumstances in this case, segregation of the investigation is warranted, insofar as it is reasonably segregable, because disclosure to the complainant of the portions of the investigation that pertain solely to the employee would be a clearly unwarranted invasion of the employee's privacy.

[OIP Op. Ltr. No. 03-18, November 12, 2003]

Records of Deceased Persons

A state legislator asked the OIP for an opinion on "whether living or deceased persons' names may be obtained from State records and put on public display" on a monument to the memory of victims of Hansen's disease to be erected in Kalaupapa. Soon thereafter, a chief of police and a news reporter wrote to the OIP concerning the reporter's request for access to the records of deceased police officers.

The OIP reconsidered the treatment of information about deceased persons, which it had addressed in many previous opinions: OIP Op. Ltr. Nos. 90-13, 90-18, 90-26, 91-32, 95-21, and 97-2. Those previous opinions were issued before the appearance of 45 C.F.R. Parts 160 and 164, the medical privacy rules promulgated under the Administrative Simplification subtitle of the Health Insurance Portability and Accountability Act of 1996, Public Law 104-191 ("HIPAA rules"), and before several recent Freedom of Information Act cases showing a trend toward recognizing a privacy interest for deceased persons.

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

The OIP concluded that agencies that are not directly regulated by the HIPAA rules should also withhold health information about deceased persons under the UIPA's privacy exception to disclosure, because the HIPAA rules set a new standard for privacy of medical records. For health records older than those the HIPAA rules were intended to apply to, though, the OIP concluded that the privacy exception required balancing the deceased person's remaining privacy interest (which would diminish over time) against the public interest in the records. Eventually, historical health records become public.

The OIP also concluded that deceased persons retain some privacy interest in non-health information, but that privacy interest diminishes over time. For non-health records, as for older health records, the privacy exception requires balancing the passage of time against the sensitivity of the records to determine the remaining privacy interest, and then balancing the remaining privacy interest against the public interest in disclosure.

[OIP Op. Ltr. No. 03-19, December 16, 2003]

Oversight Committee for the First Circuit Family Court

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

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

The Judiciary is not required to hold open meetings under Part I of chapter 92, HRS, and the Oversight Committee meetings were closed. Thus, minutes of the meetings were not required to be made available as minutes of a meeting open to the public. See Haw. Rev. Stat. § 92F-12(a)(7) (1993).

The Oversight Committee records as a whole were predecisional and fell within the deliberative process privilege. In addition, some portions of the records would disclose the identity of confidential sources. Thus, the records could be withheld because their release would frustrate a legitimate government function. See Haw. Rev. Stat. § 92F-13(3) (1993).

[OIP Op. Ltr. No. 03-20, December 17, 2003]

Records Pertaining to Kahana Valley State Park Interpretive Leases

Residents living in Kahana prior to its condemnation for a State park negotiated a "living park" concept to be able to continue living in the Kahana Valley State Park ("Park"). The General Leases between the DLNR and each Lessee states that, for consideration of a Lessee's participation in the Park interpretive program, the Lessee is given a residential lease to a specific lot for 65 years. Thus, Lessees pay for their leases with in-kind services rather than monetary rent.

General Leases, and exhibits and addenda attached thereto, are public under section 92F-12(a)(5), HRS. In a typical lease, the dollar amount paid as lease rent is set forth in the lease itself and, thus, is public. With the General Leases, the activities performed as rent for the leases are not set forth because the specific activities to be performed were agreed upon at a later date and are memorialized in subsequent agreements or other records. Thus, because of the unique method of payment of the General Leases, rent amounts were not included in the lease documents at the time they were executed.

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

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

Office of Disciplinary Counsel and Disciplinary Board

The Office of Disciplinary Counsel ("ODC") and the Disciplinary Board of the Supreme Court of Hawaii ("Board") are subject to the UIPA based on the totality of the circumstances.

Both the ODC and the Board are created and, to a significant extent, controlled by the Supreme Court of Hawaii. A majority, if not all, of the ODC's and the Board's activities relating to attorney disciplinary matters are powers inherently belonging to the Supreme Court that have been delegated to them. In addition, while their budgets do not come from government, the

Supreme Court retains the power to approve their budgets.

The ODC and the Board are not subject to the UIPA insofar as they perform, on behalf of the Hawaii Supreme Court, the Court's nonadministrative functions of disciplining attorneys because the UIPA's definition of "agency" excludes the nonadministrative functions of the courts. Haw. Rev. Stat. § 92F-3 (1993). Purely administrative records of the ODC and the Board are subject to the UIPA. [OIP Op. Ltr. No. 04-02, February 3, 2004]

Tourism Data

The Department of Business, Economic Development and Tourism ("DBEDT") asked the OIP if it can charge a requester for segregating information that a business has designated, with DBEDT's concurrence, as proprietary and subject to withholding under the UIPA. The OIP responded that DBEDT can charge, assuming that the information segregated does indeed fall within an exception to disclosure under the UIPA.

DBEDT asked if, when a second person requests the same record, DBEDT can also charge the second requester for segregating the same information. If DBEDT still has an already-segregated copy of the record, it cannot charge the second requester.

DBEDT also asked if it can selectively disclose, to only Hawaii businesses, compiled information that does not identify specific businesses or include competitively sensitive information. In the absence of a statute authorizing selective disclosure, access to public records may not be restricted to only those requesters who intend to use the information for certain purposes.

Finally, DBEDT asked if it can selectively charge a requester the market value of requested information, and if not, would legislation be required to sell information at market value to a specific group of requesters.

The OIP responded that unless an agency has specific statutory authority to sell information at market value, it may not do so. The UIPA permits only fees for search, review, and segregation functions and other lawful fees (such as for copies and postage).

[OIP Op. Ltr. No. 04-03, February 9, 2004]

Honolulu Police Commission Records

A member of the public requested access to records of the Honolulu Police Commission (“Commission”) pertaining to investigations of complaints against police officers convicted of police brutality.

The Commission routinely destroys records after 30 months, and thus maintained no records responsive to the record request. The OIP therefore provided the Commission with general advice on how to respond to future similar requests.

First, although the Commission adopted a rule that makes its investigative reports confidential, the rule is not a “state law” for purposes of the UIPA and cannot be used to avoid disclosure of records that are otherwise public under the UIPA. The UIPA, not the Commission’s rules, dictates whether its records of the investigations may be withheld.

Assuming the Commission maintains records pertaining to a criminal conviction of a police officer, they are presumed public under the UIPA, subject to the exceptions at section 92F-13, HRS. Information about individuals mentioned in Commission investigations may be withheld from public disclosure to the extent that disclosure would constitute “a clearly unwarranted invasion of personal privacy” under section 92F-13(1), HRS.

In addition, agencies are not required to disclose government records that must be confidential for the government to avoid the frustration of a legitimate government function. Haw. Rev. Stat.

§ 92F-13(3) (1993). This exception applies to certain records or information compiled for law enforcement and other purposes. Public information which is reasonably segregable from nonpublic information, however, should be made available.

The decision of whether to deny access to investigative records must be made on a case-by-case basis; and the OIP advised the Commission to consult with the OIP or its own attorney upon receipt of a record request.

[OIP Op. Ltr. No. 04-05, February 23, 2004]

Court Abstracts

The Judiciary asked the OIP whether the UIPA requires public access to court abstracts and miscellaneous criminal abstracts of the Traffic Violations Bureau of the District Courts.

The Judiciary provided information to the OIP concerning court abstracts, but not miscellaneous criminal abstracts (which are apparently rarely used). Thus, with the Judiciary’s agreement, this opinion is limited to the court abstracts.

The OIP opined that court abstracts are not subject to the UIPA. The court abstracts are part of the nonadministrative functions of the courts, and hence are not maintained by an “agency” subject to the UIPA.

The UIPA governs the public’s right to inspect and copy records maintained by an agency. See Haw. Rev. Stat. §§ 92F-3 (definitions of “government record” and “personal record”), 92F-11 (access to government records), and 92F-21 (access to personal records) (1993). The UIPA specifically defines “agency” to exclude “the non-administrative functions of the courts of this State.” Thus, the UIPA does not apply to records associated with the non-administrative functions of the courts.

[OIP Op. Ltr. No. 04-06, March 23, 2004]

Evaluation and Expectations of University of Hawaii President

The University of Hawaii (“UH”) Board of Regents’ evaluation of UH President Evan Dobbelle (“Evaluation”) and the Expectations and Performance Guidelines prepared by the Board of Regents relating to President Dobbelle (“Expectations”) are public under the UIPA.

The OIP found that President Dobbelle has a significant privacy interest in the Evaluation and the Expectations. His privacy interest, however, is diminished by the fact that he is a public figure by virtue of his position as UH President. When balanced against the public interest in knowing how the Board of Regents is performing its duties, including the employment of the UH president, as well as in knowing how President Dobbelle is performing his job, we found that the public interest is greater.

Accordingly, UH cannot withhold the Evaluation and the Expectations, as disclosure would not be a clearly unwarranted invasion of personal privacy under section 92F-13(1), HRS. This Opinion does not imply that evaluations of employees who are not in high ranking positions are public.

[OIP Op. Ltr. No. 04-07, March 25, 2004]

List of Voters

The General County Register required to be maintained by the County Clerk under section 11-14, HRS, which contains, among other things, the name and address of each voter, is not public under the UIPA when requested for purposes unrelated to “government or elections.”

Section 92F-13(4), HRS, allows an agency to withhold records that are protected from public disclosure by another State law. Section 11-14, HRS, provides that the General County Register is only available for “election or government purposes.” Thus, section 11-14, HRS, protects the General County Register from general

disclosure. The County Clerk is entitled under the UIPA to deny access to the General County Register to a member of the public who is not seeking the record for “election or government purposes.”

The Hawaii County Elections Division Office (“EDO”), maintains a list, pursuant to section 11-97, HRS, containing, among other things, each voter’s name, arranged alphabetically, district/precinct designation for the voter, and the voter’s status (the “Public List”). The EDO maintains the Public List in binders available for public review.

The UIPA requires the County Clerk to provide a copy of the alphabetical list of registered voters, district/precinct, and status, which is available for review, to the public. The UIPA requires an agency to make all public records available for inspection and copying during regular business hours. Haw. Rev. Stat. § 92F-11(b) (1993).

NOTE: this Opinion supercedes the OIP Opinion Letter Number 90-22.

[OIP Op. Ltr. No. 04-08, April 2, 2004]

Personal Information of Petition and Nominating Paper Signatures

The Hawaii County Clerk requested an opinion of the OIP regarding whether the public has a right to inspect and copy petitions which contain personal information of signers under the UIPA.

Hawaii County requires initiative and charter amendment petitioners to collect information from petition signatories. Section 12-3(a)(5), HRS, requires nominating paper signatories to provide similar information: names, signatures, dates of birth, social security numbers, and home addresses.

The petitioners who collect signatures are not government employees and do not generally provide signatories with any type of notice

regarding whether collection of the social security numbers is mandatory or voluntary, or what use may be made of the social security numbers.

The OIP opined that the County Clerk may withhold signatories' street addresses, social security numbers, and dates of birth based on the UIPA's privacy exception, section 92F-13(1), HRS.

The OIP was also asked whether the UIPA prevents the County Clerk from requiring petitioners to collect social security numbers from signatories, as required by the Hawaii County Charter for initiative or referendum petitions and by the Hawaii Revised Statutes for candidate nominating papers.

The OIP opined that the UIPA does not specifically address what information may be collected by a government agency. However, the requirement that petitioners collect social security numbers may be imputed to the county or the state, and may violate the federal Privacy Act, the federal Constitution, or both.

The OIP therefore advised the County Clerk to consult with Corporation Counsel regarding whether it should enforce the social security number collection requirements.

[OIP Op. Ltr. No. 04-11, June 30, 2004]

Sunshine Law:

Attendance at Executive Meetings by Parties Other Than Council or Board Members

A county council and its Corporation Counsel asked the OIP to issue an opinion after a member of the public questioned the county council's practices of: (1) allowing non-council members to attend executive meetings, and (2) permitting more than one attorney from the Office of the Corporation Counsel to attend executive meetings.

When, in order to accomplish the purpose of convening an executive meeting, a board requires the assistance of non-board members, a board is authorized under the Sunshine Law to summon the non-board members to participate in the closed board meeting.

Furthermore, more than one of a board's attorneys may attend an executive meeting to advise the board concerning the board's powers, duties, privileges, immunities, and liabilities.

Non-board members should remain at the meeting only so long as their presence is essential to the agenda item being considered in the executive meeting. Once the agenda item for which the non-board member's participation is needed has been concluded, the non-board member should be excused.

[OIP Op. Ltr. No. 03-12, July 14, 2003]

Views of Non-Board Members Included in Minutes

The Sunshine Law requires that boards keep written minutes of all meetings which “give a true reflection of the matters discussed at the meeting and the views of the participants.” Haw. Rev. Stat. § 92-9 (1993).

With this statutory mandate in mind, the OIP found that the primary purpose for keeping minutes is to reflect what a board did at a meeting. Looking to the Sunshine Law’s policy of protecting the public’s right to know, it is of primary importance to know the actions taken by the decision-makers (board members) so that the public can scrutinize their actions.

Thus, the OIP concluded that, while the Sunshine Law requires that minutes reflect the views of non-board members who participated in meetings, it is sufficient for the minutes to describe, in very general terms, the positions expressed by the non-board members.

Therefore, the OIP found that minutes of a Land Use Commission (“LUC”) meeting were sufficient despite a complaint by a member of the public that points enumerated in her presentation to the LUC were not individually listed in the minutes.

[OIP Op. Ltr. No. 03-13, July 14, 2002]

Attorneys’ Presence - Required to Accomplish the Essential Purposes of an Executive Meeting

In OIP Opinion Letter Number 03-12, the OIP advised that the Sunshine Law authorizes boards to summon non-board members to participate in a closed board meeting if necessary to further the purpose for which the executive meeting is convened.

The Hawaii County Corporation Counsel thereafter sought advice concerning whether the Sunshine Law only authorizes attorneys to be present in executive meetings convened to consult concerning a board’s “powers, duties, privileges, immunities, and liabilities” (one of the Sunshine Law’s eight authorized purposes set out at section 92-5(a), HRS).

Two circumstances were articulated: consultation concerning any purpose listed in section 92-5(a), HRS, and consultation to ensure that a board complies with 92-5(b), which requires that boards deliberate and decide in executive meetings only on matters directly related to the eight purposes listed in 92-5(a), HRS.

The OIP advised that consultation in both those circumstances is appropriate, but only so long as the attorney’s presence is essential to accomplish the purpose of the executive meeting.

[OIP Op. Ltr. No. 03-17, September 11, 2003]

Oahu Island Burial Council

The State Historic Preservation Division, Oahu Island Burial Council (“Burial Council”) convened an executive meeting on March 12, 2003, under section 92-5(a)(4), HRS, which allows a board subject to the Sunshine Law to have executive meetings to consult with the board’s attorney on the board’s powers, duties, privileges, immunities, and liabilities. The meeting was improper because no attorney was present or otherwise participated in the meeting.

In addition, the Burial Council should have allowed individuals present at a meeting to testify, even though they had testified at prior meetings, because boards are required by section 92-3, HRS, to allow written and oral testimony on all agenda items for public meetings.

[OIP Op. Ltr. No. 03-22, December 30, 2003]

Board Members Discussion of Official Business Outside of a Duly Noticed Meeting; E-mail Communication

A state legislator asked the OIP to investigate the Landfill Selection Committee's ("Committee") compliance with the Sunshine Law. The Committee is an advisory board established by the City and County of Honolulu ("City") to assist in the selection of Oahu's future landfill. According to the City, the Committee is subject to the Sunshine law. The legislator, who was also a member of the Committee, alleged that, outside of a properly noticed meeting, a Committee member solicited and obtained signatures on documents related to the decision making function of the Committee.

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

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

The OIP therefore found that the e-mail violated the Sunshine Law. Nevertheless, the OIP noted that it believes that using e-mail for routine, administrative matters such as scheduling purposes may be permissible under the Sunshine Law.

[OIP Op. Ltr. No. 04-01, January 13, 2004]

Board Decisionmaking Outside of Open Meetings

The Hawaii Civil Rights Commission ("HCRC") asked the OIP whether it could poll the Commissioners relating to the agency's legislative testimony.

The OIP advised that the Sunshine Law requires that all decisionmaking take place in meetings open to the public, unless the Sunshine Law authorizes an executive meeting. Where the purpose of calls or e-mails to board members is to receive their position, i.e., their vote, on proposed legislation involving the HCRC's powers, the voting is in effect a decision concerning official Commission business.

Therefore, the OIP opined that the HCRC staff cannot poll individual Commissioners outside of a properly noticed meeting for the purpose of determining and/or approving the HCRC's legislative testimony. That does not mean that staff cannot gather information from Commissioners to assist staff in drafting testimony, so long as staff ensures that there is no facilitation of deliberation through staff's discussion with multiple Commissioners. The OIP also suggested alternatives to assist the HCRC to consult with Commissioners and still follow the Sunshine Law.

[OIP Op. Ltr. No. 04-04, February 20, 2004]

Anonymous Testimony and Liability for Disclosure of Records Containing Defamatory Statements

The OIP was asked for an opinion on receipt and disclosure of testimony provided to boards subject to the Sunshine Law.

The OIP opined that, because the Sunshine Law requires that “all interested persons” be given the opportunity to provide written and oral testimony on agenda items (see Haw. Rev. Stat. § 92-3 (1993)), in keeping with the Sunshine Law’s policy of liberally construing its provisions in favor of openness, it is not appropriate to condition submission of testimony on whether a potential testifier identifies himself or herself. Because boards “shall” allow interested persons the opportunity to submit testimony, they do not have authority to refuse anonymous testimony.

The OIP also opined that an agency or agency employee is immune from liability under the UIPA for disclosing testimony that may contain defamatory statements. The UIPA requires that government records be public, unless access is closed by law. Haw. Rev. Stat. § 92F-11(a) (1993). Written testimony received by a board at a public meeting is public, and copies of such testimony should be made available upon request.

Because the OIP is of the opinion that the UIPA requires agencies to disclose public testimony upon request, the OIP believes that section 92F-16, HRS, provides agency employees with immunity from criminal or civil liability for such disclosures. The OIP notes, however, that section 92F-16, HRS, has never been tested in court.

[OIP Op. Ltr. No. 04-09, May 3, 2004]

Right to Testify on Agenda Items

A county charter provision barring county employees from representing private interests before a county agency does not conflict with the Sunshine Law. The Sunshine Law requires boards to provide an opportunity for members of the public to testify. It does not prevent an employer, whether government or private, from forbidding its employees to present testimony to a board.

However, if a county employee nevertheless seeks to testify before a county agency that is a board under the Sunshine Law, the board must allow that testimony as required by section 92-3, HRS.

[OIP Op. Ltr. No. 04-10, June 29, 2004]



Legislation

One of the functions of the OIP is to make recommendations for legislative changes. The OIP introduces legislation to amend the UIPA and/or the Sunshine Law to clarify areas that have created confusion in application or to amend provisions that work counter to the legislative mandate of open government. The OIP also consults with government agencies and elected officials in the drafting of proposed bills.

To provide for uniform legislation in the area of government information practices, the OIP also monitors and testifies on proposed legislation that may impact the UIPA; the government's practices in the collection, use, maintenance, and dissemination of information; and the government's open meetings practices.

In 2004, the OIP introduced 5 bills and reviewed and monitored 164 legislative initiatives as they progressed through the legislative process. The OIP Director and staff attorneys also appeared frequently before the Legislature to testify on many of these bills.

The following summarizes some of the legislation that the OIP introduced, collaborated on, or monitored during the 2004 legislative session.

Social Security Numbers and Privacy Interest (HB 2674; Act 92)

This bill, which was signed into law, limits public access to social security numbers previously required to be disclosed as part of certified payroll records pursuant to section 92F-12(a)(9), HRS, and expressly instructs agencies to attach a significant privacy interest to social security numbers, thus limiting opportunities for identity theft.

Natural Energy Laboratory of Hawaii: Proprietary Information (HB 2142; Act 23)

This bill, which became Act 23, creates a new section in chapter 227D, HRS, which protects from public disclosure business trade secrets and other confidential proprietary information contained within records pertaining to tenants and prospective tenants of the Natural Energy Laboratory of Hawaii Authority ("NELHA"), notwithstanding chapter 92F, HRS, or any other law to the contrary.



This law allows NELHA to segregate information contained in business plans attached to leases of state land prior to public disclosure, but does not apply to leases of state land themselves or to other information required to be public by section 92F-12(a)(5), HRS. The OIP worked with NELHA on appropriate language, and supported the bill before the Legislature.

Office of Information Practices: Civil Enforcement (HB 2335/SB 2810)

These bills would have made clear that the OIP has the authority to civilly enforce the Sunshine Law. They would also have made the OIP's powers and duties under the Sunshine Law more akin to its powers and duties under the UIPA. Both bills died before crossover.

Site Inspections by Sunshine Boards (HB 2336)

A site inspection bill was introduced as part of the administration's package to authorize boards and commissions subject to the Sunshine Law to conduct on-site inspections of physical facilities and locations which relate to a matter under a board's supervision, control, jurisdiction or advisory power without the public's participation in certain limited circumstances.

The bill would have required that the board specify its reasons for holding the on-site inspection and the reasons that the public participation is impractical, that the OIP concur with those reasons, and that procedural safeguards such as notice, videotaping, and minute-taking be required. No decisions would be permitted to be made at the meeting.

The bill was passed out of its first committee but did not receive further hearings. The companion, SB 2811, was not heard by the Senate.

Sunshine Law: Teleconferencing (HB 2480/ SB 2955)

Section 92-2.5, HRS, currently allows boards to meet by videoconference, but requires that the meeting terminate if both audio and video communication cannot be maintained.

These bills would have allowed boards to continue a videoconference meeting if the video communication failed, provided that: (1) all visual aids required by, or brought to the meeting by, board members or the public, already had been provided to all meeting participants at all videoconference locations; or (2) participants were able to transmit visual aids to all other participants at all other videoconference locations by other means, such as facsimile, within fifteen minutes after the video communication failed.

If copies of visual aids are not available to all meeting participants at all videoconference locations, these bills would have required that the specific agenda items related to the visual aids not be discussed and be renoticed for a future meeting. Both bills died.

Non-Attending Sunshine Board Members (HB 1765; Act 234)

This bill, which was signed into law, provides for the expiration of the term of a member of any state board where the member, without valid excuse, fails to attend three consecutive meetings and the board is unable to constitute quorum due to the member's unexcused absences.

Hawaii Convention Center Records (SB 2395)

This bill would have exempted the Hawaii Convention Center from disclosure under the UIPA when a group renting the center requested that records relating to the rental not be disclosed.

The bill originally would have kept the records secret indefinitely, but based on concerns expressed by the OIP, the Hawaii Tourism Authority asked the legislature to limit the period of secrecy so that it would end 10 days after the conclusion of the Convention Center rental in question. The OIP did not support the bill, even as amended.

The Legislature passed the bill out with the more limited period of secrecy. The Governor, however, vetoed the bill based on concerns that the bill would unduly limit public access to Convention Center records about upcoming conventions.

Vexatious Requester (SB 3185)

This bill would have allowed an agency to ask the OIP to determine that a person was a vexatious requester. The agency would have the burden of proof to establish that the person's pattern of conduct met at least two of a list of factors.

If the OIP determined that a person was a vexatious requester, the bill would have allowed the OIP to impose restrictions on the person's use of the UIPA, so long as the restrictions were narrowly tailored to the abuses that the agency had proved.

The OIP supported the bill, which would have provided agencies a potential means to address the difficulties created in the few instances in which a requester genuinely has a pattern of abusing the processes created by the UIPA, to the detriment of both the agencies affected and other record requesters.

The Senate and House passed the bill in different forms, but the conference committee draft was rejected on the floor of the House.

Certain boards have complained that their jurisdiction overlaps with that of other boards, and the present law does not permit board members to attend the other board's meeting to discuss issues and coordinate the boards' efforts. Both bills died.



Permitted Interactions (HB 2334/ SB 2809)

These bills sought to clarify the interpretation of section 92-2.5(a), HRS, and would have allowed two members of a board to discuss official board business outside of a meeting.

In addition, the bill would have allowed less than the number of board members constituting a quorum to attend and participate in the meeting of another board or a public hearing of the legislature as long as, among other things, the board members reported to their board at their board's next meeting: (1) their attendance, and (2) the topics discussed.

Agency Public Reports

The UIPA requires all state and county agencies to “compile a public report describing the records it routinely uses or maintains using forms prescribed by the office of information practices.” Haw. Rev. Stat. § 92F-18(b) (1993).



These public reports are filed with the OIP and must be reviewed and updated annually. The OIP is directed to make these reports available for public inspection.

The Records Report System

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

From the beginning of 1994 when the first record report was added to the system up to July 1, 2004, state and county agencies have reported 33,544 records. See **Table 11**.



Records Report System

Status of Records Reported by Agencies: 2004 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	33,544*

* This total includes 30,147 “live” records that can be browsed by all users, and 3,397 records still being edited by agencies and accessible only to those agencies, as of July 1, 2004.

Table 11

Moving the RRS to the Internet

The RRS was developed as a Wang computer-based system. In 2003, the OIP worked with the Information and Communications Services Division of the Department of Accounting and General Services to migrate the RRS to the Internet, creating a system accessible to both government agencies and the public.

In January 2004, the OIP began meeting with state RRS department coordinators to initiate the updating process. The OIP also prepared new data entry forms and materials and posted them on the OIP website.

The RRS is now accessible on the Internet through the OIP's website. Agencies may access the system directly to enter and update the agencies' records data. County agencies are awaiting a cable connection to the system before they can update their reports. Agencies and the public may access the system to view the data and to create various reports. A guide on how to retrieve information and how to create reports is also available on the OIP's website.

Key Information: What's Public

The RRS requires agencies to enter, among other things, public access classifications for their records and to designate the agency official having control over each record. When a government agency receives a request for a record, it can use the RRS to make an initial determination as to public access to the record.

Agencies have reported 16% of their records as unconditionally confidential, with no public access permitted; 59% as accessible to the public in their entirety; and 21% in the category "confidential/conditional access." See **Chart 6**. In most cases, the OIP has not reviewed the access classifications.

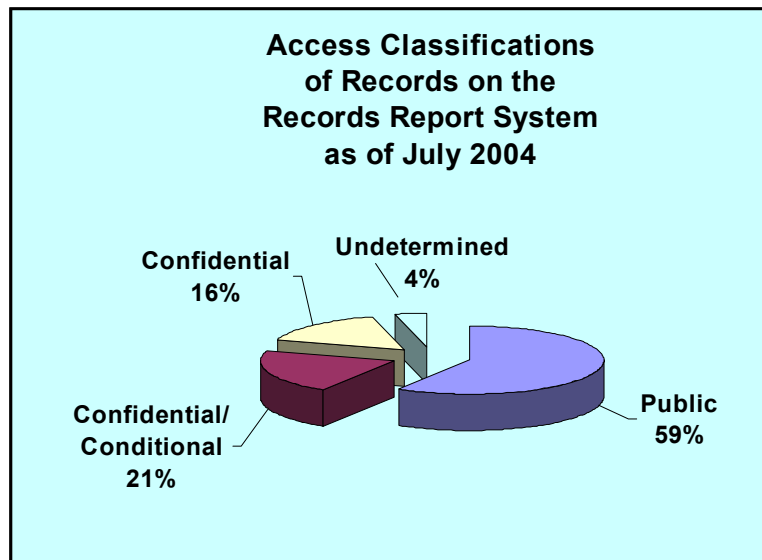


Chart 6

Most records in the "confidential/conditional access" category are accessible after the segregation of confidential information (14% of the total records), and the remaining records are accessible only to those persons, or under those conditions, described by specific statutes (7% of the total records).

The RRS only describes government records and information regarding their accessibility. It does not contain the actual records. Accordingly, the record reports contain no confidential information and are public in their entirety.



Education

Publications and Website

The OIP's publications and website play a vital role in the agency's ongoing efforts to inform the public and government agencies and boards about the UIPA, the Sunshine Law, and the work of the OIP.



OpenLine

In FY 2004, the OIP continued its traditional print publications, including the monthly *Openline* newsletter and the *Office of Information Practices Annual Report 2003*. In addition, the OIP continued to expand the website 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, boards and commissions, and libraries throughout the State.

Current and past issues of *Openline* are also available on the OIP's website. FY 2004 issues included: summaries of recently published OIP opinion letters; discussions on such topics as public employee salaries and the UIPA, executive meeting agendas, inter-agency sharing of records, and legislation affecting information practices; announcements on training sessions and new features on the OIP website; and a short guide to HIPAA rules and the UIPA.

Model Forms

The OIP has prepared, and makes available, model forms for use by agencies, boards, and members of the public.

To follow the procedures set forth in the OIP's rules for making and responding to record requests, the OIP has created two model forms. 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.”

To assist agencies in complying with the Sunshine Law, the OIP created the model form “Public Meeting Notice Checklist.”

The newest OIP model form is the “Request for Assistance to the Office of Information Practices,” for use by those requesters who have already made and been denied their request for government records.

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 as 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 §21-13, 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 BUSINESS 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 Disclosure: The record will be disclosed in increments. (The agency must attach a description of extenuating circumstances that support its intention to disclose incrementally. See §2-71-15 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 808-586-1809.

OP 2 (Rev. 9/12/01)

The OIP Website

The OIP website, at www.hawaii.gov/oip, has become the agency's primary means of publishing information. Given the OIP's reduced budget and consequently limited resources to implement training, the site plays a major role in educating and informing government agencies and citizens about access to state and county government records and meetings.

Visitors to the site can access, among other things, the following information and materials:

- the UIPA and the Sunshine Law statutes
- the OIP's administrative rules
- the OIP's current and past *Openline* newsletters
- the OIP's recent annual reports
- the model forms created by the OIP
- the OIP's formal opinion letters
- the summaries of the opinion letters
- the subject index for the opinion letters
- general guidance for commonly asked questions

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

Features

The website is updated weekly. For those unfamiliar with the OIP, the homepage gives a quick overview of the agency. The site features a menu on the left margin 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, an updated subject index, a summary of each letter, and the full text of each letter.

"Forms"

Visitors can view and print the model forms created by the OIP to help implement the UIPA, the Sunshine Law, and the OIP's administrative rules.

"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 answers to frequently asked questions from government agencies and boards and members of the public, including the following:

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. This section also includes announcements from the OIP.

“Related Links”

To expand a search, visit the growing page of links to related sites concerned with freedom of information and privacy protection.

“Reports”

The OIP’s annual reports are available here for viewing and printing, beginning with the annual report for FY 2000. Other reports available include reports to the State Legislature on the commercial use of personal information and on medical privacy. This is also the place to read about, and link to, the RRS.



The screenshot shows the homepage of the Office of Information Practices (OIP) on the eHawaiiGov website. The page features a navigation menu on the left with links to '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 in Hawaiian ('Aloha!'), and a description of the OIP's role in administering Hawaii's open records law. A large banner on the right reads 'Ensuring open government while protecting your privacy'. The footer contains links to 'eHawaiiGov Home', 'eHawaiiGov Terms of Use', and 'eHawaiiGov Privacy Policy', along with a copyright notice for 2002.

Annotations on the screenshot:

- link to the State's home-page: state government agencies and information about Hawaii (points to the eHawaiiGov logo)
- link to the State's many online services (points to the State Online Services button)
- link to important information about Hawaii (points to the Hawaii Information Link Index button)
- find out when the site was last updated (points to the 'Last updated April 23, 2003' text)
- main menu: link to laws, rules, opinions, forms, guidance, reports (points to the left-hand navigation menu)
- contact information (points to the 'Contact the OIP' link)



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 to assist government agencies in complying with the UIPA and the Sunshine Law.

Following the substantial budget cutback and staff reduction at the beginning of FY 1999, the OIP focused much of its educational and training efforts on the OIP website. For more information about this resource, see pages 52-53.

In spite of its limited budget, the OIP in FY 2004 expanded its training program to twenty sessions.

Boards and Commissions Training

In November 2003, the OIP gave its annual presentation on information practices and the Sunshine Law to new members of the State's boards and commissions.

UIPA Training

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

- Department of Commerce and Consumer Affairs: 'Olelo
- Department of Human Services: Med-Quest Division
- Office of the Auditor
- Hawaii County (Hilo agencies)
- Department of Business, Economic Development and Tourism: Small Business Regulatory Board
- Department of Commerce and Consumer Affairs: Cable Television Division
- City and County of Honolulu: Department of Parks and Recreation
- Department of the Attorney General: Land/Transportation Division
- City and County of Honolulu: Honolulu Police Department
- Department of Education

Sunshine Training

The OIP trained the following agencies on the Sunshine Law:

- Department of Land and Natural Resources: Board of Land and Natural Resources
- Department of Business, Economic Development and Tourism: Community-Based Economic Development Advisory Council
- City and County of Honolulu: Kahaluu Neighborhood Board
- Office of the Auditor
- Hawaii County (Hilo agencies)
- University of Hawaii: Board of Regents
- Department of Business, Economic Development and Tourism: Small Business Regulatory Board
- Department of Commerce and Consumer Affairs: Cable Television Division
- Department of Land and Natural Resources: Oahu Island Burial Council

