

Office of Information Practices

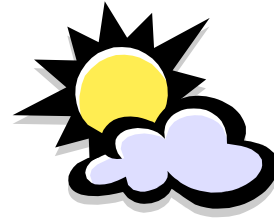
State of Hawaii

Annual Report 2011



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, 2010, to June 30, 2011.

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History



In 1988, the Legislature enacted the comprehensive Uniform Information Practices Act (Modified) (“UIPA”), to clarify and consolidate the State’s then existing laws relating to public records and individual privacy, and to better address the balance between the public’s interest in disclosure and the individual’s interest in privacy.

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

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

Public access to government records ... the confidential treatment of personal information provided to or maintained by the government ... access to information about oneself being kept by the government. These are issues which have been the subject of increasing debate over the years. And well such issues



Ensuring open government while protecting your privacy

should be debated as few go more to the heart of our democracy.

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

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

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

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

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

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

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

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

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

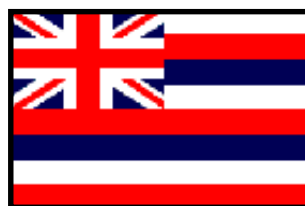
- (1) Promote the public interest in disclosure;
- (2) Provide for accurate, relevant, timely, and complete government records;

- (3) Enhance governmental accountability through a general policy of access to government records;

- (4) Make government accountable to individuals in the collection, use, and dissemination of information relating to them; and

- (5) Balance the individual privacy interest and the public access interest, allowing access unless it would constitute a clearly unwarranted invasion of personal privacy.

In 1988, the Office of Information Practices (OIP) was created by the UIPA to administer that statute. In 1998, OIP was given the additional responsibility of administering Hawaii's open meetings law, part I of chapter 92, HRS (the Sunshine Law), which had been previously administered by the Attorney General's office since its enactment in 1975.



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

OIP provides legal guidance and assistance under both the UIPA and Sunshine Law to the public as well as all state and county boards and agencies. Among other duties, OIP also provides guidance and recommendations on legislation that affects access to government records or board meetings. The executive summary provides an overview of OIP's work during the past fiscal year.



Executive Summary



The Office of Information Practices (OIP) administers Hawaii's open government laws: the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), requiring open access to government records, and the Sunshine Law, part I of chapter 92, Hawaii Revised Statutes, requiring open meetings.

OIP serves the public and the state and county government entities by providing assistance and legal guidance in the application of both laws. OIP also provides education and training in both laws, primarily to government boards and agencies. To resolve UIPA and Sunshine Law issues, OIP provides a free and informal process.

This annual report details OIP's activities for fiscal year 2011, which began on July 1, 2010, and ended on June 30, 2011. For most of FY 2010 and 2011, OIP was led by an acting director, who left in March 2011. On April 1, 2011, Cheryl Kakazu Park was appointed as OIP's director.

Legal Guidance

Each year, OIP receives hundreds of requests for assistance from members of the public, government employees, and government officials and board members.

In FY 2011, OIP received 822 requests for assistance. This number includes requests from the public and from government boards and agencies for general guidance regarding the application of, and compliance with, the UIPA and Sunshine Law; requests for assistance from the public in obtaining records from government agencies; requests from the public for investigations of actions and policies of agencies and boards for violations of the Sunshine Law, the UIPA, or OIP's administrative rules; requests for advisory opinions regarding the rights of individuals or the functions and responsibilities of agencies and

boards under the UIPA and the Sunshine Law; and requests for training under both laws.

Over 80% of the requests for assistance are fulfilled by OIP's "Attorney of the Day" (AOD) service. Over the past 12 years, OIP has received a total of 9,188 requests through its AOD service, an average of 765 per year. In FY 2011, OIP received 676 AOD requests.

The AOD service allows the public, agencies, and boards to receive general legal advice from an OIP staff attorney, usually within that same day. 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 required by the Sunshine Law.

Agencies often use the service to assist them in responding to record requests. For example, agencies will consult with OIP as to whether the agency has the discretion to redact information about an individual in a record to be disclosed to a third party to protect the privacy of the individual. Boards also frequently use the service to assist them in navigating Sunshine Law requirements.

Opinions

OIP resolves complaints made under the Sunshine Law or the UIPA. When a complaint is filed, OIP will generally investigate the complaint and may issue a formal or informal (memorandum) opinion. OIP publishes and distributes these opinions to provide useful general guidance to the public and to government boards and agencies. The full text of OIP's formal opinions, summaries of OIP's memorandum opinions, and a subject matter index of opinions may be found on OIP's website at www.hawaii.gov/oip.

Education

OIP provides education to the public and to government agencies and boards regarding the UIPA and the Sunshine Law.

Each year, OIP presents numerous live training sessions throughout the state to government agencies and boards. In FY 2011, OIP conducted 12 training workshops.

In June 2011, OIP presented its first-ever course providing continuing legal education (CLE) credits for attorneys. For next fiscal year, OIP plans to offer additional CLE courses for attorneys, as well as online video training for all persons interested in learning about Hawaii's open government laws. These new training opportunities will leverage OIP's small staff, will provide training to an expanded group of people, and will free OIP's staff attorneys to provide specialized workshops and do other legal work.

In addition to in-person and online training, OIP's publications play a vital role in the agency's ongoing efforts to inform the public and government agencies about the UIPA, the Sunshine Law, and the work of OIP. In FY 2011, OIP continued its traditional print publications, including the *OpenLine* newsletter and *Office of Information Practices Annual Report 2010*, which can also be found on OIP's website at www.hawaii.gov/oip. In June 2011, OIP also updated its online *Open Meetings Guide* to the Sunshine Law, created a new *Open Meetings Guide* specifically for neighborhood boards, and revised its *Open Records Guide*. OIP's guides are intended primarily to provide an overall understanding of the UIPA and Sunshine Laws and a step-by-step application of the laws.

For the latest in government news and a wealth of free educational resources, including OIP's opinions, guides, and training, please go to OIP's website at www.hawaii.gov/oip.

Other Duties

OIP serves as a resource for government agencies in reviewing their procedures under the UIPA and the Sunshine Law. OIP also continually receives comment on both laws regarding their implementation and makes recommendations for legislative changes to clarify areas that have created confusion in application, or to amend provisions that work counter to the legislative mandate of open government or that hinder government efficiency without advancing openness.

During the 2011 legislative session, OIP reviewed and monitored 180 bills and resolutions affecting government information practices, and testified on 35 of these measures.

Additionally, OIP monitors litigation in the courts that raise issues under the UIPA or the Sunshine Law or that challenge OIP's decisions, and may intervene in those cases. In FY 2011, OIP tracked one lawsuit involving President Barack Obama's birth certificate.

Records Report System

OIP is directed by statute to receive and make publicly available reports of records that are maintained by state and county agencies. These reports are maintained on the Records Report System (RRS), an online database which contains the titles of 29,612 government records that may be accessed by the public. OIP continually assists agencies in filing and updating their records reports. OIP has created a guide for the public to locate records, to retrieve information, and to generate reports from the RRS, which the public can access through OIP's website at www.hawaii.gov/oip.



Budget

OIP's budget allocation is the amount that it was authorized to use of the legislatively appropriated amount. In FY 2011, OIP's



total allocation was \$357,158, down from \$372,950 in FY 2010. OIP's personnel costs in FY 2011 were \$314,454 and operational costs were \$42,704. See **Figure 2** on page 9. Additional budget restrictions were imposed in FY 2011, in the amount of \$7,289.

OIP is authorized to have a total staff of 7.5 full-time equivalent (FTE) positions. In actuality, OIP has operated with only 6.5 FTE

positions because one of 3.5 staff attorney positions has been unfilled since FY 2010 due to budget restrictions.

OIP's largest budget year was in FY 1994, when the annual budget was \$827,537 (or \$1,261,530 when adjusted for inflation), and OIP had a staff of 15 positions. In FY 1998, the same year that OIP was charged with the additional responsibility of administering the Sunshine Law, the Legislature sharply reduced OIP's budget and eliminated three positions. Most recently in FY 2010, OIP's allocated budget (inflation adjusted) was roughly half of what it was in FY 1998.

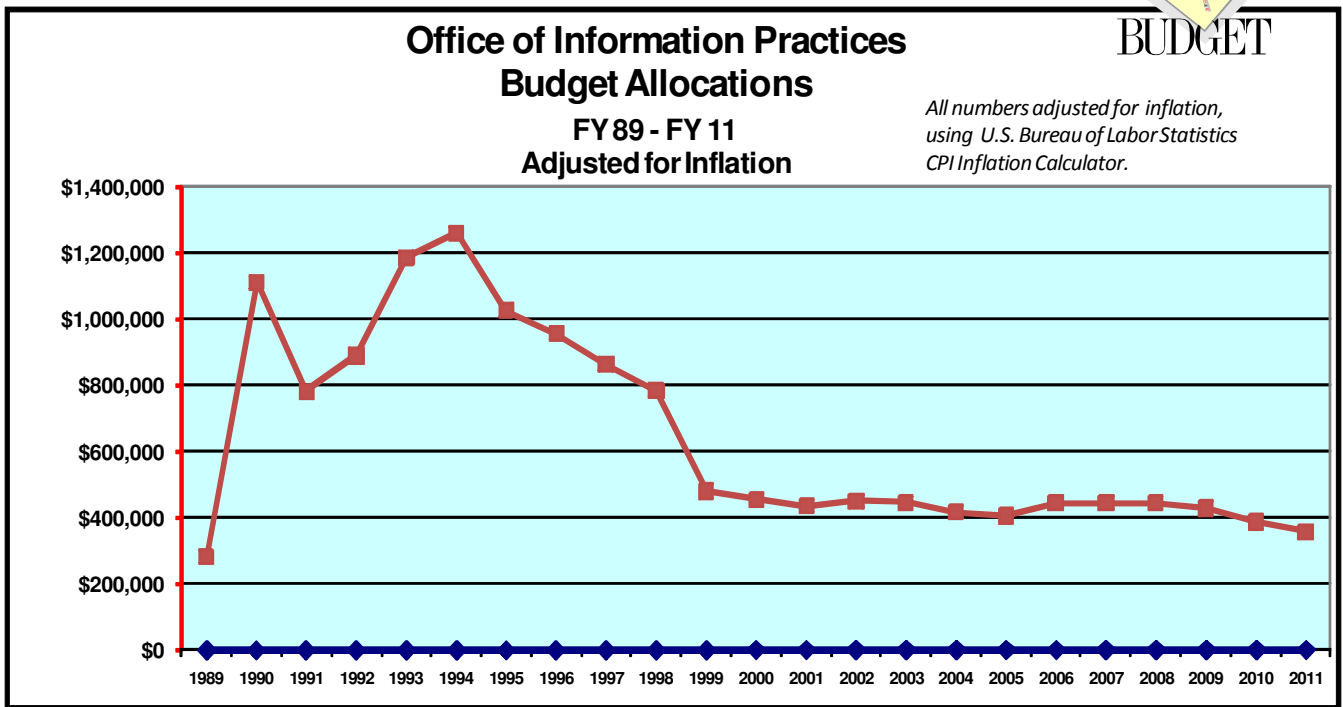


Figure 1



**Office of Information Practices
Budget FY 1989 to FY 2011**

Fiscal Year	Operational Expenses	Personnel	Total Allocation	Allocations Adjusted for Inflation	Approved Positions
FY 11	42,704	314,454	357,158	357,158	7.5
FY 10	19,208	353,742	372,950	386,403	7.5
FY 09	27,443	379,117	406,560	428,135	7.5
FY 08	45,220	377,487	422,707	443,555	7.5
FY 07	32,686	374,008	406,694	443,138	7.5
FY 06	52,592	342,894	395,486	443,199	7
FY 05	40,966	309,249	350,215	405,126	7
FY 04	39,039	308,664	347,703	415,848	7
FY 03	38,179	323,823	362,002	444,479	8
FY 02	38,179	320,278	358,457	450,157	8
FY 01	38,179	302,735	340,914	434,895	8
FY 00	37,991	308,736	346,727	454,896	8
FY 99	45,768	308,736	354,504	480,733	8
FY 98	119,214	446,856	566,070	784,586	8
FY 97	154,424	458,882	613,306	863,297	11
FY 96	171,524	492,882	664,406	956,685	12
FY 95	171,524	520,020	692,544	1,026,646	15
FY 94	249,024	578,513	827,537	1,261,530	15
FY 93	248,934	510,060	758,994	1,186,667	15
FY 92	167,964	385,338	553,302	890,970	10
FY 91	169,685	302,080	471,765	782,541	10
FY 90	417,057	226,575	643,632	1,112,552	10
FY 89	70,000	86,000	156,000	284,224	4

Figure 2



Legal Assistance, Guidance and Rulings



All branches and levels of government seek OIP's assistance. Each year, OIP receives hundreds of requests for assistance from members of the public, government employees and officials, volunteer board members, and the executive, legislative, and judicial branches, as well as all counties, including neighborhood boards.

In FY 2011, OIP received a total of 822 formal and informal requests for assistance, including 676 Attorney of the Day (AOD) requests regarding the application of, and compliance with, the UIPA and Sunshine Law. See **Figure 4**. Of the 822 total requests, 643 related to the UIPA and 179 related to the Sunshine Law. This section details the UIPA requests. Sunshine Law requests are explained later in this report, beginning at page 29.

Formal Requests

Of the total 822 requests, 646 were considered informal requests and 146 were considered formal requests. Formal requests are categorized as follows (see **Figure 3**).

Formal Requests FY 2011	
<i>Type of Request</i>	<i>Number of Requests</i>
Request for Assistance	37
Request for Advisory Opinion	4
UIPA Appeals	33
Sunshine Law Investigations/ Requests for Opinion	10
Inquiries	51
Training	11
Total Formal Requests	146

Figure 3

Requests for Assistance

OIP may be asked by the public for assistance in obtaining a response from an agency to a record request. In FY 2011, OIP received 37 such requests for assistance.

In these cases, OIP staff attorneys will generally contact the agency to determine the status of the request, provide the agency with guidance as to the proper response required, and in appropriate instances, will attempt to facilitate disclosure of the records.

Requests for Legal Opinions

Upon request, OIP provides written advisory opinions on UIPA issues in cases that are not pending or may not yet have occurred. In FY 2011, OIP received 4 requests for UIPA advisory opinions.

UIPA Appeals

OIP provides written opinions on appeals by requesters who have been denied access to all or part of a record by an agency. In FY 2011, OIP received 33 UIPA appeals.

Sunshine Law Investigations/ Requests for Opinions

Sunshine Law requests for investigations and opinions concerning open meeting issues are separately tabulated. In FY 2011, OIP received 10 Sunshine Law complaints and requests. See the Sunshine Law Report, beginning on page 29.

Inquiries

OIP may respond to general inquiries, which often include simple legal questions, by correspondence. In FY 2011, OIP received 51 such inquiries.

Types of Opinions and Rulings Issued

In responding to requests for advisory opinions, Sunshine Law complaints, and UIPA appeals, OIP issues opinions that it designates as either formal or informal opinions.

Formal opinions address issues that are novel or controversial, that require complex legal analysis, or that involve specific records. Formal opinions are used by OIP as precedent for its later opinions and are “published,” i.e., distributed to government agencies and other persons or entities requesting copies, such as:

- State and county agencies and boards;
- WestLaw;
- Michie, for annotation of the Hawaii Revised Statutes;
- Persons or entities on OIP’s mailing list.

The full text of formal opinions are also available on OIP’s website at www.hawaii.gov/oip. Summaries of the formal opinions are published in OIP’s *OpenLine* newsletter and on OIP’s website. The website also contains a subject-matter index for the formal opinions.

Informal opinions, also known as memorandum opinions, are public records that are sent to the parties involved but are not published for distribution. Summaries of informal opinions, however, are available on OIP’s website and found in this report beginning on page 17.

Because informal opinions address issues that have already been more fully addressed in formal opinions, or because their factual basis limits their general applicability, the informal opinions generally provide less detailed legal discussion and are not considered to be agency precedents.

In an effort to provide more timely responses, in FY 2010, OIP began issuing summary dispositions, with abbreviated legal discussion, in those cases where it believes appropriate.



AOD Requests

Fiscal Year	Total	Public	Government Agencies
FY 11	676	187	489
FY 10	719	207	512
FY 09	798	186	612
FY 08	779	255	524
FY 07	772	201	571
FY 06	720	222	498
FY 05	711	269	442
FY 04	824	320	504
FY 03	808	371	437
FY 02	696	306	390
FY 01	830	469	361
FY 00	874	424	450

Figure 4

Informal Requests

Attorney of the Day Service

The vast majority (82%) of the requests for assistance are informally handled through OIP’s “Attorney of the Day” (AOD) service. The AOD service allows the public, agencies, and boards to receive general legal advice from an OIP staff attorney, usually within that same day. Over the past 12 years, OIP has received a total of 9,188 requests through its AOD service, an average of 765 requests per year. See **Figure 4**.

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 required by the Sunshine Law.

Agencies often use the service to assist them in responding to record requests. This may include questions on the proper method to respond to requests or on specific information that may be redacted from records under the UIPA’s exceptions. Boards also frequently use the service to assist them in navigating Sunshine Law requirements.

In FY 2011, OIP received 676 inquiries through its AOD service. Roughly seven out of ten inquiries came from government boards and agencies seeking guidance to comply with the law. Some 489 (72%) of the AOD requests came from government boards and agencies, and 187 requests (28%) came from the public. See **Figure 5**.

Of the 187 public requests, 122 (65%) came from private individuals, 37 (20%) from media, 14 (8%) from private attorneys, 6 (3%) from businesses, 4 (2%) from public interest groups, and 4 (2%) from other sources. See **Figure 6** and **Figure 7**.

Types of Callers	Number of Inquiries
Private Individual	122
Media	37
Private Attorney	14
Business	6
Public Interest Group	4
Other	4
TOTAL	187

Figure 6

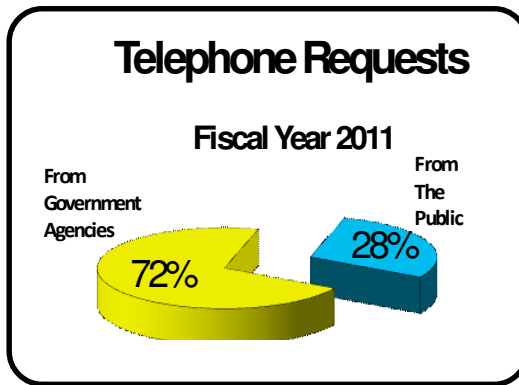


Figure 5

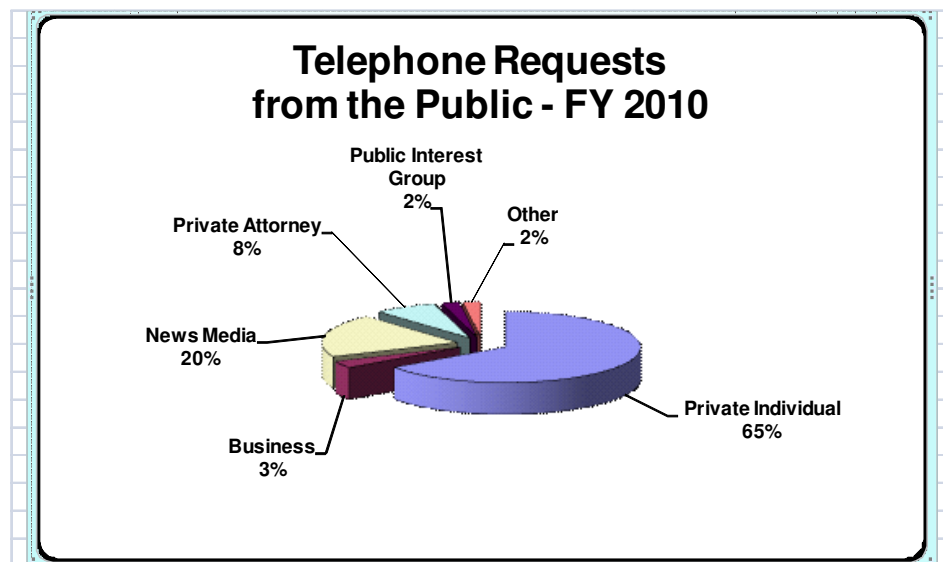


Figure 7

UIPA AOD Requests

In FY 2011, OIP received 349 AOD requests concerning the UIPA. These numbers reflect calls both from the public and from the agencies themselves. For a summary of AOD calls concerning the Sunshine Law, please see the Sunshine Law Report beginning on page 29.

State Agencies and Branches

In FY 2011, OIP received a total of 269 AOD inquiries about state agencies. About 40% of

these requests concerned three state agencies: the Department of Health (48), the Department of Commerce and Consumer Affairs (34), and the Department of Land and Natural Resources (25). As shown below, about 42% of the requests were made by the agencies themselves seeking guidance on compliance with the UIPA.

OIP also received 4 inquiries concerning the legislative branch and 13 inquiries concerning the judicial branch. See **Figure 8** below.



**Calls to OIP About
State Government Agencies
FY 2011**

Executive Branch Department	Requests by Agency	Requests by Public	Total Requests
Health	20	28	48
Commerce and Consumer Affairs	23	11	34
Land and Natural Resources	9	16	25
Transportation	8	11	19
Business, Econ Development, & Tourism	8	6	14
Lieutenant Governor (including OIP)	0	14	14
Labor and Industrial Relations	1	12	13
Public Safety	10	3	13
Education (including Public Libraries)	3	8	11
Agriculture	3	5	8
Accounting and General Services	4	3	7
University of Hawaii System	2	5	7
Attorney General	0	6	6
Human Resources Development	4	2	6
Human Services	2	4	6
Budget and Finance	4	1	5
Tax	2	3	5
Governor	0	3	3
Hawaiian Home Lands	1	1	2
Defense	0	0	0
TOTAL EXECUTIVE	104	142	246
TOTAL LEGISLATURE	3	1	4
TOTAL JUDICIARY	6	7	13
Office of Hawaiian Affairs	2	3	5
Unnamed Agency	0	1	1
TOTAL STATE AGENCIES	115	154	269

Figure 8

County Agencies

In FY 2011, OIP received 68 AOD inquiries regarding county agencies and boards. Of these, 46 inquiries (67%) came from the public.

Of the 68 AOD inquiries, 40 inquiries concerned agencies in the City and County of Honolulu, up from 35 in the previous year. See **Figure 9**. As shown below, about one-third of the requests were made by the agencies themselves seeking guidance on compliance with the UIPA.

Requests regarding the Honolulu Police Department remained at 13, the same as the previous year, including 4 requests from the agency seeking guidance on compliance with the UIPA.

OIP received 28 inquiries regarding neighbor island county agencies and boards: Hawaii County (12), Maui County (5), and Kauai County (11). Requests regarding the Hawaii Police Department went down from 10 in FY 2010 to 2 in FY 2011. See **Figures 10-12**.



**Calls to OIP About
City and County of Honolulu
Government Agencies - FY 2011**

Department	Requests by Agency	Requests by Public	Total Requests
Police	4	9	13
Budget and Fiscal Services	3	5	8
City Council	1	1	2
Parks and Recreation	2	2	4
Corporation Counsel	0	1	1
Transportation Services	0	1	1
Board of Water Supply	1	2	3
Environmental Services	0	1	1
Design and Construction	0	1	1
Planning and Permitting	0	1	1
Liquor Commission	1	0	1
Neighborhood Commission/ Neighborhood Boards	1	1	2
Prosecuting Attorney	0	2	2
TOTAL	13	27	40

Figure 9



**Calls to OIP About
Hawaii County
Government Agencies - FY 2011**

Department	Requests by Agency	Requests by Public	Total Requests
Prosecuting Attorney	3	1	4
Public Works	1	2	3
Police	0	2	2
Corporation Counsel	0	1	1
County Council	0	1	1
Unnamed Agency	0	1	1
TOTAL	4	8	12

Figure 10



**Calls to OIP About
Kauai County
Government Agencies - FY 2011**

Department	Requests by Agency	Requests by Public	Total Requests
County Council	0	2	2
County Attorney	1	0	1
Finance	1	0	1
Fire	0	1	1
Water	0	1	1
Unnamed Agency	2	3	5
TOTAL	4	7	11

Figure 11



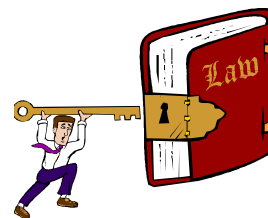
**Calls to OIP About
Maui County
Government Agencies - FY 2011**

Department	Requests by Agency	Requests by Public	Total Requests
Corporation Counsel	0	2	2
County Council	1	0	1
Fire Control	0	1	1
Office of the Mayor	0	1	1
TOTAL	1	4	5

Figure 12



Legal Guidance and Rulings



UIPA Advisory Opinions

In response to requests made for advisory opinions under the UIPA, OIP issued 16 memorandum opinions in FY 2011. The following are summaries of these opinions.

Unemployment Insurance Benefits Records

Requester asked whether the Employment Security Appeals Referees' Office, Department of Labor and Industrial Relations (DLIR), properly denied his request under part III of the UIPA for copies of documents submitted by his employer (Employer's Records) in its request to reopen the appeals officer's decision on Requester's claim for unemployment insurance benefits.

OIP found that DLIR may properly withhold the Employer's Records from Requester under HRS § 383-95(a) and HRS § 92F-22(5).

Disclosure of information obtained from an employer or employee pursuant to administration of HRS chapter 383, Hawaii Employment Security Law, is governed by HRS § 383-95(a).

DLIR must hold information obtained from an employer pursuant to chapter 383 confidential, except that such information must be supplied to the claimant "to the extent necessary for the proper presentation of the claimant's claim in any proceeding" under that chapter. HRS § 383-95(a).

Thus, absent any proceeding on a claimant's claim, DLIR may withhold from the claimant information received from an employer based upon the UIPA's exemption to disclosure for

records "required to be withheld from the individual to whom it pertains by statute." HRS § 92F-22(5).

DLIR's July 1 letter to Requester stated that access was being denied because "the employer's request to reopen was denied, by decision dated June 21, 2010, and there is no evidence the employer further appealed the decision in Circuit Court[.]"

Absent any facts asserted by Requester that presented a basis for disclosure under HRS § 383-95(a), OIP concluded that DLIR's response was proper under the UIPA. [UIPA Memo 11-1]

Procurement Documents

Requester asked OIP whether the Department of Public Safety (PSD) properly denied Requester's request under the UIPA for: 1) the "References" section of a technical proposal submitted for Invitation for Bids No. PSD 10-Ned-01 (IFB) by bidder, NDCHC Corporation (NDCHC) ("References Section"); and 2) the initial bids and technical proposals submitted by bidders on this same IFB ("Initial Bids") prior to amendment of the IFB on September 3, 2009.

OIP found that PSD must disclose the References Section, but properly withheld the Initial Bids.

Based upon OIP's *in camera* review, OIP found that the References Section lists three state and federal governmental entities as references and gives summary descriptions of NDCHC's work performed for these

entities, and that this information does not fall under an exception to disclosure under HRS § 92F-13, with the possible exception of direct contact information for the governmental entities' contact persons, if any, that could be withheld under the UIPA's "frustration" exception. HRS § 92F-13(3).

Regarding the Initial Bids, under the Hawaii Public Procurement Code, HRS chapter 103D, competitive sealed bids under HRS § 103D-302 become public upon their official public opening at the time and place designated in the invitation for bids. HRS § 103D-302(d). Under this Code provision, OIP believes that the sealed bids are confidential unless and until they are officially opened and thus, the Initial Bids that were not opened are exempt from public disclosure. The fact that the Initial Bids remained in the hands of PSD instead of being properly returned to the respective bidders does not change the status of these bids. HRS § 92F-13(3) and -13(4). [UIPA Memo 11-2]

Disclosure of Employee Names, Titles and Salaries

Corporation Counsel asked OIP whether the City and County of Honolulu must disclose the names of all city employees in conjunction with each employee's respective title and salary or salary range in response to a request made under the UIPA.

OIP found that the UIPA requires the City to disclose the name, title and salary (or salary range for covered employees) for all City employees, except present or former undercover law enforcement officers.

The City raised a variety of privacy and frustration concerns over the requested disclosure. Although there may be legitimate arguments that identifiable salary information is the type of information that would usually fall under the UIPA's privacy and frustration exceptions, OIP was constrained to find that those arguments could not be considered

because of the specific statutory requirement that this information be disclosed under § 92F-12 without consideration of the exceptions to disclosure under HRS § 92F-13.

The City also asked what authority requires the City to create a roster of its employees given the statement in HRS § 92F-12(a)(14) that it does not require the creation of a roster of employees. If the City does not maintain a "roster," then one need not be created in order to respond to the request made. However, HRS § 92F-11(c) requires an agency to compile a specific list of information requested if it is "readily retrievable." See OIP Op. Ltr. No. 90-35.

Lastly, the City sought guidance regarding disclosure of the identities of certain law enforcement personnel in light of the exception provided in HRS § 92F-12(a)(14), for "present or former employees involved in an undercover capacity in a law enforcement agency." Specifically, the City has asked for guidance concerning law enforcement employees who are not currently performing undercover activities but may be involved in undercover activities in the future.

OIP found that a plain and narrow reading of the exception for "present or former employees involved in an undercover capacity" limits withholding to those law enforcement employees who are, or were, engaged in an undercover law enforcement capacity. Without more specific factual justification, OIP did not read this language to include law enforcement employees who could potentially receive an undercover assignment at some future date. [UIPA Memo 11-3]

Rules Projects and Records Between DOTAX and Legislature

Requester asked whether the Department of Taxation, State of Hawaii (DOTAX), properly denied his request under part II of the UIPA

for (1) all documents relating to active rules projects, and (2) documents from DOTAX to specified committees and members of the Hawaii State Legislature relating to specific legislation.

OIP generally found that DOTAX's stated basis for withholding all draft rules and other internal materials relating to pending administrative rules projects under HRS § 92F-13(3) is proper.

OIP also found that DOTAX cannot withhold the records sent to the Legislature under HRS § 92F-13(5), which applies only to records maintained by the Legislature's committees and members, not a third party agency. Further, DOTAX had not presented a factual basis for application of the deliberative process privilege to those same records to justify withholding under HRS § 92F-13(3). [*UIPA Memo 11-4*]

Microorganism Names

Requester asked whether the Hawaii Department of Agriculture (DOA) properly denied a request under part II of the UIPA for approved import permits for import of restricted microorganisms (Import Permits). The DOA disclosed the permits in redacted form, and Requester specifically challenged the redaction of several virus names.

DOA, as the agency responding to the request, was prepared to disclose the Import Permits, including the identities of all microorganisms listed in the permits. However, DOA first contacted the University of Hawaii (UH) and other permittees prior to disclosing the permits to determine whether the permittees considered information about laboratory locations to be confidential under the UIPA. In response, UH asked DOA to withhold not only the laboratory location information, but also the identities of three viruses. DOA withheld the information at UH's request and it was UH, rather than DOA, that

argued against disclosure of the information in response to Requester's appeal.

OIP found that UH had not met its burden to establish that disclosure of the virus identities would frustrate a legitimate governmental function by either disclosing information whose disclosure by federal agencies is prohibited by federal law or by preventing UH from ensuring that the viruses are handled safely. See HRS §§ 92F-13(3) and -15(c). Thus, the virus identities must be disclosed. [*UIPA Memo 11-5*]

Grant of Easement

Requester asked whether the Office of the County Attorney, County of Kauai properly responded to Requester's request for a copy of a Grant of Easement agreement (the Agreement) between Wai'oli Corporation and the County of Kauai under part II of the UIPA.

An agency may generally withhold a draft agreement under the UIPA, but when doing so the agency must still acknowledge that the draft agreement exists and state the legal basis for its denial. HRS § 92F-13(3); HAR §§ 2-71-13(b) and -(14)(b). OIP found that the County Attorney's response to Requester's written request, which was to deny that it had any records responsive to the request, did not comply with OIP's administrative rules promulgated under the UIPA. HRS § 92F-42(12); HAR § 2-71-13(b) and -(14)(b). [*UIPA Memo 11-6*]

Vital Records

Requester asked whether the Office of Health Statistics, Department of Health (DOH), properly denied Requester's request for a certified copy of the Certificate of Live Birth for Barack Hussein Obama II (Obama Birth Certificate) under part II of the UIPA.

Requester asked for a copy of the Obama birth certificate and cited the provision of Hawaii's vital statistics law that makes vital records confidential, but permits copies to be provided where DOH is satisfied that the requester has a direct and tangible interest in the record, such as "a person having a common ancestor with the registrant." HRS § 338-18(b)(5). The Requester claimed a common ancestor of either Noah or Adam from Biblical reference or the most recent common ancestor (MRCA) from scientific theory. DOH denied access, applying HRS § 338-18(b)(5) to limit common ancestors to those shown by verifiable vital records, and rejecting a construction that included all of humankind.

OIP found that DOH's withholding was proper under HRS § 338-18(b)(5) and HRS § 92F-13(4). See HRS § 1-15(3) (under Hawaii law, every construction of the law "which leads to an absurdity shall be rejected."). [UIPA Memo 11-7]

Personnel Records

Requester asked whether the Department of Human Resources Development (DHRD) must disclose an employee evaluation and other personnel records under part II of the UIPA.

Environment Hawaii, a monthly newsletter, made a UIPA request to DHRD for a letter dated February 23, 2010, and its attachments. The letter is from a state employee to DHRD, expressing concerns regarding the handling of an internal complaint he made arising out of a suspension by his employing agency, and the attachments that are at issue are an employment evaluation and a memorandum regarding an employment issue.

DHRD denied Environment Hawaii's request as to the letter itself and the two attached personnel records based on the UIPA's privacy exception, § 92F-13(1), HRS, and

asked OIP whether its denial was justified under the UIPA.

OIP concluded that under the UIPA's privacy exception, § 92F-13(1), HRS, DHRD properly withheld the employee evaluation and memorandum that were attached to the February 23 letter. However, the letter itself should have been partially disclosed, with redactions to protect the employee's privacy interest in the underlying employment matters. [UIPA Memo 11-8]

OHA Employee Salary Information

The Office of Hawaiian Affairs (OHA) asked whether it must disclose the names, titles, and salaries of all OHA employees (Salary Information) in response to a request made under part II of the UIPA.

OHA asked for guidance in light of OHA's unique funding, which results in its employees' salaries being paid either fully or primarily with funds derived from the public land trust described in HRS § 10-3. OHA argued that these monies from receipts derived from ceded lands flow directly to OHA, do not belong to the State, and thus are not public funds. OHA thus more specifically asked whether its employees whose salaries are paid in full or in part with these trust funds, i.e., not "public funds," are considered "public employees" for purposes of the UIPA's disclosure requirements.

The UIPA requires an agency to disclose the names, titles and salaries (or salary range for covered employees) for all present or former officers or "employees of the agency," except present or former undercover law enforcement personnel. HRS § 92F-12(a)(14). OIP found that the phrase "employees of the agency" is not ambiguous, and that its common and ordinary meaning includes all individuals employed by the agency without regard to

what funds are used to pay their salaries. Moreover, this meaning is consistent with the purposes and policies of the UIPA. See HRS § 92F-2.

OIP thus found that a plain reading of HRS § 92F-12(a)(14) provided no basis to differentiate among various agency employees based upon whether or not their salaries are paid by their employing agency from general funds. [UIPA Memo 11-9]

AG Opinion Issued to BLNR

Requester asked whether the Office of the Attorney General (the AG) properly denied Requester's request under part II of the UIPA for a copy of an AG opinion issued to the Board of Land and Natural Resources concerning the transfer of ownership of a mooring permit by a commercial fishing corporation.

OIP found that the denial was proper under the UIPA. A review of the opinion makes clear that, in response to requester's threatened lawsuit, the AG, serving as the Board's legal adviser, was providing its advice and counsel to the Board, its client, regarding interpretation and application of the law governing permit transfers. Accordingly, OIP found that the AG opinion may be withheld under HRS § 92F-13(2) as attorney work product and HRS § 92F-13(4) as a record that is protected by law under the attorney-client privilege provided under Rule 503 of the Hawaii Rules of Evidence, which is codified at HRS § 626-1. [UIPA Memo 11-10]

Permittee Passenger Count Information

Requester asked whether the Department of Land & Natural Resources (DLNR) may withhold passenger count information received from permittees holding Marine Life Conservation District Use Permits for:

Commercial Activities in the Molokini Shoal Marine Life Conservation District (Molokini Use Permit) under the UIPA's frustration exception as confidential business information (CBI).

An agency may withhold CBI under the frustration exception. HRS § 92F-13-3. As a threshold matter, however, that information must in fact be confidential. See generally OIP Op. Ltr. No. 05-13 at 3-4 (to qualify for the frustration exception as CBI, information must not be public already or be of a kind that would customarily not be released to the public by the person from whom it was obtained).

Because the daily passenger count information may be readily witnessed in a public space, OIP found that this information reported to DLNR would not qualify as CBI and thus must be disclosed under the UIPA. [UIPA Memo 11-11]

Condominium Association Complaints

Requester asked whether the Regulated Industries Complaints Office (RICO) properly denied Requester's request for disclosure of the numbers of complaints over the past decade regarding condominium Association of Apartment Owners (AOAOs) and time shares for which RICO took these actions: (1) intake; (2) investigation; (3) contact with subjects of complaints; (4) assignment of case numbers; and (5) finding of violation, as well as records about any system for evaluating RICO's handling of these complaints.

OIP found that because RICO's electronic filing system does not contain the requested information and compilation of the information would require a manual search of hundreds of case files, the information is not readily retrievable and RICO is not required to prepare compilations or summaries of this information in order to respond to this request. Under the UIPA, an agency is not required to

compile data in response to a UIPA request unless it is “readily retrievable in the form requested.” HRS § 92F-11(c). [UIPA Memo 11-12]

Detailed Implementation Plans

Requester has asked whether the Charter School Review Panel (CSRP) properly denied Requester’s request for Detailed Implementation Plans (DIP) under part II of the UIPA.

OIP found that the majority of the DIPs should have been disclosed. However, based on the UIPA’s frustration exception, CSRP could properly withhold the figures in the expense portion of each DIP’s proposed budget and, where applicable, a figure such as “fund balance” that, when combined with the income portion of the budget, would reveal the amount of the expenses.

CSRP could also withhold personal contact information of an individual not listed as the applicant school’s primary contact, under the UIPA’s privacy exception.

Finally, where disclosure of a non-primary contact’s direct phone line or e-mail at work would frustrate the CSRP’s ability to obtain such contact information, CSRP could withhold the non-primary contact’s direct work contact information. [UIPA Memo 11-13]

Complaint Files

Requester asked whether the Office of the Ombudsman (Ombudsman) properly denied Requester’s request under part III of the UIPA for case files pertaining to complaints he had filed with that office.

OIP found that the UIPA allowed the Ombudsman to withhold the requested case files in order to maintain secrecy regarding its

investigations as required by statute. HRS §§ 92F-13(4) and -22(5); HRS § 96-9(b). [UIPA Memo 11-14]

Attorneys’ Invoices

Requester asked whether the University of Hawaii (UH) properly denied Requester’s request for disclosure of attorneys’ invoices to UH (Invoices) under part II of the UIPA.

OIP found that UH must disclose the Invoices after redacting information that is protected under one or more of the UIPA exceptions. Specifically, UH may redact information revealing privileged attorney-client communications and attorney work-product that are exempt under one or more UIPA exceptions, and may also redact individually identifiable information about employees that falls under the UIPA’s “clearly unwarranted invasion of personal privacy” exception. [UIPA Memo 11-15]

Unable to Locate Records

Requester asked whether the Office of the Mayor, County of Hawaii, properly denied Requester’s request for a 26-page fax under the UIPA. He had requested copies of the fax, a telephone message slip, and a phone log, which were all dated June 4, 2009. Requester was provided copies of the message slip and phone log, but was unable to locate the 26-page fax.

The Office of the Mayor, County of Hawaii, made a reasonable search for the 26-page fax because it made a search reasonably calculated to uncover all relevant documents. Therefore, the Office of the Mayor had complied with the UIPA. [UIPA Memo 11-16]



General Legal Assistance and Guidance Under the UIPA and Sunshine Law



The following summaries are a sampling of the types of general legal guidance provided by OIP through the Attorney of the Day service.

General Excise Tax and Federal Taxpayer ID Numbers

An agency asked whether businesses' General Excise Tax identification number and Federal Taxpayer identification number should be redacted when providing records in response to a request. Another agency asked whether vendor codes for state vendors should be redacted, given that they had been told that the Department of Accounting and General Services (DAGS) did not consider them confidential.

For both inquiries, OIP responded that the only potential basis for withholding a business's tax identification number or vendor code would be the frustration exception, since a business does not have a privacy interest the way an individual might. To redact based on frustration, an agency would have to make the case that disclosure was likely to result in some form of harm such as identity theft. OIP is aware that agencies have generally concluded that business tax identification numbers, which are often publicly disclosed in any case, are not susceptible to use for identity theft. Similarly, in the case of the vendor codes, DAGS evidently did not believe disclosure of vendor codes would frustrate its legitimate functions.

So it appears unlikely that businesses' tax identification numbers or state vendor codes would fall within the frustration exception; however, since that information has not been the subject of an OIP opinion, an agency that had a good faith argument that disclosure would be harmful could still withhold on that basis. (This advice requiring disclosure does not apply to an individual's social security number, even when used as tax identification for a business purpose.)

Mailing Meeting Notices Six Days Before Meeting Date

An individual is on a Sunshine board's list of people who have requested notice of meetings by mail. For an upcoming meeting, the board sent its notice with a postage machine stamp date of five days before the meeting date. Was that valid notice under the law?

OIP advised that for the people on its mailing list, a board must send notice by mail at least six days before the meeting date. Thus, he or another member of the public who received similarly late notice would have a basis under the Sunshine Law to challenge validity of the meeting based on late notice. However, since the individual did in fact get the notice in time to hear of and prepare for the meeting, he might choose to just warn the board that its notice was untimely so that it could correct the problem for future meetings.

Executive Meeting Minutes

A board asked what must be included in the minutes of an executive meeting. OIP advised that executive meeting minutes must include the same information and level of detail as regular public meeting minutes; the difference is that the executive meeting minutes are not automatically public 30 days after the meeting.

Continuing Board Meetings

A board was scheduling a meeting that was anticipated to possibly run so long that it would need to be continued the next day. The board asked whether it would be better to schedule two meetings, one for each day, or to schedule one meeting and continue it.

OIP advised that it would be better to schedule one meeting and continue it. The Sunshine Law allows a meeting to be continued to a reasonable day and time, which a board can do by announcing the date, time, and place at which the meeting will continue before recessing. If the board noticed two meetings, then the board would have to hear agenda items only during the meeting day for which they were on the agenda, thus limiting its ability to take agenda items out of order or spend more time than anticipated on a particular item.

Approval of Minutes

A task force subject to the Sunshine Law was about to have its final meeting, at which it would vote on its final report to the Legislature and approve minutes of prior meetings. The task force asked how it could approve the minutes of its final meeting, given that there would not be another meeting at which it could do so.

OIP advised that the Sunshine Law does not require board approval of minutes; the law only requires that they exist, contain the minimum information specified in the law, and be made available within thirty days after the meeting. The minutes of the final meeting could thus be created and sent to the Legislature with the final report without the need for further board action to approve them.

Processing Requests for DVDs

An agency received a request for a copy of a DVD, and asked (1) whether it was required to make a copy as opposed to simply making the DVD available for viewing in its office, (2) what fees it could charge, and (3) whether it could require the requester to provide a blank DVD or a computer capable of burning a DVD.

OIP advised that the agency was required to make a copy, but could charge an appropriate fee for its cost of making the copy. If the agency had the capacity to copy the DVD in-house (for instance, if it had appropriate software and someone who knew how to use it), then the fee would likely be just the cost of a blank DVD. If the agency didn't have the capacity to copy it in-house, it could send it out to a third-party provider to be copied and pass on the cost of doing so. Either way, the cost of copying the DVD would be considered 'other legal fees' under OIP's rules and the agency could therefore ask for prepayment of 100% of the estimated cost.

Certified Payroll Records

An agency received a request for certified payroll records. The agency had reviewed OIP Op. Ltr. No. 97-07, which concluded that certified payroll records must be disclosed in full, but the agency was aware that the statute had been amended since that time. The agency wanted to confirm that it could redact social security numbers and home addresses under the current law.

OIP confirmed that the agency should redact social security numbers and home addresses, as permitted by the current statute. The statute, which formerly required disclosure of certified payroll records without exception, was amended at OIP's request to fix the issue so that social security numbers and home addresses were not required to be disclosed and could be redacted under the privacy exception.

Retention Period for Minutes and Agendas

An agency asked how long it must keep minutes and agendas for its attached Sunshine Law boards.

OIP advised that the Sunshine Law does not provide an end date for keeping minutes, but OIP does not interpret that to mean that minutes must be kept forever. OIP considers it reasonable to dispose of old minutes and agendas in accordance with an agency's retention schedule.

Procurement Records of Hawaii Public Housing Authority (HPHA)

During a period of several months, HPHA was planning to issue several requests for proposals (RFPs) for public housing management and had received a request to disclose the proposals received for one of its first RFPs in which a contract had been already awarded.

HPHA explained to OIP that the proposals received for this first RFP were submitted by persons who would likely be submitting proposals for its subsequently issued RFPs. HPHA was concerned that disclosure of proposals at this time would allow competitors to review the contents of these previous proposals and adjust their proposals for subsequent RFPs to the detriment of HPHA's procurement goals.

Because disclosure of the proposals can arguably "frustrate" HPHA's ability to procure and negotiate the most favorable terms in its subsequent contracts within a defined time frame, HPHA may be able to assert the "frustration of a legitimate government function" exception to withhold the proposals, but only until HPHA has executed all contracts for the same services within this limited time period.

Personal Information about Newly Appointed Members of Board of Education

After the Governor announced his appointments to the Board of Education, news reporters asked for information about those selected candidates as well as about persons who had applied but were not selected.

OIP advised the Manager of Boards and Commissions that, regarding the successful applicants selected by the Governor for appointment, their names, current occupations, business addresses and phone numbers, as well as relevant work experience should be disclosed, while their home addresses and telephone numbers, birthdates and personal financial information should be withheld. The Governor is not required to disclose the names and identifying information about the unsuccessful applicants.

Private Meeting Between Governor and Newly Appointed Board of Education

A news reporter had learned that the newly appointed Board of Education was planning to meet with the Governor before its first public meeting and asked OIP if the Sunshine Law allowed this private meeting.

OIP explained that the Sunshine Law provides a permitted interaction, in § 92-2.5(d), HRS, that allows “[d]iscussion between the governor and one or more members of a board [to]

be conducted in private without limitation or subsequent reporting” (except where the board is exercising an adjudicatory function). Consequently, the private meeting between the BOE and the Governor was permitted by the Sunshine Law.

Discussion of Commission Duties at a Community Meeting

A Hawaii County Councilmember was planning to propose a resolution to provide that the County will not take action on revising the County Plan until the conclusion of the Planning Commission’s work on the Plan or after December 2012, whichever is later. The Councilmember was planning to discuss the resolution to be proposed at an upcoming community meeting.

OIP agreed with the County Attorney’s advice to members of the Review Commission that they should not attend the community meeting when the Councilmember will discuss the proposed resolution because the Commission’s duties regarding the County Plan may be discussed. Discussion of board business by more than two board members would trigger the Sunshine Law’s requirements. Instead, as the County Attorney advised, the Commission can invite the Councilmember to explain the proposed resolution at a duly noticed meeting when board business could properly be discussed by more than two board members.

Chairperson's Private Meeting with Individual Members

The new chairperson of the Kahoolawe Island Reserve Commission was planning to meet with each commission member to hear about that member's concerns and ideas.

OIP advised that the chairperson was authorized to meet with each member outside of a meeting because the Sunshine Law sets forth a permitted interaction in § 92-2.5(a), HRS, allowing two members of a board to discuss official board business so long as the two members do not constitute a quorum and do not seek a commitment to vote. In order to prevent improper serial communications after the Chair's meetings with individual Commission members, OIP cautioned that the Chair and members should take care to avoid subsequent discussions with each other about the matters discussed in their individual meetings with the Chair.

the agency should retain the document until it is determined whether or not to disclose the document. The agency may develop retention schedules of its own or follow the General Records Schedules of the Department of Accounting and General Services.

Added note: The UIPA applies to information that an agency already maintains. "Maintain," as defined by the Hawaii Supreme Court, is possession or control of the records an agency has chosen to retain. *Nu'uaniu Valley Association v. City and County of Honolulu*, 119 Haw. 90, 97 (2008). The UIPA does not impose an affirmative obligation upon an agency to maintain records, but it requires agencies to provide access to those records that are actually maintained. *Id.*

Personnel Report Records: Where to Keep, and How Long to Maintain

An agency had investigative reports on some personnel and asked how long it was required to maintain the records and whether the reports could be kept in both its personnel files and its risk management files.

The UIPA does not address where records must be maintained. Nor does the UIPA impose any obligation to keep records or set up document retention schedules. However, if there is a request for an existing document,

Board Member's Facebook Posting

A board asked what information a board member can post on the board member's Facebook page. OIP advised that information that is public under the Sunshine Law or the UIPA may be posted on a board member's Facebook page. However, information from a Board's executive session should not be posted if it has been, and continues to be, withheld under the Sunshine Law, to avoid waiving the board's ability to withhold it in the future. Similarly, information that would be withheld under the UIPA should not be posted. Keep in mind that once information is posted on Facebook, it is no longer under the control of the Board member as it becomes Facebook property.

(Note: This advice did not address the Sunshine Law's possible restriction of board members' use of social media to discuss board business with each other. OIP is proposing Sunshine Law legislation in 2012 regarding board members' usage of social media to discuss board business.)



Sunshine Law Report

OIP was given responsibility for administration of the Sunshine Law in 1998. OIP averages more than 200 requests a year concerning the Sunshine Law. See **Figure 13**.

Of the 676 Attorney of the Day (AOD) requests made in FY 2011, 166 (24%) involved the Sunshine Law and its application. OIP also opened 13 case files for formal requests for assistance, consisting of 3 written requests for opinions and 10 written requests for investigations regarding the Sunshine Law. See **Figure 14**.

Of the 166 AOD requests involving the Sunshine Law, 136 were requests for general advice, and 14 were complaints. Also, 66 of the AOD requests involved the requester's own agency.

OIP provided training to newly appointed board and commission members and their staff in fiscal year 2011. See page 44 for a list of the sessions provided in FY 2011.



Sunshine Law Inquiries

<i>Fiscal Year</i>	<i>AOD Inquiries</i>	<i>Formal Requests</i>	<i>Total</i>
2011	166	13	179
2010	235	21	256
2009	259	14	273
2008	322	30	352
2007	281	51	332
2006	271	52	323
2005	185	38	223
2004	209	17	226
2003	149	28	177
2002	84	8	92
2001	61	15	76
2000	57	10	67

Figure 14

In fiscal year 2012, OIP will produce video training sessions that will be available online 24 hours a day, seven days a week, and will be available to members of the public as well.

Sunshine Law Inquiries

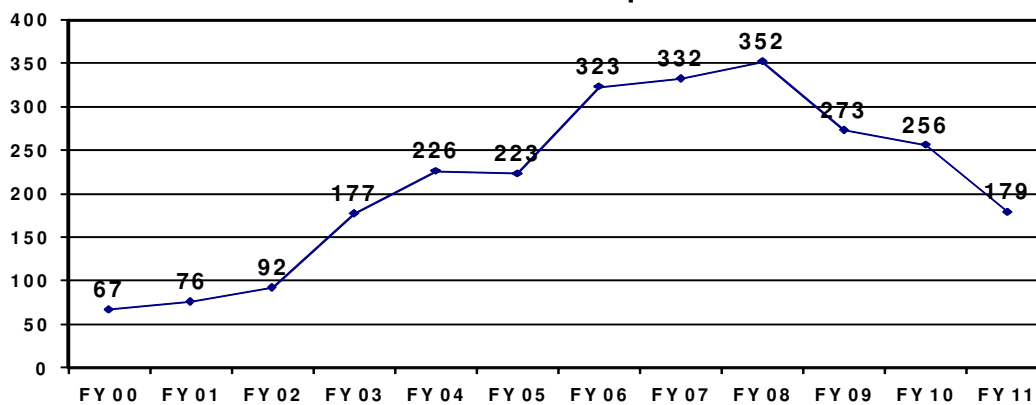


Figure 13

Sunshine Law

Investigations

OIP opened 10 investigations into the actions of government agencies in FY 2011, following complaints made by members of the public (down from 18 investigations opened in FY 2010).

The following investigations were completed in FY 2011.

Adequacy of Notice, Agenda and Minutes; Executive Meetings

Requester alleged various violations of the Sunshine Law by the Neighborhood Commission, City & County of Honolulu. Requester asked OIP to investigate whether the Commission had violated the Sunshine Law, and, if so, to determine whether these violations presented a pattern that rises to the level of intentional misconduct.

OIP found that the agenda and minutes reviewed revealed violations of agenda and minutes requirements at various meetings over the course of the approximately four and a half year period Requester identified. However, OIP did not believe that the deficiencies reviewed, alone, showed a pattern of violations that rose to the level of intentional conduct. Further, not all of the issues raised by Requester were violations of the Sunshine Law.

[Sunshine Memo 11-1]

Adequacy of Notice

Requester asked for an investigation into whether the Kauai County Council violated the Sunshine Law by failing to give proper notice that it would be discussing a particular arbitration settlement in executive session.

OIP found that the Council did not give sufficient notice of the arbitration settlement it considered under item ES-323 at its meeting held January 17, 2008. OIP found that the meeting agenda gave notice that the Council would be considering an arbitration settlement, but did not identify the arbitration in question by naming the parties, describing the dispute being arbitrated, or any other means.

Because of the lack of any description or identification of what arbitration was to be discussed, the item was insufficient to provide the public with reasonable notice of what the Council intended to consider. Thus, any discussion of the proposed settlement during the executive session was not permitted under the Sunshine Law.

[Sunshine Memo 11-2]

Board Member's Correspondence Concerning Chairperson Selection

Requester asked for an investigation into whether the Hawaii Historic Places Review Board (the Board) violated the Sunshine Law when one of its members authored a letter, which was e-mailed to the other Board members, regarding the selection of a new Board chairperson in an upcoming election (Letter).

In its review of the Letter, OIP found that it specifically referred to the anticipated selection of a new Board chairperson at an upcoming election and that it expressed the authoring member's opinion of the desirable personal traits and abilities that she wanted her fellow Board members to keep in mind when selecting a new chairperson. OIP found that because the Letter concerned the Board's upcoming officer election and was forwarded to all members, the Letter improperly constituted the members' discussion of the Board's "official business" in violation of the Sunshine Law's open meeting requirement.

Where a board member will not be attending a meeting and wishes to share his or her views or opinions on an agenda item with the other members, OIP recommends that the board member do so by submitting a statement as written testimony for the board to consider at the meeting together with other written public testimony. Alternatively, the board member could use the Sunshine Law's two-person permitted interaction to communicate views or opinions to only one other board member, prior to the meeting, with the understanding that the second member would then convey those views to the other board members at the meeting. See HRS § 92-2.5(a).

[Sunshine Memo 11-3]

Statewide Health Coordinating Council Plan Development Committee

Requester asked for an investigation into whether the requirements of the Sunshine Law were complied with in the development of the current state health services and facilities plan that was adopted in 2009 (the State Plan). The underlying issue is whether the Plan Development Committee (PDC) of the Statewide Health Coordinating Council (SHCC), and the PDC's subcommittees, violated the Sunshine Law by failing to properly notice its meetings and by meeting without quorum, or by failing to create permitted interaction groups that would allow the PDC and its subcommittees to meet outside of noticed open meetings.

OIP found that the PDC and its subcommittees did not meet the definition of a "board" under the Sunshine Law. However, OIP found that the presence of more than two members on both the SHCC and the PDC, as well as the presence of more than two SHCC members or more than two members of any one subarea health planning council on any subcommittee, violated the Sunshine Law.

Unlike the PDC, the SHCC is indisputably subject to the Sunshine Law. Thus, the SHCC members could not discuss SHCC board business, which was also the PDC board business, outside of a noticed SHCC meeting unless a permitted interaction under HRS § 92-2.5 applied. Based upon the facts presented, none of the permitted interactions applied.

OIP did not find any intentional violation, given SHCC's reasonable reliance on informal OIP guidance provided regarding the status of the PDC as a Sunshine Law board and the opportunities provided for public participation with respect to the State Plan.

[Sunshine Memo 11-4]

Adequacy of Agenda

Requester asked whether the agenda for the August 14, 2009 meeting of the Board of Land and Natural Resources (BLNR) met the notice requirements under the Sunshine Law.

OIP found that the August 14 agenda was not sufficient under the Sunshine Law because it did not reasonably allow a member of the public to understand what rule amendments BLNR would be discussing.

This agenda item provides notice that BLNR would be discussing amendment of certain portions of all of the Division of Boating and Recreation's administrative rules. Given the breadth of this agenda item which encompassed possible amendment of every BLNR administrative rule regulating ocean recreation and coastal areas, OIP does not believe that the agenda item provided reasonable public notice of the actual proposed rule amendments to be considered at the meeting.

OIP advised that, at a minimum, the agenda should have provided the section numbers of the rules to be amended and a brief description of the subject matter of those rules and proposed amendments. Without this minimum level of detail, OIP does not believe the members of the public would have enough information to allow meaningful participation in the BLNR meeting.

[Sunshine Memo 11-5]

Board Discussion Outside of Meeting

Requester asked for an investigation into whether a violation of the Sunshine Law occurred based upon the distribution of a letter from then Vice Chair Jay Furfaro to the remaining members of the Kauai County Council concerning a bill proposing amendments to a county ordinance.

Based upon representations made on behalf of Vice Chair Furfaro and the Council, OIP found that no violation occurred.

Specifically, it was represented that the letter was a draft that was shown to the Chair, but was never signed nor circulated to the members.

[Sunshine Memo 11-6]

Restriction on Board Member Discussion

Requester, a Kauai County Council member, asked whether a line of questioning that he was not allowed to pursue, which related to an agenda item at a Council meeting, would have violated the Sunshine Law. The agenda item in question was a request by the Prosecuting Attorney for Council approval to apply for federal grant monies and to use those monies for the Kauai VOCA (Victims of Crime Act) Expansion Program.

This presented a factual question of whether Requester's line of questioning fell within the scope of an agenda item as required by the Sunshine Law.

OIP found that, to the extent that Requester's line of questioning would have related to whether other sources of funds existed for the VOCA program so that the grant monies did not need to be used for that program, the line of questioning would have been reasonably related to the agenda item and thus would not have violated the Sunshine Law.

[Sunshine Memo 11-7]

Internal Working Group Status as Board

Requester asked whether an internal working group formed from employees of the Honolulu Fire Department (HFD) and the Honolulu Emergency Services Department (HESD) by the Fire Chief and HESD Director to identify issues, challenges and benefits of a potential merger of the two departments is a “board” subject to the Sunshine Law. OIP found that the working group is not a “board” under the Sunshine Law because it was not created by constitution, statute, rule, or executive order.

Although the Mayor directed the Fire Chief and HESD Director to explore a possible merger and make a recommendation, the Mayor did not issue an executive order nor did he require that the exploration be done by creation of a working group.

[Sunshine Memo 11-8]

Notice of Cancellation of Meeting

Requester asked whether a violation of the Sunshine Law occurred in connection with a meeting held by the Hawaii Service Area Board (HSAB). Specifically, Requester, who is a HSAB member, asked whether a violation occurred because she was initially informed that the meeting was cancelled and then later told the meeting would be held, at which point she was unable to get a ride to the meeting.

OIP did not find evidence that a violation of the Sunshine Law occurred. Although notifying members of the public that a meeting was cancelled and then holding the meeting could violate the Sunshine Law in certain circumstances, none of the accounts (including that of Requester) states that any member of the public was among those told that the meeting was cancelled.

[Sunshine Memo 11-9]

Sunshine Law

Advisory Opinions

OIP issued the following opinions in response to three requests for advisory opinion under the Sunshine Law.

Discussion Outside of a Meeting

The Neighborhood Commission Office sought an advisory opinion, pursuant to a complaint received from a neighborhood board chair, on whether a board member violated the Sunshine Law by sending an email to his fellow neighborhood board members discussing his position on the Ho‘opili project.

The Sunshine Law requires board members to discuss “board business” as part of a properly noticed board meeting unless a permitted interaction or other exception applies. OIP has opined that a member’s expression to other members of his or her views on board business is a prohibited discussion outside of a meeting whether the other members are physically present to hear an oral communication of those views or receive those views through other means, including through receipt of written correspondence by email.

It was undisputed that at the time the email was sent, the Ho‘opili project was a specific matter pending before the Board. Because the board member sent the email to all board members concerning his views on the project, OIP found that it constituted a discussion of board business outside of a properly noticed open meeting in violation of the Sunshine Law. *[Sunshine Memo 11-10]*

Permitted Interaction Group Procedures

A Neighborhood Board sought an advisory opinion regarding the proper procedures to be followed with respect to permitted interaction groups under HRS § 92-2.5(b)(1).

OIP provided general guidance and also discussed a specific example raised.

Among other things, OIP advised that the investigative task force permitted interaction does not allow regular, unlimited substantive reports by the investigative task force, and does not allow any discussion to occur at the same board meeting at which the task force makes its single report to the board. Instead, any discussion and decision-making on the subject of the investigation must occur at a subsequent meeting of the board.

More specifically, OIP advised that the board’s permitted interaction group in this case functioned as a standing committee. It was not formed to investigate a matter of defined and limited scope with a single report to be made to the Board. Rather, it was a long-standing committee, initially formed on and apparently existing since April 7, 2005; it was tasked with and did work on various issues; and it was required to and usually did regularly report to the Board. Accordingly, it did not meet the requirements under HRS § 92-2.5(b)(1), and instead should have operated as a standing committee of the board and independently followed the Sunshine Law’s open meeting requirements.

OIP also generally advised that the Sunshine Law does not require that members of an investigative task force be formally “appointed” or assigned at a meeting, and that OIP has opined that it is improper to add new members to an investigative task force after its initial formation.

[Sunshine Memo 11-11]

Amendment of Agenda

Requester sought an advisory opinion on whether the Honolulu City Council violated the Sunshine Law by amending the agenda of its Executive Matters Committee meeting to consider Resolution 07-168. OIP found that the Council’s agenda amendment did not violate the Sunshine Law.

The Sunshine Law provides that a filed agenda may be amended to add an item by a two-thirds recorded vote of all members to which the board is entitled, “provided that no item shall be added to the agenda if it is of reasonably major importance and action thereon by the board will affect a significant number of persons.” HRS § 92-7(d). Determination of whether an item “is of reasonably major importance” and when board action thereon will “affect a significant number of persons” is fact-specific and must be made on a case-by-case basis.

Resolution 07-168 authorized the Council Chair to enter into an agreement with Olelo Community Television (Olelo) relating to the televised broadcast of Council meetings, hearings and other activities in substantially the same form as the exhibit attached to the resolution. The Chair was further authorized to amend the agreement as necessary, including amendment of the “distribution” to be made by Olelo to the City under the contract.

The authority given to the Chair under Resolution 07-168 was to try to obtain a larger distribution from Olelo under a contract in which Olelo was paying the City \$44,000 for programming. Under these circumstances, the contract amount being paid the City and the latitude being afforded the Chair was relatively small. OIP thus found that amendment of the agenda to add this item to enter into and negotiate any additional distribution was not of reasonably major importance and that action on that item would not affect a significant number of persons.

[Sunshine Memo 11-12]



Legislation Report

One of OIP's functions is to make recommendations for legislative change to the UIPA and Sunshine Law. OIP may draft proposed bills and monitor or testify on legisla-



tion to clarify areas that have created confusion in application, to amend provisions that work counter to the legislative mandate of

open government, or to provide for more efficient government as balanced against government openness. To provide for uniform legislation in the area of government information practices, OIP also monitors and testifies on proposed legislation that may impact the UIPA or Sunshine Law; the government's practices in the collection, use, maintenance, and dissemination of information; and government boards' open meetings practices.

During the 2011 Legislative session, OIP reviewed and monitored 180 bills and resolutions affecting government information practices, and testified on 35 of these measures. No bills were passed that amended the UIPA or the Sunshine Law.

Summarized below are four bills that would have affected the UIPA and the Sunshine Law, which failed to pass in 2011 but carry over to the 2012 legislative session.

► **H.B. No. 1411** sought to place a confidentiality provision within the UIPA to require agencies to keep all pending complaint information related to "consumer complaints" confidential.

► **H.B. No. 109** sought to add permitted interactions under the Sunshine Law for board members to attend public gatherings or professional association conferences and activities.

► **S.B. No. 1094** sought to eliminate the requirement that a government employee's name be considered public and for "regulatory agenc[ies]" to disclose any information about their employees, including information such as job titles, salary information, qualifications, and dates of service; seeks to narrow the types of public employee positions for which exact compensation, rather than a salary range, must be disclosed.

► **H.B. No. 549** sought to require electronic filings on the state calendar on the state website for state boards in lieu of filing a hard copy with the Lieutenant Governor's office.



Litigation Report



OIP monitors litigation that raises issues under the UIPA or the Sunshine Law or involves challenges to OIP’s rulings.

Under the UIPA, a person may bring an action for relief in the circuit courts if an agency denies access to records or fails to comply with the provisions of the UIPA governing personal records. A person filing suit must notify OIP at the time of filing. OIP has standing to appear in an action in which the provisions of the UIPA have been called into question.

The only case that OIP monitored in FY 2011 is summarized below.

Intermediate Court held that the Plaintiff’s reason for seeking to inspect the President’s birth records does not constitute “compelling circumstances” mandating disclosure of the records under section 92F-12(b)(3), HRS.



Birth Records of President Obama

Dr. Robert V. Justice v. Loretta Fuddy, Director of the Department of Health, and the State of Hawaii—Department of Health, Civ. No. 09-1-0783 (Intermediate Court of Appeals). Plaintiff appealed the First Circuit Court’s decision granting the State’s motion to dismiss the Complaint seeking access to the birth records of President Barack Obama under the UIPA. In its decision on April 7, 2011, the Intermediate Court affirmed the lower court’s dismissal of the complaint. The

Records Report System Report



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

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

Public reports must be updated annually by the agencies.

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

To date, state and county agencies have reported 29,612 records. See **Figure 15**.



Records Report System

Status of Records Reported by Agencies: 2011 Update

Jurisdiction	Number of Records
State Executive Agencies	20,703
Legislature	836
Judiciary	1,645
City and County of Honolulu	3,909
County of Hawaii	947
County of Kauai	930
County of Maui	642
Total Records	29,612

Figure 15

RRS on the Internet

The RRS was first developed as a Wang computer-based system. In 2003, the RRS was transferred to the Internet, creating a system accessible to both government agencies and the public.

Beginning in October 2004, the RRS has been accessible on the Internet through OIP’s website. Agencies may access the system directly to enter and update their records data. Agencies and the public may access the system to view the data and to create various reports. A guide on how to retrieve information and how to create reports is also available on OIP’s website at www.hawaii.gov/oip.



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.

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



State executive agencies have reported 51% of their records as accessible to the public in their entirety; 18% as unconditionally confidential, with no public access permitted; and 26% in the category “confidential/conditional access.” Another 5% are reported as undetermined. See **Figure 16**. In most cases, OIP has not reviewed the access classifications.

Records in the category “confidential/conditional access” are (1) accessible after the segregation of confidential information, or (2) accessible only to those persons, or under those conditions, described by specific statutes.

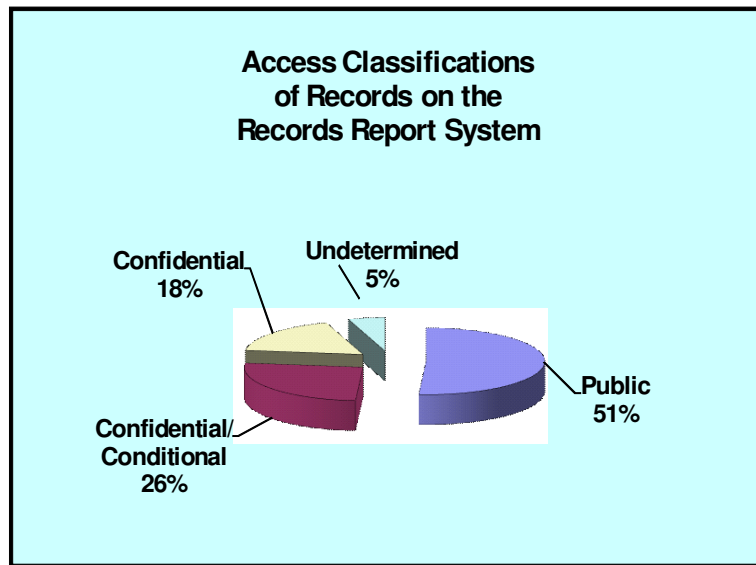


Figure 16

Education

Publications and Website



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

In FY 2011, OIP continued its traditional print publications, including the *OpenLine* newsletter and its *Annual Report 2010*. OIP also updated its online guides that are intended primarily to give the non-lawyer agency official an overall understanding of the UIPA and a step-by-step application of the law: *Open Meetings: Guide to the Sunshine Law for State and County Boards* (updated in June 2011); and *Open Records: Guide to Hawaii's Uniform Information Practices Act* (updated in June 2011). OIP produced a new *Open Meetings* guide specifically for neighborhood boards. OIP's forms and publications are available on the OIP website at www.hawaii.gov/oip.

To conserve resources, OIP now distributes the *OpenLine* by email, with print copies still going to those who request a print copy.

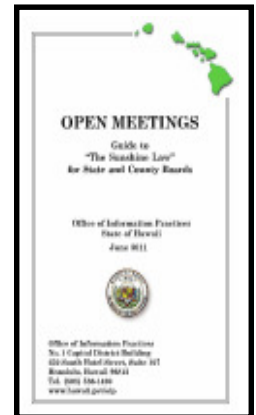
Current and past issues of *OpenLine* are also available on OIP's website. Issues in FY 2011 included summaries of recently published OIP opinions; a wrap-up report on the 2010 Legislative session; information about open government bills in the 2011 Legislative session; UIPA and Sunshine Law pointers and guidelines; and other issues relevant to OIP's mission.

Sunshine Law Guides

The *Open Meetings: Guide to the Sunshine Law for State and County Boards* is intended primarily to assist board members in understanding and navigating the Sunshine Law.

The guide, which was updated in June 2011, uses a question and answer format to provide general information about the law and covers such topics as meeting requirements, permitted interactions, notice and agenda requirements, minutes, and the role of OIP.

OIP also produced a new *Open Meetings* guide for neighborhood boards in June 2011.



OpenLine

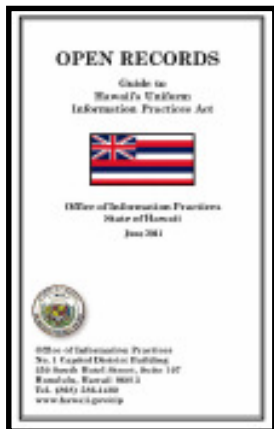
The *OpenLine* newsletter, which originated in March 1989, has always played a major role in OIP's educational efforts.

The newsletter is sent to all state and county agencies, including boards and commissions, and libraries throughout the state, as well as all other persons requesting the newsletter.

UIPA Guide

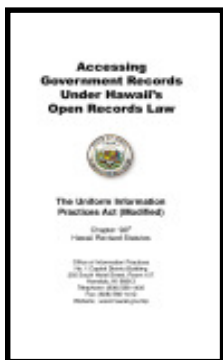
Open Records: Guide to Hawaii's Uniform Information Practices Act (updated in June 2011) is a guide to Hawaii public record law and OIP's administrative rules.

The guide directs agencies through the process of responding to a record request, including determining whether the record falls under the UIPA, providing the required response to the request, analyzing whether any of the exceptions to disclosure apply, and suggesting how the agency review and segregate the record. The guide also includes answers to a number of frequently asked questions.



Accessing Government Records Under Hawaii's Open Records Law

This three-fold pamphlet is intended to provide the public with basic information about the UIPA. It explains how to make a record request, the amount of time an agency has to respond to that request, what types of records or information can be withheld and any fees that can be charged for search, review, and segregation. The pamphlet also discusses what options are available for appeal if an agency should deny a request.



Model Forms

OIP has created model forms for use by agencies and the public.

To assist members of the public in making a record request to an agency that provides all of the basic information the agency requires to respond to the request, OIP provides a **“Request to Access a Government Record”** form. To follow the procedures set forth in OIP's rules for responding to record requests, agencies may use OIP's model form **“Notice to Requester”** or, where extenuating circumstances are present, the **“Acknowledgment to Requester”** form.

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



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

Related to Act 20 (2008), OIP has created a **“Request for OIP's Concurrence for a Limited Meeting”** form for the convenience of boards seeking OIP's concurrence to hold a limited meeting. Act 20 amended the limited meetings provision (§ 92-3.1) to allow closed meeting where public attendance is not practicable. In order to hold such a meeting, a board must, among other things, obtain the concurrence of OIP's director that it is necessary to hold the meeting at a location where public attendance is not practicable. Under the amended statute, OIP must also concur where a board seeks to hold a limited meeting at a location dangerous to health or safety.

All of these forms may be obtained online at www.hawaii.gov/oip.

OIP Website

OIP's website, www.hawaii.gov/oip, has become an important means of disseminating information. The site plays a major role in educating and informing government agencies and citizens about access to state and county government records and meetings. In FY 2008, a counter was installed on the site and has now recorded more than 77,000 hits.

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

- The UIPA and the Sunshine Law statutes
- OIP's administrative rules

- *OpenLine* newsletters
- OIP's recent annual reports
- Model forms created by OIP
- OIP's formal opinion letters
- Formal opinion letter summaries
- Formal opinion letter subject index
- Informal opinion letter summaries
- General guidance for commonly asked questions
- What's new at OIP and in open government news

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

find out when the site was last updated



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

overview of OIP and the website

contact information

OIP's website also serves as a gateway to Internet sites on public records, privacy, and informational practices in Hawaii, other states, and the international community.

Features

OIP's website features the following sections, which may be accessed through a menu located on the left margin.

“Laws/ Rules/ Opinions”

This section features four parts:

- *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 OIP's administrative rules (“Agency Procedures and Fees for Processing Government Record Requests”), along with a quick guide to the rules and 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.
- *Informal Opinions*: summaries of OIP's informal opinion letters, in three categories: Sunshine Law opinions, UIPA opinions, and UIPA decisions on appeal.

“Forms”

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

“OpenLine/ Guidance”

The *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 from members of the public. Additionally, links to OIP's training materials can be found here and under most of the other main menu pages.

“Reports”

OIP's annual reports are available here for viewing and printing, beginning with the annual report for FY 2000. Also available are reports to the Legislature on the commercial use of personal information and on medical privacy. Viewers may also read about, and link to, the Records Report System.

“Related Links”

To expand your search, visit the growing page of links to related sites concerning freedom of information and privacy protection.

“Records Report System (RRS)”

Shortcut link to the Records Report System online database.

“What's New”

Lists current events and happenings at OIP and elsewhere.





Each year, OIP makes presentations and provides training on the UIPA and the Sunshine Law. OIP conducts this outreach effort as part of its mission to inform the public of its rights and to assist government agencies and boards in understanding and complying with the UIPA and the Sunshine Law. OIP also provides educational materials to participants.

OIP conducted 12 training workshops in FY 2011. These trainings included workshops for the general public, various state agencies, and the constantly changing cast of board members throughout the state and counties.

In June 2011, OIP conducted general Sunshine Law training for county board and commission members on Kauai and Oahu.

In addition to OIP's general Sunshine Law training for board members and staff, OIP developed its first accredited legal education seminar to provide attorneys with one credit to meet Hawaii's mandatory continuing professional education (MCPE) requirements.

The new legal education course, "Ethical Considerations for Counsel When Advising Sunshine Law Boards," was offered for the first time at the Hawaii State Association of Counties' (HSAC) conference on Maui on June 22, 2011.

The new legal ethics course is specifically geared to government attorneys who advise the many state and county agencies, boards, and commissions on Sunshine Law issues. By training these key legal advisors, OIP can leverage its small staff and be assisted by many other attorneys to help OIP to obtain government agencies' voluntary compliance with the laws that OIP administers.

Additional legal education courses on the UIPA and Sunshine Law will be developed by OIP in the next fiscal year. Moreover, OIP will produce, for the first time, online video training on the UIPA and Sunshine Law, which will be accessible 24/7 by all people, including members of the public.

The following is a listing of the workshops and training sessions OIP conducted during FY 2011.

UIPA Training

OIP provided training sessions on the UIPA for the following agencies and groups:

- 7/15/10 Kauai County employees:
Mayor's Office
- 7/19/10 University of Hawaii Law
School: Administrative
Law Class
- 4/5/11 University of Hawaii Law
School: Administrative
Law Class
- 6/23/11 Hawaii State Association of
Counties Conference: Social
Media Discussion Panel

Sunshine Training

OIP provided training sessions on the Sunshine Law for the following agencies and groups:

- 7/16/10 Department of Human
Services: Hawaii Public
Housing Authority
- 7/30/10 Office of Hawaiian Affairs:
Kahoolawe Island
Reserve Commission
- 12/8/10 Honolulu County
Commission on the Status
of Women
- 3/16/11 Hawaii County Council
(Teleconference)
- 4/25/11 Department of Business,
Economic Development and
Tourism: Marine & Coastal
Zone Advocacy Council
- 6/7/11 Kauai County: Office of
Boards and Commissions
- 6/18/11 City and County of Honolulu:
Boards and Commissions
- 6/22/11 Hawaii State Association of
Counties Conference: "Ethical
Considerations for Counsel
When Advising Sunshine Law
Boards" (1 MCPE credit)

