Office of Information Practices

State of Hawaii

Annual Report 2012

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, 2011, to June 30, 2012.

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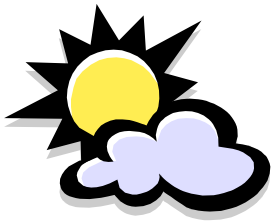

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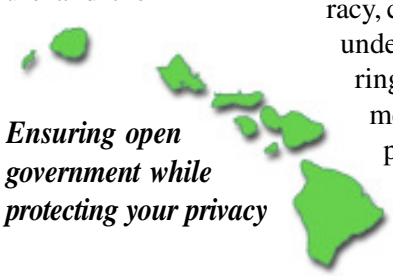
History

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.



Ensuring open government while protecting your 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 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:

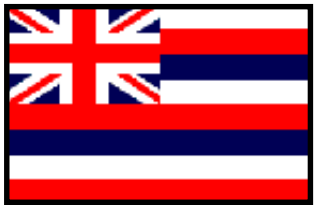
> In a democracy, the people are vested with the ultimate decision-making power. Government agencies exist to aid the people in the formation and conduct of public policy. Opening up the government processes to public scrutiny and participation is the only viable and reasonable method of protecting the 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 general 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 disputes, OIP provides a free and informal process that is not a contested case or judicial proceeding.

In light of the state's recent budgetary challenges, and with only 7.5 total positions, OIP has sought to cost-effectively provide services to the greatest number of people and to increase compliance by more government agencies by placing greater emphasis on education and the prevention of problems. Thus, in FY 2012, OIP increased by 50% the number of training materials that are freely available on its website 24/7. With the basic training on the UIPA and Sunshine Law readily available on-line, OIP was able to double the number of in-person training sessions to provide more specialized courses. For the first time, OIP partnered with other public and private organizations to provide continuing legal education to over 265 attorneys so that they can properly counsel their clients on open government laws and procedures. OIP's education efforts and use of technology have efficiently leveraged the time and knowledge of its four staff attorneys and have made OIP's training more widely and readily available to all members of the public, and not just to government employees or board members.

Mainly through e-mails and website postings, OIP has also more than quadrupled its communications in order to reach out to the agencies and the public with timely information regarding OIP and open government news. Additionally, OIP conducted its first on-line survey of users to learn how it could improve its services and was honored to discover that more than 95% (48 of 51) respondents reported being satisfied (30) or very satisfied (9) with OIP's services overall.

The emphasis on training and communication has resulted in greater agency and public awareness of the open government requirements and a 31% increase in requests for OIP's assistance, including a 39% increase in attorney of the day calls. Despite this increased workload, OIP was still able to issue 25 opinions, obtain successful passage of two legislative proposals, and reduce its case backlog by 7% in FY 2012.

This annual report details OIP's activities for fiscal year 2012, which began on July 1, 2011, and ended on June 30, 2012. Since April 1, 2011, Cheryl Kakazu Park has been OIP's director.

Budget and Personnel

Like other government agencies, OIP's budget in recent years has been drastically reduced, which necessitated job vacancies and work hour reductions, and other cost savings. While the reduction in resources has ham-

pered OIP's ability to reduce its backlog of opinion requests and other cases, OIP continues to provide assistance in an increasing number of requests from agency personnel and members of the general public.

Fortunately, OIP received a slight increase in its allocated budget in FY 2012 and, for the first time in years, OIP was able to fill all positions in October 2011 with the addition of a fourth attorney, which helped OIP to keep up with the substantial increase in requests for assistance. In recognition of their hard work and willingness to embrace change, OIP's staff was named as an honoree for the state's Team of the Year Award for FY 2012: Staff Attorneys Carlotta Amerino, Lorna Aratani, Jennifer Brooks, and Linden Joesting; Legal Assistant Dawn Shimabukuro; Administrative Assistant Cindy Yee; and Records Report Specialist Michael Little.

Legal Assistance and Guidance

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

In FY 2012, OIP received 1,075 requests for assistance, a 31% increase over FY 2011, which OIP attributes to its increased training and outreach efforts. This number includes both formal and informal 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 from the public for assistance 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.

The vast majority (87%) of the informal requests for assistance are fulfilled by OIP's "Attorney of the Day" (AOD) service. Over the past 13 years, OIP has received a total of 10,147 requests through its AOD service, an average of 780 per year. In FY 2012, OIP received 940 AOD requests, which was 264, or 39%, more than the 676 requests it received the prior year. See **Figure 4** on page 13.

The AOD service allows the public, agencies, and boards to receive general legal advice from an OIP staff attorney, usually within the same day of the request. Members of the public frequently use the service to determine whether agencies are properly responding to record requests or if government boards are following the procedures required by the Sunshine Law. Agencies often use the service to assist them in properly responding to record requests. Boards also frequently use the service to assist them in navigating Sunshine Law requirements.

Besides informal AOD requests, OIP received a total of 135 formal requests for assistance in FY 2012, as compared to 146 the previous year. OIP ended FY 2012 with 78 open cases (excluding litigation tracking, training, rules, and special projects), a 7% decrease from the 84 case backlog in FY 2011.

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. For FY 2012, OIP issued two formal opinions and 23 informal opinions, for a total of 25 opinions, as compared to 33 in FY 2011. Because OIP

already has a considerable body of precedent-setting formal opinions that have resolved many legal questions, OIP has been issuing more informal opinions that are based on prior precedent. Informal opinions are also issued when the legal conclusion is based upon specific facts that limit the opinion's usefulness for general guidance purposes.

The full text of OIP's formal opinions, summaries of OIP's memorandum opinions, and a searchable 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 2012, OIP conducted 25 live training workshops and seminars, including courses providing continuing legal education (CLE) credits to over 265 state, county, and private sector attorneys, to help them properly advise government agencies and clients.

Besides doubling the number of live training sessions over the previous year (12 sessions in FY 2011), OIP has also increased the number of training courses and materials on its website. In FY 2012, OIP added three online videos with accompanying written materials to provide basic training on the UIPA and Sunshine Law, which are now available to the government agencies, volunteer board members, and the general public 24 hours a day, 7 days a week. In addition to providing greater access to training at times convenient for the user, these online courses and training materials have freed OIP's legal staff from having to conduct the same presentations in person and gave them more time to create new training materials, to conduct specialized workshops, to work on cases, and to do other duties. In FY 2012, OIP added or updated 12 training videos and educational materials on its website. As of FY 2012, OIP doubled the total number of training materials on its website to 18, as compared to 9 in FY 2011.

In addition to in-person and online training, OIP began development in FY 2012 of the UIPA Record Request Log, a new tool to help agencies comply with their open records responsibilities. Beginning in January 2013, summaries of agencies' logs will be uploaded onto OIP's Master Log on the new state website at data.hawaii.gov.

By effectively using technology and efficiently leveraging its attorneys' time and knowledge, OIP has been able to increase its training materials and presentaions to provide greater awareness of and compliance with Hawaii's open government laws.

Communications

In FY 2012, OIP more than quadrupled its communications and outreach to government agencies, general public, and the media, primarily through *What's New* articles that provide timely news about OIP and open government issues in Hawaii and elsewhere. Although OIP also printed three *OpenLine* newsletters in FY 2012, these have largely been replaced by more timely *What's New* articles that are e-mailed and posted on OIP's website.

As compared to five *OpenLine* newsletters and seven *What's New* e-mails in FY 2011, OIP e-mailed and posted online 48 *What's New* articles, printed three *OpenLine* issues, and participated in two Hawaii Public Radio interviews in FY 2012. Including the Annual Report published each year, OIP increased the number of communications from 13 in FY 2011 to 53 in FY 2012, or 423%.

In FY 2012, OIP conducted its first-ever survey of its users to find out how it could improve its services. In an on-line survey conducted over a two-month period in the fall of 2011, over 32% of the 53 respondents reported using OIP's services at least monthly, 39.6% use OIP's services two to four times a year, and 28.4% use OIP's services once a year, infrequently, or never. OIP was honored to learn that 94.1% (48 of 51) of the respondents reported being satisfied (39) or very satisfied (9) with OIP's services overall, and only three persons (5.9%) were dissatisfied. Moreover, eight (89%) of the nine people who had requested OIP's assistance in obtaining government records or concerning a potential Sunshine Law violation were satisfied with the help they received from OIP.

For the full survey and response summary, *What's New* articles, the *OpenLin*e archive, 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**.

Legislation and Litigation

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 2012 legislative session, OIP reviewed and monitored 267 bills and resolutions affecting government information practices, and testified on 39 of these measures. In particular, OIP proposed and successfully obtained passage of two bills, which clarify the process for judicial appeals of OIP's decisions and modernize the Sunshine Law.

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 2012, OIP tracked four lawsuits.

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 29,597 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**.

With the fall 2012 launch of the state's data.hawaii.gov website, the RRS will play a greater role in ensuring that confidential data is not inadvertently posted onto the website. In FY 2012, OIP worked closely with the Office of Information Management Technology to develop processes and training materials for government agencies to use and post data to data.hawaii.gov.

Budget and Personnel

OIP's budget allocation is the amount that it was authorized to use of the legislatively appropriated amount minus administratively imposed budget restrictions. In FY 2012, OIP's total allocation was $382,282, up from $357,158 in FY 2011. OIP's allocation for personnel costs in FY 2012 was $352,085 and for operational costs was $30,197. See **Figure 2** on page 11.

In FY 2012, OIP operated with a total staff of 7.5 full-time equivalent (FTE) positions. OIP's fourth staff attorney position was filled in October 2011, so that all of OIP's positions were staffed for the first time since 2007.

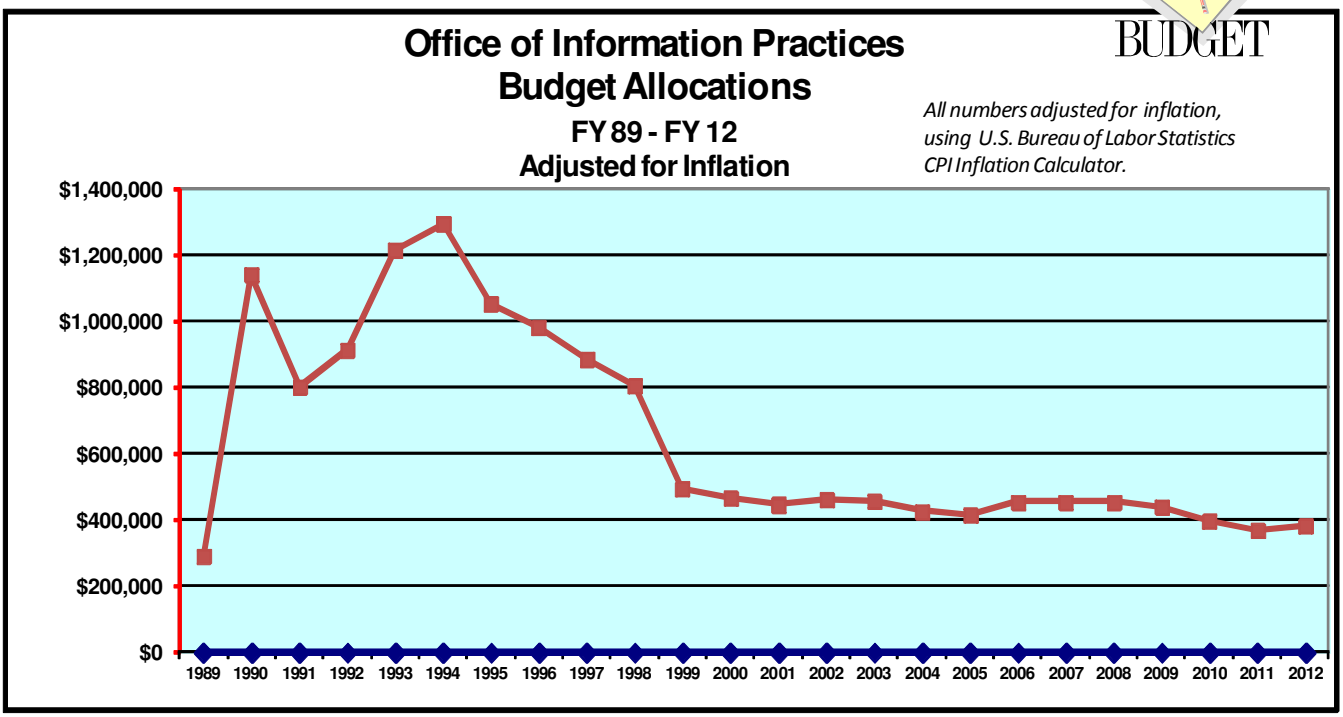


Figure 1

Office of Information Practices
Budget FY 1989 to FY 2012

Fiscal Year	Operational Expense Allocation	Personnel Allocation	Total Allocation	Allocations Adjusted for Inflation	Approved Positions
FY 12	30,197	352,085	382,282	382,282	7.5
FY 11	42,704	314,454	357,158	367,427	7.5
FY 10	19,208	353,742	372,950	395,784	7.5
FY 09	27,443	379,117	406,560	438,529	7.5
FY 08	45,220	377,487	422,707	454,234	7.5
FY 07	32,686	374,008	406,694	453,896	7.5
FY 06	52,592	342,894	395,486	453,959	7
FY 05	40,966	309,249	350,215	414,962	7
FY 04	39,039	308,664	347,703	425,944	7
FY 03	38,179	323,823	362,002	455,270	8
FY 02	38,179	320,278	358,457	461,086	8
FY 01	38,179	302,735	340,914	445,453	8
FY 00	37,991	308,736	346,727	465,941	8
FY 99	45,768	308,736	354,504	492,405	8
FY 98	119,214	446,856	566,070	803,635	8
FY 97	154,424	458,882	613,306	884,257	11
FY 96	171,524	492,882	664,406	979,912	12
FY 95	171,524	520,020	692,544	1,051,571	15
FY 94	249,024	578,513	827,537	1,292,530	15
FY 93	248,934	510,060	758,994	1,215,477	15
FY 92	167,964	385,338	553,302	912,601	10
FY 91	169,685	302,080	471,765	801,539	10
FY 90	417,057	226,575	643,632	1,139,563	10
FY 89	70,000	86,000	156,000	291,124	4

Figure 2

Legal Assistance, Guidance, and Rulings

All branches and levels of Hawaii's state and county governments seek OIP's assistance. Each year, OIP receives hundreds of requests for assistance from members of the public, government employees and officials, and volunteer board members who come from the executive, legislative, and judicial branches of the state and counties.

In FY 2012, OIP received a total of 1,075 formal and informal requests for assistance, which is a 30.77% increase over FY 2011. This total includes 940 Attorney of the Day (AOD) requests regarding the application of, and compliance with, the UIPA and Sunshine Law. See **Figure 4**. Of the 1,074 total requests, 718 related to the UIPA and 356 related to the Sunshine Law.

Formal Requests

Of the total 1,075 UIPA and Sunshine Law requests, 940 were considered informal requests and 135 were considered formal requests. Formal requests are categorized as follows. See **Figure 3**.

Formal Requests FY 2012

Type of Request	*Number of Requests*
Request for Assistance	47
Request for Advisory Opinion	8
UIPA Appeals	19
Sunshine Law Investigations/ Requests for Opinion	23
Correspondence	20
UIPA Requests	18
Total Formal Requests	**135**

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 2012, OIP received 47 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 2012, OIP received 8 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 2012, OIP received 19 UIPA appeals.

Sunshine Law Investigations/ Requests for Opinions

Sunshine Law requests for investigations and opinions concerning open meeting issues are separately tabulated. In FY 2012, OIP received 23 Sunshine Law complaints and requests. See page 19 for details on these.

Correspondence and UIPA Requests

OIP may respond to general inquiries, which often include simple legal questions, by correspondence. In FY 2012, OIP received 20 such inquiries by correspondence, along with 18 UIPA requests.

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" by distributing 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 posted on OIP's website and are also found here on pages 20-21. The website also contains a searchable 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 22.

Because informal opinions address issues that have already been more fully analyzed 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 Inquiries

Fiscal Year	Total	Public	Government Agencies
FY 12	**940**	298	642
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 (87%) 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 13 years, OIP has received a total of 10,147 inquiries through its AOD service, an average of 780 requests per year. In FY 2012, OIP received 940 AOD inquiries, exceeding the average by over 20% and FY 2011's inquiries by 39%. 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.

Of the 940 AOD inquiries in FY 2012, roughly seven out of ten inquiries came from government boards and agencies seeking guidance to comply with the law. Some 642 (68%) of the AOD requests came from government boards and agencies, and 298 requests (32%) came from the public. See **Figure 5**.

Of the 298 public requests, 214 (72%) came from private individuals, 41 (14%) from media, 19 (6%) from private attorneys, 14 (5%) from public interest groups, and 10 (3%) from businesses. See **Figures 6-7**.

AOD Requests from the Public FY 2012

Types of Callers	Number of Inquiries
Private Individual	214
Media	41
Private Attorney	19
Public Interest Group	14
Business	10
TOTAL	**298**

Figure 6

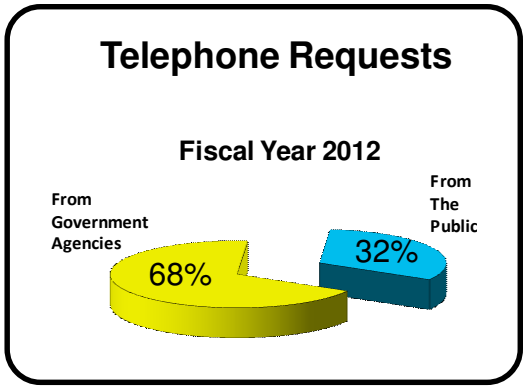


Figure 5

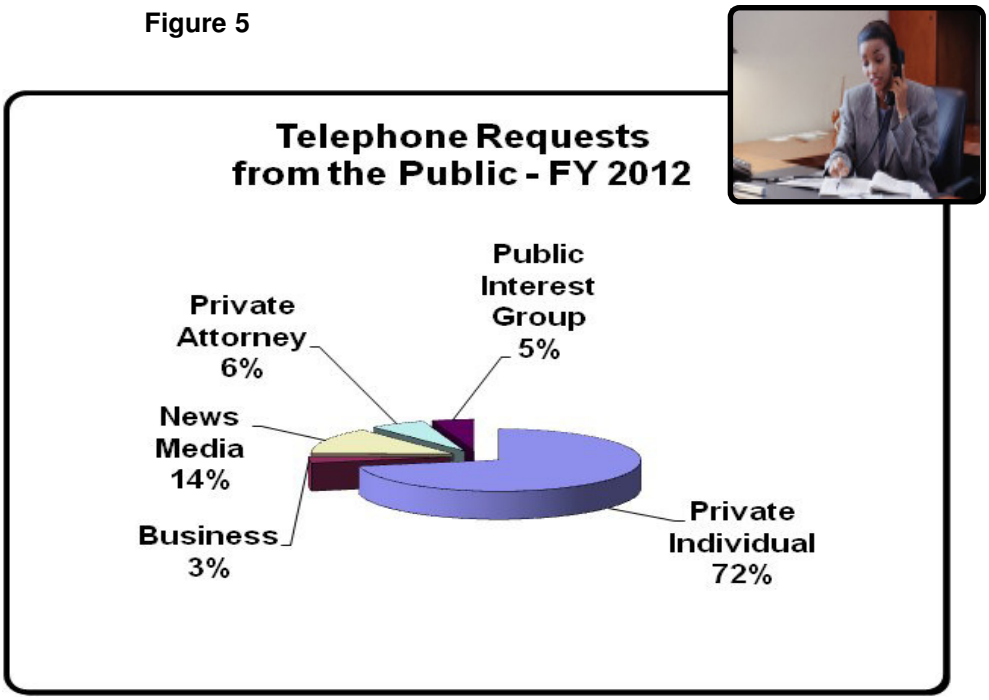


Figure 7

UIPA Requests:

UIPA AOD Requests

In FY 2012, OIP received 489 AOD requests concerning the UIPA. These numbers reflect calls both from the public and from the agencies themselves. For a summary of the numbers and types of AOD calls concerning the Sunshine Law, please see the charts that follow. A sampling of the AOD advice given starts on page 33.

State Agencies and Branches

In FY 2012, OIP received a total of 356 AOD inquiries about state agencies. About 47% of these requests concerned four state agencies: the Department of Land and Natural Resources (69), the Department of Health (34), the Department of Commerce and Consumer Affairs (33), and the Department of Education (33). As shown below, about 44% of the requests were made by the agencies themselves seeking guidance on compliance with the UIPA.

OIP also received 7 inquiries concerning the legislative branch and 9 inquiries concerning the judicial branch. See **Figure 8** below.

Calls to OIP About

State Government Agencies

FY 2012

Executive Branch Department	Requests by Agency	Requests by Public	Total Requests
Land and Natural Resources	20	49	69
Health	16	18	34
Commerce and Consumer Affairs	23	10	33
Education (including Public Libraries)	14	19	33
Human Services	11	9	20
Lieutenant Governor (including OIP)	0	19	19
Labor and Industrial Relations	8	10	18
Transportation	5	12	17
Agriculture	11	3	14
Governor	6	7	13
Attorney General	3	7	10
Accounting and General Services	6	3	9
Tax	5	2	7
Business, Econ Development, & Tourism	3	3	6
Hawaiian Home Lands	2	2	4
Human Resources Development	2	2	4
Budget and Finance	3	0	3
Public Safety	2	0	2
Defense	0	0	0
TOTAL EXECUTIVE	**140**	**175**	**315**
TOTAL LEGISLATURE	**2**	**5**	**7**
TOTAL JUDICIARY	**5**	**4**	**9**
University of Hawaii System	**5**	**10**	**15**
Office of Hawaiian Affairs	**2**	**0**	**2**
Unnamed Agency	**3**	**5**	**8**
TOTAL STATE AGENCIES	**157**	**199**	**356**

Figure 8

County Agencies

In FY 2012, OIP received 73 AOD inquiries regarding county agencies and boards. Of these, 52 inquiries (71%) came from the public.

Of the 73 AOD inquiries, 34 inquiries concerned agencies in the City and County of Honolulu, down from 40 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 totaled 14, up one from the previous two years, including 5 requests from the agency seeking guidance on compliance with the UIPA.

OIP received 39 inquiries regarding neighbor island county agencies and boards: Hawaii County (19), Kauai County (14), and Maui County (6). See **Figures 10-12**.

Calls to OIP About

City and County of Honolulu

Government Agencies - FY 2012

Department	Requests by Agency	Requests by Public	Total Requests
Police	5	9	14
Board of Water Supply	1	3	4
Planning and Permitting	1	3	4
Parks and Recreation	0	2	2
Transportation Services	0	2	2
Budget and Fiscal Services	0	1	1
City Council	1	0	1
City Ethics Commission	1	0	1
Design and Construction	0	1	1
Environmental Services	0	1	1
Fire	0	1	1
Neighborhood Commission/ Neighborhood Boards	1	0	1
Unnamed Agency	0	1	1
TOTAL	**10**	**24**	**34**

Figure 9

Calls to OIP About
Hawaii County
Government Agencies - FY 2012

Department	Requests by Agency	Requests by Public	Total Requests
County Council	3	3	6
Corporation Counsel	2	1	3
Mayor	0	3	3
Police	1	2	3
County Physicians	0	1	1
Fire	0	1	1
Housing & Community Devt.	0	1	1
Public Works	0	1	1
Water Supply	0	1	1
Unnamed Agency	0	2	2
TOTAL	**6**	**13**	**19**

Figure 10

Calls to OIP About
Kauai County
Government Agencies - FY 2012

Department	Requests by Agency	Requests by Public	Total Requests
Prosecuting Attorney	2	4	6
County Attorney	0	3	3
County Council	0	2	2
Planning	0	1	1
Water	1	0	1
Unnamed Agency	0	1	1
TOTAL	**3**	**11**	**14**

Figure 11

Calls to OIP About

Maui County

Government Agencies - FY 2011

Department	Requests by Agency	Requests by Public	Total Requests
Police	1	2	3
Corporation Counsel	0	1	1
County Council	1	0	1
Finance	0	1	1
TOTAL	**2**	**4**	**6**

Figure 12

Sunshine Law Requests:

OIP was given responsibility for administration of the Sunshine Law in 1998. OIP averages more than 240 requests a year concerning the Sunshine Law. In FY 2012, Sunshine Law requests more than doubled. The 379 requests received in FY 2012 represents a nearly 112% increase (200 more) over the 179 requests received in FY 2011, and a nearly 60% increase (139 more) over the average 240 requests received each year. See **Figure 13**.

Of the 1,074 Attorney of the Day (AOD) requests made in FY 2012, 356 (33%) involved the Sunshine Law and its application. OIP also opened 23 case files for formal requests for assistance, consisting of 5 written requests for opinions and 18 written requests for investigations regarding the Sunshine Law. See **Figure 14**.

Of the 356 AOD requests involving the Sunshine Law, 289 were requests for general advice, and 52 were complaints. Also, 150 of the AOD requests involved the requester's own agency.

In FY 2012, OIP provided 16 training sessions on the Sunshine Law to boards and commissions, as well as other agencies and groups. See page 47 for a list of the sessions provided in FY 2012.

In FY 2012, OIP also produced Sunshine Law video training materials that are available on the OIP website. These free on-line materials include a PowerPoint presentation with a voice-over, and written examples that OIP's attorneys formerly presented in person. The videos and on-line training have enabled OIP to reduce its in-person training on the Sunshine Law basics, and to develop additional or more specialized training materials or sessions, such as workshops to critique participants' own agencies and minutes.

Sunshine Law Inquiries

Fiscal Year	*AOD Inquiries*	*Formal Requests*	*Total*
2012	356	23	**379**
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

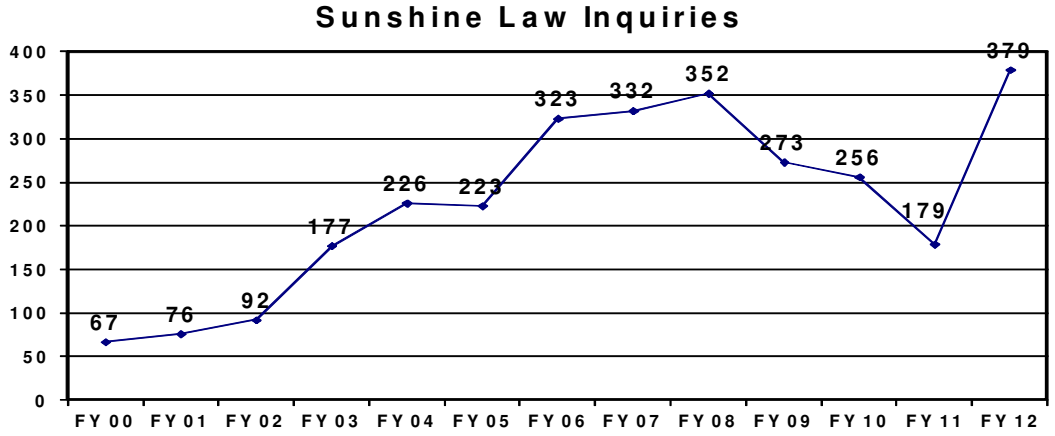
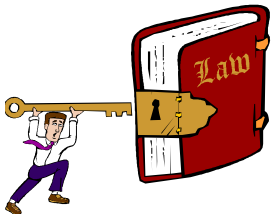


Figure 13

Formal Opinions



In FY 2012, OIP issued two formal opinions, both related to the UIPA, which are summarized as follows.

UIPA Formal Opinions:

Mailing Addresses and Social Security Numbers of Real Property Owners

Requester asked OIP whether the Honolulu Real Property Assessment Division properly withheld all mailing addresses and social security numbers when responding to Requester's request for the 2011 Oahu Assessment Notices under part II of the UIPA.

OIP found that the mailing address of record for a property owner is "real property tax information" and as such is subject to mandatory disclosure under the UIPA. HRS § 92F-12(a)(5).

OIP also found that a property owner's social security number is not "real property tax information" subject to mandatory disclosure, and falls within the UIPA's exception for information whose disclosure would constitute a clearly unwarranted invasion of personal privacy. HRS § 92F-12(a)(5) and -13(1). Disclosure of only the last four digits of a property owner's social security number would result in a likelihood of actual identification of the full social security number, so the Division properly denied access to the last four digits of property owners' social security numbers. *[OIP Op. Ltr. No. 11-1]*

Hawaii County Fire Department Records on Persons Rescued

The *Hawaii Tribune-Herald* asked whether the Hawaii County Fire Department (HCFD) must disclose the name, gender, age, and hometown of persons rescued (i.e., persons who received HCFD assistance pursuant to fire, medical, rescue, and motor vehicle accident calls).

The UIPA allows agencies to withhold records that are protected from public disclosure by federal law. To the extent that HCFD is subject to the federal Health Insurance Portability and Accountability Act (HIPAA), and the DHHS rules, 45 C.F.R. Parts 160 and 164 (Privacy Rule) promulgated under HIPAA, it must determine on a case by case basis whether HIPAA or the Privacy Rule allow or prohibit disclosure of a person's identity.

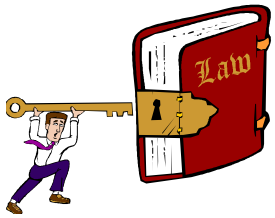
While HCFD did not object to disclosure of gender and ages of persons rescued, HCFD must determine on a case by case basis whether disclosure of hometowns of persons rescued, especially along with other information such as gender and age, could lead to discovery of the identity of an individual whose identity is protected under HIPAA. If so, as in the case of an extremely small town with few residents of the rescued person's gender and age, disclosure of the hometown is prohibited under the Privacy Rule. If not, then hometown disclosure is not prohibited by the Privacy Rule, and, as the UIPA's privacy exception does not apply to

de-identified information, HCFD would have no basis to withhold the hometown under the UIPA.

Not all of HCFD's records are subject to HIPAA. For HCFD's functions that are not subject to HIPAA or the Privacy Rule, the UIPA's privacy exception applies. The UIPA requires that, when the names of persons rescued by HCFD carry a significant privacy interest, the privacy interest must be balanced against the public interest in disclosure on a case by case basis to determine whether disclosure of that person's identity is appropriate.

Under the UIPA, an individual does not have an inherent privacy interest in his or her hometown. When there is no basis under the UIPA's privacy exception to withhold the name of a rescued person, there is likewise no basis to withhold the name of the person's hometown. In instances when HCFD may withhold the name of a rescued person under the UIPA's privacy exception, the issue of whether disclosure of the person's hometown, without the person's name, would amount to a clearly unwarranted invasion of personal privacy must be determined on a case by case basis. When disclosure of a hometown could lead to actual identification of an individual whose identity is protected under the UIPA's privacy exception, HCFD may also withhold the person's hometown to protect the individual's identity. *[OIP Op. Ltr. No. 12-1]*

Informal Opinions



In response to requests made for advisory opinions on Sunshine Law investigations, OIP in FY 2012 issued 7 informal opinion opinions under the UIPA and 16 informal opinions under the Sunshine Law. The following are summaries of these informal opinions.

UIPA Informal Opinions:

Reasonableness of Fees and Costs

Requester asked whether the requested cost for copies of executive session minutes from the State Ethics Commission was reasonable.

OIP found that the State Ethics Commission had already performed the work of searching for, reviewing, and segregating the documents requested. The fees and costs for the work were based on the actual work performed and were not an estimate. OIP found that the total charges were reasonable, given the volume of records and work performed.

OIP noted that the agency did not provide a good faith estimate to the requester *before* doing the work. If the requester wanted to narrow his request now, he may pay the lesser amount for the fewer records. If he did not narrow his request, and the fees are not paid, the request is deemed abandoned. *[UIPA Memo 12-1]*

Mortgage Loan Originator Licensure Records

Requester asked whether the Division of Financial Institutions, Department of Commerce and Consumer Affairs (DFI), properly denied Requester's request under Part II of the UIPA for information about mortgage loan originator license applicants to whom DFI had denied licensure (denied applicants) during a specified time period, including the number of denied applicants, the number of them denied due to their high numbers of credit delinquencies, and a list of their names and identifying numbers.

OIP found that DFI has no obligation under the UIPA to disclose the requested information about denied applicants because DFI does not maintain any "government record" that is responsive to this records request, and is not required to create the requested records by paying for the preparation by the national records administrator of a report containing the requested information. *[UIPA Memo 12-2]*

Mayor's Public Schedule

Requester asked whether the City and County of Honolulu (City) properly denied her requests (1) for a copy of the Mayor's Public Schedule, and (2) to be placed on a list of news media persons who are regularly emailed updates of the Mayor's Public Schedule.

OIP found that the Mayor's Public Schedule does not fall within an exception to disclosure under the UIPA, and the City must disclose it upon request.

The UIPA does not require agencies to respond to "standing requests" for records to be created in the future, and it likewise does not require agencies to create or maintain email lists for recipients of government records to be created in the future. The fact that the City chose to create such a list for routine distribution of the Mayor's Public Schedule to a limited number of outside recipients is an undertaking outside the scope of the UIPA, and does not have the effect of creating a UIPA obligation for the City to expand the distribution list to any member of the public wishing to be included. The City is therefore not required under the UIPA to add Requester to its list of news media persons who are regularly emailed updates of the Mayor's Public Schedule. *[UIPA Memo 12-3]*

Identifying Numbers Assigned to Individuals on the Nationwide Mortgage Licensing System & Registry (NMLS)

Requester asked whether the Department of Commerce & Consumer Affairs, Division of Financial Institutions (DFI) properly denied Requester's request for a list of identifying numbers assigned to individuals who applied for licensure as Mortgage Loan Originators (MLO). All MLO applicants must register and submit their applications into the NMLS, and DFI is mandated by federal law to use the NMLS information for MLO licensure in Hawaii.

DFI informed Requester that it will disclose the NMLS numbers of active MLO licensees but that it "is unable to disclose records of persons who applied for an MU4 [MLO license] with the DFI and whose applications are still pending; withdrew their applications, or were denied licensure." Therefore, this opinion is limited to addressing whether the Uniform Information Practices Act (UIPA) requires the disclosure of the NMLS numbers for those individuals who are not currently licensed as MLOs and whose numbers will not be disclosed by DFI.

OIP found that the UIPA does not require DFI to disclose the NMLS numbers of applicants whose applications were denied, withdrawn, or are undergoing DFI's review. DFI is not required to disclose lists of NMLS numbers of either withdrawn or denied applicants because DFI does not maintain either of these applicant lists, and the numbers are thus not government records subject to the UIPA. HRS § 92F-11. DFI does administratively maintain lists of applicants whose applications are currently undergoing DFI's review, but those applicants' NMLS numbers could reasonably lead to actual identification of the applicants and may be withheld under the UIPA's "clearly unwarranted invasion of personal privacy" exception. *[UIPA Memo 12-4]*

Providing Records in the Format Requested; Waiver of Copying Fees

Requester posed three questions to OIP: (1) whether the Department of Transportation, Harbors Division's (DOT) response to Requester's request for an electronic copy of records was proper, (2) whether Requester is entitled to an electronic copy of a mitigation plan with all fees waived, and (3) whether Requester is entitled to an electronic copy of an e-mail. OIP concluded the following:

(1) DOT advised Requester that it does not maintain any records other than what had already been provided, thus OIP found that DOT has properly responded to this portion of the request.

(2) OIP found that Requester is entitled to an electronic copy of the mitigation plan. DOT advised Requester that he would be provided with an electronic copy of the mitigation plan after payment of copying fees. Because copying fees are not set by the UIPA or the rules implementing it, OIP does not have jurisdiction to opine whether DOT may deny Requester's request for a waiver of copying fees.

(3) Requester is entitled to a copy of the e-mail in electronic format, as DOT has not presented facts to support a finding that it is unable to provide the e-mail in that format. *[UIPA Memo 12-5]*

Denial of Request for Records, Equipment Pricing Lists for Contract to Provide Airport Passenger Information Systems

Requester asked whether the Department of Transportation, Airports Division (DOT), properly denied Requester's request under Part II of the UIPA for the equipment price list sheet submitted to DOT by the company awarded the contract to provide and install new passenger information systems for Kahului Airport.

OIP found that from the Awardee's equipment price sheet, DOT may withhold information specifically identifying the manufacturers and models because this information is confidential commercial and financial information that is exempt from disclosure under the UIPA's "frustration of a legitimate government function" exception. However, DOT must disclose the general equipment descriptions, quantity and unit, and total costs because this information reveals the unit prices that DOT will be paying for all equipment components and, therefore, constitutes "government purchasing information" required to be public. HRS § 92F-12(a)(3). *[UIPA Memo 12-6]*

On-the-Job Training Records

Requester asked whether, under Part II of the UIPA, WorkHawaii, Department of Community Services, City & County of Honolulu (WorkHawaii), may redact information from an On-the-Job Training (OJT) Contract between WorkHawaii and a private employer, regarding the employer's employment and training of an individual (trainee).

OIP found that WorkHawaii may redact the trainee's name and social security number because this information identifies the individual who is the trainee, and reveals financial and employment information about this individual that falls within the UIPA's "clearly unwarranted invasion of personal privacy" exception. However, after WorkHawaii redacts the trainee's identifying information, the agency must publicly disclose the remaining OJT Contract information, including the employer's salary and education requirements for the trainee that will be hired. *[UIPA Memo 12-7]*

Sunshine Law Informal Opinions:

Sunshine Law informal opinions are written to resolve investigations and requests for advisory opinions. OIP opened 11 investigations into the actions of government agencies in FY 2012, due to complaints made by members of the public (up from 10 investigations opened in FY 2011). The investigations were completed in FY 2012 and resulted in the following 11 informal opinions. Additionally, five informal opinions were written in response to requests for advisory opinions. Overall, OIP wrote 16 informal opinions concerning the Sunshine Law in FY 2012, as summarized below.

Closed Meeting of Board of Ethics

Requester asked for an investigation into whether the Kauai Board of Ethics (Board) violated the Sunshine Law by holding an executive session to investigate and hear allegations of ethical violations by the Chief of Police.

OIP found that the Board properly held an executive session because the Sunshine Law provides exceptions to its open meeting requirements when the board considers charges against an officer or employee and also when the board consults with its attorney. HRS § 92-5(a)(2) and (4) (Supp. 2010).
[Sunshine Memo 12-3]

Written Testimony Submitted by E-mail

Requester asked for an investigation into whether the Kauai County Council (Council) violated the Sunshine Law by its alleged refusal to accept written testimony that Requester submitted by e-mail concerning an item on the Council's agenda for its upcoming meeting.

OIP found that Requester's e-mail correspondence to the Council served as written testimony for an upcoming meeting. If the Council had failed to distribute the testimony, this would have violated the Sunshine Law's requirement that a board accept written testimony submitted by the public. The Council's apparent omission of Requester's transmittal e-mail as testimony, was mitigated, however, because with respect to the four documents attached to Requester's testimony, the Council had considered and made public redacted versions of two of the same documents that had been provided as testimony by another person and the other two attached documents were not required to be disclosed in order to protect the privacy of the government employee named therein.
[Sunshine Memo 12-4]

Adequacy of Agendas; Permitted Interaction Group

A requester asked whether the Reapportionment Commission violated the Sunshine Law by (1) discussing items that were insufficiently noticed on its agendas for July 12 and 19, 2011; (2) adding an item to its agenda by vote of 2/3 of its members at its June 28 meeting; and (3) participation of board members in its Technical Committee.

OIP found that the July 12 agenda included several item descriptions that were too vague to notify the public of what, if anything, would be discussed under that heading. However,

OIP further found that the minutes from that meeting show that the only topic actually discussed under those vague headings—inclusion of the military in the permanent resident population and the permanent resident population generally—was listed elsewhere on the agenda as an executive session agenda item. Thus, although the vague agenda items by themselves did not give sufficient notice to allow the Commission's discussion of any topic, the public had notice from the executive session agenda item that this topic was coming before the Commission for its consideration at the meeting, so OIP concluded that, in this specific instance, the discussion did not violate the Sunshine Law. OIP also found that the July 19 agenda item, although less informative than it might have been, was legally adequate as notice to the public to allow the board's discussion of the item.

OIP also found that the issue of which categories of persons should be included in the permanent resident population was both of reasonably major importance and affecting a significant number of persons, and thus would not have been a suitable item to be added to an agenda by a 2/3 vote of all members to which the Commission was entitled. The filed agenda, however, had described the topic as the subject of a report, and the Commission's vote to add it once again to the agenda was apparently made under the belief that the agenda should have specified that the Commission would take action on that topic. Because a board's consideration of an item implicitly includes the possibility of board action on the item, the Commission's vote to add the permanent resident population issue to the agenda was not necessary to allow the Commission to consider and take action on the issue. Therefore, OIP concluded that the Commission's vote on the issue did not violate the Sunshine Law because the action taken fell within the scope of an already noticed agenda item.

OIP further found that the Technical Committee was formed as a permitted interaction group under section 92-2.5(b)(1), HRS. The Commission voted to allow substitution of other members for the original Technical Committee membership, and the status of the Technical Committee's work was listed as a topic on multiple agendas over a two-month span. However, the Technical Committee's gatherings did not result in any substitution of members nor did the Committee make multiple reports back to the Commission; only the members originally appointed to the group participated in the group and the Technical Committee did not present a substantive report to the Commission until the last meeting reviewed by OIP. OIP concluded that despite the confusion created by the Commission's agenda listings and vote to allow substitutions, the manner in which the Technical Committee actually operated was consistent with the requirements of the permitted interaction and thus in compliance with the Sunshine Law.
[Sunshine Memo 12-6]

Amendment of Agendas

A requester asked whether a Neighborhood Board violated the Sunshine Law by amending its Regular Meeting Agenda (Agenda) during its meeting held on October 25, 2011, to add Bill 54 proposed by the Honolulu City Council for discussion and action.

The Sunshine Law requires that boards give written public notice of meetings which shall include an agenda listing all items to be considered. HRS § 92-7(a). The Sunshine Law also 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) (emphasis added).

OIP found that the Neighborhood Board's Agenda amendment violated the Sunshine Law because Bill 54 was an item of reasonably major importance and action upon it affected a significant number of persons.
[Sunshine Memo 12-7]

Council Selection of Successor Councilmember

A requester asked for an investigation into whether the Kauai County Council violated the Sunshine Law with regards to its selection of KipuKai Kualii as the successor councilmember when former Councilmember Derek Kawakami was appointed by the Governor to the State House of Representatives.

Because OIP was not presented with any specific facts indicating that councilmembers discussed the successor selection before the Council's meeting, and because OIP believed there is a plausible alternative explanation for the Council's apparent assumption that Mr. Kualii was likely to be selected, OIP could not conclude that the Council's selection of Mr. Kualii was the result of improper discussions, including possible serial one-on-one communications.
[Sunshine Memo 12-8]

Adequacy of Agenda

Requester asked for an investigation into whether the Department of Land and Natural Resources Commission on Water Resource Management (CWRM) violated the Sunshine Law by discussing items that were alleged to be insufficiently described on the agenda for the CWRM meeting of November 16, 2011.

OIP found that Item F on the agenda for the CWRM's meeting, which stated "ADMINISTRATIVE OTHER BUSINESS," was a "catch-all" agenda item that did not meet the notice and agenda requirements in the Sunshine Law because it did not indicate that there would be a discussion on hiring staff. Under the specific facts of this case, however, any public harm resulting from this deficiency was minimal, because commissioners did not discuss hiring, and no action was taken.

OIP recommended that, in order to avoid future Sunshine Law complaints, the CWRM (1) not use "catch-alls" in agendas without providing more detailed descriptions in subheadings, and (2) instruct its commissioners to identify, in advance of filing an agenda, matters of "official business" that they wish to inquire about and possibly discuss at the meeting. OIP also noted that boards may amend filed agendas in accordance with section 92-7(b), HRS.
[Sunshine Memo 12-11]

Board Member's E-mail Correspondence to Other Members

The Neighborhood Commission Office (NCO) asked whether a Neighborhood Board (Board) violated the Sunshine Law when a Board member sent messages by e-mail to the other Board members regarding various matters that were, or anticipated to be, on the Board's agenda for upcoming meetings.

OIP found that because the Board member's e-mail messages sent to all Board members concerned matters within the Board's authority that were anticipated to appear on the Board's agenda in the foreseeable future, these e-mail messages improperly constituted Board discussion of official business in violation of the Sunshine Law's open meeting requirement.

OIP recommended that the NCO work with the Board to enforce the Sunshine Law's prohibition against Board members' discussion of official business outside a meeting, which in this case took the form of e-mail correspondence from one Board member to the others. *[Sunshine Memo 12-12]*

Sunshine Law Complaints About Testimony, Minutes, and Agenda

Requester asked for an investigation into whether a Neighborhood Board (NB) violated the Sunshine Law by 1) refusing to allow testimony at two meetings; 2) limiting the public to only one question of persons presenting reports, limiting testimony to only one minute for some testifiers while allowing others to testify for longer, and in some cases, interrupting testifiers before one minute was up; 3) refusing to add a board member's requested reference into the minutes; and 4) refusing to place a board member's item on the NB agenda. The Requester was an NB member at the time of the meetings that form the bases for the complaints.

Given the changes in NB membership, the Neighborhood Commission's Decision and Order relating to these and similar issues, and the ENB's subsequent commitment to ameliorate the issues raised, OIP found detailed factual findings unnecessary to address the concerns raised by Requester. Instead, OIP offered this general guidance regarding the issues raised by the Requester.

(1) A board must allow any interested person to testify on any agenda item at every meeting. Hawaii Revised Statutes (HRS) § 92-3 (1993) ("boards shall also afford interested persons an opportunity to present oral testimony on any agenda item"). While a board member may testify as a member of the public, the Sunshine Law does not regulate how board members conduct their own discussion and deliberation of agenda items or whether the public may question other testifiers during the meeting. OIP Op. Ltr. No. 06-01.

(2) Reasonable time limits on testimony by the public may be imposed if a rule or policy setting such limits has been previously adopted by a board at a meeting, but time limits must be fairly applied. OIP Op. Ltr. No. 02-02. A mere notice of time limits placed at the top of the meeting agenda does not substitute for a board's adoption of a rule or policy setting time limits, so a board should not seek to enforce time limits that are not based on a written rule or policy adopted by the board at a previous meeting. And where a board has previously established time limits, those time limits must be applied in an evenhanded manner. Applying time limits only to some testifiers and not others is an improper restriction of testimony under the Sunshine Law.

(3) A request by a board member to add other information, such as a YouTube video reference, into the minutes must be accommodated. HRS § 92-9(a)(4)(1993). However,

OIP has interpreted this to apply only to a request made during the same meeting in which the information is sought to be included in that meeting's minutes. When the request is made at a meeting and the information was included in the minutes of that meeting, there is no Sunshine Law violation.

(4) And lastly, the Sunshine Law requires an agenda to provide adequate notice but does not address the board's process in determining matters to be placed on an agenda. Since the Sunshine Law is not implicated in this case, Requester's complaint about the agenda's composition is outside of OIP's jurisdiction. The requester may instead address this complaint to the Neighborhood Commission Office.
[Sunshine Memo 12-13]

Early Adjournment, Threats, and Adequacy of Agenda

Requester asked for an investigation into whether a Neighborhood Board (NB) violated the Sunshine Law at its meeting held on December 10, 2009 (Meeting), by (1) the Chair's unilateral adjournment of the Meeting, (2) an NB member's threats of physical violence and property damage to a member of the public who sought to videotape a meeting, (3) the Chair's action in shoving Requester, an NB member, and (4) a presentation on "Conduct of Board Meeting."

OIP noted that in the time since the Meeting, the NB has had considerable turnover in its membership. This opinion is therefore intended primarily as guidance for the current board members in their efforts to comply with the Sunshine Law.

OIP found the following:

(1) A board may adjourn a meeting without considering all items on the board's agenda, unless it has begun hearing testimony or otherwise begins considering an item. Once the board begins considering an item, it must hear testimony from all interested persons prior to adjourning the meeting. The Sunshine Law is silent on the question of who has the authority to adjourn a board meeting. In the absence of any allegation that the meeting's early adjournment prevented members of the public from testifying on an issue the board considered during the meeting, OIP could not find that the adjournment violated the Sunshine Law.

(2) The Sunshine Law provides a public right to make an audio recording of a meeting, but does not provide a similar right to make a video recording, so while OIP recommends that a board allow video recording, the law does not require a board to do so. However, if a board wishes to ban video cameras at its meetings, it must inform members of the public in a reasonable manner. Threatening physical violence and damage to personal property is not a reasonable way to ask a member of the public to stop video recording a meeting. Such threats are a deterrent to members of the public seeking to attend the meeting, and thus violate the Sunshine Law's requirement that meetings be open to the public.

(3) The Sunshine Law's open meeting requirement is concerned primarily with the public's right to attend board meetings. Since a board member does not have a lesser right to attend a meeting than the general public, physical aggression directed against a fellow board member at a public meeting is likewise inconsistent with the Sunshine Law's open meeting requirement; however, OIP could not find from the evidence presented here that the former NB Chair's act of elbowing a member in the back constituted an independent Sunshine Law violation.

(4) The Sunshine Law does not specify who sets a board's agenda, nor does it require that agenda items be non-defamatory. As the "Conduct of Board Meetings" issue was on

the agenda, and as the presentation apparently did address the conduct of board meetings, OIP concluded that the agenda gave reasonable notice of what the board would consider under that item. The question of whether the presentation was defamatory is outside OIP's jurisdiction.

Finally, OIP noted that the criminal laws are a more appropriate means than the Sunshine Law to pursue complaints of threats or physical altercations directed to either board members or members of the public.
[Sunshine Memo 12-14]

Sufficiency of and Omission from Agenda

Requester asked for an investigation into whether the Hawaii County Board of Ethics (HCBE) violated the Sunshine Law by (1) listing public testimony before new business on the September 23, 2009 meeting agenda; (2) failing to name the petitioner and the County employee who was the subject of the petition on the same agenda; and (3) failing to include letters sent to the HCBE Chair on an agenda as correspondence.

OIP found the following:

(1) Public testimony may be taken on all agenda items at the beginning of a meeting. OIP Op. Ltr. No. 06-01.

(2) The two agenda items, Petition No. 2009-6 and Petition No. 2009-07, were described with sufficient detail to allow the public to understand what the HCBE intended to consider at the meeting and to decide whether or not to participate in the meeting.

(3) The Sunshine Law does not address the question of whether a board is required to consider an issue when requested; it only provides that issues a board chooses to consider at its meeting must be properly listed on its agenda. See HRS § 92-7 (Supp. 2011). The HCBE, therefore, did not violate the Sunshine Law by declining to place on its agenda or consider the matters raised in Requester's letter to the Chair.
[Sunshine Memo 12-15]

Executive Session on Adding Item to Agenda

Requester asked for an investigation into whether the Kauai County Council (Council) violated the Sunshine Law by holding an executive session to discuss a motion to add an item to the agenda for its meeting held on June 3, 2009 (the Meeting).

OIP found that in appropriate circumstances, a board may go into an unanticipated executive session with its attorney to discuss its ability to add an item to its agenda, so long as the board does not discuss the underlying item proposed to be added. See HRS § 92-5(a)(4) (Supp. 2011). However, given the length of the executive session and the fact that the County Attorney publicly announced his advice on whether the proposed item could be added to the agenda by vote, OIP infers that the discussion was not limited to advice on that legal question. Because the Council failed to rebut that inference by explaining what discussion occurred during the executive session and why it properly fell within an executive session purpose, and failed to provide any evidence or arguments to meet its burden to justify the executive session, OIP could not find that the executive session was allowed under the Sunshine Law.
[Sunshine Memo 12-16]

The following five informal opinions were written in FY 2012 in response to requests for advisory opinions under the Sunshine Law.

Application of Sunshine Law to 2011 Reapportionment Commission

Requester sought an advisory opinion on whether the 2011 Reapportionment Commission is subject to the Sunshine Law.

OIP found that the 2011 Reapportionment Commission is a "board" as defined in the Sunshine Law and that no exemption to the Sunshine Law applies to it, and thus concluded that the 2011 Reapportionment Commission is subject to the Sunshine Law.
[Sunshine Memo 12-1]

Application of Sunshine Law to Hawaii Forest Stewardship Advisory Committee

Requester sought an advisory opinion on whether the Hawaii Forest Stewardship Advisory Committee (Committee) is subject to the Sunshine Law.

Even though there are federal laws that were the impetus for the Committee, OIP found that because the Committee was created by state rule and meets the Sunshine Law's other requirements for a board, the Committee is subject to the Sunshine Law.
[Sunshine Memo 12-2]

Determination Whether WasteStream Kohala Is a Board Subject to the Sunshine Law

Requester sought an opinion as to whether WasteStream Kohala ("WasteStream") is a board subject to the Sunshine Law.

OIP found that WasteStream Kohala is *not* a board subject to the requirements of Hawaii's Sunshine Law because it was not created by constitution, statute, rule, or executive order; was not delegated any duties by the North Kohala Community Development Plan Action Committee; and none of the members of the Action Committee are a part of WasteStream.
[Sunshine Memo 12-5]

Whether the Maui Master Gardener Advisory Board Is a Board Subject to the Sunshine Law

A requester asked whether the Maui Master Gardener Advisory Board is a board subject to the Sunshine Law.

OIP found that the Maui Master Gardener Advisory Board is not a board subject to Hawaii's Sunshine Law because it was not created by constitution, statute, rule or executive order.

The Sunshine Law governs the interactions of boards and board members in order to open up governmental processes to public scrutiny and participation. Haw. Rev. Stat. § 92-1. In order to be a "board" under the Sunshine Law, a body must have five elements: (1) be an agency, board, commission, authority, or committee of the State or its political

subdivisions; (2) created by constitution, statute, rule, or executive order; (3) have supervision, control, jurisdiction or advisory power over specific matters; (4) be required to conduct meetings; and (5) be required to take official actions. Haw. Rev. Stat. § 92-2(1); OIP Op. Ltrs. No. 08-02 at 3-4; 05-01 at 4; 01-01 at 11.
[Sunshine Memo 12-9]

Applicability of Sunshine Law to Interim Board of Directors of the Hawaii Health Connector

The Interim Board of Directors of the Hawaii Health Connector (Interim Board) was not a board as defined by the Sunshine Law and was not subject to the requirements of the Sunshine Law.

The federal Patient Protection and Affordable Care Act of 2010 provides for the establishment by the federal government of health insurance exchanges in every state if the state does not establish its own exchange by January 1, 2014. In 2011, Hawaii enacted Act 205, which established a Hawaii health insurance exchange known as the Hawaii Health Connector (Connector).

Act 205 expressly states that the Connector "shall not be an agency of the State. . . . The connector shall be a Hawaii nonprofit corporation organized and governed pursuant to chapter 414D, the Hawaii nonprofit corporations act." HRS § 435H 2(a). The Connector is a nonprofit entity governed by a board of directors. Before the board commenced on July 1, 2012, Act 205 provided for establishment of a separate Interim Board, which was to "sunset" on June 30, 2012.

It is clear from Act 205 that the Connector and its board of directors are not State entities. The temporary Interim Board operated the Connector, a nonprofit corporation, until the Interim Board's sunset date when the board of directors was scheduled to take over. The Interim Board was not an "an agency, board, commission, authority, or committee of the State or its political subdivisions." Rather, it is a governing board for a nonprofit corporation. Thus, the Interim Board, having failed to meet the first prong of the definition of a "board," was not subject to the Sunshine Law.
[Sunshine Memo 12-10]

General Legal Assistance and Guidance

The following summaries are a sampling of the types of general legal guidance provided by OIP through the Attorney of the Day service, beginning with guidance related to the UIPA.

UIPA Guidance:

Mailing Addresses of Small Business Vendors

The Human Resources Office at the University of Hawaii (UH) informed OIP that it makes purchases from small business vendors and sends its check payments to the vendors at their mailing addresses. UH asked whether it would be required to disclose these vendors' mailing addresses when the addresses often are the vendors' home addresses.

OIP advised that, because the vendors' mailing addresses include home addresses, the mailing addresses would not be required to be disclosed under the "privacy" exception, unless the addresses are clearly business addresses only.

Note: unlike the following licensee example, there is no specific requirement that a vendor's address be public.

Information about Licensees

The Department of Commerce and Consumer Affairs Professional & Vocational Licensing Division (PVL) received a request for files of licensed individuals who were the subject of administrative review. Some licensees had incurred penalties and fines. Some files contained handwritten staff notes indicating whether fines were paid. PVL asked whether the UIPA's privacy exception, at HRS section 92F-13(1), HRS, protects staff notes from disclosure on the basis that they contain information about an individual's finances.

Under section 92F-14(b)(6), HRS, information describing an individual's finances carries a significant privacy interest. Privacy interests must always be weighed against the public interest in disclosure under section 92F-14(a), HRS, to determine whether disclosure is appropriate. The fact that someone has or has not paid a penalty or fine is information about an individual's finances. However, OIP advised that it is questionable whether any privacy interest in this information outweighs the public interest in disclosure, because the fact that the individual was involved in an administrative action, and the judgment in the case, are already public. Also, the level of detail regarding the individual's finances appears to be minimal.

Further, section 92F-14(b)(7), HRS, states that information relating to an individual's fitness to be granted a license carries a significant privacy interest, except for the record of any proceeding resulting in discipline. OIP advised that this section appears to make the staff notes on fines public.

PVL later asked whether the following information about licensees is public: (1) the

mailing address for a licensee who is an entity (not an individual); (2) a mailing address provided by a licensee that appears to be a residence address; and (3) the address provided for a business that appears to be a residence address when no other address was provided.

OIP advised that section 92F-12(a)(13), HRS, specifically requires a licensee's business address to be public. Thus, if the mailing address is the only address given for the licensed entity, it will be public regardless of whether it appears to be a residential address. If separate business and mailing addresses were provided, then the fact that the licensee is an entity, by itself, will not automatically make the mailing address public. The public interest is satisfied by ensuring that the listed business address is public.

OIP noted that there are individuals in licensed professions who operate professionally as one-person corporations with a contractual relationship to the business entity at their actual workplace. Thus, it should not be assumed that the fact that the mailing address is for an entity means there is no privacy interest for the individual who makes up that entity. For example, a dentist or cosmetologist works out of an office that is the listed business address, but prefers to get licensing-related mail at home. In such cases, when a mailing address of a licensed entity is provided in addition to a business address (which is public), and the mailing address appears to be a residential address, the privacy exception allows withholding the mailing address.

NOTE: OIP generally advises agencies dealing with a request involving numerous addresses that are not clearly residential, that it is reasonable for the agency to err on the side of privacy and assume the address is residential in redacting it. However, if the redactions are appealed, the agency will still have the burden to establish that the redacted addresses are, in fact, residential.

Death Certificates

The son of a deceased woman asked the Department of Health (DOH) for a copy of his mother's original death certificate. DOH provided to the son a document setting forth the death certificate information but not a copy of the actual death certificate. The son asked whether the UIPA requires DOH to provide the copy of the death certificate that he requested.

OIP explained that the disclosure of vital statistics records like death certificates are governed by a specific statute (HRS chapter 338) and that this specific statute's provisions supersede the UIPA's general records disclosure provisions. Therefore, this statute, and not the UIPA, instructs the DOH when it must provide a copy of a death certificate or otherwise verify information about a death.

Identity of Records Requester

An agency received a request to disclose proposals received in response to its solicitation, and was also asked to disclose the identity of the person who made this records request. The agency's deputy attorney general asked OIP if the agency must disclose this requester's identity.

OIP responded affirmatively, citing its three opinions, OIP Op. Ltr. Nos. 90-37, 93-23, and 96-4, concluding that an agency must disclose identities of persons requesting public disclosure of government records under Part II of the UIPA. Notably, depending on the description of the personal record set forth in an individual's personal record request made under Part III of the UIPA, the identity of the individual requesting access to the described personal record may be protected from public disclosure under the "privacy" exception.

Confidential Business Information, Post-Procurement

An agency received a request for documents submitted in response to a Request For Proposals. At the time of the request, the procurement process was complete, the award had been made, and the contract had already been signed. The agency asked what could generally be withheld from the proposals.

OIP advised that the likely issue would be the extent to which information within the proposals was confidential business information that could be withheld under the UIPA's frustration exception. Assuming that there was a competitive market for the services in question, which the existence of multiple proposals would indicate, and assuming that the proposers themselves had not already made the information public, the question would be whether the information would cause substantial competitive harm if disclosed.

Some portion of the financial information submitted by a business typically qualifies as confidential business information. In particular, it is appropriate to withhold information that would reveal the profit margin from a contract, which would include overhead figures that could be combined with the contract price (which is public) to calculate anticipated profit.

For non-financial information, a business can potentially withhold the information, but must be able to factually support the claim that disclosure would cause substantial competitive harm. The fact that employees of a business spent time writing up the narrative portions of a proposal, which a competitor might adapt for its own use, is not sufficient. A description of business processes might meet the test, but the description would have to be specific and the processes described would have to be proprietary and not a standard practice in the industry. Narrative descriptions of how the proposer intended to fulfill the contract would need to reveal a unique idea that competitors had not figured out, not just one of various likely approaches. Similarly, a client list resulting from years of work at building relationships and tracking contacts might be confidential business information, where a client list consisting of the same top five companies whose business all competitors bid for would not qualify.

How to Redact an Audiotape

An agency received a request for a copy of an audiotape of a closed meeting. Because portions of the recording can be withheld, the agency planned to provide a redacted copy of the audiotape, and had already determined based on written minutes which portions of the meeting would need to be redacted. The agency asked how the redaction should be done, and whether it could send the job out to a third party and pass on the cost to the requester.

OIP advised that the agency could have a third party do the redaction and pass on the cost, so long as the agency did not pass on an hourly rate higher than the $20 per hour that OIP's rules allowed for redaction and segregation time. Passing the cost of making a copy of the tape would be fine, and passing on time spent by a third party in review and segregation would be fine, but the time would have to be charged to the requester at the rate allowed by rule.

As far as the mechanics of how to redact an audiotape, the usual way would be to first make a copy of the full original tape to redact. The person doing the redaction would listen to that copy and mark the number shown on the tape recorder at the beginning and end of each segment to be redacted. After doing that for the entire tape, the person would then rewind to the number marking the beginning of the first segment to be redacted, press record, record the silence (without talking in

the background) until reaching the number for the end of the segment, and then press stop. The person would then fast forward to the beginning of the next segment and repeat the process, until all segments had been redacted. All the time spent in that process can be charged to the requester as review and segregation time.

Using a Deceased Employee's Address Information to Send a Sympathy Card

An agency wanted to send a sympathy card to the family of an employee who had recently died. This would require looking up the employee's home address in personnel records. Would this be allowed under the UIPA?

OIP advised that such a use would be for agency purposes, as the sympathy card was being sent on behalf of the agency, so there was no problem with using a home address taken from personnel records.

Sharing Employee Performance Information with Supervisor

A state manager shared information about a managed employee with the manager's own supervisor. The managed employee complained about the manager's action to the Department of Human Resources Development (DHRD). The manager asked whether the UIPA placed limits on his ability to share employee performance information with his own supervisor, and whether he could disclose that performance information to DHRD in the course of defending himself against the employee's complaint.

OIP advised that the UIPA's exceptions to disclosure are applicable to record requests from outside the agency, and that a disclosure of confidential information within an agency would be considered an internal disclosure so long as it was for work purposes, involving employees with a need to know the information. A manager passing information about a managed employee's job performance on to the next level of supervisor would generally be a disclosure for work purposes to someone with a need to know the information.

Disclosure of the same information to DHRD in the course of responding to the employee's complaint would be considered interagency sharing. Section 92F-19, HRS, allows interagency sharing of otherwise protected information if the receiving agency needs the information, and the disclosure is reasonably consistent with expected use of the information. This section appears to apply here to allow disclosure of the performance information at issue in responding to the complaint about disclosure of the performance information.

Personal Contact Information of Board Members

A member of the public sought to contact members of the Alien Species Recovery Committee "in their personal capacity" and asked the Committee's staff for each member's contact information. Three members are state employees set by statute, one is a federal employee, and two are private citizens appointed by the Governor.

In a separate inquiry, a member of the public requested home or private work e-mail addresses for each member of the Commission on Water Resource Management.

Both boards were advised that personal contact information is protected under the "privacy" exception, section 92F-13(1), HRS, so both boards were advised not to disclose personal telephone numbers or e-mail addresses absent written consent.

Although business contact information is not protected under the "privacy" exception, the "frustration" exception at section 92F-13(3), HRS, allows withholding of direct work telephone lines and e-mail addresses for the government employees who are board members. Business contact information for non-governmental members of boards may also be withheld. The basis for this is that board members would be less likely to provide direct contact information if it was made public, which would interfere with the agency's ability to perform its functions more efficiently (i.e., it can contact board members quickly and directly via their personal or private business contact information).

Instead of direct work or personal telephone and e-mail information, the office contact information may be provided as the contact information for board members.

Providing Records in Requested Format

Requester asked for copies of several sets of minutes of meetings of the Board of Agriculture (BOA) in Microsoft Word (Word) format. BOA was unable to produce a copy of the final approved minutes signed by the Chairperson in Word format, but was able to provide Portable Document Format, or "pdf" copies. Requester only wanted a Word version of the minutes.

OIP advised BOA that if unsigned versions of the minutes are available in Word which are essentially "final" except that they do not include the Chairperson's signature, and Requester seeks access to unsigned versions, then BOA should provide them as Word documents if it has the capability to do so. BOA was concerned that providing minutes in Word would allow a requester to manipulate the document. OIP explained that any document provided in response to a record request has the potential to be manipulated, and the agency would not be responsible for a record requester's illegal manipulation of a document.

NOTE: Metadata is loosely defined as "data providing information about one or more aspects of the data," or "data about data." For example, a webpage may include metadata specifying what language it is written in, what tools were used to create it, and where to go for more on the subject. Metadata in Word documents includes information that is intended for the writer to use to view and edit, and is in addition to the portion of the document containing the text intended for the reader. Agencies that receive requests for records in a particular format may be able to assert the privacy and frustration exceptions to disclosure of documents in formats that contain metadata. This issue was not raised by BOA regarding the request for its minutes, and must be looked at on a case-by-case basis.

Request for Swap Meet Lease

A person requested a copy of a lease between UH Maui College and a private party where a swap meet was being held. UH Maui was willing to provide the record but had concerns about confidential commercial information being released. UH Maui also asked if the identity of the requester, who might be a competitor to the lessor, could have any impact on their response to the request.

Under the UIPA, the identity of the requester does not make any difference for the agency's response. However, the agency must withhold any confidential commercial information contained in the lease, such as confidential commercial information.

Multiple Requests for 911 Recording

A high-profile series of criminal events generated multiple 911 calls leading to requests for the 911 recordings by various news media. The cost to provide the recording to the first requester was much higher than for the subsequent news media requesters. The first response would require listening to the various radio transmissions, which took place on multiple channels, to segregate out information protected by privacy or other exceptions. Some of the calls were between districts and would take additional time to find, review, and segregate, which would take hours.

The police asked if the costs could be shared among all the requesters since the requests were made fairly close in time and splitting the costs seemed fairer.

Because it is not possible to predict how many requesters will seek the same records within the time period for an agency's response, the first requester must bear all the costs associated with a request. Subsequent requesters would pay the costs to copy the material but would not pay the initial cost to search, review, and segregate.

Request for Board Applicants' Résumés

A staff person who received applications for board positions was asked for copies of applicants' résumé. The staffer wondered how much of the résumé was required to be disclosed and whether privacy required any of the information to be redacted.

A UIPA provision on privacy gives examples of certain material considered to have a "significant privacy interest." The law states that "information relating to an individual's nongovernmental employment history except as necessary to demonstrate compliance with requirements for a particular government position" is an example of information in which an individual has a significant privacy interest. HRS § 92F-14(b)(5).

In this case, OIP advised that for successful applicants, information irrelevant to the Board position would carry a significant privacy interest and should be redacted. However, the Board applicant could choose to disclose any of the same information that had a significant privacy interest. Some examples of résumé information with a significant privacy interest would be personal contact information, marital status, children's names, and hobbies.

For unsuccessful applicants, who would have a privacy interest in the fact that they applied to the board, the board should generally deny access to the résumés to avoid identifying the applicants.

Written Materials Used at a Board Meeting Need Not Be Provided to the Public Simultaneously, Even When Requested at the Meeting

The Board of Education members used written materials during their deliberations at a meeting but did not supply copies to the audience. The materials were the Department of Education's special education policies. Requester asked for, but was not provided, the same special education policy materials at the meeting.

The requester asked if this was a violation of the law because the public could not easily follow the discussion without the same written materials used by the Board.

A request for records is governed by the UIPA, which permits an agency ten business days within which to respond. Therefore, the Board did not have to supply a copy of their policies at the meeting.

Sunshine Law Guidance:

Board's Discussion on a Matter after Board's Vote

A neighborhood board voted on making a recommendation to the City Council about a land use matter. After the board's vote and while the land use matter was pending at the City Council, one of the neighborhood board members asked OIP if he could discuss this matter freely with other neighborhood board members.

OIP advised that once the neighborhood board took its vote on the matter and this matter was not likely to be further considered by the board in the foreseeable future, the matter was no longer official board business of the board for which the board must comply with the Sunshine Law's open meeting requirements. Therefore, the neighborhood board members may freely discuss this matter after the board's vote.

Time Limit for Disclosing Audio Tape Recording of a Meeting

After a meeting, the board received a request for a copy the audio tape recording of the meeting. The board's staff contacted OIP to find out the time limit for providing a copy of the required audio tape recording, upon request, when the Sunshine Law, in HRS § 92-9, mandates that minutes of the meeting shall be made available within thirty days.

As OIP advised, the time limit for responding to a request for an audio tape copy is the time limit set forth in OIP's administrative rules for responding to government records requests under the UIPA. Thus, under OIP's rules, the board has ten business days, not including the day of the request, to provide the audio tape copy. In this case, the board did not hold an executive session so that the recording of the meeting can be disclosed in its entirety.

NOTE: A request for the meeting's audio tape must be distinguished from a request for draft minutes made while the minutes are in draft form during the 30 days after the meeting. In the latter case, the board could deny the request based on the deliberative process privilege form of frustration. Once 30 days have passed, though, minutes must be disclosed, even if they remain in draft form. The board may want to disclose the draft minutes with a notation that they are "DRAFT" or "UNAPPROVED."

Board Members' Comments Regarding Drafting of Minutes

While drafting minutes for the Election Commission's meetings, the Commission's staff frequently receive comments and suggestions from Commission members about the content and wording of the minutes. The Commission staff asked OIP for advice about accommodating comments and suggestions made by Commission members about the drafting of the minutes.

First, OIP noted that the Sunshine Law, in HRS § 92-9, requires that minutes should contain information that is requested by a board member to be included or reflected therein, and that OIP has interpreted this requirement to apply only when the board member makes this request at a meeting and not afterwards. While drafting the minutes, the staff may circulate subsequent drafts to Commission members to indicate that changes were made without indicating which comments or suggestions were made by Commission members. The potential pitfall to avoid is circulating comments or suggestions of Commission members as a "discussion" that runs afoul of the Sunshine Law's open meeting requirements.

NOTE: The Sunshine Law does not require a board to vote on approving its minutes. If no approval is required, then the minutes are not "board business" that cannot be discussed outside a meeting.

Keeping Information Discussed in Executive Session Confidential

In an executive session, a county council asked a staff member to look into an issue and report back on what she had found at a subsequent meeting. The staff member asked OIP to what degree she could talk about the issue to people not present during the executive session in the course of looking into it, without violating the confidentiality of the executive session.

OIP advised that an executive session does not create an independent requirement of confidentiality, but instead is a tool that allows a board to protect the confidentiality of information it discusses when there is a good reason for that confidentiality as recognized by the Sunshine Law's list of purposes for holding an executive session. So when talking to others about an issue that was discussed in executive session, the focus should be on recognizing the underlying reason for confidentiality that the executive session was intended to protect, and trying not to frustrate that.

If the purpose of the executive session was to protect the attorney-client privilege, for instance, then the focus would be on ensuring that any discussions about the issue being investigated would not result in a waiver of the privilege.

If the purpose was to protect the privacy of an employee with respect to possible disciplinary action, then the focus would be on ensuring that details of the alleged misconduct were shared only with those employees who needed to know the information.

Effect of Act 202 on Board's Ability to Hold a Teleconference

A board asked how S.B. 2737, which became Act 202, SLH 2012, affects a board's ability to hold meetings with members attending from a distance. OIP responded that Act 202 allows boards to hold meetings with members participating via audio-conference, and does not require video-conference as was previously the case. The requirement that the board's members attend from a public location listed in the board's notice as a meeting site remains the same, except that a *disabled* member now has the option to attend from an undisclosed *private* location, such as a hospital or home, with an announcement of where he or she is and who else is present in the room.

Third Party Lobbying of Board Members

A person with an interest in an issue the board is considering wants to lobby the board's members individually about the issue. The board asked OIP if that would violate the Sunshine Law.

OIP advised that the Sunshine Law does not generally prohibit a third party from talking to all the board members individually about the same thing, even though the third party might pass on board members' comments on the issue to the other members. The Sunshine Law is focused on communications between board members, not board members' communications with members of the public, so unless it appeared that the third party was being deliberately tasked with carrying a message between board members (for instance, if a board's chair asked a staff member to poll board members on their thoughts and report back), OIP would not consider such an interaction to be a serial communication between board members.

Ex Officio Board Members' Participation in Executive Session

A board asked whether ex officio nonvoting members of the board could be a part of its executive sessions.

OIP advised that ex officio members could participate in executive sessions. OIP has opined (in OIP Op. Ltr. No. 03-12) that non-members need a reason to be included in an executive session, such as the person taking notes for the minutes or a board's executive director. Ex officio members, even though nonvoting, would generally need to be present to participate in the board's discussions, including regular board meetings or executive sessions, as that is a part of their role as ex officio members. Thus, as a general principle, it would be fair to say that ex officio members can routinely be part of executive sessions.

Sunshine Law Notice Does Not Require Newspaper Publication

A board asked whether the Legislature had fixed the potential conflict between the general statutory notice requirement, section 1-28, HRS, and the Sunshine Law's notice requirement, section 92-7, HRS, during the 2012 session.

OIP advised that S.B. 2859, which became Act 177, SLH 2012, clarified that section 92-7 sets out the only method of notice required by the Sunshine Law. Newspaper publication of meeting notices is not required by the Sunshine Law.

Changing the Date and Time of a Meeting

A board asked how to handle a change of date and time for a noticed meeting, and how to cancel a meeting under the Sunshine Law.

OIP advised that the way to change a meeting to a different date and time is to cancel the original meeting and file a new notice for the new date and time. A board is not legally required to file a notice of cancellation–if nothing was filed and the board simply failed to show up at the scheduled time and place, the meeting would be automatically canceled in any case. As a courtesy to the public, however, it is best to notify interested members of the public that the meeting has been cancelled.

Notifying the Public of a Continued Meeting

A board continued its discussion of an executive session item until a date and time just prior to its next regular meeting. The board asked OIP what sort of notice it was required to provide.

OIP advised that the Sunshine Law allows items not finished at a meeting to be continued to a reasonable date and time. Continuing a meeting means the continued discussion is still part of the same meeting, taken back up where the board left off. If the board was done with testimony on the item, then it does not need to hear testimony again before picking up the discussion, and the board does not have to file a fresh notice since it is not holding a new meeting. The public notification of when and where the meeting will continue is done by announcing it to whoever is in attendance at the meeting when it breaks off. This is the same provision that allows a board to recess a meeting that has run late and continue it the next morning or two days later.

The continuation in this case is two weeks, which is on the long side, but there is no hard and fast rule as to how long is too long. The primary concern with a lengthy continuation is that a board should not seek to get around the Sunshine Law's testimony requirement by repeatedly "continuing" the meeting that first raised a controversial issue, rather than listing the controversial issue on the agenda for each new meeting and hearing testimony. So the question would be whether the "continuation" has gone on so long from the original meeting that the issue may have evolved, which is probably not the case here.

Assuming the board returned from its executive session to the public meeting to announce the continuation and recess, then there is no further obligation for the board to file any sort of notice since the continuation is not actually a new meeting.

While the board could create a separate notice clearly informing the public that the prior meeting's decision-making portion has been continued and no additional testimony will be heard, the board should be careful not to place a notice of the continued business on the same agenda for the new meeting since that would effectively make the continued business part of the new meeting and require the board to hear any additional testimony.

For example, if the board were to take a continued item from Meeting 1, and put it on the notice and agenda for Meeting 2, it would certainly be able to discuss the item, but would also have to hear testimony again. Instead, the board could consider posting something outside the meeting room informing the public about the continued meeting, separate from the notice for the new meeting, to preempt complaints from members of the public who are not aware of the continuation announced two weeks previously and who would otherwise wonder why the board was in an apparently unannounced closed session prior to the start of its regular meeting.

Reflecting Irrelevant Public Comments in Board Minutes

A board asked how its meeting minutes should report public comments that are irrelevant to anything on the board's agenda. The board's agenda routinely includes a "community and public comments" time during which members of the public can speak about whatever is on their minds. Often the comments are not remotely related to anything within the board's authority. At other times the comments do relate to an issue within the board's authority that is not on the current agenda but is expected to come on a future agenda, or is a new issue but is one the board is interested in taking up.

OIP noted that for public testimony given on actual agenda items, OIP has previously opined that the minutes' intended focus is on the board's discussion, so an adequate bare minimum level of detail for public testimony would basically be the testifier's name, what the testimony was on, and whether the testifier supported it, opposed it, or offered comments. For public comments on issues that are not even on the agenda, the law certainly would not require more detail than that, although it would be best for the minutes to include a short summary about the comments since they were made as part of a meeting. For instance, the minutes could say, "X commented on his genealogy," or "Y commented on U.S. foreign policy" to cover what might have been 5 or 10 minutes' worth of remarks and incidental exchanges with board members.

For comments on issues that are within the board's authority and expected to be on a future agenda, or are new but are of interest to the board, OIP suggested that the board's members be cautioned not to engage the speaker once they realize that the issue is one they would be interested in considering as a board. The minutes could then reflect the public comments with more detailed statements

such as, "Z commented on a proposal to hold a Mango Festival in the neighborhood park. Board member A asked for details and noted that the board might be willing to act as a sponsor. Chair B then recommended that the Board place the issue on the next meeting's agenda."

County Attorney Opinions Circulated to County Council Members

A County asked whether the Sunshine Law permits the County Attorney's office to send a legal opinion to all County Council members, and if so, whether a Council member can then ask a follow-up question that the County Attorney's office responds to in a communication sent to all County Council members.

OIP advised that the Sunshine Law allows the County Attorney's office to send a legal opinion to all County Council members, and in the event a Council member asks a follow-up question, to answer the follow-up question in a communication sent to all County Council members. The Sunshine Law regulates Council members' communications with one another, not their communications with Council staff or other County employees, members of the general public, or anyone else who is not a Council member.

While there might be a factual scenario in which Council members were found to be using a nonmember as a go-between to avoid the Sunshine Law's requirements, that would be an unusual situation. The situation where the County Attorney's office gives a legal opinion and then responds with supplementary legal advice in response to a Council member's follow-up question does not entail any direct communication between Council members, and there is no reason to believe the office is being used as a mere go-between to facilitate communication among Council members, particularly since the office is primarily communicating to the Council members its own legal advice.

County Council Members' Participation in Student County Council

A county asked whether and how the County Council's members could participate in a mock county council in which students acted as mock council members. Council members expressed an interest in having the real Council introduce the measures proposed by the student council. Some Council members also expressed an interest in coming to speak to the student council, possibly as testifiers on agenda issues during the student council meeting, or possibly as speakers during a recess of the student council meeting.

OIP noted that given the Council's intent to introduce items from the student agenda for consideration by the real Council, it was likely that at least some of the student council's agenda items would be considered 'board business' of the real Council, so Council members' participation in the student council's meeting would raise Sunshine Law issues.

Interested Council members could potentially attend as part of an investigative task force (a.k.a. ad hoc committee) set up under section 92-2.5(b), HRS, but only if less than a quorum of members planned to attend and the Council set up the task force ahead of time. (After this advice was given, a new permitted interaction was added by Act 177 which, if it had been available at the time, would have allowed less than a quorum of the Council to attend the student council and then report back without having to set up a task force at a prior meeting.) The advantage of this approach would be that the members attending would be free to testify to the student council or otherwise participate in discussion of student

council agenda items that are also real Council business.

If more than a quorum of Council members wanted to participate, they could still go and speak to the students during a recess of the student council meeting, so long as their remarks did not touch on the Council's board business. Remarks about how great it is to see the students' enthusiasm for government, the importance of civic participation, and how youth are the future of the county, would be fine from any number of Council members, as such remarks would not involve Council business and thus would not be restricted by the Sunshine Law no matter how many Council members were there.

Private Meetings with Board Chair and Employment Applicants

The Honolulu Police Commission was interviewing persons to fill its executive director position. The Chair scheduled private appointments between himself and applicants for interviews. Requester asked OIP whether the appointments raise any issues under the Sunshine Law. OIP advised that the Chair does not appear to have violated the SL by scheduling private appointments with candidates for a position because the SL does not contain any language that would prohibit the Chair from doing so. OIP noted that the Chair should follow the Commission's own applicable procedural rules and County laws, if any.

Calculating Time for Filing Meeting Notice

Section 1-29, HRS, states "[t]he time in which any act provided by law is to be done is computed by excluding the first day and including the last, unless the last day is a Sunday or holiday and then it is also excluded. When so provided by the rules of court, the last day also shall be excluded if it is a Saturday." The Office of Elections asked about application of section 1-29, HRS, to the Sunshine Law's requirement in section 92-7, HRS, that boards provide written notice of meetings at least six calendar days before the meeting.

OIP advised that, to avoid SL complaints, a board should file notice with the Lt. Governor or county clerk at least six calendar days before the meeting, as required by section 92-7, HRS. See OIP Op. Ltr. No. 06-06. If the sixth calendar day before a meeting falls on a weekend or holiday and the board is unable to file on the sixth day because the filing office is closed, the board should file notice on a weekday prior to the weekend or holiday. Otherwise, a board would open itself up to challenges for insufficient notice. Also, Executive Memorandum No. 11-11 requires state boards to electronically file notices and agendas on the State Online Calendar. It is OIP's understanding that the State Online Calendar will not allow someone to file a notice with less time than six calendar days.

NOTE: Hawaii Attorney General Opinion 92-06 found that sections 1-29 and 92-7, HRS, are laws on the same subject matter, and must be read together. This opinion noted that, where an act is required to be done a specific number of days before an event, the required number of days is to be computed by excluding the day on which the act is done and including the day on which the event is to occur." The opinion concluded with this example

of how to calculate the time required for posting notice: "if a … board or commission meeting is scheduled for any hour on July 20, the board or commission must file its meeting notice at least six calendar days before the meeting, or on July 14."

Providing Councilmembers with Factual Information Prior to Meeting

The Kauai County Council was in the midst of budget hearings, and was considering the budget for the Office of the Prosecuting Attorney (OPA). A Councilmember and staff did research via public records from the Personnel Department on the number of deputy prosecutor turnovers in the past ten years and the length of time positions were vacant. The Member intended to pass out copies of this information to other Members at the OPA budget hearing, but time allotted for the agenda item ran short and he was only able to mention that he had the information. He later asked staff to distribute the information to other Members, and a concern was raised because the Sunshine Law generally prohibits board members from engaging in serial communications outside of a properly noticed meeting. See OIP Op. Ltr. No. 05-15.

OIP advised that if the information is purely factual (*i.e.*, does not contain the Member's position on a matter that is Council business), it may be shared outside of a meeting, preferably through the council clerk. To avoid having such information sharing challenged as an inappropriate serial communication, a safer approach would be to distribute the information at the beginning of the next meeting at which the OPA budget will be discussed, and note that it is for that agenda item. Alternatively, factual information that any board member wishes to be shared before a meeting could be provided to a staff member, such as the council clerk, who would then include all factual material submitted in a distribution to members, typically as part of the Council's meeting packet, without any further written or oral discussions between members on those board matters.

Reorganization of Board Membership

A Board Chair was resigning because of health reasons and the Board was planning to reorganize after his resignation. He asked for an executive session to explain the health reasons in private to the other Board members.

Executive sessions, where discussion and deliberations are held out of the public view, are limited since the purpose of the Sunshine Law is to conduct public policy decisions in the open. While the Sunshine Law permits deliberation on decisions to be made in Executive Session where information must be kept confidential, a member's resignation does not require deliberation or a decision by the Board. Therefore, explanation of the personal medical situation which is causing a resignation is not a subject permitted for executive sessions.

OIP advised the Board staff that the Board was not permitted to go into executive session to discuss the member's medical condition in private. The resigning Board member could discuss his condition in general terms in public.

Education and Communications

Training

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.

Because basic training on the UIPA and Sunshine Law are now conveniently accessible online, OIP has been able to produce more specialized training workshops. Thus, OIP created its first accredited continuing legal education (CLE) seminar. The CLE seminars are 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.

OIP also produced, for the first time, online video training on the UIPA and Sunshine Law, which is accessible 24/7 by all people, including members of the public. Overall, in FY 2012, OIP produced 12 new training videos, guides, and other materials, guides, and other materials, which are freely available on OIP's website.

Additionally, OIP doubled the number of its live training sessions for the general public, various state agencies, and the constantly changing cast of board members throughout the state and counties. The following is a listing of the 25 workshops and training sessions OIP conducted during FY 2012, as opposed to 12 in FY 2011.

UIPA Training

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

- 9/28/11 ALL: "Government Attorneys' Obligations Regarding Open Records Requirements of the UIPA" course
- 9/30/11 University of Hawaii at Hilo: "Government Attorneys' Obligations Regarding Open Records Requirements of the UIPA" course
- 11/10/11 Maui County Corporation Counsel: "Government Attorneys' Obligations Regarding Open Records Requirements of the UIPA" course
- 1/10/12 Charter School Board
- 2/2/12 Legislature, Senate Majority Caucus: "OIP Overview" (UIPA & Sunshine Law)

- ➢2/23/12 Hawaii Public Radio "Town Square" radio program: UIPA & Sunshine Law Information Session
- ➢3/7/12 Legislature, House Majority Caucus: "OIP Overview" (UIPA & Sunshine Law)
- ➢4/6/12 Hawaii Public Radio "Conversation" radio program: UIPA & Sunshine Law Legislation
- ➢6/21/12 University of Hawaii: UIPA & Records Report System training

Sunshine Training

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

- ➢7/19/11 Board of Education: "Sunshine Law Overview"
- ➢9/28/11 ALL: "Government Attorneys' Obligations Regarding Open Meetings Requirements of the Sunshine Law" CLE course
- ➢9/28/11 ALL: "Ethical Considerations" CLE course
- ➢9/30/11 University of Hawaii at Hilo, Media Symposium: Sunshine Law Basics and an Overview of OIP (Sunshine Law & UIPA); Legislation and Other Issues Relating to the Sunshine Law
- ➢9/30/11 Hawaii County Corporation Counsel: Meeting Notices and Agenda Requirements
- ➢9/30/11 University of Hawaii at Hilo: "Government Attorneys' Obligations Regarding Open Meetings Requirements of the Sunshine Law" CLE course
- ➢10/1/11 University of Hawaii at Hilo: OIP MCPE Course: "Ethical Considerations for Counsel When Advising Sunshine Law Boards"
- ➢10/21/11 West Hawaii Bar Association (Kona): "Ethical Considerations" CLE course
- ➢11/10/11 Maui County Corporation Counsel: "Ethical Considerations" CLE course
- ➢11/30/11 OIP Workshop: All Boards and Commissions: "Meeting Notices and Agenda Requirements"
- ➢12/6/11 Department of Commerce & Consumer Affairs; Professional and Vocational Licensing Boards and Commissions: Sunshine Law and UIPA Training
- ➢12/7/11 OIP Workshop: All Boards and Commissions: "Meeting Notices and Agenda Requirements"
- ➢12/14/11 OIP Workshop: All Boards and Commissions: "Meeting Notices and Agenda Requirements"
- ➢12/15/11 Department of Business, Economic Development and Tourism; Hawaii Tourism Authority: Sunshine Law and UIPA Overview
- ➢12/21/11 OIP Workshop: All Boards and Commissions: "Meeting Notices and Agenda Requirements"
- ➢1/20/12 Department of Land and Natural Resources; Forest Stewardship Advisory Commission: Sunshine Law Overview

Publications

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 2012, OIP published its *Annual Report 2011*. OIP also updated its online guides that are intended primarily to give the non-lawyer agency official an overall understanding of the UIPA and Sunshine Law and a step-by-step application of the laws. OIP's forms and publications are available on the OIP website at **www.hawaii.gov/oip**.

OpenLine Replaced by *What's New*

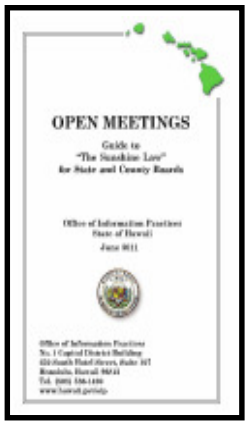
The *OpenLine* newsletter, which originated in March 1989, has played a major role in OIP's educational efforts. The newsletter was mailed to all state and county agencies, including boards and commissions, and libraries throughout the state, as well as all other persons requesting the newsletter.

OIP printed three *OpenLine* newsletters in FY 2012, as compared to five in FY 2011. Past issues of *OpenLine* are also available on OIP's website. To conserve resources, and to provide more timely information, OIP has largely replaced the *OpenLine* with more frequent *What's New* articles distributed primarily by e-mail and posted on OIP's website.

Sunshine Law Guides and Videos

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 specifically for neighborhood boards in June 2011. In FY 2012, OIP produced two videos of its Sunshine Law training: one is a one-hour overview, while the second video is 1.5 hours long and provides basic training utilizing the same PowerPoint presentation and training materials that OIP formerly presented in person. These videos make the Sunshine Law training conveniently available 24/7 to board members and staff as well as the general public, and has freed OIP's staff to do many other duties.

A new training guide that OIP created in FY 2012 is the "Agenda Guidance for Sunshine Law Boards," which is posted on OIP's website.

UIPA Guides and Video

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 navigates 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 may review and segregate the record. The guide also includes answers to a number of frequently asked questions.

In addition to the detailed guide, a threefold pamphlet provides the public with basic information about the UIPA. The pamphlet, "Accessing Government Records Under Hawaii's Open Records Law," 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.

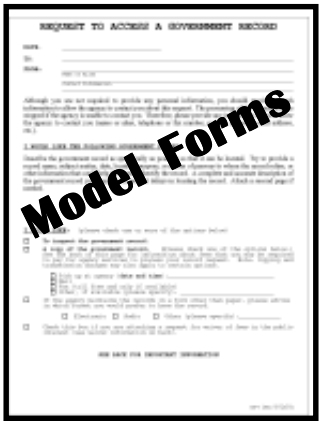
As it did for the Sunshine Law, OIP also produced a 1.5 hour long video of its basic training on the UIPA. Additionally, OIP began in FY 2012 to develop the UIPA Records Request Log, which will be a useful tool to help agencies comply with the UIPA's requirements.

In FY 2012, OIP updated its "Guidelines on the Disclosure of Personnel Records." OIP also posted a letter providing guidance on the waiver of record request fess in the public interest. Moreover, OIP created an informal guide to processing large or complex UIPA record requests. All of these materials, and more, can be found on OIP's website under Openline/Guidance/Training.

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."**

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, which is closed to the public because the meeting location is dangerous to health or safety, or for an on-site inspection 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.

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

Communications

OIP's website at **www.hawaii.gov/oip**, and the *What's New* articles that are e-mailed and posted on the website, have become important means of disseminating information. In FY 2012, OIP more than quadrupled its communications to the public, mainly through *What's New* articles that are e-mailed and posted on its website.

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
- 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.

Website 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.

➢ *Formal 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"

OIP printed 3 *OpenLine* newsletters in FY 2012, as compared to 5 in FY 2011. While the *OpenLine* printed newsletter has been largely replaced by more timely *What's New* articles that are e-mailed and posted to OIP's website, past issues of *OpenLine* dating back to November 1997 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)"

This is a shortcut link to the Records Report System online database and information.

"What's New"

OIP has increased the frequency of its *What's New* articles, and e-mailed and posted on its website 48 articles in FY 2012, as compared to 7 in FY 2011. These articles provide helpful tips and current news regarding OIP and open government issues. To be included on OIP's *What's New* e-mail list, please e-mail *oip@hawaii.gov*.

Other Communications: Media Interviews

OIP's participated in two public radio interviews regarding the UIPA and Sunshine Law in FY 2012.

OIP Services Survey

Through the website, in FY 2012, OIP conducted its first on-line survey to find out how it could improve its services. Fifty-three people responded to the survey and identified themselves as follows: 33 government attorneys; 3 government officials; 2 board members or volunteers; 2 private individuals; 2 media representatives; and 1 public interest group representative.

Most of the respondents have used the following OIP services: opinions, index, laws/rules, and other legal resources on OIP's website; OpenLine newsletter; Attorney of the Day telephone/e-mail service for general advice; on-line open government guides; OIP's continuing legal education courses; and on-line forms. Over 32% of the 53 respondents use OIP's services at least monthly, 39.6% use OIP's services two to four times a year, and 28.4% use OIP's services once a year, infrequently, or never.

More than 94% (48 of 51) of the respondents reported being satisfied (39) or very satisfied (9) with OIP's services overall, and only three persons (5.9%) were dissatisfied. Moreover, eight (89%) of the nine people who had requested OIP's assistance in obtaining government records or concerning a potential Sunshine Law violation were satisfied with the help they received from OIP.

The survey was conducted from September 21 to November 21, 2011, before OIP proposed legislation, which ultimately passed and was enacted in 2012, to clarify agencies' right to judicially appeal from OIP decisions. In the survey, twenty-seven (58.7%) of 46 respondents did not believe that OIP needed any new powers, while 19 (41%) thought that OIP should have one or more of the following powers, without having to seek a court's prior approval: subpoena powers (16 respondents); contempt power (14 respondents); injunctive power (12 respondents); final authority in UIPA and Sunshine Law cases, with no right to judicial appeals by government agencies, but retaining the public's right to appeal at any time (10 respondents). Forty-one (80.4%) of 51 respondents believed that agencies should be allowed under the UIPA and Sunshine Law to challenge OIP decisions in appeals to the courts, while ten (19.6%) disagreed.

If OIP is given additional responsibilities, but no additional resources or staff, then twenty-two (51.1%) of 43 respondents were willing to do one or more of the following: wait longer for OIP to resolve disputes (14 respondents); go through more formal procedures, such as contested case and administrative procedures under HRS Chapter 91 (7 respondents); pay fees to receive OIP services (5 respondents); or pay for their own attorney to represent them in OIP proceedings (2 respondents). Twenty-one (48.8%) of the respondents did not want to do any of the above.

The full survey and a "Response Summary," along with the comments received from respondents, can be found on OIP's website at hawaii.gov/oip under What's New.

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 legislation 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 2012 Legislative session, OIP reviewed and monitored 267 bills and resolutions affecting government information practices, and testified on 39 of these measures.

OIP introduced two open government bills as part of the Governor's legislative package. Both of these bills passed during the 2012 session and were signed into law by Governor Neil Abercrombie as Act 176 and Act 177.

▶ **Act 176**, signed on June 28, 2012, enacts **S.B. 2858, S.D. 1, H.D. 2, C.D. 1**. The new law was needed to eliminate the confusion and potential litigation arising from *County of Kauai v. OIP*, 120 Haw. 34, 200 P.3d 403 (Haw. App. 2009), which allowed an agency to judicially appeal an OIP decision. To avoid continued uncertainty and costly litigation over questions of OIP's authority, Act 176 creates a simple and uniform process for agencies to obtain judicial review of OIP decisions relating to the (UIPA) and the Sunshine Law, while directing the courts to uphold OIP decisions unless they are "palpably erroneous." This strong standard of judicial review gives OIP's decisions more clout and discourages agencies from frivolously appealing. Moreover, agencies can no longer simply ignore OIP, as an OIP decision mandating disclosure of a record under the UIPA will be binding unless the agency takes a timely appeal, based on the record presented to OIP. While OIP or the requester may choose to intervene in an agency's appeal, they are not required to participate in costly and time-consuming appeals. These changes take effect on January 1, 2013.

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▶ **Act 177** was also signed into law on June 28, 2012, by Governor Abercrombie, and it enacts **S.B. 2859, S.D. 1, H.D. 2**, which creates two new permitted interactions under the Sunshine Law.

One new permitted interaction would allow board members to receive testimony and ask questions at public meetings that must be cancelled due to a lack of quorum, provided that they make no decisions and thereafter report to the full board.

The second new permitted interaction is similar to an existing provision that previously applied only to neighborhood boards. Less than a quorum of any Sunshine Law board's members can now attend and discuss board business at seminars, conferences, informational meetings, legislative hearings, and other meetings, again provided that they make no decisions and thereafter report to the full board.

Both of these new permitted interactions went into effect on July 1, 2012, and will help to promote greater public participation in government, better communication between the public and board members, and a fuller understanding of the issues and various perspectives by board members.

▶ On July 3, 2012, Governor Abercrombie signed into law **S.B. 2737, S.D. 1, H.D. 2, C.D. 1**, as **Act 202**, which allows boards to conduct meetings by "interactive conference technology," including teleconferences that have no video component. This bill amends the Sunshine Law to allow teleconferences and eliminates the need for video coverage. The law also creates a new exception to make it easier for disabled members to attend a board meeting from a private location not open to the public, such as a hospital or personal residence. This bill took effect on July 1, 2012.

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 four cases that OIP monitored in FY 2012 are summarized below.

Denial of Access to Records

Kilakila O Haleakala (Plaintiff) filed a complaint against the University of Hawaii (UH), alleging that UH violated the UIPA by improperly denying access to records requested by the Plaintiff concerning the proposed construction of an advanced technology solar telescope on the summit of Haleakala.

In February 2010, UH filed a conservation district use application to construct this telescope and the Plaintiff requested the Board of Land and Natural Resources (BLNR) to conduct a contested case hearing on the application. After the first hearings officer (appointed by BLNR) filed a recommended decision with BLNR in the contested case, he asked UH's legal counsel in e-mail correspondence to disclose whether counsel had been involved in communications he received from United States Senator Daniel Inouye and Hawaii State Governor Neil Abercrombie that the hearings officer characterized as putting inappropriate ex parte pressure on him regarding his recommended decision.

In March 2012, Plaintiff submitted a request to UH for: (1) all e-mails and correspondence between UH and Senator Inouye and (2) all e-mails and correspondence between UH and Governor Abercrombie, regarding the proposed telescope construction.

In April 2012, UH notified Plaintiff that it was denying access to the requested documents because of the ongoing contested case hearing. Specifically, UH asserted that it is not required to disclose the requested correspondence records because the documents are protected by the UIPA exception, in section 92F-13(2), HRS, for records pertaining to a quasi-judicial action to which the State is a party "to the extent that such records would not be discoverable." UH also asserted applicability of three other UIPA exceptions as well as the attorney-client and attorney work product privileges. The case remains pending in the First Circuit Court.

Certified Copy of Birth Certificate

Duncan Sunahara (Plaintiff) requested that the Department of Health (DOH) provide a certified copy of the original certificate of live birth for his sister, Virginia Sunahara, who was born on August 4, 1961 (the same birth date as that of President Barack Obama), and died on August 5, 1961). DOH provided a computer generated abstract of the birth record for Virginia Sunahara. Plaintiff

thereafter filed a lawsuit in the First Circuit Court against DOH, claiming that DOH did not respond to his request. Plaintiff alleged violations of section 338-18, HRS, of the Public Health Statistics Act, which requires that certain individuals be provided with certified copies of vital records; the UIPA; and chapter 91, HRS, the Hawaii Administrative Procedures Act (HAPA). Plaintiff asked the Court to order DOH to provide a certified copy of the original paper birth certificate, to allow him or his representative to be present at the copying of his sister's original birth certificate, and to be awarded fees, costs, and other legal and equitable relief.

DOH filed a Motion to Dismiss Complaint, which the Court treated as a Motion for Summary Judgment. DOH's Motion and accompanying documents argued that it did respond to Plaintiff's request when it provided a computer generated abstract of his sister's birth certificate and informed him that he was only entitled to an abstract. DOH cited to section 338-13, HRS, which, it argued, allows DOH's director to choose the process by which copies of vital records are made. DOH also cited its administrative rules, which allow abbreviated copies of vital records to be prepared by computer printout, or any other process approved by the director. Thus, DOH argued that by providing a computer generated abstract of Virginia Sunahara's birth certificate, it is in compliance with the law. DOH also argued that the UIPA does not entitle Plaintiff to obtain a certified copy of his sister's original birth certificate or allow him to be present for the copying. DOH further asserted it did not violate HAPA when it adopted its administrative rules in 1975.

The Circuit Court found there to be no genuine issue of material fact, and granted DOH's Motion for Summary Judgment. Plaintiff thereafter filed an appeal with the Intermediate Court of Appeals. The appeal is pending.

Judicial Nominee List

In August 2011, Oahu Publications, Inc., dba *Honolulu Star-Advertiser* (Plaintiff), filed a complaint against Governor Neil Abercrombie (Governor), alleging that the Governor violated the UIPA by his denial of access to the lists of judicial candidates provided to him by the Judicial Selection Commission.

The Governor argued that based on the Hawaii Supreme Court's decision in *Pray v. Judicial Selection Committee*, it was within his discretion to decide whether to disclose the candidate lists provided to him. Nonetheless, in November 2011, the Circuit Court granted Plaintiff's motion for summary judgment and ordered disclosure of the requested lists. Two days later, the Judicial Selection Commission announced that it was changing its policy and would, in the future, make public the lists of judicial candidates it sends to the Governor.

After some months' delay, the Court subsequently granted Plaintiff's motion for attorney's fees and costs and entered final judgment in June 2012.

The Governor did not appeal the ruling requiring disclosure of the candidate lists. The Governor's appeal of the fee award, filed in July 2012, remains pending.

Suit for 911 Calls Partially Granted

A series of widely publicized shooting incidents in June 2011 triggered several requests for the Honolulu Police Department's (HPD) 911 recordings and tapes on the same day and shortly after the incidents. The HPD denied the requests, stating that the recordings were evidence and part of an ongoing investigation and would not be released. No statutory bases for the denial were provided.

The *Star-Advertiser* filed suit in Circuit Court, asking the court to find HPD failed to make a timely response, did not specify the legal authority to withhold the records, and violated the Uniform Information Practices Act (UIPA). The newspaper asked the court to order HPD to provide access to all of the records in addition to paying attorneys fees and costs. The Office of the Public Defender (OPD) intervened on behalf of the person accused of the shootings. OPD argued the defendant would not have an impartial trial, as guaranteed by the U.S. and Hawaii Constitutions, if all of the records were released. The National Crime Victim Law Institute also filed an amicus brief asserting the crime victims and their families had a constitutional right to privacy.

The *Star-Advertiser's* motion for summary judgment was granted in part and denied in part. The court ordered three victim recordings to be withheld based on the privacy exception of the UIPA. The court also ordered another recording withheld based on the frustration of a legitimate government function exception of the UIPA. The HPD had no objection to release of five other gunshot recordings and the court granted the motion as to those five recordings. A stipulation was entered which dismissed all claims and each side paid its own costs.

Records Report System

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 29,597 records. See **Figure 15**.

Records Report System

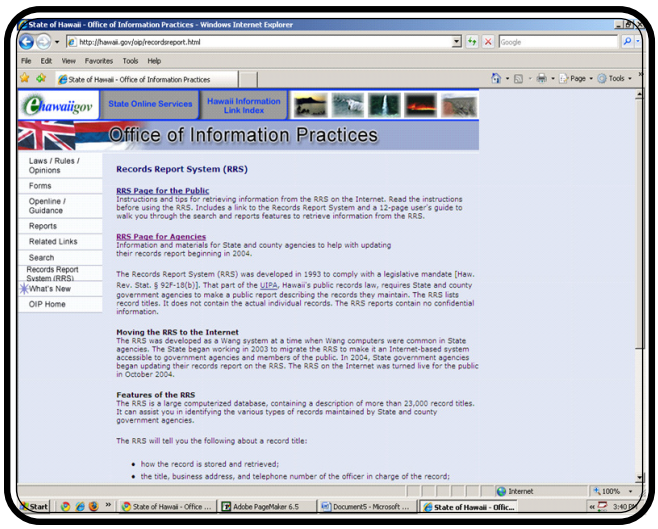
Status of Records Reported by Agencies: 2012 Update

Jurisdiction	Number of Records
State Executive Agencies	20,688
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	**29,597**

Figure 15

RRS on the Internet

Since 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.

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**. OIP is not required to and in most cases 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.

With the fall 2012 launch of the state's new website at data.hawaii.gov, the RRS access classification will play an important role in determing whether actual records held by agencies should be posted onto the Internet. To prevent the inadvertent posting of confidential information onto data.hawaii.gov, agencies may not post records that are classified as being confidential, and they must take special care to avoid posting confidential data from records that are classified in the RRS as being public or "confidential/conditional."

Note that the RRS only lists government records and information and describes their accessibility. The system does not contain the actual records, as these remain with the agency. Accordingly, the record reports on the RRS contain no confidential information and are public in their entirety.

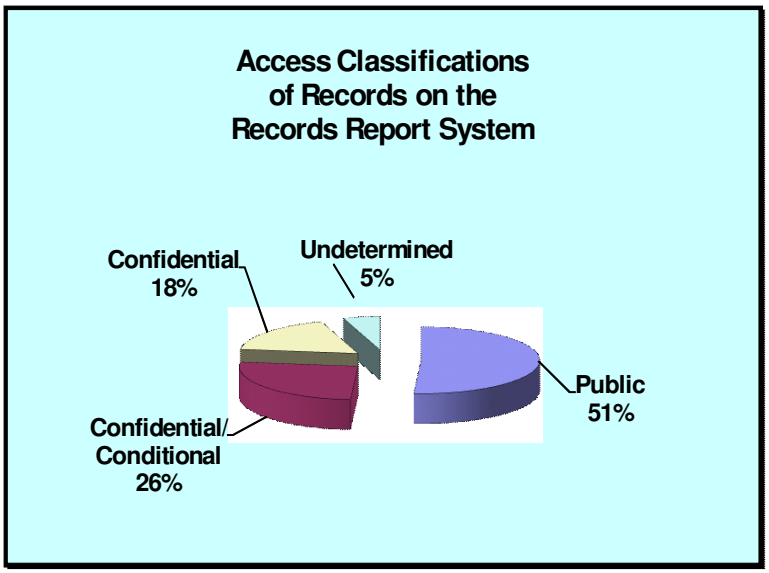


Figure 16