

Office of Information Practices

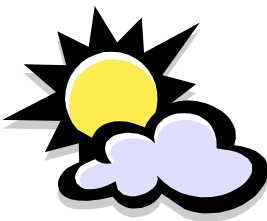
State of Hawaii

Annual Report 2009



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, 2008, to June 30, 2009.

Table of Contents

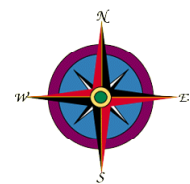


Director’s Message	4
Executive Summary.....	7
Budget.....	10

HIGHLIGHTS OF FISCAL YEAR 2009

Legal Assistance, Guidance and Rulings	12
Legal Guidance and Rulings.....	19
UIPA Advisory Opinions.....	19
UIPA Appeals and Investigations.....	21
General Legal Assistance and Guidance Under the UIPA and Sunshine Law.....	27
Sunshine Law Report.....	33
Legislation Report.....	40
Litigation Report.....	42
Records Report System Report.....	46
Education	48
Publications and Website.....	48
Training.....	52





The Office of Information Practices (OIP) anticipates a challenging year ahead as it, along with all other government agencies, faces decreases in personnel and employee work hours because of fiscal restrictions. Reduced staff resources will likely impact access to government records as agencies struggle to meet all of their duties with less manpower. This will, in turn, likely increase requests and complaints made to OIP. OIP clearly must, similar to all other agencies, adapt its priorities and procedures to fulfill its responsibilities to the greatest extent possible.

OIP has a broad mission to provide legal guidance and assistance to the public as well as all state and county boards and agencies under both the State's public records law and open meetings law. OIP has begun to institute measures it believes will best utilize its limited resources to provide assistance to the broadest range and number of individuals, boards, and agencies requesting OIP's services.

For example, in an effort to clear a backlog of appeals, opinion requests and investigations while providing timely assistance to current requests, OIP is issuing abbreviated opinions to resolve requests where OIP's reasoning has been explained in prior, published OIP opinions, or where it may otherwise be appropriate. New procedures will also include an emphasis on informal resolution and consolidation of similar requests that may be more efficiently addressed together. Full legal opinions will still be given where useful to

provide guidance on issues or specific records not previously addressed in a published OIP opinion. OIP will also continue to provide general, informal advice and assistance through its well used "Attorney of the Day" service.



In the immediate future, OIP will also be issuing advisory opinions to address UIPA appeals from agency denials of access to any government record.

This is due in part to staffing constraints and the time demands to issue determinations, and in part to the recent affirmation by the Hawaii Supreme Court of a court challenge by the County of Kauai of an OIP determination on disclosure of executive meeting minutes of the Kauai County Council.

In 2005, Kauai County brought an action in court against OIP to invalidate an OIP decision that directed the Kauai Council to disclose a redacted version of executive (closed) meeting minutes. See *County of Kauai v. OIP*, 120 Hawaii 34 (Haw. App. 2009). OIP devoted significant staff resources in defending against this suit over the course of the next four years.

As a threshold matter, OIP argued that the UIPA did not give the County the right to bring an action against OIP for its determination on appeal from the Kauai Council's denial of access to executive meeting minutes. OIP based its argument upon section 92F-15.5, HRS, which provides the public an alternative means to appeal a denial of access to a

government record to OIP, and states that if OIP's "decision is to disclose..., the agency shall make the record available." OIP further pointed to the statute's legislative history, which indicates the Legislature's intent that OIP's decision not be subject to appeal: "a government agency dissatisfied with an administrative ruling by the OIP does not have the right to bring an action in circuit court to contest the OIP ruling. The legislative intent for expediency and uniformity in providing access to government records would be frustrated by agencies suing each other." 1989 Senate Journal, at 763-64. The ICA and Supreme Court, however, affirmed the County's right to sue OIP under the Sunshine Law because the record at issue was executive meeting minutes. Significantly, neither the ICA nor the Supreme Court specifically limited the situation in which suits may be brought against OIP to disputes over executive meeting minutes under the Sunshine Law.

The courts also found that OIP had improperly concluded that most of the minutes should be disclosed. Specifically, the court found that privileged portions of the minutes were so intertwined with non-privileged portions that redaction would be impractical.

OIP's conclusion was based upon a statutorily directed narrow construction of the Sunshine Law exemption allowing boards to close meetings to consult with the board's attorney. It was further based upon the statute's amendment in 1985, which OIP believed indicated the Legislature's intent that the exemption was meant to protect less than all consultations made by a board with its attorney.

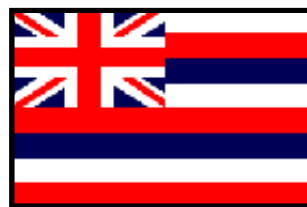
Where previously a board could hold an executive session "[t]o consult with [its] attorney," period, the 1985 amendments limited boards to consultation "on questions and issues pertaining to the board's powers, duties, privileges, immunities, and liabilities." The

Legislature stated that the 1985 amendments were intended to "afford the public more participation in the open meetings of government" and to "strengthen[] the Sunshine Law." 1985 Senate Journal at 867. In line with that intent, the language qualifying a board's ability to meet privately with its attorney was added "to require that closed meetings with the board's attorney be limited to questions pertaining to the board's legal responsibilities, to legal issues, and to matters relating to actual, threatened, or proposed lawsuits which may involve the board[.]" *Id.* The Legislature reiterated that "[t]he amendment would limit the situations in which a board could call an executive meeting with its attorney." *Id.*

Given this legislative history, OIP interpreted the Sunshine Law's exemption to consult with a board's attorney to be consistent with the more limited attorney-client privilege afforded to public entity clients when seeking direct and specific advice and counsel. The courts, however, applied a much broader construction to protect discussions of the board with the board's counsel. Unfortunately, neither the ICA nor the Supreme Court specifically articulated the parameters of the discussions that would be protected.

The court's ruling presents some potential problems for OIP. First, it clearly allows a legal challenge to an OIP decision regarding the disclosure of executive meeting minutes for boards subject to the Sunshine Law. Understandably, a fair number of appeals filed with OIP concern the disclosure of executive meeting minutes of Sunshine Law boards.

Second, the ICA opinion did not expressly limit such challenges to meeting minutes. Thus, it is unclear whether other OIP decisions under



Office of Information Practices

§92F-15.5 of the UIPA could result in a suit against OIP where OIP's underlying decision is based in part on another law that provides a right to file suit. OIP does in numerous instances make determinations based on laws collateral to the UIPA, such as where government records are protected from disclosure "pursuant to State or federal law" under HRS §92F-13(4). The potential for such lawsuits is a concern because the time and effort required for OIP's small legal staff to defend those suits detracts from OIP's primary mission of providing legal guidance and assistance under the UIPA and Sunshine Law.

Lastly, the ICA opinion also creates uncertainty on the breadth of the Sunshine Law exemption to open meetings to "consult with the board's attorney on questions and issues pertaining to the board's powers, duties, privileges, immunities or liabilities" under HRS §92-5(4). The ICA offered no specific guidance on the limits of privileged discussions. OIP is concerned about the extent to which the ICA opinion will be used as authority for frequent, liberal use of closed meetings based on the attorney consultation exception.

The court's decision will clearly impact public access in two ways. First, the public will not be able to appeal to OIP for a final determination on the disclosure of executive meeting minutes. This will mean that a member of the public must be willing to invest the time, money and effort necessary to appeal a denial of access through the court system. Second, boards may close more meetings to the public under the attorney consultation exemption.

Because the courts have not provided specific guidance on the limits of suits against OIP or application of the attorney consultation exemption, clarification of these issues by the Legislature would greatly assist OIP in its administration of the UIPA and Sunshine Law by providing a clear statement of the Legislature's intent.

Cathy L. Takase
Acting Director



Executive Summary



The Office of Information Practices (OIP) was created by the Legislature in 1988 to administer Hawaii's public records law, the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes (UIPA), which took effect on July 1, 1989. The UIPA applies to all state and county agencies except for the state judiciary in the performance of its nonadministrative functions.

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 a 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 1998, OIP was given the additional responsibility of administering Hawaii's open meetings law, part I of chapter 92, HRS (the Sunshine Law). The Sunshine Law similarly requires state and county boards to conduct their business as openly as possible in order to open up the governmental processes to public scrutiny and participation.

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

OIP is given many roles in administering the UIPA and the Sunshine Law. OIP serves both the public and government bodies 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. OIP also resolves Sunshine Law and UIPA complaints and appeals of denials of access under the UIPA.

Legal Guidance

Each year, OIP receives close to a thousand requests for assistance from members of the public, government employees, and government officials and board members.

In FY 2009, OIP received 931 requests for assistance. This included requests from the public and government boards and agencies for general guidance regarding the application of, and compliance with, the UIPA and Sunshine Law; requests for assistance in obtaining records from government agencies; requests 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.

A majority of the requests for assistance are met by 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 ten years, OIP has received a total of 7,793 requests through its AOD service, an average of 779 per year. In FY 2009, OIP received 798 AOD requests.

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

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

OIP also issues advisory opinions in response to requests made for legal opinions under either the UIPA or Sunshine Law. OIP publishes and distributes these opinions where the opinions provide useful general guidance to the public and government boards and agencies.

Rulings

OIP is also charged with the responsibility of resolving complaints made under the Sunshine Law or the UIPA. When a complaint is filed with OIP, OIP will generally investigate the complaint and issue an opinion.

OIP is also authorized under the UIPA to issue determinations where appeal is made to OIP from a government agency's denial of access to a government record. OIP is meant to serve as an alternative method of appeal. Specifically, the Legislature intended OIP to provide an efficient and less costly option for resolution from a denial of access to a government record than an appeal to the circuit courts.

Education

OIP also provides education to the public and government boards and agencies under both the UIPA and the Sunshine Law. Boards and agencies are provided more extensive training regarding their responsibilities under the UIPA, OIP's administrative rules, and the Sunshine Law.

Each year, OIP provides numerous live training sessions on both the UIPA and the Sunshine Law, including trainings on the neighbor islands. In FY 2009, OIP conducted 22 training workshops.

OIP's publications and website (**www.hawaii.gov/oip**) also 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 2009, OIP continued its traditional print publications, including the *OpenLine* newsletter, *Office of Information Practices Annual Report 2008*, a guide to the Sunshine Law entitled *Open Meetings*, and the guide book *Hawaii's Open Records Law*, intended primarily to give the non-lawyer agency official an overall understanding of the UIPA and a step-by-step application of the law. OIP's publications are made available on OIP's website.

OIP also monitors litigation in the courts that involve issues concerning the UIPA or the Sunshine Law and may intervene in those cases involving the UIPA. In FY 2009, OIP tracked ten lawsuits involving UIPA or Sunshine Law issues. OIP was actively involved in defending one lawsuit against OIP by the County of Kauai regarding the disclosure of the minutes of a Kauai County Council executive meeting.

Other Duties

OIP serves as a resource for government agencies in reviewing their procedures under the UIPA and the Sunshine Law. OIP also continually receives comment on both laws regarding their implementation and makes recommendations for legislative change to clarify areas in the laws 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. OIP also provides assistance to government agencies, government boards, elected officials, and the public in the drafting of proposed bills.

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

This past legislative session, OIP introduced three pieces of legislation as part of the Governor's legislative package. OIP also reviewed and monitored 103 bills affecting government information practices, and testified on 25 of the bills.

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), a database which may be accessed by the public over the Internet. OIP continually assists agencies in filing and updating their records reports. Public access to the RRS is available through OIP's website.

OIP has created a guide for the public to locate records, to retrieve information, and to generate reports from the RRS. To date, state and county agencies have reported 29,740 records on the RRS.



Budget

OIP’s total allocation for FY 2009 was \$406,560. OIP’s personnel costs were \$379,117 and operational costs were \$27,443.

See **Figure 2** on page 11. Budget restrictions were imposed in FY 2009, in the amount of \$24,066.



OIP functioned with 8 filled positions. This included the director, one full-time staff attorney, three part-time staff attorneys, two staff members, and one part-time staff member.

OIP’s largest budget year was FY 1994, when the annual budget was \$827,537, funding a staff of 15 positions. In FY 1998, the Legislature sharply reduced OIP’s budget and eliminated three positions. From FY 1999 through 2009, OIP’s budget adjusted for inflation has been approximately \$400,000.

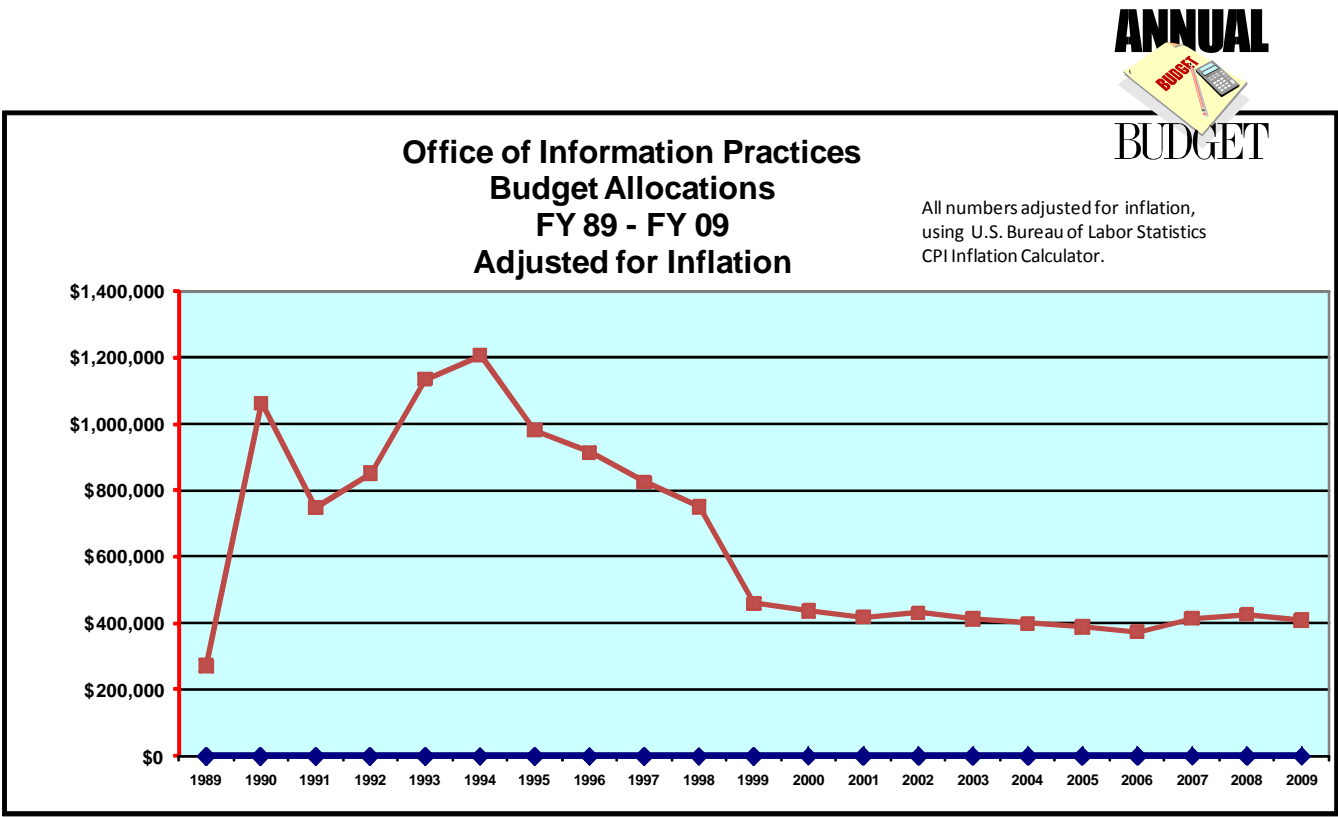


Figure 1



Office of Information Practices
Budget FY 1989 to FY 2009

Fiscal Year	Operational Costs	Personnel Costs	Allocations	Allocations Adjusted for Inflation	Approved Positions
FY 09	27,443	379,117	406,560	406,560	8
FY 08	35,220	387,487	422,707	424,014	8
FY 07	35,220	360,266	395,486	411,941	8
FY 06	35,220	312,483	347,703	372,485	8
FY 05	35,220	314,995	350,215	387,278	8
FY 04	35,220	312,483	347,703	397,528	8
FY 03	38,179	312,483	350,662	411,470	8
FY 02	38,179	320,278	358,457	430,325	8
FY 01	38,179	302,735	340,914	415,736	8
FY 00	37,991	308,736	346,727	434,856	8
FY 99	45,768	308,736	354,504	459,555	8
FY 98	119,214	446,856	566,070	750,021	8
FY 97	154,424	458,882	613,306	825,265	11
FY 96	171,524	492,882	664,406	914,538	12
FY 95	171,524	520,020	692,544	981,417	15
FY 94	249,024	578,513	827,537	1,205,953	15
FY 93	248,934	510,060	758,994	1,134,388	15
FY 92	167,964	385,338	553,302	851,718	10
FY 91	169,685	302,080	471,765	748,066	10
FY 90	417,057	226,575	643,632	1,063,539	10
FY 89	70,000	86,000	156,000	271,702	4

Figure 2



Legal Assistance, Guidance and Rulings



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

In FY 2009, OIP received 931 requests for assistance, including 798 requests for general advice and guidance regarding application of and compliance with the UIPA and Sunshine Law; 49 requests for assistance in obtaining records from government agencies; 14 requests for investigations of actions and policies of agencies and boards for violations of the Sunshine Law, the UIPA, or OIP’s administrative rules; 23 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; 25 UIPA appeals; and 22 requests for training.

Formal Requests

Requests for Assistance

OIP may be asked for assistance in obtaining a response from an agency to a record request. In FY 2009, OIP received 49 such requests for assistance.

OIP staff attorneys will in these cases generally contact the agency to determine the status of the request, direct and instruct the agency as to the proper response required, and in some instances, will attempt to facilitate disclosure of the records.

Requests for Legal Opinions

Upon request, OIP provides written advisory opinions on issues under the UIPA and the Sunshine Law. In FY 2009, OIP received 23 requests for advisory opinions. See **Figure 3**.

Requests for Rulings

OIP also provides rulings on Sunshine Law complaints and UIPA appeals. In FY 2009, OIP received 14 Sunshine Law complaints and 25 UIPA appeals.

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 are “published” and distributed to government agencies and other persons or entities

Formal Requests FY 2009	
Type of Request	Number of Requests
Request for Assistance	49
Request for Advisory Opinion	23
UIPA Appeals	25
Sunshine Law Complaints	14
Training	22
Total Formal Requests	133

Figure 3

requesting copies. They are also made available on OIP’s website. Formal opinions address issues that are novel or controversial, that require complex legal analysis, or that involve specific records. Formal opinion letters are distributed to:

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

These formal opinions are also available on OIP’s website at www.hawaii.gov/oip. OIP publishes summaries of the formal opinions in OIP’s newsletter, *OpenLine*, and on OIP’s website. The website also contains an index for the formal opinions and provides for word searches.

Informal opinions, or memorandum opinions, are public records, but are not circulated. These opinions are deemed to be of more limited guidance because they address issues that have already been more fully addressed in formal opinions, or because their factual basis limits their general applicability. These opinions generally provide less detailed legal discussion. Memorandum opinions are sent to the parties involved and are maintained as public records at OIP. Summaries of informal opinions are now available on OIP’s website.

In an effort to provide more timely responses, OIP is now also issuing summary dispositions in those cases where it believes appropriate. These dispositions contain even more abbreviated legal discussion.

Summaries of opinions issued in FY 2009 are found in this report beginning on page 19.

Informal Requests

Attorney of the Day Service

A majority of the requests for assistance are handled through OIP’s “Attorney of the Day” (AOD) service. Over the past ten years, OIP

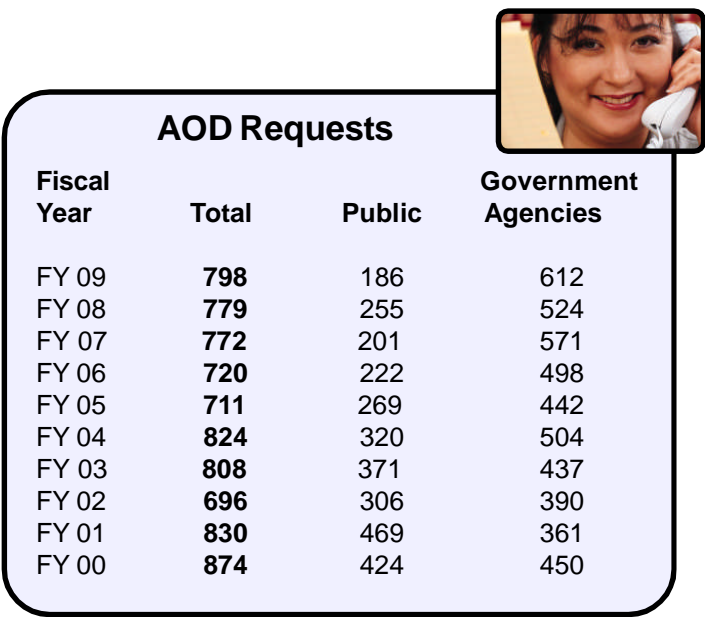


Figure 4

has received a total of 7,793 requests through its AOD service. See **Figure 4**.

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

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

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

In FY 2009, OIP received 798 inquiries through its AOD service. Roughly three out of four inquiries came from government boards and agencies.

Of the 798 AOD inquiries received in FY 2009, 186 requests (23%) came from the public and 612 (77%) came from government boards and agencies. See **Figure 5**.

Of the 186 public requests, 118 (64%) came from private individuals, 21 from media, 19 from private attorneys, 11 from businesses, 12 from public interest groups, and 5 from other sources. See **Figure 6** and **Figure 7**.

AOD Requests from the Public FY 2009	
Types of Callers	Number of Inquiries
Private Individual	118
Media	21
Private Attorney	19
Business	11
Public Interest Group	12
Other	5
TOTAL	186

Figure 6

Telephone Requests
Fiscal Year 2009

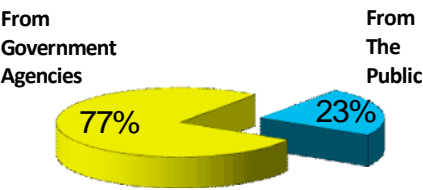


Figure 5

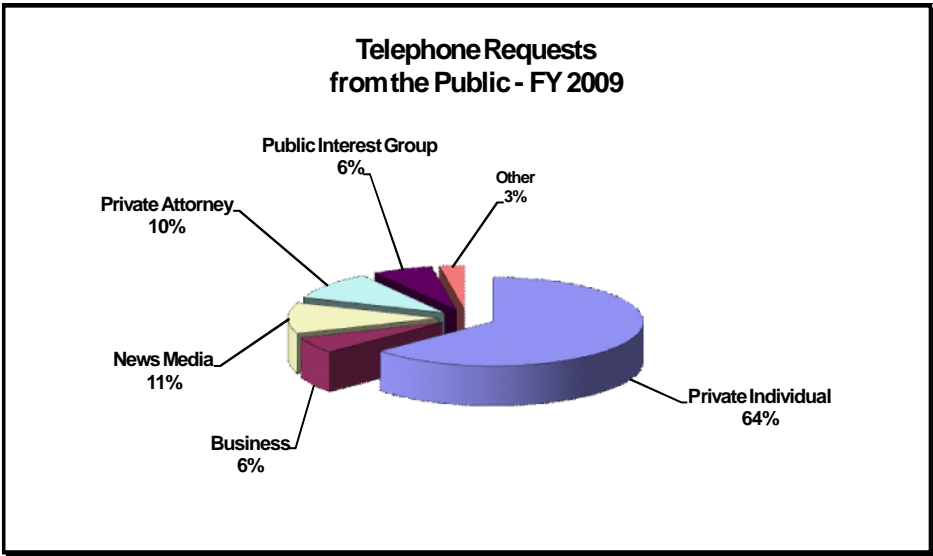


Figure 7

UIPA AOD Requests

In FY 2009, OIP received 414 AOD requests concerning the UIPA. These numbers reflect calls both from the public and from the agencies themselves. For a summary of AOD calls concerning the Sunshine Law, please see the Sunshine Law Report beginning on page 33.

State Agencies and Branches

In FY 2009, OIP received a total of 313 AOD inquiries about state agencies. Almost half of these requests concerned five state agencies:

the Department of Commerce and Consumer Affairs (46), the Department of Land and Natural Resources (31), the Department of Health (30), the Department of Education (27), and the University of Hawaii System (17). As shown below, approximately two-thirds of the requests were made by the agencies themselves seeking guidance on compliance with the UIPA.

OIP also received 14 inquiries concerning the legislative branch and 8 inquiries concerning the judicial branch, as shown below. See **Figure 8** below.



Calls to OIP About State Government Agencies FY 2009			
Executive Branch Department	Requests by Agency	Requests by Public	Total Requests
Commerce and Consumer Affairs	34	12	46
Land and Natural Resources	20	11	31
Health	11	19	30
Education (including Public Libraries)	17	10	27
University of Hawaii System	11	6	17
Accounting and General Services	8	8	16
Attorney General	8	8	16
Human Services	6	9	15
Transportation	8	7	15
Agriculture	7	5	12
Labor and Industrial Relations	7	5	12
Public Safety	6	5	11
Business, Econ Development, & Tourism	7	2	9
Governor	1	5	6
Tax	5	1	6
Lieutenant Governor (including OIP)	0	4	4
Budget and Finance	1	1	2
Hawaiian Home Lands	1	0	1
Human Resources Development	1	0	1
Defense	0	0	0
TOTAL EXECUTIVE	159	118	277
TOTAL LEGISLATURE	6	8	14
TOTAL JUDICIARY	3	5	8
Office of Hawaiian Affairs	3	2	5
Unnamed Agency	2	7	9
TOTAL STATE AGENCIES	173	140	313

Figure 8

County Agencies

In FY 2009, OIP received 101 AOD inquiries regarding county agencies and boards. Two-thirds of the inquiries came from the public.

Of these, 31 inquiries concerned agencies in the City and County of Honolulu, down from 75 in the previous year. See **Figure 9**.

Requests regarding the Neighborhood Commission and Neighborhood Boards went down from 26 to 4. Requests regarding the Honolulu Police Department went from 12 to 3, and requests regarding the Honolulu City Council went from 7 to 1.

OIP received 70 inquiries regarding neighbor island county agencies and boards: Hawaii County (29), Kauai County (34), and Maui County (7). See **Figures 10-12**.



Calls to OIP About
City and County of Honolulu
Government Agencies - FY 2009

Department	Requests by Agency	Requests by Public	Total Requests
Environmental Services	2	2	4
Neighborhood Commission/ Neighborhood Boards	2	2	4
Board of Water Supply	2	1	3
Police	1	2	3
Transportation Services	0	3	3
City Ethics Commission	0	2	2
Office of the Mayor	0	2	2
Budget and Fiscal Services	1	0	1
City Council	0	1	1
Community Services	0	1	1
Corporation Counsel	1	0	1
Parks and Recreation	0	1	1
Prosecuting Attorney	1	0	1
Unnamed Agency	1	3	4
TOTAL	11	20	31

Figure 9

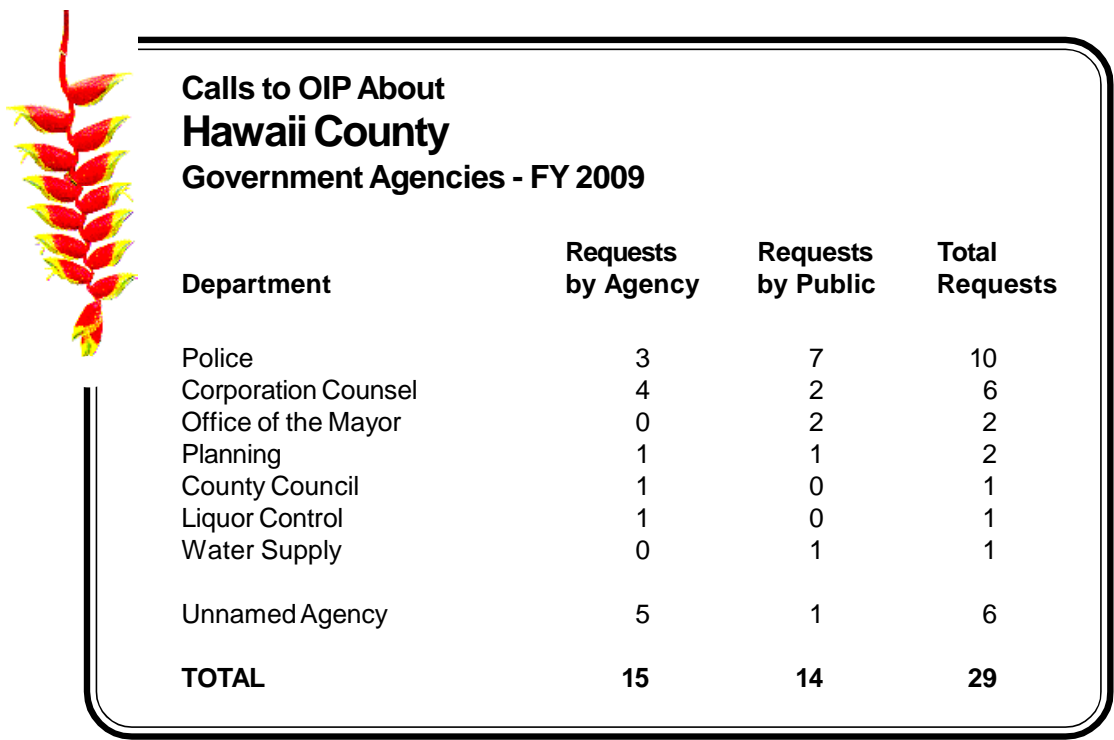


Figure 10

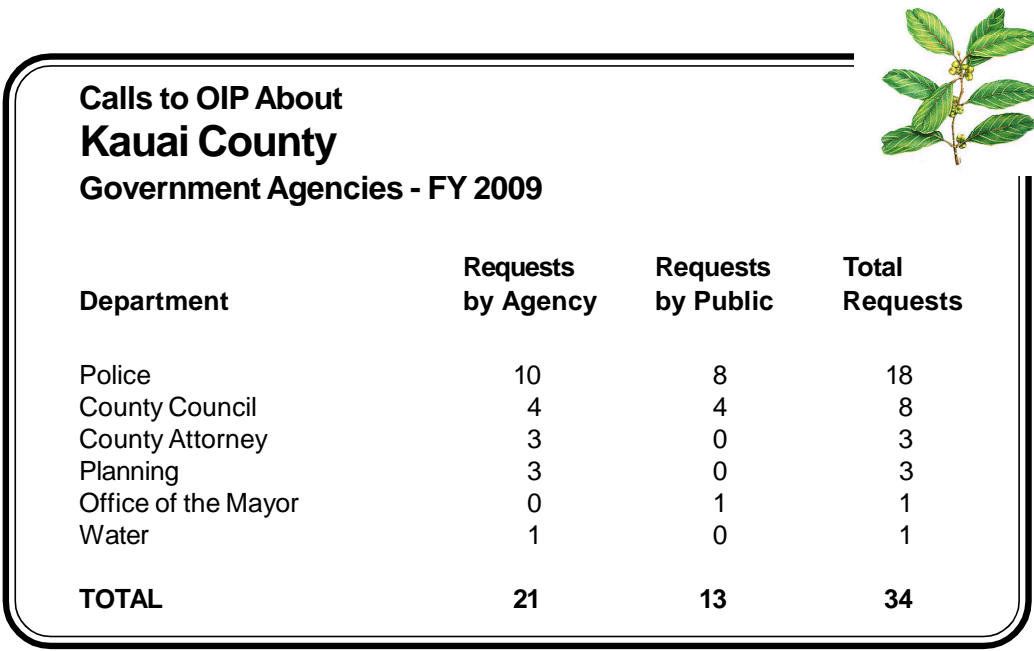


Figure 11

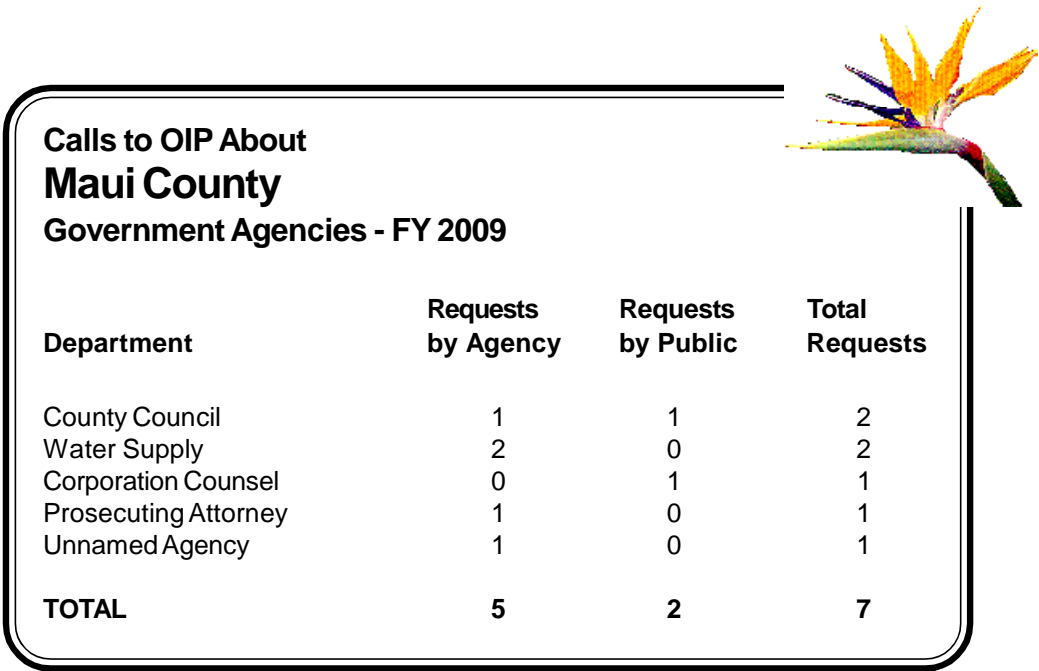


Figure 12



Legal Guidance and Rulings

UIPA Advisory Opinions

In response to requests made for advisory opinions under the UIPA, OIP issued seven memorandum opinions in FY 2009. Three of these requests were made by government agencies or officials. The following are summaries of these opinions.

the burden to establish that the material designated as confidential qualifies as confidential business information or trade secrets under the UIPA. The proposal must therefore be disclosed. *[UIPA Memo 09-2]*



Disclosure of RICO Complaint Reports

The Complaints and Enforcement Officer, Department of Commerce and Consumer Affairs, Regulated Industries Complaint Office (RICO), asked whether RICO must disclose its investigative report and an Advisory Committee Member (ACM) report to a member of the public who had requested them. The reports relate to a complaint made by that member of the public to RICO in 2003.

OIP found that the requested records are joint personal records because they are about a realtor and the member of the public. However, RICO may redact information if the information could identify confidential sources. The remainder of the material in the two reports must be disclosed to the member of the public. *[UIPA Memo 09-1]*

Disclosure of Proposal

A member of the public asked whether a proposal by Harcourt Assessment, Inc., for development and administration of Hawaii Science Assessments, must be disclosed under part II of the UIPA.

OIP found that Harcourt, acting through the Department of Education (DOE), has not met

Confidentiality of DCCA Draft Work Plan

A State Senator (Requester) asked whether the Department of Commerce and Consumer Affairs (DCCA) properly requested that he maintain the confidentiality of DCCA's draft work plan for the renewal of Time Warner Entertainment Company, L.P.'s (TWE) cable television franchise, which was provided to Requester by DCCA "subject to Hawaii Revised Statutes §92F-19(b)" of the UIPA. Specifically, Requester questioned whether DCCA improperly classifies its draft "Franchise Renewal Work Program" plan (the Draft Plan) as confidential.

OIP found that DCCA's characterization of the Draft Plan as confidential for purposes of interagency sharing is proper because it may be withheld from public disclosure under section 92F-13(3) of the UIPA. *[UIPA Memo 09-3]*

Disclosure of Investigative Report by University of Hawaii

The University of Hawaii (UH) requested an opinion as to whether, under Part III of the UIPA, it must disclose to Requester its investigative report setting forth its findings

and conclusions about Requester’s complaint of an employee’s alleged scientific research misconduct (Report) when Requester refuses to sign a confidentiality agreement requiring her to refrain from publicly disclosing the Report.

OIP concluded that Part III of the UIPA requires UH to disclose the Report to Requester because the Report is Requester’s personal record and the Report does not fall within any of the UIPA’s exemptions to an individual’s access to personal records. Specifically, UH had not shown that the Report is not Requester’s personal record, and none of the UIPA exemptions authorizes UH to deny Requester access to the Report based upon Requester’s refusal to sign an agreement to keep this personal record confidential.

[UIPA Memo 09-4]

Inmate Inspection of Records Before Payment of Copying Fees

An inmate asked whether the Department of Public Safety (PSD) must allow him to inspect the copies of government records he requested before requiring him to pay the full amount of fees that PSD assessed for providing the copies in response to his records request under part II of the UIPA.

OIP concluded that because the requester is confined in PSD’s correctional facility and is unable to inspect the records at the location where PSD maintains them, he may seek public access to the records by requesting copies of the records and will be assessed the applicable fees. PSD may require the requester to prepay only those portions of the estimated fees as specified in section 2-71-19(b), Hawaii Administrative Rules, and may cease to process the request, including providing the records, if the requester fails to submit the full amount of the prepayment, in which case the requester is presumed to have abandoned the request. [UIPA Memo 09-5]

Candidate’s Financial Disclosure Statement

An attorney asked whether a financial disclosure statement filed with the Maui County Board of Ethics by a candidate for Maui County elective office (candidate financial disclosure statement) is open to public inspection under part II of the UIPA before the Board has met to discuss it.

OIP concluded that a candidate financial disclosure statement is open to public inspection at the time it is filed. The statement is maintained by the Board from the time it is filed, and a candidate for Maui County elective office does not have a significant privacy interest in the information contained therein. Thus, the Board has no basis to deny public access to the candidate financial disclosure statement. [UIPA Memo 09-6]

Police Chief’s Evaluation

A member of the public asked whether the current Honolulu Police Chief’s past performance evaluations and goals must be provided to a requester under part II of the UIPA.

OIP found that because of the importance of the position of Honolulu Police Chief, the public interest in the Police Chief’s past performance evaluations and goals generally outweighs his privacy interest. The evaluations at issue did not contain sensitive health or financial information that might carry an elevated privacy interest. Thus, OIP found no basis under the UIPA for the Police Commission to deny access to any part of the performance evaluations and goals. [UIPA Memo 09-7]



UIPA Appeals and Investigations

OIP issued 18 Decisions in FY 2009 to resolve 17 UIPA appeals and 1 UIPA investigation. The following are summaries of those opinions.

Suitability Investigation Report

A member of the public (Requester) asked whether the Department of Human Services (DHS) properly denied Requester's request for access to a suitability investigation report (Report) about himself under Part III of the UIPA.

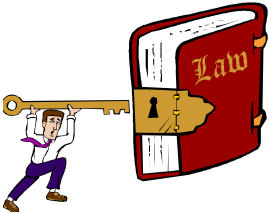
OIP found that DHS is not required to disclose the Report to Requester because the Report falls under the UIPA exemption that allows an agency to withhold from an individual access to personal records consisting of examination material for appointment in public employment where disclosure "would compromise the objectivity, fairness, or effectiveness" of the examination process. Haw. Rev. Stat. §92F-22(3) (1993).
[Decision 09-1]

Medical Marijuana Registry

A member of the public (Requester) asked whether the Department of Public Safety's (PSD) public disclosure of information from the medical marijuana registry violated the UIPA.

OIP concluded that PSD's public disclosure of information from the medical marijuana registry was a disclosure of "confidential information explicitly described by specific confidentiality statutes." However, because there was no indication that this disclosure was

anything other than inadvertent, OIP declined to forward this file to the Attorney General for investigation as a misdemeanor under the UIPA.
[Decision 09-2]



Lobbying Firm's Bills and Invoices

A newspaper reporter (Requester) asked whether the Office of Hawaiian Affairs (OHA) properly denied Requester's request for bills and invoices from OHA's Washington, D.C. lobbying firm Patton Boggs. The request was made under part II of the UIPA. OIP found that OHA must produce the bills and invoices from Patton Boggs which are not protected by the attorney-client privilege. OHA may redact a particular description of a service rendered where it would disclose privileged matters.
[Decision 09-3]

Golf Club Records

Two members of the public (Requester) asked whether the County of Hawaii, Department of Parks and Recreation (County), properly denied Requester's request under part III of the UIPA for records related to an accident at the Makalei Golf Club.

OIP found that the County properly denied the request as it does not have custody or control over the documents held by the Makalei Golf Club.
[Decision 09-4]

Ombudsman’s Letter to Kauai Police Commission

A member of the public (Requester) asked whether the Office of the Ombudsman properly denied Requester’s request for a letter written from the Ombudsman to the Kauai Police Commission under the UIPA.

OIP concluded that the Ombudsman may deny access to the requested record. This denial is based on a state law requiring confidentiality except as necessary to carry out his duties or support his recommendations. The UIPA permits an agency to withhold a record when a specific state law prohibits disclosure.
[Decision 09-5]

Police Arrest Records

A newspaper reporter (Requester) asked whether the Honolulu Police Department (HPD) properly denied Requester’s UIPA request for arrest and charge data of individuals in connection with pedestrian fatalities. Specifically, Requester sought the names of drivers arrested or charged for each specific pedestrian fatality cases from 2003 through 2007. Although Requester had since obtained the information sought from the Office of the Prosecuting Attorney, Requester asked that OIP render an opinion to determine his right to obtain this information from HPD in the future.

HPD represented that the only records it maintained from which it could link arrestees to specific pedestrian fatalities are what it refers to as motor vehicle collision (MVC) reports. HPD stated that these MVC reports are the “traffic accident reports” required to be filed under the Statewide Traffic Code, chapter 291C, HRS. HPD further represented that it did not create a separate criminal investigation file for traffic offenses under that chapter.

OIP concluded that HPD’s denial of access to the requested information contained only in its MVC reports is allowed under the UIPA. By statute, disclosure of traffic accident reports is restricted to persons other than Requester and thus may be withheld under the UIPA exception to disclosure for records protected by state law. Haw. Rev. Stat. §92F-13(4) (1993).
[Decision 09-6]

Unredacted Minutes of an Executive Session

A member of the public (Requester) asked whether the Hawaii County Council properly denied Requester’s request under part III of the UIPA for unredacted minutes of its executive session held August 27, 2008.

OIP found that the Council was justified under the UIPA in denying access to the redacted portion of the minutes.
[Decision 09-7]

Access to Minutes of an Executive Session

A State Senator (Requester) asked whether the Board of Trustees (the Board) of the Office of Hawaiian Affairs (OHA) properly denied Requester’s request for access to the minutes of an executive session held on February 24, 2005.

OIP found that OHA had not demonstrated that the Board’s executive session was covered by the Sunshine Law exception for consultation with its attorney. Since OHA had not borne its burden to justify the session, the discussion should have taken place in an open session. Therefore, OHA must provide Requester with the Executive Session minutes for its meeting of February 24, 2005.
[Decision 09-8]

**Kauai Police Commission
Records**

A member of the public (Requester) asked whether the Kauai Police Commission (KPC) properly denied his request for records under the UIPA. Requester sought access to records relating to an item on KPC’s agenda for its October 20, 2006, meeting. The records sought by Requester included:

1. A letter to the Police Commission requesting legal representation;
2. Executive session minutes relating to the same item;
3. A copy of a letter to the KPC from the Office of the Ombudsman; and,
4. The executive session minutes relating to the same letter.

Regarding the letter to the KPC from the Office of the Ombudsman, Requester’s appeal to OIP, from a denial by the Office of the Ombudsman for the same record, was denied because a state law permits the Ombudsman confidentiality “as necessary to carry out his duties or support his recommendations.” H.R.S. §96-9(b)(1993). This decision as to the records from the Ombudsman’s office was issued by OIP on September 17, 2008, as a memorandum opinion (Memo Decision 09-5). The question that remains is whether the materials described in numbers 1 and 2, relating to a request for legal representation, must be disclosed.

OIP concluded that the letter to the KPC requesting legal representation may be released, after redacting any home contact information, because the record is not excepted from disclosure.

Records of the executive session may be kept confidential because KPC’s consultations with its attorney during the sessions were properly closed to the public under H.R.S. §92-5(a)(4).
[Decision 09-9]

**Land Use Commission
Transcript**

A member of the public (Requester) asked whether the Land Use Commission (LUC) properly denied her request for a copy of a LUC proceeding transcript under the UIPA. Requester also asked whether the LUC may require her to pay expedited fees for a copy of a transcript within 60 days after the proceeding.

OIP found that the LUC’s denial was proper because, at the time of the request, the record had not yet been created. The LUC did not maintain a government record that responded to the request. The UIPA does not place an affirmative obligation upon an agency to create a record if it is not readily retrievable.

Because the question of expediting the transcript and whether the requester may be charged for the expedited fees did not arise in this circumstance, OIP did not address whether the LUC may pass on the expedited charges.
[Decision 09-10]

Client’s Inmate File

A member of the public asked whether the Department of Public Safety (PSD) properly denied his request under part III of the UIPA for his client’s inmate file.

OIP found that PSD may redact the point values and total score from the RAD Substance Abuse Assessment Instrument and the RECLASSIFICATION report dated October 2, 1996, but must disclose the remainder of those records. All other records must be disclosed.
[Decision 09-11]

Prosecutor's Office Records

A member of the public (Requester) asked whether the Department of the Prosecuting Attorney (the Prosecutor's Office) properly denied Requester's request under part III of the UIPA for "all investigative records, files, notes and decisions not to prosecute" made by a deputy prosecuting attorney concerning the Requester related to two criminal cases.

The Prosecutor's Office represented that it maintained three records responsive to Requester's request, specifically, the deputy prosecuting attorney's conferral sheet for the two identified cases; the deputy prosecuting attorney's notes of the suspect's taped statement to police; and the deputy prosecuting attorney's notes of the alleged victim's taped statement to police (the Prosecutor Records).

OIP concluded that the Prosecutor's Office may withhold the Prosecutor Records, all of which constitute attorney work product, under section 92F-22(5), HRS.

[Decision 09-12]

Hawaii Superferry Records

A newspaper reporter sought a determination on whether the Office of the Governor properly withheld certain records under the UIPA in response to the requester's request for records concerning the Hawaii Superferry. Specifically, the requester asked OIP to review select records he identified on the privilege log provided to him by the Department of the Attorney General (the "AG"), and to determine whether the executive privilege and/or attorney-client privilege designated on the log as the basis for denying access were properly applied.

Except for limited factual information identified, OIP found based upon its review that the disputed records did fall under UIPA exceptions to disclosure, primarily being records protected by the deliberative process or the attorney-client privilege. These records consisted primarily of back and forth predecisional communications seeking and sharing the subjective thoughts and opinions of various employees and consultants, projected timelines, and drafts of letters and agreements, preliminary to policy decisions by the Department of Transportation and/or the Office of the Governor that concerned the Superferry project.

[Decision 09-13]

Payroll Records

A member of the public asked whether Waters of Life Charter School ("WOLCS") properly denied his request for the payroll records of WOLCS from 2003 to the time of his request (the "Payroll Records"). OIP did not have the opportunity to review the records and WOLCS did not provide any information as to what the records contained.

OIP found that WOLCS had failed to meet its burden to justify nondisclosure of the records. OIP did, however, raise certain exceptions sua sponte and found that the Payroll Records must be disclosed subject to possible redaction of (1) any individuals' social security numbers, based on the individuals' privacy interests and because disclosure is prohibited by statute; and (2) any payroll deductions, tax withholding or net pay under the UIPA's privacy exception, HRS § 92F-13(1). OIP advised that WOLCS should seek guidance from OIP before redacting any other information.

[Decision 09-14]

**Disclosure of Pre-award
Contract Proposal Information**

A member of the public asked whether the Department of Transportation, Highways Division (“DOT”) properly denied Requester’s request for contract proposal records under Part II of the UIPA.

Based upon its review, OIP found that DOT is not required to disclose proposals before a contract has been awarded.

There are five exceptions to the general rule of disclosure. One of the exceptions is when, government records, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function[.] Haw. Rev. Stat. § 92F-13(3)(1993).

The legislative history to this exception describes records, which if disclosed would frustrate a legitimate government function.

These examples include information which, if disclosed, would raise the cost of government procurements or give a manifestly unfair advantage to any person proposing to enter into a contract or agreement with an agency, Sen. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Sen. Journal, at 1093-95.

OIP found here that disclosure of the proposals of other offerors could give the Requester’s company an unfair advantage since it submitted a proposal for the same contract. Therefore, OIP found that the proposals could be withheld from disclosure under section 92F-13(3).
[Decision 09-16]

**Request for Hawaii
Paroling Authority File**

An inmate asked whether the Hawaii Paroling Authority (“HPA”) properly denied his request for records in HPA’s file pertaining to him.

Requester is currently incarcerated in a prison in Arizona. He wrote to the HPA requesting copies of all the records in his file. He was provided two records, his request to initiate a reduction in sentence and the HPA Chair’s decision, but was denied access to all others. Requester then appealed to OIP for assistance.

Based upon its review, OIP found that HPA may redact its final recommendation and the names of other inmates from its records, but must disclose the remainder of its records.
[Decision 09-17]

Executive Minutes

A member of the public asked whether the Procurement Policy Board (“PPB”) properly denied Requester’s request for the minutes of its executive meeting on October 5, 2006 under part II of the UIPA.

Based upon its review, OIP found that the executive minutes are not required to be disclosed because the minutes reveal privileged attorney-client communications between PPB and its legal counsel about legal issues relating to three petitions presented to PPB for its consideration and exempting public, education and government access services from the State Procurement Code (“PEG petitions”). Records protected by the attorney-client privilege are not required to be disclosed under the UIPA’s exceptions in section 92F-13(3) & (4), HRS.

Also, because public disclosure of the executive minutes would reveal the PPB’s discussion with its legal counsel in executive session authorized by section 92-5(a)(4), HRS, the executive minutes are not required to be disclosed in order to avoid defeating this legitimate executive session purpose. See Haw. Rev. Stat. § 92-9(b)(1993); Haw. Rev. Stat. 92F-13(4).

[Decision 09-18]



General Legal Assistance and Guidance Under the UIPA and Sunshine Law



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

Co-introduction of Resolutions by More than One Council Member

OIP was asked whether the co-introduction of resolutions by more than one council member would violate the Sunshine Law. OIP generally advised as follows.

Although OIP has not directly addressed the question in an opinion, it did indirectly question the practice of multiple council members introducing resolutions. *See* OIP Op. Ltr. No. 05-15 at footnote 2. OIP said there that even if no discussions occurred, it appeared at a minimum that the member who authored the resolution, by asking whether other council members were willing to co-introduce the Resolution, was essentially "polling" the other members regarding the subject matter of that resolution.

The Hawaii Intermediate Court of Appeals cited to a related July 12 OIP letter in that matter in the case of *Right to Know Committee v. City Council*. The court quoted at length from that July 12 letter, with respect to multiple members co-introduction of a resolution, in which OIP had stated that even if no discussions occurred, it appeared at a mini-

mum that the council member who authored the resolution was, by asking other members to co-introduce the resolution, polling the other members outside of a meeting.

The Maui circuit court recently cited to the Right to Know case, stating that "the written resolution at issue was introduced by a group of council members jointly, and thus evidenced that there necessarily were serial communications regarding whether the other council members were willing to co-introduce the resolution." It appears, thus, to be settled that the co-introduction by more than two members is a violation of the Sunshine Law because it indicates communication outside of a meeting.

The issue where two members are co-introducing a resolution would likely raise a factual question as to the intent of the members under section 92-2.5(a). Namely, in co-introducing a resolution, is a commitment to vote being made or sought (even if it may be subject to change). Given the ICA case's recitation of the July 12 OIP opinion, when two members are co-introducing a resolution, the inference would likely be that a commitment to vote has been made or sought.

The requester was informed that a more definitive statement could be obtained by requesting a written opinion stating specific facts upon which requester wanted OIP to opine.

Redaction of Personal Information from Certified Payroll Documents

Requester asked whether, under section 92F-12(9), HRS, a certified payroll document under HRS Chapter 104 must be disclosed with only social security numbers and home addresses redacted. Requester asked whether other information should be redacted to protect the privacy of the employees.

OIP advised that requester was correct in that section 92F-12(a)(9), HRS, requires certified payrolls to be disclosed and the agency may only redact social security numbers and home addresses. OIP noted that amendment of the statute was sought by OIP within the last several years to allow these specific redactions in response to concerns raised by agencies.

OIP recognized that some of the other information required to be disclosed raises privacy concerns. However, OIP stated that it is apparent from the Report on the Governor's Committee on Public Records and Privacy, which was reviewed and relied upon by the legislature prior to enactment of the UIPA, that these concerns were considered, but that the public interest in disclosure was deemed to outweigh the privacy interests of the individual employees.

OIP explained that it appeared that construction industry associations and unions were instrumental in making these records public to allow the industry to monitor compliance with the law, uniform and consistent enforcement of the law, and fair competition. The information these parties specifically wanted to be made public was: employee names, job classifications, rates of pay, daily and weekly log of hours worked, payroll deductions made, and actual wages paid.

Cancellation of Board Meetings

The Neighborhood Commission Office (NCO) asked for guidance in drafting a procedure identifying reasons board meetings may be cancelled. A concern expressed was that if a meeting was held during a flood or high winds, the board would be depriving people of the chance to attend the meeting and testify.

OIP advised generally that the question raised is not one that is directly addressed by the Sunshine Law or OIP. (Cancellation is only addressed where notice given is tardy under section 92-7(c)). However, OIP does often recommend that boards take into account the purpose and intent of the law and avoid taking actions that may not technically violate the letter of the law, but rather the spirit of the law.

In the two situations raised, i.e. where floods or high winds would likely deter the public from attending the neighborhood meetings, OIP noted that the NCO's decision to cancel and reschedule the meeting so that the public would freely be able to attend and participate upholds the spirit of the law. OIP did not have any more specific guidance to offer in terms of what other situations should be provided for, but made the office available to comment on other specific reasons.

Noticing Executive Sessions on Agendas

OIP was asked for guidance on noticing executive sessions, including unanticipated executive sessions. Requester provided agenda language used by the board at issue to inform the public that the board did not anticipate an executive session, but that it had the authority to convene such a session if necessary.

OIP generally advised that inclusion of a clause on the agenda regarding a possible unanticipated executive session was unnecessary. However, if the board wanted to include such a clause on its agenda, OIP provided sample language that more closely tracked the statutory requirements:

“The Commission may go into an executive session on an agenda item for one of the permitted purposes listed in section 92-5(a), HRS, without noticing the executive session on the agenda where the executive session was not anticipated in advance. Haw. Rev. Stat. §92-7(a). The executive session may only be held, however, upon an affirmative vote of two-thirds of the members present, which must also be the majority of the members to which the board is entitled. Haw. Rev. Stat. §92-4. The reason for holding the executive session shall be publicly announced.”

Consultant’s Report About Aloha Stadium

The Stadium Authority is not required to disclose the Consultant's report evaluating the Swap Meet (Report) because the Report falls within one of the UIPA’s exceptions to required public disclosure.

Specifically, the UIPA exception in section 92F-13(3), HRS, applies to government records where disclosure would frustrate a legitimate government function, and this "frustration" exception allows an agency to withhold intra-agency and inter-agency memoranda consisting of "recommendations, draft documents, proposals, suggestions and other subjective documents that comprise part of the process by which the government formulates decisions and policies." Haw. Rev. Stat. Sec. 92F-13(3) (1993); *see* OIP Op. Ltr. Nos. 07-11, 04-15.

OIP has previously opined that the "frustration" exception also applies to these types of records when prepared by a consultant so long as the consultant's submission of the records is solicited by the agency and the records are "predecisional" and "deliberative" in character. *See* OIP Op. Ltr. No. 91-16.

Filing of Government Records with a Mainland Company

The Department of Commerce and Consumer Affairs (DCCA) explained that condominiums will be filing records at DCCA by submitting the records electronically to a company on the mainland. DCCA will provide access to the public information filed by the condominiums by providing a diskette of the information upon request. However, DCCA inquired whether it must accommodate requests for inspection of the records.

Because the UIPA gives the public the right to inspect or obtain a copy of government records, DCCA must accommodate requests for physical inspection of the records.

Records Request by Telephone

The Department of Land and Natural Resources (DLNR) received a records request by telephone and asked whether it can require the requester to submit the request in writing.

Under OIP’s administrative rules, an agency can respond to the telephone request as an informal request, or can tell requester to submit the request in writing. A written request is a formal records request under OIP’s rules. When an agency receives a formal records request, the agency must comply with the procedures set forth in OIP's rules for responding to formal requests.

Informational Briefing on a Possible Race Track

The Hawaii Community Development Authority (HCDA) was planning to hold an informational briefing to consider constructing a race track but was reluctant to take public testimony because it anticipated extensive oral testimony based upon the large number of testifiers it expected. The information briefing was noticed on the agenda and was a matter of board business.

OIP advised that the Sunshine Law required HCDA to take public testimony on this matter because it was an agenda item.

Moving the Meeting Room

A board committee was scheduled to meet in a room with a broken air conditioner, and wanted to move the meeting location. The committee asked whether the Sunshine Law allowed them to announce at the outset that the meeting would be moving, and then reconvene a short while later in a nearby location. The committee also asked whether they could do the same thing if the meeting was being moved to a more distant location.

OIP advised that the Sunshine Law would allow the committee to continue its meeting by calling it to order in the original location, announcing that the meeting would reconvene in the new location in a stated period of time, and then recessing and reconvening at the stated time and location. A meeting may be continued to a reasonable time and place. Because the members would be present at the original location to bang the gavel and announce the new location, they would be under the same constraints as the attending public in terms of getting to the new location, so even a more distant new location would likely be reasonable.

When a board plans to move a meeting to a new location by continuing it in this manner, the board may wish to post a notice of the new location ahead of time as a courtesy to the public, although this would not be required by the Sunshine Law.

Accommodating Public Attendance of a Task Force Meeting

The Legislature created a Task Force to review the special service needs of autistic children (Task Force). The Task Force noticed its meeting to be held in a room at the Department of Health (DOH), but the Task Force later anticipated that a much larger audience would attend.

The Task Force inquired whether it could move its meeting to a new location to accommodate the larger crowd, e.g., the Capitol Auditorium.

OIP advised that, if the new location was very close to the original location, the Task Force could make the change so long as it provided notice of the new location, including at the original location on the day of the meeting. Since the Capitol Auditorium was across the street from the original meeting location at DOH, this possible location change was reasonable.

Request to View Records on Another Island

A UIPA requester asked to view records on the island where the requester was located, rather than on the island where the records were located. The agency asked OIP where it was required to provide access under the UIPA.

OIP advised that access is normally provided at the agency's office during normal working hours. If a requester wants access to a record at another location, the agency must make a reasonable effort to accommodate the request as long as the record is not the agency's only original record and the arrangement does not unreasonably interfere with the agency's functions.

**Testimony Presented by
Videoconference or
Speakerphone**

A board had a request to take oral testimony at its meeting via videoconference. The board asked OIP whether its agenda needed to specify that it would be accepting the testimony by videoconference.

OIP advised that the Sunshine Law's videoconferencing section requires notice of all locations at which board members are participating remotely, but does not restrict the ways in which public testimony can be given or heard. Thus, a board does not need to specify on its notice that it will hear testimony via videoconference, and the board could also hear testimony by speakerphone.

**Meeting Scheduled for
Different Day than Usual**

A board holds regular twice-monthly meetings that are normally always on the same day of the week. The board asked OIP whether the Sunshine Law allows a meeting date that departs from the usual pattern (such as a Thursday meeting instead of Friday, or skipping a meeting), and whether the board must notify the public that the regular meeting date won't be used.

OIP advised that the Sunshine Law only requires six calendar days' notice of a meeting date, and does not require that boards keep to a particular meeting schedule. Thus, although it would be a good practice to let members of the public who may expect a board to meet on a "regular" meeting date know when a meeting won't be held on that date, it is not a violation of the Sunshine Law for a board to fail to provide such notice or to hold a meeting on the day of the month it usually meets.

**County Council Discussion of
Employment Complaint**

An employment complaint, involving questions of federal law, was going to be discussed by a County Council. The County attorney's questions asked how to list it on the agenda without violating any federal provisions. Should they exclude the complainant's name? What if someone asks for a copy?

OIP advised that the agenda should be specific as to case number and basis for ES. However, the name of the complainant should be omitted. The EEOC's policy is not to release any complaint. It states on its FOIA page: "The vast majority of requests received by the EEOC are for charge files. They are ordinarily not available under FOIA to anyone other than the charging party, respondent, or their counsel."

The employee complained about, and the complainant, have privacy interests in the complaint. Haw. Rev. Stat. §92F-14(b)(4). OIP suggested they follow the EEOC practice and not disclose the document with its complaint of discrimination.

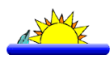
Notifying OIP of UIPA Lawsuit

An attorney in private practice asked if he was required to serve a copy of his complaint on OIP by sheriff. OIP advised him that the UIPA only required notice of suit to OIP, which may be done by sending OIP a copy by mail.

Historic Preservation Division Concerns over Revealing Location of Historic Site

The Historic Preservation Division of the State Historic Preservation office asked whether they could keep the location of an historic site confidential while they were preparing a report. The site was on private property and SHPD was concerned that people would come onto the property if the location was known.

OIP advised that the home address and TMK could be redacted during the process of evaluating the site. It is possible that the site location could be redacted when the report was finished if revealing the location would “frustrate a legitimate government function.”



Sunshine Law Report

OIP was given responsibility for administration of the Sunshine Law in 1998. Since that time, OIP has seen a large increase in the number of requests. See **Figure 13**.

Of the 798 AOD requests made in FY 2009, 259 (or 32%) involved the Sunshine Law and its application (down from 322 in the previous year). OIP also opened 14 case files in response to 3 written requests for opinions and 11 written requests for investigations regarding the Sunshine Law (down from 30 formal requests in the previous year). See **Figure 14**.

Of the 259 AOD requests involving the Sunshine Law, 129 involved the requester's own agency, 118 were requests for general advice, and 12 were complaints.

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



Sunshine Law Inquiries			
<i>Fiscal Year</i>	<i>AOD Inquiries</i>	<i>Formal Requests</i>	<i>Total</i>
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

which result in greater use of OIP as a resource.

OIP continues to provide an annual training to newly appointed board and commission members and their staff, as well as providing other training sessions throughout the year. See page 52 for a list of the sessions provided in FY 2009.

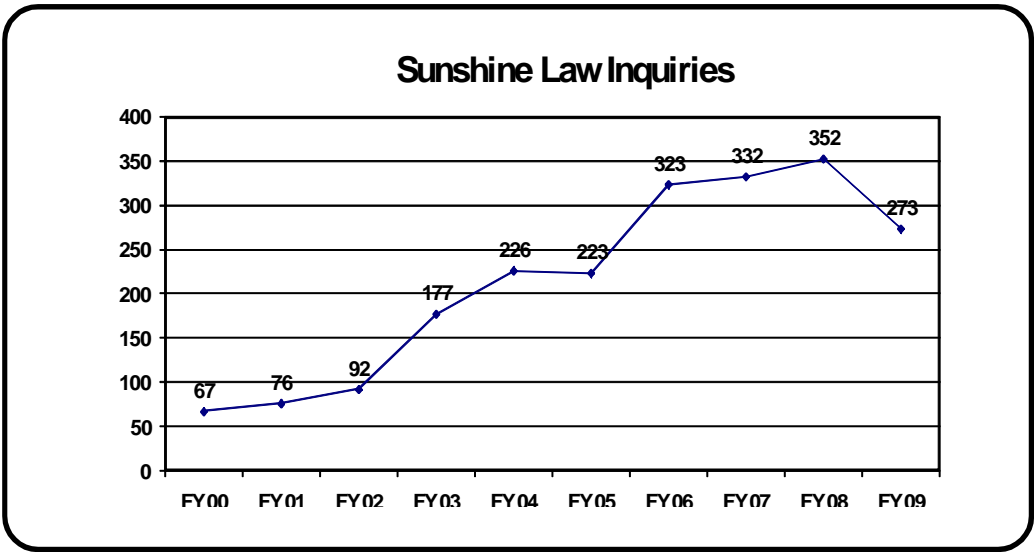


Figure 13

Sunshine Law

Investigations

OIP opened 14 investigations into the actions of government agencies in FY 2009 following complaints made by members of the public (the same number opened as in FY 2008).

The following investigations were completed in FY 2009.

Discussing Neighborhood Board Business Via E-Mail

An anonymous requester asked whether three members of the Kahaluu Neighborhood Board (KNB) violated the Sunshine Law by discussing KNB business via e-mail in connection with their service on the board of the KEY Project Board of Directors (KEY Board).

Based on the facts presented, OIP could not conclude that the KNB members serving on the KEY Board discussed KNB business with one another in the course of their service on the KEY Board. OIP therefore found no violation of the Sunshine Law. [*Sunshine Memo 09-2*]

Board Meeting Agenda and Minutes

A member of the public (Requester) asked whether the Board of Public Accountancy complied with the Sunshine Law at its December 2, 2005, meeting. More specifically, Requester asked whether 1) the Board violated the Sunshine Law by not listing the executive session on the agenda and not specifically describing the subject for the execu-

tive session; and 2) the testimony of a participant should be reflected in the minutes of the meeting.

OIP concluded that:

1. It is not clear from the public meeting or executive session minutes whether the Board should have anticipated its executive session and therefore noticed it on the agenda.

2. The testifier's testimony should have been reflected in the minutes of the public meeting, as the minutes are required to "give a true reflection of . . . the views of the participants." Haw. Rev. Stat. §92-9(a). OIP was unable to resolve the other inconsistencies raised by the testifier, lacking a recorded version of the meeting. [*Sunshine Memo 09-3*]

Executive Session

A member of the public asked whether the Kauai County Council violated the Sunshine Law by meeting in executive session on agenda items ES-346, ES-348 and ES-349 during its July 30, 2008 meeting.

OIP found that the Council's discussions under ES-346, ES-348 and ES-349 fell within an exception to the Sunshine Law. Accordingly, the executive meeting on these matters did not violate the Sunshine Law. [*Sunshine Memo 09-4*]

Amended Agenda and Adequate Notice

A member of the public asked OIP to investigate whether the State Procurement Policy Board properly noticed a meeting. Specifically, he asked whether the agenda, entitled “Amended Agenda,” provided sufficient notice for the Board’s discussion and action on a petition of Akaku, Maui Community Television.

OIP reviewed the language of the agenda and concluded that the Amended Agenda sufficiently detailed the Akaku petition to apprise the public of the Board’s meeting topics. However, because the title “Amended Agenda” may have been misleading OIP recommended against labeling agendas as “amended.” [Sunshine Memo 09-10]

Testimony Limitation, Executive Meeting for Attorney Consultation, and Minutes

A member of the public asked whether certain actions taken by the Cost of Government Commission, County of Maui (COGC), including its staff and deputy Corporation Counsel violated the Sunshine Law.

OIP concluded that COGC failed to comply with the UIPA and the Sunshine Law’s requirement to make minutes available within thirty days after a meeting when COGC’s basis for its refusal was that the minutes had not yet been approved.

OIP found no other violation of the Sunshine Law to have occurred. Specifically, COGC had complied with the Sunshine Law by allowing Requester to provide testimony on a matter that OIP determined did fall within the scope of an agenda item. COGC also properly held an executive session for the purpose of

consulting with its legal counsel as permitted by HRS §92-5(a) (4). COGC was not required to accommodate a standing request for minutes not yet created. [Sunshine Memo 09-11]

Whether the Act 213 Charter Schools Work Group Is Subject to the Sunshine Law

Two members of the public asked separately whether the Work Group, created by Act 213 in the 2007 Hawaii State Legislature, violated the Sunshine Law by not providing public notice of its meetings, taking public testimony, holding meetings open to the public, or providing minutes to the public.

OIP found that the Act 213 Work Group did not “conduct meetings” as defined by the Sunshine Law and, therefore, was not a Sunshine Law board. Specifically, the Act 213 Work Group did not require a quorum to meet because its recommendations to the Legislature were not voted on, but rather were either reached by consensus or submitted by individual members separately. [Sunshine Memo 09-12]

Board of Education Executive Session Notice and Procedures

A member of the public asked whether the Board of Education (BOE) violated the Sunshine Law when it convened an executive session to evaluate Dr. James Shon, then Executive Director of the Charter School Administrative Office.

OIP found that:
(1) the agenda, which identified the matter to be considered in the executive session as “Evaluation of the Executive Director of the

Charter School Administrative Office,” was sufficiently detailed to apprise the public of the BOE’s discussion on Dr. Shon, which reasonably included consideration of whether his performance justified continued employment;

(2) the agenda provided reasonable notice to Dr. Shon of his evaluation, thereby allowing Dr. Shon to exercise his right to require the BOE to consider his evaluation in a meeting open to the public; and,

(3) the BOE complied with the procedural requirements to convene its executive session by properly voting in an open meeting and publicly announcing the purpose of the executive session.
[Sunshine Memo 09-13]

after the meeting that it had lacked quorum due to a recent replacement of a member present at the meeting. No further corrective action is required after PPB’s reconsideration at a subsequent meeting of its actions taken at this improper meeting.

OIP also found that PPB’s executive session was authorized under the Sunshine Law. Specifically, section 92-5(a)(4), HRS, permitted PPB to meet in executive session to consult with its legal counsel on questions and issues relating to PPB’s “powers, duties, privileges, immunities, and liabilities” concerning the PEG petitions. [Sunshine Memo 09-14]

Meeting Without Quorum

A member of the public asked whether the Procurement Policy Board (PPB) violated the Sunshine Law when: (1) PPB convened a meeting on October 5, 2006 without a quorum of its members present; and (2) PPB convened an executive meeting at its October 5 meeting to discuss three petitions seeking to exempt public, education and government access services from the State Procurement Code (PEG petitions).

OIP found that because PPB lacked quorum, PPB should not have held its October 5 meeting because it did not qualify as a proper “meeting,” as this term is defined by the Sunshine Law. However, PPB’s violation was not willful because, in good faith, PPB had believed that it had quorum and only learned

Sunshine Law

Advisory Opinions

Boards Created by Resolution

A Council member asked OIP for an advisory opinion as to whether a task panel created by council resolution falls within the definition of “board” under the Sunshine Law. OIP opined that under a plain reading of the Sunshine Law’s definition of “board,” a task panel or other body created by or pursuant to a “resolution” of county (or state) government generally does not fall within that definition.

However, OIP believes that a task panel or other body created by a Sunshine Law board is subject to the Sunshine Law where circumstances show that, by delegation of authority from that board, the panel is in fact acting in place of that board on a matter that is the official business of the board. These circumstances must be reviewed on a case-by-case basis.

OIP reasoned that allowing a subordinate group of the Council to meet in private to act on council business, which would otherwise be determined at an open Council meeting, would contravene the Sunshine Law’s policy and intent to allow the public to participate in the Council’s formation of public policy.

This question initially arose in the context of the City Mass Transit Technical Expert Panel created by Honolulu City Council resolution. OIP did not specifically opine on the Panel because the Panel voluntarily complied with the Sunshine Law.

However, OIP did use the Panel as an example of an instance in which a resolution created panel would be subject to the Sunshine Law

because the resolution creating the panel delegated the Council’s authority to make the final selection of a fixed guideway system. OIP stated that the public had a preponderant interest in and expectation to be officially heard early in the process on a Council decision as important and far reaching as the choice of Honolulu’s mass transit system. [*OIP Op. Ltr. No. 08-02, July 28, 2008*]

PEG Task Force

The Department of Commerce and Consumer Affairs, Cable TV Division, asked whether the Public, Education, and Government Access Task Force (Task Force) is subject to the Sunshine Law. The Task Force was created by House Concurrent Resolution 358 HD1 during the 2008 regular legislative session.

OIP concluded that the Task Force is not a board or commission subject to the Sunshine Law. The Task Force was not created by “constitution, statute, rule, or executive order,” nor was it created by an agency which is vested with specific statutory authority to create a board or commission. [*Sunshine Memo 09-1*]

Statewide Independent Living Council of Hawaii

The Executive Director of the Statewide Independent Living Council of Hawaii (SILC-Hawaii) asked whether the SILC-Hawaii is subject to the Sunshine Law.

OIP found that the SILC-Hawaii is not subject to Hawaii’s Sunshine Law because it was established by federal law and is not a “board” created by “constitution, statute, rule or executive order.” Haw. Rev. Stat. §92-3 (1993).

However, federal law appears to require it to “ensure that all regularly scheduled meetings . . . are open to the public and sufficient advance notice is provided.” 29 U.S.C. §769d(c)(4); 31 C.F.R. §364.21(g)(4). [Sunshine Memo 09-5]

Hawaii Access to Justice Commission

The Department Chief of the Intergovernmental and Community Relations Department, part of the Hawaii Judiciary, asked whether the Hawaii Access to Justice Commission is subject to the Sunshine Law.

OIP found that the Commission is not subject to the Sunshine Law because, even assuming that it met the Sunshine Law’s definition of a “board,” it would be exempt from the Sunshine Law as part of the judicial branch. Section 92-6, HRS, makes the Sunshine Law inapplicable to the judicial branch. Haw. Rev. Stat. §§92-2(1) and 92-6(a)(1). [Sunshine Memo 09-6]

Neighborhood Board Members Attending Other Board Meetings

A member of the public (Requester) asked whether certain actions of members of Neighborhood Board No. 5, as described by Requester, violated the Sunshine Law. Specifically, Requester raised five enumerated issues.

OIP found that the first three items alleged did not raise issues under the Sunshine Law. Those items primarily concerned violations of the Neighborhood Plan. Item 4 asserted that

two board violated the Sunshine Law by discussing official business outside of a meeting of their board. OIP advised that this fell within a permitted interaction under the Sunshine Law that allows two members of a board to discuss their board business outside of a meeting so long as no commitment to vote is made or sought.

Item 5 alleged that a Sunshine Law violation occurred where three members attended another board’s meeting and two of the three members participated in a discussion of a matter that is official board business of their own board. OIP advised that item 5 was rendered moot by Act 153, which was specifically enacted to create an exception for neighborhood board members to allow for such attendance and participation subject to certain limitations. [Sunshine Memo 09-7]

Task Forces Created by Legislative Resolution

The Director of the Senate Majority Research Office asked whether the S.C.R. Joint Committee and associated task forces established pursuant to 2006 Senate Concurrent Resolution No. 52, S.D. 1 are subject to the Sunshine Law.

OIP found that the S.C.R. 52 Joint Committee and associated task forces are not subject to the Sunshine Law because they were created by legislative resolution rather than by statute. OIP Op. Ltr. No. 08-02; see Haw. Rev. Stat. §92-2(1) (1993). [Sunshine Memo 09-8]

**Sufficiency of Agenda and
Circulation of Proposed
Amendments to Bill**

A member of the Kauai County Council asked whether the agenda language for a Council meeting would have allowed the Council to discuss amendments to a bill, and secondly, whether proposed versions of the bill could be circulated before the Council meeting.

OIP concluded that the Council’s agenda for the meeting did not adequately describe the bill and all of its amendments. Although two areas of amendment were anticipated and listed on the agenda, the agenda should have listed all the major topic areas to be amended. In addition, OIP opined that proposed amendments to the bill could have been circulated among board members before the meeting as long as there was no discussion of or voting on the proposed versions before the meeting. *[Sunshine Memo 09-9]*



Legislation Report



One of OIP’s functions is to make recommendations for legislative change to the UIPA and Sunshine Law. OIP makes recommendations to clarify areas that have created confusion in application, to amend provisions that work counter to the legislative mandate of open government, or to amend the law to provide for more efficient government where government openness will not be affected. OIP also provides assistance to government agencies, government boards, elected officials and the public in the drafting of proposed bills.

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; the government’s practices in the collection, use, maintenance, and dissemination of information; and government boards’ open meetings practices.

During the 2009 Legislative session, OIP reviewed and monitored 103 bills affecting government information practices, and testified on 25 of these bills.

Bills Proposed by OIP

► The Legislature held hearings on H.B. No. 1148, which proposed amendment to the **notice provision of the Sunshine Law** to allow boards to file their notices and agendas electronically on the State calendar in lieu of filing with the Office of the Lieutenant

Governor. The House disagreed with the Senate’s amendments to the bill and no further action was taken on this bill.

► The Legislature declined to consider H.B. No. 1146 and S.B. No. 964. These bills proposed to **amend the Sunshine Law by adding another permitted interaction**. A permitted interaction is an allowed interaction between board members outside of a noticed meeting concerning the official business of their board. The proposed permitted interaction would specifically allow board members present when a noticed meeting is canceled for lack of quorum the option of receiving public testimony and presentations on noticed agenda items.

Members of the public that come to testify, or individuals scheduled to make a presentation to the board, often want the option to give the testimony or presentation to the members present at that time instead of coming back again for the next scheduled meeting. This is especially important for those who must travel long distances or even inter-island to come to a meeting. This bill would allow those board members present to accommodate those members of the public who have come to a scheduled meeting to testify or give a presentation by permitting the board members present to hear the testimony or presentation and then report back on that testimony or presentation at a noticed meeting.

OIP believes that the reporting requirement will generally ensure that the full board has access to the information given in testimony and presentations. Further, OIP believes that public access to board members’ discussions will not be impeded because the public had

notice of the meeting and because the board members cannot deliberate or make a decision concerning the testimony or a presentation until a subsequent duly noticed board meeting.

► The Legislature declined to consider H.B. 1147 and S.B. 965. These bills proposed that the **emergency meeting section of the Sunshine Law** be amended to transfer from the Attorney General to the OIP Director the responsibility of providing the required concurrence with a board's finding that an emergency meeting is necessary.

Under section 92-8, a board is authorized to hold an emergency meeting when it finds an emergency meeting is necessary to respond to either: (1) an imminent peril to the public health, safety, or welfare, or (2) an unanticipated event. When a board finds it necessary to hold an emergency meeting in response to the latter, i.e. an unanticipated event, a board currently must obtain the Attorney General's concurrence that the conditions necessary for an emergency meeting for this purpose exist.

The OIP Director is currently responsible for providing the required concurrence for boards to hold closed meetings under section 92-3.1, the limited meetings section. OIP believes that transferring responsibility for concurrence under the emergency meeting section to the OIP Director is consistent with the OIP Director's responsibility to administer the Sunshine Law and will avoid any resulting confusion if responsibility for concurrence under these two sections is not placed with the same official.

UIPA Bills

OIP offered testimony on a number of bills that would affect the UIPA or the Sunshine Law. For example, OIP testified on two bills that would restrict access to previously public information.

► OIP testified about its concerns regarding H.B. No. 1212, a bill that sought to protect **licensee complaint information** from public disclosure despite the fact that the Legislature enacted the UIPA with the express provision that an individual licensee does not have a significant privacy interest in a record of complaints.

Specifically, the bill proposed to remove the longstanding provision in the UIPA that an individual licensee does not have a significant privacy interest in his or her record of complaints including all dispositions.

After being heard and approved, with amendments, by both House and Senate Judiciary Committees, the bill was left unresolved.

► Similarly, H.B. No. 1359 proposed to prohibit the Office of Consumer Protection from disclosing **consumer complaints** where the complaints were resolved in favor of the businesses. No further action was taken on this bill after its hearing and approval by the House Judiciary Committee with amendments.



Litigation Report

OIP monitors litigation that raises issues under both the UIPA and the Sunshine Law.



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 following summarizes cases that OIP was a party to or monitored in FY 2009.

Access to Council Minutes

Kauai County, et al. v. Office of Information Practices, et al., Civ. No. 05-1-0088 (Circuit Court of the Fifth Circuit). In 2005, the County of Kauai and the Kauai County Council filed a lawsuit against OIP seeking declaratory relief to invalidate OIP’s decision that portions of the minutes of a Council executive meeting must be disclosed.

OIP previously found that the majority of the matters actually considered by the Council during the meeting did not fall within the executive meeting purpose cited on the Council’s agenda (or any other executive meeting purpose). For that reason, OIP determined that those portions of the minutes must be disclosed.

By this suit, plaintiffs sought judicial review of OIP’s ruling to disclose the minutes. OIP contends that the court does not have jurisdiction to hear this case because the UIPA does not provide government agencies the right to bring suit to challenge a ruling by OIP that a record must be disclosed under the UIPA.

The lower court concluded that access to the ES-177 minutes is governed by the Sunshine Law, not the UIPA. Under the Sunshine Law, the court concluded that the privileged portions of ES-177 minutes were so intertwined with the other portions protected by the attorney client privilege that redaction would be impractical and accordingly concluded that the minutes could be withheld in their entirety.

OIP appealed this decision to the Intermediate Court of Appeals (ICA), arguing among other things that the UIPA did not allow the County to bring its action to overturn OIP’s determination on the disclosure of the minutes under the UIPA.

The ICA found that the County could instead challenge OIP’s UIPA determination under the Sunshine Law, based upon OIP’s earlier, underlying Sunshine Law decision that most of the executive meeting discussion should have occurred in an open meeting. (Although OIP’s briefs also argued that HRS §92-71 required application of the more stringent Kauai County Charter provision limiting the use of closed meetings, the ICA opinion did not address HRS §92-71 or the Kauai County Charter.)

The ICA interpreted the Sunshine Law’s “attorney consultation exception” to open meetings much more broadly than OIP and found that all of the Council’s closed meeting discussions were either attorney-client communications or were inextricably intertwined with those communications. The ICA thus concluded that the minutes could be withheld from public disclosure in their entirety under the Sunshine Law.

OIP appealed to the Hawaii Supreme Court, which affirmed the ICA decision without issuing its own opinion.

**Kauai County Council’s
Executive Meeting Minutes**

Chuan, et al. v. County of Kauai, et al., Civ. No. 05-1-0168 (Circuit Court of the Fifth Circuit). Members of the public filed suit against Kauai County, the Kauai County Council, and Kauai County Council members over disclosure of the Council’s executive meeting minutes for a three and a half year period. This case is still pending.

**Request for Engineering
Reports**

Nuuanu Valley Association v. City and County of Honolulu, Supreme Court No. 28599, appeal from Civ. No. 06-1-0501. This litigation stemmed from a request for engineering reports submitted to the Honolulu Department of Planning and Permitting (“DPP”). Although the reports accepted by DPP were made public, DPP returned the unaccepted reports with comments to the applicant, and did not retain a copy. The requester appealed from a circuit court judgment in favor of DPP.

On October 24, 2008, the Hawaii Supreme Court issued an opinion upholding the circuit court’s judgment. The Court, while noting the UIPA’s broad definition of a government record, found that DPP did not have a duty to retain possession or control of the rejected engineering reports. Because DPP did not have such a duty, and had not retained possession or control of the rejected engineering reports, the court concluded that the rejected engineering reports were not “governmental records” of DPP. Therefore, DPP’s denial of access to the reports on that basis was proper under the UIPA.

**Akaku: Sharing Confidential
Information**

Akaku Maui Community Television v. Fujioka, et al., Civ. No. 07-1-01279 (Circuit Court of the Second Circuit). Akaku filed suit against the State alleging violations of the UIPA. Specifically, Akaku has alleged that the DCCA violated the UIPA by improperly sharing confidential information concerning Akaku with the State Procurement Office and by disclosing that information to the public. Trial is currently set for April 19, 2010.

**Akaku: Access to Attorney
General Opinion**

Akaku: Maui Community Television v. Fujioka, et al., Civ. No. 07-1-0279 (Circuit Court of the Second Circuit). Akaku, operator of Maui’s public, education and government (PEG) television channels, brought suit to obtain a copy of an opinion letter by the Office of the Attorney General (the AG) to the Department of Commerce and Consumer Affairs (DCCA) regarding whether DCCA was required to comply with the State Procurement Code in awarding contracts to PEG operators.

The circuit court opined that the letter written fell within the mandatory disclosure provisions of section 28-3, HRS, as an opinion on a question of law requested by the head of the DCCA on a matter of significance to the public. The court concluded that the opinion resulted in changing the actions of a governmental agency on a statewide basis. The court further stated that the DCCA had disclosed a significant part of the opinion thereby waiving the attorney-client privilege on communications on the same subject matter.

After the court’s *in camera* review to determine what information if any could be redacted to avoid the frustration of a legitimate

government function, the court concluded that the distributed copies of the letter should be disclosed without redaction. Akaku was subsequently awarded reasonable attorney’s fees in the amount of \$6,442.80 and costs of \$803.95.

Return of Documents in Clean Water Enforcement Action

State of Hawaii v. Earthjustice, et al., Civ. No. 03-1-1203-06 (Circuit Court of the First Circuit). In this case, the Department of Health, Clean Water Branch (DOH) obtained six boxes of documents from a private landowner and associated entities in connection with an enforcement action on Kauai for violations of clean water laws.

DOH asserted, *inter alia*, that it inadvertently allowed Earthjustice to inspect and copy certain confidential documents protected from disclosure by state and federal law. DOH sought the return or destruction of the copies made by Earthjustice.

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

Pursuant to court order, most of the documents were returned to the State as privileged and confidential. The lower court also awarded Earthjustice attorney’s fees and costs.

The State appealed the award of attorney’s fees and costs. The Intermediate Court of Appeals, by memorandum opinion, reversed the award, finding that Earthjustice was not “a person aggrieved by denial of access to a government record” because it had initially been granted all of the records responsive to its request in their entirety.

Kanahele, et al., v. Maui County Council

Kanahele, et. al. v. Maui County Council, Civ. No. 08-1-0115 (Circuit Court of the Second Circuit). Plaintiffs brought suit against the Maui County Council and Maui County to void certain Council actions related to the Honua’ula housing development project. The plaintiffs alleged violations of the Sunshine Law based upon the Council’s multiple continuation of meetings, the member’s circulation of memoranda of bill amendments to be proposed at a public meeting, and the consideration and action on amendments after the close of public testimony.

The lower court found based upon the facts that the Council’s actions did not violate the Sunshine Law. The plaintiffs have appealed.

Birth Records of President Obama

Dr. Robert V. Justice v. Dr. Chiyome Fukino, M.D., Director of Health and the State of Hawaii, Department of Health, Civ. No. 09-1-0783-04 (Circuit Court of the First Circuit). This suit, brought in 2009, sought the birth records of President Barack Obama under the UIPA. The State filed a Motion to Dismiss the Complaint which was heard by the court on August 26, 2009, and granted September 10, 2009.

The Court ruled that the records are confidential except to those persons who have a direct and tangible interest by virtue of Haw. Rev. Stat. §338-18(b). The statutory prohibition is respected by the UIPA as a specific exclusion under Haw. Rev. Stat. §92F-13(4).

RICO Complaint

Robert S. Flowers, M.D. v. Regulated Industries Complaints Office, DCCA, State of Hawaii; Civ. No. 08-1-1804-09. This suit was filed in late 2008. The Plaintiff, who is being investigated by the Regulated Industries Complaints Office (RICO), seeks the complaint made about him to RICO. RICO states the information is not available under the UIPA. This case is pending.

License and Contract Records

MST Constructors, Inc. v. Swinerton Builders Northwest, Inc.; Fidelity and Deposit Company of Maryland, Doe Defendants. Civ. No. 08-1-0229 (Circuit Court of the First Circuit). This action seeks license and contract documents held by the State Department of Commerce and Consumer Affairs, Professional and Vocational Licensing Division (DCCA). Parts of the documents were redacted based on the privacy and “frustration of legitimate government function” exceptions of the UIPA.



Records Report System Report



The UIPA requires each state and county agency to compile a public report describing the records it routinely uses or maintains and to file these reports with OIP. Haw. Rev. Stat. §92F-18(b) (1993).

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 29,740 records. See **Figure 15**.



Records Report System

Status of Records
Reported by Agencies:
2009 Update

Jurisdiction	Number of Records
State Executive Agencies	20,831
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	29,740

Figure 15

RRS on the Internet

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

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



Key Information: What’s Public

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

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



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

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

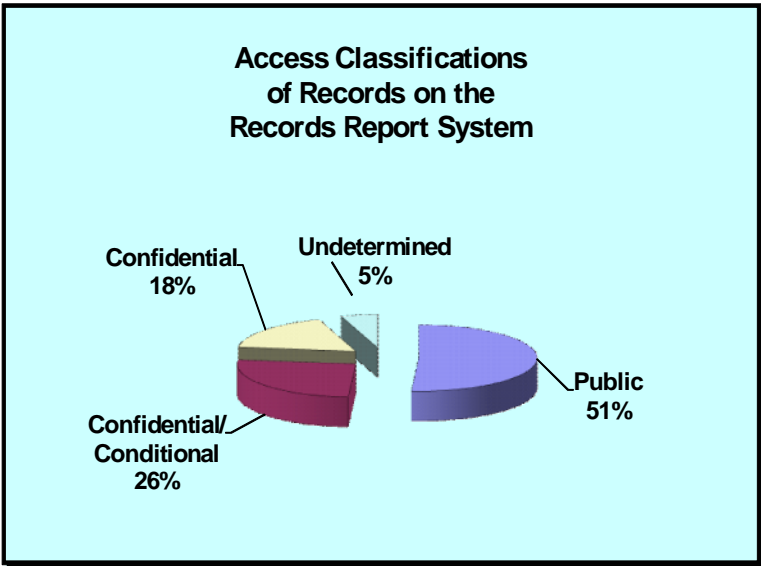


Figure 16

Education

Publications and Website

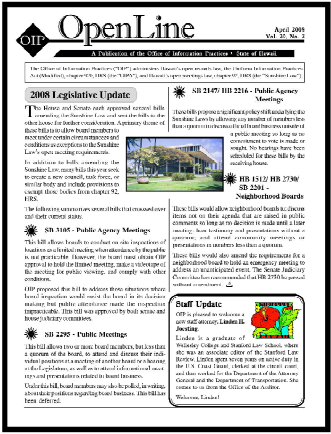


OIP’s publications and website play a vital role in the agency’s ongoing efforts to inform the public and government agencies about the UIPA, the Sunshine Law, and the work of OIP.

In FY 2009, OIP continued its traditional print publications, including the *OpenLine* newsletter, *Office of Information Practices Annual Report 2008*, a guide to the Sunshine Law entitled *Open Meetings* (updated in August 2008), and the guide book *Hawaii’s Open Records Law* (updated in June 2008), intended primarily to give the non-lawyer agency official an overall understanding of the UIPA and a step-by-step application of the law. OIP’s publications are available on OIP’s website.

with print copies still going to the state libraries and those who request a print copy.

Current and past issues of *OpenLine* are also available on OIP’s website. Issues in FY 2009 included summaries of recently published OIP opinions; information about OIP’s legislative proposals and new acts affecting the Sunshine Law; UIPA and Sunshine Law pointers and guidelines; and other issues relevant to OIP’s mission.



OpenLine

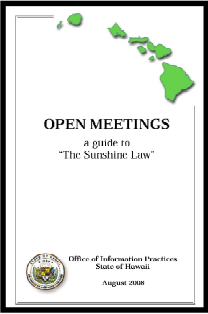
The *OpenLine* newsletter, which originated in March 1989, has always played a major role in OIP’s educational efforts.

The newsletter is sent to all state and county agencies, including boards and commissions, and libraries throughout the

state, as well as all other persons requesting the newsletter.

This past year, to conserve resources, OIP began distributing the *OpenLine* by e-mail,

Sunshine Law Guide



Open Meetings, a 64-page guide to the Sunshine Law, is intended primarily to assist board members in understanding and navigating the Sunshine Law.

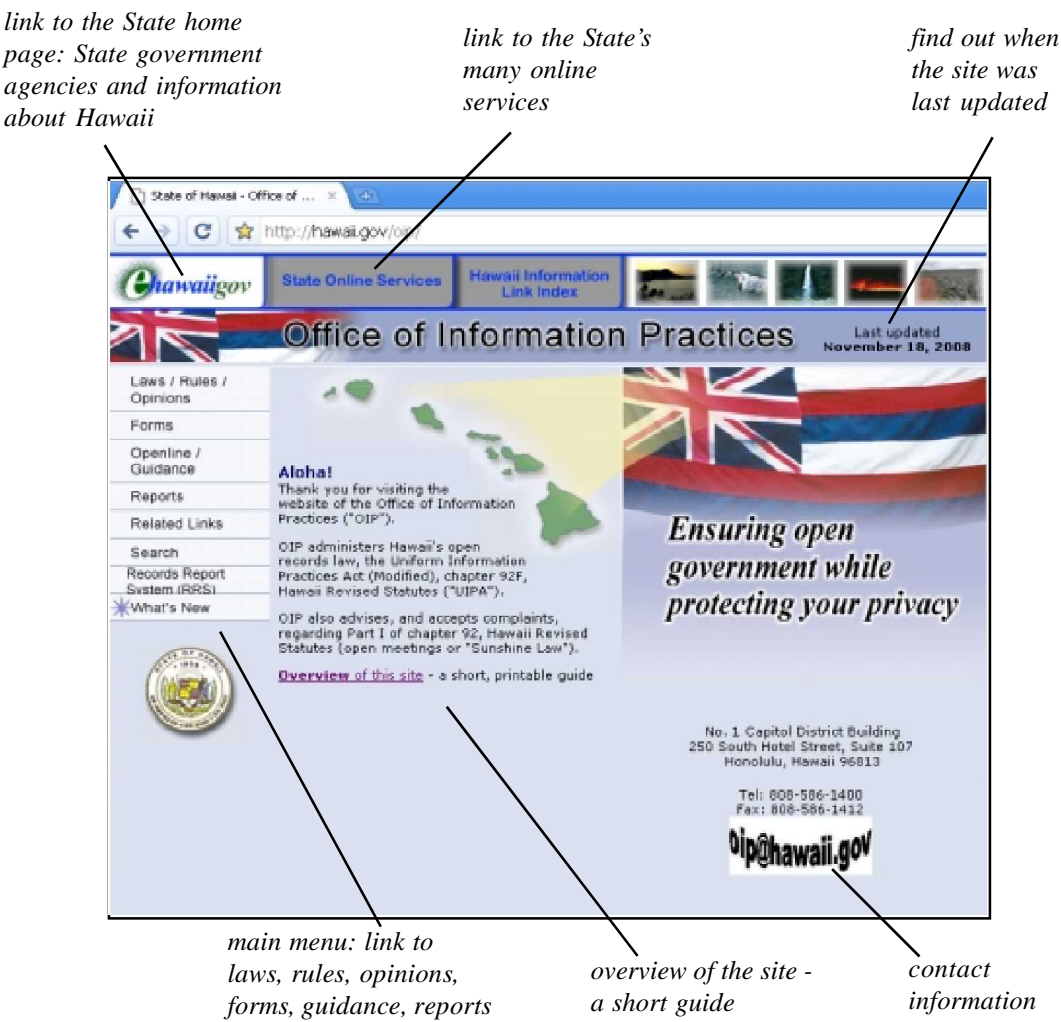
The guide, which was updated in August 2008, uses a question and answer format to provide general information about the law and covers such topics as meeting requirements, permitted interactions, notice and agenda requirements, minutes, and the role of OIP.

OIP Website

OIP’s website, www.hawaii.gov/oip, has become an important means of disseminating information. The site plays a major role in educating and informing government agencies and citizens about access to state and county government records and meetings. In FY 2008, a counter was installed on the site and has now recorded more than 64,000 hits.

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

- The UIPA and the Sunshine Law statutes
- OIP’s administrative rules
- *OpenLine* newsletters
- OIP’s recent annual reports
- Model forms created by OIP
- OIP’s formal opinion letters
- Formal opinion letter summaries
- Formal opinion letter subject index
- Informal opinion letter summaries
- General guidance for commonly asked questions



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

Features

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

“Laws/ Rules/ Opinions”

This section features four parts:

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

“Forms”

Visitors can view and print the model forms created by OIP to facilitate access under and compliance with the UIPA and the Sunshine Law.

“OpenLine/ Guidance”

The *OpenLine* newsletter is available online. Back issues, beginning with the November 1997 newsletter, are archived here and easily accessed. Online guidance includes answers

to frequently asked questions from government agencies and boards and from members of the public.

“Reports”

OIP’s annual reports are available here for viewing and printing, beginning with the annual report for FY 2000. Other reports available include reports to the 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.

“Search”

Convenient search engine to search OIP’s website. Enter your search terms, phrases, OIP opinion letter number or subject matter in the box provided. A listing of relevant hits will display along with the date the page or document was modified as well as a brief description of the material.

“Records Report System (RRS)”

Shortcut link to the Records Report System online database.

“What’s New”

Lists current events and happenings at OIP.





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

OIP conducted 22 training workshops in FY 2009. These trainings included workshops 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 workshops and training sessions OIP conducted during FY 2009.

UIPA Training

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

- 9/15/08 Maui Liquor Control (Liquor Commission)
- 9/17/08 Legislature: Senate Office
- 9/26/08 Department of Accounting and General Services; Office of Hawaiian Affairs

- 10/26/08 All Agencies (via Department of Accounting and General Services)
- 1/20/09 Department of Land and Natural Resources: Land Division

Sunshine Training

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

- 7/8/08 Family Celebration Commission
- 7/25/08 Honolulu City Council: Clean Water & Natural Lands Commission
- 8/22/08 Hawaii County: Annual Municipal Attorneys Conference (Kona)
- 8/23/08 City & County of Honolulu: Neighborhood Commission
- 9/9/08 State Council on Mental Health
- 9/15/08 Maui Liquor Control (Liquor Commission)
- 9/24/08 Department of Labor and Industrial Relations: Language Access Advisory Council
- 9/25/08 City & County of Honolulu: Committee on the Status of Women

- 10/3/08 Department of Human Services: State Advisory Council on Rehabilitation
- 12/10/08 Office of Hawaiian Affairs: Taro Security & Purity Task Force
- 3/3/09 Maui Corporation Counsel (two sessions)
- 4/15/09 Kauai County: Office of Boards and Commissions (two sessions)
- 5/28/09 City & County of Honolulu: Corporation Counsel
- 6/17/09 Hawaii Association of Conservation Districts (Annual HACD Conference)
- 6/20/09 City & County of Honolulu: Neighborhood Commission Office (for Neighborhood Board members)

