

# Office of Information Practices

State of Hawaii

---

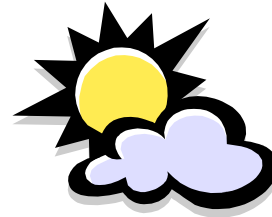
## Annual Report 2010



**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, 2009, to June 30, 2010.**



# Table of Contents

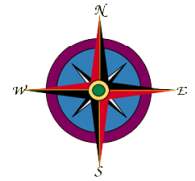


<b>Director's Message .....</b>	<b>4</b>
<b>Executive Summary.....</b>	<b>7</b>
<b>Budget.....</b>	<b>10</b>

## ***HIGHLIGHTS OF FISCAL YEAR 2010***

<b>Legal Assistance, Guidance and Rulings .....</b>	<b>12</b>
<b>Legal Guidance and Rulings.....</b>	<b>19</b>
<b>UIPA Advisory Opinions.....</b>	<b>19</b>
<b>UIPA Appeals and Investigations.....</b>	<b>23</b>
<b>General Legal Assistance and Guidance     Under the UIPA and Sunshine Law.....</b>	<b>25</b>
<b>Sunshine Law Report.....</b>	<b>29</b>
<b>Legislation Report.....</b>	<b>33</b>
<b>Litigation Report.....</b>	<b>36</b>
<b>Records Report System Report.....</b>	<b>38</b>
<b>Education .....</b>	<b>40</b>
<b>Publications and Website.....</b>	<b>40</b>
<b>Training.....</b>	<b>44</b>





In 1998, the Legislature enacted the comprehensive Uniform Information Practices Act (Modified) (the UIPA), to clarify and consolidate the State's then existing laws relating to public records and individual privacy, and to better address the balance between the public interest in disclosure and the privacy interest of individuals.

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

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

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

over the years. And well such issues should be debated as few go more to the heart of our democracy.

We define our democracy as a government of the people. And a government of the people must be accessible to the people. In a democracy, citizens must be able to understand what is occurring within their government in order to participate in the process of governing.

Of equal importance, citizens must believe their government to be accessible if they are to continue to place their faith in that government whether or not they choose to actively participate in its processes.

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

In sum, the laws pertaining to government information and records are at the core of our democratic form of government. These laws



*Ensuring open  
government while  
protecting your privacy*

are at once a reflection of, and a foundation of, our way of life. These are laws which must always be kept strong through periodic review and revision.

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

The Office of Information Practices (OIP) was created by the UIPA to administer that statute, and the Legislature later also gave OIP responsibility for administration of the State's open meetings law, often called the Sunshine Law. Among other duties, OIP provides legal guidance and assistance under both laws to the public as well as all state and county boards and agencies. OIP also provides guidance and recommendations on legislation that affects access to government records or board meetings. The executive summary that follows this message provides an overview of OIP's work during fiscal year 2010.

The past fiscal year has presented challenges for all government agencies as we all attempt to maintain services with less resources. Despite the pressure on agency personnel, however, OIP has found continued diligence by most government agencies, boards, and officials in trying to meet their responsibilities under the UIPA and the Sunshine Law. Consistent with this effort being made, OIP has not seen an increase in requests and complaints made to OIP.

Faced with understaffing this past year, OIP instituted measures to best utilize its limited resources to provide assistance to the broadest range of individuals, boards, and agencies requesting OIP's services. New procedures included an emphasis on informal resolution, consolidation of requests that may be efficiently addressed together, and the issuance

of abbreviated legal opinions where OIP's reasoning is based upon published OIP opinions or is otherwise appropriate. As discussed in OIP's 2009 Annual Report, OIP has also been issuing advisory opinions rather than rulings in response to appeals from agency denials of access under the UIPA because of staffing constraints and the Hawaii Supreme Court's affirmation of a county's court action brought against OIP for such a ruling, which forced OIP to divert significant resources for court proceedings that extended from 2005 to 2009.



Along with these new procedures, OIP continues to provide general, informal guidance to the public or to agency personnel through its well used "Attorney of the Day" program. This program allows anyone contacting the agency to communicate with an OIP attorney about any UIPA or Sunshine Law question and to receive guidance usually within the same day. Because of the success of this program, OIP seeks to address more complaints and disputes through a similarly informal process.

Going forward, OIP believes that minor revision to the UIPA and the Sunshine Law may be necessary or helpful to, among other things, continue to address the changes in access brought about by advances in technology and the growing majority that uses it. For example, government systems and procedures must account for the public's growing desire for large volumes of information and for transmission in electronic form. OIP notes that many agencies have begun to take affirmative steps in that direction, posting many commonly requested records online. However, legislation requiring posting of specific key records, such as agency contracts and board meeting minutes, may be useful to ensure uniform practices by all state and county boards and agencies.

Amendment may also be desired to better safeguard individual privacy interests that have become more vulnerable to invasion because of technology, which allows easy publication of information obtained from government records. For example, this past year a media organization requested the names and salaries of all individual state and City and County of Honolulu employees and posted them online. This raised questions regarding invasion of privacy, especially for lower level exempt employees whose exact salaries were posted while their civil service counterparts, whose privacy interests are given greater protection under the UIPA, had only their salary ranges disclosed and posted online.

As recognized by the Governor's Committee in 1987, increased technology also raises the need for continued vigilance in monitoring government information practices because of the vast amount of data that technology allows government to hold on its citizens. Awareness of government's responsibility with respect to its retention, use, and safeguarding of that information, together with amendments such as those suggested above, will continue to advance the spirit and intent of the UIPA and Sunshine Law of ensuring public access to government while safeguarding the privacy rights of individuals.

*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 2010, OIP received 854 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 eleven years, OIP has received a total of 8,512 requests through its AOD service, an average of 773 per year. In FY 2010, OIP received 719 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 2010, OIP conducted 15 training workshops.

OIP's publications and website ([www.hawaii.gov/oip](http://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 2010, OIP continued its traditional print publications, including the *OpenLine* newsletter, *Office of Information Practices Annual Report 2009*, 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.

## 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 95 bills affecting government information practices, and testified on 12 of the bills.

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 2010, OIP tracked 5 lawsuits involving UIPA or Sunshine Law issues.

## 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 29,607 records on the RRS.



# Budget

OIP's total allocation for FY 2010 was \$372,950, down from \$406,560 in FY 2009. OIP's personnel costs in FY 2010 were \$352,626 and operational costs were \$20,324. See **Figure 2** on page 11. Budget restrictions were imposed in FY 2010, in the amount of \$54,027.



After the departure of the former director one-third the way through FY 2010, OIP functioned with the equivalent of less than three full-time attorneys and two staff members.

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 2010, OIP's budget adjusted for inflation has been approximately \$400,000.

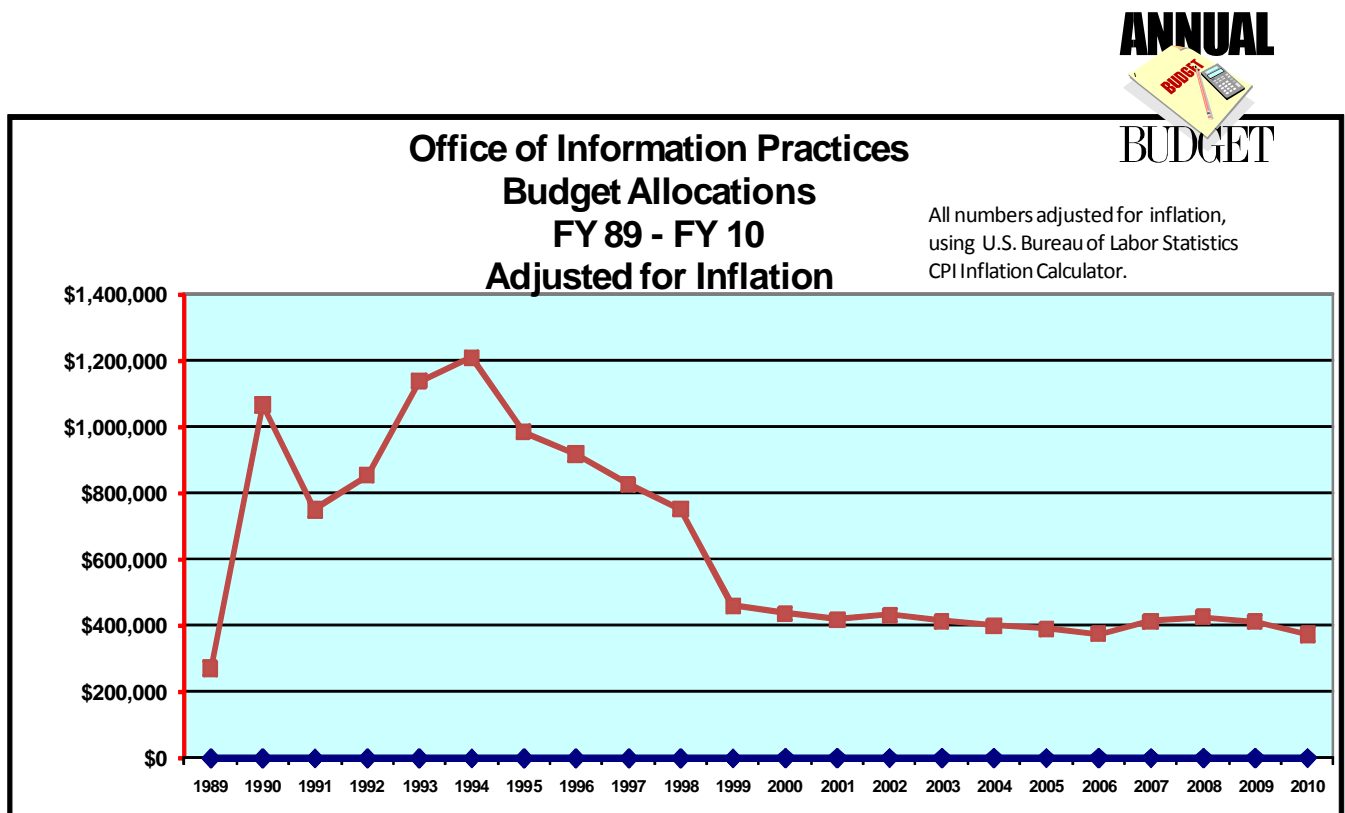


Figure 1



**Office of Information Practices  
Budget FY 1989 to FY 2010**

<b>Fiscal Year</b>	<b>Operational Costs</b>	<b>Personnel Costs</b>	<b>Allocations</b>	<b>Allocations Adjusted for Inflation</b>	<b>Approved Positions</b>
FY 10	20,324	352,626	372,950	372,950	8
FY 09	27,443	379,117	406,560	410,634	8
FY 08	35,220	387,487	422,707	425,436	8
FY 07	35,220	360,266	395,486	413,320	8
FY 06	35,220	312,483	347,703	337,728	8
FY 05	35,220	314,995	350,215	388,571	8
FY 04	35,220	312,483	347,703	398,855	8
FY 03	38,179	312,483	350,662	412,123	8
FY 02	38,179	320,278	358,457	431,762	8
FY 01	38,179	302,735	340,914	417,123	8
FY 00	37,991	308,736	346,727	436,308	8
FY 99	45,768	308,736	354,504	461,089	8
FY 98	119,214	446,856	566,070	752,525	8
FY 97	154,424	458,882	613,306	828,020	11
FY 96	171,524	492,882	664,406	917,591	12
FY 95	171,524	520,020	692,544	984,693	15
FY 94	249,024	578,513	827,537	1,209,979	15
FY 93	248,934	510,060	758,994	1,138,175	15
FY 92	167,964	385,338	553,302	854,561	10
FY 91	169,685	302,080	471,765	750,563	10
FY 90	417,057	226,575	643,632	1,067,089	10
FY 89	70,000	86,000	156,000	272,610	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 2010, OIP received 854 requests for assistance, including 719 requests for general advice and guidance regarding the application of, and compliance with, the UIPA and Sunshine Law. See **Figure 4**. These requests also included 168 formal requests. See **Figure 3**.

## Formal Requests

The formal requests received are categorized as follows:

### Requests for Assistance

OIP may be asked for assistance in obtaining a response from an agency to a record

request. In FY 2010, OIP received 56 such requests for assistance.

OIP staff attorneys will in these cases generally contact the agency to determine the status of the request, provide the agency with guidance 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. In FY 2010, OIP received 14 requests for UIPA advisory opinions. See **Figure 3**.

### UIPA Appeals

OIP also provides rulings on UIPA appeals. In FY 2010, OIP received 32 UIPA appeals.

### Sunshine Law Investigations/ Requests for Opinions

OIP also responds to Sunshine Law complaints and requests for opinions. In FY 2010, OIP received 18 of these complaints and requests. See the Sunshine Law Report, beginning on page 29.

### Inquiries

OIP responds to general inquiries, which often include simple legal questions, by correspondence. In FY 2010, OIP received 33 such inquiries.

Formal Requests FY 2010	
Type of Request	Number of Requests
Request for Assistance	56
Request for Advisory Opinion	14
UIPA Appeals	32
Sunshine Law Investigations/ Requests for Opinion	18
Inquiries	33
Training	15
<b>Total Formal Requests</b>	<b>168</b>

Figure 3

## 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, which are used by OIP as precedent for its later opinions, are “published,” i.e., distributed to government agencies and other persons or entities 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](http://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, with abbreviated legal discussion, in those cases where it believes appropriate.

Summaries of opinions issued in FY 2010 are found in this report beginning on page 19.

### AOD Requests



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

Figure 4

## Informal Requests

### Attorney of the Day Service

A majority of the requests for assistance are handled through OIP’s “Attorney of the Day” (AOD) service. Over the past eleven years, OIP has received a total of 8,512 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 2010, OIP received 719 inquiries through its AOD service. Roughly seven out of ten inquiries came from government boards and agencies.

Of the 719 AOD inquiries received in FY 2010, 207 requests (29%) came from the public and 512 (71%) came from government boards and agencies. See **Figure 5**.

Of the 207 public requests, 151 (73%) came from private individuals, 31 from media, 12 from private attorneys, 10 from public interest groups, 2 from businesses, and 1 from other sources. See **Figure 6** and **Figure 7**.

### AOD Requests from the Public FY 2010

Types of Callers	Number of Inquiries
Private Individual	151
Media	31
Private Attorney	12
Public Interest Group	10
Business	2
Other	1
<b>TOTAL</b>	<b>207</b>

Figure 6

### Telephone Requests Fiscal Year 2010

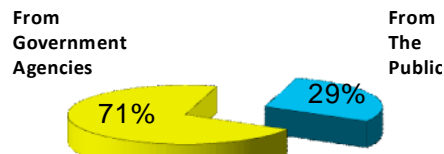


Figure 5

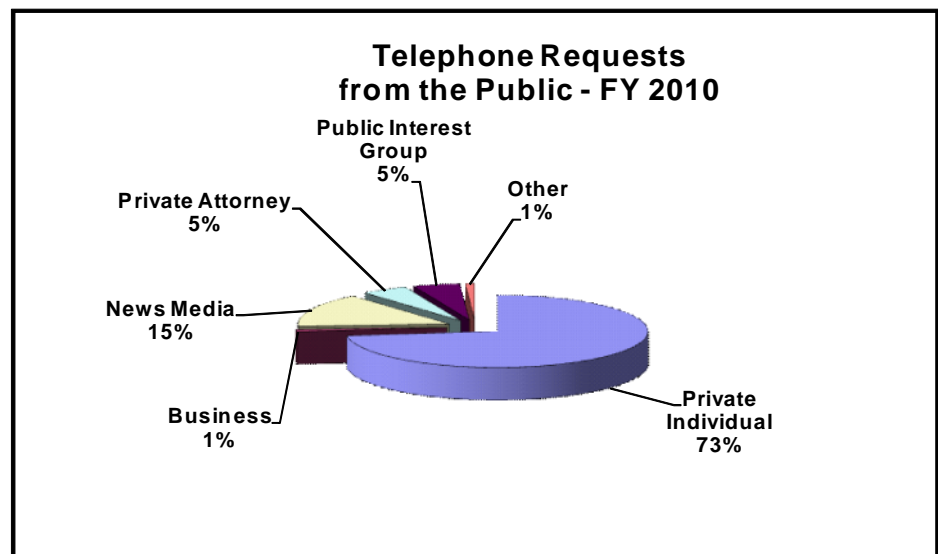


Figure 7

## UIPA AOD Requests

In FY 2010, OIP received 352 AOD requests concerning the UIPA. These numbers reflect calls both from the public and from the agencies themselves. For a summary of AOD calls concerning the Sunshine Law, please see the Sunshine Law Report beginning on page 29.

## State Agencies and Branches

In FY 2010, OIP received a total of 270 AOD inquiries about state agencies. Half of these requests concerned four state agencies: the

Department of Health (69), the Department of Commerce and Consumer Affairs (27), the Department of Land and Natural Resources (20), and the Department of Accounting and General Services (19). 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 11 inquiries concerning the legislative branch and 2 inquiries concerning the judicial branch. See **Figure 8** below.



### Calls to OIP About State Government Agencies FY 2010

Executive Branch Department	Requests by Agency	Requests by Public	Total Requests
Health	29	40	69
Commerce and Consumer Affairs	23	4	27
Land and Natural Resources	14	6	20
Accounting and General Services	16	3	19
Business, Econ Development, & Tourism	10	2	12
Education (including Public Libraries)	5	7	12
Transportation	11	0	11
Attorney General	10	0	10
Human Services	8	2	10
Agriculture	9	0	9
Public Safety	6	3	9
Human Resources Development	5	2	7
Labor and Industrial Relations	5	2	7
Lieutenant Governor (including OIP)	1	6	7
University of Hawaii System	3	4	7
Budget and Finance	2	1	3
Hawaiian Home Lands	2	1	3
Tax	3	0	3
Governor	0	2	2
Defense	0	0	0
<b>TOTAL EXECUTIVE</b>	<b>162</b>	<b>85</b>	<b>247</b>
<b>TOTAL LEGISLATURE</b>	<b>9</b>	<b>2</b>	<b>11</b>
<b>TOTAL JUDICIARY</b>	<b>1</b>	<b>1</b>	<b>2</b>
<b>Office of Hawaiian Affairs</b>	<b>0</b>	<b>1</b>	<b>1</b>
<b>Unnamed Agency</b>	<b>5</b>	<b>4</b>	<b>9</b>
<b>TOTAL STATE AGENCIES</b>	<b>177</b>	<b>93</b>	<b>270</b>

Figure 8



### County Agencies

In FY 2010, OIP received 82 AOD inquiries regarding county agencies and boards. Of these, 33 inquiries (40%) came from the public.

Of the 82 AOD inquiries, 35 inquiries concerned agencies in the City and County of Honolulu, up from 31 in the previous year. See **Figure 9**. As shown below, almost two-thirds of the requests were made by the agencies themselves seeking guidance on compliance with the UIPA.

Requests regarding the Honolulu Police Department went from 3 to 13, including 8 requests from the agency seeking guidance on compliance with the UIPA.

OIP received 47 inquiries regarding neighbor island county agencies and boards: Hawaii County (28), Maui County (10), and Kauai County (9). Requests regarding the Kauai Police Department went down from 18 in FY 2009 to 3 in FY 2010. See **Figures 10-12**.



### Calls to OIP About City and County of Honolulu Government Agencies - FY 2010

Department	Requests by Agency	Requests by Public	Total Requests
Police	8	5	13
Budget and Fiscal Services	3	0	3
City Council	1	2	3
Parks and Recreation	2	1	3
Corporation Counsel	2	0	2
Transportation Services	0	2	2
City Ethics Commission	1	0	1
Community Services	1	0	1
Design and Construction	0	1	1
Enterprise Services	0	1	1
Human Resources	0	1	1
Liquor Commission	1	0	1
Neighborhood Commission/ Neighborhood Boards	1	0	1
Prosecuting Attorney	1	0	1
Unnamed Agency	1	0	1
<b>TOTAL</b>	<b>22</b>	<b>13</b>	<b>35</b>

Figure 9





**Calls to OIP About  
Hawaii County  
Government Agencies - FY 2010**

Department	Requests by Agency	Requests by Public	Total Requests
Police	3	7	10
Corporation Counsel	3	2	5
Office of the Mayor	1	1	2
Public Works	0	2	2
County Council	4	1	5
Prosecuting Attorney	1	1	2
Environmental Management	1	0	1
Unnamed Agency	1	0	1
<b>TOTAL</b>	<b>14</b>	<b>14</b>	<b>28</b>


Figure 10



**Calls to OIP About  
Kauai County  
Government Agencies - FY 2010**

Department	Requests by Agency	Requests by Public	Total Requests
Police	1	2	3
County Council	3	1	4
Unnamed Agency	2	0	2
<b>TOTAL</b>	<b>6</b>	<b>3</b>	<b>9</b>

Figure 11



<b>Department</b>	<b>Requests by Agency</b>	<b>Requests by Public</b>	<b>Total Requests</b>
Police	1	3	4
Corporation Counsel	2	0	2
County Council	2	0	2
Office of the Mayor	2	0	2
<b>TOTAL</b>	<b>7</b>	<b>3</b>	<b>10</b>

Figure 12



## Legal Guidance and Rulings

### UIPA Advisory Opinions

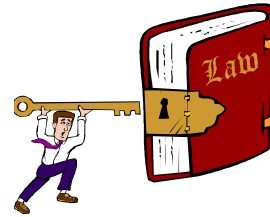
In response to requests made for advisory opinions under the UIPA, OIP issued ten memorandum opinions in FY 2010. The following are summaries of these opinions.

#### Judges' Financial Disclosure Statements

OIP was asked whether the financial disclosures each state judge must file annually in the supreme court clerk's office pursuant to Rule 15 of the Rules of the Supreme Court (the Judges' Financial Statements) are subject to disclosure under part II of the UIPA.

OIP found that the Judges' Financial Statements relate to the courts' "executive," i.e., "administrative," functions of managing the conduct of Judiciary personnel and providing the public with access to such information. Accordingly, OIP concluded that the Judges' Financial Statements are subject to disclosure under the UIPA and in accordance with OIP's administrative rules.

In denying a Motion for Waiver of Fees filed by two media groups, the Hawaii Supreme Court subsequently ruled that the Judges' Financial Statements are judicial records, created and governed by its rules, which fall inherently within its power to adjudicate and are inherently intertwined with that power. The Court thus concluded that the records were not subject to the UIPA or OIP review. [*UIPA Memo 10-1*]



#### Request for Parolees' Files by Their Attorneys

OIP was asked whether the Hawaii Paroling Authority (HPA) may keep the names of witnesses and informants confidential in response to requests for disclosure of parolee records submitted to the HPA Board. HPA further inquired as to whether disclosure of the packet provided to the HPA Board complies with the UIPA in response to requests for parolee files by the parolees' legal counsel.

OIP found that the names of confidential witnesses or informants may be excluded from disclosure if they are part of a report prepared by the HPA at any stage of its enforcement work. Additionally, those parts of records that would reveal the identity of confidential sources may also be excluded from disclosure.

OIP also found that the HPA may offer attorneys the option of a copy of the Parole Board packet instead of the parolee's file. However, the parolee file, excluding privileged information, must be disclosed if the requester is unwilling to accept the HPA Board packet as an alternative. [*UIPA Memo 10-2*]

#### Settlement Terms Pending Execution of Agreement

OIP was asked by the Department of the Attorney General (the AG) under part II of the UIPA whether it may withhold from disclosure the State's portion of the settlement

amount for the Ka Loko dam civil cases before the settlement agreement is fully executed. The settlement will result in the dismissal of all pending civil cases arising from the Ka Loko dam breach.

The AG specifically asked OIP to review the AG's position that HRS §92F-13(3) (disclosure not required where records must be confidential to avoid frustration of a legitimate government function) permits postponing disclosure of the State's settlement amount until the settlement agreement is finalized and fully executed by all parties to the litigation.

OIP concluded that the AG may withhold the State's portion of the Ka Loko dam settlement amount pending full execution of the settlement agreement by the parties, agreeing that disclosure of the settlement agreement, or terms contained in that agreement, prior to its final execution could potentially jeopardize the settlement. [UIPA Memo 10-3]

## Vacation Credit Liabilities

The Chair of a legislative committee appealed a denial of access by the Office of the Governor and the Office of the Lieutenant Governor to certain information concerning the offices' vacation credit liabilities for individual employees. To best utilize government resources, OIP provided guidance to both offices regarding disclosure, and the information was provided requested in the desired form. OIP was subsequently asked for a written opinion.

Accordingly, OIP provided a general advisory opinion on two issues as follows:

- (1) Whether an agency may withhold information regarding vacation credit liabilities for identified exempt employees

The information requested would allow (1) identification of employees; (2) the amount of

vacation hours that each had accrued; and (3) the dollar value of those vacation hours, which OIP understands would reflect their current salaries. The UIPA requires an agency to disclose the name of employees and the exact compensation for employees not covered by or included in chapter 76 and sections 302A-602 to 302A-640, and 302A-701, or bargaining unit (8). Haw. Rev. Stat. § 92F-12(a)(14).

Further, OIP had previously opined that a government employee's vacation leave records may not be withheld under the privacy exception to disclosure. OIP Op. Ltr. No. 90-17. Thus, records of the number of vacation hours accrued for an employee and the dollar amount an agency would be required to pay out for vacation hours of an *exempt* employee must be disclosed upon request. OIP noted, however, that for covered or included employees, an agency may disclose vacation pay out amounts for those employees in a manner that would not disclose their exact compensation.

- (2) What remedies are available to the legislature where an agency fails to provide information required to be disclosed under the UIPA

The general remedies available to a person for a denial of access, i.e., appeal to OIP or to the circuit court, may be utilized by a legislative body. In addition, the UIPA provides the legislature with greater authority through subpoena powers to access records that may not otherwise be generally accessible. Specifically, section 92F-12(b)(5), HRS, requires an agency to disclose "records pursuant to a subpoena from either house of the state legislature[.]" [UIPA Memo 10-4]

## **Hawaii Access to Justice Commission Subject to UIPA**

OIP was asked whether the Hawaii Access to Justice Commission is an agency subject to the UIPA. If so, Requester specifically asked whether notes of discussions proposing changes to existing policies or procedures would be subject to disclosure.

OIP concluded that the Commission, a public-private hybrid, does not meet the definition of “agency” under the UIPA. *See* HRS § 92F-3; *Olelo v. OIP*, 173 P.3d 184 (Haw. 2007). Thus, the records maintained by the Commission are not subject to the UIPA.

The Judiciary, however, is included within the UIPA’s definition of “agency” for its “administrative” functions. *See* HRS § 92F-3 (“agency” does not include the “nonadministrative functions” of the state courts). Therefore, Commission-related records maintained by the Judiciary are subject to the UIPA only if the creation and oversight of the Commission is an “administrative” as opposed to a “judicial” function.

OIP presumes that records created pursuant to the court’s authority to oversee and control the practice of law in this State, particularly as expressed by Supreme Court rule, relate to its judicial function and would thus be exempt from the UIPA. [*UIPA Memo 10-5*]

## **Unemployment Insurance Benefits Hearing Transcript**

OIP was asked whether the Employment Security Appeals Referees’ Office, Department of Labor and Industrial Relations (DLIR), properly denied Requester’s request under part III of the UIPA for a transcript or recording of the partial hearing on Requester’s claim for unemployment insurance benefits.

Disclosure of information obtained from an employer or employee pursuant to administration of HRS chapter 383, Hawaii Employment Security Law, is governed by HRS § 383-95(a). OIP previously addressed disclosure of an Employment Security Appeals hearing transcript in OIP Opinion Letter Number 04-18. Based upon that opinion, unless the Hearing Transcript is “necessary for the proper presentation of the claimant’s claim in any proceeding” under chapter 383 or as otherwise provided in that chapter, DLIR may withhold the Hearing Transcript from the Requester/claimant.

Because there was no chapter 383 proceeding and Requester presented no basis for disclosure under HRS § 383-95(a), OIP concluded that DLIR may withhold the Hearing Transcript from Requester under HRS § 92F-22(5). [*UIPA Memo 10-6*]

## **Request for Personal Records at University of Hawaii**

OIP was asked whether the University of Hawaii, Manoa, properly denied a student’s request for records about himself under the UIPA.

There were three issues: first, whether the University’s denial of access to certain records was proper; second, whether the University adequately searched for other documents; and third, whether the University acted within the bounds of the UIPA when it sent a memo about the Requester to the Honolulu Police Department (HPD).

OIP could not conclude that the University’s withholding of records was proper because the University did not allow OIP an *in camera* review of those records. However, OIP also found that the University conducted an adequate search for the requested records.

Finally, OIP concluded that the University was not acting contrary to the UIPA when it sent a memo to HPD. The University disclosed the memo to HPD because the University believed it raised campus security concerns. [UIPA Memo 10-7]

### **Police Policies – Revised G.O. 602**

OIP was asked by the Hawaii County Police Department whether any portion of the revised G.O. 602 may be withheld in response to a request under part II of the UIPA.

In OIP Op. Ltr. No. 95-13, OIP discussed the rationale for withholding internal police policies, and opined that portions of the previous version of G.O. 602 could be withheld. Based upon its review of the revised G.O. 602 provided by Requester, OIP found that Sections III, VIII, and IX of the revised G.O. 602 may likewise be withheld for the reasons stated in OIP Op. Ltr. No. 95-13. [UIPA Memo 10-8]

### **Grade Distribution Data**

OIP was asked whether the University of Hawaii (UH) must disclose information regarding grade distributions for specific university classes identified by course number and instructor name in response to a request made under part II of the UIPA.

OIP found that UH must disclose data requested to the extent that it is public, but need not compile the data in the form requested if not readily retrievable in that form. In accordance with Family Educational Rights and Privacy Act (FERPA) guidelines, data may be withheld to the extent that it would allow identification of students in connection with their educational records with reasonable certainty.

OIP also found that information that would allow identification of an instructor to a particular set of grades should generally be disclosed. [UIPA Memo 10-9]

### **Request for General Records, Definition of “Date filed by” and “Date accepted by” Registrar**

OIP was asked whether the State Department of Health (DOH) properly denied a request for a definition of the phrases “Date filed by Registrar” and “Date accepted by Registrar,” under part II of the UIPA.

OIP found that DOH met its obligations under the UIPA. This was based on DOH’s search for records, which was done in a way reasonably calculated to uncover all relevant documents. [UIPA Memo 10-10]



## UIPA Appeals and Investigations

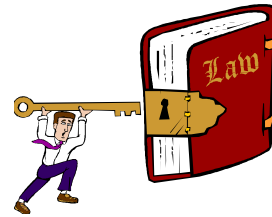
OIP issued two Decisions in FY 2010 to resolve two UIPA investigations. The following are summaries of those opinions.

### Investigative Records of Grounding of USS *Port Royal*

The Sierra Club asked whether the Department of Land and Natural Resources (DLNR) properly denied their request for “any and all documents including, without limit, journals, reports, photos, videos, communications, and logs, regarding the grounding of the USS *Port Royal* on February 5, 2009 and any subsequent investigation.”

OIP reviewed DLNR’s list and description of responsive records and found that the records, as described, were either communications with legal counsel or records prepared by DLNR personnel in its investigation carried out in anticipation of litigation with the U.S. Navy. Accordingly, OIP concluded that the records are protected under the work product and attorney-client privileges and thus may be withheld under sections 92F-13(2), (3) and (4) of the UIPA. [*Decision 10-1*]

### Investigation Reports



A member of the public asked whether the Department of Education (DOE) properly denied his request for DOE’s records pertaining to his civil rights complaints on behalf of his son, under part III of the UIPA.

OIP found that the DOE may redact information which would reveal the identity of a source who furnished information under an express or implied promise of confidentiality. However, the DOE must disclose information provided by the Requester, any information about the Requester’s son, and any other records generally available to the public. [*Decision 10-2*]







## 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.

### Anonymous Complainants

An agency was conducting an investigation based on a complaint by someone who preferred to remain anonymous. The lady who was the subject of the complaint wanted to know who had complained.

OIP advised that a complainant's name can be withheld as identifying a confidential source in response to either a personal or public records request, so long as the complainant was expressly or implicitly promised confidentiality for a good reason. This is based on the confidential source exemption for personal record requests, and the frustration exception for public record requests.

Anonymous complainants typically do qualify as confidential sources given an agency's need to receive complaints and complainants' frequent concern about retribution from the subject of the complaint.

### Furlough Days and UIPA Deadlines

An agency asked whether a furlough day counts as a business day when calculating deadlines under the UIPA. The agency staff was taking furlough days but was using flexible

scheduling to keep the office open on state furlough days.

OIP advised that a furlough day is not counted as a business day if the office is not open to the public, but if the office is open to the public on what would otherwise be a furlough day then it is counted as a business day.

### When the Board Member Is 'Department Head or Designee'

Many boards are set up with a membership consisting mainly of agency representatives, typically described as "Director of X or the Director's designee." A caller asked whether, in these cases, it is appropriate for the agency to decide at the last minute based on schedule whether to send the named member or a designee to a board meeting, and whether it makes a difference if the named member is also the board's chair.

OIP advised that whether it's the chair or another member, it is better for the member agency to be clear at any given time as to who is assigned to be the board member from the agency. Although the board's creating statute allows for designees, and the Sunshine Law itself doesn't say anything about how a board's membership is determined, the problem with deciding on an ad hoc basis who will be the member each meeting is that the Sunshine Law also governs board members' interactions with one another outside of meetings.



Thus, if those involved in an issue don't know who is a member of the board at any given time, it can be easy to inadvertently violate the Sunshine Law through a discussion of board business by people who all turn up as member-designees at the next board meeting. For this reason, OIP recommends that agencies have a more formal designation of the board member, rather than deciding on an ad hoc basis shortly before the next board meeting.

## **Videotaping Meetings**

A board asked what restrictions its chair could place on a member of the public who wanted to record the meeting? For instance, could a board restrict the location of the recording equipment, and the amount of equipment used?

OIP advised that the Sunshine Law requires only that a board allow audio recording. Although OIP generally recommends that boards allow videotaping, if a board declines to do so that is not a Sunshine Law violation, so a board can likewise place restrictions on the equipment and location of video recording.

As for restrictions on audio recording, a board could potentially limit the location or amount of the equipment if necessary to prevent an unreasonable interference with the meeting. The question of when such a limitation would be warranted would depend on the facts of a particular situation.

## **How Long to Keep Minutes**

A board asked whether the Sunshine Law requires keeping minutes indefinitely, or whether they can be discarded in accordance with a retention schedule.

OIP advised that the Sunshine Law requires that minutes be available, but does not provide for how long they must be available. OIP does

not read the Sunshine Law to require boards to keep minutes forever, so discarding minutes in accordance with a retention schedule is generally reasonable. However, before disposing of minutes based on a general retention schedule a board should check with its counsel to make sure there's not a more specific retention requirement for that particular board's minutes.

## **Requests for Databases or Statistics Compiled from Databases**

Several agencies received requests for an electronic copy of an agency database in Excel format, or for specific information taken from an agency database to be entered into an Excel-based form provided by the requester. The information in question was public, but the agencies had questions about their obligations under the UIPA to convert their electronic data into the requested format.

Regarding an agency's obligation to enter information from its database into a form provided by the requester, OIP advised that the UIPA generally doesn't require an agency to create records, except that under section 92F-11, HRS, an agency must provide a compilation or summary of existing records when the information is readily retrievable in the form requested.

Although OIP hasn't issued a formal opinion as to when information is "readily retrievable," it has generally advised that a compilation or summary is likely "readily retrievable" if the staff time required to prepare it is comparable to the two or three hours of staff time a requester would get for free under the automatic fee waiver in OIP's rules.

Regarding an agency's obligation to provide its entire database in Excel format, if the database does not already exist in that format,

the translation of the database into Excel would essentially be the creation of a compilation or summary and thus not required if not “readily retrievable.” Because the conversion of a legacy software database into Excel would require significant time and thus not be “readily retrievable,” an agency does not have a UIPA obligation to provide the database in Excel form.

The agency would have a UIPA obligation to provide the database in its original electronic format, but because the electronic information in the original format would only be readable from agency terminals running the proprietary software, that UIPA-required response would not be useful to the requester.

In such instances, although it is not required to do so under the UIPA, the agency may choose to agree with the requester for the agency to do the necessary programming or reformatting to provide the information in the form requested, and for the requester to pay the agency for that programming or reformatting at the rate the agency considers appropriate. Because such an agreement would be outside the scope of the UIPA, the agency would not be bound to follow the UIPA’s fee structure.

### **Board Must Accept Testimony on Investigated Board Business**

Kauai’s Charter Review Commission assigned some of its members to investigate possible amendments to the charter under the permitted interaction in HRS § 92-2.5(b).

Under this permitted interaction, the assigned investigative group is not required to comply with the Sunshine Law’s open meeting requirements. However, the group chose to hold open meetings and take public testimony at their meetings.

When the group reports back to the Commission, the Commission questioned but was advised by OIP that it must still take public testimony on the possible charter amendments even though the same public testimony may have already been offered at the investigative group’s public meetings.

### **Board’s Breakout Sessions at Retreat**

A board under the Department of Labor was planning a meeting as a retreat to discuss various items of board business. At the retreat, the board wanted to split into breakout sessions to brainstorm on different board matters and then reconvene to discuss the ideas proposed in the sessions.

OIP recommended that the board comply with the Sunshine Law by assigning its members to the breakout sessions as investigative groups authorized as a permitted interaction under HRS § 92-2.5(b). Alternatively, the board would need to create committees to address the two different board matters, but the committees would then be required to comply with the Sunshine Law’s open meeting requirements including public notice, attendance and testimony.

### **Cashier’s Check Not Required Form of Fees Payment**

The Employees’ Retirement System (ERS) indicated on its response to a records request that the only acceptable method of paying the fees for processing the records request was in the form of a cashier’s check.

According to ERS, it preferred payment of fees by cashier’s checks because it was concerned about receiving bad checks in payment

of fees and cash payment of the fees would require trips to the bank to make deposits.

However, getting a cashier's check would be burdensome for requesters especially requesters who are unable to go to a banking institution to obtain a cashier's check. Furthermore, there is often a fee for obtaining a cashier's check. OIP advised ERS to accept the requester's personal check and that it may reasonably require a cashier's check in cases of previous bad payments of fees.

### **Notice Amendment Not Required to Cancel Agenda Item**

The Kauai County Council wanted to cancel an item on its agenda for its upcoming meeting, but the deadline had passed for filing a new agenda showing the cancelled item.

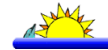
As OIP advised, the Sunshine Law does not require the Council to file an agenda from which cancelled agenda items are omitted. Instead the Council may cancel the agenda items at the meeting. The Sunshine Law does not require the Council to take public testimony on cancelled agenda items when the chair announces the cancellation at the meeting without any discussion or vote on that item.

### **Description of Agenda Item May Include Assignment of Members to Investigative Group**

The Hawaii County Council's agenda included a matter of board business about which the Council was considering the option of assigning several of its members to further investigate outside of meetings as authorized by the permitted interaction under HRS § 92-2.5(b).

The Council questioned whether its description of this agenda item must include the possible formation of a "permitted interaction" group.

So long as the description of the agenda item was sufficient to provide notice to the public of the subject matter for Council consideration, the Council was not required to include in the agenda item's description the possible actions that it may take on this item, including the creation of a "permitted interaction" group.



## Sunshine Law Report

OIP was given responsibility for administration of the Sunshine Law in 1998. OIP averages approximately 300 requests a year concerning the Sunshine Law. See **Figure 13**.

Of the 719 AOD requests made in FY 2010, 235 (or 33%) involved the Sunshine Law and its application. OIP also opened 21 case files in response to 3 written requests for opinions and 18 written requests for investigations regarding the Sunshine Law (up from 14 formal requests in the previous year). See **Figure 14**.

Of the 235 AOD requests involving the Sunshine Law, 38 involved the requester's own agency, 179 were requests for general advice, and 18 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 which result in greater use of OIP as a resource.



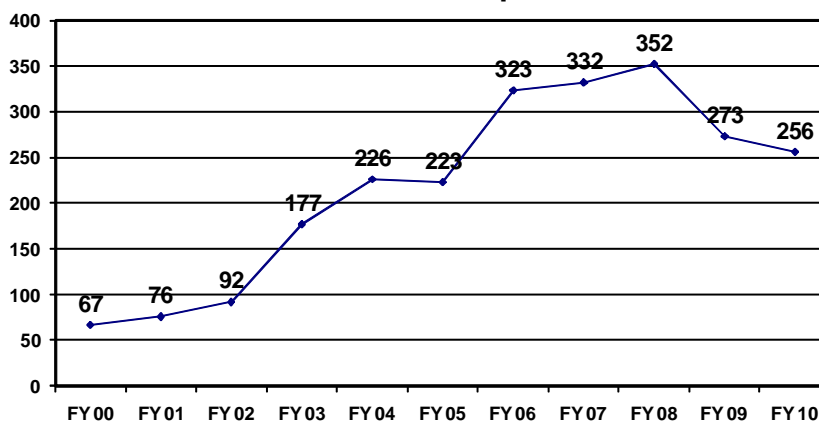
### Sunshine Law Inquiries

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

**Figure 14**

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 46 for a list of the sessions provided in FY 2010.

### Sunshine Law Inquiries



**Figure 13**

## Sunshine Law

### Investigations

OIP opened 18 investigations into the actions of government agencies in FY 2010 following complaints made by members of the public (up from 14 investigations opened in FY 2009).

The following investigations were completed in FY 2010.

#### Minutes of Neighborhood Boards Committee Meetings

A member of the public asked whether Neighborhood Boards violate the Sunshine Law by not keeping minutes of their Committee meetings.

OIP found that the Sunshine Law, including its requirement to keep written minutes, applies to committees of the Neighborhood Boards.

The Sunshine Law governs meetings of State and County boards, which this office has determined includes Neighborhood Boards. Haw. Rev. Stat. § 92-2 (1993); OIP Op. Ltr. No. 01-01 at 5. Neighborhood Boards were created pursuant to the City and County of Honolulu's Revised Charter which makes them a Board subject to the Sunshine Law. Id. at 4-5 (citing Rev. Charter of Honolulu, § 14-101 and Att'y Gen. Op. 86-5 (a board created by Charter is subject to the Sunshine Law)).

The Sunshine Law governs requires written minutes of all board meetings. Minutes must include specific information and, with a possible exception for executive meeting minutes, be available within thirty days after the meeting. Haw. Rev. Stat. § 92-9(a)-(b).

The question here is whether or not committees of boards are meetings of a board with the requirement to create written minutes. This Office and the Attorney General have both found that committees of Sunshine Law boards are also subject to the Sunshine Law. OIP Op. Ltr. No. 03-07 at 2 (citing Att'y Gen. Op. 85-27). Committees of boards are delegated functions that normally would be dealt with at meetings of the full board. The mere fact of delegation should not permit committees to evade the requirements of openness set forth in the Sunshine Law. [*Sunshine Memo 10-1*]

#### Permitted Interaction Group

A member of the public asked whether the Neighborhood Commission, City & County of Honolulu (the Commission) violated the Sunshine Law in the formation of a permitted interaction group to review minute-taking processes for the neighborhood boards (the Minutes PIG), and by the Commission's actions in approving the Minutes PIG's recommendations.

Specifically, the requester asserted that: (1) the Minutes PIG's composition was set up outside of an open meeting; (2) the Minutes PIG's name and function were changed without official notice and action; and (3) the Commission improperly adopted the Minutes PIG's recommendations immediately after the report was made and without proper notice to the public. The requester also asked that OIP determine if the Commission's members (with the exclusion of one Commissioner) willfully violated the Sunshine Law.

Based upon its review of the Commission agendas and minutes, OIP found that the Commission failed to meet certain requirements necessary to create, operate and act on the recommendations of the Minutes PIG as set out in the opinion. However, OIP found that the facts presented did not evidence willful violation of the Sunshine Law by any Commission member.

*[SunshineMemo 10-2]*

## **Sufficiency of Agenda**

A member of the public asked whether the County Council, County of Hawaii (Council), violated the Sunshine Law because the agenda for its meeting on August 5, 2009 (Agenda) omitted the name of the Council's Vice Chair in the description of an Agenda item, Resolution 218-09 (Resolution), designating the Council's Vice Chair and Committee Chairs and Vice Chairs.

OIP opined that the Council did not violate the Sunshine Law because its Agenda adequately complied with the Sunshine Law's notice requirements.

OIP found that the Agenda did list the Resolution and hence, at a minimum, complied with the Sunshine Law's instruction that it "lists all of the items to be considered." Haw. Rev. Stat. § 92-7(b) (Supp. 2008). Furthermore, in OIP's opinion, by identifying which positions on the Council were being designated in the Resolution, the Agenda's description adequately gave the public notice of the Resolution's subject matter so that the public had the opportunity to elect to attend the meeting and provide testimony on this Agenda item. Thus, OIP found that the Council did not violate the Sunshine Law when its Agenda listed the Resolution but did not name the Council member whom the Resolution was designating as the Council's Vice Chair.

*[Sunshine Memo 10-4]*

## **Serial Discussion of Board Leadership**

Requesters asked OIP whether a series of discussions about leadership among Hawaii County Council members, prior to the meeting held June 16, 2009, violated the Sunshine Law.

OIP found that a majority of Hawaii County Council members discussed leadership through a series of interconnected conversations. This serial discussion was not permitted by, and thus violated, the Sunshine Law.

The Sunshine Law limits the number of board members who may privately discuss board leadership to a number less than a quorum. HRS § 92-2.5(c). A board cannot by serial communications avoid this limitation. *Right to Know Committee v. City Council, City and County of Honolulu*, 117 Haw. 1, 12-13 (Haw. App. 2007); HRS § 92-2.5(c); OIP Op. Ltr. No. 05-15. Because a majority of the Council's members were involved in the serial discussion of board leadership, the discussion was not permitted under the Sunshine Law. See *id.*

OIP believes that the involvement of a majority of Council members in the serial discussion occurred because the members were not mindful to the possibility of serial communications, rather than because of a deliberate strategy to circumvent the Sunshine Law's requirements.

*[Sunshine Memo 10-5]*

## **Appropriateness of Executive Session**

Requester asked for an investigation into whether the Hawaii Historic Places Review Board (HHPRB) violated the Sunshine Law by going into executive session to discuss "how to get through the entire agenda in a timely fashion before they lost quorum."

The Sunshine Law allows boards to meet in an executive meeting for a limited number of purposes. HRS § 92-5. The purpose stated by the HHPRB is not one of the permitted purposes. OIP found therefore that the Board's executive meeting on August 8, 2009, was not allowed under the Sunshine Law.

Upon being made aware of the violation, the DLNR asked OIP to provide training to its Board and staff on the Sunshine Law. OIP has since provided training, including the proper reasons for meeting in an executive session and minutes requirements.

*[Sunshine Memo 10-6]*

## **Discussion of County Office Renovation**

Requester asked for an investigation into whether six members of the Kauai County Council violated the Sunshine Law by discussing the renovation of the offices in the County building.

Requester advised OIP that on February 4, 2009, after the scheduled Council meeting for that day was adjourned and the public left the room where the meeting was held, six Council members and one member of the County administration remained in the room with the door locked. When Requester asked a County employee what was going on, he was told that they were discussing "the renovation of the offices in the County building."

OIP found that, based upon the Council's apparent tacit acknowledgment, that the six Council members' discussion of the renovation of offices in the County building was Council business that, in the absence of any applicable permitted interaction, should have been discussed in an open meeting.

*[Sunshine Memo 10-7]*

## **Sunshine Law**

### **Advisory Opinions**

OIP issued the following opinion in response to a request for an advisory opinion under the Sunshine Law.

### **Sufficiency of Notice**

OIP was asked whether a meeting notice for the Land Use Committee of the Maui County Council (the Land Use Committee) concerning the rezoning of a parcel of land was rendered insufficient under the Sunshine Law where the street address of the parcel was incorrectly noted.

The agenda item at issue listed a bill for an ordinance to change the zoning of a 25 acre parcel of land (the Church Parcel) from Agricultural District to Public/Quasi-Public District to allow for the development and operation of the Emmanuel Lutheran Church and School. The agenda item included the parcel's tax map key number, but listed an incorrect address, which OIP understood was not anywhere near the Church Parcel.

OIP found that a correct street address was material to a proper notice because it would allow a member of the public to reasonably identify the property that was subject to the rezoning. Although the tax map key number was correct, the fact remained that the street address given for the Church Parcel in fact identified a different property than the one to be considered for rezoning. A member of the public interested in the rezoning of the Church Parcel understandably might not, from the defective notice given, have had the information necessary to decide whether to participate in the meeting. OIP believes that it is reasonable for the public to rely on the street address alone to identify the parcel subject to rezoning. OIP thus concluded that the erroneous street address rendered the notice insufficient under the Sunshine Law. *[Sunshine Memo 10-3]*





# 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 2010 Legislative session, OIP introduced three bills as part of the Governor's legislative package to promote greater government efficiency while safeguarding open government. Unfortunately, none of these bills passed out of the Legislature. See Bills that Failed below.

OIP also reviewed and monitored 95 bills affecting government information practices, and testified on 12 of these bills.

## Bills that Passed

### New Laws: UIPA

► **Act 100 (S.B. No. 2937):** Act 100 amends HRS § 92F-11 to allow an agency to *not* respond when a requester makes a duplicate request within 12 months, so long as the agency made a prior proper response under the UIPA and that response would remain unchanged.

Contrary to popular misconception, this Act is intended to address very limited situations and would have no effect on the great majority of UIPA requests because it only provides relief from abusive or unwarranted repetitive requests.

Specifically, the Act is intended to eliminate the need to respond to repeated requests for the same records by requesters who may lack the capacity to understand that a response to a request has already been properly given; or may be intentionally harassing an agency; or may simply be unwilling to accept an agency's response.

An agency must still respond to requests for the same or substantially similar records where new records have been created or have become publicly available since a requester's prior request, where the prior request was made more than a year before, or where the agency did not respond properly to the earlier request.

## New Laws: Sunshine

► **Act 102 (S.B. No. 2187):** This Act allows the Hawaii Tourism Authority, under HRS § 201B-4(a)(2), to meet in an executive (closed) meeting to receive “[i]nformation that is necessary to protect Hawaii’s competitive advantage as a visitor destination[.]”

OIP had strongly recommended that if an exception was deemed appropriate, the wording more narrowly describe the type of information OIP understood HTA wanted to protect—such as detailed marketing plans, market intelligence and research studies, and specific marketing opportunities.

► **Act 63 (S.B. No. 2121):** This Act became law without the Governor’s signature. It allows one specific board, the Early Learning Council, to meet by telephone conference instead of following the Sunshine Law’s videoconference provision, which is applicable to all other boards.

An administration bill that proposed a similar amendment to allow more flexibility in the use of interactive conference technology for all Sunshine Law boards did not advance.

There was no explanation in testimony or by the legislative committees as to why this board’s needs were different from other boards.

Absent special circumstances surrounding this board, OIP testified that, if it is desirable to make changes to the Sunshine Law’s current long distance meeting provision, such changes should apply to *all* Sunshine Law boards.

## Bills that Failed

### ► **H.B. No. 1212 Vetoes: Complaint History**

The Governor vetoed H.B. No. 1212 on July 6, 2010, finding that the “overly-broad and inappropriate” proposed amendment of the UIPA would adversely affect consumers.

The bill would effectively have recognized a significant privacy interest for a licensee in his or her complaint history unless resolved against the licensee, which would make unavailable to the public most complaint information for pending complaints or for complaints not resolved against a licensee for any reason.

The Governor stated: “Consumers have been, and should be, encouraged to obtain licensing and complaint information prior to consulting and retaining licensed professionals. The disclosure of a licensee’s complete complaint record results in increased consumer awareness and informed decision-making. This bill will decrease information available to consumers and thereby hinder this process.”

Further, the Governor defused proponents’ concerns that current practices allow frivolous complaints to become public, noting that RICO’s procedures “screen out over half of all complaints because they are frivolous, cannot be substantiated, do not involve a licensing violation, or can be resolved between the parties. Only when sufficient grounds have been found to start an investigation, does a complaint get disclosed in the Complaint History Report available to the public.”

The Governor continued: “Unfortunately, this bill would restrict the Department’s ability to disclose a significant number of the complaints that are currently available to over 500,000 individual reviewers who access this site each

year. If complaints cannot be disclosed without an outcome, even if an investigation is underway, the complaint history becomes less useful to consumers. The report will no longer provide up to date information about licensees, and leaves consumers to question whether businesses and professionals not on the complaints list are those who truly have not received any complaints or those who have complaints pending.”

OIP had offered testimony raising this issue, and noted that the Legislature in enacting the UIPA had purposefully directly provided that a licensee does not have a significant privacy interest in “the record of complaints including all dispositions” thus making access to this complaint information public, without question, since the inception of the UIPA. OIP further testified that the disclosure of all complaint information is also important to the public interest in ensuring DCCA’s accountability in its administration of professional vocational licensing.

#### ► **Bills Proposed by OIP**

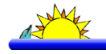
H.B. No. 1148 HD1, SD1 (and S.B. No. 966) proposed amendment to the Sunshine Law to require electronic filing of notices and agendas on the State calendar in lieu of filing with the Office of the Lt. Governor. Both houses had heard and amended the House bill, but did not meet to recommend a final conference draft.

H.B. No. 1146 and S.B. No. 964 proposed to amend the Sunshine Law to allow board members present to receive public testimony and presentations on noticed agenda items when a noticed meeting must be canceled for lack of quorum.

H.B. No. 1147 and S.B. No. 965 proposed to transfer concurrence responsibilities under the Sunshine Law’s emergency meeting provision from the AG to OIP.

#### ► **Other Sunshine Law Bills**

S.B. No. 906 was proposed by the Administration to expand board members’ ability to participate in meetings without being physically present by use of interactive conference technology. This bill sought to remove the current Sunshine Law requirement that the public must be able to view the board members’ participation via both video and audio technology. Although approved by the Senate Judiciary Committee, the bill did not receive further consideration.



# Litigation Report

**O**IP monitors litigation that raises issues under the UIPA or 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 monitored in FY 2010.

## **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.

Both parties failed to prevail on the primary issues raised in their cross motions for summary judgment.

The parties subsequently entered into a Stipulation for Dismissal With Prejudice as to all Claims and Parties on December 3, 2009.

## **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 through a request for proposal ("RFP") issued for the operation of Public, Educational, and Governmental (PEG) Access Channels. The information at issue was similar to that routinely provided by Akaku to DCCA as required by contract and posted on DCCA's website, such as annual report information, financial statements, and lists of facilities and equipment.

The Court granted the State's Motion for Summary Judgment on April 27, 2010. Specifically, the Court found that the information in the RFP did not involve any "trade secret" protected by statute; that Akaku had freely disclosed information it later claimed to be confidential, proprietary, and/or a "trade secret" and therefore waived any confidentiality rights that it might have had; and that information provided constitutes a "government record" under HRS chapter 92F to which no exemption under § 92F-13 applied.

## 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).

This case is on appeal.

## Cole v. Hawaii County Council

*Cole v. County Council of the County of Hawaii, et al.*, Civ. No. 10-1-0082 (Circuit Court of the Third Circuit). Plaintiff filed suit *pro se* alleging violation of the Sunshine Law based upon a letter communication dated June 5, 2008, between two Council members.

The Court found that Plaintiff was asserting that the “final action” complained of allegedly occurred by that letter. Given that Plaintiffs’ complaint was filed more than ninety days after the alleged final action, the Court dismissed the Complaint.



## Hawaii County Council’s Meeting Notice

*Ford v. County Council of the County of Hawaii*, Civ. No. 09-01-415K (Circuit Court of the Third Circuit). Council member Brenda Ford filed suit against the Hawaii County Council alleging that the Council violated the Sunshine Law by improper notice of its meeting.

Specifically, Ms. Ford sought a declaratory judgment that the Council had failed to provide the requisite six day notice prior to its meeting because it filed its notice with the County Clerk at 11:15 p.m. on the sixth day prior to the meeting. Ms. Ford has voluntarily dismissed this suit.

# Records Report System Report



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

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

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

To date, state and county agencies have reported 29,607 records. See **Figure 15**.



## **Records Report System**

### **Status of Records Reported by Agencies: 2010 Update**

<b>Jurisdiction</b>	<b>Number of Records</b>
State Executive Agencies	20,698
Legislature	836
Judiciary	1,645
City and County of Honolulu	3,909
County of Hawaii	947
County of Kauai	930
County of Maui	642
<b>Total Records</b>	<b>29,607</b>

**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.

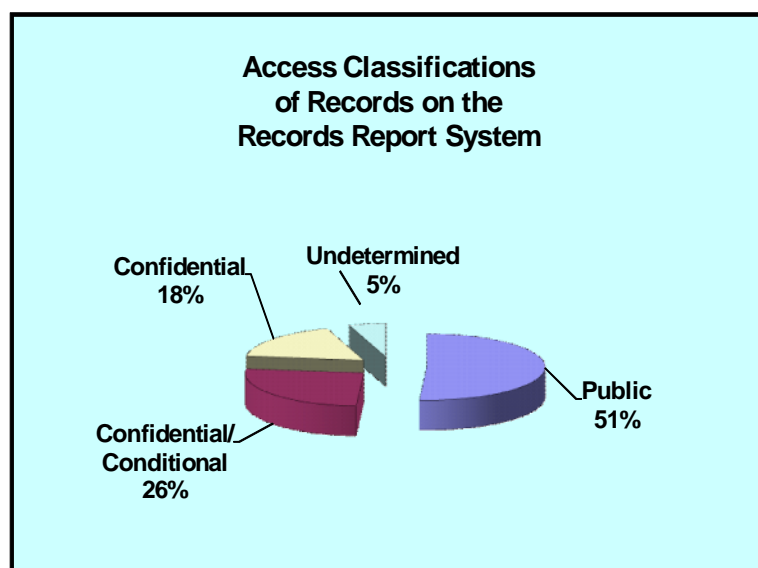


Figure 16



# Education

## Publications and Website

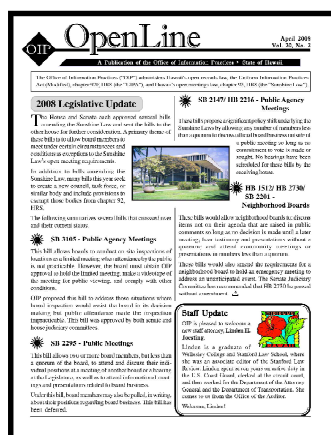


OIP's publications and website play a vital role in the agency's ongoing efforts to inform the public and government agencies about the UIPA, the Sunshine Law, and the work of OIP.

In FY 2010, OIP continued its traditional print publications, including the *OpenLine* newsletter, *Office of Information Practices Annual Report 2009*, 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.

To conserve resources, OIP now distributes the *OpenLine* by e-mail, 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 2010 included summaries of recently published OIP opinions; information about OIP's proposals in the 2010 Legislative session; UIPA and Sunshine Law pointers and guidelines; and other issues relevant to OIP's mission.



## OpenLine

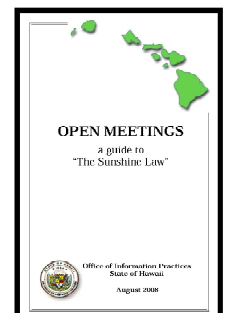
The *OpenLine* newsletter, which originated in March 1989, has always played a major role in OIP's educational efforts.

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.

## 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.

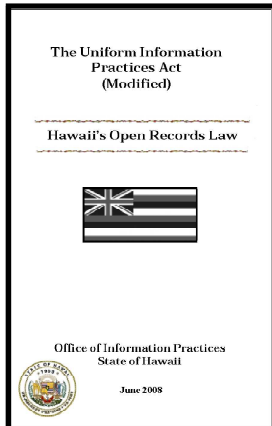




## UIPA Guide

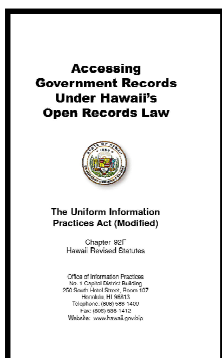
*Hawaii's Open Records Law* is a 44-page guide to the Uniform Information Practices Act and OIP's administrative rules.

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



## Accessing Government Records Under Hawaii's Open Records Law

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



## Model Forms

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

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

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

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

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

All of these forms may be obtained online at [www.hawaii.gov/oip](http://www.hawaii.gov/oip).

## OIP Website

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

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

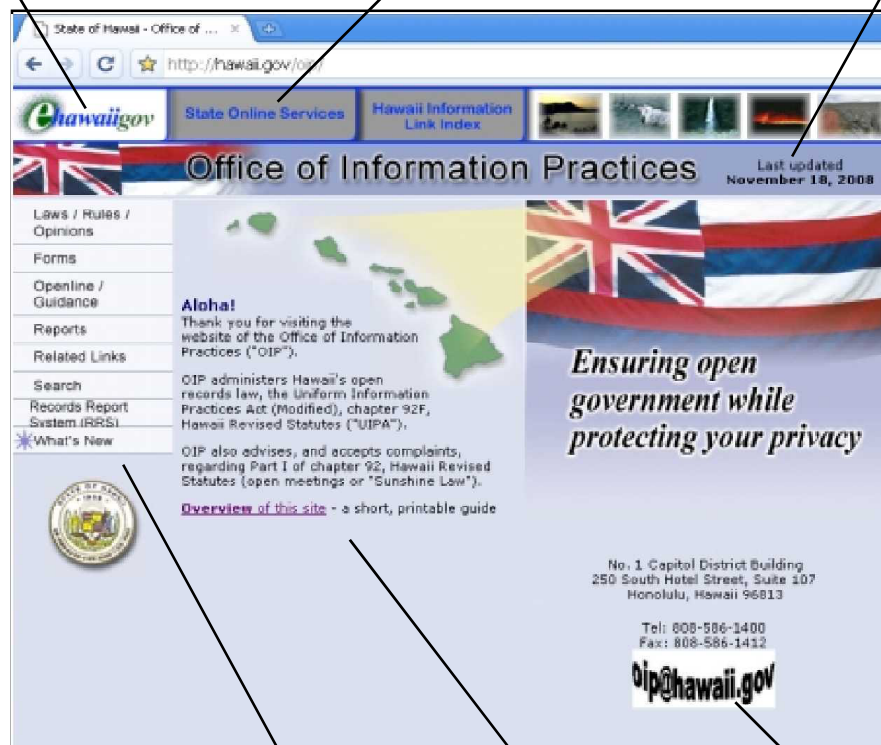
- The UIPA and the Sunshine Law statutes
- OIP's administrative rules

- *OpenLine* newsletters
- OIP's recent annual reports
- Model forms created by OIP
- OIP's formal opinion letters
- Formal opinion letter summaries
- Formal opinion letter subject index
- Informal opinion letter summaries
- General guidance for commonly asked questions

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

*link to the State's many online services*

*find out when the site was last updated*



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

*overview of the site - a short guide*

*contact information*

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

## Features

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

### ***"Laws/ Rules/ Opinions"***

This section features four parts:

➤ *Laws:* the complete text of the UIPA and the Sunshine Law, with quick links to each section. With an Internet browser, a user can perform a key word search of the law.

➤ *Rules:* the full text of OIP's administrative rules ("Agency Procedures and Fees for Processing Government Record Requests"), along with a quick guide to the rules and OIP's impact statement for the rules.

➤ *Opinions:* a chronological list of all OIP opinion letters, an updated subject index, a summary of each letter, and the full text of each letter.

➤ *Informal Opinions:* summaries of OIP's informal opinion letters, in three categories: Sunshine Law opinions, UIPA opinions, and UIPA decisions on appeal.

### ***"Forms"***

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

### ***"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.

### ***"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 15 training workshops in FY 2010. 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 2010.

### UIPA Training

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

- 12/3/09 Legislature: The Senate
- 12/9/09 Department of Accounting and General Services: State Procurement Office (“Public Disclosure of Procurement Records Statewide” for all state employees)

- 3/9/10 University of Hawaii Law School: Administrative Law Class
- 4/13/10 City & County of Honolulu: Department of Budget and Fiscal Services

### Sunshine Training

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

- 7/8/09 Department of Health: State Health Planning and Development Agency
- 7/17/09 Big Island League of Women Voters
- 8/25/09 Department of Health: Advisory Commission on Drug Abuse and Controlled Substances
- 8/28/09 Hawaii County: Annual Municipal Attorneys Conference (Kona)
- 10/15/09 Department of Health: Tobacco Prevention and Control Advisory Board
- 10/22/09 Mahalo Broadcasting (Big Island)

- 11/13/09 Department of Labor and  
Industrial Relations: Workforce  
Development Council
- 12/7/09 Department of Education:  
Charter School Administrators
- 1/2/10 Department of Land and  
Natural Resources: Historic  
Places Review Board
- 4/19/10 Kauai County: Office of  
Boards and Commissions  
(two sessions)

