

# OPEN GOVERNMENT GUIDE

Access to Public Records  
and Meetings in

HAWAII

**REPORTERS  
COMMITTEE**  
FOR FREEDOM OF THE PRESS

Sixth Edition  
2011



# OPEN GOVERNMENT GUIDE

## OPEN RECORDS AND MEETINGS LAWS IN

# HAWAII

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## HAWAII

**SIXTH EDITION  
2011**

Previously Titled  
Tapping Officials' Secrets

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## Introductory Note

The OPEN GOVERNMENT GUIDE is a comprehensive guide to open government law and practice in each of the 50 states and the District of Columbia. Fifty-one outlines detail the rights of reporters and other citizens to see information and attend meetings of state and local governments.

The OPEN GOVERNMENT GUIDE — previously published as *Tapping Officials' Secrets* — is the sole reference on open government laws in many states.

Written to follow a standard outline to allow easy comparisons between state laws, the compendium has enabled open government advocates in one state to use arguments successful in other states to enhance access rights at home. Press associations and lobbyists have been able to invoke other sunshine laws as they seek reforms in their own.

Volunteer attorneys, expert in open government laws in each state and in Washington, D.C., generously donated their time to prepare the initial outlines for the first incarnation of this project in 1989. In most states these same attorneys or their close associates updated and rewrote the outlines for the 1993, 1997, 2001 and 2006 editions as well this current 2011 edition.

Attorneys who are new to the compendium in this edition are also experts in open government and access issues, and we are grateful to them for their willingness to share in this ongoing project to create the first and only detailed treatise on state open government law. The rich knowledge and experience all the participating attorneys bring to this project make it a success.

While most of the initial users of this compendium were journalists, we know that lawyers and citizens have discovered it and find it to be indispensable as well.

At its core, participatory democracy decries locked files and closed doors. Good citizens study their governors, challenge the decisions they make and petition or vote for change when change is needed. But no citizen can carry out these responsibilities when government is secret.

Assurances of open government exist in the common law, in the first state laws after colonization, in territorial laws in the west and even in state constitutions. All states

have passed laws requiring openness, often in direct response to the scandals spawned by government secrecy. The U.S. Congress strengthened the federal Freedom of Information Act after Watergate, and many states followed suit.

States with traditionally strong access laws include Vermont, which provides virtually unfettered access on many levels; Florida, which was one of the first states to enact a sunshine law; and Ohio, whose courts have issued several access-friendly rulings. Other jurisdictions, such as Pennsylvania and the District of Columbia, have made significant changes to their respective open government laws since the fifth edition was published designed to foster greater public access to information. Historically, Pennsylvania had a reputation as being relatively non-transparent while the District of Columbia was known to have a very restrictive open meetings law.

Some public officials in state and local governments work hard to achieve and enforce open government laws. The movement toward state freedom of information compliance officers reflects a growing activism for access to information in the states.

But such official disposition toward openness is exceptional. Hardly a day goes by when we don't hear that a state or local government is trying to restrict access to records that have traditionally been public — usually because it is feared release of the records will violate someone's "privacy" or threaten our nation's security.

It is in this climate of tension between broad democratic mandates for openness and official preference for secrecy that reporters and good citizens need to garner their resources to ensure the passage and success of open government laws.

The Reporters Committee genuinely hopes that the OPEN GOVERNMENT GUIDE will help a vigorous press and citizenry to shape and achieve demands for openness, and that it will serve as a primer for those who battle in government offices and in the courts for access to records and meetings. When challenges to secrecy are successful, the news is better and so is the government.

## User's Guide

Whether you are using a guide from one state to find a specific answer to an access issue, or the complete compendium encompassing all states to survey approaches to a particular aspect of open government law around the country, knowing a few basics on how the OPEN GOVERNMENT GUIDE is set up will help you to get the most out of it.

*Following the outline.* Every state section is based on the same standard outline. The outline is divided into two parts: access to records and access to meetings.

Start by reviewing the table of contents for each state. It includes the first two tiers of that state's outline. Once you are familiar with the structure of the outline, finding specific information is simple. Typically, the outline begins by describing the general structure of the state law, then provides detailed topical listings explaining access policies for specific kinds of records or meetings.

Every state outline follows the standard outline, but there will be some variations. Some contributors added items within the outline, or omitted subpoints found in the complete outline which were not relevant to that state's law. Each change was made to fit the needs of a particular state's laws and practices.

In general, outline points that appear in boldface type are part of the standard outline, while additional topics will appear in italicized type.

Whether you are using one state outline or any number of outlines, we think you will find the outline form helpful in finding specific information quickly without having to read an entire statute or search through many court cases. But when you do need to consult statutes, you will find the complete text of the relevant portions at the end of each outline.

Additional copies of individual state booklets, or of the compendium covering the 50 states and the District of Columbia, can be ordered from The Reporters Committee for Freedom of the Press, 1101 Wilson Blvd., Suite 1100, Arlington, Virginia 22209, or by calling (703) 807-2100. The compendium is available in electronic format on CD.

The state outlines also are available on our World-Wide Web site, [www.rcfp.org/ogg](http://www.rcfp.org/ogg). The Internet version of the outlines allows you to search the database and compare the law in different states.

*Updates:* The Reporters Committee published new editions of THE OPEN GOVERNMENT GUIDE in 1989, 1993, 1997, 2001, 2006, and now in 2011. We expect future updates to follow on approximately the same schedule. If we become aware of mistakes or material omissions in this work, we will post notices on this project's page on our World-Wide Web site, at [www.rcfp.org/ogg](http://www.rcfp.org/ogg). This does not mean that the outlines will constantly be updated on the site — it simply means known errors will be corrected there.

For our many readers who are not lawyers: This book is designed to help journalists, lawyers, and citizens understand and use state open records and meetings law. Although the guides were written by lawyers, they are designed to be useful to and readable by nonlawyers as well. However, some of the elements of legal writing may be unfamiliar to lay readers. A quick overview of some of these customs should suffice to help you over any hurdles.

Lawyers are trained to give a "legal citation" for most statements of law. The name of a court case or number of a statute may therefore be tacked on to the end of a sentence. This may look like a sentence fragment, or may leave you wondering if some information about that case was omitted. Nothing was left out; inclusion of a legal citation provides a reference to the case or statute supporting the statement and provides a shorthand method of identifying that authority, should you need to locate it.

Legal citation form also indicates where the law can be found in official reporters or other legal digests. Typically, a cite to a court case will be followed by the volume and page numbers of a legal reporter. Most state cases will be found in the state reporter, a larger regional reporter, or both. A case cite reading 123 A.2d 456 means the case could be found in the Atlantic (regional) reporter, second series, volume 123, starting at page 456.

Note that the complete citation for a case is often given only once. We have tried to eliminate as many cryptic second-reference cites as possible, but you may encounter cites like "Jackson at 321." This means that the author is referring you to page 321 of a case cited earlier that includes the name Jackson. Authors may also use the words *supra* or *infra* to refer to a discussion of a case appearing earlier or later in the outline, respectively.

Except for these legal citation forms, most "legalese" has been avoided. We hope this will make this guide more accessible to everyone.



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**FOREWORD**

*This edition contains revisions resulting primarily from the publication of opinion letters from the Hawaii Office of Information Practices through 2011.*

Hawaii's initial Sunshine Law relating to public meetings and records was enacted in 1975 and is codified as chapter 92 of *Hawaii Revised Statutes* [Chapter 92, Sunshine Law].

In 1980, in response to the adoption of a constitutional right of privacy, Haw. Const. art. I, § 6 (adopted 1978), the Legislature enacted the Fair Information Practice Act (Confidentiality of Personal Records), Act 226, 10th Leg., Reg. Sess. (1980), *reprinted in* 1980 Haw. Sess. Laws at 378 [Privacy Act, Chapter 92E], which severely limited access to records. The Privacy Act substantially reduced access to government records by prohibiting access to records containing "confidential" information identifying any person whose privacy would be invaded. The Privacy Act's definition of a "public record" included records which were (1) the property of the state, the county, or a "board" (2) on which an entry was or had to be made and (3) which was or had to be received for filing.

Both the ambiguity of the confidentiality restrictions and the technical definition of "public record" in the Privacy Act led to widespread criticism of the law. In December 1987, a Governor-appointed task force issued a four-volume report containing public testimony on, analysis of, and recommendations regarding Hawaii's open records laws.

The report noted:

[T]he most criticized feature of the current law is that it simply is not a cohesive law. Chapters 92 and 92E in particular are in obvious conflict. These two laws were written at different times, for different purposes, and no real effort appears to have been made to properly link them together.

*Report of the Governor's Ad Hoc Committee on Public Records and Privacy 17* (1987). The report discussed possible models for a new law, including the federal Freedom of Information Act [FOIA] and the Uniform Information Practices Code [Uniform Code]. The legislature chose to adopt the Uniform Code with modifications.

In 1988, Hawaii adopted the Uniform Information Practices Act [UIPA, Chapter 92F]. Act 262, 14th Leg., Reg. Sess. (1988), *reprinted in* 1988 Haw. Sess. Laws 473 (codified at Haw. Rev. Stat. ch. 92F (Supp. 1991)). The UIPA went into effect on July 1, 1989. *Id.* § 7, *reprinted in* 1988 Haw. Sess. Laws at 483. It replaced both the Sunshine Law's original provisions on public records, Haw. Rev. Stat. §§ 92-50 to 92-52, *repealed by* Act 262 § 3, 14th Leg., Reg. Sess. (1988), *reprinted in* 1988 Haw. Sess. Laws at 482, and the Privacy Act, *id.* ch. 92E, *repealed by* Act 262 § 4.

While it repealed the open records and privacy provisions of the Sunshine Law, the UIPA did *not* materially affect the public meetings portion of Hawaii's Sunshine Law. Neither did passage of the UIPA affect provisions in the Hawaii Administrative Procedure Act [HAPA] concerning public hearings and related procedures required for rule-making by government agencies.

Section 92F-2 sets forth the UIPA's purpose:

In a democracy, the people are vested with the ultimate decision-making power. Governmental agencies exist to aid the people in the formation and conduct of public policy. Opening up the

governmental 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 governmental agencies – shall be conducted as openly as possible.

Haw. Rev. Stat. § 92F-2 (1996).

The UIPA covers *all records* in the possession of *any unit* of government. It generally applies to the judiciary and legislature. *See id.* §§ 92F-3 (1996) (defining agency to exclude non-administrative functions of judiciary), 92F-13(5) (exempting drafts and notes of the legislature).

There are approximately 6,800 discrete units of state government that meet the UIPA's definition of "agency." Office of Information Practices [OIP], *Records Report Training Guide* 40 (1992) (on file with OIP). The UIPA's broad definition of "agency" affords access to many records of entities regulated by government or performing a government function. Whether non-governmental entities fit the UIPA's definition of "agency" is a matter decided on a case-by-case basis. The Sunshine Law, by way of contrast, applies to "boards," which include agencies, but defines such entities more narrowly than the UIPA. The result is that there may be some government agencies whose records are accessible under the UIPA but whose meetings under the Sunshine Law need not be.

Reducing confusion that arose under the Privacy Act's definition of "public record," the UIPA defines a "personal record" to be "any item, collection, or grouping of information about an individual that is maintained by an agency," making such records a type of government records. Haw. Rev. Stat. § 92F-3 (1996). The UIPA explicitly grants individuals the right to inspect and correct their own personal records. *Id.* §§ 92F-21 to 92F-28.

The UIPA's presumption of openness and accessibility replaced the broad exception under the former Privacy Act that allowed agencies to deny access to records because disclosure might invade an individual's personal privacy. *Id.* § 92F-11(a) ("All government records are open to public inspection unless access is restricted or closed by law."). Nevertheless, the UIPA preserves the Privacy Act's concern for privacy by acknowledging 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 Hawaii Constitution. *Id.* § 92F-2. When constitutional concerns arise, Chapter 92F calls for a balancing of "the individual privacy interest and the public access interest . . . unless [access] would constitute a clearly unwarranted invasion of personal privacy." *Id.* § 92F-2(5).

The UIPA requires that certain categories of records be disclosed, regardless of privacy considerations or other grounds for exempting disclosure. *Id.* § 92F-12 (listing documents for which disclosure is required "[a]ny other provision in this chapter to the contrary notwithstanding"). Past disputes involved many of these listed categories of records.

The UIPA requires government agencies to promulgate rules and regulations to implement the law. *Id.* § 92F-18. Its passage also funded the Office of Information Practice, which is a division of the Lieutenant Governor's Office. Haw. Rev. Stat. § 92F-41 (Supp. 1999).

The UIPA requires the OIP to disseminate information on access. Haw. Rev. Stat. § 92F-42(11) (Supp. 1999). To facilitate dissemination of information on government records to the public, the OIP maintains a computerized database of the records reports received from state agencies. *Id.* § 92F-18(b) (requiring agencies to submit to OIP annual reports on records they maintain and on requests for access received). This allows public users of the state's computerized information network to access statistical information, including "the percentage of each agency's records that are public or confidential, the number of written record inquiries received by the agency, and the

number granted or denied in the previous fiscal year.” OIP, *RRS to be Available on HAWAII FYI*, OIP Openline (newsletter), July 1992, at 1.

Starting in 1994, the computerized catalog of Hawaii state and county government records has been available to the public. As of June 2010, more than 29,000 sets of records have been reported on the State Record Report System (RRS). OIP 2010 Annual Report. RRS provides information concerning which government records are open to public inspections and copying. *Id.* Beginning in October 2004, RRS has been available on the Internet via OIP’s website. *Id.*

The UIPA empowers the OIP to issue public advisory guidelines to agencies and to issue formal and informal advisory opinions to agencies and the public. Haw. Rev. Stat. §§ 92F-42(2), (3) (Supp. 1999). OIP also provides answers to telephone inquiries. The majority of OIP formal advisory opinions were requested by government agencies or officials.

The OIP also issues unnumbered (informal) advisory opinion letters. OIP explains that it usually issues such letters when the period in which to answer a request for advice is necessarily so short as to preclude full legal research and/or when the request involves analysis that is directly duplicative of that already contained in previously issued formal opinion letters. Although it does not provide these unnumbered advisory opinion letters to the agencies and private parties on its regular mailing list (as it routinely does with its numbered advisory opinion letters), the OIP does make its unnumbered advisory opinion letters available upon request. Most unnumbered opinions contain personal information, which the OIP redacts before releasing copies.

The UIPA also authorizes the OIP to devise an administrative appeal system and to rule on such appeals. *Id.* §§ 92F-42(1), (12) (Supp. 1999); *see also* Haw. Rev. Stat. §§ 92F-15.5 and 92F-27.5 (Supp. 1999). The OIP’s rulings in such cases are “optional and without prejudice to rights of judicial enforcement.” Haw. Rev. Stat. § 92F-42(1). The OIP has drafted the rules for the appeal process. *See* Haw. Admin. R. tit. 2, ch. 71. OIP has previously advanced the position that its opinion that a record must be disclosed – as opposed to an opinion that disclosure of a record is not required – is not subject to appeal by the agency having custody of the record. The reasoning is that the right to judicial enforcement of the UIPA is statutorily limited to a “person aggrieved by a denial of access to a government record.” Haw. Rev. Stat. § 92F-15(a). When records covered by the Sunshine Law are concerned (e.g., minutes of government board meetings), however, the Intermediate Court of Appeals has held that the agency may initiate an original action under the Sunshine Law for the determination of whether such records must be disclosed. *See* Haw. Rev. Stat. § 92-12(c); *County of Kaua‘i v. OIP*, 120 Hawai‘i 34,43, 200 P.3d 403, 412 (2009).

OIP’s determinations as to the applicability of the UIPA, such as the definition of “agency” or “government record,” are not given deference on appeal, but rather, are reviewed *de novo*. *Olelo: The Corporation For Community Television v. OIP*, 116 Hawai‘i 337, 346, 173 P.3d 484, 493 (2007).

Members of the public can appeal directly to the state’s circuit courts any time a government agency denies them a request for information held by the particular government agency. Haw. Rev. Stat. § 92F-15 (1996). The access provisions of the UIPA were upheld in *Burnham Broad. Co. v. County of Hawaii*, Civ. No. 92-0161 (Haw. 3d Cir. Mar. 1992). The case involved the refusal by a county agency, the police department, to release to media organizations records pertaining to the agency’s allegedly deficient response to 911 calls connected to a widely publicized Christmas Eve rape and murder. *Id.* The county not only lost the lawsuit, but also ended up paying the court costs and attorneys’ fees that the media plaintiffs’ had incurred in their efforts to secure access to the tapes and transcripts. OIP, *The Cost of Denying Public Access*, OIP Openline (newsletter), May 1992, at 2.

Contrast this with the remedies available for violation of the Open Meetings law. In the case of wrongful denial of public access to meetings of government agencies, the sanction is to render null and void any decisions reached in such meetings. Haw. Rev. Stat. § 92-11. Under the Sunshine Law, parties denied access to government meetings can file suit in the state circuit courts to obtain an injunction “or other appropriate remedy.” *Id.* § 92-12 (1996). The court can order payment of reasonable attorney fees and costs. *Id.* § 92-12(c). Willful violation of the Sunshine Law by a government official constitutes a misdemeanor as well as grounds for removal from the “board.” *Id.* § 92-13.

The OIP, through its interpretations of the UIPA and its efforts to disseminate information about the law, particularly to agencies, has been a constructive influence moderating tensions between agencies and the public over access issues.

Nevertheless, problems regarding access still exist, and litigation over the provisions of UIPA as well as other access laws has resulted. For example, in 1996, the Hawaii Supreme Court required the public disclosure of information concerning employment-related disciplinary actions involving police officers, as required by the UIPA; and a federal district court invalidated a state statute limiting access to voter registration records. These cases, among others, demonstrate the necessity of continued vigilance to unlocking government secrets.

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# Open Records

## I. STATUTE — BASIC APPLICATION

The basic purpose of the UIPA, Hawaii's revised open records law, which became effective July 1, 1989, is to afford public access to all government records unless access is restricted or closed by law. Haw. Rev. Stat. § 92F-11(a) (1996). It seeks to “[e]nhance government[] accountability” and to “[m]ake government accountable to individuals in [its] collection, use, and dissemination of information [about] them.” *Id.* §§ 92F-2(3), (4). The UIPA complements the requirements of the Hawaii Administrative Procedure Act [HAPA], which also mandates that government agencies make information under their control available for public inspection. *Id.* § 91-2 (1996).

A significant constraint on the statutorily sanctioned philosophy of access comes from the Hawaii Constitution's explicit guarantees of privacy. Haw. Const. art. I, §§ 6, 7. The UIPA acknowledges 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 . . .” Haw. Rev. Stat. § 92F-2 (referring to Haw. Const. art. I, §§ 6, 7). The OIP often cites the UIPA's provision providing an exception to the general rule of public access based on unwarranted invasion of privacy as the reason for denying or limiting access. While the UIPA's invasion of privacy exception applies only to natural persons, *id.* § 92F-14(a), it accords with the HAPA provisions mandating confidentiality of agency records about individuals *and entities*. *Id.* § 91-2(b) (1996). Under the UIPA, agencies receive the effective equivalent of “privacy” protection when disclosure falls within UIPA's exception based on frustration of legitimate government purpose. *Id.* § 92F-13(3).

The UIPA lists three other bases that might support a denial of access to government records, *see id.* § 92F-13, including the most frequently cited: specific statutes or court orders. *Records Not Available to Public*, OIP Openline (newsletter), July 1992, at 2; Haw. Rev. Stat. § 92F-13(4) (Supp. 1999). The remaining two exceptions supporting denials of access primarily serve to protect government interests in undiscoverable materials associated with the prosecution or defense of judicial or quasi-judicial “action[s] to which the state or any county is or may be a party,” Haw. Rev. Stat. § 92F-13(2); and “inchoate and draft working papers of legislative committees . . .,” legislative investigative committees, and “personal files of members of the legislature,” *id.* § 92F-13(5).

### A. Who can request records?

#### 1. Status of requestor.

The UIPA contains no restrictions based on citizenship. Section 92F-11(b) provides that “[e]xcept as provided in section 92F-13 [(detailing exceptions for disclosure)], each agency upon request by *any person* shall make government records available for inspection and copying during regular business hours.” Haw. Rev. Stat. § 92F-11(b) (emphasis added). Section 92F-3 defines “person” as “an individual, corporation, government, or governmental subdivision or agency, business trust, estate, trust, partnership, association, or any other legal entity.” Even foreign governments when engaged in “civil or criminal law enforcement activity authorized by law” may obtain access pursuant to written agreement, written request or, under specified circumstances, verbal request. *Id.* § 92F-19(a)(3).

A person who makes a request for records to an agency, however, is not entitled to a response from the agency if the request is duplicative or substantially similar to a request that had been responded to within the past year, and the agency's response would remain unchanged. *Id.* § 92F-11(b).

If a person wants to be anonymous, in most circumstances, an agency may not ask or require the requester's name. Water Service Consumption Data, OIP Op. Ltr. No. 90-29 (Oct. 5, 1990); *but see* Information About Requesters of Conviction Data Records, OIP Op. Ltr.

No. 96-4 (Dec. 10, 1996) (Hawaii Criminal Justice Center must allow access to information about individuals who request conviction data).

Section 92F-19, however, prohibits the sharing of records and information between agencies except in ten sets of circumstances. Disclosure to the Legislative Auditor, the Legislative Reference Bureau, and the Ombudsman are expressly permitted. Haw. Rev. Stat. § 92F-19(a)(9) (1996). So is disclosure to “the legislature or a county council, or any committee or subcommittee thereof.” *Id.* § 92F-19(a)(6).

#### 2. Purpose of request.

The UIPA does not limit the use by private individuals of records obtained under its provisions. The requester's purpose, with a few exceptions noted *infra*, generally becomes relevant only when disclosure occurs between or as a result of interagency disclosure or when disclosure is governed by a statute or provision other than the UIPA. *See* Right to Inspect Your Medical File Possessed by State Department of Public Safety, OIP Op. Ltr. No. 93-7 (July 27, 1993) (“a requester's reason or purpose in requesting access is generally irrelevant to the merits of the person's request”). The burden is on the party seeking to avoid disclosure to prove that a particular use implicates an interest protected under the exceptions supporting denial of access. *See, e.g.*, Disclosure of Hawaiian Homelands Waiting List, OIP Op. Ltr. No. 89-4 (Nov. 9, 1989) (holding that only public interests protected under the law can outweigh private interests).

The primary determinant of accessibility is not the purpose of the request, the use to which the information will be put, or the type of document in which it appears but the nature of the information itself. Applicability of UIPA (Modified) to State Financial Assistance Programs Records, OIP Op. Ltr. No. 89-5 (Nov. 20, 1989).

Specific exceptions: Section 2 of Act 262 amended Chapter 89 (Collective Bargaining) to add a new section affording access to personal records by an employee organization *if the records “are relevant to the investigation or processing of a grievance.”* *See* Haw. Rev. Stat. § 89-16.5 (emphasis added). Also, the UIPA permits disclosure of information from the state's motor vehicle registration files “provided that the person requesting such files [has] a legitimate reason as determined by rules.” Haw. Rev. Stat. § 92F-12(b)(6) (emphasis added); *see also id.* § 91-2(a)(1) (1996) (requiring agencies to adopt rules “whereby the public may obtain information or make submittals or requests”).

Particularly when personal or corporate records are involved, however, the purpose for disclosure *between government agencies* is quite material. *See* List of Employers That are Self-Insured for Workers' Compensation Purposes, OIP Op. Ltr. No. 92-7 (June 29, 1992). Interagency disclosure of government records is generally prohibited unless it falls under one of the UIPA's exceptions. Section 92F-19 limits interagency disclosure on the basis not only of the involved agencies' identities but also on the basis of the purpose(s) for the sought after disclosure. Interagency disclosure must be “necessary for the performance of the requesting agency's duties and functions” and “[c]ompatible with the purpose for which the information was collected or obtained” or “[c]onsistent with the conditions or reasonable expectations of use and disclosure under which the information was provided.” *Id.* § 92F-19(a)(1). If disclosure is made to the State Archives (where most records are available for public inspection) it must be “for the purposes of historical preservation, administrative maintenance, or destruction.” *Id.* § 92F-19(a)(2). Disclosure “for a civil or criminal law enforcement activity authorized by law” may be made to “another state agency, another state, the federal government, or foreign law enforcement agency or authority” if made pursuant to written agreement or request or verbal request under prescribed circumstances. *Id.* § 92F-19(a)(3). Disclosures to a foreign government may be made “pursuant to an executive agreement, compact, treaty or statute.” *Id.* § 92F-19(a)(5). Disclosure pursuant to court order is also exempted from the general prohibition on interagency disclosure. *Id.* § 92F-19(a)(7). Disclosure to “authorized officials of another agency, another state, or the federal government [must be] for the purpose of auditing or monitoring an agency program that receives federal,

state or county funding.” Haw. Rev. Stat. § 92F-19(a)(8). Disclosure to the Legislative Auditor, the Legislative Reference Bureau, or the State Ombudsman must be “for the performance of their respective functions.” *Id.* § 92F-19(a)(9).

### 3. Use of records.

The UIPA itself does not restrict subsequent use of information provided to individuals. Furthermore, Section 92F-16 grants immunity from civil or criminal liability for “[a]nyone participating in good faith in the disclosure or nondisclosure of a government record . . .” *Id.* § 92F-16.

This does not mean that subsequent use of information obtained from government agencies may not be restricted by other laws. For instance, the UIPA amendment to Chapter 89 specifically proscribes the sharing or disclosure of information contained in personal records disclosed to employee representatives except for specific purposes. Haw. Rev. Stat. § 89-16.5 (1996).

Similarly, although the legislature did not adopt the provisions of the Uniform Code permitting disclosure for research purposes only under certain circumstances where safeguards are used to insure privacy, other provisions may effectively govern disclosure of research data. Initially, the UIPA authorizes the OIP to “adopt rules that set forth uniform standards for disclosure of records for research purposes,” Haw. Rev. Stat. § 92F-42(15), as well as to “adopt, amend, or repeal rules . . . necessary for the purposes of [the UIPA],” *id.* § 92F-42(17). The OIP is still in the process of drafting such rules. Nevertheless, the law’s breadth and its requirement that privacy interests be balanced against the public’s interest in disclosure of personal records, such as those often maintained or potentially available for research, may obviate the legislature’s refusal to adopt the Uniform Code’s research provisions. *See* Ombudsman Op. 77-985 (permitting research of marriage and death records). The ombudsman, who is appointed by the legislature, has jurisdiction to investigate the administrative “acts of agencies.” Haw. Rev. Stat. § 96-5 (1996) (describing function and operational parameters of the Office of Ombudsman). Lateral application of other statutory provisions may also regulate use of research data. *See, e.g.*, Haw. Rev. Stat. §§ 324-31 to 324-34 (2000) (regulating release of data and use of identity in records of the State Health Department); Public Inspection of Vital Statistic Records Maintained by the Dep’t of Health, OIP Op. Ltr. No. 90-23 (June 28, 1990) (allowing inspection of records less than 75-years old only upon showing required by Haw. Rev. Stat. § 338-18(b) (2000) of necessity for determining familial relation establishing personal or property rights).

Other laws may specifically limit the use of government records and even the release and/or use of *privately maintained* records. *See, e.g., id.* §§ 325-101 to 325-104 (Supp. 2000) (establishing confidentiality of all records relating to HIV infection, civil liability for willful disclosure without a patient’s consent and prohibition of disclosure by the Department of Health in any judicial proceeding without a patient’s consent).

And, of course, common law torts may subject an individual or corporation to liability for certain uses, misuses, or abuses of information, including information obtained from government agencies.

In the case of interagency disclosures, confidential information disclosed to another agency does not thereby lose its confidential status; the receiving agency is “subject to the same restrictions on disclosure of the records as the originating agency.” Haw. Rev. Stat. § 92F-19(b); List of Employers That are Self-Insured for Workers’ Compensation Purposes, OIP Op. Ltr. No. 92-7 (June 29, 1992).

### B. Whose records are and are not subject to the act?

Section 92F-11 provides that, except as provided in Section 92F-13 [exceptions to disclosure], “each agency shall upon request . . . make government records available for inspection and copying . . .” Haw. Rev. Stat. § 92F-11(b). The definition of “agency” in Section 92F-3

is very broad and includes all “units” of government, including the legislative branch and administrative functions of the judicial branch. An agency is specifically defined as

any unit of government in this State, any county, or any combination of counties; department; institution; board; commission; district; council; bureau; office; governing authority; other instrumentality of state or county government; or corporation or other establishment owned, operated, or managed by or on behalf of this State or any county, but does not include the non-administrative functions of the courts of this State.

Haw. Rev. Stat. § 92F-3. There are nearly 7000 such units of government in Hawaii, each qualifying as an “agency” under the UIPA’s statutory definition. OIP, *Records Report Training Guide* 40 (1992) (on file with OIP) (summarizing data).

Records in possession of third persons are “government records” for the purposes of the UIPA if an agency retains administrative control over those records. UIPA Request of Gusalino Brothers Construction Inc., OIP Op. Ltr. No. 95-8 (May 4, 1995). Provided that none of the exceptions in Section 92F-13 apply, an agency must disclose those records upon request. *Id.*

### 1. Executive branch.

The UIPA does not expressly include or exclude the executive branch. However, all agencies (defined as “any unit of government”) are subject to the law. Seventy percent or 4,793 of the 6,839 units of state government classified by the OIP as government agencies belong to the executive branch. OIP, *Records Report Training Guide* 40 (1992) (on file with OIP).

For example, the Review Commission on the state water code, though temporary, is classified as an “agency” for UIPA purposes. Review Commission on the State Water Code, OIP Op. Ltr. No. 94-2 (Mar. 21, 1994). According to the OIP, it is the function and purpose of the entity, not the duration that determines whether an entity is subject to UIPA. *Id.*

#### a. Records of the executives themselves.

It is unclear to what extent the UIPA applies to records of individual executive office holders. *Cf.* Haw. Rev. Stat. § 92F-13(5) (excluding “personal files of members of the legislature”). Under prior law, the Corporation Counsel advised that certain “personal papers and records of living mayors, and the personal records of other City employees and officers” may be exempt from public disclosure. Op. Honolulu Corp. Counsel No. 75-43 (May 27, 1975).

#### b. Records of certain but not all functions.

Even under the UIPA, agency information, such as the notes and drafts of executive personnel, will be confidential when it is deliberative and pre-decisional in nature such that disclosure would interfere with a protected public interest, e.g., frustrate a legitimate government function or interfere with prosecution or defense of lawsuits involving an agency. *See, e.g.*, Drafts of Correspondence and Staff Notes About an Alleged Zoning Violation, OIP Op. Ltr. No. 90-8 (Feb. 12, 1990). Where factual matters contained in records can be segregated from information protected by the pre-decisional deliberative privilege, then disclosure of factual matters may be required. *See, e.g.*, Public Inspection of Univ. Program Reviews, OIP Op. Ltr. No. 90-11 (Feb. 26, 1990). Confidentiality under UIPA is of limited duration and extends “only so long as *the nature of the information* is deserving of protection . . .” Proposed HECO Confidentiality Agreement Relating to Geothermal Interisland Transmission Project, OIP Op. Ltr. No. 90-2 (Jan. 18, 1990) (emphasis added) (citing *Audio Technical Serv. Ltd. v. Dep’t of the Army*, 487 F. Supp. 779, 784 (D.D.C. 1980)); *see also* Applicability of UIPA to Aloha Tower Dev. Proposals, OIP Op. Ltr. No. 89-15 (Dec. 20, 1989) (protecting competitive bids only until contract negotiated).

## 2. Legislative bodies.

The State Legislature is subject to the UIPA, but Section 92F-13(5) provides an exception for “[i]nchoate and draft working papers of legislative committees including budget worksheets and unfiled committee reports; work product; records or transcripts of an investigating committee of the legislature which are closed by rules adopted pursuant to Section 21-4 and the personal files of members of the legislature.” Legislative rules provide that committee reports (as opposed to drafts) are public records.

## 3. Courts.

Section 92F-3 defining “agency” expressly excludes the “non-administrative functions of the courts,” thereby shielding the judiciary from overly broad requests to disclose its deliberative processes. However, disclosure is mandatory for “[f]inal opinions . . . as well as orders made in the adjudication of cases, except to the extent protected by section 92F-13(1).” Haw. Rev. Stat. § 92F-12(a)(2). Furthermore, rules of procedure, statutes, and constitutional standards all require the creation of public records in adjudicatory proceedings, which must be disclosed under the UIPA provisions mandating access required by other laws. *Id.* § 92F-12(a), (b)(2). The UIPA’s legislative history explains that the intent of the language excluding the judiciary’s non-administrative functions from the definition of “agency” was to preserve the established practice of granting broad access to records of court proceedings. Conf. Comm. Rep. No. 235, 14th Leg., Reg. Sess. (1988), *reprinted in* 1988 Haw. Sen. J. 689, 690. Prior to the passage of the UIPA, the judiciary relied on provisions in the Privacy Act, Chapter 92E, which summarily excluded the judiciary from the definition of “agency,” to argue that it was not subject to the open records provisions of the Sunshine Law. The UIPA more clearly defines which records of the Judiciary are accessible.

## 4. Nongovernmental bodies.

### a. Bodies receiving public funds or benefits.

The UIPA defines “agency” to include any unit of government which is owned, operated, or managed by or *on behalf of* the State or any county. This may conceivably include nongovernmental bodies receiving public funds or benefits, although a case-by-case examination is necessary to determine whether such an organization is, for purposes of the law, a government agency. *See* East-West Center, OIP Op. Ltr. No. 92-2 (Mar. 4, 1992) (discussing autonomy of East-West Center from University of Hawaii operations and federal funding as factors whose consideration in a determination of whether Center was a state agency was obviated by a statutory measure exempting the Center from classification as a state “agency”); Hawaii Humane Society as Agency; Animal Control Enforcement Records, OIP Op. Ltr. No. 09-01 (Aug. 7, 2009) (Hawaii Humane Society is “agency” for the limited purpose of compliance with the UIPA when it provides services directly related to its enforcement of state and county laws concerning animal control).

### b. Bodies whose members include governmental officials.

The UIPA is unclear about the status of nongovernmental organizations whose members include governmental officials. Again, case-by-case examination of the circumstances may determine the extent of state control and/or the extent to which such organizations perform government functions, and, hence, whether such entities qualify as government agencies.

## 5. Multi-state or regional bodies.

Because of its insular geography, issues relating to multistate or regional bodies crop up less frequently in Hawaii than on the U.S. mainland. Although not explicitly considered to date in OIP opinions, the “agency” status of such bodies for purposes of the UIPA presumably rests on a case-by-case examination of the totality of factors determining whether records requested fall within the extent to which such

agencies can be deemed state agencies subject to the UIPA. Obviously, to the extent such bodies might be federal in nature, they may be also or separately subject to the disclosure provisions of the FOIA.

Clearly, the definition of “agency” in Section 92F-12(a)(2) requires the disclosure of “[f]inal opinions, including concurring and dissenting opinions, as well as orders made in the adjudication of cases, except to the extent protected by section 92F-13(1).” This section contemplates public disclosure of the decisions and orders of advisory boards, commissions, and quasi-governmental bodies. *See also* Haw. Rev. Stat. § 91-1 (1996) (defining “agency” under HAPA to include boards and commissions authorized to adjudicate contested cases); *id.* § 91-12 (requiring decisions and orders in contested cases to be in writing with separate findings of fact and conclusions of law); Public Availability of a Transcript of an HLRB Prohibited Practice Proceeding, OIP Op. Ltr. No. 95-22 (Sept. 12, 1995) (requiring disclosure of transcript of Hawaii Labor Relations Board of a proceeding open to the public); Disclosure About Revocation of Contractors’ Licenses, OIP Op. Ltr. No. 90-28 (Aug. 23, 1990) (requiring disclosure of license revocation orders issued by Contractors License Board).

On the other hand, disclosure to federal or multistate agencies of information maintained by state agencies can be significantly restricted under the UIPA. *See* Disclosure of Names, Ethnicity, and Home Addresses of Veterans Who Reside in the State of Haw., OIP Op. Ltr. No. 92-8 (July 16, 1992) (refusing disclosure of state agency’s data to Veterans Administration).

## 6. Advisory boards and commissions, quasi-governmental entities.

Subunits of the legislature, even if limited in duration, are included within the term “agency” for the purposes of the UIPA provided that they are performing a government function. *See* Commission on Sexual Orientation and the Law, OIP Op. Ltr. No. 95-1 (Jan. 1, 1995) (finding Commission on Sexual Orientation and the Law to be an “agency” subject to the UIPA); Review Commission of State Water Code, OIP Op. Ltr. No. 94-2 (Mar. 21, 1994) (finding Water Code Commission to be an “agency” subject to the UIPA).

## 7. Others.

A nonprofit corporation that managed public, education, and government access television channels is not an “agency” subject to the UIPA. *Olelo: The Corporation For Community Television v. OIP*, 116 Hawai’i 337, 351, 173 P.3d 484, 498 (2007).

## C. What records are and are not subject to the act?

### 1. What kind of records are covered?

Section 92F-11 states the general rule that *all government records* are open to public inspection unless access is restricted or closed by law. A “government record” is broadly defined in Section 92F-3 as “information maintained by an agency in written, auditory, visual, electronic, or other physical form.” The UIPA applies to existing government records and cannot be used to compel agencies to create requested records. *Cf.* Requests for Government Records Which Do Not Exist, OIP Op. Ltr. No. 97-8 (Sept. 9, 1997) (UIPA does not apply to oral conversations unless there is a physical record of them). While all government records are subject to the general rule favoring disclosure, Section 92F-12 sets forth a non-exhaustive list of sixteen categories of records that *must* be disclosed. Haw. Rev. Stat. § 92F-12(a)(1)-(16); Conf. Comm. Rep. No. 235, 14th Leg., Reg. Sess. (1988), *reprinted in* 1988 Haw. Sen. J. 689, 690 (listing of record categories requiring affirmative disclosure is not exhaustive). These include:

- (1) Rules of procedure, substantive rules of general applicability, statements of general policy, and interpretations of general applicability adopted by the agency;
- (2) Final opinions, including concurring and dissenting opinions, as well as orders made in the adjudication of cases;

(3) Government purchasing information, including all bid results, except to the extent prohibited by Section 92F-13;

(4) Pardons and commutations, as well as directory information concerning an individual's presence at any correctional facility;

(5) Land ownership, transfer, and lien records, including real property tax information and leases of state land;

(6) Results of environmental tests;

(7) Minutes of all agency meetings required by law to be public;

(8) Name, address, and occupation of any person borrowing funds from a state or county loan program, and the amount, purpose, and current status of the loan;

(9) Certified payroll record on public works contracts except that Social Security numbers of individuals shall not be disclosed;

(10) Regarding contract hires and consultants employed by agencies:

(A) The contract itself, the amount of compensation;

(B) The duration of the contract; and

(C) The objectives of the contract;

(11) Building permit information within the control of the agency;

(12) Water service consumption data maintained by boards of water supply;

(13) Rosters of persons holding licenses or permits granted by an agency which may include name, business address, type of license held, and status of the license;

(14) The name, compensation (but only salary range for employees covered by or included in chapter 76, and sections 302A-602 to 302A-640 and 302A-701, or bargaining unit (8)), job title, business address, business telephone number, job description, education and training background, previous work experience, dates of first and last employment, position number, type of appointment, service computation date, occupational group or class code, bargaining unit code, employing agency name and code, department, division, branch, office, section, unit, and island of employment of present or former officers or employees of the agency, provided that this provision shall not require the creation of a roster of employees; and provided further that this paragraph shall not apply to information regarding present or former employees involved in an undercover capacity in a law enforcement agency;

(15) Information collected and maintained for the purpose of making information available to the general public; and

(16) Information contained in or compiled from a transcript, minutes, report, or summary of a proceeding open to the public.

Haw. Rev. Stat. § 92F-12(a)(1)-(16).

The UIPA does not alter the effect of other statutes mandating confidentiality for certain records. *See id.* § 92F-13.

## 2. What physical form of records are covered?

Section 92F-3 defines a "government record" as "information maintained by an agency in written, auditory, visual, electronic, or other physical form." The key is physical form. Disclosure of Names, Ethnicity, and Home Addresses of Veterans Who Reside in the State of Haw., OIP Op. Ltr. No. 92-8 (July 16, 1992) (construing definition of "government record"). According to the OIP, "government records" include computer diskettes containing transcripts of public City Council meetings since diskettes contain information in some physical form. Real Time Captioning of City Council Meetings and Committee Meetings, OIP Op. Ltr. No. 96-1 (June 18, 1996). How-

ever, samples of live organisms (e.g., bacterial isolated from submitted food or patient specimens) kept by the Department of Health are not "government records." Samples of Live Organisms, OIP Op. Ltr. No. 05-12 (May 5, 2005).

If an agency maintains a requested record in the form in which it is requested, it must make the record available to the requester in that form. Disclosure of Audio Cassette Tape Recordings of Public Meetings, OIP Op. Ltr. No. 97-6 (June 23, 1997) (opining that audio tape recordings are government records and audio tapes must be disclosed); Public Access to Declarations of Water Use and Electronic Mailing List of Declarants, OIP Op. Ltr. No. 90-35 (Dec. 17, 1990) (requiring disclosure in form requested if so maintained by agency); Audio Tape Recording of the Comm'n's Pub. Meeting, OIP Op. Ltr. No. 92-13 (Aug. 13, 1992) (requiring disclosure of taped meeting if available, rather than written minutes, when requested). This is a broader requirement than that of decisions construing the FOIA to only require disclosure of records in hard copy (on paper). Public Access to Declarations of Water Use and Electronic Mailing List of Declarants, OIP Op. Ltr. No. 90-35 (Dec. 17, 1990).

However, "[u]nless the information is readily retrievable by the agency in the form in which it is requested, an agency [is] not required to prepare a compilation or summary of its records." Haw. Rev. Stat. § 92F-11(c). Disclosure of Audio Cassette Tape Recordings of Public Meetings, OIP Op. Ltr. No. 97-6 (June 23, 1997) (finding that the UIPA does not require an agency create written transcripts of audio tape recordings); Form of Record; Limitations on Employer Actions, OIP Op. Ltr. No. 10-02 (Aug. 16, 2010) (University of Hawai'i is not required to provide access to faculty e-mail addresses if the form in which such information is stored cannot be segregated from a form in which faculty members and staff have a significant privacy interest and therefore is except from disclosure). By the same token, an agency does not satisfy the UIPA disclosure requirements by providing a requester with only a summary of the requested government record in lieu of the actual record. Access to "Daily Activity Reports" Maintained by the University of Hawaii at Hilo, Auxiliary Services, OIP Op. Ltr. No. 94-3 (Mar. 23, 1994).

## 3. Are certain records available for inspection but not copying?

No. Section 92-21 states that copies must be made available of any document that is open for public inspection. Section 92F-11(d) provides that each agency shall assure reasonable access to facilities for duplicating records and for making memoranda or abstracts.

### D. Fee provisions or practices.

#### 1. Levels or limitations on fees.

Section 92-21 authorizes the imposition of reasonable costs and fees of *not less than* five cents per page. Reproduction costs may include the labor cost for search and reproduction, material cost, certification cost, and other related costs. Haw. Rev. Stat. § 92-21 (Supp. 1999). In addition, the UIPA directs the OIP to adopt rules regarding fees and waivers "of fees when the public interest would be served." Haw. Rev. Stat. § 92-F42 (13) (Supp. 1999). The OIP rules help ensure uniformity of fees among agencies. The OIP Rules set the fees agencies may charge for searching for, reviewing, and segregating government records when processing requests for access to a government record under the open records law. *See* Haw. Admin. Rules. ch. 71.

#### 2. Particular fee specifications or provisions.

##### a. Search.

Most agencies allow requesters themselves to search for the records they request, depending on the type of records sought. In assessing fees for disclosure of government records, agencies may charge the following fees: \$2.50 per fifteen minutes for an agency search for the record; \$5.00 per fifteen minutes for an agency review and segrega-

tion of the record; and the actual rate that is charged to the agency by a person other than the agency for services to assist the agency in the search. Haw. Admin. Rules § 2-71-31(a). The first \$30 of fees for search, review and segregation of a record are automatically waived. *Id.*

### b. Duplication.

Duplication costs vary in amount depending on the agencies, ranging from five cents to one dollar per page. Haw. Rev. Stat. § 92-24 (imposing a fee of one dollar per page for documents in the possession of the Departments of Finance and Commerce and Consumer Affairs).

### c. Other.

#### *Computer access, printouts.*

Some agencies maintain computer terminals that are available to the public for searching records although not all agency records are maintained thereon. Many agencies also maintain current computer printouts allowing the public to search records maintained by the agency in at least certain computer files. Nevertheless, at least some major agencies (and probably most agencies) still do not make records available on computer disks or provide computer printouts of data requested. Such practices are of clearly dubious legality under the UIPA.

There is only limited public online, off-premise access to government records themselves. The services currently available through HAWAII FYI, the state-sponsored online network, are free. Because the State is in the process of phasing out HAWAII FYI in order to move toward internet access of government records, information currently available on HAWAII FYI is limited to access of a few government bulletin boards, the State and University of Hawaii library catalog system and the legislative bill tracking system. The State government web page, found at <http://www.ehawaii.gov.org>, currently provides public access to information concerning (1) business name registration; (2) certificates of good standing; (3) freshwater game fishing application; (4) insurance licensees; (5) sex offender registry; and (6) tax licenses. The individual agency web pages may follow the State government's trend of providing internet access to government records.

While not as convenient as internet access, the OIP provides terminal access from its office to a database of the records reports from state agencies. Presently, the database is current through 1995 and includes the following information:

- how the record is stored and retrieved;
- the name, business address, and telephone number of the officer in charge of the record;
- the retention period for the record;
- whether the record is public or confidential;
- whether it is a personal record;
- the legal authority for maintaining the record; and
- uses of the record, and the categories of routine users of the record.

See Haw. Rev. Stat. § 92F-18(b) (1996).

#### *Microfiche/Microfilm.*

Some agencies make microfiche directly available to members of the public wishing to search their records. Many use microfiche or microfilm to consolidate and reduce the volume of records they must maintain. See Haw. Rev. Stat. § 92-24 (1996) (allowing agencies to microform records). After placing records on microfiche or microfilm, agencies may then destroy the originals provided they first receive approval from the State Comptroller, who has the discretion to require

that the originals be deposited with another agency or with a research library, including the State Archives. Haw. Rev. Stat. § 92-31.

#### *Non-print audio or audio-visual records.*

Section 92-21 mentions fees for copies of photographs. Otherwise, there are no special provisions on audio, film, or video records, although some agencies apparently still refuse to make audio and video records, i.e., of meetings, available to the public. See *Burnham Broad. Co. vs. County of Hawaii*, Civ. No. 92-0161 (Haw. 3d Cir., filed Feb. 14, 1992) (refusing to release 911 tapes); Audio Tape Recording of Comm'n's Pub. Meeting, OIP Op. Ltr. No. 92-13 (Aug. 13, 1992) (requiring release of audio tape of meeting rather than written minutes when requested if available in audio tape).

### 3. Provisions for fee waivers.

Under the OIP Rules, an agency must waive the first \$30 of fees for any search, review and segregation of a record. Haw. Admin. Rules § 2-71-31(b)(3). Additionally, an agency must waive \$60 of fees when a request for waiver is supported by a statement of facts which includes the requester's identity and the agency finds that the waiver of fees is in the public interest. Haw. Admin. Rules § 2-71-32(a). A waiver of fees is in the public interest when:

- The requested record pertains to the operation or activities of an agency; however, the agency shall not consider the record's relative importance to the public in applying this subsection;
- The record is not readily available in the public domain; and
- The requester has the primary intention and the actual ability to widely disseminate information from the government record to the general public at large.

*Id.* § 2-71-32(b). Moreover, the OIP has stated that the cost of redacting information may not be transferred to the requester where the agency chooses to incorporate confidential information into a public record. Department of Human Services Fair Housing Decisions on Eligibility for General Assistance Benefits, OIP Op. Ltr. No. 00-02 (May 23, 2000).

### 4. Requirements or prohibitions regarding advance payment.

The OIP Rules allow agencies to require advance payments. Haw. Admin. Rules § 2-71-19. An agency may require prepayment of fifty percent of the estimated fees that exceed \$30 for searching for, reviewing and segregating government records. *Id.* § 2-71-19(b)(1). An agency may require prepayment of one hundred percent of estimated fees for other services to prepare and or transmit the government record and outstanding fees from previous requests. *Id.* § 2-71-19(b)(2), (3).

The Sunshine Law implicitly requires advance payment. Haw. Rev. Stat. § 92-21 (requiring agency to furnish copies "upon the payment of the reasonable cost[s] of reproduc[tion]"). Section 91-2 (HAPA) allows agencies to make their own rules regarding fees and collection thereof.

### 5. Have agencies imposed prohibitive fees to discourage requesters?

The OIP Rules provide that the fees "are not intended to obstruct public access to . . . records, but rather are intended to allow agencies to recover some costs in providing access . . ." Haw. Admin. Rules § 2-71-1(2). Section 92-21 sets a minimum charge of five cents per page for most records. When an individual complained that a \$1.00 per page fee for copies charged by the Department of Transportation was excessive, the ombudsman noted that the Sunshine Law allows charges for the "reasonable cost" of such copies. Subsequently the department reduced its copy fee to twenty-five cents per page. Ombudsman Op. No. 82-860 (1982). Section 92-28 now limits such increases or decreases to fifty percent "in order to maintain a reasonable relation between the revenues derived from such fee or nontax revenue and the

cost or value of services rendered . . . .”

### E. Who enforces the act?

The UIPA requires government agencies to promulgate rules and regulations to implement the law. *Id.* § 92F-18. Its passage also funded the Office of Information Practice, which is a division of the Lieutenant Governor’s Office. Haw. Rev. Stat. § 92F-41 (Supp. 1999).

#### 1. Attorney General’s role.

Not specified.

#### 2. Availability of an ombudsman.

The ombudsman, who is appointed by the legislature, has jurisdiction to investigate the administrative “acts of agencies.” Haw. Rev. Stat. § 96-5; *see generally id.*, ch. 96 (describing functions of the Office of Ombudsman).

#### 3. Commission or agency enforcement.

The UIPA requires the OIP to disseminate information on access. Haw. Rev. Stat. § 92F-42(11) (Supp. 1999). To facilitate dissemination of information on government records to the public, the OIP maintains a computerized database of the records reports received from state agencies. *Id.* § 92F-18(b) (requiring agencies to submit to OIP annual reports on records they maintain and on requests for access received). This allows public users of the state’s computerized information network to access statistical information, including “the percentage of each agency’s records that are public or confidential, the number of written record inquiries received by the agency, and the number granted or denied in the previous fiscal year.” OIP, *RRS to be Available on HAWAII FYI*, OIP Openline (newsletter), July 1992, at 1.

### F. Are there sanctions for noncompliance?

Under the UIPA, an individual can either appeal a denial of access to a government record, including personal records, to the OIP pursuant to Haw. Rev. Stat. § 92F-15.5 or bring an action against the agency in circuit court pursuant to Haw. Rev. Stat. § 92F-15.

## II. EXEMPTIONS AND OTHER LEGAL LIMITATIONS

### A. Exemptions in the open records statute.

#### 1. Character of exemptions.

##### a. General or specific?

All but two of the exemptions in Chapter 92F are specific. *See* Haw. Rev. Stat. § 92F-13.

##### b. Mandatory or discretionary?

Because the law supports disclosure, exemptions from disclosure are basically discretionary. Section 92F-13 provides that the act “shall not require disclosure of” five categories of records. Agencies or third parties attempting to block disclosure bear the burden of proof to justify nondisclosure. Haw. Rev. Stat. § 92F-15(c). Criminal penalties are only enforceable against those disclosing “confidential information explicitly described by specific confidentiality statutes.” *Id.* § 92F-17(a).

As an evidentiary matter, the OIP has opined that the exemptions in section 92F-13 do not afford a basis to object to a subpoena or discovery request under the rules of pretrial discovery. Disclosure of Patient Medical Records in Response to Clerk-Issued Subpoenas, OIP Op. Ltr. No. 95-16 (July 18, 1995).

##### c. Patterned after federal Freedom of Information Act?

The exemptions are not tightly patterned after those in the FOIA, 5 U.S.C.A. § 552 (1996 and Supp. 2000), although the OIP frequently turns to the FOIA, its legislative history, and federal case law for guidance in interpreting the scope of the UIPA exceptions.

## 2. Discussion of each exemption.

Section 92F-13 enumerates five grounds for exempting government records from disclosure, inspection, and/or duplication upon request. More than one ground for exemption may apply to any particular record. These grounds for exempting disclosure can never be used to preclude disclosure of the specific types and categories of documents listed in Section 92F-12.

*a. Government records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy.* Haw. Rev. Stat. § 92F-13(1) (1996).

Under Section 92-50 (repealed), public records did not include records deemed to invade any unconvicted individual’s right of privacy. Now, under Section 92F-2 and Section 92F-14, privacy interests do not determine whether a record is a “public record”; instead, government records to which privacy interests attach are “personal records.” Haw. Rev. Stat. § 92F-3. An individual’s privacy interest and the public’s interest in access are weighed against each other to determine whether the record is exempted from disclosure. Accordingly, while personal records of convicted individuals may be protected from disclosure, disclosure of a record may not constitute a clearly unwarranted invasion of personal privacy if the public interest outweighs the privacy interest of the individual. *Id.* § 92F-14(a). An “individual” is defined by statute as a natural person. *Id.* § 92F-3; *Whether Private Donor Records of the University of Hawaii Foundation Are Subject to Public Disclosure*, OIP Op. Ltr. No. 97-3 (Apr. 7, 1997) (finding that individual donors were “individuals” who had privacy interests under the UIPA, but corporations, partnerships, business trusts and associations were not “individuals”). Moreover, generally only a *living* individual to whom a record refers may have a privacy interest in that record. *Photograph of Deceased Former Employee*, OIP Op. Ltr. No. 97-2 (Mar. 1, 1997).

Section 92F-14(b) lists some examples of information in which individuals have a significant privacy interest. These include:

- Information relating to medical, psychiatric, or psychological history, diagnosis, condition, treatment, or evaluation, other than directory information while an individual is present at such facility;
- Information identifiable as part of an investigation into a possible violation of criminal law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;
- Information relating to eligibility for social services or welfare benefits or to the determination of benefit levels;
- Information in an agency’s personnel file, or applications, nominations, recommendations, or proposals for public employment or appointment to a governmental position, except information relating to the status of any formal charges against the employee and disciplinary action taken or information disclosed under Section 92F-12(a)(14) [name, job title, compensation, etc.] and specific information related to employment misconduct that results in employee suspension or discharge;
- Information relating to an individual’s non-governmental employment history except as necessary to demonstrate compliance with requirements for a particular government position;
- Information describing an individual’s finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or credit worthiness;
- Information compiled as part of an inquiry into an individual’s fitness to be granted or to retain a license, except: (A) the record of any proceeding resulting in the discipline of a licensee and the grounds for discipline; (B) information on the current place of employment and required insurance coverage of licensees; and (C) the record of complaints including all dispositions;

- Information comprising a personal recommendation or evaluation; and
- Social security numbers.

Haw. Rev. Stat. § 92F-14(b).

The OIP's written advisory opinions have frequently considered privacy interests of individuals in determining whether denial of access to agency records is supportable. *See, e.g.*, Public Access to City Ethics Commission Advisory Opinions, OIP Op. Ltr. No. 96-2 (July 16, 1996) (identities of persons referred to in City Ethics Commission advisory opinions and identities of requesters of such opinions are protected from disclosure); Ethics Advisory, OIP Op. Ltr. No. 07-09 (May 11, 2007) (requiring disclosure of Ethics Commission's advisory opinion identifying employee whom the Commission concluded had violated ethics laws, where employee was not suspended or discharged for that misconduct); Workers' Compensation Records, OIP Op. Ltr. No. 10-05 (Dec. 3, 2010) (with the exception of disputed claims on which a final decision has been issued, an individual has a significant privacy interest in the fact that he or she has filed a workers' compensation claim).

Occasionally, the OIP recommends redaction of personal information whose disclosure would constitute an unwarranted invasion of privacy and disclosure of the remaining portions of government records. *See, e.g.*, Senior Mailing List, OIP Op. Ltr. No. 99-6 (Oct. 25, 1999) (disclosing home addresses of senior citizens would constitute an unwarranted invasion of personal privacy and would not shed light on the workings of the government); Applicant Waiting Lists for Section 8 Program Rent-Subsidized Housing, OIP Op. Ltr. No. 92-11 (Aug. 12, 1992) (individuals have a significant privacy interest in information that would reveal that their income is equal to or less than the minimum required for subsidized rent); Public Access to Names and Locations of Inmates Confined in State Correctional Facilities, OIP Op. Ltr. No. 89-14 (Dec. 15, 1989) (disclosing Social Security numbers would say nothing concerning inmates' presence at a facility nor conduct of Corrections Department). *But see* Status of Certified Payroll Records on Public Works Contracts, OIP Op. Ltr. No. 89-8, at 4 (Nov. 20, 1989) (requiring disclosure without sanitization of certified payroll records pursuant to Section 92F 12(a)(9)), *reconfirmed* by Reconsideration of OIP Opinion Letter No. 89-8, OIP Op. Ltr. No. 97-7 (July 18, 1997).

*b. Government records pertaining to the prosecution or defense of any judicial or quasi-judicial action to which the State or any county is or may be a party, to the extent that such records would not be discoverable.* Haw. Rev. Stat. § 92F-13(2).

The exception allows withholding of traffic accident data that was compiled or collected for purposes of a federal program identified in section 409 of Title 23 of the United States Code to which the discovery and evidentiary privilege would apply. Traffic Accident Data, OIP Op. Ltr. No. 10-04 (Nov. 3, 2010).

The OIP has interpreted this exception to encompass the state's refusal to disclose settlement agreements with some but not all of the defendants in ongoing litigation concerning Aloha Stadium (site of the Pro Bowl). Public Access to Aloha Stadium Litig. Settlement Agreements, OIP Op. Ltr. No. 89-10 (Dec. 12, 1989) (requiring final resolution before disclosure to media). More recently, however, the OIP noted that this exception does not protect from disclosure records that an agency merely fears will be used in *future* litigation. Document Reviews Prepared by the Comm'n on Persons With Disabilities, OIP Op. Ltr. No. 92-5 (June 16, 1992) (refusing to validate denial of access to reports based on agency's concern that documents would be used in litigation against government agencies failing to comply with federal physical access laws).

Nor does the exception prevent disclosure of general policies of law enforcement conduct, including standards for police conduct, HPD Standards of Conduct, OIP Op. Ltr. No. 91-3 (Mar. 22, 1991), and for

state corrections officials, Standards of Conduct of the Dep't of Corrections, OIP Op. Ltr. No. 92-1 (Feb. 21, 1992) (holding disclosure does not frustrate legitimate government function).

However, the OIP has opined that the agency is not required to disclose internal memoranda nor an internal work order which contain information protected by attorney work product privilege. Request for Records Containing Attorney Work Product, OIP Op. Ltr. No. 98-3 (May 11, 1998) (finding that the documents were work product that would not be discoverable pursuant to Rule 26 of the Hawaii Rules of Civil Procedure and thus, exempt from disclosure under Section 92F-13(2)).

*c. Government records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function.* Haw. Rev. Stat. § 92F-13(3).

A government agency has the discretion to withhold from public disclosure information that it maintains as part of its decision-making function pursuant to the frustration of a legitimate government function exception under Section 92F-13(3). Request for Advisory Letter, OIP Op. Ltr. No. 00-01 (Apr. 12, 2000). In recognizing the decision-making function of the agencies, the OIP has opined that disclosure of records that are both pre-decisional and deliberative would frustrate agency decision-making functions. Drafts of Correspondence and Staff Notes, OIP Op. Ltr. No. 90-8 (Feb. 12, 1990). A record is pre-decisional if it is made "antecedent to the adoption of an agency policy." Financial and Compliance Audit Prepared by Private Consultant, OIP Op. Ltr. No. 90-21 (June 20, 1990) (citing *Jordan v. Dept. of Justice*, 591 F.2d 753, 744 (D.C. Cir. 1978)). Further, a record is deliberative if it is "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal policy matters." *Id.* (citing *Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975)). The OIP, however, has recognized three categories of records that are not protected under the frustration of a legitimate government function exception. Those categories are: (1) post-decisional documents; (2) certain factual materials and (3) excepted records that are incorporated or adopted in an agency's final decision. *Id.*

An agency, however, may easily waive the privilege if it initiates discussion of the deliberative processes involved. Intra-Agency Memoranda Cited or Identified at a Pub. Meeting, OIP Op. Ltr. No. 91-22 (Nov. 25, 1991) (discussing at a public meeting an internal agency memo detailing current status of complaints held to waive agency's right to maintain confidentiality of memo pursuant to exception for disclosure likely to frustrate a legitimate government function).

Under certain circumstances, an agency may deny access to its internal policies to avoid frustration of a legitimate government function. Upon examination of general orders of the Hawaii County Police Department, the OIP invoked the following two-part test from *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051 (D.C. Cir. 1981) for determining whether sensitive material is exempt from mandatory disclosure: (1) requested document is "predominately internal" and (2) disclosure "significantly risks circumvention of agency regulations or statutes." Public Access to General Order Nos. 528, 601, 602, 604, 606, 804, and 805, OIP Op. Ltr. No. 95-13 (May 8, 1995). In applying the *Crooker* test, the OIP determined that disclosure of general orders relating to motor vehicle pursuit tactics and procedures for the use of chemical agents to disable violent subjects could significantly risk the circumvention of the law and undermine the effectiveness of such procedures. *Id.*

An agency may also deny access to the identity of persons complaining of civil law violations on the grounds that public disclosure would likely chill the agency's legitimate government function of investigating and enforcing possible violations of law because individuals would be less likely to come forward with information. *See, e.g.*, Identities of Informants, OIP Op. Ltr. No. 99-8 (Nov. 29, 1999) (Department of Land and Natural Resources could withhold the identities of informants); Identities of Complainants to Department of Health Alleging

Violations of Hawaii Labeling Laws, OIP Op. Ltr. No. 99-7 (Nov. 3, 1999) (Department of Health could withhold identities of informants by redacting the name and any information that could lead to the identification of the individual); Public Requests for City Ethics Commission Advisory Opinions, OIP Op. Ltr. No. 98-1 (Jan. 16, 1998) (finding that when an advisory opinion about a specifically named individual has been requested no amount of segregation can protect the identity of the people involved in the opinion, thus advising the City Ethics Commission to provide copies of all advisory opinions that have already been segregated for public disclosure).

In a case where the Office of State Planning had obtained confidential business information — compilation of data on the geographic location and status of rare species and ecosystems in Hawaii — from an outside source, the OIP opined that disclosure of the information would result in the impairment of the agency's ability to obtain such information and in substantial competitive harm to the outside source. Access to Information Contained in State Geographic Information System Database, OIP Op. Ltr. No. 97-9 (Dec. 17, 1997). Under those circumstances, the OIP found that such information was exempt from disclosure because the agency's inability to obtain the information would frustrate its ability to effectively carry out its planning and environmental functions. *Id.*

The OIP has determined that agency opinion surveys containing statistical and aggregate reports generated from opinion surveys are largely factual compilations that must be made available to the public. State of Hawaii Management Study Reports Compiled by SMS Research & Marketing Services Inc., OIP Op. Ltr. No. 95-24 (Oct. 6, 1995). In contrast, the OIP stated that verbatim comments and opinions set forth in survey reports should be withheld under the UIPA's frustration of a legitimate government function exception because the verbatim comments are linked to individual survey respondents and would likely chill free and candid responses to survey questions. *Id.* Similarly, the OIP has concluded an agency may withhold commercial or financial information voluntarily submitted to it in response to a survey to the extent that the submitters themselves do not customarily release the information to the public, because release of such information would impair the agency's ability to get such information in the future and thus frustrate a legitimate function of the agency. Information From Survey Responses, OIP Op. Ltr. No. 05-13 (May 23, 2005).

When the government invokes this exception to the UIPA's general rule mandating disclosure, it is important to weigh against its assertion the public policies supporting disclosure, which aim to facilitate oversight of government operations. Applicability of UIPA to State Fin. Assistance Programs Records, OIP Op. Ltr. No. 89-5 (Nov. 20, 1989) (balancing relationship of government with loan applicants—which government alleged was threatened by the release of financial information concerning private sector companies receiving publicly financed loans—against the public's prevailing interest in its ability to scrutinize government agencies' handling of public funds).

The OIP has also opined that this exemption and the exemption under Section 92F-13(4) allows an agency to withhold access to government records that are within the scope of the attorney-client privilege or attorney work-product doctrine. Access to Timesheets of Deputy Attorneys General, OIP Op. Ltr. No. 96-3 (Aug. 12, 1996) (finding that timesheets prepared by state deputy attorneys must be made available for inspection and copying after segregating the specific nature of the work).

Also in the litigation context, OIP has opined that an agency may withhold the terms of an agency's settlement agreement under this exception, but only while the agency is engaged in ongoing settlement negotiations with similarly situated defendants. See Aloha Stadium Settlement Agreements, OIP Op. Ltr. No. 89-10 (Dec. 12, 1989). The exception ceases to apply once a settlement is final. See *id.* OIP applied such reasoning to conclude that the disclosure is required of amounts paid by Kauai County under its private liability insurance policies to settle claims against the County related to the Ka Loko

Dam breach. Settlement Proceeds paid by County's Private Insurers, OIP Op. Ltr. No. 10-01 (July 28, 2010). The disclosure requirement is not diminished by the fact that the settlement proceeds were paid out of private insurance proceeds as opposed to money from the County's coffers, nor that the settlement agreement contained a confidentiality clause. *Id.*

While records requests place an administrative burden on agencies, according to the OIP, those administrative burdens do not constitute a frustration of a legitimate government purpose. Monthly Outstanding Checks Reports, OIP Op. Ltr. No. 98-4 (June 17, 1998); see *State Org. of Police Officers v. Soc'y of Professional Journalists*, 83 Haw. 378, 394-96, 927 P.2d 386, 402-04 (1996) (stating that the UIPA contains no exception from disclosure for requests that an agency deems too burdensome).

*d. Government records which, pursuant to state or federal law including an order of any state or federal court, are protected from disclosure.* Haw. Rev. Stat. § 92F-13(4).

The OIP has construed this exemption to include confidentiality rules promulgated under the state constitutional provision that protects the Judicial Selection Commission's deliberative processes. Judicial Selection Comm'n's List of Nominees to Fill Judicial Vacancy, OIP Op. Ltr. No. 92-3 (Mar. 19, 1992) (upholding Haw. Const. art. VI, § 4 as state law protecting the Commission's deliberative processes and nominee lists submitted to the governor from disclosure but suggesting — without asserting jurisdiction to make such a decision — that non-deliberative records of the Commission should be disclosed notwithstanding the priority of the constitutional provision over the UIPA).

Court orders frequently bar disclosure otherwise sanctioned by the UIPA. Although the OIP recommended disclosure of records pertaining to sexual harassment charges filed against a University of Hawaii faculty member, Disclosure of Sexual Harassment Complaint and Disciplinary Action Taken Against Univ. of Haw. Faculty Member, OIP Op. Ltr. No. 90-12 (Feb. 26, 1990), a court subsequently ordered the university administration not to disclose the identity of the individual faculty member against whom charges had been filed and disciplinary action taken. The basis for the court's order, superseding disclosure otherwise mandated by the UIPA, lay in the collective bargaining agreement between the faculty union and the university administration. Order Granting Preliminary Injunction, Feb. 7, 1991, *Hawaii Gov't Employees' Ass'n v. University of Haw.*, Civ. No. 91-0074-01 (Haw. 1st Cir., filed Jan. 11, 1991).

*e. Inchoate and draft working papers of legislative committees including budget worksheets and unfiled committee reports; work product; records or transcripts of an investigating committee of the legislature which are closed by rules adopted pursuant to [S]ection 21-4 and personal files of members of the legislature.* Haw. Rev. Stat. § 92F-13(5).

This provision clearly protected from disclosure a Senate committee report which a majority of the committee members had refused to endorse. Unfiled Senate Comm. Report, OIP Op. Ltr. No. 90-19 (May 23, 1990).

## B. Other statutory exclusions.

There are many other, albeit narrow, statutory exclusions. These are often found in the enabling and organic statutes for state agencies, in statutes governing licensing, and in federal statutes governing state-administered programs.

## C. Court-derived exclusions, common law prohibitions, recognized privileges against disclosure.

Probably the most significant of these is the "deliberative process privilege" protecting agencies' policymaking and adjudicative processes. See Haw. Rev. Stat. § 92F-13 (4) and (5). Also significant are evidentiary privileges shielding undiscoverable matters from disclosure. See Haw. Rev. Stat. § 92F-13(2); see also Report on Claim Against the

State, OIP Op. Ltr. No. 92-14 (Aug. 13, 1992) (discussing attorney-client and attorney work product privileges as grounds supporting nondisclosure).

**D. Are segregable portions of records containing exempt material available?**

Yes. The director of the OIP “[s]hall adopt rules that set forth the fees and other charges that may be imposed for . . . segregating disclosable records[.]” Haw. Rev. Stat. § 92F-42(13). The OIP often recommends that agencies disclose records after excising information that might be protected under one of Chapter 92F’s exemptions.

**E. Homeland Security Measures.**

The UIPA does not address this topic.

### III. STATE LAW ON ELECTRONIC RECORDS

**A. Can the requester choose a format for receiving records?**

No, according to the OIP the appropriate format is determined on a case-by-case basis.

**B. Can the requester obtain a customized search of computer databases to fit particular needs?**

Yes, the OIP provides that address and phone numbers be given.

**C. Does the existence of information in electronic format affect its openness?**

No. Section 92F-11 states the general rule that *all government records* are open to public inspection unless access is restricted or closed by law. A “government record” is broadly defined in Section 92F-3 as “information maintained by an agency in written, auditory, visual, *electronic*, or other physical form.” *Id.*

**D. How is e-mail treated?**

On a case-by-case basis. In other words, accessibility depends on the substance of the communication and not its form. *See Haw. Rev. Stat. Sec. 92F* for analysis.

**1. Does e-mail constitute a record?**

There is no statutory or case law addressing this issue.

**2. Public matter on government e-mail or government hardware**

There is no statutory or case law addressing this issue.

**3. Private matter on government e-mail or government hardware**

There is no statutory or case law addressing this issue.

**4. Public matter on private e-mail**

There is no statutory or case law addressing this issue.

**5. Private matter on private e-mail**

There is no statutory or case law addressing this issue.

**E. How are text messages and instant messages treated?**

There is no statutory or case law addressing this issue.

**1. Do text messages and/or instant messages constitute a record?**

There is no statutory or case law addressing this issue.

**2. Public matter message on government hardware.**

There is no statutory or case law addressing this issue.

**3. Private matter message on government hardware.**

There is no statutory or case law addressing this issue.

**4. Public matter message on private hardware.**

There is no statutory or case law addressing this issue.

**5. Private matter message on private hardware.**

There is no statutory or case law addressing this issue.

**F. How are social media postings and messages treated?**

There is no statutory or case law addressing this issue.

**G. How are online discussion board posts treated?**

There is no statutory or case law addressing this issue.

**H. Computer software**

There is no statutory or case law addressing this issue.

**1. Is software public?**

There is no statutory or case law addressing this issue.

**2. Is software and/or file metadata public?**

There is no statutory or case law addressing this issue.

**I. How are fees for electronic records assessed?**

There is no statutory or case law addressing this issue.

**J. Money-making schemes.**

There is no statutory or case law addressing this issue.

**1. Revenues.**

There is no statutory or case law addressing this issue.

**2. Geographic Information Systems.**

There is no statutory or case law addressing this issue.

**K. On-line dissemination.**

There is no statutory or case law addressing this issue.

### IV. RECORD CATEGORIES — OPEN OR CLOSED

Specific record categories listed in Section 92F-12 must be disclosed regardless of the applicability of grounds for applying any of the policy-based exemptions enumerated in Section 92F-13.

*Other categories:*

*Civil Investigations.*

Section 92F-13(2) excepts from disclosure government records pertaining to the prosecution or defense of any judicial or quasi-judicial action to which the State or any county is or may be a party to the extent that such records would not be discoverable. Section 92F-13(3) excepts from the UIPA’s disclosure requirement government records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function. *See, e.g.,* Identities of Complainants to Department of Health Alleging Violations of Hawaii Labeling Laws, OIP Op. Ltr. No. 99-7 (Nov. 3, 1999) (Department of Health could withhold identities of informants by redacting the name and any information that could lead to the identification of the individual).

Section 96-9 requires the Ombudsman to “maintain secrecy” in respect to all matters and identities of complainants or witnesses.

Investigative reports are confidential if their disclosure would likely interfere with agency law enforcement activities, frustrate a legitimate government function, or reveal deliberative processes. An examina-

tion of all factors is necessary to determine whether such reports must be disclosed. *See, e.g.*, RFO 98-004 - Honolulu Police Department; Request for Opinion on *The Honolulu Advertiser*; Request for Internal Affairs Reports, OIP Op. Ltr. No. 98-5 (Dec. 20, 1998) (opining that redacting portions of the report is appropriate to protect privacy interests and to prevent frustrating the agency's ability to conduct full and accurate investigations); DLNR Investigation Report Concerning the Pacific Whale Foundation, OIP Op. Ltr. No. 91-9 (July 18, 1991) (focusing on possible legal action as grounds for precluding disclosure of Department of Land and Natural Resources investigational report to a state legislator); Investigative Reports Concerning Molokai Ranch Ltd. and Perreira Ranch, OIP Op. Ltr. No. 91-6 (May 2, 1991) (holding that Department of Agriculture investigative reports concerning corporate agricultural operations are disclosable because the reports did not reveal confidential sources, deprive anyone of a right to an impartial adjudication, or reveal enforcement techniques or procedures).

On the other hand, in addressing access to an investigative report, the OIP has opined that an individual who filed a complaint with the Maui Police Commission must be permitted access to the Commission's investigative report under Part III of the UIPA, which permits individuals to access their own personal records. Disclosure of Police Commission File to Complaining Party, OIP Op. Ltr. No. 95-19 (Aug. 1, 1995). Upon finding that the investigative report was the complainant's and the officer's personal record, the OIP determined that the complainant could inspect and copy the record. *Id.*

#### *License and Permit Applications.*

Section 92F-14(b)(7) provides that "[i]nformation compiled as part of an inquiry into an individual's fitness to be granted or to retain a license" is information in which an individual has a substantial privacy interest, but excludes: (a) the record of disciplinary proceedings, (b) information on the current place of employment and required insurance coverage, and (c) the record of complaints. *Cf.* Access to Contractors License Application Experience Certificates Prior to the Contractors License Board Approval of the Application, OIP Op. Ltr. No. 97-10 (Dec. 30, 1997) (finding a significant privacy interest in experience certificates submitted with an application for a contractors license); Legislative Access to Professional and Vocational Licensing Application Data, OIP Op. Ltr. No. 90-10 (Feb. 26, 1990) (prohibiting even interagency disclosure and citing privacy concerns of both the UIPA and prior law); *c.f.* Applications for Appointments to Boards and Commissions, OIP Op. Ltr. No. 91-8 (June 24, 1991) (allowing interagency disclosure to the legislature of application information submitted to the governor's office but requiring confidentiality pursuant to privacy interests of applicants). *But see Painting Industry of Hawaii Market Recovery Fund v. Alm*, 69 Haw. 449, 453-54, 746 P.2d 79, 82 (1987) (refusing to protect licensing violation settlement agreement); Clarification of OIP Op. Ltr. No. 91-1, OIP Op. Ltr. No. 91-11 (July 30, 1991) (requiring disclosure pursuant to Section 452-9 governing applications received by the Board of Massage), superseding Public Access to Massage Therapist License Applications, OIP Op. Ltr. No. 91-1 (Feb. 15, 1991) (refusing access to pending applications under Section 92F-14(b)(7)). The law does not protect from disclosure "[r]osters of persons holding licenses or permits granted by an agency . . ." Haw. Rev. Stat. § 92F-12(a)(13) (Supp. 1999) (requiring disclosure).

The Professional and Vocational Licensing Division of the State Department of Commerce and Consumer Affairs licenses various professionals. It maintains a computerized roster showing the name, address, and type of license held by each individual licensee. The names and type of license held by each individual are matters of public record. Att'y Gen. Op. Ltr. No. 84-13 (Dec. 18, 1984); see also OIP Op. Ltr. No. 91-11 (July 30, 1991) (concerning statutorily mandated disclosure of massage therapist license applications).

Vessel Registration Application forms are generally a matter of public record provided that certain personal information is segregated. Vessel Registration Information, OIP Op. Ltr. No. 99-3 (June 1,

1999). If an application is granted, the vessel registration applications may be disclosed only after segregation of the home address, home telephone number, date of birth and citizenship. *Id.* If the application is not granted, the name of the applicant should also be redacted. *Id.*

No comparable privacy interest exists for corporate entities. For instance, the Hawaii courts held that the City Building Department must permit public inspection of building permit applications, including all plans, specifications, and other documentation submitted to it, i.e., in connection with a condominium development. *Pauoa-Pacific Heights Community Group vs. Building Dept.*, Civ. No. 59632 (Haw. 1st Cir. Nov. 7, 1979). The UIPA now explicitly requires the disclosure of building permit information within the control of an agency. Haw. Rev. Stat. § 92F-12(a)(11). If architectural plans are protected by copyright, additional precautions may be necessary, but the copyright laws are not, in themselves, grounds for nondisclosure. Reconsideration of OIP Opinion Letter No. 90-20 Regarding Public Inspection and Duplication of Building Plans and Permit Applications, OIP Op. Ltr. No. 99-5 (Oct. 19, 1999) (reaffirming prior opinion that section 92F-12(a)(11) which mandates disclosure of building permit information includes information submitted before and after the issuance of a building permit); Public Inspection and Duplication of Building Plans and Permit Applications, OIP Op. Ltr. No. 90-20 (June 12, 1990).

#### **A. Autopsy reports.**

Autopsy reports prepared by the Medical Examiner are public records. Honolulu Corp. Counsel Op. No. 61-25; *see also* Public Access to Ambulance Report Form Concerning a Deceased Individual, OIP Op. Ltr. No. 91-33 (Dec. 31, 1991) (stating that privacy interest applies only to living individuals and allowing access). *But see* Welfare Records of Deceased Individual, OIP Op. Ltr. No. 90-26 (July 19, 1990) (holding that death does not extinguish confidentiality and limited disclosure pursuant to Haw. Rev. Stat. § 346-10 of welfare records); Disclosure of Autopsy Reports, OIP Op. Ltr. No. 91-32 (Dec. 31, 1991) (withholding access pending completion of law enforcement investigation).

#### **B. Administrative enforcement records (e.g., worker safety and health inspections, or accident investigations)**

Hawaii's occupational safety and health law, Haw. Rev. Stat. § 396-14, provides that certain records and reports created by the Department of Labor and Industrial Relations ("DLIR") regarding the administration and enforcement of occupational safety and health laws cannot be used as evidence or as discovery in civil actions growing out of any matter mentioned in the record, determination, statement, or report. Because this information would not be discoverable during civil actions, the general public is similarly barred access to this information pursuant to Haw. Rev. Stat. § 92F-13(4), which provides an exception to disclosure for government records that are protect from disclosure under state or federal law. Accordingly, records of any determinations in Haw. Rev. Stat. § 396-11 and/or an informant's identity and information supplied to DLIR in connection with an investigation of alleged industrial law violations. Disclosure of Occupational Safety Records, OIP Op. Ltr. 95-17 (July 26, 1995).

##### **1. Rules for active investigations.**

Per HRS § 92F-22(4), the Regulated Industries Complaints Office, Department of Commerce and Consumer Affairs may withhold access to its investigative report and other related materials where an administrative proceeding is pending. RICO Investigative Records, OIP Op. Ltr. No. 09-03 (Sept. 25, 2009).

##### **2. Rules for closed investigations.**

There is no authority directly on point, but OIP's opinions have narrowly construed the exception to disclosure for materials relating to an open investigation. *See, e.g.*, RICO Investigative Records, OIP

Op. Ltr. No. 09-03 (Sept. 25, 2009). This suggests that materials relating to completed investigations would be subject to disclosure.

### C. Bank records.

Individuals have a “significant privacy interest” in “information describing [their] finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or credit worthiness.” Haw. Rev. Stat. § 92F-14(b)(6). Hawaii’s case law on the subject, however, shows that this particular privacy interest is not very “significant,” apparently has little constitutional basis, and can be easily outweighed by public interests. In the case of *State v. Klattenhoff*, 71 Haw. 598, 801 P.2d 548 (1990), the court held that the defendant’s bank records were business records owned by the bank and that their subpoena did not violate either state or federal privacy rights. *Id.* at 606, 801 P.2d at 552 (citing *U.S. v. Miller*, 425 U.S. 435, 440-43 (1976)). Additionally, in the pre-UIPA case of *Nakano v. Matayoshi*, 68 Haw. 140, 706 P.2d 814 (1985), the court upheld a county ethics commission requirement that regulatory employees disclose their financial records by noting that “the expectation of financial privacy of public ‘officials having significant discretionary or physical powers’ is not protected to the same extent as that of other citizens.” *Id.* at 149, 706 P.2d at 819.

### D. Budgets.

Budget information submitted by organizations granted licenses to operate special treatment facilities,

and personal information about the licensee’s employees and the residents in such facilities are protected from required disclosure under the UIPA. Special Treatment Facility Information, OIP Op. Ltr. No. 89-13 (Dec. 12, 1989). The budget information is confidential commercial and financial information and Haw. Rev. Stat. § 224-5 provides that information directly or indirectly identifying a person who is a patient in a special treatment facility is confidential. *Id.*

A county budget ordinance must be available for public inspection and copying notwithstanding the fact that it contained the salaries paid to identified civil service employees. Kauai County Budget Ordinance, OIP Op. Ltr. No. 91-17 (Oct. 7, 1991).

### E. Business records, financial data, trade secrets.

Unlike the FOIA, 5 U.S.C.A. § 552(b)(4), and Hawaii’s earlier Privacy Act, Haw. Rev. Stat. ch. 92E (repealed by Chapter 92F), Chapter 92F does not expressly exclude from its disclosure requirement trade secrets and confidential or financial information obtained, upon request, from an individual. *Cf.* Honolulu Corp. Counsel Op. No. M-84-15 (Apr. 12, 1984) (holding that bid proposals containing trade secrets could be withheld). However, Section 92F-14(6) states that information describing an individual’s financial history or activities, or credit worthiness may be information in which the individual has a significant privacy interest, which must be weighed against the public interest in disclosure. Furthermore, in the case of corporations, disclosure of “confidential commercial or financial information” obtained by an agency may frustrate the agency’s ability to perform a legitimate government function. Demurrage Fee Report Forms and Invoices, OIP Op. Ltr. No. 92-9 (July 17, 1992) (refusing to shield agency reports filed by private companies to self-report demurrage fees owed for their use of government-owned harbor facilities).

### F. Contracts, proposals and bids.

Agencies need to make available for public inspection and duplication “government purchasing information including all bid results except to the extent prohibited by section 92F-13.” Haw. Rev. Stat. § 92F-12(a)(3); *compare* Public Inspection of Gov’t Contract Lump Sum Bid Price Components, OIP Op. Ltr. No. 90-15 (Apr. 9, 1990) (refusing to protect from disclosure to low bidder and public information on component prices contained in unsuccessful bids) *with* Nordic/PCL’s Subcontracts for the Convention Center, OIP Op. Ltr. No. 97-4 (Apr. 22, 1997) (costs set forth in subcontracts for the design and construc-

tion of the convention center constituted confidential commercial and financial information that is not required to be disclosed since disclosure is likely to cause the builder substantial competitive harm).

Upon request, agencies must also disclose records “[r]egarding contract hires and consultants employed by agencies: the contract itself, the amount of compensation, the duration of the contract, and the objectives of the contract.” Haw. Rev. Stat. § 92F-12(a)(10); *but see* Attachments to HVB Contract, OIP Op. Ltr. No. 92-17 (Sept. 2, 1992) (protecting under Section 92F-14(b)(6) contract information regarding individual employees’ salaries).

In 1994, OIP stated its opinion that prior to the deadline for the submission of a bid to an agency, that agency is not required to disclose the identity of persons who have received bid solicitations or submitted a bid. List of Person Attending Bidders’ Conference and Notices of Intent to Bid, OIP Op. Ltr. No. 94-26 (Dec. 15, 1994). However, after the deadline for submission such information must be made available. *Id.*

Under the UIPA’s exception for “frustration of a legitimate government function,” the State Procurement Office is not required to disclose information in protests submitted before a contract award that may identify and provide information about prospective offerors and information that may be included in their proposals. Protests Filed on Requests For Proposals, OIP Op. Ltr. No. 09-02 (Sept. 9, 2009).

Despite the fact that release of payroll information may invade the privacy of individuals involved, Section 92F-12(a)(9) requires disclosure of the certified payroll records of public works contracts except that Social Security numbers of individuals shall not be disclosed. Certified Payroll Records, OIP Op. Ltr. No. 89-8 (Nov. 20, 1989).

The OIP also opined that a community hospital must disclose the eligible charges — the amounts that a health care benefits company uses to calculate and reimburse a hospital for medical services — contained in contracts between the hospital and private health care benefits companies. Kona Community Hospital Inpatient Contracts, OIP Ltr. Op. No. 98-2 (Apr. 24, 1998). The OIP noted that an agency is not required to disclose information if (1) the information is confidential business information and (2) if doing so would frustrate the agency’s legitimate government function. *Id.*

The results under UIPA are not too different from those produced by opinions issued in years past. In one pre-UIPA incident, the Department of Health awarded a contract for the printing of its newsletter. The amount involved was under \$4,000 so that formal bidding procedures were not required. However, the department asked several companies to submit cost estimates. When an unsuccessful bidder asked the department to disclose the amount of the successful bid, the department refused. After consultation with the ombudsman, the department agreed to provide the information about the successful bid. Ombudsman Op. 82-2277.

However, when the Department of Transportation received a request for information concerning the number of persons intending to bid on a certain contract, the ombudsman, in consultation with the attorney general, determined that the names and number of persons submitting bids must be held confidential until after the Department opened the bids. Ombudsman Op. 82-67. Section 102-3 prohibits the disclosure of the names and numbers of persons who have submitted a notice of intent to bid until after the opening of bids. *Accord*, Applicability of UIPA to Aloha Tower Dev. Proposals, OIP Op. Ltr. No. 89-15, at 5 (Dec. 20, 1989) (refusing public disclosure of proposals pending execution of final negotiations and citing frustration of legitimate government function).

When Common Cause Hawaii requested access to proposals submitted to the City Housing Department pursuant to a design/bid competition, the Corporation Counsel held that such proposals are public records open to inspection unless release of the information would (a) violate personal privacy, (b) reveal trade secrets, or (c) impair present or imminent contract awards. In order to justify withholding

information, Corporation Counsel stated, “the burden is on the party to prove that the information is a trade secret.” In addition, the public’s interest in disclosure must be balanced against any reasons alleged to justify withholding of records from it. Honolulu Corp. Counsel Op. M84-15 (Apr. 12, 1984).

Non-UIPA statutory provisions may also call for disclosure. For instance, any person desiring to see the record books of an auctioneer may inspect them during regular business hours. The records must include an inventory of items offered for sale in each public auction. The state director of finance has no authority to grant or deny any person the right to inspect auctioneers’ records. Honolulu Corp. Counsel Op. M78-54 (May 31, 1978).

### G. Collective bargaining records.

Collective bargaining information is not exempt from disclosure. (1996 and Supp. 1999).

### H. Coroners reports.

Autopsy reports prepared by the Medical Examiner are public records, subject to public inspection and disclosure. Honolulu Corp. Counsel Op. No. 61-25.

### I. Economic development records.

There is no statutory or case law addressing this issue.

### J. Election records.

A voter’s full name, district/precinct designation, and voter status is open to the public. Haw. Rev. Stat. § 11-97. All other information provided on the voter registration affidavit, including the voter’s address, is confidential except for “election or government purposes.” *Id.* OIP has opined that the County Clerk is entitled under the UIPA to deny access to the General County Register to a member of the public who is not seeking the record for “election or government purposes.” OIP Ltr. Op. 04-08 (Apr. 2, 2004).

#### 1. Voter registration records.

A 1990 state law that banned public access to voter registration information was declared unconstitutional by a federal judge in December 1996. The law, Haw. Rev. Stat. § 11-14.6 was determined to violate equal protection rights by arbitrarily denying the public and media access to the records. See “Voter Records Law Ruled Unfair,” *Honolulu Advertiser*, December 17, 1996 at A-1. Representing the *Hawaii Tribune-Herald*, a Hawaii County newspaper, and other media organizations, attorney Jeffrey S. Portnoy argued for equal access to the voter registration lists for the news organizations. In striking down the law, U.S. District Court Judge David Ezra noted that the law was an “intolerable infringement” on the public’s right to know. *Id.*

In a pre-UIPA case, the City was asked but refused to allow public access to written challenges to voters’ registration and to records of an investigation into possible election fraud involving voter registration. Corporation Counsel held that the records were exempt under Section 92 (sections on privacy appealed by UIPA, Chapter 92F) but concluded that the list of stricken voters would be a public record because the public’s right to know outweighed the stricken voters’ right to privacy. Honolulu Corp. Counsel Op. M82-95 (Nov. 12, 1982).

#### 2. Voting results.

See above.

### K. Gun permits.

The names of individuals who are licensed by the Honolulu Police Department to carry concealed firearms are not a matter of public record. Names of Individuals Who Are Licensed to Carry Concealed Firearms, OIP Op. Ltr. No. 95-18 (July 28, 1995). The OIP has opined that the identities of such licensees are protected under Haw. Rev. Stat. § 134-3 which requires registration data that would

identify the individuals registering firearms be kept confidential and under Haw. Rev. Stat. § 92F-13(4) which protects disclosure of government records pursuant to state law. *Id.* Similarly, the OIP has opined that firearm permit information that identifies an individual permit by name or address is protected under Haw. Rev. Stat. § 134-3. Firearm Permits, OIP Op. Ltr. No. 07-01 (Feb. 1, 2007). Other permit information that could reasonably identify the individual permit holder, such as the individual’s social security number, fingerprints, and photograph, should also be segregated and withheld under the UIPA’s frustration exception, Haw. Rev. Stat. § 92F-13(3) to maintain the confidentiality of the individual’s identity. *Id.* The Honolulu Police Department may generally withhold information that allows the identification of individuals who have been denied permits, as well as those who did not apply for a permit, who did not complete the application process, or who were granted a permit, but allowed it to lapse without acquiring a firearm. *Id.*

### L. Hospital reports.

Information relating to medical, psychiatric, or psychological history, diagnosis, condition, treatment, or evaluation, other than directory information while an individual is present at such a facility, is information in which an individual has a significant privacy interest and may be withheld pursuant to Section 92F-13(1) unless the public interest in disclosure outweighs the privacy interest. Haw. Rev. Stat. § 92F-14(b)(1). *But see* Names and Locations of Inmates Confined in State Correctional Facilities, OIP Op. Ltr. No. 89-14 (Dec. 15, 1989) (requiring public disclosure of roster listings pursuant to § 92F-12(a)(4) (directory information concerning presence in state facility) and release date but mandating withholding of inmates’ Social Security numbers).

### M. Personnel records.

#### 1. Salary.

With respect to compensation of agency employees, the UIPA requires disclosure of only the salary range for certain employees. Haw. Rev. Stat. § 92F-12(a)(14). OIP has concluded that disclosure of the exact salaries of identifiable agency employees would constitute a clearly unwarranted invasion of personal privacy under Haw. Rev. Stat. § 92F-13(1). See Law School Accreditation Reports, OIP Op. Ltr. No. 91-15 (Sept. 10, 1991); Information About Police Officers, OIP Op. Ltr. No. 91-26 (Dec. 13, 1991); University of Hawaii Coaches Contracts, OIP Op. Ltr. No. 91-31 (Dec. 30, 1991); Salaries of Mayor’s Exempt Employees Public, OIP Op. Ltr. No. 93-10 (Sept. 2, 1993); State Enforcement Plan Public, OIP Op. Ltr. No. 93-19 (Oct. 21, 1993).

#### 2. Disciplinary records.

The UIPA provides that there is no significant privacy interest in information in an agency’s personnel file relating to disciplinary action taken against an agency employee when: the highest non-judicial grievance adjustment procedure timely invoked by the employee or the employee’s representative has concluded; a written decision sustaining the suspension or discharged has been issued after this procedure; and thirty calendar days have elapsed from the issuance of the decision. Haw. Rev. Stat. § 92F-14(b)(4). In the case of a county police department officer, the discharge of the officer is necessary for the foregoing conditions to apply. *Id.* Where information resulting in the discharge or suspension of the employee may have been removed from the employee’s personnel file under a collective bargaining agreement provision, but remains elsewhere in the agency’s files, it is subject to disclosure. Disclosure of Employee Misconduct Records, OIP Op. Ltr. No. 99-01 (Jan. 26, 1999).

#### 3. Applications.

Generally, an individual has a significant privacy interest in the information in his or her application for employment in a governmental

position. *See* Haw. Rev. Stat. § 92F-14(b)(4). As such, OIP has determined that individually identifiable about unsuccessful employment applicants, including their applications and exam scores, must be kept confidential because this information is protected by the exception to disclosure for “[g]overnment records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy.” Haw. Rev. Stat. § 92F-13(1); *see also* Executive Search Committee Report, OIP Op. Ltr. No. 89-2 (Oct. 27, 1989) (names of individuals recommended for selection in executive search report but who were not ultimately appointed to position); Certified List of Eligibles OIP Op. Ltr. No. 90-14 (Mar. 30, 1990) (identity of individuals on certified list of eligible appointees who were not appointed); Names of Nominees For Boards and Commissions, OIP Op. Ltr. No. 91-8 (June 24, 1991) (commission and board applications). The “frustration of a legitimate government function” exception may also be invoked to withhold the names of individuals who are eligible for appointment to a governmental position but ultimately not appointed. *See* Haw. Rev. Stat. § 92F-13(3); Certified List of Eligibles OIP Op. Ltr. No. 90-14 (Mar. 30, 1990). However, certain information on an application form that would not result in the “likelihood of actual identification” must be made available for public inspection. *See* Job Eligibles List and Unsuccessful Job Applicants Information, OIP Op. Ltr. No. 95-2 (Jan. 19, 1995).

#### 4. Personally identifying information.

*See* section M.3, *supra*.

#### 5. Expense reports.

There is no statutory or case law addressing this issue.

#### 6. Other.

N/A.

### N. Police records.

The government may justify a denial of a request for police records by invoking particularly one of two UIPA exemptions. It may cite Section 92F-13(2), which excepts “[g]overnment records pertaining to the prosecution or defense of any judicial or quasi-judicial action to which the State or any county is or may be a party, *to the extent that such records would not be discoverable.*” Haw. Rev. Stat. § 92F-13(2) (emphasis added). In other instances it may cite Section 92F-13(3), which excepts “[g]overnment records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function.” Haw. Rev. Stat. § 92F-13(3).

#### 1. Accident reports.

There is no statutory or case law addressing this issue.

#### 2. Police blotter.

Police blotter data concerning adult offenders do not fall under any exception to the UIPA and therefore must be disclosed. Public Access to Police Blotter Information, OIP Op. Ltr. No. 91-4 (Mar. 25, 1991). This rule applies even where the arrestee was released without charges being filed or released pending further investigation. Police Blotter Information, OIP Op. Ltr. No. 07-04 (Mar. 22, 2007).

#### 3. 911 tapes.

A 911 tape pertaining to the stabbing death of an infant, for which the infant’s mother was subsequently arrested and charged in Family Court with second degree murder, was not subject to disclosure because an agency may withhold government records that “pursuant to State or federal law including an order of any State or federal court, are protected from disclosure[.]” Request For Emergency 911 Tape, OIP Op. Ltr. No. 05-17 (Nov. 17, 2005) (quoting Haw. Rev. Stat. § 92F-13(4)). Under state law, police department records relating to proceedings filed in the Family Court are confidential unless otherwise ordered by the court. Haw. Rev. Stat. § 571-84(e).

### 4. Investigatory records.

#### a. Rules for active investigations.

An individual has a significant privacy interest in “[i]nformation identifiable as part of an investigation into a possible violation of criminal law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation.” Haw. Rev. Stat. § 92F-14(b)(2). OIP has opined that an individual’s significant personal privacy interest in information identifying the individual as a suspect in a criminal investigation is not outweighed by the public interest in disclosure. Disclosure of the Identity of a County Employee Who Is the Subject of a Criminal Investigation, OIP Op. Ltr. No. 92-19 (Oct. 7, 1992).

#### b. Rules for closed investigations.

Police reports for a closed criminal investigation which resulted in a deferred acceptance of nolo contendere plea must be made available for public inspection and copying. Disclosure of Police Reports, OIP Op. Ltr. No. 99-02 (Apr. 5, 1999). However, before disclosure, in addition to information identifying the victim and witnesses, the defendant’s social security number and home address and phone number must be redacted as information excepted from disclosure as government records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy. *Id.*

### 5. Arrest records.

Arrest logs must be disclosed. *See* Public Access to Police Blotter Information, OIP Op. Ltr. No. 91-4 (Mar. 25, 1991). There is no exception for disclosure of names of individuals who were arrested and later released without charges being filed or released pending further investigation. Police Blotter Information, OIP Op. Ltr. No. 07-04 (Mar. 22, 2007). Conviction information in the Hawai’i Criminal Justice Data Center’s database of information concern the criminal history of individuals is public, but non-conviction information, including arrest information, is confidential and can only be disclosed to certain persons or under certain circumstances as set forth in Haw. Rev. Stat. § 846-9. Access to Arrest History Information, OIP Op. Ltr. No. 97-05 (June 10, 1997).

### 6. Compilations of criminal histories.

*See* section M.5, *supra*.

### 7. Victims.

There is no statutory or case law addressing this issue.

### 8. Confessions.

A videotaped confession is not required to be available for public inspection and copying as disclosure during the investigation of the crime would frustrate the investigative function of the police department. Video-Taped Confession in Homicide Investigation, OIP Op. Ltr. No. 90-18 (May 18, 1990).

### 9. Confidential informants.

OIP has determined that the identity of confidential informants should not be disclosed, and if such information is part of investigation records that otherwise are subject to disclosure, information that reveals the identity of confidential informants should be segregated from the records disclosed. Disclosure of Closed Police Investigation Reports, OIP Op. Ltr. No. 95-21 (Aug. 28, 1995).

## 10. Police techniques.

There is no statutory or case law addressing this issue.

## 11. Mug shots.

Police Department mug shots of arrests that have been expunged by order of the Attorney General are protected from disclosure under Haw. Rev. Stat. § 92F-13(4). Police Department Mug Shots, OIP Op. LTr. No. 03-09 (June 26, 2003). However, mug shots may not be withheld due to the possibility that an expungement order may be obtained in the future. *Id.* Haw. Rev. Stat. chapter 846, which covers disclosure of criminal history record information, does not restrict the disclosure of mug shots if the arrest is less than one year old, if active prosecution of the charge remains pending, or if a conviction results. If the mug shot is disclosable, state identification numbers and dates of arrest contained are to be disclosed as well. Police Department Mug Shots, OIP Op. LTr. No. 03-09 (June 26, 2003).

## 12. Sex offender records.

Information on the Sex Offender Custody Level Review form is protected from disclosure under Haw. Rev. Stat. chapter 846. The form contains information about inmates who: (1) were charged but not convicted of a sex offense as an adult, (2) have a prior juvenile record of a sex offense, or (3) have exhibited deviant behavior while incarcerated. Sex Offender Data, OIP Op. Ltr. No. 95-11 (May 8, 1995).

## 13. Emergency medical services records.

An ambulance report about a deceased individual must be made available for public inspection. Ambulance Report About Deceased Individual, OIP Op. Ltr. No. 91-33 (Dec. 31, 1991).

### O. Prison, parole and probation reports.

The Department of Public Safety may not make a blanket denial of access to inmates for all records in their institutional files; only records constituting “reports” prepared or compiled during the criminal law enforcement process may be withheld. Withholding of Inmate Records and Regulations on Inmate Access Rights, OIP Op. Ltr. No. 05-14 (May 26, 2005). The Department of Public Safety may impose restrictions on inmates’ rights under the UIPA under the same standard applicable to the imposition of restrictions on inmates’ constitutional rights, i.e., where those restrictions are reasonably related to legitimate penal interests. *Id.*

### P. Public utility records.

Section 92F-12(a)(12) requires disclosure of “[w]ater service consumption data maintained by the boards of water supply.” Although it has not explicitly ruled on the issue, the OIP does not appear to consider Hawaii’s other public utilities—i.e., telephone, electric, and gas companies—to be government agencies whose records fall under the UIPA. *See* Proposed HECO Confidentiality Agreement Relating to Geothermal Interisland Transmission Project, OIP Op. Ltr. No. 90-2 (Jan. 18, 1990) (addressing legality of proposed confidentiality agreement between electric company and state agency without considering UIPA provisions on interagency disclosure). Information regarding usage of such other public utilities’ services could conceivably fall under Section 92F-14(b)(6), which defines information in which individuals have significant privacy interests to include information regarding their “financial . . . activities.” Disclosure of public utility records secured by government, i.e., in the course of regulating privately owned public utilities, might be precluded by Section 92F-13(3) (protecting from disclosure information whose release would frustrate a legitimate government function, which OIP has interpreted to include confidential financial information). *See* Workpapers Provided to the Consumer Advocate by Matson Navigation Co., OIP Op. Ltr. No. 91-29 (Dec. 23, 1991) (refusing disclosure of records provided to agency during petition for rate increase on grounds that disclosure of financial information would frustrate legitimate government function); *see also*

Haw. Rev. Stat. § 269-8 (2000) (requiring utilities to furnish to Public Utilities Commission upon request “all information that [the Commission] may require respecting any of the matters concerning which it is given power to investigate . . .”).

## Q. Real estate appraisals, negotiations.

### 1. Appraisals.

Airport property appraisals used by the Department of Transportation to readjust lease rents and

permit fees charged to persons using airport property must be disclosed. Haw. Rev. Stat. chapter 171 requires that appraisals be used to set negotiated lease rents and that such appraisals be available for public examination. DOT Airport Property Appraisals, OIP Op. Ltr. No. 91-10 (July 18, 1991).

### 2. Negotiations.

There is no statutory or case law addressing this issue.

### 3. Transactions.

There is no statutory or case law addressing this issue.

### 4. Deeds, liens, foreclosures, title history.

Personal information contained in the Department of Land and Natural Resources, Land Division (“DLNR”) land records that carry a significant privacy interest, such as social security numbers, home addresses, and telephone numbers, ethnicity, and dates of birth, may generally be redacted under the UIPA’s privacy exception. There generally is no public interest in disclosure of this type of information that would outweigh the privacy interest in such information. Certain other records or information in which individuals may have a significant privacy interest must be disclosed, however, where those records or information shed light on DLNR’s functions, such as its duty ensuring the genealogy of land owners and transferees. DLNR may, prior to disclosure, redact all information contained in the vital records except that information necessary to establish genealogy for purposes of DLNR’s functions. Personal Information and Vital Records in Land Records, OIP Op. Ltr. No. 07-07 (Apr. 18, 2007).

### 5. Zoning records.

Engineering reports submitted to the city department of planning and permitting (“DPP”) by a developer in connection with a subdivision application for a proposed residential development, and written comments on such reports made by the DPP, were not “government records” subject to disclosure under the UIPA prior to their acceptance by DPP. *Nuuuanu Valley Ass’n v. City & County of Honolulu*, 119 Hawai’i 90, 97-98, 194 P.3d 531, 538-39 (2008)

## R. School and university records.

### 1. Athletic records.

Records relating to the testing of student-athletes for banned substances by the Athletic Department of the University of Hawaii were partially subject to disclosure. Although OIP agreed that the student-athletes’ privacy interests protected the identity of the student-athletes, the request specifically did not seek disclosure of the names of the student-athletes. The question was therefore whether the requested information would allow the public to reasonably determine the identity of a student-athlete who had tested positive for a banned substance. OIP decided that the number of positive test results was subject to disclosure because it alone was insufficient to allow identification of a student-athlete who tested positive. However, the breakdown of the specific sanctions imposed against the student-athletes who tested positive may be withheld because very few student-athletes received the same sanction as those who tested positive for a banned substance. Student-Athlete Testing Records, OIP Op. Ltr. No. 06-03 (May 9, 2006).

## 2. Trustee records.

While this issue has not been directly addressed by the OIP, the material is typically made public. In a highly publicized case from 2003, the media requested the University of Hawaii Board of Regents' Annual Evaluation and Expectations and Performance Guidelines of then University President, Evan Dobbelle. *See* OIP Op. Ltr. No. 04-07 (March 25, 2004). The OIP issued an opinion addressing the issue of whether the Evaluation and the Expectations were public under UIPA. *Id.* The OIP opined that while President Dobbelle has a significant privacy interest in the material in question, that privacy interest is diminished by the fact that he is a public figure by virtue of his position as President of the University of Hawaii. *Id.* Upon balancing President Dobbelle's privacy interest against the public interest in knowing how the Board of Regents is performing its duties, the OIP concluded that the public interest is greater and therefore opined that disclosure of the Evaluation and Expectations would not be an unwarranted invasion of personal privacy. *Id.*

## 3. Student records.

To date, the issue under state law of unauthorized access to student records has not surfaced. The Federal Family Educational Rights and Privacy Act ("FERPA") limits disclosure of education records without the student's consent by federal funded educational institutions. *See, e.g.,* Disclosure of Records Relating to Cases Brought Under the Academic Grievance Procedures and Student Code of Conduct, OIP Ltr. Op. No. 95-3 (Feb. 27, 1995) (records associated with cases brought by the University of Hawaii under the Student Code of Conduct and Academic Grievance Procedure are "education records" protected from disclosure under the FERPA).

No specific mention is made in either Chapters 302A or 304, the latter dealing with the University of Hawaii, regarding access to or confidentiality of student and personal records. *But cf.* Haw. Rev. Stat. § 302A-1137 (1998) (makes a student's dates of attendance available to authorized police officers). Rules of college registrar's generally restrict access to student transcripts to students themselves absent a written request or authorization for release from the student. The UIPA's provisions on intra-agency access presumably govern disclosure to other school officials. State statutory provisions are minimal, at best. Primary and secondary schools are required to maintain a register of students and to forward copies of it to the Department of Education. Haw. Rev. Stat. § 302A-1144 (1998). The Department of Education is required to provide student health record forms for immunization and physical examination to schools, private physicians, advanced practice registered nurses, and authorized personnel of the Department of Health. Haw. Rev. Stat. § 302A-1160 (1998).

The OIP has addressed the issue of access to student applications. In an opinion to the University of Hawaii William S. Richardson School of Law, the OIP advised the law school not to disclose the identities of individuals who have applied for admission to Law School without the written consent of such individuals. Identity of Applicants for Admission to the Law School, OIP Op. Ltr. No. 95-10 (May 4, 1995). The OIP opined that public access to such information would constitute a clearly unwarranted invasion of personal privacy. *Id.* Moreover, the OIP cautioned that disclosure of the identities of applicants should be limited to only those individuals within the Law School or University with an official "need to know" in performance of their duties. *Id.*

## 4. Other.

The alleged victim of sexual assault requested access to a written report of the assault kept by the University of Hawaii Campus Security office. Attached to the report was a photograph of the person alleged to have committed the assault and three statements prepared by witnesses. OIP concluded that the report should be disclosed to the requester, who is the alleged victim, because the report is the personal record of the requester and none of the exemptions from disclosure provided under part III of the UIPA applied. However, the report is

a joint personal record, i.e., also a personal record of the alleged assailant and of each of the witnesses, and certain personal information in the report is only "about" these individuals and not "about" the requester. The personal information that is not "about" the requester is not subject to disclosure as a personal record of the requester, and must be analyzed as a general record request under part II of the UIPA. Disclosure would result in clearly unwarranted invasion of the personal privacy of the other parties to the report, and thus, this personal information may be redacted from the copy of the report made available to the requester. University of Hawaii Campus Security Records, OIP Op. Ltr. No. 05-10 (Apr. 25, 2005).

## S. Vital statistics.

### 1. Birth certificates.

Haw. Rev. Stat. § 338-18 restricts the inspection and copying of, and disclosure of information contained in, vital statistics records to certain persons.

### 2. Marriage & divorce.

Haw. Rev. Stat. § 338-18 restricts the inspection and copying of, and disclosure of information contained in, vital statistics records to certain persons.

### 3. Death certificates.

Haw. Rev. Stat. § 338-18 restricts the inspection and copying of, and disclosure of information contained in, vital statistics records to certain persons.

### 4. Infectious disease and health epidemics.

Medical opinions recorded in records maintained by a treatment center operated by the Research Corporation of the University of Hawaii are within the scope of the physician-patient privilege and, therefore, protected from public disclosure under the UIPA. Medical Opinions Protected, OIP Op. Ltr. No. 93-15 (Oct. 1, 1993).

## V. PROCEDURE FOR OBTAINING RECORDS

The UIPA directs each agency to "[i]ssue instructions and guidelines necessary to effectuate" the Act. Haw. Rev. Stat. § 92F-18(a) (1) (implementing UIPA). In addition, the law directs each agency to compile a public report describing the records it routinely uses or maintains, which must be filed with OIP and must also contain, among other things, the name and location of each set of records, the policies and practice of the agency regarding storage, retrievability, access controls, retentions and disposals, and the title, business address, and business telephone number of the agency officer or officers responsible for the records. Haw. Rev. Stat. § 92F-18(b). Therefore, many of the questions below cannot be answered without reference to the agencies' rules, many of which await updating or promulgation pursuant to the Agency Procedures and Fees for Processing Government Record Requests recently adopted by the OIP.

### A. How to start.

#### 1. Who receives a request?

Requests should be directed to the agency possessing the desired records.

#### 2. Does the law cover oral requests?

Yes. The UIPA does not require a written request. If the requester is not satisfied with the agency's response or lack thereof to an informal request, the requester may also make a formal request for access. Haw. Admin. Rules § 2-71-11(c).

#### a. Arrangements to inspect & copy.

Generally, records are available where they are maintained by the agency. *Id.* § 2-71-18. Copies are generally made by the agency's staff. Copies of the record may be transmitted by mail, telefax or other

means provided that the transmission does not interfere with the agency's functions and that all fees are paid. *Id.*

**b. If an oral request is denied:**

If oral requests are denied, the requester can appeal directly to the courts, Haw. Rev. Stat. § 92F-15, or to the OIP, *id.* § 92F-15.5. Section 92F-42 enumerates the powers and duties of the OIP, including investigatory powers and authority to recommend agency disciplinary actions.

**3. Contents of a written request.**

A formal request for access to government records must be in written, electronic, or other physical form. Haw. Admin. Rules § 2-71-2.

The OIP Rules require a formal request to include the following:

- Information that would enable the agency to correspond with or contact the requester;
- A reasonable description of the requested record to enable agency personnel to locate it with reasonable effort. The description should include, if known, the record name, subject matter, date, location, and any other additional information that reasonably describes the requested record;
- If applicable, a request for a waiver of fees for searching for, reviewing, or segregating the requested record, when the requester believes that a waiver would serve the public interest in accordance with section 2-71-32; provided that the request states the requester's identity and other facts that support the request for a waiver of fees; and
- A request to inspect or obtain a copy of the records described and, if applicable, the means by which the requester would like to receive the copy.

Haw. Admin. Rules § 2-71-12(b).

**a. Description of the records.**

See above.

**b. Need to address fee issues.**

See above.

**c. Plea for quick response.**

See above.

**d. Can the request be for future records?**

See above.

**e. Other.**

N/A.

**B. How long to wait.**

Neither the UIPA nor the OIP Rules set a specific time for agency response to an informal request. Instead, the OIP Rules specify that the agency must provide access to any disclosable government record in a "reasonably timely manner." Haw. Admin. Rules § 2-71-11(b)(1).

In the case of formal requests, the agency has ten business days to disclose government records that will be disclosed in its entirety. Haw. Admin. Rules § 2-71-13(a). For those records that will be segregated before being disclosed, the agency has ten business days to provide notice to the requester. *Id.* § 2-71-13(b). The notice must include:

- the location where the record will be made available to the requester;
- information about fees, if applicable;
- instructions, if any, regarding additional arrangements that the requester must make with the agency to inspect or copy the records;

- when the agency will make the records available to the requester; and

- a description of any extenuating circumstances and, if that is the case, the agency's intent to disclose the records incrementally.

*Id.* § 2-71-14(a). Within five business days of providing notice and after receiving prepayment of fees, if required, the agency must disclose the public part of the requested government record. *Id.* § 2-71-11(b)(1). In extenuating circumstances, the agency may first provide a written acknowledgement within ten business days. *Id.* § 2-71-11(c). That acknowledgement must be followed by a written notice sent within twenty business days of the date when the agency received the request. *Id.* § 2-71-11(c). Within five business days after providing notice or after receiving prepayment, if required, the agency must disclose the public parts of the requested record. *Id.* § 2-71-11(c).

Extenuating circumstances justifying additional time for agency disclosure exist when an agency seeks consultation concerning possible exemption from disclosure, the request requires extensive agency efforts to search, review or segregate, the agency requires additional time to avoid unreasonable interference with its statutory duties, or a natural disaster or situation prevents the agency from sending notice. *Id.* § 2-71-15(a). Under extenuating circumstances and when the requested records are voluminous, an agency may make the records available in increments. *Id.* § 2-71-15(b).

If an agency fails to respond to an informal request, the requester may make a formal request for access to government records. Haw. Admin. Rules § 2-71-11(c).

**1. Statutory, regulatory or court-set time limits for agency response.**

In the case of formal requests, the agency has ten business days to disclose government records that will be disclosed in its entirety. Haw. Admin. Rules § 2-71-13(a). For those records that will be segregated before being disclosed, the agency has ten business days to provide notice to the requester. *Id.* § 2-71-13(b).

**C. Administrative appeal.**

The OIP is empowered to review and rule on agency denials and to adopt rules setting forth an internal appeals structure providing for direct appeal and time limits.

The OIP has prepared a first draft of its rules for the administrative appeal procedures and has made it available for public review and comment. OIP Annual Report 1999. These rules will govern the procedures for filing an appeal to the OIP by a person denied access to a government record and the review and hearing of an appeal. *Id.* Even without a formal appeal process, the OIP informally assists requesters and agencies in resolving disputes arising out of requests or denials. This assistance may sometimes lead to a formal written OIP opinion.

**1. Time limit.**

Appeals of an agency's denial of access must be brought within two years of the denial. Haw. Rev. Stat. § 92F-15(a).

**2. To whom is an appeal directed?**

Unsuccessful requesters may bring an action to compel disclosure directly in state circuit court. Haw. Rev. Stat. § 92F-15(b).

**a. Individual agencies.**

The OIP enforces the UIPA and oversees compliance with the open records law. Haw. Rev. Stat. § 92F-42.

The OIP plays an important role in formulating, mediating, and shaping disclosure practices of state agencies under the law.

The Director of the Office of Information Practices:

Shall, upon request, review and rule on an agency denial of access to information or records, or an agency's granting of access;

Upon request by an agency, shall provide and make public advisory guidelines, opinions, or other information concerning that agency's functions and responsibilities;

Upon request by any person, may provide advisory opinions or other information regarding that person's rights and the functions and responsibilities of agencies under this chapter 92F;

May conduct inquiries regarding compliance by an agency and investigate possible violations by any agency;

May examine the records of any agency for the purpose of conducting inquiries regarding compliance and seek to enforce that power in the courts of this State;

May recommend disciplinary action to appropriate officers of an agency;

Shall report annually to the governor and the state legislature on the activities and findings of the OIP, including recommendations for legislative changes;

Shall receive complaints from and actively solicit the comments of the public regarding the implementation of chapter 92F;

Shall review the official acts, records, policies and procedures of each agency;

Shall assist agencies in complying with the provisions of this chapter;

Shall inform the public of the following rights of an individual and the procedures for exercising them:

The right of access to records pertaining to the individual;

The right to obtain a copy of records pertaining to the individual;

The right to know the purposes for which records pertaining to the individual are kept;

The right to be informed of the uses and disclosures of records pertaining to the individual;

The right to correct or amend records pertaining to the individual; and

The individual's right to place a statement in a record pertaining to that individual;

Shall adopt rules that set forth an internal appeals structure which provides for agency procedures for processing records requests, a direct appeal from the division maintaining the record and time limits for action by agencies;

Shall adopt rules that set forth the fees and other charges that may be imposed for searching, reviewing, or segregating disclosable records as well as to provide for a waiver of such fees when the public interest would be served;

Shall adopt rules which set forth uniform standards for the records collection practices of agencies;

Shall have standing to appear in cases where the provisions of this chapter are called into question;

Shall adopt, amend, or repeal rules pursuant to chapter 91 (administrative procedures) necessary for the purposes of this chapter; and

Shall take action to oversee compliance with part I of chapter 92 (open meetings) by all state and county boards including:

Receiving and resolving complaints;

Advising all government boards and the public about compliance with chapter 92 (public agency meetings and records); and

Reporting each year to the legislature on all complaints received.

Haw. Rev. Stat. § 92F-42.

#### **b. A state commission or ombudsman.**

The ombudsman, who is appointed by the legislature, has jurisdiction to investigate the administrative "acts of agencies." Haw. Rev. Stat. § 96-5; *see generally id.*, ch. 96 (describing functions of the Office of Ombudsman).

#### **c. State attorney general.**

Not specified.

#### **3. Fee issues.**

Yes, although advisory opinions of the Attorney General, Ombudsman, and the OIP are not themselves enforceable.

#### **4. Contents of appeal letter.**

The appeal letter should describe the records or portion of records withheld. Other requirements for appeals may be established by agency regulations or by the OIP.

##### **a. Description of records or portions of records denied.**

See above.

##### **b. Refuting the reasons for denial.**

See above.

#### **5. Waiting for a response.**

There is no specified time. Again, time limits may be established by agencies or by the OIP in its yet-to-be adopted rules.

#### **6. Subsequent remedies.**

No. The only subsequent appeal available is a judicial appeal in which the case is considered *de novo* by the circuit court. Appeals to the OIP are without prejudice to the right to appeal before the courts. Haw. Rev. Stat. § 92F-15.5(a).

### **D. Court action.**

#### **1. Who may sue?**

The UIPA provides that any person (including corporations) aggrieved by a denial of access to a government record may bring an action in the state circuit court against the agency to compel disclosure. Haw. Rev. Stat. § 92F-15. A "person" includes an individual, corporation, government, or governmental subdivision or agency, business trust, estate, trust, partnership, association or any other legal entity. *Id.* § 92F-3. The court shall hear the matter *de novo* and may review the documents in question *in camera* if necessary. *Id.* § 92F-15(b).

A person filing an action in state circuit court must notify the OIP in writing at the time of filing to allow the OIP the opportunity to intervene. *Id.* § 92F-15.3 (Supp. 1999).

#### **2. Priority.**

Yes. Section 92F-15(f) provides that such actions are to be expedited except as to cases in the circuit court which the court considers of greater importance.

#### **3. Pro se.**

There are no requirements that an attorney be engaged, but technicalities of the law, questions concerning current applicability of many agencies' holdover rules, the constitutional basis of certain exceptions, and the procedural requirements of litigation make it generally advisable to retain an attorney.

#### 4. Issues the court will address:

##### a. Denial.

The court addresses the issue of denial de novo. Haw. Rev. Stat. § 92F-15(b).

##### b. Fees for records.

Yes.

##### c. Delays.

Probably, since the OIP Rules establish time limits for disclosure.

##### d. Patterns for future access (declaratory judgment).

Yes. It is likely that the court will defer to the OIP, which has been given the mandate to provide advisory opinions at the request of the agencies and individuals and which has been given the power to enforce compliance and to investigate violations. Haw. Rev. Stat. § 92F-42.

#### 5. Pleading format.

See Haw. R. Civ. P.; Haw. R. Cir. Ct.

#### 6. Time limit for filing suit.

An action may be brought at any time within two years after a denial. Administrative remedies need not be exhausted. Haw. Rev. Stat. § 92F-15.

#### 7. What court.

The circuit court in the judicial circuit in which the request for the record is made, where the requested record is maintained, or where the agency's headquarters are located, has jurisdiction over an action brought under the UIPA. Haw. Rev. Stat. § 92F-15(e).

#### 8. Judicial remedies available.

The court may compel disclosure. Additionally, the court may assess damages caused by failure of an agency to properly maintain a personal record, *id.* § 92F-27(c)(1); reasonable attorneys' fees and costs, *id.*, §§ 92F-15(d), 92F-27(c)(2), 92F-27(d); and criminal sanctions for government officials and employees making disclosure knowing disclosure is prohibited or for any person that obtains access to or a copy of a government record by "false pretense, bribery, or theft with actual knowledge that disclosure is prohibited . . .," *id.* § 92F-17.

#### 9. Litigation expenses.

If the complainant prevails in an action involving denial of access or failure to properly maintain or correct a personal record, the court shall assess against the agency reasonable attorneys' fees and all other expenses reasonably incurred in the litigation. Haw. Rev. Stat. §§ 92F-15(d) (judicial enforcement), 92F-27(c)(2) and (d) (remedies for disclosure of personal records); *see also Burnham Broad. Co. v. County of Hawaii*, Civ. No. 92-0161 (Haw. 3d Cir., filed Feb. 14, 1992) (imposing fees on agency refusing disclosure of 911 tapes and transcripts). The court may also assess reasonable attorneys' fees and costs against complainants bringing frivolous cases involving personal records. Haw. Rev. Stat. § 92F-27(d) (1996).

##### a. Attorney fees.

In *State v. Earthjustice*, No. 29289, 2009 WL 2371920 (Aug. 3, 2009), the Intermediate Court of Appeals reversed a trial court order awarding attorneys' fees and costs to the requester in a declaratory action brought by the State to recover materials that the Department of Health, Clean Water Branch ("CWB") erroneously disclosed to the requester in response to an UIPA request. The court reasoned that HRS § 92F-15(d) provides for an award of fees and costs to a "complainant" [who] prevails in an action brought under this section . . . , and that the phrase "an action brought under this section" refers to

HRS § 92F-15. That section provides a right of action to a "person aggrieved by a denial of access to a government record . . ." In this case, the requester was not a "person aggrieved by a denial of access to a government record" because the CWB never denied access to any governmental record. Rather, the CWB had granted the records request in its entirety, albeit erroneously. *Id.* at \*5.

##### b. Court and litigation costs.

See above.

#### 10. Fines.

The OIP may investigate violations by agencies, *id.* § 92F-42(4), and recommend appropriate disciplinary action to "appropriate officers of an agency," *id.* § 92F-42(6). Specific statutes governing particular records may also mandate fines.

#### 11. Other penalties.

*Criminal penalties.* An officer or employee who intentionally discloses a government record or any confidential information in violation of specific confidentiality statutes is guilty of a misdemeanor, unless a greater penalty is provided by law. Haw. Rev. Stat. § 92F-17(a); *see Honolulu Corp. Counsel Memo. of Law No. 95-7* (June 19, 1995) (warning Department of Data Systems of its potential liability if volunteers reveal confidential information obtained in performance of their tasks). Any person who intentionally gains access to or obtains a copy of a government record by false pretense, bribery, or theft, with actual knowledge that access is prohibited is guilty of a misdemeanor. Haw. Rev. Stat. § 92F-17(b). Failure to disclose records may result in imposition of an award of attorneys' fees. *Id.* § 92F-15(d); *Burnham Broad.*, Civ. No. 92-0161 (Haw. 3d Cir. 1992).

#### 12. Settlement, pros and cons.

Settlement is always preferable as it results in quicker access to records. However, no court precedent will be established securing future access to the same kinds of records. Also, since open records cases are granted priority in the courts and since the party seeking to prevent disclosure bears the burden to justify nondisclosure, following a general policy of favoring settlement may not always best serve media plaintiffs' interests. The UIPA's provisions allowing recovery of attorneys' fees also mitigate against settlement of valid cases when a court ruling might place an intransigent agency on notice regarding the need to change its records handling policies. Note that the court may award attorneys' fees against any party filing frivolous suits concerning personal records. Haw. Rev. Stat. § 92F-27(d).

#### E. Appealing initial court decisions.

##### 1. Appeal routes.

In Hawaii, appeals from all final judgments of the circuit courts are made to the Hawaii Supreme Court. Haw. Rev. Stat. § 641-1 (1995). The Hawaii Supreme Court has the discretion to transfer any matter to the Hawaii Intermediate Court of Appeals (ICA). Haw. R. App. Proc. 31(c). The ICA in turn may certify a matter to the Hawaii Supreme Court, which may take or reject the matter within thirty days. Haw. R. App. Proc. 31(d).

##### 2. Time limits for filing appeals.

Within thirty days after the filing of a decision by the circuit court or the ICA, any party may apply in writing to the Hawaii Supreme Court for a writ of certiorari. Haw. Rev. App. Proc. 4. Appellate review is discretionary with the Hawaii Supreme Court.

##### 3. Contact of interested amici.

The OIP (contact: staff attorney (808) 585-1400), the ACLU (contact: (808) 522-5900) and the Common Cause Hawaii (contact: (808) 275-6275) and the Society of Professional Journalists (contact: spj@flex.com).

The Reporters Committee for Freedom of the Press often files *am-*

*icus* briefs in cases involving significant media law issues before a state's highest court.

#### F. Addressing government suits against disclosure.

While agencies often request opinions to be issued by the OIP regarding particular records, suits specifically filed by government agencies to set a precedent on certain records have not surfaced in Hawaii.

## Open Meetings

### I. STATUTE — BASIC APPLICATION.

The Hawaii Sunshine Law intends “to protect the people’s right to know.” Haw. Rev. Stat. § 92-1 (1996). It protects the public’s right to know when government bodies meet, to be informed in advance of what business they intend to conduct, to attend these meetings, and to obtain their minutes within a reasonable period. Like the UIPA with its presumption of public access to government records, *id.* § 92F-11(a) (1996), the Sunshine Law presumes that the public may attend and participate in any meeting of government, *id.* § 92-3 (1996).

Like the more recently adopted UIPA, *see id.* § 92F-1 (1996), the Sunshine Law recognizes that “[o]pening up the governmental processes to public scrutiny and participation is the only viable and reasonable method of protecting the public’s interest,” *id.* § 92-1. The Sunshine Law’s declaration of policy and intent adds, “[I]t 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.” *Id.* § 92-1.

While the Sunshine Law previously contained statutory provisions affording public access to government records, *id.* §§ 92-50 to 92-52 (repealed), the UIPA repealed and replaced these sections, Act 262, § 3, 14th Leg., Reg. Sess. (1988), reprinted in 1988 Haw. Sess. Laws 473, 482. Significant areas of overlap remain, however, between the Sunshine Law and the UIPA as well as some areas where the uncertain interaction of the UIPA and Sunshine Law tends to leave the law less than clearly defined. For example, the Sunshine Law more narrowly defines the entities to which its provisions apply than does the UIPA; under the Sunshine Law’s definition of “board,” it is possible to have an entity whose meetings need not be open to the public, Haw. Rev. Stat. § 92-9 (1996), but whose records, under the UIPA’s broader definition of “agency,” must be made available to the public, *id.* § 92F-11.

Just as the UIPA defines certain circumstances that may exempt an entity from complying with the UIPA’s overriding presumption of public access to records, the Sunshine Law allows government bodies to hold executive sessions and emergency meetings that may be closed to the public.

#### A. Who may attend?

“[A]ll persons” may attend, but any person “who willfully disrupts a meeting to prevent and compromise the conduct of the meeting” may be removed. Haw. Rev. Stat. § 92-3.

#### B. What governments are subject to the law?

The Sunshine Law, Chapter 92, concerns meetings of “boards,” which include “any agency, board, commission, authority or committee of the State or its political subdivisions which is created by constitution, statute, rule or executive order to have supervision, control, jurisdiction or advisory power over specific matters and which is required to conduct meetings and to take official actions.” Haw. Rev. Stat. § 92-2(1) (1996) (emphasis added). The law is liberally construed to include entities granted authority pursuant to not only the enumerated sources but also county charters. *But cf.* Haw. Rev. Stat. § 92F-3 (1996) (defining “agency” to include entities not limited to those created by “constitution, statute, rule or executive order”).

##### 1. State.

Yes. The definition expressly includes state entities, *id.* § 92-2(1), to which the law applies, *id.* § 92-71 (1996).

##### 2. County.

Yes. The definition of “board” refers to “political subdivisions” of the state, encompassing entities of county government. Haw. Rev. Stat. § 92-2(1). The law applies to all political subdivisions of the State, *id.* § 92-71, and should be liberally construed to apply to government-

tal bodies created solely by county charter. Applicability of the State Sunshine Law to the County Councils and the Presentation of Oral or Written Testimony on Agenda Items, Att’y Gen. Op. No. 86-5, at 4 (Feb. 10, 1986) (pointing to legislative history and Section 92-71 to construe the requirement per the law’s definitions that a “board” be established by constitution to include governmental bodies created by county charters).

At least one county concurs that the law applies to its entities. In a memo to “all departments, boards, and commissions” of the City and County of Honolulu, Deputy Corporation Counsel William Kahane stated that every meeting of a board, “defined as any temporary or permanent agency, authority, board, commission, or committee of the City” is covered by the law “if that board requires a quorum to conduct official business.” Honolulu Corp. Counsel Memo. (July 11, 1975) (Corporation Counsel, in response to a request from then-Councilmember Marilyn Bornhorst, issued an updated version of these guidelines February 13, 1985); *cf.* Haw. Rev. Stat. §§ 92-2(1), (3).

### 3. Local or municipal.

No, because Hawaii has no local or municipal governments. *See e.g.*, David L. Callies, *How Development Agreements Work in Hawaii, in Development Agreements: Practice, Policy, and Prospects* 71, 71 (Douglas R. Porter & Lindell L. Marsh, eds., Urban Land Institute 1989). The boundaries and governmental structure of the state’s largest city, Honolulu, are coextensive with those of the County of Honolulu, which both comprise the island of O’ahu. The neighbor islands also lack separately defined county and municipal governments; the county government of Hawaii covers the Big Island of Hawaii; the county government of Maui also encompasses the adjacent islands of Lanai and Molokai; Kauai County includes Niihau.

#### C. What bodies are covered by the law?

The Sunshine Law applies to all “boards” when they conduct “meetings.” Haw. Rev. Stat. § 92-3 (“[e]very meeting of all boards shall be open to the public”). Accordingly, a two-part test will reveal whether the law applies to a particular board on a particular occasion. First, is the body a “board” as defined by the statute? If not, the law does not apply. If so, is the board conducting a “meeting” as defined by the statute? If not, the law does not apply.

Such a test helps to explain determinations that the law applies to deliberative committees or subgroups appointed by a government entity pursuant to authority embodied in a state statute but not to individual technical consultants denominated in groups as “subcommittees” of the advisory committee when these subcommittees never met or operated as deliberative bodies. Applicability of State Sunshine Law to Dep’t of Agric.’s Advisory Comm. on Plants and Animals and Subcomms., Att’y Gen. Op. No. 90-7 (Sept. 12, 1990).

The law defines “meeting” as “the convening of a board for which a quorum is required in order to make a decision or to deliberate toward a decision upon a matter over which the board has supervision, control, jurisdiction or advisory power.” Haw. Rev. Stat. § 92-2(3). An agency retreat is a meeting. Applicability of Pt. I, Ch. 92, Haw. Rev. Stat., to a Private “Retreat” of OHA Trustees, Att’y Gen. Op. No. 86-19 (Sept. 2, 1986) (holding that “retreat” is synonymous with “meeting” under the Sunshine Law). Despite negative implications from the language of the statute, the fact that a quorum may not be required for a “retreat” or meeting does not alter the need to comply with the Sunshine Laws when agency deliberations or decisions are to take place. *Id.* (relying on Section 92-5(b) prohibiting use of chance meetings to circumvent spirit of law).

#### 1. Executive branch agencies.

##### a. What officials are covered?

The law applies to officials in all political subdivisions of the state, *see* Haw. Rev. Stat. § 92-71, except for legislators, who are governed

by the rules and procedures of their respective chamber, *id.* § 92-10 (1996).

##### b. Are certain executive functions covered?

The law covers any attempt by a board to decide on or deliberate about matters over which the board is allowed to exercise supervision, control, jurisdiction or on which it renders advice. *See* Att’y Gen. Op. No. 86-19 (Sept. 2, 1986) (holding that an OHA meeting potentially involving disciplinary actions against trustees was subject to Sunshine Laws).

A 1996 amendment deleted a provision in Haw. Rev. Stat. § 92-5(b) stating that the law does not apply to chance meetings, defined as “social or informal assemblage[s] of two or more members [of a board] at which matters relating to official business are not discussed.” Haw. Rev. Stat. § 92-2(2). It prohibits use of “chance meetings or electronic communication . . . to circumvent the spirit or requirements of [the law] to make a decision or to deliberate toward a decision upon a matter over which [a] board has supervision, control, jurisdiction, or advisory power.” *id.* § 92-5(b) (Supp. 1999); Att’y Gen. Op. No. 86-19, at 2 (Sept. 2, 1986) (citing Haw. Rev. Stat. § 92-5(b)).

The wording of the statute may create a technical loophole in cases where a board or so-called board might attempt to decide or deliberate on a matter not within its jurisdiction. In such cases, because the board lacks jurisdiction, the public may impliedly be denied access to the board meeting or minutes with the result that agencies attempting to act outside of their jurisdiction may be able to circumvent public accountability for doing so. Consequently, although the board’s actual or so-called actions might lack official weight, any discussion and/or decisions reached at such a meeting may be the actual basis for later or related action, thus facilitating avoidance of public scrutiny and meaningful participation of the public in government.

This kind of situation arose in 1978 when seven newly elected Democratic Honolulu City Council members met “informally” to consider leadership and committee assignments six weeks before the official swearing in. Corporation Counsel opined that the “individuals who were in attendance at the informal assemblage can close its meeting to the public as well as the media because it was not a meeting of a duly constituted council and therefore not subject to . . . the State Sunshine Law.” Honolulu Corp. Counsel Op. (Nov. 20, 1978); *cf.* Att’y Gen. Op. No. 90-7 (Sept. 12, 1990) (allowing consulting “subcommittees” of advisory board to operate outside the law). *But see* Haw. Rev. Stat. §§ 92-1(2), (3) (calling for liberal construction of provisions requiring open meetings and strict construction regarding the provisions allowing closed meetings).

In contrast, the Sunshine Law may require that the public be given access to internal agency meetings. In response to a letter from the Sunshine Law Coalition, the Corporation Council stated that “it is unquestionable that the provisions of Chapters 91 and 92 . . . are applicable to the activities of the City government . . .” Honolulu Corp. Counsel Letter (Jan. 20, 1983). Corporation Counsel agreed that a committee meeting of the City Council to consult with its non-legal staff must be open to the public. *Id.*; *accord* Applicability of the State Sunshine Law to the County Councils and the Presentation of Oral or Written Testimony on Agenda Items, Att’y Gen. Op. No. 86-5 (Feb. 10, 1986).

In 1996, the Hawaii legislature authorized private communications between two or more members of a board under certain circumstances. *See* Haw. Rev. Stat. § 92-2.5 (Supp. 1999). Section 92-2.5 permits two members of a board to discuss between themselves matters related to official board business, provided that either no commitment to vote is made or sought, and a quorum is not achieved. Haw. Rev. Stat. § 92-2.5. Among the other permitted interactions, discussions between the governor and one or more members of a board may be conducted in private without limitation or subsequent reporting, so long as the discussion does not relate to a matter which the board is adjudicating. Haw. Rev. Stat. § 92-2.5(d).

### c. Are only certain agencies subject to the act?

“Board” is defined to include “any agency.” Haw. Rev. Stat. § 92-2(1). No “agency” is specifically excluded, but the Sunshine Law does not define “agency,” and defines “board” more narrowly than the UIPA defines “agency.” The Sunshine Law’s definition encompasses standing and select committees and other organizational subdivisions whose role is of “significance in the conduct of the [board’s] business.” Applicability of the Haw. Sunshine Law to the Comms. of the [Univ. of Haw.] Bd. of Regents, Att’y Gen. Op. No. 85-27 (Nov. 27, 1985).

However, open meetings requirements do not apply to adjudicatory functions of most executive branch boards. *Id.* § 92-6 (Supp. 1999). Section 92-6(a)(2) exempts adjudicatory functions including those governed by Sections 91-8 and 91-9 (setting forth Hawaii Administrative Procedure Act (HAPA) provisions on declaratory judgment and contested case jurisdiction of agencies) or authorized by other sections in Hawaii Revised Statutes. The law gives seven examples of boards that are exempted from the Sunshine Law when exercising adjudicatory functions: Hawaii Labor Relations Boards; Labor and Industrial Relations Appeals Board; Hawaii Paroling Authority; Civil Service Commission; Board of Trustees, Employee’s Retirement System of the State of Hawaii; Crime Victim Compensation Commission; and State Ethics Commission. *Id.* § 92-6.

The Land Use Commission, by express provision, is not exempt and must hold open adjudicative sessions. *Id.* § 92-6(b); *Chang v. Planning Comm’n of County of Maui*, 64 Haw. 431, 442-43, 643 P.2d 55, 64 (1982) (noting that Maui County Planning Commission, not being the Land Use Commission, is exempt from Section 92-6(b) although governed by the Maui County Charter’s open meetings provisions).

#### 2. Legislative bodies.

The rules and procedures of the State Senate and House of Representatives supersede the Sunshine Law and govern meetings among legislators. Haw. Rev. Stat. § 92-10. Among other things, notice, agenda, and minutes of the Legislature are not subject to the Sunshine Laws. *Id.*

#### 3. Courts.

Chapter 92 expressly excludes the judicial branch. Haw. Rev. Stat. § 92-6(a)(1). *But cf. id.* §§ 92F-3 (1996), 92F-12(a)(2) (Supp. 1999) (excluding from the disclosure requirements of the UIPA only those non-administrative functions which are not part of final opinions adjudicating cases before the judiciary).

#### 4. Nongovernmental bodies receiving public funds or benefits.

The Sunshine Law’s definition of “board” encompasses only entities of “the State or its political subdivisions which [are] created by constitution, statute, rule, or executive order to have supervision, control, jurisdiction or advisory power over specific matters and which [are] required to conduct meetings and to take official actions.” Haw. Rev. Stat. § 92-2(1) (emphases added). The Sunshine Law implies that it cannot be applied to nongovernmental bodies receiving public funds or benefits if they have not been created under some authority of the State. Organizations not required to hold open meetings under the Sunshine Law may, nevertheless, be required to disclose records considered in those meetings or records of related activities to the extent that they fall within the UIPA definition of “agency” even though the UIPA may exempt from disclosure the actual records of meetings not open to the public. Haw. Rev. Stat. § 92F-12(a)(16) (requiring disclosure of information from “a proceeding open to the public”).

#### 5. Nongovernmental groups whose members include governmental officials.

Probably not. The Sunshine Law’s definition of a “board,” Haw. Rev. Stat. § 92-2, probably does not encompass such nongovernmental groups unless by borrowing the totality of circumstances test from the UIPA one can show that they have been set up to supervise, con-

trol, exercise jurisdiction, or advise government.

One such situation might occur in student organizations advised or including as members faculty members. For instance, in response to an inquiry apparently initiated by the Editor-In-Chief of *Ka Leo O Hawaii*, the student-run newspaper at the University of Hawaii’s Manoa Campus, the Attorney General informed University Regents and Administrators that “ASUH (Associated Students of the University of Hawaii) and other student organizations do not fall within the definition [of a board] and thus are not subject to the requirements imposed by the State Sunshine Law.” Att’y Gen. Op. No. 85-18 (Sept. 6, 1985). Thus, the newspaper could not demand access to meetings that student organizations might otherwise elect to close to the public.

#### 6. Multi-state or regional bodies.

It is unlikely, although not impossible, that such organizations will meet the Sunshine Law definition of “board.”

#### 7. Advisory boards and commissions, quasi-governmental entities.

A task panel created by resolution of county or state government generally does not fall within the definition of a “board” under the Sunshine Law. Boards Created by Resolution, OIP Op. Ltr. No. 08-02 (July 28, 2008).

An advisory function, particularly when not involving final decisions, may provide grounds to forego public access to the meetings of advisory boards and commissions, task forces, and similar quasi-governmental entities. When television station KHON sued the State because the State Department of Health had refused to allow the public and press to attend a meeting of an advisory committee appointed to consider the problem of pesticides in drinking water, the court held that the committee was purely advisory, had no final decision-making power, was made up of volunteers, and was “not formed by statute, constitution, rule or executive order.” Accordingly, the court held, the Sunshine Law’s open meetings requirements did not apply. *KHON-TV Inc. v. Ariyoshi*, Civ. No. 78696 (Haw. 1st Cir. Aug. 1983). Notably, the Hawaii Supreme Court rejected the appeal on the grounds that the issue was moot.

Only more stringent requirements set forth in a charter, ordinance, or other regulation of a political subdivision of the State can supersede the Sunshine Law’s requirements. *Chang*, 64 Haw. 431, 443-44, 643 P.2d 55, 64 (1982); Haw. Rev. Stat. § 92-71 (1996).

The Sunshine Law generally applies to neighborhood boards overseen by a neighborhood commission of the City and County of Honolulu, as well as similar neighborhood boards created in other counties and overseen by a count-based commission. Haw. Rev. Stat. § 92-81; *see also* Haw. Rev. Stat. §§ 92-82, -83.

#### 8. Other bodies to which governmental or public functions are delegated.

When government functions are delegated to individuals or groups, the Sunshine Law applies to their meetings. Trustees of the Travel Agency Recovery Fund, Att’y Gen. Op. No. 85-14 (July 26, 1985) (determining that trustees appointed pursuant to authority granted to an agency director by statute and who were charged by statute with managing a recovery fund are subject to Sunshine Law); Boards Created by Resolution, OIP Op. Ltr. No. 08-02 (July 28, 2008) (City Mass Transit Technical Expert Panel created by Honolulu City Council resolution was subject to Sunshine Law because the resolution creating the Panel delegated the Council’s authority to make the final selection of a fixed guideway system for rail project).

#### 9. Appointed as well as elected bodies.

The law applies to appointed bodies. *Id.*

In response to a request from then-State Senator Neil Abercrombie after he was denied access to an orientation for three newly appointed members of the University of Hawaii Board of Regents, the senate

majority attorney issued an opinion holding that the session should have been open to the public: “The Legislature did not intend to limit public access only to decision-making meetings.” Tom Kaser, *Honolulu Advertiser*, July 28, 1979 (quoting Senate Majority Att’y Letter).

In response to an inquiry, the attorney general found that “the role of the standing and select committees of the Board of Regents is of such significance in conduct of the Board’s business that the meetings of the committees must be conducted in accordance with the Hawaii Sunshine Law.” Although the deputy attorney general found that the law does not explicitly apply to a subgroup of a board, she noted that to exempt the Board’s committees would “permit members of a board to evade the open meeting requirements of the Sunshine Law merely by convening themselves as ‘committees’, thereafter discussing and deliberating upon board business in meetings closed to the public, and making only pro forma decisions at the open public board meetings.” This would clearly be contrary to the intent of the Sunshine Law, and therefore, the deputy attorney general concluded, committees must comply with the open meeting provisions. Applicability of the Haw. Sunshine Law to the Comms. of the [Univ. of Haw.] Bd. of Regents, Att’y Gen. Op. No. 85-27 (Nov. 27, 1985).

#### D. What constitutes a meeting subject to the law.

##### 1. Number that must be present.

###### a. Must a minimum number be present to constitute a “meeting”?

“Meeting” means the convening of a board for which a quorum is required in order to make a decision or to deliberate toward a decision . . .” Haw. Rev. Stat. § 92-2(3). The law is ambiguous on whether a quorum is required to constitute a meeting, although a board will usually be unable to conduct official business without a quorum. Haw. Rev. Stat. § 92-15 (1996) (requiring concurrence of majority absent statutory or other provision prescribing quorum).

###### b. What effect does absence of a quorum have?

None, except as it affects the power of the board to take official action. *See id.* § 92-5(b) (proscribing secret meetings); Att’y Gen. Op. No. 86-19 (Sept. 2, 1986) (citing Section 92-5(b) as applicable even when a quorum is not required to conduct business); *see also* Applicability of the Haw. Sunshine Law to the Comms. of the [Univ. of Haw.] Bd. of Regents, Att’y Gen. Op. No. 85-27 (Nov. 27, 1985) (requiring Sunshine Law notice requirements be met even if quorum-short board is meeting deliberately to discuss official board business).

Meetings without a quorum may serve important purposes. A neighborhood board failed to garner a quorum for a regularly scheduled meeting raising a question whether this “meeting” was sufficient to meet their obligation under the Neighbor Plan to hold a certain number of meetings per year. Corporation Counsel opined that although the Sunshine Law requires the presence of a quorum in order to conduct official business, convening the meeting upon issuance of proper notice was sufficient to meet the Plan requirements, even though the board had to adjourn immediately due to lack of a quorum. Honolulu Corp. Counsel Memo. of Law No. M84-11 (Apr. 10, 1984).

Section 92-5(b) exempts “chance meetings” from the operation of the Sunshine Law. A “chance meeting” is a social or informal assemblage of two or more members at which matters relating to official business are *not* discussed. *Id.* § 92-2.

##### 2. Nature of business subject to the law.

The nature of business conducted at a meeting open to the public includes making or deliberating “toward a decision upon a matter over which the board has supervision, control, jurisdiction, or advisory power.” Haw. Rev. Stat. § 92-2(3).

*Serial One-on-One Communications:* In August of 2005, the OIP opined while the Sunshine Law allows two council members to dis-

uss county business between themselves, *see* Haw. Rev. Stat. § 92-2.5, the statute does not permit either of those council members to then discuss the same council business with any other council members outside of a properly noticed meeting. Serial One-On-One Communications, OIP Op. Ltr. No. 05-15 (August 4, 2005). The OIP concluded that such serial communication is contrary to the letter, the intent and the spirit of the statute and therefore not permitted. *Id.* In a lawsuit initiated by a non-profit media organization concerning the serial one-on-one communications that were the subject of the OIP opinion, the Intermediate Court of Appeals agreed with the conclusion of the OIP, except that it held that the limitation on serial one-on-one communications applies only when a quorum of board members are involved in the serial communications. *Right to Know Committee v. City & County of Honolulu*, 117 Hawai‘i 1, 10-11, 175 P.3d 111, 120-21 (2008). Thus, a quorum of board members may not use serial one-on-one conversations to circumvent the Sunshine Law. *Id.*

###### a. “Information gathering” and “fact-finding” sessions.

Hawaii’s Sunshine Law permits some investigations and information gathering sessions between board members to be conducted in private. Section 92-2.5(b) provides that two or more board members may be assigned to investigate a matter relating to official business of the board provided that (1) the number of board members is insufficient to constitute a quorum of the board, (2) the scope of the investigation and the scope of each member’s authority are defined at a meeting, (3) all findings and recommendations are presented to the board at a meeting, and (4) the deliberation and decision-making on the matter investigated occurs only at a duly noticed meeting of the board that is held subsequent to the meeting at which the findings and recommendations of the investigation were presented to the board. Haw. Rev. Stat. § 92-2.5 (2005). In addition, two board members may privately communicate or interact between themselves to gather information from each other about official board matters as long as no commitment to vote is made or sought. *Id.* § 92-2.5(a).

###### b. Deliberations toward decisions.

A meeting of the board to make decisions or deliberate toward a decision upon a matter that is within the board’s purview must be open to the public. Haw. Rev. Stat. §§ 92-2(3), 92-3.

##### 3. Electronic meetings.

A board may hold a meeting by videoconference; provided that the videoconference system used by the board shall allow both audio and visual interaction between all members of the board participating in the meeting and the public attending the meeting, at any videoconference location. Haw. Rev. Stat. § 92-3.5(a) (2005). The notice must specify all locations at which board members will be physically present during the videoconference meeting so that the public may attend the meeting at any of those locations. *Id.* If both audio and video communication cannot be maintained at all locations, the meeting must be terminated. *Id.* § 92-3.5(c).

###### a. Conference calls and video/Internet conferencing.

A board may hold meetings by videoconference, provided that the videoconferencing system used by the board shall allow both audio and visual interaction between all members of the board participating in the meeting and the public attending the meeting at any videoconference location. Haw. Rev. Stat. § 92-3.5(a).

Generally speaking, any form of discussion among board members concerning matters over which the board has supervision, control, jurisdiction or advisory power and that are before or are reasonably expected to come before the board, outside of a duly noticed meeting, violates the Sunshine Law unless it is a permitted interaction under

H.R.S. § 92-2.5(a). *See generally* Board Members Discussion of Official Business Outside of a Duly Noticed Meeting, OIP Op. Ltr. No. 04-01 (January 13, 2004).

**b. E-mail.**

The OIP has recognized that e-mail use by governmental agencies is widespread and has become an acceptable method of communication. Electronic Transmission of Testimony; Identification of Testimony Received By Boards, OIP Op. Ltr. No. 03-06 (May 2, 2003). However, under the Sunshine Law, board members are not authorized to vote via e-mail concerning matters over which the board has supervision, control, jurisdiction or advisory power and that are before or are reasonably expected to come before the board. Board Members Discussion of Official Business Outside of a Duly Noticed Meeting, OIP Op Ltr. No. 04-01 (January 13, 2004). Electronic communications cannot be used to circumvent the spirit or requirements of the Sunshine Law or to make a decision upon a matter concerning official business via e-mail. Haw. Rev. Stat. § 92-5(b).

**c. Text messages.**

There is no statutory or case law addressing this issue.

**d. Instant messaging.**

There is no statutory or case law addressing this issue.

**e. Social media and online discussion boards.**

There is no statutory or case law addressing this issue.

**E. Categories of meetings subject to the law.**

*Administrative rulemaking.*

Chapter 91, Hawaii Administrative Procedure Act (HAPA), sets forth the procedures for administrative rulemaking. Haw. Rev. Stat. ch. 91 (1996).

a. Public hearing requirement. Any board or agency adopting, amending, or repealing any rule under authority of law must first hold a public hearing. *Id.* § 91-3 (Supp. 1999).

b. Notice requirements.

(1) Time limit for giving notice.

Thirty days. *Id.* § 91-3(a)(1).

(2) To whom is notice given.

Agencies must give notice of administrative rulemaking to all persons who have made a timely written request of the agency to receive advance notice of its rulemaking proceedings. *Id.* § 91-3(a)(1).

(3) Where posted.

Agencies must publish notice of administrative rulemaking at least once in a newspaper of general circulation in the state for state agencies and, for county agencies, in a newspaper of general circulation in the county. *Id.* § 91-3(a)(1). Agencies must also post their proposed rules on the internet. *Id.*

(4) Public agenda items required.

The notice must include a statement of the substance of the proposed rule and the date, time, and place where interested persons can testify on it. *Id.* § 91-3(a)(1). An agenda must provide notice of the matters the board intends to consider at its meeting by listing matters with enough detail to reasonably allow the public to understand the subject of the matter to be considered; however, the agenda does not need to specifically notice that a decision may be made on an item

or the exact nature of that decision as long as it reasonably arises under the subject matter listed. Sufficiency of Agenda, OIP Op. Ltr. No. 07-06 (Apr. 13, 2007).

The meeting agenda may not be amended to add an item of reasonably major importance and action on the item will affect a significant number of persons. Amendment of Agenda; Executive Meeting Agenda, OIP Op. Ltr. No. 06-05 (July 19, 2006).

(5) Exceptions.

If the agency, in writing, finds that an imminent peril to the public health, safety, or morals, or to livestock and poultry health requires adoption, amendment, or repeal of a rule, the agency may proceed without notice of hearing or upon abbreviated notice and hearing. *Id.* § 91-3(b). The governor or mayor may waive the notice and hearing requirements whenever a state or county agency is required to promulgate rules as a condition of receiving federal funds. *Id.* § 91-3(d). Such an agency is allowed no discretion in interpreting the federal provisions regarding the rules to be promulgated. Promulgations of such rules must be published in a newspaper of general circulation in the state prior to the waiver by the governor or mayor and posted on the internet. *Id.* § 91-3(d).

(6) Penalties and remedies for failure to give adequate notice.

“Any final action taken in violation of [the open meetings and notice provisions is] voidable upon proof of willful violation.” *Id.* § 92-11. In addition, “[a]ny person who willfully violates any provision of [the Act regarding access to meetings and notice]” can be found guilty of a misdemeanor and dismissed from the board. *Id.* § 92-13 (1996).

**1. Regular meetings.**

**a. Definition.**

A “meeting” is defined as “the convening of a board for which a quorum is required in order to make a decision or to deliberate toward a decision upon a matter over which the board has supervision, control, jurisdiction, or advisory power.” Haw. Rev. Stat. § 92-2(3).

**b. Notice.**

**(1). Time limit for giving notice.**

Notice must be given six calendar days in advance of a meeting. Haw. Rev. Stat. § 92-7(b). *But cf.* Haw. R. Civ. Proc. 6 (requiring that only business days be counted when period to respond to court pleadings is less than 10 days).

**(2). To whom notice is given.**

The board must file notice in the office of the lieutenant governor or the appropriate county clerk’s office *and* in the board’s office. Haw. Rev. Stat. § 92-7(b).

The board must also maintain a list of names and addresses of persons who request notification and mail a copy of the notice to such persons at their last recorded address no later than the time the agenda is filed. *Id.* § 92-7(e).

**(3). Where posted.**

In addition to filing, the notice is to be filed in the board’s office for public inspection and posted at the site of the meeting whenever feasible. Haw. Rev. Stat. § 92-7(b).

**(4). Public agenda items required.**

The notice is to include an agenda which lists all of the items to be considered at the forthcoming meeting and in the case of an executive meeting, the purpose of the meeting. Haw. Rev. Stat. § 92-7(a).

Agenda items must be listed with particularity. A published agenda containing only general references, such as “old business” and “new business,” is insufficient to comply with the law. Agenda and Minutes of Haw. State Comm’n on the Status of Women, Att’y Gen. Op. No. 85-2 (Feb. 4, 1985) (requiring list of all specific “items” or “matters”). Including a generic entry of “executive session” on all agendas without identifying the subject matter of the executive meeting also is not allowed. Amendment of Agenda; Executive Meeting Agenda, OIP Op. Ltr. No. 06-05 (July 19, 2006).

However, the board may add items to the publicly noticed agenda with a two-thirds recorded vote of all members to which the board is entitled. *Id.* § 92-7(d).

The agenda may not be changed, however, to add an item “if it is of reasonably major importance and action thereon by the board will affect a significant number of persons.” *Id.*; see Kauai County Op. No. 99-1 (Jan. 22, 1999) (opining that additions of sub-items related to a previously noticed item, in and of itself, does not rise to the level of an item of reasonably major importance possessing the inherent ability to affect a significant number of persons which would require a new meeting be rescheduled allowing for the appropriate number of days for notice); Amendment of Agenda; Executive Meeting Agenda, OIP Op. Ltr. No. 06-05 (July 19, 2006). Such items should be considered only at a meeting continued at a later reasonable day and time. Kauai County Op. No. 99-1 (Jan. 22, 1999).

#### (5). Other information required in notice.

The notice must also contain the date, time, and place of the meeting. Haw. Rev. Stat. § 92-7(a).

Generally, other essential information must also be included. The main concern is that the public receive sufficient notice of the meeting to make an informed decision regarding attendance and participation. For instance, when questions arose concerning the adequacy of a published agenda for a meeting of the Maui Planning Commission because the agenda failed to explain the relevant items, neglected to describe the specific nature of the council action accurately, and omitted one parcel of land involved, Maui Corporation Counsel, while agreeing that the agenda “leaves a lot to be desired,” held that, in the context of the entire record, it was adequate as a notice to the public. Maui Corp. Counsel Op. (Oct. 2, 1984).

As a closely related matter, it is worth noting that controversy continues to arise over the advance release of supplemental materials made available to members of a board but not to the public as part of the public notice or agenda.

#### (6). Penalties and remedies for failure to give adequate notice.

Any final action taken in violation of Sections 92-3 (open meetings) and 92-7 (notice) may be voidable upon proof of a violation. Haw. Rev. Stat. § 92-11 (1996).

#### c. Minutes.

The law specifically requires that minutes of meetings must be made available to the public on request, although a reasonable fee may be charged. Haw. Rev. Stat. 92-21 (Supp. 1999) (regarding costs for copies); see also Agenda and Minutes of Haw. State Comm’n on the Status of Women, Att’y Gen. Op. No. 85-2, at 4 (Feb. 4, 1985) (citing Haw. Rev. Stat. § 92-9(b)).

#### (1). Information required.

Boards must keep minutes of all meetings open to the public, and these minutes must give a “true reflection of the matters discussed at the meeting and the views of the participants.” Haw. Rev. Stat. § 92-9(a). Unless otherwise required by law, however, neither a full transcript nor a recording of the meeting is required, *id.*, but any person in attendance can record the meeting if the “recording does not actively interfere with the conduct of the meeting,” *id.* § 92-9(c). The minutes

must cover the following items:

The date, time, and place of the meeting;

The presence or absence of members of the board;

The substance of all matters proposed, discussed, or decided, and a record, by individual member, of any votes taken; and

Any other information that any member of the board requests be included or reflected in the minutes.

*Id.* § 92-9(a).

#### (2). Are minutes public record?

Yes. Haw. Rev. Stat. § 92-9(b). Whether disclosure of minutes of government boards is required is analyzed according to both the Sunshine Law and the UIPA. *County of Kauai v. OIP*, 120 Hawai‘i 34, 43, 200 P.3d 403, 412 (App. 2009). Minutes must be made available within thirty days after the meeting, *id.*, or as soon as approved if such minutes are approved in less than 30 days, Minutes of Employees’ Retirement System Meetings, OIP Op. Ltr. No. 92-27 (Dec. 30, 1992). Draft minutes, as government records governed by the UIPA, must also be made available to the public. *Id.* (discussing overlapping requirements under similarly worded purpose of the Sunshine Law and the UIPA).

*Continued meetings.*

Whether notice is required for reconvened meetings following an adjournment before all business has been conducted continues to generate controversy in Hawaii.

The Maui Corporation Counsel held that a meeting recessed to a later date can be treated as a continuation of the same meeting as long as the time of resumption is specified. “However, if a meeting is adjourned sine die [without delay], such an adjournment terminates the meeting. Any resumption of said meeting would be, in fact, the beginning of a new meeting for which new notice should be given.” [References omitted.] The failure to provide public notice of the new meeting “would clearly subvert the public notice requirement of Subsection 92-7(a) . . .” Maui Corp. Counsel Op. (Oct. 17, 1980).

But, when a similar situation occurred in a meeting of the University of Hawaii Board of Regents in 1992, the State Attorney General advised the board that notice of the reconvened meeting was not necessary. The media threatened suit and the Regents opted to provide notice. The Sunshine Coalition has subsequently organized efforts to amend the Sunshine Law to clearly require notice of the resumption of recessed meetings.

#### 2. Special or emergency meetings.

##### a. Definition.

A board may hold an emergency meeting if two-thirds of all members to which the board is entitled agree that either (1) an imminent peril to public health, safety, or welfare requires a meeting in less than six calendar days; or (2) an unanticipated event requires a board to take action on a matter within its power in less than six calendar days. Haw. Rev. Stat. § 92-8 (2005).

“Unanticipated events” include:

(1) An event which members of the board did not have sufficient advance knowledge of or reasonably could not have known about from information published by the media or information generally available in the community;

(2) A deadline established by a legislative body, a court, or a federal, state, or county agency beyond the control of a board; or

(3) A consequence of an event for which reasonably informed and knowledgeable board members could not have taken all necessary action.

Haw. Rev. Stat. § 92-8(c).

A board may also hold a limited meeting if it determines that it is necessary to meet at a location that is dangerous to health or safety, or if necessary to conduct an on-site inspection of a location that is related to the board's business at which public attendance is not practicable, and the director of OIP concurs. Haw. Rev. Stat. § 92-3.1(a).

**b. Notice requirements.**

**(1). Time limit for giving notice.**

Notice must be given to people requesting notification on a regular basis as soon as practicable. Haw. Rev. Stat. §§ 92-8(a)(4), (b)(4).

**(2). To whom notice is given.**

Persons previously requesting notification are to be contacted by mail or telephone *as soon as practicable*. Haw. Rev. Stat. §§ 92-8(a)(4), (b)(4) (emphasis added). The statute, however, does not indicate whether such notice, as practicable, must be given in advance of the meeting.

**(3). Where posted.**

An emergency agenda and findings are to be filed with the office of the lieutenant governor or the appropriate county clerk's office, *and* in the board's office. Haw. Rev. Stat. §§ 92-8(a)(3), (b)(3).

**(4). Public agenda items required.**

The requirements regarding notice of the agenda for an emergency meeting are the same as for a regular meeting, although the agenda may be amended upon two-thirds vote of all board members.

**(5). Other information required in notice.**

It is unlikely that notice itself is always required for emergency meetings. Furthermore, although the board must state in writing its findings that an imminent peril to the public health, safety, or welfare or that an unanticipated event requires an emergency meeting, Haw. Rev. Stat. § 92-8, the law does not explicitly state that this information must be contained in the notice. The law only requires advance notice for "regular, special, or rescheduled meeting[s], [and] *any executive meeting when anticipated in advance*." *Id.* § 92-7. Emergency meetings may be conducted as executive meetings. *Id.* § 92-5 (a)(6) (excepting from the statute's public meeting requirements those meetings held "[t]o consider sensitive matters related to public safety or security"). Thus, even if an emergency meeting is conducted as an executive meeting, advance notice will apparently only be required when such an executive meeting was "anticipated in advance." *Id.* § 92-8 ("imminent peril . . . requires a meeting in less time than is provided for in [S]ection 92-7").

**(6). Penalties and remedies for failure to give adequate notice.**

Actions taken at emergency meetings will not be voidable because of willful violation of the Sunshine Laws. This is because Section 92-11, providing for voidability of actions in violation of the Sunshine Law, only applies to Section 92-3, which exempts executive meetings, and Section 92-7, regarding meetings requiring six-day notice. If the law's requirements are not met, Haw. Rev. Stat. § 92-8, anyone affected may sue to determine the enforceability of the agency's actions. *Id.* § 92-12(c). Only upon a showing of likelihood of success on the merits, irreparable harm to the plaintiff, no irreparable harm to the public, and public interest served may enforcement of agency actions be stayed pending such a judicial appeal. *Id.* § 92-12(d).

**c. Minutes.**

**(1). Information required.**

In addition to the normal items required, the board must state in writing the reasons for its finding that an emergency meeting was required. Haw. Rev. Stat. § 92-8.

**(2). Are minutes a public record?**

Yes. Haw. Rev. Stat. § 92-9(a).

**3. Closed meetings or executive sessions.**

**a. Definition.**

Executive meetings are meetings closed to the public. "A board may hold an executive meeting closed to the public upon an affirmative vote, taken at an open meeting, of two-thirds of the members present; provided the affirmative vote constitutes a majority of the members *to which the board is entitled*." Haw. Rev. Stat. § 92-4 (1996) (emphasis added).

Limited meetings are also closed to the public. A board may hold a limited meeting closed to the public provided that at a regular meeting prior to the limited meeting, the board determines that it is necessary to meet at a location that is dangerous to health or safety, specifies the reasons for such a determination and that two-thirds of all members to which the board is entitled vote to adopt the determinations and to conduct the meeting. Haw. Rev. Stat. § 92-3.1 (1996). The state attorney general must concur in the determination that it is necessary to meet at a location that is dangerous to health or safety. *Id.* The board may not make any decisions at a limited meeting. *Id.*

**b. Notice requirements.**

**(1). Time limit for giving notice.**

The time limit for giving notice of executive and limited meetings is the same as regular meetings — at least six days in advance. Haw. Rev. Stat. §§ 92-3.1(3), 92-7.

**(2). To whom notice is given.**

Notice must be given to all those included on the board's mailing list of individuals requesting notice six days in advance or as soon as practicable. Haw. Rev. Stat. § 92-7.

**(3). Where posted.**

Posting requirements are the same for regular meetings and for executive and limited meetings.

**(4). Public agenda items required.**

Required agenda items are the same for regular meeting and for executive and limited meetings.

**(5). Other information required in notice.**

The purpose for holding an executive meeting must be stated. Haw. Rev. Stat. § 92-7(a).

**(6). Penalties and remedies for failure to give adequate notice.**

The final action is voidable upon proof of a willful violation. Haw. Rev. Stat. § 92-11.

**c. Minutes.**

**(1). Information required.**

The information required for the minutes are the same for regular meetings and for executive and limited meetings.

**(2). Are minutes a public record?**

Yes, except when and so long as publication would defeat the purpose of the closed hearing, but no longer. Haw. Rev. Stat. § 92-9(b).

**d. Requirement to meet in public before closing meeting.**

Yes. In the case of executive meetings, the board must also record the vote of each member on the question of holding a meeting closed to the public in the minutes of an open meeting. Haw. Rev. Stat. § 92-4. Before holding a limited meeting, the board must hold an open meeting. *See id.* § 92-3.1(a).

**e. Requirement to state statutory authority for closing meetings before closure.**

Yes. The board must publicly announce the reason(s) for holding a closed meeting. Haw. Rev. Stat. § 92-4. Executive sessions must be

limited to the purposes enumerated in Section 92-5, *id.* § 92-4, and cannot involve decisions or deliberations toward a decision on other matters, *id.* § 92-5(b).

Moreover, at an open meeting held prior to a limited meeting, the board must determine that it is necessary to meet at the dangerous location and specify the reasons for its determination and two-thirds of all members to which is entitled vote to adopt the determinations and conduct the limited meeting. *Id.* § 92-3.1(a).

#### f. Tape recording requirements.

While there are no tape recording requirements for executive meetings, unless the state attorney general waives the requirement, the board must videotape limited meetings and make the videotape available at the next regular meeting. Haw. Rev. Stat. § 92-3.1(b).

### F. Recording/broadcast of meetings.

#### 1. Sound recordings allowed.

Any person in attendance may make a recording if doing so does not actively interfere with the conduct of the meeting. Haw. Rev. Stat. § 92-9(c). Executive (closed) meetings are excepted. *Id.*

Considerable confusion exists regarding recordings of board meetings. In response to a written request, the executive secretary of the Honolulu Neighborhood Commission refused to grant access to a tape recording of a Waikiki Neighborhood Board meeting made by commission staff on the grounds that “any taping of board meetings is purely a personal tool limited to assist our field staff in developing a set of draft minutes, and because no existing statute or regulation requires the mandatory tape recording of a public meeting, no tapes that may be taken of open meetings . . . are retained by this office as public documents.” Letter to Audrey Fox Anderson from John A. Parish, Jr., Honolulu Neighborhood Comm’n (Dec. 28, 1983). The Commission’s position is now illegal under the UIPA, which requires that access be afforded to any government record in physical form unless it is protected by statutory exemptions. *Id.* 92F-3 (1996). The recordings of open meetings if made are government records to which the public must be given access under the laws. Audio Tape Recording of the Comm’n’s Pub. Meeting, OIP Op. Ltr. No. 92-13 (Aug. 13, 1992).

#### 2. Photographic recordings allowed.

While the open meetings law allows any part of a meeting to be recorded “by means of a tape recorder or any other means of sonic reproduction,” there is nothing that authorizes photographic recordings. *See* Haw. Rev. Stat. § 92-9(c). However, in the case of limited meetings, the board must videotape the meeting. *Id.* § 92-3.

### G. Are there sanctions for noncompliance?

“Any final action taken in violation of sections 92-3 and 92-7 may be voidable upon proof of violation. A suit to void any final action shall be commenced within ninety days of the action.” *See* Haw. Rev. Stat. § 92-11. Suits may be commenced by any person in the corresponding circuit court of the State where the violation has occurred. *See* Haw. Rev. Stat. § 92-12. Furthermore, the Sunshine Law provides that “[a]ny person who willfully violates any provisions of [the law] shall be guilty of a misdemeanor, and upon conviction, may be summarily removed from the board unless otherwise provided by the law.” Haw. Rev. Stat. § 92-13.

## II. EXEMPTIONS AND OTHER LEGAL LIMITATIONS

### A. Exemptions in the open meetings statute.

#### 1. Character of exemptions.

##### a. General or specific.

**Specific.** The open meetings law does not require all communications between board members to be conducted in public. A board may hold a closed executive meeting for any one or more of eight enumerated purposes. Haw. Rev. Stat. § 92-4. In addition, certain com-

munications among board members are characterized as “permitted interactions of members” which may be conducted in private. *Id.* § 92-2.5 (2005).

#### b. Mandatory or discretionary closure.

Discretionary. *See id.* § 92-5(a).

### 2. Description of each exemption.

Closed executive meetings are limited to enumerated subjects. Haw. Rev. Stat. § 92-1 (referring to § 92-5(a)). These are:

Consideration and evaluation of personal information relating to individuals applying for professional and/or vocational licenses in various trade businesses and professions — including banks, insurance companies, and brokerage firms — governed by the Department of Commerce and Consumer Affairs;

Consideration concerning the hire, evaluation, dismissal, or discipline of an officer or employee or of charges brought against the officer or employee, where consideration of matters affecting privacy will be involved, provided that if the individual concerned requests an open meeting, an open meeting must be held;

Deliberations concerning the authority of persons designated by the board to conduct labor negotiations or to negotiate the acquisition of public property, or deliberations during the conduct of such negotiations;

Consultations with the board’s attorney on questions and issues pertaining to the board’s powers, duties, privileges, immunities, and liabilities;

Investigative proceedings regarding criminal misconduct;

Consideration of sensitive matters related to public safety or security;

Consideration of matters relating to the solicitation and acceptance of private donations; and

Deliberations or decisions upon a matter that requires the consideration of information that must be kept confidential pursuant to a state or federal law, or a court order.

*Id.* § 92-5(a).

The following permitted interactions between board members are not “meetings” that mandate public access:

Discussions between two members of a board relating to official board business to enable them to faithfully perform their duties, so long as no commitment to vote is made or sought and the two members do not constitute a quorum of their board;

Investigations of two or more board members, so long as the number of members do not constitute a quorum for the board, relating to the official business of their board provided that: (1) the scope the investigation and scope of each member’s authority are defined at a meeting of the board, (2) all resulting findings and recommendations are present to the board at a meeting of the board; and (3) deliberation and decision making on the matter investigated, if any occurs only at a duly noticed meeting of the board held subsequent to the meeting at which any findings and recommendations of the investigation were presented;

Presentations, discussions or negotiations between two or more board members, so long as the number of members do not constitute a quorum for the board, relating to any position which the board has adopted at a meeting of the board, provided that the assignment is made and the scope of each member’s authority is defined at a meeting of the board prior to the presentation, discussion or negotiation;

Discussions between two or more board members, so long as the number of members does not constitute a quorum for the board,

relating to the selection of the board's officers;

Discussions between the governor and one or more members of a board not relating to a matter for which a board is exercising its adjudicatory function; and

Discussions between two or more board members and the head of a department to which the board is administratively assigned so long as discussion is limited to matters specified in Section 26-35.

Haw. Rev. Stat. § 92-2.5.

In response to a request from the executive secretary of the Neighborhood Commission as to how the Board may develop a notice for Board members who attend community meetings, the Honolulu Corporate Counsel concluded that individual members could attend community meetings in their individual capacities without violating the open meetings law if none of the matters discussed at the community meetings were currently pending before the Neighborhood Board. Honolulu Corporate Counsel Memo. of Law No. 00-2 (May 19, 2000). The corporate counsel noted that this raised constitutional concerns that a membership on a public body should not deprive an individual of the opportunity to engage in public debate. However, if an item to be discussed at a community meeting was pending before a Neighborhood Board, Honolulu Corporate Counsel advised that Board members should be deputized, *i.e.*, designate members, constituting less than a quorum, to attend the community meetings, and state that they may consider themselves doing it for the purpose of ascertaining the interests of those attending and reporting the same to the Board and/or for the purpose of informing those at the community meeting about a position taken by the Board. So long as the number of attending Board members do not constitute a quorum, Honolulu corporate counsel opined that deputization protected the attending Board members' "investigation" or "discussion" as a "permitted interaction" under Sections 92-2.5(b)(1) and (b)(2).

#### **B. Any other statutory requirements for closed or open meetings.**

The provisions of the City Charter or applicable city ordinances apply if they are more stringent than those of the Sunshine Law. The Honolulu Charter allows closed "executive sessions" under fewer circumstances than under state law.

Corporation Counsel guidelines on proper implementation of the Sunshine Law include advanced written notice of meetings, written minutes, the public's right to tape record a meeting, and the penalties for willful violation of the law. As amended in 1984, the county ordinance requires eight days advance notice. Honolulu Corp. Counsel Memo. (Feb. 13, 1985).

#### **C. Court mandated opening, closing.**

Courts can mandate that meetings be opened or closed.

### **III. MEETING CATEGORIES — OPEN OR CLOSED.**

*Other categories: Planning.*

The Sunshine Law expressly applies to the Land Use Commission; its meetings must be open to the public. Haw. Rev. Stat. § 92-6(b).

Maui Corporation Counsel held that an "informational meeting" between the Planning and Land Use Committee of the Maui County Council and members of the Kihei-Makena Citizens Advisory Committee did not violate the Sunshine Law. Because it was not the Land Use Commission, the rules of the council, not Section 92-6(b), governed its conduct. Maui Corp. Counsel Op. (Sept. 27, 1985).

#### **A. Adjudications by administrative bodies.**

##### **1. Deliberations closed, but not fact-finding.**

When the Office of Human Resources received a request to release a taped transcript of a fact-finding hearing involving a complaint alleging discrimination, Corporation Counsel determined that the

transcript was not a public record and that disclosure would violate the privacy of persons involved in the case. Honolulu Corp. Counsel Memo. of Law No. M83-65 (Dec. 28, 1983).

#### **2. Only certain adjudications closed, i.e. under certain statutes.**

All "board" adjudications are closed. Haw. Rev. Stat. § 92-6(a)(2). Contested case hearings conducted by an agency are not governed by the Sunshine Law. See *E&F Lounge Operating Co. v. Liquor Comm'n of City & County of Honolulu*, 118 Hawai'i 320, 334 n.20, 189 P.3d 432, 446 n.20 (2008).

#### **B. Budget sessions.**

When Common Cause Hawaii filed suit against the legislature after its executive director was denied entry to a closed meeting of a legislative subcommittee working on the state budget, the court held that the issue was moot because the governor had vetoed the budget bill and the legislature had then met in special session to adopt a new budget bill. The court also noted that both House and Senate rules required open meetings and were therefore consistent with article III, section 12 of the Hawaii Constitution. *Grade v. Kumimura*, Civ. No. 66451 (Haw. 1st Cir. July 13, 1981).

#### **C. Business and industry relations.**

Adjudicatory proceedings involving the Hawaii Labor Relations Board, the Labor and Industrial Relations Appeal Board, or the Board of Trustees for the State of Hawaii Employees' Retirement System are all closed. Haw. Rev. Stat. § 92-6. Deliberations about "the authority of persons designated . . . to conduct labor negotiations" fall within purposes for which closed meetings are allowed. Haw. Rev. Stat. § 92-5(a)(3).

#### **D. Federal programs.**

If administered by state agencies, meetings concerning federal programs are presumably open except to the extent mandated by federal law.

#### **E. Financial data of public bodies.**

Meetings concerning the financial aspects of "public bodies" are presumably open.

#### **F. Financial data, trade secrets or proprietary data of private corporations and individuals.**

If the meeting pertains to an individual applying for certain professional licenses and involves "personal information," the meeting qualifies as one which can be closed. Haw. Rev. Stat. § 92-5(a)(1). Otherwise, unless such matters involve "sensitive matters related to public safety or security," *id.* § 92-5(a)(6), such meetings cannot be closed merely because of information discussed. *Id.* § 92-4 (limiting executive meetings to those closed for reasons enumerated in Section 92-5).

#### **G. Gifts, trusts and honorary degrees.**

No cases. Meetings are presumably open.

#### **H. Grand jury testimony by public employees.**

No. Chapter 92 does not apply to the judicial branch. Haw. Rev. Stat. § 92-6(a)(1).

#### **I. Licensing examinations.**

Meetings "[t]o consider and evaluate personal information relating to individuals applying for professional or vocational licenses" may be closed. Haw. Rev. Stat. § 92-5(a)(1).

#### **J. Litigation; pending litigation or other attorney-client privileges.**

Meetings to consult with a board's attorney "on questions and issues pertaining to the board's powers, duties, privileges, immunities, and

liabilities” may be closed. Haw. Rev. Stat. § 92-5(a)(4).

When a Hawaii County Council subcommittee on collective bargaining met in executive session to hear testimony concerning the progress of negotiations with public employee unions, reporters and others challenged the closed meeting while the Council asked the court to approve the executive session. The court found that the meeting seemed to fall within certain provisions of the Sunshine Law and the County Charter, and that “the provision which is most strongly supportive of openness” would prevail. The court held that although the Sunshine Law permits closed meetings for a board to meet with the county attorney regarding “pending or imminent litigation, or pending contested cases in administrative proceedings,” a closed meeting to discuss collective bargaining violated the Charter. *County of Hawaii v. Shapiro*, Civ. No. 4684 (Haw. 3d Cir. 1977).

#### **K. Negotiations and collective bargaining of public employees.**

A board may hold a closed meeting to “deliberate concerning the authority of persons designated by the board to conduct labor negotiations . . . or during the conduct of such negotiations.” Haw. Rev. Stat. § 92-5(a)(3) (Supp. 1999).

#### **L. Parole board meetings, or meetings involving parole board decisions.**

The Hawaii Paroling Authority is among the seven enumerated agencies that exercise adjudicatory functions exempting meetings for these purposes from the open meetings law. Haw. Rev. Stat. § 92-6(a)(2).

#### **M. Patients; discussions on individual patients.**

Such meetings may be closed if the discussions involve “sensitive matters relating to public safety or security,” or matters that “require[] the consideration of information that must be confidential pursuant to state or federal law, or a court order.” See Haw. Rev. Stat. §§ 92-5(a)(6), (a)(8).

#### **N. Personnel matters.**

##### **1. Interviews for public employment.**

Employment interviews by government entities may be closed “where consideration of matters affecting privacy will be involved, provided that if the individual concerned requests an open meeting, an open meeting shall be held . . .” Haw. Rev. Stat. § 92-5(a)(2).

At its meeting of October 16, 1981, the University of Hawaii Board of Regents created a new position of University of Hawaii Vice-President and appointed a person to fill the position. The Sunshine Law Coalition complained that this was done without providing the notice required under the Sunshine Law. The attorney general held that this appointment would not “affect” a significant number of persons” and was primarily a matter of “internal management.” Further, the attorney general held that since personnel matters can be discussed in closed executive sessions, the placement of this matter on the agenda only for a final vote did not violate the Sunshine Law. Att’y Gen. Letter (Mar. 16, 1982).

The Police Commission may close its meetings to interview applicants for the position of Chief of Police and to deliberate towards a decision. However, the actual official selection of the new police chief must be made at a public, open meeting. Honolulu Corp. Counsel Memo. of Law No. M83-29 (Aug. 6, 1983).

The Kauai County Council may not meet in executive session to interview individuals who are appointed by the Mayor to county boards and commissions. The interviews did not qualify for the exemption to the Sunshine Law allowing a board to meet in executive session in order to “deliberate or make a decision upon a matter that requires the consideration of information that must be kept confidential pursuant to a state or federal law” because neither UIPA and Kauai County

Charter provisions that exempt applications and nominations for a governmental position from disclosure are “state laws” for purposes of the exemption. Moreover, because an individual nominated to a board or commission will not serve for pay or compensation, a nominee cannot be considered a “hire” for purposes of invoking the exemption in Haw. Rev. Stat. § 92-5(a)(2). OIP Op. Ltr. 05-04 (Jan. 21, 2005).

#### **2. Disciplinary matters, performance or ethics of public employees.**

Meetings involving such matters may be closed “where consideration of matters affecting privacy will be involved, provided that if the individual concerned requests an open meeting, an open meeting shall be held. . . .” Haw. Rev. Stat. § 92-5(a)(2).

When the Board of Education requested an opinion as to whether they were permitted to hold a closed meeting to develop employment criteria to be used in reviewing applicants for the job of Superintendent of Education, the attorney general informed them that the Sunshine Law does not contain any exemption for such meetings. A closed executive meeting can be held to consider the hire, evaluation, dismissal, or discipline of a specific individual, but this does not allow general discussions to be closed. Att’y Gen. Op. No. 75-11.

Likewise, meetings of the Civil Service Commission and the Commission staff to discuss the process used to evaluate police officers for promotion must be open to the public. The Civil Service Commission is a “board” as defined by the Sunshine Law and its meetings must generally be open. If the meeting is for the evaluation of a specific person, then the meeting may be closed. Honolulu Corp. Counsel Memo. of Law No. M75-81 (Aug. 11, 1976).

However, the Corporation Counsel has held that the Promotion Potential Review Panel, which recommends promotion of Honolulu police officers, is not subject to provisions of the Sunshine Law because it was not created “by constitution, statute, rule, or executive order.” Therefore, the Panel is not a “board” for purposes of the Sunshine Law. Honolulu Corp. Counsel Memo. of Law No. M76-101 (Oct. 14, 1976).

#### **3. Dismissal; considering dismissal of public employees.**

Meetings can be closed if they “consider the . . . dismissal . . . of an officer or employee” where such consideration involves matters of privacy, unless the officer or employee requests an open meeting. Haw. Rev. Stat. § 92-5(a)(2).

#### **O. Real estate negotiations.**

Negotiations to acquire public property may be closed. Haw. Rev. Stat. § 92-5(a)(3).

#### **P. Security, national and/or state, of buildings, personnel or other.**

If the subject matter is sensitive and related to public safety, meetings on these matters may be closed. Haw. Rev. Stat. § 92-5(a)(6).

#### **Q. Students; discussions on individual students.**

The statutes do not specifically address meetings of or concerning students.

### **IV. PROCEDURE FOR ASSERTING RIGHT OF ACCESS**

#### **A. When to challenge.**

##### **1. Does the law provide expedited procedure for reviewing request to attend upcoming meetings?**

Unlike the UIPA, which provides expedited review of denial of access to records, the Sunshine Law does not explicitly provide for expedited hearings although the courts can enforce the law “by injunctions or other appropriate remedy.” Haw. Rev. Stat. § 92-12.

## 2. When barred from attending.

The Director of the Office of Information Practices (OIP) is charged with administration of the open meetings law and establishing the procedures for filing and responding to complaints filed by any person concerning the failure of any board to comply with the open meetings law. Haw. Rev. Stat. § 92-1.5 (Supp. 1999).

A person who feels he or she has been illegally barred from a meeting should argue that the “board” in question is covered by the Sunshine Law, that none of the exemptions apply to the meeting, and that therefore the meeting should be open. If this fails, the person is advised to contact an attorney who can negotiate with the board’s attorney and, if necessary, file suit against the “board.”

## 3. To set aside decision.

A lawsuit to void a final action must be brought within ninety days of the action. Haw. Rev. Stat. § 92-11.

## 4. For ruling on future meetings.

A ruling on whether a future meeting must be open may be possible, *see id.* § 92-12(c), as long as proof of controversy exists. One could also seek an advisory opinion from the Deputy Attorney General assigned to the particular agency scheduling the meeting.

## 5. Other.

N/A.

### B. How to start.

#### 1. Where to ask for ruling.

##### a. Administrative forum.

The OIP, created by Chapter 92F, administers and establishes procedures for filing and responding to open meeting complaints. As of fall 2000, the OIP did not have formal or written procedures for filing or responding to complaints. Generally, complaints stating the facts and nature of the dispute are forwarded to the OIP Director. The OIP Director assigns the complaint to one of the staff attorneys who conducts research on the issue. Responses vary depending on the circumstances. Where appropriate, the OIP may respond by forwarding an informal letter to the person or agency complaining, issuing a formal written OIP opinion, or mediating the dispute. *See, e.g.*, Openline (OIP newsletter) October 1999 (upon the request of the public, the OIP issued a recommendation to the Liquor Commission to allow oral testimony on an agenda item properly noticed).

##### (1). Agency procedure for challenge.

See above.

##### (2). Commission or independent agency.

See above.

##### b. State attorney general.

The attorney general and the prosecuting attorney enforce the open meetings law. Haw. Rev. Stat. § 92-12(a).

When a member of the Honolulu City Council requested an opinion from the county Ethics Commission concerning possible Sunshine Law violations involving a “briefing” held by the Council’s Zoning Committee, the Ethics Commission determined that “there are no standards of conduct applicable to officers and employees who are alleged to have violated the provisions of the Sunshine Law.” The Commission further recommended that any requests regarding enforcement be referred to the Prosecutor or the Attorney General. Honolulu Ethics Comm’n Letter (May 25, 1980).

##### c. Court.

The state circuit courts have jurisdiction to enforce the Sunshine Law by injunction or other appropriate remedy. Haw. Rev. Stat. § 92-

12(b). Suits should be commenced in the circuit court of the circuit in which the prohibited act occurred. *Id.* § 92-12(c).

## 2. Applicable time limits.

Suits to void a final action must be commenced within ninety days of the action. Haw. Rev. Stat. § 92-11.

## 3. Contents of request for ruling.

No requirements.

## 4. How long should you wait for a response?

No provision.

## 5. Are subsequent or concurrent measures (formal or informal) available?

No provision.

### C. Court review of administrative decision.

#### 1. Who may sue?

Any person may commence suit for an alleged violation of the open meetings law. Haw. Rev. Stat. § 92-12(c) (1996); *see Kaapu v. Aloha Tower Dev. Corp.*, 74 Haw. 365, 383, 846 P.2d 882, 889 (1993) (Section 92-12 entitles any person to commence a suit regardless of the person’s participation in the public meeting).

#### 2. Will the court give priority to the pleading?

No.

#### 3. Pro se possibility, advisability.

There are no requirements that an attorney be engaged, but technicalities of the act and procedural requirements of litigation make it advisable to retain an attorney.

#### 4. What issues will the court address?

##### a. Open the meeting.

Yes. Haw. Rev. Stat. § 92-12(c).

##### b. Invalidate the decision.

Yes. Haw. Rev. Stat. § 92-11.

##### c. Order future meetings open.

Yes. Haw. Rev. Stat. § 92-12(c).

#### 5. Pleading format.

See Haw. R. Civ. Proc. 10 and court rules.

#### 6. Time limit for filing suit.

Actions to void any final action taken in violation of sections 92-3 (open meetings requirement) and 92-7 (notice requirements) must be commenced within ninety days of the final action. Haw. Rev. Stat. § 92-11 (1975).

#### 7. What court.

Suits should be commenced in the circuit court of the circuit in which the prohibited act occurred. *Id.* § 92-12(c).

#### 8. Judicial remedies available.

The court may grant an injunction or any appropriate remedy. Haw. Rev. Stat. § 92-12(b). The court may also stay the enforcement of any agency decision if the following criteria have been met:

There is likelihood that the party bringing the action will prevail on the merits;

Irreparable damage will result if a stay is not ordered;

No irreparable damage to the public will result from the stay order;

and

Public interest will be served by the stay order.

Haw. Rev. Stat. § 92-12(d).

The court may also determine that any final action taken in violation of Sections 92-3 (open meetings) and 92-7 (notice) is void, provided there is proof of a violation. Haw. Rev. Stat. § 92-11 (1996).

#### 9. Availability of court costs and attorneys' fees.

The court may also "order payment of reasonable attorney fees and costs to the prevailing party . . ." Haw. Rev. Stat. § 92-12(c).

#### 10. Fines.

No express provision.

#### 11. Other penalties.

Any person willfully violating any provision of the open meetings law is guilty of a misdemeanor and, upon conviction, can be summarily removed from the board unless otherwise provided by law. Haw. Rev. Stat. § 92-13.

### D. Appealing initial court decisions.

#### 1. Appeal routes.

In Hawaii, appeals from all final judgments of the circuit courts are made to the Supreme Court. Haw. Rev. Stat. § 641-1. The Supreme Court has discretion to transfer any matter to the Intermediate Court of Appeals (ICA). Haw. R. App. Proc. 31(c). The ICA in turn may certify a matter to the Supreme Court, which may take or reject the matter within thirty days.

#### 2. Time limits for filing appeals.

Within thirty days after the filing of a final decision or order of a circuit court or the ICA, any party may apply in writing to the State Supreme Court for a writ of certiorari. Haw. R. App. Proc. 4. Appellate review is discretionary with the State Supreme Court.

#### 3. Contact of interested amici.

The OIP (contact: staff attorney (808) 585-1400), the ACLU (contact: (808) 522-5900) and the Common Cause Hawaii (contact: (808) 275-6275) and the Society of Professional Journalists (contact: spj@flex.com).

The Reporters Committee for Freedom of the Press often files *amicus* briefs in cases involving significant media law issues before a state's highest court.

## V. ASSERTING A RIGHT TO COMMENT.

### A. Is there a right to participate in public meetings?

Yes. Pursuant to Haw. Rev. Stat. § 92-3 (2005) every meeting of all boards shall be open to the public and all persons shall be permitted to attend and submit data, views, or arguments, in writing as well as provide oral testimony. *See id.* A board must allow a person to testify on as many of the items on the agenda as the person wishes. Public Testimony, OIP Op. Ltr. No. 06-01 (Feb. 28, 2006). However, a person giving testimony at a public meeting does not have the right to question board members under the guise of oral testimony. *Id.*

A board is not required to accept oral testimony on an agenda item that has been cancelled before the board considers it. Public Testimony, OIP Op. Ltr. No. 07-03 (Feb. 13, 2007). With respect to an agenda item of which the board has begun consideration but has deferred further action to another meeting or indefinitely, the board must accept oral testimony on such item. *Id.*

A board can require that testimony be related to a stated agenda item, but it must interpret the agenda item broadly for the purpose of determining whether testimony is related to the agenda item. A board may not restrict the public from testifying on issues that fall within the general subject matter of an agenda item, and the scope of an agenda item is determined by the language used on the filed agenda, not the board's intent as to the meaning of the agenda item. Right to Present Testimony, OIP Op. Ltr. No. 07-10 (June 27, 2007).

### B. Must a commenter give notice of intentions to comment?

No. Registering to testify is not required. The law requires that all interested persons be afforded an opportunity to present oral testimony. OIP Op. Ltr. No. 01-06 (December 31, 2001).

### C. Can a public body limit comment?

Boards may provide for reasonable administration or oral testimony by rule. Haw. Rev. Stat. § 92-3 (2005).

### D. How can a participant assert rights to comment?

Simply submit written or oral testimony on any agenda item for public meetings and the board must accept it. Oahu Island Burial Council, OIP Op. Ltr. No. 03-22 (December 30, 2003).

### E. Are there sanctions for unapproved comment?

A decision made in willful violation of the Sunshine Law is voidable "upon proof of willful violation," through suit commenced within 90 days of the contested action. Haw. Rev. Stat. § 92-12(b).

## Statute

### Open Records

*Hawaii Revised Statutes Annotated*

*Division 1. Government.*

*Title 8. Public Proceedings and Records.*

*Chapter 92F. Uniform Information Practices Act.*

*Part I. General Provisions and Definitions.*

#### § 92F-1. Short title

This chapter shall be known and may be cited as the Uniform Information Practices Act (Modified).

#### § 92F-2. Purposes; rules of construction

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.

The 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.

This chapter shall be applied and construed to promote its underlying purposes and policies, which are 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.

#### § 92F-3. General definitions

Unless the context otherwise requires, in this chapter:

“Agency” means any unit of government in this State, any county, or any combination of counties; department; institution; board; commission; district; council; bureau; office; governing authority; other instrumentality of state or county government; or corporation or other establishment owned, operated, or managed by or on behalf of this State or any county, but does not include the nonadministrative functions of the courts of this State.

“Government record” means information maintained by an agency in written, auditory, visual, electronic, or other physical form.

“Individual” means a natural person.

“Person” means an individual, corporation, government, or governmental subdivision or agency, business trust, estate, trust, partnership, association, or any other legal entity.

“Personal record” means any item, collection, or grouping of information about an individual that is maintained by an agency. It includes, but is not limited to, the individual's education, financial, medical, or employment history, or items that contain or make reference to the individual's name, identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph.

#### Part II. Freedom of Information

#### § 92F-4. Funding, services, and other federal assistance

Where compliance with any provision of this chapter would cause an agency to lose or be denied funding, services, or other assistance from the federal government, compliance with that provision shall be waived but only to the extent necessary to protect eligibility for federal funding, services, or other assistance.

#### § 92F-11. Affirmative agency disclosure responsibilities

(a) All government records are open to public inspection unless access is restricted or closed by law.

(Repeal and reenactment of subsec. (b) July 1, 2014, by Laws 2010, ch. 100, § 3.)

(b) Except as provided in section 92F-13, each agency upon request by any person shall make government records available for inspection and copying during regular business hours; provided that an agency shall not be required to make government records available or respond to a person's subsequent duplicative request, if:

(1) After conducting a good faith review and comparison of the earlier request and the pending request, the agency finds that the pending request is duplicative or substantially similar in nature;

(2) The pending request has already been responded to within the past year; and

(3) The agency's response to the pending request would remain unchanged.

(c) Unless the information is readily retrievable by the agency in the form in which it is requested, an agency shall not be required to prepare a compilation or summary of its records.

(d) Each agency shall assure reasonable access to facilities for duplicating records and for making memoranda or abstracts.

(e) Each agency may adopt rules, pursuant to chapter 91, to protect its records from theft, loss, defacement, alteration, or deterioration and to prevent manifestly excessive interference with the discharge of its other lawful responsibilities and functions.

#### § 92F-12. Disclosure required

(a) Any other provision in this chapter to the contrary notwithstanding, each agency shall make available for public inspection and duplication during regular business hours:

(1) Rules of procedure, substantive rules of general applicability, statements of general policy, and interpretations of general applicability adopted by the agency;

(2) Final opinions, including concurring and dissenting opinions, as well as orders made in the adjudication of cases, except to the extent protected by section 92F-13(1);

(3) Government purchasing information, including all bid results, except to the extent prohibited by section 92F-13;

(4) Pardons and commutations, as well as directory information concerning an individual's presence at any correctional facility;

(5) Land ownership, transfer, and lien records, including real property tax information and leases of state land;

(6) Results of environmental tests;

(7) Minutes of all agency meetings required by law to be public;

(8) Name, address, and occupation of any person borrowing funds from a state or county loan program, and the amount, purpose, and current status of the loan;

(9) Certified payroll records on public works contracts except social security numbers and home addresses;

(10) Regarding contract hires and consultants employed by agencies:

(A) The contract itself, the amount of compensa-

tion;

(B) The duration of the contract; and

(C) The objectives of the contract,  
except social security numbers and home addresses;

(11) Building permit information within the control of the agency;

(12) Water service consumption data maintained by the boards of water supply;

(13) Rosters of persons holding licenses or permits granted by an agency that may include name, business address, type of license held, and status of the license;

(14) The name, compensation (but only the salary range for employees covered by or included in chapter 76, and sections 302A-602 to 302A-640, and 302A-701, or bargaining unit (8)), job title, business address, business telephone number, job description, education and training background, previous work experience, dates of first and last employment, position number, type of appointment, service computation date, occupational group or class code, bargaining unit code, employing agency name and code, department, division, branch, office, section, unit, and island of employment, of present or former officers or employees of the agency; provided that this paragraph shall not require the creation of a roster of employees; and provided further that this paragraph shall not apply to information regarding present or former employees involved in an undercover capacity in a law enforcement agency;

(15) Information collected and maintained for the purpose of making information available to the general public; and

(16) Information contained in or compiled from a transcript, minutes, report, or summary of a proceeding open to the public.

(b) Any provision to the contrary notwithstanding, each agency shall also disclose:

(1) Any government record, if the requesting person has the prior written consent of all individuals to whom the record refers;

(2) Government records which, pursuant to federal law or a statute of this State, are expressly authorized to be disclosed to the person requesting access;

(3) Government records pursuant to a showing of compelling circumstances affecting the health or safety of any individual;

(4) Government records requested pursuant to an order of a court;

(5) Government records pursuant to a subpoena from either house of the state legislature; and

(6) Information from the motor vehicle registration files, provided that the person requesting such files shall have a legitimate reason as determined by rules.

#### § 92F-13. Government records; exceptions to general rule

This part shall not require disclosure of:

(1) Government records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy;

(2) Government records pertaining to the prosecution or defense of any judicial or quasi-judicial action to which the State or any county is or may be a party, to the extent that such records would not be discoverable;

(3) Government records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function;

(4) Government records which, pursuant to state or federal law including an order of any state or federal court, are protected from disclosure; and

(5) Inchoate and draft working papers of legislative committees including budget worksheets and unfiled committee reports; work product; records or transcripts of an investigating committee of the legislature which are closed

by rules adopted pursuant to section 21-4 and the personal files of members of the legislature.

#### § 92F-14. Significant privacy interest; examples

(a) Disclosure of a government record shall not constitute a clearly unwarranted invasion of personal privacy if the public interest in disclosure outweighs the privacy interest of the individual.

(b) The following are examples of information in which the individual has a significant privacy interest:

(1) Information relating to medical, psychiatric, or psychological history, diagnosis, condition, treatment, or evaluation, other than directory information while an individual is present at such facility;

(2) Information identifiable as part of an investigation into a possible violation of criminal law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

(3) Information relating to eligibility for social services or welfare benefits or to the determination of benefit levels;

(4) Information in an agency's personnel file, or applications, nominations, recommendations, or proposals for public employment or appointment to a governmental position, except:

(A) Information disclosed under section 92F-12(a) (14); and

(B) The following information related to employment misconduct that results in an employee's suspension or discharge:

(i) The name of the employee;

(ii) The nature of the employment related misconduct;

(iii) The agency's summary of the allegations of misconduct;

(iv) Findings of fact and conclusions of law; and

(v) The disciplinary action taken by the agency;

when the following has occurred: the highest non-judicial grievance adjustment procedure timely invoked by the employee or the employee's representative has concluded; a written decision sustaining the suspension or discharge has been issued after this procedure; and thirty calendar days have elapsed following the issuance of the decision; provided that this subparagraph shall not apply to a county police department officer except in a case which results in the discharge of the officer;

(5) Information relating to an individual's nongovernmental employment history except as necessary to demonstrate compliance with requirements for a particular government position;

(6) Information describing an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

(7) Information compiled as part of an inquiry into an individual's fitness to be granted or to retain a license, except:

(A) The record of any proceeding resulting in the discipline of a licensee and the grounds for discipline;

(B) Information on the current place of employment and required insurance coverages of licensees; and

(C) The record of complaints including all dispositions;

(8) Information comprising a personal recommendation or evaluation; and

(9) Social security numbers.

§ 92F-15. *Judicial enforcement*

(a) A person aggrieved by a denial of access to a government record may bring an action against the agency at any time within two years after the agency denial to compel disclosure.

(b) In an action to compel disclosure the circuit court shall hear the matter de novo. Opinions and rulings of the office of information practices shall be admissible. The circuit court may examine the government record at issue, in camera, to assist in determining whether it, or any part of it, may be withheld.

(c) The agency has the burden of proof to establish justification for nondisclosure.

(d) If the complainant prevails in an action brought under this section, the court shall assess against the agency reasonable attorney's fees and all other expenses reasonably incurred in the litigation.

(e) The circuit court in the judicial circuit in which the request for the record is made, where the requested record is maintained, or where the agency's headquarters are located shall have jurisdiction over an action brought under this section.

(f) Except as to cases the circuit court considers of greater importance, proceedings before the court, as authorized by this section, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

§ 92F-15.3. *Notice to the office of information practices*

When filing a civil action that is under, related to, or is affected by this chapter, a person shall notify the office of information practices in writing at the time of the filing. The office of information practices may intervene in the action.

§ 92F-15.5. *Alternative method to appeal a denial of access*

(a) When an agency denies a person access to a government record, the person may appeal the denial to the office of information practices in accordance with rules adopted pursuant to section 92F-42(12). A decision to appeal to the office of information practices for review of the agency denial shall not prejudice the person's right to appeal to the circuit court after a decision is made by the office of information practices.

(b) If the decision is to disclose, the office of information practices shall notify the person and the agency, and the agency shall make the record available. If the denial of access is upheld, in whole or in part, the office of information practices shall, in writing, notify the person of the decision, the reasons for the decision, and the right to bring a judicial action under section 92F-15(a).

§ 92F-16. *Immunity from liability*

Anyone participating in good faith in the disclosure or nondisclosure of a government record shall be immune from any liability, civil or criminal, that might otherwise be incurred, imposed or result from such acts or omissions.

§ 92F-17. *Criminal penalties*

(a) An officer or employee of an agency who intentionally discloses or provides a copy of a government record, or any confidential information explicitly described by specific confidentiality statutes, to any person or agency with actual knowledge that disclosure is prohibited, shall be guilty of a misdemeanor, unless a greater penalty is otherwise provided for by law.

(b) A person who intentionally gains access to or obtains a copy of a government record by false pretense, bribery, or theft, with actual knowledge that access is prohibited, or who intentionally obtains any confidential information by false pretense, bribery, or theft, with actual knowledge that it is prohibited [by] a confidentiality statute, shall be guilty of a misdemeanor.

§ 92F-18. *Agency implementation*

(a) Each agency shall:

- (1) Issue instructions and guidelines necessary to effectuate this chapter; and
- (2) Take steps to assure that all its employees and officers

responsible for the collection, maintenance, use, and dissemination of government records are informed of the requirements of this chapter.

(b) Each agency shall compile a public report describing the records it routinely uses or maintains using forms prescribed by the office of information practices. The public reports shall be filed with the office of information practices on or before December 31, 1994. The public reports shall include:

- (1) The name and location of each set of records;
- (2) The authority under which the records are maintained;
- (3) The categories of individuals for whom records are maintained;
- (4) The categories of information or data maintained in the records;
- (5) The categories of sources of information in the records;
- (6) The categories of uses and disclosures made of the records;
- (7) The agencies and categories of persons outside of the agency which routinely use the records;
- (8) The records routinely used by the agency which are maintained by:
  - (A) Another agency; or
  - (B) A person other than an agency;
- (9) The policies and practices of the agency regarding storage, retrievability, access controls, retentions, and disposal of the information maintained in records;
- (10) The title, business address, and business telephone number of the agency officer or officers responsible for the records;
- (11) The agency procedures whereby an individual may request access to records; and
- (12) The number of written requests for access within the preceding year, the number denied, the number of lawsuits initiated against the agency under this part, and the number of suits in which access was granted.

(c) Each agency shall supplement or amend its public report, or file a new report, on or before July 1 of each subsequent year, to ensure that the information remains accurate and complete. Each agency shall file the supplemental, amended, or new report with the office of information practices, which shall make the reports available for public inspection.

§ 92F-19. *Limitations on disclosure of government records to other agencies*

(a) No agency may disclose or authorize disclosure of government records to any other agency unless the disclosure is:

- (1) Necessary for the performance of the requesting agency's duties and functions and is also:
  - (A) Compatible with the purpose for which the information was collected or obtained; or
  - (B) Consistent with the conditions or reasonable expectations of use and disclosure under which the information was provided;
- (2) To the state archives for the purposes of historical preservation, administrative maintenance, or destruction;
- (3) To another agency, another state, or the federal government, or foreign law enforcement agency or authority, if the disclosure is:
  - (A) For the purpose of a civil or criminal law enforcement activity authorized by law; and
  - (B) Pursuant to:
    - (i) A written agreement or written request, or
    - (ii) A verbal request, made under exigent cir-

circumstances, by an officer or employee of the requesting agency whose identity has been verified, provided that such request is promptly confirmed in writing;

(4) To a criminal law enforcement agency of this State, another state, or the federal government, or a foreign criminal law enforcement agency or authority, if the information is limited to an individual's name and other identifying particulars, including present and past places of employment;

(5) To a foreign government pursuant to an executive agreement, compact, treaty, or statute;

(6) To the legislature, or a county council, or any committee or subcommittee thereof;

(7) Pursuant to an order of a court of competent jurisdiction;

(8) To authorized officials of another agency, another state, or the federal government for the purpose of auditing or monitoring an agency program that receives federal, state, or county funding;

(9) To the offices of the legislative auditor, the legislative reference bureau, or the ombudsman of this State for the performance of their respective functions;

(10) To the department of human resources development, county personnel agencies, or line agency personnel offices for the performance of their respective duties and functions, including employee recruitment and examination, classification and compensation reviews, the administration and auditing of personnel transactions, the administration of training and safety, workers' compensation, and employee benefits and assistance programs, and for labor relations purposes; or

(11) Otherwise subject to disclosure under this chapter.

(b) An agency receiving government records pursuant to subsection (a) shall be subject to the same restrictions on disclosure of the records as the originating agency.

### *Part III. Disclosure of Personal Records*

#### *§ 92F-21. Individual's access to own personal record*

Each agency that maintains any accessible personal record shall make that record available to the individual to whom it pertains, in a reasonably prompt manner and in a reasonably intelligible form. Where necessary the agency shall provide a translation into common terms of any machine readable code or any code or abbreviation employed for internal agency use.

#### *§ 92F-21.5. Repealed by Laws 1990, ch. 250, § 4*

#### *§ 92F-22. Exemptions and limitations on individual access*

An agency is not required by this part to grant an individual access to personal records, or information in such records:

(1) Maintained by an agency that performs as its or as a principal function any activity pertaining to the prevention, control, or reduction of crime, and which consist of:

(A) Information or reports prepared or compiled for the purpose of criminal intelligence or of a criminal investigation, including reports of informers, witnesses, and investigators; or

(B) Reports prepared or compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through confinement, correctional supervision, and release from supervision.

(2) The disclosure of which would reveal the identity of a source who furnished information to the agency under an express or implied promise of confidentiality.

(3) Consisting of testing or examination material or scoring keys used solely to determine individual qualifications for appointment or promotion in public employment, or used as or to administer a licensing examination or an academic examination, the disclosure of which would compromise the objectivity, fairness, or effectiveness of the testing or examination process.

(4) Including investigative reports and materials, related to an upcom-

ing, ongoing, or pending civil or criminal action or administrative proceeding against the individual.

(5) Required to be withheld from the individual to whom it pertains by statute or judicial decision or authorized to be so withheld by constitutional or statutory privilege.

#### *§ 92F-23. Access to personal record; initial procedure*

Upon the request of an individual to gain access to the individual's personal record, an agency shall permit the individual to review the record and have a copy made within ten working days following the date of receipt of the request by the agency unless the personal record requested is exempted under section 92F-22. The ten-day period may be extended for an additional twenty working days if the agency provides to the individual, within the initial ten working days, a written explanation of unusual circumstances causing the delay.

#### *§ 92F-24. Right to correct personal record; initial procedure*

(a) An individual has a right to have any factual error in that person's personal record corrected and any misrepresentation or misleading entry in the record amended by the agency which is responsible for its maintenance.

(b) Within twenty business days after receipt of a written request to correct or amend a personal record and evidence that the personal record contains a factual error, misrepresentation, or misleading entry, an agency shall acknowledge receipt of the request and purported evidence in writing and promptly:

(1) Make the requested correction or amendment; or

(2) Inform the individual in writing of its refusal to correct or amend the personal record, the reason for the refusal, and the agency procedures for review of the refusal.

#### *§ 92F-25. Correction and amendment; review procedures*

(a) Not later than thirty business days after receipt of a request for review of an agency refusal to allow correction or amendment of a personal record, the agency shall make a final determination.

(b) If the agency refuses upon final determination to allow correction or amendment of a personal record, the agency shall so state in writing and:

(1) Permit, whenever appropriate, the individual to file in the record a concise statement setting forth the reasons for the individual's disagreement with the refusal of the agency to correct or amend it; and

(2) Notify the individual of the applicable procedures for obtaining appropriate judicial remedy.

#### *§ 92F-26. Rules*

The office of information practices shall adopt rules, under chapter 91, establishing procedures necessary to implement or administer this part, which the agencies shall adopt, insofar as practicable, in order to ensure uniformity among state and county agencies.

#### *§ 92F-27. Civil actions and remedies*

(a) An individual may bring a civil action against an agency in a circuit court of the State whenever an agency fails to comply with any provision of this part, and after appropriate administrative remedies under sections 92F-23, 92F-24, and 92F-25 have been exhausted.

(b) In any action brought under this section the court may order the agency to correct or amend the complainant's personal record, to require any other agency action, or to enjoin such agency from improper actions as the court may deem necessary and appropriate to render substantial relief.

(c) In any action brought under this section in which the court determines that the agency knowingly or intentionally violated a provision of this part, the agency shall be liable to the complainant in an amount equal to the sum of:

(1) Actual damages sustained by the complainant as a result of the failure of the agency to properly maintain the personal record, but in no case shall a complainant (individual) entitled to recovery receive less than the sum of \$1,000; and

(2) The costs of the action together with reasonable attorney's fees as determined by the court.

(d) The court may assess reasonable attorney's fees and other litigation costs reasonably incurred against the agency in any case in which the complainant has substantially prevailed, and against the complainant where the charges brought against the agency were frivolous.

(e) An action may be brought in the circuit court where the complainant resides, the complainant's principal place of business is situated, or the complainant's relevant personal record is situated. No action shall be brought later than two years after notification of the agency denial, or where applicable, the date of receipt of the final determination of the office of information practices.

*§ 92F-27.5. Alternative method to appeal a denial of access*

(a) When an agency denies an individual access to that individual's personal record, the individual may appeal the denial to the office of information practices in accordance with rules adopted pursuant to section 92F-42(12). A decision to appeal to the office of information practices for review of the agency denial shall not prejudice the individual's right to appeal to the circuit court after a decision is made by the office of information practices.

(b) If the decision is to disclose, the office of information practices shall notify the individual and the agency, and the agency shall make the record available. If the denial of access is upheld, in whole or in part, the office of information practices shall, in writing, notify the individual of the decision, the reasons for the decision, and the right to bring a judicial action under section 92F-27.

*§ 92F-28. Access to personal records by order in judicial or administrative proceedings; access as authorized or required by other law*

Nothing in this part shall be construed to permit or require an agency to withhold or deny access to a personal record, or any information in a personal record:

(1) When the agency is ordered to produce, disclose, or allow access to the record or information in the record, or when discovery of such record or information is allowed by prevailing rules of discovery or by subpoena, in any judicial or administrative proceeding; or

(2) Where any statute, administrative rules, rule of court, judicial decision, or other law authorizes or allows an individual to gain access to a personal record or to any information in a personal record or requires that the individual be given such access.

*Part IV. Office of Information Practices; Duties*

*§ 92F-41. Office of information practices; established*

(a) There is established a temporary office of information practices for a special purpose within the office of the lieutenant governor for administrative purposes.

(b) The governor shall appoint a director of the office of information practices to be its chief executive officer and who shall be exempt from chapter 76.

(c) All powers and duties of the office of information practices are vested in the director and may be delegated to any other officer or employee of the office.

(d) The director may employ any other personnel that are necessary, including but not limited to attorneys and clerical staff without regard to chapter 76.

*§ 92F-42. Powers and duties of the office of information practices*

The director of the office of information practices:

(1) Shall, upon request, review and rule on an agency denial of access to information or records, or an agency's granting of access; provided that any review by the office of information practices shall not be a contested case under chapter 91 and shall be optional and without prejudice to rights of judicial enforcement available under this chapter;

(2) Upon request by an agency, shall provide and make public advisory guidelines, opinions, or other information concerning that agency's functions and responsibilities;

(3) Upon request by any person, may provide advisory opinions or other information regarding that person's rights and the functions and responsibilities of agencies under this chapter;

(4) May conduct inquiries regarding compliance by an agency and investigate possible violations by any agency;

(5) May examine the records of any agency for the purpose of paragraph (4) and seek to enforce that power in the courts of this State;

(6) May recommend disciplinary action to appropriate officers of an agency;

(7) Shall report annually to the governor and the state legislature on the activities and findings of the office of information practices, including recommendations for legislative changes;

(8) Shall receive complaints from and actively solicit the comments of the public regarding the implementation of this chapter;

(9) Shall review the official acts, records, policies, and procedures of each agency;

(10) Shall assist agencies in complying with the provisions of this chapter;

(11) Shall inform the public of the following rights of an individual and the procedures for exercising them:

(A) The right of access to records pertaining to the individual;

(B) The right to obtain a copy of records pertaining to the individual;

(C) The right to know the purposes for which records pertaining to the individual are kept;

(D) The right to be informed of the uses and disclosures of records pertaining to the individual;

(E) The right to correct or amend records pertaining to the individual; and

(F) The individual's right to place a statement in a record pertaining to that individual;

(12) Shall adopt rules that set forth an administrative appeals structure which provides for:

(A) Agency procedures for processing records requests;

(B) A direct appeal from the division maintaining the record; and

(C) Time limits for action by agencies;

(13) Shall adopt rules that set forth the fees and other charges that may be imposed for searching, reviewing, or segregating disclosable records, as well as to provide for a waiver of fees when the public interest would be served;

(14) Shall adopt rules which set forth uniform standards for the records collection practices of agencies;

(15) Shall adopt rules that set forth uniform standards for disclosure of records for research purposes;

(16) Shall have standing to appear in cases where the provisions of this chapter are called into question;

(17) Shall adopt, amend, or repeal rules pursuant to chapter 91 necessary for the purposes of this chapter; and

(18) Shall take action to oversee compliance with part I of chapter 92 by all state and county boards including:

(A) Receiving and resolving complaints;

(B) Advising all government boards and the public about compliance with chapter 92; and

(C) Reporting each year to the legislature on all complaints received pursuant to section 92-1.5.

## Open Meetings

### Division 1. Government.

### Title 8. Public Proceedings And Records.

### Chapter 92. Public Agency Meetings And Records.

### Part I. Meetings.

#### § 92-1. Declaration of policy and intent

In a democracy, the people are vested with the ultimate decision-making power. Governmental agencies exist to aid the people in the formation and conduct of public policy. Opening up the governmental 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 governmental agencies—shall be conducted as openly as possible. To implement this policy the legislature declares that:

- (1) It is the intent of this part to protect the people's right to know;
- (2) The provisions requiring open meetings shall be liberally construed; and
- (3) The provisions providing for exceptions to the open meeting requirements shall be strictly construed against closed meetings.

#### § 92-1.5. Administration of this part

The director of the office of information practices shall administer this part. The director shall establish procedures for filing and responding to complaints filed by any person concerning the failure of any board to comply with this part. The director of the office of information practices shall submit an annual report of these complaints along with final resolution of complaints, and other statistical data to the legislature, no later than twenty days prior to the convening of each regular session.

#### § 92-2. Definitions

As used in this part:

- (1) "Board" means any agency, board, commission, authority, or committee of the State or its political subdivisions which is created by constitution, statute, rule, or executive order, to have supervision, control, jurisdiction or advisory power over specific matters and which is required to conduct meetings and to take official actions.
- (2) "Chance meeting" means a social or informal assemblage of two or more members at which matters relating to official business are not discussed.
- (3) "Meeting" means the convening of a board for which a quorum is required in order to make a decision or to deliberate toward a decision upon a matter over which the board has supervision, control, jurisdiction, or advisory power.

#### § 92-2.5. Permitted interactions of members

- (a) Two members of a board may discuss between themselves matters relating to official board business to enable them to perform their duties faithfully, as long as no commitment to vote is made or sought and the two members do not constitute a quorum of their board.
- (b) Two or more members of a board, but less than the number of members which would constitute a quorum for the board, may be assigned to:
  - (1) Investigate a matter relating to the official business of their board; provided that:
    - (A) The scope of the investigation and the scope of each member's authority are defined at a meeting of the board;
    - (B) All resulting findings and recommendations are presented to the board at a meeting of the board; and
    - (C) Deliberation and decisionmaking on the matter investigated, if any, occurs only at a duly noticed meeting of the board held subsequent to the meeting at which the findings and recommendations of the investigation were presented to the board; or
  - (2) Present, discuss, or negotiate any position which the board

has adopted at a meeting of the board; provided that the assignment is made and the scope of each member's authority is defined at a meeting of the board prior to the presentation, discussion or negotiation.

(c) Discussions between two or more members of a board, but less than the number of members which would constitute a quorum for the board, concerning the selection of the board's officers may be conducted in private without limitation or subsequent reporting.

(d) Discussions between the governor and one or more members of a board may be conducted in private without limitation or subsequent reporting; provided that the discussion does not relate to a matter over which a board is exercising its adjudicatory function.

(e) Discussions between two or more members of a board and the head of a department to which the board is administratively assigned may be conducted in private without limitation; provided that the discussion is limited to matters specified in section 26-35.

(f) Communications, interactions, discussions, investigations, and presentations described in this section are not meetings for purposes of this part.

#### § 92-3. Open meetings

Every meeting of all boards shall be open to the public and all persons shall be permitted to attend any meeting unless otherwise provided in the constitution or as closed pursuant to sections 92-4 and 92-5; provided that the removal of any person or persons who wilfully disrupts a meeting to prevent and compromise the conduct of the meeting shall not be prohibited. The boards shall afford all interested persons an opportunity to submit data, views, or arguments, in writing, on any agenda item. The boards shall also afford all interested persons an opportunity to present oral testimony on any agenda item. The boards may provide for reasonable administration of oral testimony by rule.

#### § 92-3.1. Limited meetings

(a) If a board determines that it is necessary to meet at a location that is dangerous to health or safety, or if a board determines that it is necessary to conduct an on-site inspection of a location that is related to the board's business at which public attendance is not practicable, and the director of the office of information practices concurs, the board may hold a limited meeting at that location that shall not be open to the public; provided that at a regular meeting of the board prior to the limited meeting:

(1) The board determines, after sufficient public deliberation, that it is necessary to hold the limited meeting and specifies that the location is dangerous to health or safety or that the on-site inspection is necessary and public attendance is impracticable;

(2) Two-thirds of all members to which the board is entitled vote to adopt the determinations required by paragraph (1); and

(3) Notice of the limited meeting is provided in accordance with section 92-7.

(b) At all limited meetings, the board shall:

(1) Videotape the meeting, unless the requirement is waived by the director of the office of information practices, and comply with all requirements of section 92-9;

(2) Make the videotape available at the next regular meeting; and

(3) Make no decisions at the meeting.

#### § 92-3.5. Meeting by videoconference; notice; quorum

(a) A board may hold a meeting by videoconference; provided that the videoconference system used by the board shall allow both audio and visual interaction between all members of the board participating in the meeting and the public attending the meeting, at any videoconference location. The notice required by section 92-7 shall specify all locations at which board members will be physically present during a videoconference meeting. The notice shall also specify that the public may attend the meeting at any of the specified locations.

(b) Any board member participating in a meeting by videoconference shall be considered present at the meeting for the purpose of determining compliance with the quorum and voting requirements of the board.

(c) A meeting held by videoconference shall be terminated if, after the

meeting convenes, both the audio and video communication cannot be maintained with all locations where the meeting is being held, even if a quorum of the board is physically present in one location; provided that a meeting may be continued by audio communication alone, if:

- (1) All visual aids required by, or brought to the meeting by board members or members of the public have already been provided to all meeting participants at all videoconference locations where the meeting is held; or
- (2) Participants are able to readily transmit visual aids by some other means (e.g., fax copies), to all other meeting participants at all other videoconference locations where the meeting is held. If copies of visual aids are not available to all meeting participants at all videoconference locations where the meeting is held, those agenda items related to the visual aids shall be deferred until the next meeting; and
- (3) No more than fifteen minutes shall elapse in implementing the requirements listed in paragraph (2).

#### § 92-4. Executive meetings

A board may hold an executive meeting closed to the public upon an affirmative vote, taken at an open meeting, of two-thirds of the members present; provided the affirmative vote constitutes a majority of the members to which the board is entitled. A meeting closed to the public shall be limited to matters exempted by section 92-5. The reason for holding such a meeting shall be publicly announced and the vote of each member on the question of holding a meeting closed to the public shall be recorded, and entered into the minutes of the meeting.

#### § 92-5. Exceptions

(a) A board may hold a meeting closed to the public pursuant to section 92-4 for one or more of the following purposes:

- (1) To consider and evaluate personal information relating to individuals applying for professional or vocational licenses cited in section 26-9 or both;
- (2) To consider the hire, evaluation, dismissal, or discipline of an officer or employee or of charges brought against the officer or employee, where consideration of matters affecting privacy will be involved; provided that if the individual concerned requests an open meeting, an open meeting shall be held;
- (3) To deliberate concerning the authority of persons designated by the board to conduct labor negotiations or to negotiate the acquisition of public property, or during the conduct of such negotiations;
- (4) To consult with the board's attorney on questions and issues pertaining to the board's powers, duties, privileges, immunities, and liabilities;
- (5) To investigate proceedings regarding criminal misconduct;
- (6) To consider sensitive matters related to public safety or security;
- (7) To consider matters relating to the solicitation and acceptance of private donations; and
- (8) To deliberate or make a decision upon a matter that requires the consideration of information that must be kept confidential pursuant to a state or federal law, or a court order.

(b) In no instance shall the board make a decision or deliberate toward a decision in an executive meeting on matters not directly related to the purposes specified in subsection (a). No chance meeting, permitted interaction, or electronic communication shall be used to circumvent the spirit or requirements of this part to make a decision or to deliberate toward a decision upon a matter over which the board has supervision, control, jurisdiction, or advisory power.

#### § 92-6. Judicial branch, quasi-judicial boards and investigatory functions; applicability

- (a) This part shall not apply:
  - (1) To the judicial branch.
  - (2) To adjudicatory functions exercised by a board and governed by sections 91-8 and 91-9, or authorized by other sections of

the Hawaii Revised Statutes. In the application of this subsection, boards exercising adjudicatory functions include, but are not limited to, the following:

- (A) Hawaii labor relations board, chapters 89 and 377;
- (B) Labor and industrial relations appeals board, chapter 371;
- (C) Hawaii paroling authority, chapter 353;
- (D) Civil service commission, chapter 26;
- (E) Board of trustees, employees' retirement system of the State of Hawaii, chapter 88;
- (F) Crime victim compensation commission, chapter 351; and
- (G) State ethics commission, chapter 84.

(b) Notwithstanding provisions in this section to the contrary, this part shall apply to require open deliberation of the adjudicatory functions of the land use commission.

#### § 92-7. Notice

(a) The board shall give written public notice of any regular, special, or rescheduled meeting, or any executive meeting when anticipated in advance. The notice shall include an agenda which lists all of the items to be considered at the forthcoming meeting, the date, time, and place of the meeting, and in the case of an executive meeting the purpose shall be stated.

(b) The board shall file the notice in the office of the lieutenant governor or the appropriate county clerk's office, and in the board's office for public inspection, at least six calendar days before the meeting. The notice shall also be posted at the site of the meeting whenever feasible.

(c) If the written public notice is filed in the office of the lieutenant governor or the appropriate county clerk's office less than six calendar days before the meeting, the lieutenant governor or the appropriate county clerk shall immediately notify the chairperson of the board, or the director of the department within which the board is established or placed, of the tardy filing of the meeting notice. The meeting shall be canceled as a matter of law, the chairperson or the director shall ensure that a notice canceling the meeting is posted at the place of the meeting, and no meeting shall be held.

(d) No board shall change the agenda, once filed, by adding items thereto without a two-thirds recorded vote of all members to which the board is entitled; provided that no item shall be added to the agenda if it is of reasonably major importance and action thereon by the board will affect a significant number of persons. Items of reasonably major importance not decided at a scheduled meeting shall be considered only at a meeting continued to a reasonable day and time.

(e) The board shall maintain a list of names and addresses of persons who request notification of meetings and shall mail a copy of the notice to such persons at their last recorded address no later than the time the agenda is filed under subsection (b).

#### § 92-8. Emergency meetings

(a) If a board finds that an imminent peril to the public health, safety, or welfare requires a meeting in less time than is provided for in section 92-7, the board may hold an emergency meeting provided that:

- (1) The board states in writing the reasons for its findings;
- (2) Two-thirds of all members to which the board is entitled agree that the findings are correct and an emergency exists;
- (3) An emergency agenda and the findings are filed with the office of the lieutenant governor or the appropriate county clerk's office, and in the board's office; and
- (4) Persons requesting notification on a regular basis are contacted by mail or telephone as soon as practicable.

(b) If an unanticipated event requires a board to take action on a matter over which it has supervision, control, jurisdiction, or advisory power, within less time than is provided for in section 92-7 to notice and convene a meeting of the board, the board may hold an emergency meeting to deliberate and de-

cide whether and how to act in response to the unanticipated event; provided that:

(1) The board states in writing the reasons for its finding that an unanticipated event has occurred and that an emergency meeting is necessary and the attorney general concurs that the conditions necessary for an emergency meeting under this subsection exist;

(2) Two-thirds of all members to which the board is entitled agree that the conditions necessary for an emergency meeting under this subsection exist;

(3) The finding that an unanticipated event has occurred and that an emergency meeting is necessary and the agenda for the emergency meeting under this subsection are filed with the office of the lieutenant governor or the appropriate county clerk's office, and in the board's office;

(4) Persons requesting notification on a regular basis are contacted by mail or telephone as soon as practicable; and

(5) The board limits its action to only that action which must be taken on or before the date that a meeting would have been held, had the board noticed the meeting pursuant to section 92-7.

(c) For purposes of this part, an "unanticipated event" means:

(1) An event which members of the board did not have sufficient advance knowledge of or reasonably could not have known about from information published by the media or information generally available in the community;

(2) A deadline established by a legislative body, a court, or a federal, state, or county agency beyond the control of a board; or

(3) A consequence of an event for which reasonably informed and knowledgeable board members could not have taken all necessary action.

#### § 92-9. Minutes

(a) The board shall keep written minutes of all meetings. Unless otherwise required by law, neither a full transcript nor a recording of the meeting is required, but the written minutes shall give a true reflection of the matters discussed at the meeting and the views of the participants. The minutes shall include, but need not be limited to:

(1) The date, time and place of the meeting;

(2) The members of the board recorded as either present or absent;

(3) The substance of all matters proposed, discussed, or decided; and a record, by individual member, of any votes taken; and

(4) Any other information that any member of the board requests be included or reflected in the minutes.

(b) The minutes shall be public records and shall be available within thirty days after the meeting except where such disclosure would be inconsistent with section 92-5; provided that minutes of executive meetings may be withheld so long as their publication would defeat the lawful purpose of the executive meeting, but no longer.

(c) All or any part of a meeting of a board may be recorded by any person in attendance by means of a tape recorder or any other means of sonic reproduction, except when a meeting is closed pursuant to section 92-4; provided the recording does not actively interfere with the conduct of the meeting.

#### § 92-10. Legislative branch; applicability

Notwithstanding any provisions contained in this chapter to the contrary, open meeting requirements, and provisions regarding enforcement, penalties and sanctions, as they are to relate to the state legislature or to any of its members shall be such as shall be from time to time prescribed by the respective rules and procedures of the senate and the house of representatives, which rules and procedures shall take precedence over this part. Similarly, provisions relating to notice, agenda and minutes of meetings, and such other requirements as may be necessary, shall also be governed by the respective rules and procedures of the senate and the house of representatives.

#### § 92-11. Voidability

Any final action taken in violation of sections 92-3 and 92-7 may be voidable

upon proof of violation. A suit to void any final action shall be commenced within ninety days of the action.

#### § 92-12. Enforcement

(a) The attorney general and the prosecuting attorney shall enforce this part.

(b) The circuit courts of the State shall have jurisdiction to enforce the provisions of this part by injunction or other appropriate remedy.

(c) Any person may commence a suit in the circuit court of the circuit in which a prohibited act occurs for the purpose of requiring compliance with or preventing violations of this part or to determine the applicability of this part to discussions or decisions of the public body. The court may order payment of reasonable attorney fees and costs to the prevailing party in a suit brought under this section.

(d) The proceedings for review shall not stay the enforcement of any agency decisions; but the reviewing court may order a stay if the following criteria have been met:

(1) There is likelihood that the party bringing the action will prevail on the merits;

(2) Irreparable damage will result if a stay is not ordered;

(3) No irreparable damage to the public will result from the stay order; and

(4) Public interest will be served by the stay order.

#### § 92-13. Penalties

Any person who willfully violates any provisions of this part shall be guilty of a misdemeanor, and upon conviction, may be summarily removed from the board unless otherwise provided by law.

#### Part II. Boards: Quorum; General Powers

##### § 92-15. Boards and commissions; quorum; number of votes necessary to validate acts

Whenever the number of members necessary to constitute a quorum to do business, or the number of members necessary to validate any act, of any board or commission of the State or of any political subdivision thereof, is not specified in the law or ordinance creating the same or in any other law or ordinance, a majority of all the members to which the board or commission is entitled shall constitute a quorum to do business, and the concurrence of a majority of all the members to which the board or commission is entitled shall be necessary to make any action of the board or commission valid; provided that due notice shall have been given to all members of the board or commission or a bona fide attempt shall have been made to give the notice to all members to whom it was reasonably practicable to give the notice. This section shall not invalidate any act of any board or commission performed prior to April 20, 1937, which, under the general law then in effect, would otherwise be valid.

##### § 92-15.5. Nonattendance of board member; expiration of term

(a) Notwithstanding any law to the contrary, the term of a board member shall expire upon the failure of the member, without valid excuse, to attend three consecutive meetings duly noticed to all members of the board and where the board failed to constitute quorum necessary to transact board business. The chair or acting chair of the board shall determine if the absence of the member is excusable. The expiration of the member's term shall be effective immediately after the third consecutive unattended meeting and unexcused absence. The vacancy shall be filled in the same manner as the original appointment.

(b) This section shall not apply to ex officio members of a board.

(c) Notwithstanding the definition of "board" in section 92-2, this section shall apply only to a state board and shall not apply to a board of any political subdivision of the State or whose authority is strictly advisory.

##### § 92-16. Power of boards to issue subpoenas, administer oaths, appoint masters, etc.

(a) Any board (which term as used in this section means any board or commission of the State or of any political subdivision of the State) which is by law authorized or required to hold hearings for the purpose of receiving evidence, shall have the following powers, in addition to those provided for by any other law, in connection with the hearings:

(1) To subpoena witnesses upon subpoena signed by the chairperson, acting chairperson, or any member, or executive secre-

tary, or executive officer of or under the board who is so authorized by the board. The subpoenas shall be served in the same manner, and the witnesses subpoenaed shall be entitled to the same witness fees, as in the case of a witness subpoenaed to testify before a circuit court. Any circuit court, upon the written application of any member of the board or of any master appointed by it as in this section provided, shall have power to enforce obedience to the subpoena by contempt proceedings.

(2) Through the chairperson, acting chairperson, or any member of the board, or through the executive secretary or executive officer of or under the board so authorized by the board, to administer oaths to witnesses and require the testimony of such witnesses on matters germane to the subject under inquiry at the hearing. Any party to the hearing upon request shall be allowed to be represented by counsel and be allowed reasonable rights of examination and cross-examination of witnesses. Any false swearing by a witness at the hearing upon any material issue or matter shall constitute perjury, and be punishable as such.

(3) To appoint, by written resolution adopted by vote of a majority of the board, a master or masters (who may, but need not be, a member or members of the board, or a disinterested attorney at law or other person, or a combination of any of them) to hold the hearing and take testimony upon the matters involved in the hearing and report to the board the master's or their findings and recommendations, together with a transcript of the hearing or a summary of the evidence and testimony taken thereat, and to adopt the findings and recommendations, in whole or in part, or otherwise act upon the report and transcript or summary, and, in the board's discretion, to hold further hearings and take further evidence and testimony in connection therewith, before taking final action thereon. Any master may be paid such reasonable compensation as shall be determined by the board, provided that no member of the board shall be eligible to receive any additional compensation for services as master.

(b) Subpoena fees, master's fees, and other expenses in connection with the hearings shall be payable out of any moneys appropriated or available for expenditure by the board for personal services or current expenses, or both. Any master so appointed shall have all of the powers which would be held and enjoyed by the board or the chairperson or any member thereof in connection with the hearing.

#### § 92-17. *Consumer complaints; procedures and remedies*

(a) All boards as defined by section 92-2(1) established to license or regulate any profession, occupation, industry, or service, shall receive complaints from consumers and other persons claiming to be aggrieved by business practices related to their respective jurisdictions.

(b) Upon receipt of a written complaint or upon receipt of an investigation report generated by the board on its own motion or upon staff investigation which establishes an alleged violation of any provision of law or rule, the board or its authorized representative shall notify the licensee or person regulated of the charge against the licensee or person and conduct a hearing in conformity with chapter 91 if the matter cannot be settled informally. If the board finds that the charge constitutes a violation, the board may order one or more of the following remedies as appropriate relief:

- (1) Refunding the money paid as fees for services;
- (2) Correcting the work done in providing services;
- (3) Revocation of the licensee's permit or license;
- (4) Suspension of the licensee's permit or license;
- (5) Imposition of a fine; and
- (6) Any other reasonable means to secure relief as determined by the board.

The board may also assess the licensee, as a penalty, any cost incurred in publishing the notice of hearing when service by registered or certified mail to the address listed on the licensee's record is unsuccessful.

(c) Notwithstanding any provision to the contrary:

- (1) No license or permit shall be suspended by the board for a period exceeding five years.

(2) A person whose license or permit has been revoked by the board may not reapply for a license until the expiration of at least five years from the effective date of the revocation of the license or permit.

(3) A suspended license or permit shall be reinstated at the end of the suspension; provided that the suspension does not carry forward to the next license period, and the person satisfies all licensing requirements and conditions contained in the order of the suspension. If a suspension carries forward to the next license period, the board shall not renew the suspended license or permit during the usual renewal period. At the end of the suspension period, a person whose license or permit was suspended may be reinstated upon filing a reinstatement form provided by the board and payment of the renewal fees, satisfaction of any other renewal requirements, and fulfillment of conditions, if any, contained in the order of suspension. If the person fails to file for reinstatement within thirty days after the end of the suspension, the person's license or permit shall be forfeited.

(d) The failure or refusal of the licensee to comply with any board order, including an order of license suspension, shall also constitute grounds for further disciplinary action, including a suspension or revocation of license, imposition of which shall be subject to chapter 91 and the procedural rules of the board. The board may also apply to any circuit court for injunctive relief to compel compliance with the board's order. Where appropriate, the board shall refer for prosecution to the proper authority any practice constituting a violation which is subject to criminal penalty.

(e) If the subject matter of the complaint does not come within its jurisdiction, or if it is found that the charge does not constitute a violation, the board shall notify and inform the complainant in writing with regard to the reasons for its inability to act upon the complaint.

(f) The complainant and the licensee or person regulated may agree to resolve the complaint through final and binding arbitration pursuant to chapter 658A. In the event of an agreement to arbitrate, the board may enter an order dismissing any proceeding instituted pursuant to subsection (b); provided that the order of dismissal may be conditioned upon prompt and complete compliance with the arbitrator's award. In the event that the licensee or person regulated fails to comply with the terms of the arbitrator's award, the board may reopen the proceeding and may, after a hearing in conformity with chapter 91, order one or more of the remedies set forth in subsection (b).

Notwithstanding any provision of chapter 658A to the contrary, an arbitration agreement entered into pursuant to this section shall be approved by the board, and the parties shall agree on an arbitrator within five days after execution of the agreement. If the parties fail to agree on an arbitrator within the time above prescribed, the board may appoint an arbitrator from a list of arbitrators maintained for that purpose by the department of commerce and consumer affairs.

(g) A fine levied in a final order of a board or commission pursuant to subsection (b) shall be confirmed as a judgment by a circuit court in which the respondent resides or has property or in which the act complained of had occurred, by filing the board or commission's final order any time after thirty days after the issuance of that final order. The judgment issued thereon shall have the same force and effect and be enforceable and collectible as any other judgment issued in the circuit court. Nothing herein shall impair the right of the board or commission to apply to the circuit court for injunctive relief pursuant to subsection (d).

#### *Part III. Copies of Records; Costs and Fees*

##### *§ 92-21. Copies of records; other costs and fees*

Except as otherwise provided by law, a copy of any government record, including any map, plan, diagram, photograph, photostat, or geographic information system digital data file, which is open to the inspection of the public, shall be furnished to any person applying for the same by the public officer having charge or control thereof upon the payment of the reasonable cost of reproducing such copy. Except as provided in section 91-2.5, the cost of reproducing any government record, except geographic information system digital data, shall not be less than 5 cents per page, sheet, or fraction thereof. The cost of reproducing geographic information system digital data shall be in accordance with rules adopted by the agency having charge or control of that data. Such reproduction cost shall include but shall not be limited to labor cost for search and actual time for reproducing, material cost, including electricity cost,

equipment cost, including rental cost, cost for certification, and other related costs. All fees shall be paid in by the public officer receiving or collecting the same to the state director of finance, the county director of finance, or to the agency or department by which the officer is employed, as government realizations; provided that fees collected by the public utilities commission pursuant to this section shall be deposited in the public utilities commission special fund established under section 269-33.

§§ 92-22, 92-23. *Repealed by Laws 1989, ch. 14, §§ 18, 19*

§ 92-24. *Directors of finance and commerce and consumer affairs; fees*

Except as provided in section 91-2.5, the director of finance and the director of commerce and consumer affairs each shall charge the following fees:

- (1) For administering any oath, \$1;
- (2) For preparing every photostat copy of any document on record in the director's office, 50 cents per page or portion thereof;
- (3) For preparing every typewritten copy of any document on record in the director's office, 50 cents per page or portion thereof;
- (4) For preparing a certificate of compliance, \$5 for the original certificate, and \$1 for each additional copy thereof, of which \$4 from each certificate and 75 cents of each additional copy shall be deposited in the compliance resolution fund established pursuant to section 26-9(o);
- (5) For comparing any document submitted for certification, 15 cents per page or portion thereof;
- (6) For certifying any document on record in the director's office, 25 cents for each certification;
- (7) For all other acts and duties, the fees of which are not otherwise provided for, such charges as each may from time to time prescribe.

§ 92-25. *Fees for copies of pleadings, etc.*

Fees as established by court rules may be charged for the certification of copies of any pleadings, order, or other paper or document filed in any court, or process thereon, or any transcript of testimony, and for the certification of records on appeal in any proceeding in any court; provided that state agencies shall be exempt from the fees; and provided further that limitations on the extent of the exemption may be established by court rules.

§ 92-26. *Fees; exemption*

One department of the state government shall not be required to pay any fee to any other department of the state government for the preparation and certification by the latter of any government record, nor shall section 92-21 be held to amend or repeal section 94-4.

§ 92-27. *Fees to be accounted for*

All official and departmental fees shall be accounted for and paid over into the public treasury, except fees designated and intended to be applied in compensation of the officers receiving the same. No public officer in receipt of a salary for the officer's services, shall receive any other or further compensation therefor, unless specially allowed by law.

§ 92-28. *State service fees; increase or decrease of*

Any law to the contrary notwithstanding, the fees or other nontax revenues assessed or charged by any board, commission, or other governmental agency may be increased or decreased by the body in an amount not to exceed fifty per cent of the statutorily assessed fee or nontax revenue, to maintain a reasonable relation between the revenues derived from such fee or nontax revenue and the cost or value of services rendered, comparability among fees imposed by the State, or any other purpose which it may deem necessary and reasonable; provided that:

- (1) The authority to increase or decrease fees or nontax revenues shall be subject to the approval of the governor and extend only to the following: chapters 36, 92, 94, 142, 144, 145, 147, 150, 171, 188, 189, 231, 269, 271, 321, 338, 373, 412, 414, 414D, 415A, 417E, 419, 421, 421C, 421H, 421I, 425, 425E, 428, 431, 436E, 437, 437B, 438, 439, 440, 441, 442, 443B, 444, 447, 448, 448E, 448F, 448H, 451A, 451J, 452, 453, 453D, 454, 455, 456, 457, 457A, 457B, 457G, 458, 459, 460J, 461, 461J, 462A, 463, 463E, 464, 465, 466, 466K,

467, 467E, 468E, 468L, 468M, 469, 471, 482, 482E, 484, 485A, 501, 502, 505, 514A, 514B, 514E, 572, 574, and 846 (part II);

(2) The authority to increase or decrease fees or nontax revenues under the chapters listed in paragraph (1) that are established by the department of commerce and consumer affairs shall apply to fees or nontax revenues established by statute or rule;

(3) The authority to increase or decrease fees or nontax revenues established by the University of Hawaii under chapter 304A shall be subject to the approval of the board of regents; provided that the board's approval of any increase or decrease in tuition for regular credit courses shall be preceded by an open public meeting held during or prior to the semester preceding the semester to which the tuition applies;

(4) This section shall not apply to judicial fees as may be set by any chapter cited in this section;

(5) The authority to increase or decrease fees or nontax revenues pursuant to this section shall be exempt from the public notice and public hearing requirements of chapter 91; and

(6) Fees for copies of proposed and final rules and public notices of proposed rulemaking actions under chapter 91 shall not exceed 10 cents a page, as required by section 91-2.5.

§ 92-29. *Reproduction of government records*

Any public officer having the care and custody of any record, paper, or document may cause the same to be photographed, microphotographed, reproduced on film, or copied to an electronic format. Any device or electronic storage system used to copy or reproduce the record, paper, or document shall accurately reflect the information in the original thereof in all details.

§ 92-30. *Copy deemed original record*

A photograph, microphotograph, reproduction on film, or electronic copy of a government record shall be deemed to be an original record for all purposes, including introduction in evidence in all courts or administrative agencies. A transcript, exemplification, facsimile, or certified copy thereof, for all purposes recited in this section, shall be deemed to be a transcript, exemplification, facsimile, or certified copy of the original record.

§ 92-31. *Disposition of original record*

A photograph, microphotograph, reproduction on film, or electronic form of a government record shall be placed in conveniently accessible files and provisions made for preserving, examining, and using the same. Thereafter, a public officer, after having first received the written approval of the comptroller as provided in section 94-3, may cause such record, paper, or document to be destroyed. The comptroller may require, as a prerequisite to the granting of such approval, that a reproduction or print of such photograph, microphotograph, or reproduction on film, or electronic form of the record be delivered into the custody of the public archives for safekeeping. The comptroller may also require the delivery into the custody of another governmental department or agency or a research library of any such record, paper, or document proposed to be destroyed under the provisions of this section.

*Part IV. Notice of Public Hearings*

§ 92-41. *Giving public notices*

Notwithstanding any law to the contrary, all governmental agencies scheduling a public hearing shall give public notice in the county affected by the proposed action, to inform the public of the time, place, and subject matter of the public hearing. This requirement shall prevail whether or not the governmental agency giving notice of public hearing is specifically required by law, and shall be in addition to other procedures required by law.

*Part V. Public Records*

§§ 92-50 to 92-52. *Repealed by Laws 1988, ch. 262, § 3*

*Part VI. General Provisions*

§ 92-71. *Political subdivision of the State; applicability*

The provisions contained in this chapter shall apply to all political subdivisions of the State. Provided, however, in the event that any political subdivision of the State shall provide by charter, ordinance or otherwise, more stringent requirements relating to mandating the openness of meetings, the more stringent provisions of said charter, ordinance, or otherwise, shall apply.

*Part VII. Neighborhood Board**§ 92-81. Neighborhood board; notice and agenda; public input; quorum*

(a) Any contrary provision in this chapter notwithstanding, the provisions of this part shall apply to neighborhood boards overseen by a neighborhood commission of the city and county of Honolulu, and such other neighborhood boards as may be created in other counties and overseen by a county-based commission.

(b) The agenda required to be included in written public notice of a neighborhood board meeting may include an opportunity for the board to receive public input on issues not specifically noticed for consideration at the forthcoming meeting.

(c) Any matter raised as part of the public input agenda allowed under subsection (b) may be discussed and information on the matter may be received by the board at the meeting; provided that the board shall not make a decision relating to the matter. The board may make decisions on matters originally raised as part of a public input agenda only at a later meeting, where the agenda for the meeting shall give notice of decision-making on the matter.

(d) A quorum for a meeting of a neighborhood board shall be required for:

- (1) Conducting official board business;
- (2) Discussions prior to and related to voting; and
- (3) Voting required to validate an act of the board as part of official board business.

A neighborhood board may receive information or testimony on a matter of official board business without a quorum; provided that the board shall not make a decision on the issue. The board members, at the next meeting of the neighborhood board, shall report the matters presented as information or testimony.

*§ 92-82. Permitted interactions of neighborhood board members*

(a) Two or more members of a neighborhood board, but fewer than the number of members necessary to constitute a quorum for the board, may attend informational meetings or presentations on matters relating to official board business, including meetings of another entity, seminars, and community meetings; provided that the presentation is not specifically and exclusively organized for or directed toward members of the board.

(b) Neighborhood board members may participate in discussions, including discussions among themselves; provided that the discussions occur during and as part of the informational meeting or presentation allowed by subsection (a); and provided further that there is no commitment made relating to a vote on the issue. The board members, at the next duly noticed meeting of the neighborhood board, shall report their attendance and the matters presented and discussed that related to official board business at the informational meeting or presentation.

*§ 92-83. Neighborhood board meeting; unanticipated events; public interest*

An unanticipated event that occurs after public notice of a neighborhood board meeting has been issued, but before the scheduled meeting, may be the subject of discussion at the scheduled meeting if timely action on the matter is necessary for public health, welfare, and safety. At a duly noticed meeting, a board may take action on an unanticipated event in the public interest that is not on the agenda in the same manner as if the board had held an emergency meeting to take action on the issue, pursuant to section 92-8.

**Ombudsman***DIVISION 1. GOVERNMENT.**TITLE 8. PUBLIC PROCEEDINGS AND RECORDS.**CHAPTER 96. THE OMBUDSMAN.**§ 96-1 Definitions.*

(a) "Agency" includes any permanent governmental entity, department, organization, or institution, and any officer, employee, or member thereof acting or purporting to act in the exercise of the officer's, employee's, or member's

official duties, except:

- (1) The judiciary and its staff;
- (2) The legislature, its committees, and its staff;
- (3) An entity of the federal government;
- (4) A multistate governmental entity;
- (5) The governor and the governor's personal staff;
- (6) The lieutenant governor and the lieutenant governor's personal staff;
- (7) The mayors of the various counties; and
- (8) The councils of the various counties.

(b) "Administrative act" includes any action, omission, decision, recommendation, practice, or procedure, but does not include the preparation or presentation of legislation.

*§ 96-2 Ombudsman; office established, appointment, tenure, removal, qualifications, salary, vacancy.*

The office of ombudsman is established. The legislature, by a majority vote of each house in joint session, shall appoint an ombudsman who shall serve for a period of six years and thereafter until a successor shall have been appointed. An ombudsman may be reappointed but may not serve for more than three terms. The legislature, by two-thirds vote of the members in joint session, may remove or suspend the ombudsman from office, but only for neglect of duty, misconduct, or disability.

No person may serve as ombudsman within two years of the last day on which the person served as a member of the legislature, or while the person is a candidate for or holds any other state office, or while the person is engaged in any other occupation for reward or profit. Effective July 1, 2005, the salary of the ombudsman shall be the same as the salary of the director of health. The salary of the ombudsman shall not be diminished during the ombudsman's term of office, unless by general law applying to all salaried officers of the State.

If the ombudsman dies, resigns, becomes ineligible to serve, or is removed or suspended from office, the first assistant to the ombudsman becomes the acting ombudsman until a new ombudsman is appointed for a full term.

*§ 96-3 Assistance, staff, delegation, funding.*

(a) The ombudsman shall appoint a first assistant and other officers and employees as may be necessary to carry out this chapter. All employees, including the first assistant, shall be hired by the ombudsman and shall serve at the ombudsman's pleasure.

(b) In determining the salary of each employee, the ombudsman shall consult with the department of human resources development and shall follow as closely as possible the recommendations of the department. Effective July 1, 2005, the first assistant's salary shall be not more than eighty-seven per cent of the salary of the ombudsman.

(c) The ombudsman and the ombudsman's full-time staff shall be entitled to participate in any employee benefit plan.

(d) The ombudsman may delegate to the ombudsman's appointees any of the ombudsman's duties except those specified in sections 96-12 and 96-13; provided that during the absence of the ombudsman from the island of Oahu, or the ombudsman's temporary inability to exercise and discharge the powers and duties of the ombudsman's office, the powers and duties as contained in sections 96-12 and 96-13 shall devolve upon the first assistant during the ombudsman's absence or inability.

(e) The funds for the support of the office of the ombudsman shall be provided for in the act providing for the expenses of the legislature.

*§ 96-4 Procedure.*

The ombudsman may establish procedures for receiving and processing complaints, conducting investigations, and reporting the ombudsman's find-

ings. However, the ombudsman may not levy fees for the submission or investigation of complaints.

*§ 96-5 Jurisdiction.*

The ombudsman has jurisdiction to investigate the administrative acts of agencies and the ombudsman may exercise the ombudsman's powers without regard to the finality of any administrative act.

*§ 96-6 Investigation of complaints.*

(a) The ombudsman may investigate any complaint which the ombudsman determines to be an appropriate subject for investigation under section 96-8.

(b) The ombudsman may investigate on the ombudsman's own motion if the ombudsman reasonably believes that an appropriate subject for investigation under section 96-8 exists.

*§ 96-7 Notice to complainant and agency.*

If the ombudsman decides not to investigate, he shall inform the complainant of that decision and shall state his reasons.

If the ombudsman decides to investigate, he shall notify the complainant of his decision and he shall also notify the agency of his intention to investigate.

*§ 96-8 Appropriate subjects for investigation.*

An appropriate subject for investigation is an administrative act of an agency which might be:

- (1) Contrary to law;
- (2) Unreasonable, unfair, oppressive, or unnecessarily discriminatory, even though in accordance with law;
- (3) Based on a mistake of fact;
- (4) Based on improper or irrelevant grounds;
- (5) Unaccompanied by an adequate statement of reasons;
- (6) Performed in an inefficient manner; or
- (7) Otherwise erroneous.

The ombudsman may investigate to find an appropriate remedy.

*§ 96-9 Investigation procedures.*

(a) In an investigation, the ombudsman may make inquiries and obtain information as the ombudsman thinks fit, enter without notice to inspect the premises of an agency, and hold private hearings.

(b) The ombudsman is required to maintain secrecy in respect to all matters and the identities of the complainants or witnesses coming before the ombudsman except so far as disclosures may be necessary to enable the ombudsman to carry out the ombudsman's duties and to support the ombudsman's recommendations.

*§ 96-10 Powers.*

Subject to the privileges which witnesses have in the courts of this State, the ombudsman may:

- (1) Compel at a specified time and place, by a subpoena, the appearance and sworn testimony of any person who the ombudsman reasonably believes may be able to give information relating to a matter under investigation; and

- (2) Compel any person to produce documents, papers, or objects which the ombudsman reasonably believes may relate to a matter under investigation.

The ombudsman may bring suit in an appropriate state court to enforce these powers.

*§ 96-11 Consultation with agency.*

Before giving any opinion or recommendation that is critical of an agency or person, the ombudsman shall consult with that agency or person.

*§ 96-12 Procedure after investigation.*

If, after investigation, the ombudsman finds that:

- (1) A matter should be further considered by the agency;
- (2) An administrative act should be modified or cancelled;
- (3) A statute or regulation on which an administrative act is based should be altered;
- (4) Reasons should be given for an administrative act; or
- (5) Any other action should be taken by the agency; the ombudsman shall report the ombudsman's opinion and recommendations to the agency. The ombudsman may request the agency to notify the ombudsman, within a specified time, of any action taken on the ombudsman's recommendations.

*§ 96-13 Publication of recommendations.*

After a reasonable time has elapsed, the ombudsman may present the ombudsman's opinion and recommendations to the governor, the legislature, the public, or any of these. The ombudsman shall include with this opinion any reply made by the agency.

*§ 96-14 Notice to the complainant.*

After a reasonable time has elapsed, the ombudsman shall notify the complainant of the actions taken by the ombudsman and by the agency.

*§ 96-15 Misconduct by agency personnel.*

If the ombudsman has a reasonable basis to believe that there may be a breach of duty or misconduct by any officer or employee of an agency, the ombudsman may refer the matter to the appropriate authorities without notice to that person.

*§ 96-16 Annual report.*

The ombudsman shall submit to the legislature and the public an annual report discussing the ombudsman's activities under this chapter.

*§ 96-17 Judicial review, immunity.*

No proceeding or decision of the ombudsman may be reviewed in any court, unless it contravenes the provisions of this chapter. The ombudsman has the same immunities from civil and criminal liability as a judge of this State. The ombudsman and the ombudsman's staff shall not testify in any court with respect to matters coming to their attention in the exercise or purported exercise of their official duties except as may be necessary to enforce the provisions of this chapter.

*§ 96-18 Agencies may not open letters to ombudsman.*

A letter to the ombudsman from a person held in custody by an agency shall be forwarded immediately, unopened, to the ombudsman.

*§ 96-19 Penalty for obstruction.*

A person who willfully hinders the lawful actions of the ombudsman or the ombudsman's staff, or willfully refuses to comply with their lawful demands, shall be fined not more than \$1,000.