

The Uniform Information Practices Act (Modified)

HAWAII'S OPEN RECORDS LAW

**This handbook is a publication of the
Office of Information Practices**

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**Please visit our website at *www.hawaii.gov/oiip*
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guidelines, forms, newsletters, announcements,
administrative rules and educational materials.
An electronic version of this handbook is available
for downloading in two size formats.**

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DIRECTOR'S MESSAGE

We, the people of Hawaii . . . reserve the right to control our destiny, to nurture the integrity of our people and culture, and to preserve the quality of life that we desire.

We reaffirm our belief in a government of the people, by the people and for the people

Hawaii State Constitution, article I, section 1

Democracy exists only when government functions in the open and protects the rights of its citizens to participate in that government. In 1988, the Hawaii State Legislature enacted the Uniform Information Practices Act (Modified) (the "UIPA") to preserve and ensure that open government and public participation.

At the same time, it created the Office of Information Practices ("OIP") to implement the UIPA and to serve as a resource for both the public and government agencies in interpreting and applying its provisions. The Legislature recognized, however, that the "proper functioning of any public records law is very much dependent upon the attitude of those who implement the law[,] requiring "strong and active agency implementation of the records laws." The Legislature thus urged "all agencies to accept this new law as a challenge and a mandate to ensure public access to the public's government."

Twenty years later, OIP continues to deliver on its "inherent promise" to ensure implementation: educating the public of its rights and agencies of its responsibilities, assisting the public in gaining access to records, and guiding agencies in the application of the statute's provisions.

We are pleased to provide you with this UIPA handbook. It is intended primarily to provide the non-lawyer agency official with a better understanding of the UIPA and a step-by-step guide for application of that law. We also remain available to assist agencies in fulfilling the role entrusted to them of ensuring and protecting our open government.

Paul T. Tsukiyama
Director

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I. INTRODUCTION

All political power of this State is inherent in the people and the responsibility for the exercise thereof rests with the people. All government is founded on this authority.

Hawaii State Constitution, article I, section 1

The Hawaii State Legislature enacted the Uniform Information Practices Act (Modified) (the “UIPA”) based upon this premise that a democracy vests the people with the ultimate decision-making power and government exists only to aid the people in the exercise of that power.

Recognizing public scrutiny and participation to be essential to the exercise of that power, the Legislature declared it to be the policy of this State to conduct government as openly as possible tempered by the right of the people to privacy as embodied in our State Constitution.

To that end, the UIPA mandates that all government records be open to public inspection unless access is specifically restricted or closed by law.

II. OVERVIEW OF THE UIPA

THE STATUTE

The UIPA is codified as chapter 92F of the Hawaii Revised Statutes (“HRS”). The UIPA governs both: (1) the public’s right to access government records; and (2) the individual’s right to access and correct his or her personal records maintained by the government.

The UIPA is divided into four parts:

Part I. General Provisions and Definitions.

This part contains the general provisions and definitions applicable to all parts of the UIPA.

Part II. Freedom of Information. This part governs general public access to government records.

Part III. Disclosure of Personal Records. This part governs an individual’s access to his or her own personal records that are maintained by the government.

Part IV. Office of Information Practices; Duties. This part establishes the Office of Information Practices (“OIP”) and sets forth the powers and duties of OIP.

THE ADMINISTRATIVE RULES

OIP has enacted administrative rules setting forth agency procedures and fees for processing government record requests under part II of the UIPA. These rules are contained in Title 2, subtitle 7, chapter 71 of the Hawaii Administrative Rules (“HAR”) and may be accessed on the OIP website.

III. THE STATUTE – CHAPTER 92F

PART I. GENERAL PROVISIONS

How Should the UIPA Be Interpreted?

The Legislature pronounced that it is the policy of this State to conduct government business as openly as possible while protecting the right of privacy embodied in our State Constitution.

Thus, part I of the UIPA requires that the UIPA be applied and construed to promote its underlying purposes and policies, which are:

- (1) To promote the public interest in disclosure;
- (2) To provide for accurate, relevant, timely and complete records;
- (3) To enhance government accountability;
- (4) To make government accountable to individuals in the collection, use, and dissemination of information relating to them; and
- (5) To balance the individual privacy interest and the public interest, allowing access unless disclosure would constitute a clearly unwarranted invasion of personal privacy.

Given this direction that the UIPA be interpreted to promote open government, any doubt regarding disclosure of a record should likely be resolved in favor of access.

Which Organizations Does the UIPA Cover?

All agencies of the state and county governments must comply with the UIPA.

“Agency” is defined broadly to encompass all state and county government units, including corporations or other establishments owned, operated, or managed by or on behalf of the State or any county. It covers the executive, legislative, and judicial branches of state and county government, but specifically excludes the nonadministrative functions of the judiciary. This means that court records related to the adjudication of a legal matter are not subject to the UIPA — access is governed by court rules instead.

FAQ: *I want to get the transcript of a hearing in my divorce case. I was referred to a court reporter who told me I need to pay \$120 to get a copy. Shouldn't I be able to get it for less under the UIPA?*

A court hearing is part of the Judiciary's nonadministrative functions and, therefore, access to records maintained by the Judiciary as part of that hearing, including a transcript and any documents filed with the court, is governed by the court's rules and not the UIPA.

What Records Does the UIPA Cover?

The UIPA requires agencies to disclose all “government records.” This term is defined broadly to include any information maintained by an agency that is recorded in any physical form.

OIP has interpreted “maintained” to mean information physically possessed or administratively controlled by an agency. An agency has administrative control over a record where it has the right to gain access to the record. For example, where an agency contracts with a private company and has the right to review the records held by the company under the contract, those records would be considered government records.

A record physically in the agency office may not be considered a “government record” where it is held or controlled by an employee personally and not in his or her capacity as an employee of the agency, for a example, a personal calendaring system used solely by the employee. See FAQ below.

Note that an agency is not required to comply with the UIPA to the extent necessary to protect an agency’s eligibility to receive federal funding, services, or other assistance.

FAQ: *I am a state employee. Is my personal calendar considered a “government record” under the UIPA?*

We addressed this question in OIP Op. Ltr. No. 04-17 with respect to the calendars of various city officials. The answer depends on the totality of circumstances surrounding the creation, maintenance and use of the calendar. Generally, the UIPA governs records “maintained” by the agency, not by the individual. Determination of whether an individual maintains a record, as opposed to the agency, depends on whether the individual holds the record in his or her personal capacity versus his or her official capacity.

Who Can Make a Request?

“Any person” may make a request for government records under part II, the Freedom of Information section of the UIPA. “Person” is defined broadly to include an individual, government agencies, partnerships and any other legal entities.

Under part II, a government agency generally may not limit access to public records based on who the requester is or the proposed use of the record.

FAQ: *May I ask the requester why he is requesting a government record?*

The agency may ask the requester why he or she is seeking access for certain purposes. For example, where the requester has made a broadly worded request rather than requesting a specific record, knowing the purpose of the request may assist the agency in determining what records are responsive to the request. But the purpose of the request should not have any bearing on the agency's decision to disclose or withhold the record.

FAQ: *Our agency has created a compilation of data regarding businesses in this State for the agency's use in providing services. A private company from an other state has requested a copy of this data that it intends to sell to the possible detriment of businesses in this State. May the agency selectively disclose the data to only Hawaii businesses?*

No. In the absence of a statute authorizing selective disclosure, access to the data may not be restricted to a limited set of requesters who intend to use the information for certain purposes.

PART II. FREEDOM OF INFORMATION

Part II of the UIPA contains the provisions that govern the general public's right to access government records while part III governs an individual's right to access his or her personal records.

Where an individual makes a request for a personal record under part III, the agency must also analyze the request under part II for any part of the record that is not required to be disclosed under part III.

Disclosure Provisions

General Rule of Disclosure

All government records are open to the public unless access is restricted or closed by law.

The UIPA requires an agency to make a government record available for inspection and copying unless the agency can show that an exception to disclosure under § 92F-13 authorizes the agency to restrict or deny access to that record.

An agency should make the information available in the form requested if it is readily retrievable in that form. An agency is not required to prepare a compilation or summary of its records unless it is readily able to do so.

However, an agency may, with the requester's consent, choose to create a compilation or summary where it would be more efficient to do so.

Agency Records that Must Always Be Disclosed (§92F-12)

The Legislature created a list of specific categories of records that must always be disclosed. An exception only applies where it is referred to in that list. These categories of records, in summary, are:

- (1) Agency rules and general policies;
- (2) Final opinions and adjudicated orders (except as protected by §92F-13(1));
- (3) Government purchasing information, including all bid results (except as prohibited by §92F-13);
- (4) Pardons and commutations, and directory information for inmates;
- (5) Land ownership, transfer and lien records, including real property tax information and state land leases;
- (6) Environmental test results;
- (7) Agency meeting minutes required by law to be public;
- (8) State/county loan program information;
- (9) Certified payroll records on public works contracts without social security numbers;
- (10) Agency contract hires and consultants' contracts, without social security numbers;
- (11) Building permit information;
- (12) Water service consumption data of the boards of water supply;
- (13) Rosters of licensee or permit holders;

- (14) General employment information for present and former agency officers and employees (except undercover law enforcement employees);
- (15) Information collected for the purpose of making information available to the public; and
- (16) Information from transcript, minutes, report, or summary of a public proceeding.

Agencies must also disclose:

- (1) Any record for which the requester has obtained the prior written consent of all individuals to whom the record refers;
- (2) Records expressly authorized by federal or state law to be disclosed to the person requesting access;
- (3) Records where compelling circumstances show an effect on the health or safety of any individual;
- (4) Records requested by court order;
- (5) Records subpoenaed from either house of the state legislature; and
- (6) Information from the motor vehicle registration files where requester has a legitimate reason under applicable rules.

The Exceptions to Disclosure (§92F-13)

For any record that does not fall into a category that must always be disclosed, the UIPA provides that it is a public record unless one of the five exceptions to disclosure under Part II applies. If an exception only applies to a portion of a record, the agency must provide access to the remaining portion of the record.

Where a record falls within an exception, an agency may withhold the record, but is not prohibited by the UIPA from disclosing it. Where an agency wants to disclose a record that could be withheld, the agency should consult with its attorney as to whether the record should or must be withheld because of another law or the state or federal constitutions.

The five exceptions to disclosure for part II are set forth in §92F-13. In summary, the five exceptions to the general rule requiring disclosure of government records are as follows:

Exception 1 – The Privacy Exception (§92F-13(1))

An agency may withhold access to a record if disclosure of the record would constitute a “clearly unwarranted invasion of personal privacy[.]” To withhold a record under this exception, an agency must be able to show that:

- (1) An individual has a **significant privacy interest** in the information contained in the record; and
- (2) The significant privacy interest is not outweighed by the **public interest in disclosure**.

An agency must balance the significant privacy interest against the public interest in disclosure of the information. If the public interest is found to outweigh the individual privacy interest, the agency must disclose the information. Where an agency cannot identify a significant privacy interest, the slightest public interest in disclosure will require the agency to disclose the record.

What is a significant privacy interest? (§92F-14)

The UIPA lists some specific examples of the types of information in which an individual has a significant privacy interest. The list includes information about an individual's:

- (1) Medical history, condition, and treatment;
- (2) Criminal law investigation, except where disclosure is necessary to prosecute or continue the investigation;
- (3) Eligibility for social services or welfare benefits;
- (4) Public employment personnel file type information, except information required to be disclosed under §92F-12(a)(14) and employee misconduct information **if** employee is suspended or discharged; or for county police officers **if** discharged;
- (5) Nongovernmental employment history except where information qualifies a government employee for his or her position;
- (6) Financial information;
- (7) Professional and vocational licensee qualifications except:
 - (a) certain discipline information;
 - (b) current employment information and required insurance coverage of licensee; and
 - (c) complaints and dispositions;
- (8) Personal recommendations or evaluations; and
- (9) Social security numbers.

OIP has further recognized that an individual has a significant privacy interest in his or her home contact information, date of birth, and ethnicity.

What is the public interest in disclosure?

The public interest to be considered is the public's interest in the disclosure of official information that sheds light on **an agency's performance of its statutory purpose and the conduct of government officials, or which otherwise promotes governmental accountability.**

Illustration: Balancing of Interests

A former University President had a significant privacy interest in the Board of Regents' evaluation of his job performance. The public had a strong interest in scrutinizing the work of the Board of Regents as well as the President's performance as a high level government official. Although the two rights were closely balanced, OIP found that the public interest outweighed the employee's privacy interest.

Exception 2 – The Litigation Privilege Exception (§92F-13(2))

An agency may withhold access to a record if a litigation privilege protects that same information in a lawsuit or quasi-judicial administrative act involving the State or any county. This exception prevents a party in an action against the State or a county from using the UIPA in order to gain an unfair advantage.

For example, an agency's communication with its attorney to seek legal advice is generally protected from disclosure in a litigation context by the attorney-client privilege. Exception 2 would similarly protect this communication from disclosure under the UIPA. The rationale is that if a person suing the State or a county has the right to consult with his or her attorney in confidence then the government should have that same right to consult with its attorney confidentially.

Exception 3 – The Frustration Exception (§92F-13(3))

An agency may withhold access to records that, by their nature, must be confidential in order for the agency to avoid frustration of a legitimate government function. To withhold a record under this exception, an agency must identify a legitimate government function of the agency and show how disclosure of the record would frustrate the agency's ability to perform that function. Examples of records that might be included under this exception are:

- (1) **Law Enforcement Records** where disclosure could reasonably be expected in some particular, discernable way to interfere with pending enforcement proceedings;
- (2) **Examination Materials** if disclosure would compromise the validity, fairness or objectivity of the examination;
- (3) **Government Purchasing Information** that, if disclosed, would raise the cost of government procurements or give a manifestly unfair advantage to any person proposing to enter into a contract or agreement with an agency;
- (4) **Land Acquisition Information** identifying or pertaining to real property under consideration for future public acquisition;
- (5) **Proprietary Information** such as research methods, records and data, computer programs and software and other types of information manufactured or marketed by persons under exclusive legal right, owned by an agency or entrusted to it;
- (6) **Confidential Business Information** which includes trade secrets or confidential commercial and financial information where there is a

likelihood of substantial competitive harm, for example, where disclosure would allow competitors to selectively under price, estimate profit margins, or determine market and supply weaknesses; and

- (7) **Inter-agency or Intra-agency Memoranda or Correspondence** used in the agency's decision-making that falls under the "**deliberative process privilege.**" This privilege allows an agency to withhold recommendations, draft documents, proposals, suggestions and other opinion materials that comprise part of the process by which the agency formulates its decisions and policies. It protects the quality of agency decisions by encouraging the uninhibited exchange of ideas, recommendations and opinions within an agency.

To withhold a record, an agency must show that the record is:

- (a) **Predecisional.** This means that the record must be received by the decision-maker prior to the time the agency decision or policy is made; **and**
- (b) **Deliberative.** This means that the record consists of a recommendation or opinion on agency matters that was a direct part of the decision-making process.

A record protected by this privilege may lose this protection where the agency later expressly adopts or incorporates the record into its final decision or policy.

Illustration: *Records or Information Compiled for Law Enforcement in a Pending or Prospective Law Enforcement Proceeding*

Access to investigative records before an investigation is concluded could frustrate a legitimate government function where: (1) the target of the investigation could obtain premature access to the government's case; (2) witnesses could be subject to reprisal or harassment; (3) evidence could be destroyed; or (4) witnesses could become unwilling to provide information to the agency.

Exception 4 – The Law or Order Exception (§92F-13(4))

An agency may withhold access to records that are protected from disclosure by a state or federal law or by a court order, for example, tax return information required to be kept confidential by statute. The term “law” does not include administrative rules, county charter provisions, or mayoral orders.

Exception 5 – The Legislature Exception (§92F-13(5))

Legislative committees may withhold their draft working papers and work product; legislative investigating committees may withhold their records or transcripts protected by legislative rule; and legislators may withhold their personal files.

ENFORCEMENT PROVISIONS

Appeal of an Agency Denial of Access (§§92F-27 & -27.5)

An individual who has been denied access to a personal record may appeal that denial in two ways. The requester may:

- (1) Appeal to the OIP; **and/or**
- (2) Bring a legal action against the agency in circuit court within 2 years of the denial of access.

An individual does not need to appeal to OIP before bringing an action in court, but may choose to do so first then later appeal to the court, if necessary. Where OIP determines that the record must be disclosed, the agency “shall make the record available.”

If the court orders the agency to disclose a record that the agency denied access to, the court is required to order the agency to pay the requester his or her reasonable attorney’s fees and all other expenses reasonably incurred in the litigation.

Criminal Penalties (§92F-17)

The UIPA imposes criminal penalties upon:

- (1) A government worker who intentionally discloses a government record or information despite being aware that a statute specifically makes that record or information confidential; and
- (2) Anyone who uses false pretense, bribery, or theft to intentionally access a government record or information that he or she knows is confidential.

The UIPA specifically provides immunity from civil or criminal liability to an employee who discloses a record or denies access to a record in good faith.

INTERAGENCY SHARING OF RECORDS

An agency may share non-public records with another agency under certain circumstances listed in §92F-19.

Generally, a specific need or legal authority must be shown for records to be shared with another agency.

For example, the statute allows a prosecutor to share with the Department of Corrections information related to an adult corrections officer's (the "ACO") arrest on drug related offenses because the department is, by statute and through its administrative rules, authorized and required to continuously monitor an ACO's character, reputation and suitability to serve in that capacity.

The agency receiving the records must treat the records in the same manner as the agency that originally had the records. In other words, the receiving agency cannot disclose a record publicly if the originating agency could not.

Agencies are generally not authorized to share records protected by a specific confidentiality statute, for example, HRS §235-116, which prohibits disclosure of income tax return information.

PART III. PERSONAL RECORDS

The UIPA has a separate section that deals with an individual's right to access and correct his or her own "personal records."

A "**personal record**" is a government record that contains information "about" the individual who is requesting the record. This includes an individual's educational, financial, or medical records, or items that reference the individual by name or otherwise.

Because "personal records" are also "government records," they may also be requested by others under part II of the UIPA, the general public access section.

An agency is only required to provide access under part III to an "accessible" personal record, which generally means one that is filed by the person's name or other identifying information, or which the agency can otherwise readily find.

Joint Personal Records

A joint personal record is a record that contains more than one individual's name or other identifying particular. A joint personal record is generally assumed to be entirely accessible to the requester where no part III exception allows the agency to withhold the record from the requester.

However, a portion of the record that is clearly "about" someone else and **not** "about" the requester may be segregated from the record because it would not be the requester's "personal record." Instead, that portion would be analyzed under part II so the privacy exception could apply to protect that information.

Illustration: Joint Records

*A UH Campus Security report of an alleged sexual assault included a campus security officer's written report, the alleged assailant's photograph, and witness statements. The report was a joint personal record. It was a personal record of the alleged victim, and it was also a personal record of the alleged assailant and each of the witnesses. In response to a request made by the alleged victim, the report should generally be disclosed to her because no personal records exception applied. However, some personal information, such as home contact information, was only "about" the other individuals and **not** "about" her. That information was not subject to disclosure as her personal record and had to be analyzed as a general records request.*

DISCLOSURE PROVISIONS

An agency must provide an individual access to his or her personal record within 10 working days after receiving a request unless an exception under part III allows the agency to withhold the record from that requester.

The agency may extend its response period for an additional 20 working days if, within the initial 10 day period, the agency provides the individual with a written explanation of “unusual circumstances” causing the delay.

The Exemptions from Disclosure (§92F-22)

The personal records section of the UIPA contains its own set of exceptions, which differ from those for general government records requests.

Generally, these exceptions protect:

- (1) Criminal law enforcement agency records;
- (2) Confidential source records;
- (3) Government exam records;
- (4) Investigative materials; and
- (5) Records protected by law

Exemption 1 – Criminal Law Enforcement Records (§92F- 22(1))

Agencies with a principal function of crime prevention, control, or reduction may withhold access to:

- (1) Information or reports prepared or compiled for criminal intelligence or investigation; and
- (2) **Reports** prepared or compiled during any stage of the criminal law enforcement process.

Exemption 2 – Confidential Source Records (§92F-22(2))

An agency may withhold records where necessary to protect the identity of a source who furnished information to the agency under an express or implied promise of confidentiality.

Exemption 3 – Government Exam Records (§92F-22(3))

An agency may withhold examination materials that it uses solely for government hiring or promotions or for licensing or academic testing, if disclosure would compromise the objectivity, fairness, or effectiveness of the process.

Exemption 4 – Investigative Materials (§92F-22(4))

An agency may withhold investigative reports and materials related to an **uncompleted** civil, criminal or administrative proceeding against the individual requesting the records.

Exemption 5 – Records Protected by Law (§92F-22(5))

An agency may withhold records (1) required to be withheld from the individual by statute or court decision; or (2) authorized to be withheld by constitutional or statutory privilege. This allows agencies to withhold records such as records sealed by a court order, communications between the agency and its attorney, and records found to be privileged in litigation.

CORRECTION OF PERSONAL RECORDS

An individual has a right to correct or amend factual errors, misrepresentations, or misleading entries in his or her personal record. Part III sets out the procedures for correction.

ENFORCEMENT PROVISIONS

Appeal from Agency Denial of Access (§§92F-15 and 15.5)

An individual who has been denied access to his or her personal record may appeal that denial in two ways. The requester may:

- (1) Appeal to the OIP; **and/or**
- (2) Bring a legal action against the agency in circuit court within 2 years of the denial of access (or where applicable, receipt of a final OIP ruling).

Where OIP determines that the record must be disclosed, the agency “shall make the record available.”

An individual does not need to appeal to OIP before bringing an action in court, but may choose to do so first and then later appeal to the court, if necessary.

An individual may also appeal to the circuit courts from an agency’s failure to correct or amend his or her personal record. This action must be brought within 2 years.

Penalties

If the court finds that the agency knowingly or intentionally violated a provision under part III, the agency is liable for:

- (1) Actual damages of not less than \$1,000; and
- (2) Costs and reasonable attorney’s fees.

The court may also assess attorney’s fees and costs against the agency where the individual bringing the action substantially prevails; or against the individual where the charges brought against the agency are frivolous.

PART IV. OFFICE OF INFORMATION PRACTICES

This part sets forth OIP's functions and duties in administering the UIPA. These functions and duties include:

- ∅ Providing guidance to the public on rights granted under the UIPA, on agency functions and responsibilities, and use of the UIPA
- ∅ Providing guidance to agencies on agency functions and responsibilities under the UIPA
- ∅ Providing assistance to the public in making UIPA requests and in obtaining records from agencies
- ∅ Providing assistance to agencies in complying with the UIPA
- ∅ Providing education and training for agencies' officers and employees
- ∅ Receiving complaints and investigating possible violations by agencies
- ∅ Reviewing and ruling on agency denials of access
- ∅ Recommending legislative changes
- ∅ Monitoring UIPA related litigation
- ∅ Reporting to the Governor and Legislature on OIP's activities and findings

OIP provides guidance and assistance through a variety of means. It issues advisory opinions and rulings. It provides direct assistance on general matters to both government agencies as well as to members of the public through its "Attorney of the Day" legal advice program and on specific matters through a more formal request process for assistance, investigation, or opinion.

OIP also continually provides training sessions; publishes resource materials and an informational newsletter; and maintains a website providing access to the statute, rules, forms, and all formal opinions.

IV. OIP'S ADMINISTRATIVE RULES

THE MECHANICS OF PROCESSING REQUESTS UNDER PART II

Upon receiving a general request for access to a government record and unless an exception applies, an agency must make the requested record available for inspection and copying during regular business hours.

OIP's administrative rules contain the procedures for, and other provisions related to, processing a request made under part II.

Informal Request

When an agency receives an oral request for a record, OIP's administrative rules provide that the agency can:

- (1) Provide access to a disclosable record in a reasonably timely manner (if the agency is going to charge more than \$15.00 in fees, it must inform the requester before processing the request);
- (2) Deny access (if the requester disagrees with the denial, the agency must tell the requester that he or she can submit a formal request);
- (3) Inform the requester that the agency does not maintain the record; **or**
- (4) Ask that the requester submit a **formal** request.

Formal Request

An agency may require that a formal request be submitted. A formal request must be made in writing and must include the following information:

- (1) Contact information for the requester;
- (2) A reasonable description of the requested record to enable the agency to locate the record with reasonable effort;
- (3) Any request for a waiver of fees in the public interest and facts to support the waiver; and
- (4) A request to inspect records or a request to obtain a copy and the desired means of transmission.

GUIDELINE TO RESPOND TO A FORMAL REQUEST

Agencies may use the following general guideline to respond to a formal request:

Step 1 – Determine Whether the Agency Has the Requested Record

A. Identify the Record.

If a request is unclear, the agency may request more information in its notice to requester, explained below, or may simply contact the requester informally and ask.

FAQ: *Our agency received a request for x. I believe that the requester is really seeking y. May I contact the requester to see which record he wants?*

Yes. The agency may formally ask for clarification in the required notice, but the agency may also and generally should attempt to clarify the request prior to sending the required notice where it would expedite the agency's response.

B. Determine if the Agency or a Unit of the Agency Maintains the Record.

The agency must make an initial determination of whether any unit or division of the agency “maintains” the requested record. As explained above, an agency “maintains” a government

record if the record is in the physical possession of the agency and/or under its administrative control.

Under OIP's administrative rules, if one unit or division receives a request for a record that is maintained by another unit or division within the agency, then it must forward the request to the appropriate unit or division. The time for response to the request will then begin to run once the request is received by the unit or division that maintains the record. See Haw. Admin. R. §2-71-13(d).

Step 2 - Determine If an Exception Applies

A record, or a portion of the record, may be withheld if it falls within one of the five exceptions to disclosure listed under § 92F-13:

- (1) The Privacy Exception
- (2) The Litigation Privilege Exception
- (3) The Frustration Exception
- (4) The Law or Order Exception
- (5) The Legislature Exception

An exception applies if the answer is yes to any of the following questions:

- Would disclosure constitute a clearly unwarranted invasion of an individual's personal privacy?
- Would the record be privileged against discovery in a judicial or quasi-judicial action involving the State or any county?
- Must the agency keep the record confidential in order to avoid the frustration of one of its legitimate functions, i.e., in order to do its job?

- Is the record protected by state or federal law or by court order?
- Is the record a draft document of a legislative committee or contained in the personal file of a legislator?

Where an agency denies access to a record, the agency has the burden of justifying its withholding under an applicable exception.

Must the record (or information) be withheld if an exception applies?

In certain instances, the agency must withhold records, such as where the record is made confidential by state or federal law or is information protected by the individual's right to privacy under the state or federal constitutions.

Does the agency want to exercise its discretion to withhold the record?

Unless it is required by another law or court order to maintain the confidentiality of a record, the agency can choose to disclose a record that falls under an exception. For example, an agency may choose to disclose a preliminary document on a project prior to making a final decision even though the agency could have withheld the record under the "frustration" exception.

Step 3 – Provide the Required Response

Within ten business days of receipt of a request, the agency must respond to the requester. Depending upon the circumstances, the agency must:

- A. Make the record available; **OR**
- B. Provide a "Notice to Requester" or an "Acknowledgment to Requester"

Fees

OIP's administrative rules allow an agency to charge certain fees. See Haw. Admin. R. § 2-71-19. These rules also allow an agency to require prepayment of 50% of the agency's estimated fees to search for, review and segregate the requested records + 100% of the agency's estimate of other lawful fees, such as copying or mailing costs.

Note that the agency must waive the first \$30 in fees for search, review and segregation or the first \$60 where the agency finds that the requester has met the requirements under OIP's administrative rules for a public interest waiver.

“Allowable fees.” An agency may charge fees as follows:

- (1) Fees for search, review, and segregation of the record(s), with the first \$30 of the total waived, calculated as follows:
 - (a) For search: \$2.50 per 15 min. or fraction thereof; and
 - (b) For review/segregation: \$5 per 15 min. or fraction thereof.
- (2) Any other lawful fees.

“Search” means to look for a government record, including page-by-page or line-by-line identification of a government record, manually or by computer using existing retrieval or programming capabilities.

“Review” means to examine a record in order to determine which portions, if any, may be exempt from disclosure, but does not include the time spent by the agency or another person to resolve issues of general law or policy regarding the applicability of exceptions to disclosure under the UIPA.

“Segregate” means to prepare the record for disclosure by excising any portion of the record exempted from disclosure. If information is reasonably segregable from a requested record, the agency is required to provide access to the portions of the record that are required to be disclosed. *OIP recommends that a copy be made; that the agency black-out the exempted information; and that the agency then make a copy of that redacted copy to be furnished to the requester. Note that the agency may only charge for 1 copy of the record.*

“Other lawful costs” include photocopying costs pursuant to §92-21; and the actual cost of a CD or videotape used to copy a record and the actual charge for postage or other transmission.

“Public interest waiver.” The agency is required to waive \$60 of the total fees for search, review, and segregation if it finds that the public interest would be served because (1) the record is not readily available to the public; and (2) the requester intends and has the actual ability to widely disseminate the information to the public.

“Prepayment.” Based upon the agency’s **good faith estimate** of the above fees, the agency may require the requester to prepay:

- (1) 50% of the estimated allowable fees for search, review, and segregation; **and**
 - (2) 100% of the estimated costs to prepare and transmit the record.
-

A. Make the Record Available

If the record is listed under §92F-12 (records that are always public) or is a record available for public access in its entirety, i.e., it is clear no exception applies to any portion of the record and there is no need to search for the record, the agency must disclose the record within a reasonable time not to exceed 10 business days or upon prepayment of fees, if required by the agency.

Where a record is easily accessible, the agency should not delay its disclosure. In such a case, disclosure on the 10th day, absent other circumstances, would likely not be reasonable.

----- ***OR*** -----

B. Provide Notice or Acknowledgment to the Requester

For a record not listed under §92F-12 or that is not publicly available in its entirety, the agency must provide a written response to the requester within 10 business days.

1. Notice to Requester

The Notice to Requester provides information required by OIP's administrative rules about how the agency will provide access to the requested record, including when and to what extent the records will be made available.

** OIP has created a "Notice to Requester" form that the agency may use. It is available in word and pdf format on the OIP website. A copy is attached to this handbook as Appendix B.*

The Notice to Requester must include the following information as applicable:

- (1) Where agency **will disclose all or part of the record**, the notice must include:
 - (a) Where or how the record or copies will be made available;
 - (b) A good faith estimate of “**allowable fees**,” grant of “**public interest waiver**,” and any “**prepayment**” required;
 - (c) Instructions for any necessary, additional arrangements;
 - (d) When the record will be available; and
 - (e) Whether “**incremental disclosure**” will be made and the justification for such disclosure.

- (2) Where agency is **denying access to all or part of a record**, the notice must identify:
 - (a) The specific record or part that will not be disclosed; **and**
 - (b) The §92F-13 exception that allows withholding (and any other applicable laws) and a brief explanation (a few words) of why the agency cited that exception.

- (3) Where agency is **unable to disclose the record or part of the record**, the notice must state that:

- (a) The agency does not maintain the record;
- (b) The agency requires a further description or clarification of the requested record to identify and search for the record; **or**
- (c) The request requires the agency to create a summary or compile information not readily retrievable.

2. Acknowledgment to Requester

Where “**extenuating circumstances**” exist, the agency may provide the requester with **written acknowledgment*** of the request within 10 business days, but must then provide the Notice to Requester within 20 business days from the agency’s receipt of the request. See Haw. Admin. R. §2-71-13(c).

** OIP has created an “Acknowledgment to Requester” form that the agency may use. It is available in word and pdf format on the OIP website. A copy is attached to this handbook as Appendix A.*

“Extenuating circumstances” exist when:

- (1) The agency must consult with another person (not including OIP or the agency’s counsel) to determine whether the record is exempt from disclosure under the UIPA;
 - (2) The request requires extensive search, review, segregation or preparation;
 - (3) The agency requires additional time to respond in order to avoid an unreasonable interference with its other statutory duties and functions; or
 - (4) A natural disaster or other situation beyond the agency’s control prevents a response.
-

Incremental Disclosure

Disclosure may be made in increments where:

- (1) “Extenuating circumstances” are present; **and**
- (2) The requested records are voluminous.

Where incremental disclosure is to be made, the agency may require: (1) one prepayment of fees prior to any disclosure; **or** (2) incremental prepayment of fees prior to each incremental disclosure.

If one prepayment is required: Each increment of records must be disclosed within 20 business days of the prior incremental disclosure.

If incremental prepayment is allowed: Each increment of records must be disclosed within 20 business days after the prepayment made for that increment of records.

Step 4 - Search, Review, & Segregate

For records not immediately accessible, the agency must:

- (1) Locate the requested record; **and**
- (2) Where the agency has identified possible exceptions to disclosure, review and segregate the information it must withhold or is allowed and has made the determination to withhold.

Information that may be withheld must be segregated if it may reasonably be removed from the record (rather than withholding the entire record) and must be done in a way that

makes it reasonably apparent that information has been deleted from the record.

Where an agency requires a prepayment of fees, the agency may and OIP recommends that the agency delay its search, review, and segregation until receipt of the prepayment in order to avoid wasted effort in the event the requester chooses to narrow or abandon the request.

Step 5 - Provide the Record in the Manner Requested

A record to be disclosed must be disclosed within 5 business days after the agency provides notice or, when applicable, after receiving prepayment of allowable fees.

The agency must make reasonable efforts to provide access to the record in the manner requested by the requester.

ACKNOWLEDGMENT TO REQUESTER

To: _____

From: _____

(Agency and name & telephone number of contact person at agency)

DATE REQUEST RECEIVED: _____

DATE OF ACKNOWLEDGMENT: _____

GOVERNMENT RECORDS YOU REQUESTED (attach copy of request or provide brief description below):

1. _____
2. _____
3. _____
4. _____
5. _____

This acknowledgment is provided in accordance with section 2-71-13, Hawaii Administrative Rules ("HAR"), because the following extenuating circumstance(s) exist:

- Agency must consult with another person to determine whether the record is exempt from disclosure under chapter 92F, HRS.
- Request requires extensive agency efforts to search, review, or segregate the records, or otherwise prepare the records for inspection or copying.
- Agency requires additional time to respond to the request in order to avoid an unreasonable interference with its other statutory duties and functions.
- A natural disaster or other situation beyond the agency's control prevents the agency from sending a notice or responding to the request within ten business days.

Due to these extenuating circumstances, the agency will send you the written notice required by section 2-71-14, HAR, within a reasonable time not to exceed twenty business days following the date when the agency received your request. Among other things, this notice will inform you whether the agency intends (1) to disclose the record; (2) to deny access to all or part of the information in the requested record, identifying the portions that will not be disclosed and justifying the nondisclosure; or that the agency is unable to disclose the record for the reasons given. The notice will also include the agency's good faith estimate of all fees that will be charged to the requester under section 2-71-19, HAR and the amount of prepayment required by the agency, if any.

If the agency is providing access to records, the agency will then:

- (1) Disclose the requested records within five business days after providing notice or, when applicable, after receiving a prepayment as provided for under section 2-71-19, HAR.

or

- (2) Disclose the requested records in increments because the requested records are voluminous. See HAR § 2-71-15. Each increment will be disclosed within twenty business days after either (A) the prior incremental disclosure (if one prepayment of fees is required and received) or (B) receipt of each incremental prepayment required.

For questions about the agency's acknowledgment, please contact the person named above. Questions regarding compliance with the UIPA may be directed to the Office of Information Practices at 808-586-1400.

OIP 3 (rev. 6/29/05)

APPENDIX A

NOTICE TO REQUESTER

(Use multiple forms if necessary)

TO: _____

FROM: _____

(Agency/name & telephone number of contact person at agency)

DATE REQUEST RECEIVED: _____

DATE OF THIS NOTICE: _____

GOVERNMENT RECORDS YOU REQUESTED (attach copy of request or provide brief description below):

1. _____
2. _____
3. _____
4. _____

NOTICE IS PROVIDED TO YOU THAT YOUR REQUEST:

Will be granted in its entirety.

Cannot be granted because

Agency does not maintain the records. Agency believed to maintain records: _____

Agency needs a further description or clarification of the records requested. Please contact the agency and provide the following information: _____

Request requires agency to create a summary or compilation from records not readily retrievable.

Is denied in its entirety

Will be granted only as to certain parts

based upon the following exemption provided in HRS § 92F-13 and/or § 92F-22 and other laws cited below (portions of records that agency will not disclose should be described in general terms).

RECORDS OR

APPLICABLE

AGENCY

INFORMATION WITHHELD

STATUTES

JUSTIFICATION

REQUESTER'S RESPONSIBILITIES:

You are required to (1) pay any lawful fees assessed; (2) make any necessary arrangements with the agency to inspect, copy or receive copies as instructed below; and (3) provide the agency any additional information requested. If you do not comply with the requirements set forth in this notice within 20 business days after the postmark date of this notice or the date the agency makes the records available, you will be presumed to have abandoned your request and the agency shall have no further duty to process your request. Once the agency begins to process your request, you may be liable for any fees incurred. If you wish to cancel or modify your request, you must advise the agency upon receipt of this notice.

METHOD & TIMING OF DISCLOSURE:

Records available for public access in their entirety must be disclosed within a reasonable time, not to exceed 10 business days, or after receipt of any prepayment required. Records not available in their entirety must be disclosed within 5 business days of this notice or after receipt of any prepayment required. If incremental disclosure is authorized by HAR § 2-71-15, the first increment must be disclosed within 5 business days of this notice or after receipt of any prepayment required.

(continued on next page)

OIP 2 (rev. 6/21/07)

APPENDIX B

Method of Disclosure:

- Inspection at the following location: _____.
- Copy will be provided in the following manner:
 - Available for pick-up at the following location: _____.
 - Will be mailed to you.
 - Will be transmitted to you by other means requested: _____.

Timing of Disclosure: All records, or first increment where applicable, will be made available or provided to you:

- On: _____.
- After prepayment of fees and costs of \$ _____ (50% of fees + 100% of costs, as estimated below).
Payment may be made by: cash personal check other _____.

For incremental disclosures, each subsequent increment will be disclosed within 20 business days after:

- The prior increment (if one prepayment of fees is required and received).
- Receipt of each incremental prepayment required.

Disclosure is being made in increments because the records are voluminous and the following extenuating circumstances exist:

- Agency must consult with another person to determine whether the record is exempt from disclosure under HRS chapter 92F.
- Request requires extensive agency efforts to search, review, or segregate the records or otherwise prepare the records for inspection or copying.
- Agency requires additional time to respond to the request in order to avoid an unreasonable interference with its other statutory duties and functions.
- A natural disaster or other situation beyond agency's control prevents agency from responding to the request within 10 business days.

ESTIMATED FEES & COSTS:

The agency is authorized to charge you certain fees and costs to process your request (even if no record is subsequently found to exist), but must waive the first \$30 in fees assessed for general requesters and the first \$60 in fees when the agency finds that the request made is in the public interest. See HAR §§ 2-71-19, 31 and -32. The agency may require prepayment of 50% of the total estimated fees and 100% of the total estimated costs prior to processing your request. The following is the estimate of the fees and costs that the agency will charge you, with the applicable waiver amount deducted:

Fees:	Search	Estimate of time to be spent: _____ (\$2.50 for each 15-minute period)	\$ _____
	Review & segregation	Estimate of time to be spent: _____ (\$5.00 for each 15-minute period)	\$ _____
	Fees waived	<input type="checkbox"/> general (\$30) <input type="checkbox"/> public interest (\$60)	<\$ _____>
	Other	_____	\$ _____
		(Pursuant to HAR § 207-31 (B))	
	Total Estimated Fees:		\$ _____
Costs:	Copying	Estimate of # of pages to be copies: _____ (@ \$ _____ per page)	\$ _____
	Other	_____	\$ _____
	Total Estimated Costs:		\$ _____

For questions about this notice, please contact the person named above. Questions regarding compliance with the UIPA may be directed to the Office of Information Practices at 808-586-1400 or oip@hawaii.gov.

OIP 2 (rev. 6/21/07)