Op. Ltr. 03-18 Closed Investigation of Deputy Attorney General

This opinion was partially overruled by OIP Op. Ltr No. F13-01.

November 12, 2003

Mr. Thomas Russi
Ms. Christine Paul

Re: Closed Investigation of Deputy Attorney General

Dear Mr. Russi and Ms. Paul:

This is in response to your request to the Office of Information Practices ("OIP") for an opinion on the above-referenced matter.

ISSUE PRESENTED

Whether you are entitled, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), to a redacted[1] copy of an internal memorandum of an investigation ("Investigation") conducted by the Department of the Attorney General ("Attorney General") regarding your complaint about a Deputy Attorney General ("Deputy").

BRIEF ANSWER

The Deputy who is the subject of the Investigation has a significant privacy interest in "personnel" type information under section 92F-14(b)(4), Hawaii Revised Statutes ("HRS"), which outweighs any public interest in the record. Thus, under part II of the UIPA, you are not entitled to a redacted version of the Investigation, and the Attorney General may withhold the Investigation from public disclosure.

Because the Investigation refers to the Deputy as well as Mr. Russi, it is a joint personal record, i.e., it is both the Deputy's and Mr. Russi's personal record. Under part III of the UIPA, Mr. Russi is entitled to access

[1] The terms "redact" and "segregate" are used synonymously herein.

information about him that is maintained by government. Due to the unique circumstances in this case, however, for the reasons explained below, the OIP is of the opinion that segregation of the Investigation is warranted, insofar as it is reasonably segregable, because disclosure to Mr. Russi of the portions of the Investigation that pertain solely to the Deputy would be a clearly unwarranted invasion of the Deputy's privacy.

FACTS

Based on information provided by you, on October 4, 2000 and September 28 2001, you made written complaints to then Attorney General Earl Anzai[2] alleging misconduct by the Deputy ("Complaints"). In letters dated May 15, 2002 and June 17, 2002, you requested a redacted copy of the Investigation, which was conducted by the Attorney General based on your Complaints.

The Attorney General advised you in a letter dated June 14, 2002, that your request for a copy of the Investigation was denied because section 92F-14(b)(4), HRS, attaches a significant privacy interest to information in a personnel file. This June 14, 2003 letter clarified that neither a full nor a redacted[3] copy of the Investigation would be provided. The Attorney General again advised you in a letter dated July 1, 2002 that you would not be provided access to the Investigation because the Investigation is a personnel record whose disclosure is not permitted by the UIPA. In a letter to you dated March 28, 2003, the Attorney General reiterated the position of the prior administration and advised he would await the OIP's opinion.

The OIP was provided with a copy of the two-page Investigation for review pursuant to section 92F-42(5), HRS.

DISCUSSION

Under the UIPA, there are two types of record requests: freedom of information requests under part II, and personal record requests under part III.[4] Based on the facts of this case, the OIP finds it appropriate to analyze your record request under both part II and part III of the UIPA.

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[2] The OIP did not receive copies of these complaints.

[3] In a letter to the OIP dated January 14, 2003, the Attorney General advised that it did not believe the Investigation was reasonably segregable.

[4] "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

I. PART II OF THE UIPA – FREEDOM OF INFORMATION

Part II of the UIPA sets forth rules for public access to government records[5] maintained by agencies[6] and operates on the presumption that "[a]ll government records are open to public inspection" unless an exception to disclosure applies. Haw. Rev. Stat. § 92F-11(a) (1993). The fact that the Investigation is a government record and that the Attorney General is an agency for the purposes of the UIPA are not at issue.

Only one of the UIPA's five exceptions to the general rule of disclosure is relevant here:

> **§92F-13 Government records; exceptions to general rule.** This part shall not require disclosure of:
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> (1) Government records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy[.]

Haw. Rev. Stat. § 92F-13(1) (1993). To determine whether public disclosure of the Investigation would constitute a clearly unwarranted invasion of the Deputy's personal privacy, the public interest in disclosure must be balanced against the Deputy's privacy interests therein. Haw. Rev. Stat. § 92F-14(a) (Supp. 2002).

The UIPA lists as an example of information in which an individual has a significant privacy interest:

> (4) Information in an agency's personnel file, or applications, nominations, recommendations, or proposals for public

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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." Haw. Rev. Stat. § 92F-3 (1993).

[5] "Government record" means "information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. § 92F-3 (1993).

[6] "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." Haw. Rev. Stat. § 92F-3 (1993).

> employment or appointment to a governmental position, except:
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> (A) Information disclosed under section 92F-12(a)(14); and
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> (B) The following information related to employment misconduct that results in an employee's suspension or discharge:
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> (i) The name of the employee;
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> (ii) The nature of the employment related misconduct;
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> (iii) The agency's summary of the allegations of misconduct;
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> (iv) Findings of fact and conclusions of law; and
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> (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[.]

Haw. Rev. Stat. § 92F-14(b)(4) (Supp. 2002).

Section 92F-14(b), HRS, provides a nonexhaustive list of information carrying significant privacy interests. Thus, records other than those listed in that section can carry significant privacy interests. The OIP has found that an employee has a significant privacy interest in personnel-related information within a report even when it is not contained in the employee's personnel file.[7] Similarly, here, the OIP finds, based on inspection of the

[7] In the OIP Opinion Letter Number 98-5, the OIP opined that Honolulu Police Department ("HPD") internal affairs reports ("IA reports") were "akin to the information maintained in a personnel file" even though the IA reports at issue were not maintained in personnel files. See also OIP Op. Ltr. No. 95-7 (March 28, 1995).

Investigation, that it contains "personnel" type information akin to the type of information listed in section 92F-14(b), HRS.

Because there is no indication that the Deputy was subject to a suspension or discharge resulting from the alleged employee misconduct, the OIP finds that he has a significant privacy interest in the Investigation. See Haw. Rev. Stat. § 92F-14(b)(4); OIP Op. Ltr. No. 98-5 at 20-21 (Nov. 24, 1998). Cf. OIP Op. Ltr. No. 99-1 (Jan. 26, 1999) (information about employee misconduct resulting in suspension or discharge of employees at hospitals administered by the Hawaii Health Systems Corporation is public under the UIPA).

In balancing the privacy interest of the Deputy against the public interest in disclosure under the UIPA, the public interest to be considered is that which sheds light upon the workings of government. See OIP Op. Ltr. No. 98-5 at 18-19 (Nov. 24, 1998). Here, the public interest in disclosure of the Investigation lies in confirming that the Attorney General is properly investigating allegations of employee misconduct.

In determining the weight of the public interest in the disclosure of the identity of an employee who is the subject of allegations of wrongdoing, courts have looked at several factors, including: the rank and level of responsibility of the employee; the activity in question; whether there is evidence of wrongdoing on the part of a government employee; and whether there is any evidence that the government has failed to investigate adequately. OIP Op. Ltr. No. 98-5 at 21-22 (Nov. 24, 1998) (citations omitted). Where lower level employees are involved, it will tilt the balance against disclosure of the names of the employees. Id. at 22 (citation omitted). Similarly, where there is no evidence of employee wrongdoing or that the government has failed to adequately investigate, the public interest in disclosure is diminished. Id. (citation omitted). Based on section 92F-14(b), HRS, consideration also should be given to whether or not there exists any finding of serious misconduct. Thus, such determinations must be made on a case-by-case basis.

Here, certain factors diminish the public interest in disclosure. It is apparent from the Investigation that no suspension or discharge was recommended as a result of the Deputy's actions. Further, no evidence has been presented to show that the government has failed to investigate adequately. Moreover, the alleged infraction was for a very limited period of time soon after the Deputy's hire and was based upon one specific set of circumstances. Based upon the totality of the circumstances, the OIP finds

that the public interest is not furthered by disclosure of the contents of the Investigation when the Deputy's identity is known, and the discipline imposed, if any, is less than a suspension or discharge. Given the foregoing, it is the opinion of the OIP that under part II of the UIPA, in balancing the privacy right of the Deputy against the public interest in disclosure, the Attorney General need not disclose the Investigation, even in redacted form, because it does not pertain to employment related misconduct that resulted in a suspension or discharge.

II. PART III OF THE UIPA – DISCLOSURE OF PERSONAL RECORDS

As noted above, part III of the UIPA governs access by individuals[8] to their personal records maintained by agencies. The rules of access[9] and exemptions to disclosure[10] under part III of the UIPA are different from the Freedom of Information provisions in part II.

The Investigation contains findings and recommendations relating to Mr. Russi's allegations against the Deputy and accordingly, is the Deputy's personal record. In light of the fact that Mr. Russi is named in the Investigation, the OIP is of the opinion that the Investigation is also Mr. Russi's personal record. See Quinn, et. al. v. Stone, et. al., 978 F. 2d 126, 133 (3rd Cir. App.) 1992, *rehearing en banc denied* ("A record 'can include as little as one descriptive item about an individual.'" (citation omitted)). Further, the OIP finds that none of the exemptions to disclosure at section 92F-22, HRS, apply to allow the Attorney General to withhold access to information in the Investigation about Mr. Russi from Mr. Russi.

However, the facts of this case require a discussion of the theory of "joint personal record." The OIP has only formally opined on joint personal records on one occasion. See OIP Op. Ltr. No. 95-19 (Aug. 1, 1995). [11] The

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[8] "Individual" means "a natural person." Haw. Rev. Stat. § 92F-3 (1993).

[9] See Haw. Rev. Stat. § 92F-23 (Supp. 2002).

[10] See Haw. Rev. Stat. § 92F-22 (1993).

[11] In that case, a complainant filed a complaint with the Maui County Police Commission ("Commission") against a Maui Police officer ("Officer"). The OIP held that complainant therein was allowed access to the Commission's file based on her complaint after the Commission found no wrongdoing and closed the file because the file contained a "collection or grouping of information 'about' the complainant and the police officer." OIP Op. Ltr. No. 95-19 (Aug. 1, 1995). The record in that case included summaries of the complainant's allegation and a witness statement, the

OIP, however, did not specifically articulate the manner in which an agency should review a request to access a joint personal record in Opinion Letter 95-19. We note here that the federal courts are not in agreement on this issue.

One line of cases states that for joint personal records, all information contained therein must be provided to all persons to whom the record pertains upon request. For example, the federal United States Court of Appeals for the Eighth Circuit decided that the subject of an Internal Revenue Service investigation was entitled to access the entire investigative record despite the fact that portions of it pertained to another individual. Voelker v. Internal Revenue Service, 646 F. 2d 332 (8th Cir. App.) 1981. The court in Voelker stated, in overturning the district court's opinion:

> The district court held that [the federal Privacy Act, 5 U.S.C. § 552a] only authorizes disclosure of information pertaining to the requesting individual. This ignores the wording of the statute. It clearly states that an individual is entitled to his record, as well as to other information that pertains to him. There is no justification for requiring that information in a requesting individual's record meet some separate "pertaining to" standard before disclosure is authorized. In any event, it defies logic to say that information properly contained in a person's record does not pertain to that person, even if it may also pertain to another individual. Accordingly, we hold that a federal agency does not have discretion to withhold information contained in a requesting individual's record on the ground that the information does not pertain to that individual.

Voelker, 646 F. 2d at 333-334 (footnotes omitted).

The Voelker court noted that the Privacy Act, like the UIPA, provides personal record requesters with the right to correct[12] personal records, and

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Officer's response, and the investigator's conclusions. Attached to the report were the statements in their entirety, and other items.

[12] The Committee of Rights, Suffrage and Elections of the 1978 Constitutional Convention of the State of Hawaii noted, in discussing a proposed privacy amendment to the Constitution of the State of Hawaii, that "the right to privacy should ensure that at the least an individual shall have the right to inspect records to correct information about himself." OIP Op. Ltr. No. 95-19 (Aug. 1, 1995) *citing* Standing Committee Report No. 69, Vol. I Proceedings of the 1978 Constitutional Convention of the State of Hawaii at 674 (emphasis added).

that "[t]o be able to intelligently challenge the government's recordkeeping practices, individuals have been given a right of access to their own records. Thus, permitting individuals to examine governmental records to determine their scope and accuracy is critical to the Privacy Act's effectiveness." Voelker, 646 F. 2d at 334. The Voelker court also noted that had Congress intended to shield from disclosure information in one's personal record that pertains to another person, it could have added such an exemption to the Privacy Act. Id. at 335; see also Topuridze v. U.S. Information Agency, 772 F. Supp. 662, (D. D.C.) 1991.

Another federal case, however, allows, on a case-by-case inquiry, segregation of information that is clearly about only one individual and not the other, such as social security numbers or home contact information. In DePlanche v. Califano, 549, F. Supp. 685 (D. S. D. Mich.) 1982, the court decided that a father who did not have visitation rights was not entitled to the addresses of his minor children that were contained in his Social Security Administration file. The father argued that because the children's addresses were in his administrative folder, and because the addresses could only be retrieved by a search for the father's name or social security number, the addresses were part of his record[13]. DePlanche 549 F. Supp. at 694. The court distinguished DePlanche from Voelker, concluding that despite the fact that addresses were in the father's file, they did not "pertain" to the father. DePlanche 549 F. Supp. at 694.

The DePlanche court noted that when an agency receives a request for information of a personal nature, possibly pertaining to a person other than the one making the request, the agency must reconcile two conflicting duties: the duty to make available to the public the information in its possession, and the duty to safeguard the privacy of individual members of the public. DePlanche 549 F. Supp. at 694 (citation omitted). The court further noted that the general purpose of FOIA is to strengthen the public's right to know; whereas the Privacy Act is intended to give the individual better control over the gathering, dissemination, and accuracy of agency information about himself[14]. Id. In other words, the DePlanche court stated that while the

[13] Under the Privacy Act, which is the federal counterpart to part III of the UIPA, "record" is "any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph[.]" 5 U.S.C. 552a(a)(4) (2003).

[14] These same general statements can be said of parts II and III of the UIPA.

primary purpose of FOIA is to increase the citizen's access to government records, the main purpose of the Privacy Act is to forbid disclosure unless it is required by FOIA. Id. at 695 (citations omitted). The conflict between the underlying policies of the two acts become especially acute when there is a question as to whether the individual is seeking access to *his* record or to information pertaining to another. Id. In resolving these conflicts, the DePlanche court found that because of the unusual factual situation, the argument that the children's addresses are not "about" the father, do not pertain to him, and therefore are not accessible to him as his record, is more compelling. Id.

The OIP agrees with the general proposition of the DePlanche court, and using federal law as a guide, adopts the following policy regarding joint personal records. If a record and/or information contains an individual's name or other identifying particular, there is a presumption that it is a personal record entirely accessible to the requester (subject to the exemptions in section 92F-22, HRS). However, this presumption can be rebutted if it can be shown that certain information is not "about" the requester, but is "about" someone else, and in the interest of protecting personal privacy, it would be a violation of part II of the UIPA to disclose the other person's information to the requester.

In this case, as the Investigation contains information "about" Mr. Russi, it is presumed that he is entitled to the entire record. However, certain information in the Investigation is not "about" Mr. Russi and is only "about" the Deputy. The information attributable to the Deputy is information, the disclosure of which would be a clearly unwarranted invasion of personal privacy (see section I., above). Thus, the OIP finds that, in order to protect the personal privacy of the Deputy in his personnel information contained in the Investigation, Mr. Russi should be provided with a segregated copy. This finding is limited to the facts of this case only and is not meant to cover all joint personal record requests.

III. SEGREGATION

The OIP's administrative rules require that agencies segregate records when possible to facilitate disclosure:

> § 2-71-17 Segregation of information in records. (a) When information in a requested record is not required to be disclosed under section 92F-13, HRS, or any other law, an agency shall assess whether

> the information is reasonably segregable from the requested record. If the record is reasonably segregable, the agency shall:
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> (1) Provide access to the portions of the record that are required to be disclosed under chapter 92F, HRS; and
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> (2) Provide a notice to the requester in accordance with section 2-71-14(b) regarding information that is not disclosed.
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> (b) An agency shall segregate information from a requested record in such a way so that it is reasonably apparent that information has been removed from the record. An agency shall not replace information that has been segregated with information or text that did not appear in the original record.

Haw. Admin. R. § 2-71-15 (1999).

The Attorney General previously advised the OIP that the Investigation could not be reasonably segregable. After reviewing the record, however, the OIP cannot agree with that conclusion. Portions of the record pertain only to Mr. Russi's allegations against the Deputy and factual information about the Attorney General's discussions with Mr. Russi as part of the Investigation.

By copy of the Opinion, the OIP advises the Attorney General of its conclusion that the record can be reasonably segregated. Prior to disclosure of the Investigation, the Attorney General should segregate the Deputy's name and individually identifiable information, along with information, which if disclosed, would be a clearly unwarranted invasion of personal privacy under section 92F-13(1), HRS. See OIP Op. Ltrs. No. 98-5 at 27-28 (Nov. 24, 1998); 94-8 at 10-11 (May 12, 1994); 95-7 at 11 (March 28, 1995); 95-21 at 23 n. 10 (Aug. 28, 1995). What constitutes identifying information must be determined not only from the standpoint of the public, but also from that of persons familiar with the circumstances involved. See Dep't of Air Force v. Rose, 425 U.S. 352, 380-381, 96 S. Ct. 1592, 1608 (1976); Cappabianca v. Commissioner, U.S. Customs Service, 847 F. Supp. 1558, 1565 (M.D. Fla. 1994) (based on requester's knowledge of the individuals and events involved, additional caution in redaction was required to prevent release of information which would further identify witnesses and their specific statements; withholding of names only would be insufficient).

CONCLUSION

Under part II of the UIPA you are not entitled to a copy of the Investigation because it contains information about the Deputy which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy under section 92f-13(1), HRS.

Under part III of the UIPA, Mr. Russi is entitled to a redacted copy of the Investigation because it is a joint personal record of both Mr. Russi and the Deputy. Ms. Paul is not entitled to the Investigation under part III of the UIPA because the Investigation is not her personal record as defined in section 92F-3, HRS.

Very truly yours,

Carlotta Dias
Staff Attorney

APPROVED:

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CMD:ankd

cc: First Deputy Attorney General Richard Bissen
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