NEIL ABERCROMBIE
GOVERNOR

SHAN TSUTSUI
LIEUTENANT GOVERNOR

STATE OF HAWAII
OFFICE OF THE LIEUTENANT GOVERNOR
OFFICE OF INFORMATION PRACTICES
NO. 1 CAPITOL DISTRICT BUILDING
250 SOUTH HOTEL STREET, SUITE 107
HONOLULU, HAWAI'I 96813
Telephone: (808) 586-1400 FAX: (808) 586-1412
E-MAIL: oip@hawaii.gov
www.hawaii.gov/oip

CHERYL KAKAZU PARK
DIRECTOR

The Office of Information Practices (OIP) is authorized to issue decisions and advisory opinions under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes (HRS) (the UIPA) pursuant to HRS §§ 92F-27.5 and 92F-42, and chapter 2-73, Hawaii Administrative Rules (HAR).

OPINION

Requesters: Donna Jinbo, Jennie Wolfe, Cathy Rabacal, Shari Yanagi
Agency: Department of Transportation
Date: April 5, 2013
Subject: Investigative Report on Workplace Violence Complaint (APPEAL 09-12)

REQUEST FOR OPINION

Requesters ask whether the Department of Transportation (DOT) properly denied their request under Part III of the UIPA for disclosure of the investigative report (Report), which was prepared by DOT's Office of Civil Rights (OCR) in response to a workplace violence complaint (Complaint) filed by the four Requesters. The Complaint alleges that another DOT employee (Respondent) was the aggressor in a workplace violence incident against one of the Requesters (Complainant). The other three Requesters (Witnesses) were interviewed by OCR regarding this incident.[1]

[1] While all four individuals who filed the Complaint with DOT are collectively referred to as the "Requesters" for purposes of this opinion, only the Requester against whom the workplace violence incident allegedly occurred will be separately identified as the "Complainant," and the remaining three Requesters will be separately identified as "Witnesses." Additionally, there are other DOT employees who were interviewed during the investigation, but do not fall within the term "Witnesses" for the purposes of this opinion.

Unless otherwise indicated, this determination is based solely upon the facts presented in the Requesters' letters to OIP dated December 12, 2008, and January 26, 2009, and DOT's letters to OIP dated December 30, 2008, and January 30, 2009. DOT's first letter to OIP included a copy of the Report specifically for OIP's *in camera* review. While the holding of this case only applies to the specific facts herein, this opinion is intended to provide a comprehensive guide to the analytical framework that agencies should follow in responding to an individual's request for access to personal records. As will also be explained, this opinion partially overrules two prior OIP opinions that created a rebuttable presumption that the mere mention of a person's name in a record made it his or her personal record in its entirety.

QUESTIONS PRESENTED

1. Whether, under Part III of the UIPA, DOT must disclose the Report, or portions thereof, to each Requester as a personal record.

2. Whether, under Part II of the UIPA, DOT must publicly disclose to the Requesters those portions of the Record that are not any of their personal records.

BRIEF ANSWERS

Analytical Framework for Responding to a Personal Record Request

Because the Requesters are individuals asking for access to the Report, which contains information "about" them, DOT must first consider their records requests as "personal records" requests and, therefore, must apply the provisions of Part III of the UIPA. Part III's provisions, which govern an individual's access to his or her own personal records, are separate and different from the provisions in Part II of the UIPA, which govern public access to government records.

To respond to the questions presented above, an agency must answer the following four questions:

(1) What is the "personal record" of the individual requesting access under Part III of the UIPA?

(2) Does an applicable Part III exemption in section 92F-22, HRS, allow the withholding of access to the personal record?

(3) What portion, if any, is a government record subject to the public disclosure requirements of Part II of the UIPA?

(4) Does an applicable Part II exception in section 92F-13, HRS, allow the non-disclosure of a government record that is not a Part III personal record?

First, it must be determined whether the requested record, or portions thereof, constitutes a "personal record" to which the requesting individual has access under Part III of the UIPA. The UIPA defines a "personal record" as "any item, collection, or grouping of information about an individual that is maintained by an agency." HRS § 92F-3 (2012) (emphasis added). An agency should review the subject matter and contents of the requested record in order to ascertain what, if any, information in the record identifies and is specifically about the individual requesting access, and thereby determine whether all or a portion of the record constitutes that individual's "personal record."

Second, when an agency has determined that the record, or portions thereof, is an individual's personal record, the agency may withhold the personal record from the individual only when there is an applicable Part III exemption as set forth in section 92F-22, HRS. We emphasize that only Part III exemptions, and not Part II exceptions, are considered in analyzing Part III personal records requests.

Third, there may be portions of the requested record that do not constitute a personal record because they are not about the requesting individual. Any portion that is not a personal record must be reviewed under Part II of the UIPA to determine whether the requester, as a member of the general public, would be entitled to access the government record. Thus, Part II, not Part III, applies to any portion of a record that is not the individual's personal record.

Fourth, when applying Part II of the UIPA to information in a government record that does not constitute a personal record, an agency may withhold such portion of the record from public access only when it falls within an exception to required public disclosure, as set forth in section 92F-13, HRS. If no Part II exception applies, the agency must publicly disclose that portion of the government record.

Brief Answers to Questions Presented

1. Yes, DOT must disclose portions of the Report, including each Requester's statement, to each Requester as a "personal record" under Part III of the UIPA. Several portions of the Report are the "joint personal records" of all four Requesters so that Part III of the UIPA requires each Requester to have access to information in the Report that is, in fact, about her, even if the same information is also about another individual, unless an exemption applies. Specifically, with respect to the Complainant, OIP finds that nearly all of the Report is her personal record since she is identified throughout the Report as the purported victim of the alleged workplace violence incident, which is the subject matter of the Report. However, the Complainant's personal record does not include those portions of the

Report that are not about her and are only about the Respondent or other DOT employees, as described in the second Brief Answer below.

OIP further finds that limited portions of the Report are about each Witness and, therefore, constitute that Witness' personal record. Thus, each Witness' personal record varies and consists specifically of each Witness' own statement in the Report, sections of the Report describing the allegations and background of the Complaint received from all four Requesters (Complainant and all Witnesses), and items of information specifically about that identified Witness in the Report's scope of investigation and analysis.

Because OIP finds that none of the exemptions in section 92F-22, HRS, apply to portions of the Report constituting the personal record of the Complainant or each Witness, OIP concludes that DOT must disclose to each Requester those portions of the Report that comprise the particular Requester's personal record.

2. Yes, under Part II of the UIPA, DOT must publicly disclose to the Requesters those portions of the Report that are not "about" any of them if there are no applicable exceptions in section 92F-13, HRS. OIP finds certain portions of the Report do not constitute the personal record of any of the Requesters, where the information is specifically and exclusively about the Respondent and other DOT employees who were interviewed (and are not among the Requesters). Such portions that are not personal records of the Requesters include statements by other DOT employees who were interviewed for the Report concerning the Respondent's past conduct unrelated to the alleged incident, as well as the Report's recommendations that specifically concern only the Respondent.

As for information in the Report that does not constitute the personal record of any of the Requesters, DOT's public disclosure of those portions is governed by Part II of the UIPA, which requires public disclosure unless an exception applies. Where statements by other DOT employees, including the Respondent, do not identify or are not about any Requester, OIP concludes that these other employees' significant privacy interests outweigh the public interest in disclosure of their statements so that this information in the Report falls within the UIPA's "clearly unwarranted invasion of personal privacy" exception in Part II, section 92F-13(1), HRS. Therefore, DOT is not required to publicly disclose the other DOT employees' statements that are not about any Requester and do not constitute any Requester's personal record.

On the other hand, the Report also includes disciplinary information about the Respondent that must be disclosed under Part II of the UIPA, namely OCR's recommendations regarding the Respondent's employment related misconduct that resulted in her suspension: her name, the nature of the misconduct, and DOT's summary of the allegations, findings of fact, conclusions of law, and the discipline imposed, including the suspension. HRS § 92F-14(b)(4)(B) (2012). As the UIPA

expressly states that a government employee has no significant privacy interest in such employment related misconduct that results in a suspension, and the public interest outweighs a privacy interest that is not deemed significant, DOT must publicly disclose this information. Id. Furthermore, the listing of DOT employees in the office, including their names, job titles, and start dates, is mandated to be public by the UIPA. HRS § 92F-12(a)(14) (2012).

FACTS

The Requesters filed the Complaint with OCR alleging a workplace violence incident by the Respondent against the Complainant in violation of DOT's workplace safety and health policies. In its investigation of the alleged incident, OCR interviewed the Requesters, the Respondent, and other DOT employees as witnesses.

Upon completing its investigation, OCR submitted to DOT the Report of OCR's findings, conclusions, and recommendations, which sets forth the Requesters' complaint and their allegations; the scope of OCR's investigation; summaries of the statements of the Requesters, the Respondent, and other DOT employees; and OCR's analysis, conclusion, and recommendations. After grievance proceedings concluded, the Respondent was suspended for five days.

The Requesters made several requests to DOT for access to the entire Report before the conclusion of the grievance proceedings. DOT did disclose to each Requester her own statement set forth in the Report. However, DOT denied the Requesters' requests for the entire Report, asserting that, because no adverse personnel actions were being taken against the Requesters, they had no right to review the entire Report. DOT also asserted that the Report was solely the Respondent's "personal record" because it concerned a complaint against her, the Respondent did not consent to disclosure of the Report, and disclosure of the entire Report would constitute a clearly unwarranted invasion of the Respondent's personal privacy.

In the discussion that follows, we will explain the difference between Part III personal records requests and Part II general records request, the legislative history and the Hawaii Supreme Court's holding concerning the definition of the UIPA term "personal record," why we are partially overruling two prior OIP opinions, and how to analyze a Part III versus Part II records request.

DISCUSSION

I. Part III of the UIPA Governs Disclosure to an Individual of Personal Records "About" the Individual.

While Part II of the UIPA governs the public's right of access to government records,[2] Part III of the UIPA governs an individual's right of access to any government record that constitutes a "personal record." Under both Parts of the UIPA, an agency is mandated to disclose a government record, upon request, unless a provision of the applicable Part allows the agency to withhold the government record from that requester.[3] See HRS § 92F-11(b) (2012) (requiring that "[e]xcept as provided in section 92F-13, each agency upon request by any person shall make government records available for inspection and copying") (emphasis added); HRS § 92F-23 (requiring that "[u]pon 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 . . . unless the personal record requested is exempted under section 92F-22") (emphasis added).

Part III of the UIPA sets forth the exclusive provisions governing an individual's right to access a personal record and to have the agency correct factual errors or misrepresentations therein. Part III provides different and often broader rights[4] when an individual is seeking access to his or her own personal records, as compared to Part II provisions that apply when the general public seeks access to government records. See OIP Op. Ltr. No. 05-16 (explaining distinction between Parts II and III of the UIPA).

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[2] The term "government record" is defined as "information maintained by an agency in written, auditory, visual, electronic, or other physical form." HRS § 92F-3 (2012).

[3] If a personal record is a government record that, in its entirety, is required to be public under Part II of the UIPA, the agency may disclose the entire record to an individual without having to perform the complete analysis as to whether the individual would have access to it as a personal record under Part III. Similarly, if the agency responds to a personal record request under Part III by disclosing the entire record–i.e., the personal record and all public parts of the remaining record–to the individual to whom the record pertains, then a Part II analysis would be unnecessary. A Part II analysis is required when a partial disclosure of the record is made in response to a personal record request, as explained *infra*.

[4] While an individual has a right to correct factual errors or misrepresentations in his or her own personal record, the public is not provided the same right to correct a government record under Part II of the UIPA. See generally HRS §§ 92F-21 through -28 (2012).

Also, Part III imposes liability upon an agency for "[a]ctual damages sustained by the complainant" in an amount no less than "the sum of $1000" when the agency is determined by a court to have "knowingly or intentionally violated a provision of this part" III. HRS § 92F-27(d)(1) (2012). Part II of the UIPA has no comparable liability provision.

In this case, each Requester sought access to the Report as her "personal record" under Part III of the UIPA. DOT denied the Requesters' requests for the Report in its entirety because DOT asserted that the entire Report was solely the Respondent's personal record, but it did disclose the Report in part by providing to each Requester her own statement as set forth in the Report.

While DOT properly provided each Requester with her own statement, DOT may not have fully understood that each Requester also had a right to other portions of the Report as a "joint personal record." Just as the Report is the Respondent's personal record, some portions of the Report also constitute the personal records of the other individuals identified in the Report, namely all the Requesters and other DOT employees who were interviewed. See OIP Op. Ltr. No. 05-10 at 4 (explaining that each individual has access under Part III to a joint personal record that is about two or more individuals). Therefore, DOT must provide each Requester access to the portions of the Report that constitute her own personal record under Part III of the UIPA.

This opinion provides the analytical framework for responding to a Part III personal records request and will guide DOT in determining what information in the Report constitutes the personal record of the Complainant and each Witness who requested access.[5] Following our examination of the history and definition of the term "personal record" used in Part III of the UIPA, we explain why we are now compelled to partially overrule two previous decisions to the extent that they relied upon a rebuttable presumption that the mere mention of an individual's name made an entire record his or her personal record.

II. What is the "Personal Record" of the Individual Requesting Access under Part III of the UIPA?

A. History and Definition of "Personal Record"

1. Statutory Definition of "Personal Record" from Former Chapter 92E, HRS, Carried Over to the UIPA

When the UIPA was adopted, the Legislature separated the three primary objectives of former chapter 92E, HRS, which was titled "Fair Information Practice (Confidentiality of Personal Record)," and transferred its provisions granting an

[5] Rather than perform this analysis separately for each Requester, DOT may seek to obtain the written consent of all Requesters to allow DOT to prepare and disclose to all of them a redacted copy of the Report that is a combination of all of their accessible joint personal records. See HRS § 92F-12(b)(1) (2012) (stating that the agency shall disclose "[a]ny government record, if the requesting person has the prior written consent of all individuals to whom the record refers").

individual the right to access and correct personal records into the new Part III of the UIPA, explaining:

> The bill will re-codify major portions of Chapter 92E, HRS, in Sections -21 to -28 except that these provisions will be limited to handling an individual's desire to see his or her own record. All other requests for access to personal records (i.e. by others) will be handled by the preceding sections of the bill. In this way, the very important right to review and correct one's own record is not confused with general access questions.

S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess. Haw. S.J. 689, 691 (1988); H.R. Conf. Comm. Rep. No. 112-88, Haw. H.J. 817, 818 (1988), cited in OIP Op. Ltr. No. 94-27 at 9-10.

The UIPA's legislative history shows that the Legislature designed Part III to continue the statutory mandate previously set forth in chapter 92E with regard to the individual's right to access and correct his or her own personal records, and it eliminated the previous statutory restriction against public disclosure of such records.[6] Specifically, the current Part III requires that "[u]pon 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," and it gives an individual "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." HRS §§ 92F-23 & -24(a) (2012). Thus, like the former chapter 92E, the current Part III of the UIPA continues to provide an individual the same right to access and correct his or her personal record.

The term "personal record" is defined in the UIPA as follows:

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[6] As explained further in this opinion, when the Legislature re-codified sections of chapter 92E, HRS, into the new Part III of the UIPA, the Legislature intentionally did not carry forward chapter 92E's prohibition against public disclosure of personal records, which had been set forth in section 92E-4, HRS, now repealed. Former section 92E-4 had been widely criticized as placing agencies in the untenable position of not being able to disclose records that should have been made public under the then existing public records statute, section 92-51, HRS. Vol. I Report of the Governor's Committee on Public Records and Privacy at 12 (Dec. 1987) (stating that "Chapter 92E has been interpreted to 'limit' access to and disclosure of records which contain 'personal record.' This is the area that committee members felt needed the greatest change"). To reconcile the conflict between the two prior government records laws, the Legislature repealed both laws, eliminated chapter 92E's public disclosure prohibition completely, and established the UIPA to address public disclosure of government records in Part II, and an individual's access to and correction of personal records in Part III.

> "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.

HRS § 92F-3 (emphasis added). The UIPA's definition of "personal record" is nearly identical to the definition previously set forth in chapter 92E, with the only difference being that it no longer refers to the former public records law that was repealed.

Based on this statutory definition, information constituting an individual's "personal record" may be limited to one or more items of information, such as the individual's name, social security number or home address, or may be entire paragraphs, pages, or documents, so long as the information is "about" the individual. Notably, for information in a record to be "about" the individual and deemed to be the individual's personal record, the information should specifically name or otherwise identify that particular individual.[7]

2. Federal Privacy Act Only Provides an Individual Access to a "Record" in a "System of Records."

Previous OIP opinions regarding an individual's access to personal records under Part III of the UIPA had cited to the federal Privacy Act, 5 U.S.C. § 552a, because the UIPA's definition of "personal record" is similar to the Privacy Act's definition of "record," 5 U.S.C. § 552a(a)(4). See, e.g., OIP Op. Ltr. Nos. 94-27, 95-19, 03-18, 05-10. After referring to Privacy Act cases, two OIP opinions in 2003 and

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[7] HRS §92F-3 (defining a "personal record" as "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"). Because a personal record must identify and be "about" the requester, anonymous personal record requests are not permitted and an individual requesting access to a personal record under Part III of the UIPA would be required to include sufficient evidence of the individual's identity. OIP Op. Ltr. No. 90-29 at 14-15. Similarly, under Part II of the UIPA, an agency must also make the initial determination about whether the government record identifies a specific individual specifically for the purpose of determining whether the government record should be protected under the Part II exception for a "clearly unwarranted invasion of personal privacy." See, e.g., OIP Op. Ltr. Nos. 99-2 at 9 and 03-18 at 10-11 (both opinions noting that "[w]hat 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").

2005 created and applied a "rebuttable presumption" that "if a record and/or information contains an individual's name or other identifying particular, . . . it is a personal record entirely accessible to the requester (subject to the exemptions in section 92F-22, HRS)." OIP Op. Ltr. No. 05-10 at 4 (applying a rebuttable presumption); OIP Op. Ltr. No. 03-18 at 9 (noting, however, that "[t]his finding [of a rebuttable presumption] is limited to the facts of this case only and is not meant to cover all joint personal record requests").

While the federal Privacy Act and related case law are helpful in interpreting the UIPA, the federal law contains an important difference that does not support the creation of such a rebuttable presumption under Hawaii's law. Despite the similarities between the Privacy Act's definition of "record," 5 U.S.C. § 552a(a)(4), and UIPA's definition of "personal record," there is a key distinction between the two laws: under the Privacy Act, an individual's right to access a "record" is only afforded when the record is contained in a "system of records," which is defined as a federal agency's group of records "from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual," such as in a personnel file or a government benefits file. 5 U.S.C. § 552a(a)(5) & (d)(1). Because the federal Privacy Act applies only to a "record" in a "system of records" for which the retrieval of a record must be by an individual's name or identifying particular, information in such a system ordinarily pertains to or is "about" the identified individual, and thus provides a factual basis for presuming under federal law that the entire "record" is about that individual.

Unlike the federal Privacy Act, Hawaii's UIPA has no requirement that its access and correction provisions for personal records only apply when an individual's personal record is in a "system of records" (e.g., a file) specifically identifying an individual. Because the UIPA does not contain the "system of records" requirement in order for Part III to apply, there is no factual basis to presumptively conclude that under this state law an entire record is the requester's personal record merely because his or her name is mentioned.

Given this key distinction between the federal Privacy Act and Hawaii's UIPA, we must look for other legal authority for guidance as to whether an individual's name in a record should automatically create a rebuttable presumption that the entire record is a "personal record" that would trigger application of Part III of the UIPA.

3. 3. Hawaii Supreme Court's Interpretation of "Personal Record"

Prior to the adoption of the UIPA, the Hawaii Supreme Court had interpreted the term "personal record," as defined in former chapter 92E, HRS. In Painting Industry of Hawaii Market Recovery Fund v. Alm, 69 Haw. 449, 746 P.2d 79 (Haw.

1987) ("Painting Industry"), the Department of Commerce and Consumer Affairs (DCCA), argued that a settlement agreement it had entered into with a licensed corporate contractor (1) was not a "public record" because it invaded the personal privacy right of the contractor's responsible managing employee, and (2) was a "personal record" because it identified the employee by name (Tagawa). The Hawaii Supreme Court rejected both of DCCA's arguments, specifically holding that the mere mention of an individual's name in a document was not sufficient to classify the entire document as a "personal record" subject to chapter 92E's prohibition against public disclosure of personal records in effect at that time.[8]

After first identifying chapter 92E's purposes, including the individual's right to access to personal records, and then citing chapter 92E's definition of "personal record," the Supreme Court stated:

> Certainly, the settlement agreement contains Mr. Tagawa's name. In most cases, the result would be absurd and unjust if the mere mention of a person's name were enough to classify a document as "personal," and so we will reject this construction. [citations omitted]. Thus, the issue is whether the settlement agreement is "about" Mr. Tagawa.

69 Haw. at 453; 746 P. 2d at 81 (emphasis added).

Because Painting Industry discussed chapter 92E's definition of "personal record" for the specific purpose of applying the former prohibition against public disclosure, the opinion has been primarily cited for its declaration that the State Constitution's recognition of the right to privacy[9] protects from public disclosure "highly personal and intimate" information[10] and that former chapter 92E's prohibition against disclosure of personal records, in section 92E-4, HRS, was

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[8] See *supra* note 6 explaining the Legislature's repeal of the statutory prohibition against public disclosure of personal records.

[9] Article I, section 6, of the Hawaii State Constitution.

[10] The State Constitution's recognition of privacy not only protects individuals from the government's public disclosure of highly personal and intimate records about themselves, but also serves to provide individuals the right to access and review government records about themselves. During the State's Constitutional Convention in 1978, the Committee of Rights, Suffrage and Elections noted, in discussing a proposed privacy amendment to the State Constitution, 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." Standing Committee Report No. 69, Vol. I Proceedings of the Constitutional Convention of the State of Hawaii of 1978 at 674, cited in OIP Op. Ltr. No. 94-27 at 11.

designed to uphold this constitutional right to privacy.[11] 69 Haw. at 453; 746 P.2d at 82.

In the present case, however, we focus on Painting Industry's separate holding that an entire settlement agreement should not be classified as a "personal record" merely because it mentions an individual's name. 69 Haw. at 453; 746 P.2d. at 81. The court's holding concerning the definition of "personal record" applied to all of chapter 92E's purposes, the first of which was listed by the court as "allow[ing] an individual to gain access to governmentally maintained personal records." 69 Haw. at 452; 746 P.2d at 81. Therefore, we do not read Painting Industry as limiting its interpretation of this statutory term only to cases involving the now repealed prohibition against public disclosure of personal records.

We further note that in its review of Hawaii's records laws, the Governor's Committee on Public Records and Privacy ("Governor's Committee") identified chapter 92E's prohibition against public disclosure as the problem that needed to be addressed by legislation, and not the statutory definition of "personal record." Vol. I Report of the Governor's Committee on Public Records and Privacy at 21 (Dec. 1987) ("Governor's Committee Report") (stating that "[t]he problem is not the definition of 'personal record.' That definition needs to be broad since it is what determines which records an individual has the right to review and correct"). The Governor's Committee was well aware of the Painting Industry decision and summarized the opinion's holdings as follows:

> There will clearly be a good deal of discussion about this opinion [in] the coming days and months. Whatever it finally comes to stand for, the following items seem clear in its aftermath:
>
> 1. Chapter 92E, HRS, has been sustained as a valid interpretation by the Legislature of the constitution's privacy provision;
>
> 2. Chapter 92E, HRS, will not be applied mechanically to cover any record which has an individual's name on it; and

[11] See, e.g., State of Hawaii Organization of Police Officers v. Society of Professional Journalists --University of Hawaii Chapter, 83 Haw. 378, 398-400, 927 P.2d 386, 406-08 (Haw. 1996) (citing Painting Industry in holding that police officer misconduct records are not "highly personal and intimate information" within the protection of Hawaii's constitutional right to privacy); OIP Op. Ltr. No. 04-07 at 10 n.13 (citing Painting Industry).

3. Chapter 92E, HRS, will instead protect "highly personal and intimate" information such as medical, financial, educational and employment records.

Vol. I Governor's Committee Report at 20 (emphasis added). The Governor's Committee showed no inclination to limit the definition of personal record and the Court's second holding—that there is no automatic classification of a record as a personal record—only to cases involving the former prohibition against disclosure of personal records. Instead, the Governor's Committee recommended that the same definition of "personal records," as had been interpreted by the Court, continue to be used in legislation that became today's UIPA. Id. at 21.

Thus, when Legislature ultimately incorporated into the UIPA the Governor's Committee's recommendations regarding chapter 92E, the former provisions concerning an individual's right to access and correct personal records were retained, along with the same definition of the term "personal record" that had been interpreted by the Hawaii Supreme Court in Painting Industry.

Given that the federal Privacy Act, the Painting Industry decision, and the UIPA's legislative history do not provide legal authority for creating a rebuttable presumption that the mere mention of a person's name makes the entire document his or her "personal record," OIP is now compelled to partially overrule OIP Opinion Letter Numbers 05-10 and 03-18 to the extent that they create or rely upon such a rebuttable presumption.[12] Haw. Admin. R. § 2-73-19 (2012) (allowing "[r]econsideration of either a final decision or of a precedent . . . based upon . . . [o]ther compelling circumstances"). Instead, as will be explained further, we conclude that it is necessary to actually review the subject matter and contents of the requested record in order to ascertain whether the entire record, or only a portion thereof, is "about" an identified individual and thereby constitutes that individual's "personal record."

B. Agency Should Review the Subject Matter and Contents of the Record to Determine What Record Information is "About" an Individual and is Thus the Individual's Personal Record.

In Painting Industry, in order to address "the issue [of] whether the settlement agreement is 'about' Mr. Tagawa," the Hawaii Supreme Court described the subject matter of the record and noted that it only included Mr. Tagawa's name "because fictional entities cannot act on their own behalf." 69 Haw. at 453; 746 P.2d at 81-82. After finding that the entire agreement was not about Mr. Tagawa himself, the Court held that the settlement agreement did not qualify as a "personal

[12] OIP notes, however, that the results in both partially overruled cases would be unchanged under the analytical framework prescribed herein.

record" subject to the then existing prohibition against public disclosure under chapter 92E, HRS. Id. Painting Industry indicates that the Hawaii Supreme Court reviewed the settlement agreement in order to assess its subject matter and contents, determined what information therein was specifically "about" an individual, and concluded that the one mention of an individual's name in the agreement did not suffice to qualify the entire record as that individual's "personal record," as defined by then governing chapter 92E.

Two OIP opinions in 1994 and 1995 did not cite Painting Industry, but they similarly reviewed the records at issue to determine what information about an individual qualified as a "personal record" under section 92F-3, HRS. First, in OIP Opinion Letter No. 94-27, OIP reviewed an investigating panel's fact-finding report prepared in response to a sexual harassment complaint. OIP found that "[t]he fact-finding report does reflect on qualities, characteristics, and personal affairs of both of these individuals, and does refer to them by name throughout the report" and that "our conclusion that the fact-finding report is a personal record of the complainant and the respondent is consistent with the UIPA's express definition of the term 'personal record' and is fully consistent with the policies that underlie part III of the UIPA." OIP Op. Ltr. No. 94-27 at 13.

Second, in OIP Opinion Letter No. 95-19, OIP reviewed the Maui Police Commission's investigative report concerning a citizen's complaint concerning her interaction with a police officer and opined as follows:

> In particular, the report contains the Complainant's name, home address, telephone number, occupation, age, weight, place of employment, date of birth, and ethnicity. This information certainly qualifies as information about the Complainant's personal qualities or characteristics. In addition to her statement to the Commission, the investigative report contains the statements of the police officers and other third persons that contain information "about" the Complainant, including statements allegedly made by the Complainant during her encounter with the police officer, and concerning the Complainant's demeanor. In short, we believe that the investigative report contains an item, collection, or grouping of information that is "about" the Complainant and, therefore, the OIP concludes that the investigative report is the Complainant's personal record.

OIP Op. Ltr. No. 95-19 at 9-10.

For both OIP Opinion Letter Nos. 94-27 and 95-19, the information contained throughout the report at issue was obviously about the requesting individual and

was thus the basis for finding the report to be the individual's personal record. In each of these opinions, OIP actually reviewed the requested record to ascertain what information in the record was about the requesting individual, and OIP did not simply presume that it was a personal record because the individual was named therein.

Rather than relying upon a rebuttable presumption that the entire record is a personal record simply because an individual is named therein, an agency responding to a request from an individual should first review the subject matter and contents of the requested record in order to ascertain what information in the record identifies and is specifically about the individual and thereby constitutes that individual's personal record. If the subject matter and the contents of the entire record, or portions thereof, are directly or contextually about the individual, then the entire record, or all relevant portions, would be the individual's personal record. Whether or not the record's subject matter is obviously about the individual, the agency must review the record and discern exactly what information in the record—whether it is one or more items, paragraphs, or pages—identifies and is about the individual, either directly or contextually, so as to constitute that individual's personal record.

Information in the requested record that is not about the identified individual does not constitute the individual's personal record. For example, even within an investigative file initiated by a complainant, there may be information that is specifically and exclusively about someone else and should not be considered part of the personal record of the complainant. See, e.g., OIP Op. Ltr. No. 05-10 (concluding that the home addresses and home telephone numbers of witnesses and the alleged assailant in a sexual assault case were not the alleged victim's personal record subject to Part III, and must instead be evaluated as a public records request under Part II); OIP Op. Ltr. No. 03-18 (determining that certain information in an investigative file concerning an individual's complaint against an agency employee was the employee's confidential personnel information, and not part of complainant's personal record).

As other examples, an agency's annual report may summarize an identified individual's case, or a consultant's report may include an identified individual's comments. When these types of records are requested, their subject matters and contents are not primarily about the identified individuals and, thus, the annual report or consultant's report would not constitute personal records in their entireties. Depending on the facts of the case, the limited portion of the annual report summarizing the identified individual's case or the individual's specific comments in the consultant's report may constitute that individual's personal record for purposes of applying Part III of the UIPA, which gives that individual the right to access and have corrections made to that portion of the record. On the other hand, if an individual, who is discussed in any of these records, is not identified within the record (in other words, if the individual discussed therein has

been de-identified), then the summary of that individual's case or the comments made by the individual would not be a "personal record" governed by Part III of the UIPA.

C. Joint Personal Records of the Requesters and the Respondent

When government records, or portions thereof, are about a requesting individual as well as one or more other individuals, those records, or relevant portions, would constitute "joint personal records" of all individuals whom the information is collectively about, and all of the individuals would have access to their own respective personal records under Part III of the UIPA, subject to the exemptions therein. See, e.g., OIP Op. Ltr. No. 03-18, 05-10 (explaining that all individuals have access to a joint personal record about all of them, subject to Part III's exemptions).

As previously noted, DOT only disclosed to each Requester her own statement and denied access to the rest of the Report on the basis that the entire Report is solely the Respondent's personal record and disclosure would invade the Respondent's privacy. While DOT was correct in disclosing each Requester's statement to her, it failed to disclose other portions of the Report that constitute the joint personal record of each Requester and the Respondent. For instance, most of the Report would be considered the joint personal record of both the Complainant and the Respondent because the investigative report was about an incident involving the both of them. Moreover, there are a few portions of the Report, such as statements from other DOT employees concerning the incident, that would be joint personal records of the Respondent, Complainant, and one or more of the Witnesses who is referred to therein.

As to these joint personal records, each identified individual has access to those portions about both herself and any other individual under Part III of the UIPA, subject to the exemptions therein. Thus, each Requester has the same right as the Respondent to access and correct those portions of the Report that constitute their joint personal record. See OIP Op. Ltr. Nos. 05-10 and 03-18 (discussing what is a "joint personal record" under the UIPA); OIP Op. Ltr. No. 05-16 at 4 (recognizing "[t]he fact that a record is an individual's 'personal record' means that individual can request it under part III of the UIPA," but that the "individual has no right, however, to restrict disclosure of his or her own 'personal record'"). In other words, the Respondent's right to access and correct her personal record under Part III does not give the agency or the Respondent the right to restrict a Requester's access to Report information that is the Requester's and the Respondent's joint personal records. Therefore, DOT's assertion that the Report is the Respondent's personal record provides no justification under Part III for denying the Requesters access to their joint personal records.

D. Personal Record of the Complainant

In this case, OIP finds that the Report's subject matter, as stated in its title, was to investigate the alleged workplace violence incident involving the named Complainant and the Respondent. After reviewing the Report's contents, OIP finds that, except for limited segments of the Report that are only about the Respondent or other DOT employees as described below, both the Complainant and the Respondent are named and referred to throughout most of the Report concerning the incident that occurred between these two individuals. OIP thus concludes that most of the Report constitutes the personal record of the Complainant because the majority of the information contained therein is about the Complainant and her involvement in the incident.

OIP further concludes, however, that the Report is not entirely the Complainant's personal record because some limited parts of the Report are specifically and exclusively about the Respondent or other DOT employees. Those portions of the Report that are not the Complainant's personal record may be redacted, unless they are determined to be subject to public disclosure as a government record under Part II of the UIPA.

E. Personal Record of Each Witness

Unlike the Complainant and the Respondent, most of the Report is not about the Witnesses in this case. Instead, each Witness' personal record is limited to information about the Complaint filed by all the Requesters (the background and allegations), each Witness' employment information, her own statement, and any information about the identified Witness in the Report's scope of investigation and analysis.

Having determined what information in the Report is "about" each Requester, we next determine whether an exemption to disclosure under Part III allows DOT to withhold the personal records, or portions thereof, from the Requesters.

III. Does an Applicable Part III Exemption in HRS § 92F-22 Allow the Withholding of Access to the Personal Record?

Only Part III exemptions apply to Part III personal record requests, and thus the privacy exception found in Part II is not applicable. OIP Op. Ltr. No. 95-19 at 11. Section 92F-22, HRS, sets forth the only exemptions that may serve as the basis for withholding a personal record from an individual's access under Part III of the UIPA. As discussed below, we find in this case that none of the Part III exemptions

apply to allow DOT to withhold from all four Requesters (Complainant and Witnesses) access to their respective personal records contained within the Report.

DOT asserted that it was not required to disclose the Report to the Requesters under the exemption for "investigative reports and materials, related to an upcoming, ongoing, or pending . . . administrative proceeding against the individual." HRS § 92F-22(4) (2012); see OIP Op. Ltr. No. 94-27 (holding that this exemption allows an investigative report to be withheld from the subject individual as well as all individuals named in the report). However, because the Respondent has been suspended and any proceeding against her is no longer "upcoming, ongoing or pending," this Part III exemption cannot apply to the Report at this time.

Although DOT did not assert it, OIP notes that Part III contains another potentially relevant exemption that protects personal records, "[t]he disclosure of which would reveal the identity of a source who furnished information to the agency under an express or implied promise of confidentiality." HRS § 92F-22(2); see OIP Op. Ltr. No. 01-04 (concluding that the names and other information that would identify witnesses coming from a small group of co-workers could be redacted from investigation reports due to promises of confidentiality made to witnesses); OIP Op. Ltr. No. 95-23 (finding that the university may withhold a faculty member's statement alleging a colleague's scientific misconduct when the identity of the faculty member making the statement is known to the colleague and the university had assured confidentiality). Such promises of confidentiality are frequently made, at least implicitly, to witnesses in an investigation of alleged workplace misconduct.

Here, however, DOT has not argued that it made an express or implied promise of confidentiality to any DOT employees interviewed for the investigation. Furthermore, the Requesters and DOT have indicated that a copy of the Report, in its entirety, was already provided to the Respondent.[13] Thus, in this case, the identities of the other witnesses (the other DOT employees), cannot be withheld from the Requesters under the exemption in section 92F-22(2), HRS, since this exemption specifically requires an express or implied promise of confidentiality, and DOT has already disclosed these other witnesses' identities by providing the Respondent with an unredacted copy of the Report. Consequently, because no Part III exemptions are applicable, OIP concludes that the Requesters' personal records, as previously described, must be disclosed to them.

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[13] OIP notes that, in this case, it was appropriate to provide the Respondent with an unredacted copy of the Report because (1) the entire Report was primarily about her and, therefore, was her personal record, and (2) in this unusual situation where no witnesses spoke under an express or implied promise of confidentiality, there are no exemptions in section 92F-22, HRS, allowing DOT to segregate the Report prior to providing the Respondent with access.

We next discuss the portions of the Report that do not constitute a personal record of any Requester so that disclosure of these portions is governed instead by the public access provisions of Part II of the UIPA.

IV. What Portion, if any, is a Government Record Subject to the Public Disclosure Requirements of Part II of the UIPA?

Even if the Requesters are not entitled to access the entire Report as their personal record, as members of the public they may have the right to access portions of it under Part II of the UIPA. In this case, OIP finds that there are portions of the Report that are not about any of the Requesters and are instead specifically and exclusively about other individuals, as follows:

a) Information in other DOT employees' statements about the Respondent, which is unrelated to the alleged workplace violence incident involving the Complainant and OCR's analyses about the DOT employees' credibility;

b) In the Background section of the Report, a listing of DOT employees in the office where the alleged workplace violence incident occurred, including the employees' names, job titles, and start dates; and

c) The Report's recommendation of disciplinary actions towards the Respondent.

We examine below whether the "clearly unwarranted invasion of personal privacy" exception to disclosure applies to protect these portions of the Report from public disclosure under Part II of the UIPA.

V. Does an Applicable Part II Exception in HRS § 92F-13 Allow the Non-disclosure of a Government Record that is Not a Part III Personal Record?

A. The Privacy Exception

Part II of the UIPA in section 92F-13, HRS, provides five exceptions that allow an agency to withhold a government record from public access. In the present case, the potentially applicable exception is the one for "[g]overnment records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy." HRS § 92F-13(1) (2012).

Part II's "clearly unwarranted invasion of personal privacy" exception involves a balancing of the individual's privacy interest against the public interest in disclosure, and this exception only applies when the individual is found to have a significant privacy interest in the record and this significant privacy interest is not

outweighed by the public interest in disclosure. HRS § 92F-14(a) (2012) (stating that the privacy exception does not apply if the public interest outweighs the individual's privacy interest); see OIP Op. Ltr. No. 10-05 (applying the balancing test to a worker's compensation claim). According to the legislative history of the UIPA, the Legislature intended that the privacy exception shall not apply when the privacy interest is not significant, explaining that "if a privacy interest is not 'significant,' a scintilla of public interest in disclosure will preclude a finding of a clearly unwarranted invasion of personal privacy." H. Conf. Comm. Rep. No. 112-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 817, 818 (1988); S. Conf. Comm. Rep. No. 235, Haw S.J. 689, 690 (1988)).

Section 92F-14(b), HRS, lists examples of government records in which an individual has a significant privacy interest. With regard to personnel related information, as is set forth in the Report, section 92F-14(b) provides in pertinent part:

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

HRS § 92F-14(b) (2012) (emphasis added). Thus, the UIPA recognizes that a government employee has a significant privacy interest in "an agency's personnel file," but does not have a significant privacy interest in two categories of personnel information: (1) items of personnel information listed in section 92F-12(a)(14), HRS,[14] and (2) certain personnel information about employment misconduct that

[14] Except with respect to present or former employees involved in an undercover capacity in a law enforcement agency, section 92F-12(a)(14), HRS, requires disclosure of the following information about present or former officers or employees of an agency: name, compensation (but only salary range for certain collective bargaining unit employees), job

resulted in the employee's discharge or suspension. In applying Part II's privacy exception, the employee's privacy interest, whether it is significant or not, must be balanced against the public interest.

We next apply the Part II privacy exception to the personnel related information in the Report. First, we discuss the significant privacy interests that Respondent and other DOT employees have in certain personnel information. Subsequently, we discuss portions of the Report containing personnel related information in which the UIPA expressly recognizes no significant privacy interest because the information is required to be disclosed under section 92F-12(a)(14) or concerns the Respondent's misconduct that resulted in her suspension.

B. Part II's Privacy Exception Protects Some Personnel Information in the Report that is About the Respondent and Other DOT Employees But Not Specifically About the Incident Under Investigation.

The Report contains personnel related information specifically and exclusively about the Respondent and other DOT employees who were interviewed (and are not among the Requesters), including the Report's analysis about their credibility and their observations as to the Respondent's past conduct unrelated to the misconduct that resulted in her suspension. Section 92F-14(b)(4), HRS, specifically recognizes the significant privacy interest in a government employee's personnel file, and OIP recognized this significant privacy interest in personnel related information in a report, even when the report is not in the government employee's personnel file. OIP Op. Ltr. Nos. 95-7 at 9 (sexual harassment report); 98-5 at 19 (police internal affairs report).

Consequently, OIP finds that the Respondent and other DOT employees have a significant privacy interest in these portions of the Report because they consist of personnel related information. OIP further finds that the significant privacy interests of the Respondent and the other DOT employees outweigh the public interest[15] in disclosure of such personnel related information in the Report since this information does not concern the facts of the specific incident that Respondent was accused of committing and that OCR was investigating. OIP thus concludes

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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.

[15] OIP previously concluded, in the context of employment misconduct information, "[t]he public interest in disclosure . . . generally lies in confirming that the [agency] is properly investigating and addressing questions." OIP Op. Ltr. No. 10-03 at 5.

that the information in the Report about the Respondent and other DOT employees that is not specifically about the facts of the alleged workplace violence incident falls within Part II's "clearly unwarranted invasion of personal privacy" exception. Such information outside of the Requesters' personal records and protected by the privacy exception may be withheld from public disclosure under Part II of the UIPA.

C. The Privacy Exception Does Not Apply to Certain Personnel Information that Must be Disclosed in Accordance with HRS § 92F-12(a)(14).

Section 92F-12(a), HRS, lists government records that agencies must publicly disclose "[a]ny other provision in this chapter to the contrary notwithstanding." HRS § 92F-12(a). As to those records listed in section 92F-12, the Legislature declared that "the exceptions such as for personal privacy and for frustration of a legitimate government purpose are inapplicable." S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess. Haw. S.J. 689, 691 (1988); H.R. Conf. Comm. Rep. No. 112-88, Haw. H.J. 817, 818 (1988).

Section 92F-12(a)(14), HRS, mandates public disclosure of certain information about government employees, including their names, job titles, business addresses, and dates of first and last employment.[16] Thus, OIP concludes that the UIPA requires disclosure of the list of all DOT employees in the office where the alleged workplace violence incident occurred, including the employees' names, job titles, and start dates, which are found in the Background section of the Report.

D. The Privacy Exception Does Not Protect from Public Disclosure Certain Personnel Information About Employee Misconduct Resulting in Suspension Because the Public Interest in Disclosure Outweighs the Employee's Privacy Interest.

When a government employee has engaged in employment related misconduct, and that misconduct resulted in a suspension or discharge, section 92F-14(b)(4)(B), HRS, expressly states that the employee's significant privacy interest in personnel file information does not apply to the following information about the misconduct: the employee's name, the nature of the employment related misconduct, the agency's summary of the allegations, findings of fact and conclusions of law, and the disciplinary action taken by the agency. HRS § 92F-14(b)(4)(B); see, e.g., OIP Op. Ltrs. Nos. 95-6 and 98-5. Under the UIPA, the employee is deemed to have no significant privacy interest in this information about employment misconduct that resulted in a discharge or suspension, but only after thirty days have passed from the conclusion of the highest non-judicial grievance

[16] See *supra* note 14 quoting section 92F-12(a)(14), HRS.

adjustment procedure timely invoked by the employee or the employee's representative. Id.

In its January 30, 2009, letter to OIP, DOT acknowledged that certain items of information listed in section 92F-14(b)(4)(B), HRS, were contained in the Report, but pointed out that the Report could not be disclosed at the time of the Requesters' records request because all grievance procedures for the proposed disciplinary actions had not yet occurred. As of the date of this opinion, however, all grievance procedures have concluded and the Respondent has been suspended. Thus, the Respondent has no significant privacy interest at this time in the specific portions of the Report discussing the items listed in section 92F-14(b)(4)(B), HRS.

Because the Respondent's privacy interest in the information regarding her suspension is not significant, and because there is at least a scintilla of public interest[17] in disclosure, OIP finds that, on balance, this privacy interest is necessarily outweighed by the public interest in disclosure. OIP thus concludes that the UIPA's "clearly unwarranted invasion of personal privacy" exception in Part II does not protect from public disclosure the following information related to the misconduct that resulted in the Respondent's suspension: her name, the nature of misconduct for which she was suspended, DOT's summary of the allegations, findings of fact, conclusions of law, and the discipline imposed. See HRS § 92F-14(a) & (b)(4)(B). As Part II's "clearly unwarranted invasion of personal privacy" exception is not applicable, the Report's recommendation of disciplinary actions against Respondent, which constitutes misconduct information covered in section 92F-14(b)(4)(B), HRS, must be publicly disclosed to all Requesters as a government record under Part II of the UIPA.

CONCLUSION

Under Part III of the UIPA, most of the Report is the personal record of the Complainant. DOT should disclose to the Complainant the portions of the Report that constitute her personal record as no exemptions to disclosure in section 92F-22, HRS, allow DOT to withhold those portions from the Complainant. Portions of the Report that are specifically and exclusively about the Respondent or other DOT employees are not the Complainant's personal record.

Under Part III, each Witness is entitled to the portions of the Report that constitute her personal record, including information about the Complaint filed by all Requesters, her employment information, her own statement, and any information about the Witness in the Report's scope of investigation and analysis. None of the exemptions in section 92F-22, HRS, allow DOT to withhold these portions of the Report from each Witness as they pertain to her.

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[17] See *supra* note 15 regarding the public interest in employment misconduct information.

Under Part II, DOT may withhold access to portions of the Report specifically and exclusively about the Respondent and other DOT employees who were interviewed, including the analysis about their credibility, and observations by these other DOT employees about the Respondent's past conduct unrelated to the misconduct that resulted in her suspension. Disclosure of this information would be a clearly unwarranted invasion of personal privacy and these portions of the Report may be withheld from public disclosure under the privacy exception in section 92F-13(1), HRS.

Under Part II of the UIPA, DOT must publicly disclose in the Report the listing of DOT employees in the office where the alleged incident occurred, as that information is public under section 92F-12(a)(14), HRS.

Under Part II, DOT must publicly disclose information in the Report related to the employment misconduct that resulted in the Respondent's suspension, including her name, the nature of misconduct for which she was suspended, DOT's summary of the allegations, findings of fact, conclusions of law, and the discipline imposed. The privacy exception, in section 92F-13(1), HRS, does not apply to this misconduct information because the UIPA, in section 92F-14(b)(4)(B), HRS, states that the employee has no significant privacy interest in this misconduct information because the employee was suspended and the public interest in disclosure outweighs a privacy interest that is not significant.

RIGHT TO BRING SUIT

For a personal record request, a Requester is entitled to seek assistance directly from the courts after the Requester has exhausted the administrative remedies set forth in section 92F-23, HRS. HRS §§ 92F-27(a), 92F-42(1) (2012). An action against the agency denying access must be brought within two years of the denial of access (or where applicable, receipt of a final OIP ruling). HRS § 92F-27(e).

For government records generally, a Requester is entitled to seek assistance from the courts when the Requester has been improperly denied access to a government record. HRS § 92F-42(1) (2012). An action for access to records is heard on an expedited basis and, if the Requester is the prevailing party, the Requester is entitled to recover reasonable attorney's fees and costs. HRS §§ 92F-15(d), (f) & -27(e)(2012).

For any lawsuit for access filed under the UIPA, the Requester must notify OIP in writing at the time the action is filed. HRS § 92F-15.3 (2012).

This opinion constitutes an appealable decision under section 92F-43, HRS. An agency may appeal an OIP decision by filing a complaint within thirty days of the date of an OIP decision in accordance with section 92F-43, HRS. The agency

shall give notice of the complaint to OIP and the person who requested the decision. HRS § 92F-43(b) (2012). OIP and the person who requested the decision are not required to participate, but may intervene in the proceeding. Id. The court's review is limited to the record that was before OIP, unless the court finds that extraordinary circumstances justify discovery and admission of additional evidence. HRS § 92F-43(c). The court shall uphold an OIP decision, unless it concludes the decision was palpably erroneous. Id.

OFFICE OF INFORMATION PRACTICES

_____
Lorna L. Aratani
Staff Attorney

APPROVED:

_____
Cheryl Kakazu Park
Director