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

DECISION

Requester: The Garden Island
Agency: Kauai Police Department, County of Kauai
Date: September 15, 2014
Subject: Toxicology Reports (APPEAL 11-15)

REQUEST FOR DECISION

Requester seeks a decision as to whether the Kauai Police Department (KPD) properly denied its request under Part II of the UIPA for access to toxicology reports concerning two individual motorists who died in motor vehicle accidents.

Unless otherwise indicated, this advisory opinion is based solely upon the letter to OIP from KPD and the Kauai Office of the County Attorney (County Attorney), dated January 10, 2011 (KPD Letter); letters from Ms. Katherine Keating, Esq., on behalf of Requester, dated December 9, 2010, and February 10, 2011; telephone conversations with Assistant Chief Roy Asher, of KPD's Investigative Services Bureau, on October 2, 2013, and November 18, 2013; and the toxicology reports for the two motorists provided for OIP's *in camera* review.

QUESTION PRESENTED

Whether the toxicology reports for two individual motorists who died in separate motor vehicle accidents are required to be disclosed under the UIPA.

BRIEF ANSWER

The toxicology reports of the deceased motorists are required to be disclosed upon request, as no exception to disclosure under the UIPA applies.

FACTS

In March 2009 and July 2010, Requester made oral requests[1] to the County of Kauai for copies of the toxicology reports for two motorists who died in separate collisions on Kauai. The KPD Letter states that "[t]he reports in question concerned toxicology records pertaining to two young individuals who died in traffic crashes where alcohol was allegedly a factor." Requester informed OIP that the Kauai County Information Officer did disclose that one of the motorists had a blood alcohol level above the legal limit of 0.08 percent, but no actual reports or other records containing the exact blood alcohol levels were released. Following KPD's denial of access to the requested records, Requester sought OIP's assistance in obtaining the toxicology reports. In its December 9, 2010 letter to OIP, Requester specified that it "use[s] the term 'toxicology report' to refer to any record that reflects the level of alcohol or drugs in the body of a deceased motorist."

KPD, through the County Attorney's office, provided copies of the toxicology reports for the two deceased motorists, for OIP's *in camera* review as authorized by section 2-73-15(c), HAR.

DISCUSSION

I. Autopsy Reports

When any person dies as a result of an accident or under other circumstances described by law,[2] the coroner or deputy coroner is required to make "a complete investigation of the cause of the death" and shall perform an autopsy of the decedent's remains if, in the opinion of the coroner, an autopsy is "necessary in the interest of the public safety or welfare." HRS §§ 841-3, -14 (1993).

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[1] The administrative rules for appeals to OIP, which went into effect after the date this appeal was opened, provide that a denial of access to records must be based on a written request. HAR § 2-73-12(1). However, the OIP's director has the discretion to accept an appeal without written documentation of the request, where an otherwise substantiated appeal is submitted regarding an agency's denial of a record request. HAR § 2-73-12(4)c.

[2] The coroner or deputy coroner shall inquire into and make a complete investigation of the cause of death "as the result of violence, or as the result of any accident, or by suicide, or suddenly when in apparent health, or when unattended by a physician, or in prison, or in a suspicious or unusual manner, or within twenty-four hours after admission to a hospital or institution." HRS § 841-3 (1993).

The Chief of Police of KPD (KPD Police Chief) is designated the coroner of the County of Kauai. HRS § 841-1 (1993). According to KPD, a forensic pathologist from the County of Maui performs the autopsy and prepares the autopsy report. A toxicological analysis is a part of the autopsy protocol, and the result thereof, the toxicology report, is incorporated into the autopsy report. Autopsy reports, including the toxicology reports, are submitted to and maintained by the KPD Police Chief as the designated coroner.

Because toxicology results are incorporated into or attached to autopsy reports, OIP's opinion letter concerning the public disclosure of autopsy reports is relevant. In OIP Opinion Letter Number 91-32, OIP had opined that the UIPA required public disclosure of an autopsy report, upon request, so long as disclosure would not interfere with a pending or prospective law enforcement investigation. OIP had found that the four counties in the State previously had differing policies regarding disclosure of autopsy reports.[3] OIP assessed whether any of the UIPA exceptions to disclosure applied, reviewed the UIPA's legislative history concerning traditionally public records,[4] and concluded that, "in order to ensure uniformity," the counties are also mandated by the UIPA to publicly disclose an autopsy report, upon request, so long as it was not connected to a pending or prospective law enforcement investigation. OIP Op. Ltr. No. 91-32 at 6.

OIP then looked at the applicability of three of the exceptions to required disclosure under the UIPA.[5] First, OIP considered whether the exception for "[g]overnment records which, pursuant to state or federal law . . . are protected from disclosure" applied to autopsy reports. HRS § 92F-13(4) (2012). OIP found no state or federal law that prohibited the disclosure of autopsy reports prepared by county

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[3] In that opinion, OIP observed that the Honolulu Medical examiner's Office considered autopsy reports to be "public." Also, the Honolulu Medical Examiner's website provides instructions to the public on how to request a copy of an autopsy report. Honolulu Department of the Medical Examiner, http://www1.honolulu.gov/med/faqs.htm (last visited Nov. 7, 2013).

[4] OIP concluded that the UIPA requires that autopsy reports maintained by the Honolulu Medical Examiner's Office should remain public, "because the legislative history of the UIPA states, in pertinent part, that "[i]t is not the intent of the Legislature that this section [92F-13] be used to close currently available records, even though these records might fit within one of the categories in this section." S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 690 (1988), H. Conf. Comm. Rep. No. 112-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 817, 818 (1988).

[5] The UIPA requires 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 during regular business hours." HRS § 92F-11(b) (2012).

coroners. OIP Op. Ltr. No. 91-32 at 7. In fact, OIP found that the State statute governing autopsy procedures and reports[6] "appears to recognize that autopsy reports will be disclosed to the public," as it establishes a fee for certified copies of a coroner's report. Id. Section 841-9, HRS, provides in relevant part that "[u]pon the application by other than governmental agencies for a certified copy of any coroner's report and inquest, the coroner or deputy coroner shall collect the sum of $2 as a governmental realization for the preparation and issuance of the same." HRS § 841-9 (1993) (emphasis added).

Next, OIP examined the applicability of the exception to the general rule of disclosure for "[g]overnment records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy."[7] HRS § 92F-13(1) (2012). OIP, relying on its earlier opinions, concluded that under the UIPA, deceased individuals do not have a recognizable privacy interest in their autopsy reports, as the right to privacy is a personal right that is generally extinguished upon the individuals' death.[8] OIP Op. Ltr. No. 91-32 at 9. However, as discussed below, OIP has issued more recent opinions further addressing the privacy interest in government records concerning a decedent.

II. KPD Has Burden of Proof

The UIPA places the burden on the agency to establish justification for the nondisclosure of government records. HRS § 92F-15(c) (2012). Consequently, KPD has the burden to establish that an exception in section 92F-13, HRS, allows it to withhold the toxicology reports, and "broad, general assertions are generally insufficient to meet this burden" of proof. OIP Op. Ltr. No. 07-04 at 4 n.1.

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[6] See chapter 841, HRS, entitled "Inquests, Coroners" (governing autopsy procedures and reports in the State) and section 841-14, HRS (describing the circumstances under which an autopsy is to be performed).

[7] In OIP Opinion Letter Number 91-32, OIP also considered the exception for records which, if disclosed, would result in the "frustration of a legitimate government function." HRS § 92F-13(3) (2012). As KPD did not assert this exception as a basis for its denial, we do not address it here, except to observe that in the foregoing opinion, OIP concluded that an autopsy report connected with an ongoing law enforcement investigation may be withheld under the UIPA's "frustration of a legitimate government function" exception; however, once the investigation and the subsequent prosecution, if any, had concluded, the autopsy report must be made available for public inspection and copying under the UIPA. OIP Op. Ltr. No. 91-32 at 12-13.

[8] That opinion further stated that if an autopsy report mentions a living individual, disclosure of that report, under the UIPA, will depend upon a balancing of the privacy interests of that living individual against the public interest in disclosure of the autopsy report. OIP Op. Ltr. No. 91-32 at 8.

III. Privacy Interest of Deceased Individual; HIPAA

KPD does not argue that the deceased individuals have privacy interests in the toxicology reports. The KPD Letter states that the "motorist's privacy interests are extinguished upon the motorist's death."[9] Moreover, KPD does not assert that the toxicology reports are protected from disclosure by the Health Insurance Portability and Accountability Act of 1996, Public Law 104-191 (HIPAA) and the rules promulgated under HIPAA, 45 C.F.R. Parts 160 and 164 (HIPAA rule or Privacy Rule).[10]

However, since issuing OIP Opinion Letter Number 91-32, OIP has reconsidered whether an agency may withhold certain records concerning deceased individuals, given further development in case law regarding the privacy rights of deceased persons and the enactment of HIPAA and the Privacy Rule. See OIP Op.

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[9] Besides stating that an individual's privacy interests are extinguished upon the individual's death, the KPD Letter agrees with Requester that a motorist does not have a privacy interest in illegal conduct. Nonetheless, KPD appears to argue that there is a privacy interest for a decedent in a toxicology report that "discloses that a motorist's body allegedly contained unlawful amounts of particular substances," and disagrees with Requester that it "must disclose information which merely amounts to an accusation of criminal activity [impaired driving]." KPD cites to the Hawaii Constitution, stating, but without further explanation, that "the Hawai`i Constitution affords more privacy rights to individuals than may exist in other jurisdictions" and "affords the citizenry protections extending far and above those afforded by the United States Constitution with respect to freedom from unreasonable government intrusions."

[10] The federal Department of Health and Human Services' (DHHS) responses to comments, which accompanied publication of the HIPAA final rule, provide that "to the extent that death records and autopsy reports are obtainable from non-covered entities, such as state legal authorities, access to this information is not impeded by this [HIPAA] rule." 65 Fed. Reg. 82462, 82597 (Dec. 28, 2000). HHS further stated:

> HIPAA does not provide HHS with statutory authority to regulate coroners' or medical examiners' re-use or re-disclosure of protected health information unless the coroner or medical examiner is also a covered entity. However, we consistently have supported comprehensive privacy legislation to regulate disclosure and use of individually identifiable health information by all entities that have access to it.

Id. at 82687.

Ltr. No. 03-19.[11] In OIP Opinion Letter Number 03-19, OIP advised that agencies that are not directly covered by HIPAA and that hold comparatively recent health records of deceased persons should limit disclosure of those records similarly to what the HIPAA rules would require, based on the UIPA's privacy exception. OIP Op. Ltr. No. 03-19 at 8. OIP stated:

> Health records held by government agencies that are not directly regulated by the HIPAA rules would not typically fall under the UIPA's exception for records protected by other laws. However, the HIPAA rules are so significant to the treatment of health information that they are strongly persuasive as to the privacy interest in even health information that is outside the HIPAA rules' coverage. OIP is of the opinion that non-HIPAA covered agencies holding comparatively recent health records should treat those records similarly to what the HIPAA rules would require, based on the UIPA's privacy exception. The HIPAA rules set the new standard for determining privacy interests in medical records, and for records dating from within the last few decades, we do not see a reason to distinguish between privacy interests in medical records or other health information held by a government agency based on whether the agency is directly covered by HIPAA.

Id. (footnote omitted).[12]

OIP adopted the following test for determining whether the privacy

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[11] At the time OIP Opinion Letter Number 03-19 was issued, HIPAA's privacy rules protected health information for as long as an institution maintained the records. In 2013, the rules were amended to limit the period of protection for individually identifiable health information about a decedent to 50 years following the date of death of the individual. Privacy Rule, 45 C.F.R. §§ 164.502(f), 160.103 (2013). DHHS's commentary accompanying publication of the amended rule noted that the 50-year period of protection balances the privacy interests of living relatives or other affected individuals with a relationship to the decedent, with the difficulty of obtaining authorizations from personal representatives as time passes. Id.

[12] For example, OIP found that the Honolulu Police Department's (HPD) records of officers' counseling or treatment for mental health, substance abuse, and alcoholism would, though held by an agency not directly covered by HIPAA, be considered "health information" under HIPAA, so that HIPAA privacy standards should apply. OIP Op. Ltr. No. 03-19 at 8.

exception[13] to disclosure applies for information about a deceased individual:

> First, for records less than 80 years old, an agency must balance the passage of time against the sensitivity of the information involved to determine how strong the remaining privacy interest is. Second, the agency must balance that privacy interest against the public interest in disclosure, as provided by section 92F-14, Hawaii Revised Statutes. If the public interest in disclosure outweighs the now-reduced privacy interests of the deceased individual, the record may not be withheld under the privacy exception.

Op. Ltr. No. 03-19 at 14 (footnotes and citation omitted).

In OIP Opinion Letter Number 05-16, OIP applied the foregoing test to determine whether medical information about an individual who died approximately ten years before the date of the opinion could be withheld under the UIPA's "privacy" exception to disclosure. See HRS §§ 92F-14(b)(1), -13(1). First, OIP found the medical information, a list of medical expenses, to be "fairly sensitive" and would not be commonly known to friends and family, and that the passage of approximately a decade since the individual's death combined with the relatively strong privacy interest would "result in a somewhat diminished but still significant privacy interest." OIP Op. Ltr. No. 05-16 at 15. Second, OIP found some public interest in the medical information, as it was a basis for the awarding of public funds, but OIP concluded that the public interest did not outweigh the significant privacy interest. Id.

As the information at issue in the present case concerns deceased individuals, it is appropriate to apply the test set forth in OIP Opinion Letter Number 03-19, to

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[13] The UIPA provides an exception to disclosure for government records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy. HRS § 92F-13(1) (2012). The UIPA further provides that "[d]isclosure of a government record shall not constitute a clearly unwarranted invasion of personal privacy if the public interest in disclosure outweighs the privacy interests of the individual." HRS § 92F-14(a) (2012). The public interest to be considered is whether disclosure of information sheds light upon an agency's performance of its statutory duties and upon the actions and conduct of government officials. E.g., OIP Op. Ltr. No. 89-4. Under this balancing test, if an individual's privacy interest in a government record is not "significant," then the record must be disclosed if there is a "scintilla" of public interest. OIP Op. Ltr. No. 95-24 at 10 (citing 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)). Notably, the legislative history of the UIPA's privacy exception indicates that this exception for a clearly unwarranted invasion of personal privacy applies only if an individual's privacy interest in a government record is "significant." See id. ("Once a significant privacy interest is found, the privacy interest will be balanced against the public interest in disclosure.")

determine whether the information may be withheld under the UIPA's "privacy" exception to disclosure at section 92F-13(1), HRS: 1) balance the passage of time against the sensitivity of the information involved to determine how strong the remaining privacy interest is; and 2) balance that privacy interest against the public interest in disclosure, as provided by section 92F-14, Hawaii Revised Statutes.

In this case, therefore, OIP first examines the passage of time and the sensitivity of the information. Both motorists died less than five years before the date of this opinion, so a relatively short amount of time has passed. With respect to the sensitivity of the information, the UIPA provides that an individual has a significant privacy interest in "[i]nformation relating to medical . . . history, diagnosis, condition, treatment, or evaluation." HRS § 92F-14(b)(1). In OIP's opinion, the presence and level of alcohol or drugs would, arguably, constitute information relating to an individual's medical condition. Even in the event the toxicology blood tests were conducted after the motorists' deaths, the results reveal information about the condition of the motorists prior to their deaths. Given the short period of time since the individuals' deaths and the sensitive nature of the information, OIP finds a diminished but still significant privacy interest in the toxicology information.[14]

The second step in the test is to balance the still significant privacy interest against the public interest in disclosure. In contrast to the medical information at issue in OIP Opinion Letter Number 05-16, above described, which was submitted by the crime victim's family to the Crime Victim Compensation Commission in support of a claim for monetary compensation, the toxicology reports at issue here were prepared as parts of investigations required by statute to be conducted by government employees for certain types of deaths. The KPD Police Chief as coroner has a statutory duty to inquire into and make a complete investigation of the cause of death of any person as the result of an accident. HRS § 841-3 (1993). The toxicology reports were prepared in connection with the performance of this

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[14] The Hawaii Supreme Court has held that article I, section 6 of the Hawaii Constitution, establishing the right of privacy, applies to "informational privacy" and protects "the right to keep confidential information which is 'highly personal and intimate.'" Brende v. Hara, 113 Haw. 424, 430, 153 P.3d 1109, 1115 (2007) (per curiam) (citations omitted) (holding that the constitutional right of privacy protects the disclosure outside of the underlying litigation of petitioners' health information produced in discovery). Because health information is "highly personal and intimate," it is protected by the informational prong of article I, section 6. Id. See also Cohan v. Circuit Court of the First Circuit (*Ayabe*), No. SCPW-13-0000092 (Haw. Feb. 27, 2014) (holding that the privacy provision of the Hawaii Constitution, article I, section 6 protected Cohan's health information against disclosure outside the underlying litigation). However, OIP did not find any relevant Hawaii court opinions concerning the confidentiality of health information of deceased individuals.

statutory duty, and, therefore, the public has a legitimate interest in their disclosure. Accordingly, OIP finds that the public interest in disclosure of toxicology information about the presence and level of alcohol, drugs or other substances is considerable, and outweighs the reduced but still significant privacy interests of the deceased motorists as that information is maintained in toxicology reports. Thus, disclosure of the toxicology reports at issue would not constitute a clearly unwarranted invasion of the personal privacy of the deceased motorists.

OIP's conclusion here is supported by comments in the Report of the Governor's Committee on Public Records and Privacy (1987) (Governor's Committee Report), a four-volume report setting forth a review, testimony, and recommendations about Hawaii's records law in effect before the UIPA. Because the Governor's Committee Report played an important role in the Legislature's drafting of the UIPA, OIP has consulted the Governor's Committee Report when appropriate. See, e.g., OIP Op. Ltr. No. F13-01.

Specifically, the Governor's Committee Report includes a summary of a discussion about medical examiner records and states that "[t]his material is maintained by the counties and at this point is considered public record" though "at least one Committee member has experienced difficulty in obtaining these reports, at least in sensitive cases." Id. Vol. I Governor's Committee Report 131 (1987). Hence, it would appear that the Legislature was aware of the public nature of medical examiner records at the time it enacted the UIPA and could have expressly exempted them from public disclosure, but did not do so. Significantly, as the Legislature declared when it established the UIPA, "it is not the intent of the Legislature that this section [setting forth exceptions to access] be used to close currently available records, even though these records might fit within one of the categories in this section." 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).

Additionally, a review of Hawaii's short-lived medical privacy law is instructive. In 1999, a bill that comprehensively governed the privacy and disclosure of health care information was signed into law as Act 87 (codified at chapter 323C, HRS). However, it was "subsequently repealed in 2001 upon the legislature's finding of 'little support for a Hawaii Medical Privacy Law in light of the adoption of [HIPAA],' 'no evidence of widespread abuse [of medical records privacy] in Hawaii,' and a need for 'a clear understanding of what, if any, problems Hawaii faces in protecting medical privacy.' Brende v. Hara, 113 Haw. 424, 430 n.5, 153 P.3d 1109, 1115 (2007) (per curiam) (quoting 2001 Haw. Sess. L. Act 244). Chapter 323C, HRS, included a section on health information maintained by coroners and medical examiners:

> **§ 323C-31 Coroner or medical examiner.** When a coroner or medical examiner or one of their duly appointed deputies seeks

> protected health information for the purpose of inquiry into and determination of the cause, manner, and circumstances of a death, any person shall provide the requested protected health information to the coroner or medical examiner or to the duly appointed deputies without undue delay. If a coroner or medical examiner or their duly appointed deputies receives protected health information, this protected health information shall remain protected health information unless it is attached to or otherwise made a part of a coroner's or medical examiner's official report. Health information attached to or otherwise made a part of a coroner's or medical examiner's official report shall be exempt from this chapter.

HRS § 323C-31 (repealed in 2001) (emphasis added).

Thus, in 1999 the Hawaii Legislature appeared to have recognized that health information in a coroner's or medical examiner's official report is distinct from other types of records containing medical information about deceased persons. Under this law (now repealed), requests for official reports of the coroner or medical examiner would not have been subject to the requirements of chapter 323D, HRS. It is further noteworthy that the basis for the repeal was the belief that such a law was unnecessary in light of HIPAA, rather than any legislative finding that the specific provisions of the law were ill-conceived.

IV. Privacy Interest of Decedents' Family Members

Having concluded that the disclosure of the toxicology reports would not constitute a clearly unwarranted invasion of personal privacy of the deceased motorists, we next consider the privacy interests of the decedents' surviving family members. KPD's position is that disclosure of the toxicology reports would "constitute a clearly unwarranted invasion of personal privacy" of the "decedent's families," under section 92F-13(1), HRS, and that these privacy "interests outweigh the interest of the public in knowing specific information contained in the toxicology report." Specifically, KPD contends that the surviving family members have a privacy interest in information pertaining to the decedents that may reveal "alleged criminal activity" and that the decedents' bodies "allegedly contained unlawful amounts of particular substances," which "would tend to bring disrepute on the families and place them in a negative light."

In support of its position that surviving family members have a privacy interest in "information pertaining to the decedent," KPD cites Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 124 S. Ct. 1570, 158 L. Ed. 2d 319 (2004) (holding that Exemption 7(C) of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(7)(C), recognizes "family members' right to personal privacy with respect to their close relative's death-scene images"). Favish at 170. With respect to Favish, OIP has stated:

> not a blanket restriction on disclosure of any information about a deceased person: "Our holding . . . would allow the Government to deny these gruesome requests **in appropriate cases**." Favish, 541 U.S. at 170-71 (emphasis added). Because the record at issue does not include any photographs or other images of the victim, or any "graphic details" surrounding the victim's death, Favish is inapposite.

OIP Op. Ltr. No. 05-16 at 13.

In the present case, the toxicology reports provided for OIP's *in camera* review do not contain photographs or other images, or any "graphic details" surrounding the victim's death, so the finding in Favish of a heightened privacy interest in "graphic details" is inapplicable. As stated earlier, the request is for toxicology reports, that is, any record that reflects the level of alcohol or drugs in the body of a deceased motorist. OIP does not agree with KPD's assertion that such measurement information amounts to "grisly details"[15] concerning the motorists' deaths.[16]

In a previous opinion, OIP considered whether the surviving family members of a deceased government employee had a privacy interest in the decedent's government employment identification photograph. OIP Op. Ltr. No. 97-2 at 8. OIP cited several federal cases in which the courts had protected the privacy

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[15] The KPD Letter states: "KPD does not agree that the public's interest in knowing the grisly details of the deaths of two members of the community is sufficiently compelling as to justify disclosure of the unexpurgated reports."

[16] In addition to Favish, KPD refers to court decisions cited by Requester, which KPD asserts are in agreement that "information pertaining to the untimely and tragic deaths of various individuals should be protected from disclosure out of respect for the privacy interests of affected family members." However, these cases, like Favish, involved graphic photographs or audio recordings of the deceased; these cases did not hold that all information pertaining to decedents should be withheld to protect their surviving families' privacy interests. Katz v. Nat'l Archives & Records Admin., 862 F. Supp. 476, 483-86 (D.D.C. 1994) (allowing access to graphic autopsy photographs and x-rays of John F. Kennedy would constitute a clearly unwarranted invasion of the Kennedy family's privacy), aff'd on other grounds, 68 F.3d 1438 (D.C. Cir. 1995); N.Y. Times Co. v. Nat'l Aeronautics & Space Admin., 782 F. Supp. 628, 631-33 (D.D.C. 1991) (audiotape of voices of space shuttle Challenger astronauts may be withheld to protect their families from "[e]xposure to the voice of a beloved family member immediately prior to that family member's death"); Catsouras v. Dep't of Cal. Highway Patrol, 181 Cal. App. 4th 856, 874 (Cal. Ct. App. 2010) (release of gruesome death images constituted "pure morbidity and sensationalism without legitimate public interest").

interests of surviving family members,[17] and noted in particular that federal courts have "recognized the significant privacy interests of murder victims' families in photographs of the victims" after their deaths. Id. at 7-8 (citations omitted). The photographs or other graphic records in those cited cases were "directly connected with the decedents' death or manner of death." Id. (emphasis added). In contrast, the employee's identification photograph did not depict or directly relate to his death, so OIP concluded that the surviving family members did not have a privacy interest in the photograph. Id. at 8.

Thus, surviving family members may have a privacy interest in the death-scene images or graphic details surrounding their close relative's death that is "significant." And, surviving family members may possibly have a privacy interest in records that may reveal the decedents' alleged illegal conduct and the presence of certain substances; however, OIP has not heretofore found this privacy interest to be "significant." KPD has not provided any legal authority for finding the privacy interest to be significant in order to support its argument that disclosure of the toxicology reports would constitute a clearly unwarranted invasion of the surviving family members' privacy.

KPD further contends that the "cultural traditions and community standards"[18] of Kauai should be considered in determining whether the toxicology reports must be disclosed under the UIPA, and in the KPD Letter states:[19]

> Hawai'i's cultural and community standards are not the same as those on the mainland; Kaua'i's are different even from those of the rest of Hawaii. The Kaua'i community is very close-knit. The community has

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[17] Badhwar v. United States Dept. of the Air Force, (829 F.2d 182, 186 (D.C. Cir. 1987) (some autopsy reports "would not be of a kind that would shock the sensibilities of surviving kin. Others clearly would."); Marzen v. HHS, 825 F.2d 1148, 1154 (7th Cir. 1987) (deceased infant's medical records describing deteriorating medical condition and parents' anguished reactions exempt); N.Y. Times Co., 782 F.Supp. 628 (audiotape of astronauts' voices recorded immediately before their deaths may be withheld).

[18] The Supreme Court in Favish discussed "cultural traditions" and found that the concept of "personal privacy" under FOIA's Exemption 7(C) encompassed surviving family members' "rights against public intrusions long deemed impermissible under the common law and in our cultural traditions," and noted our "well-established cultural tradition" acknowledging a family's right to direct and control disposition of the body of the deceased and images of the decedent's remains." Favish at 167-168 (emphases added).

[19] In its letter to OIP, KPD stated that "[Requester] attaches . . . a series of news articles . . . in which the blood alcohol content of motorists is freely described in media accounts of crashes. It is telling that none of those accounts are from Hawai`i; much less Kaua`i." In response to KPD's statement that none of the media accounts were from Hawaii, Requester's legal counsel provided copies of news reports from Hawaii, in which blood-alcohol content or the presence of drugs was disclosed.

> less tolerance for sensationalistic media exploitation of tragic events because everyone in the community knows everyone else. While [Requester] believes that the release of specific toxicological reports may have a deterrent effect on impaired driving, it fails to take into account the fact that on Kaua'i, everyone knows everyone else. The deterrent effect cited by [Requester] is likely to be outweighed by a sense of accusation or even shame leveled on the family members of the decedent. People on Kaua'i respect each other's privacy.

Under the UIPA, to determine whether an individual has a privacy interest in a government record, one examines the type of information therein, rather than the particular characteristics of the individual who is the subject of the record. This is reflected in section 92F-14(b), HRS, which provides examples of "information in which the individual has a significant privacy interest." (Emphasis added.) The UIPA does not recognize a greater privacy interest for individuals who reside in small, close-knit communities. And, OIP acknowledged the need for uniform application of the UIPA in issuing its opinion finding that autopsy reports are generally public under the UIPA. OIP Op. Ltr. No. 91-32. Prior to the time Opinion Letter Number 91-32 was issued, apparently not all of the counties were disclosing the autopsy reports, so "in order to ensure uniformity" OIP needed "to determine whether all autopsy reports in the State of Hawaii will be public under the UIPA." Id. at 6 (emphases added).

In addition to protecting the public's right to access government records, the UIPA is also intended to implement the right to privacy under Hawaii's Constitution. OIP Op. Ltr. No. 05-03 at 5 (citing HRS § 92F-2; see also Conf. Comm. Rep. 112-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 817 (1988); State of Haw. Org. of Police Officers v. Soc'y of Prof'l Journalists, 927 P.2d 386, 404 (Haw. 1996) (SHOPO)). The legislature expressly declared it to be the policy of the State to conduct "government business as openly as possible . . . tempered by a recognition of the right of the people to privacy, as embodied in section 6 and section 7 of Article I of the Constitution of the State of Hawaii." HRS § 92F-2 (2012). The balance in the UIPA between "the individual privacy interest and the public access interest, allowing access unless it would constitute a clearly unwarranted invasion of personal privacy," is based on the constitutional right to privacy. Id.

In SHOPO, the Supreme Court of Hawaii held that the privacy right protected by the "informational privacy" prong of article I, section 6 is the right to keep confidential information that is "highly personal and intimate." SHOPO at 406 (citing Painting Indus. of Hawaii Market Recovery Fund v. Alm, 746 P.2d 79 (Haw. 1987)). Thus, the Court in SHOPO examined whether the information regarding a police officer's misconduct in the course of his or her duties as a police officer was "highly personal and intimate information." SHOPO at 405, 407-08. The Court also found that when determining whether disclosure of information implicates the constitutional right to privacy, it is appropriate to consider whether

disclosure would result in tort liability for invasion of privacy. Id. at 406. The "nature of information protected by this right to privacy" is that "which would be regarded as highly offensive to a reasonable person" and is not of legitimate public concern. Id. (citing Restatement (Second) of Torts § 652D, 383 (1977) (emphasis added). Consequently, in reaching its decision, the Court examined the type or nature of information and whether that information was "highly personal and intimate," rather than looking at whether any of the individuals who are the subjects of the information had any particular characteristics that might give them a greater or lesser privacy interest.

KPD did not provide legal authority to support its contention that Kauai's cultural and community standards should be considered in assessing the privacy interest in the toxicology reports. Therefore, in OIP's opinion, KPD did not meet its burden of proof to justify withholding the toxicology reports under the UIPA's "privacy" exception.

Accordingly, OIP finds that surviving family members of the deceased motorists do not have a significant privacy interest in information contained in the toxicology reports at issue, which were prepared in connection with deaths that the coroner had a statutory duty to investigate. Because we do not find a "significant" privacy interest, we do not reach the balancing test of section 92F-14(a), HRS. As OIP determines that there is more than a "scintilla" of public interest in the toxicology reports, OIP, therefore, concludes that their disclosure would not constitute a clearly unwarranted invasion of the personal privacy of the decedents' families.[20]

OIP emphasizes that this opinion is limited to those toxicology reports included in or attached to autopsy reports that are prepared in connection with motorists' deaths, which the coroner has a duty to investigate pursuant to section 841-3, HRS. In this opinion, OIP does not address toxicology reports arising from *private* requests for autopsies.

CONCLUSION

Because toxicology results are incorporated into or attached to autopsy reports, OIP's opinion letter concerning the public disclosure of autopsy reports is relevant. In 1991, OIP determined that autopsy reports would not generally be protected from public disclosure by the UIPA's "privacy" exception, section 92F-

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[20] As noted in this opinion previously, the toxicology reports at issue do not contain photographs or other images, or any "graphic details" surrounding the victim's death, of the type that were at issue in Favish, 541 U.S. 157. If, however, a requested toxicology report were to contain such "graphic details," then surviving family members might have a heightened privacy interest, and application of the balancing test could result in a different outcome from the one reached here.

13(1), HRS, because deceased individuals do not have a recognizable privacy interest. OIP Op. Ltr. No. 91-32. In 2003, OIP reconsidered whether an agency may withhold certain records concerning deceased individuals, and adopted a test for determining whether the privacy exception to disclosure applies for information about a deceased individual. The test 1) balances the passage of time against the sensitivity of the information involved to determine how strong the remaining privacy interest is, then 2) balances that privacy interest against the public interest in disclosure, as provided by section 92F-14, Hawaii Revised Statutes. OIP Op. Ltr. No. 03-19. OIP has applied this test in the present case and found that the public interest in disclosure of toxicology information about the presence and level of alcohol, drugs or other substances is considerable, and outweighs the reduced but still significant privacy interests of the deceased motorists as that information is maintained in the toxicology reports, which were prepared in connection with deaths that the coroner had a duty to investigate pursuant to section 841-3, HRS. Thus, disclosure of the toxicology reports at issue would not constitute a clearly unwarranted invasion of the personal privacy of the deceased motorists.

Additionally, OIP finds that surviving family members of the deceased motorists do not have a significant privacy interest in information contained in the toxicology reports at issue, which were prepared in connection with deaths that the coroner had a statutory duty to investigate. Because OIP does not find a "significant" privacy interest, we do not reach the balancing test of section 92F-14(a), HRS. As OIP finds that there is more than a "scintilla" of public interest in the toxicology reports, OIP thus concludes that their disclosure would not constitute a clearly unwarranted invasion of the personal privacy of the decedents' families.

RIGHT TO BRING SUIT

Requester is entitled to file a lawsuit for access within two years of a denial of access to government records. HRS §§ 92F-15, -42(1) (2012). An action for access to records is heard on an expedited basis and, if Requester is the prevailing party, Requester is entitled to recover reasonable attorney's fees and costs. HRS § 92F-15(d), (f) (2012).

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

This 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-3(c). The court shall uphold an OIP decision unless it concludes the decision was palpably erroneous. Id.

A party to this appeal may request reconsideration of this decision within ten business days in accordance with section 2-73-19, HAR.

This letter also serves as notice that OIP is not representing anyone in this decision. OIP's role herein is as a third party neutral.

OFFICE OF INFORMATION PRACTICES

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