

January 26, 1999

Mr. Thomas M. Driskill, Jr.  
Chief Executive Officer  
Hawaii Health Systems Corporation  
3675 Kilauea Avenue  
Honolulu, Hawaii 96816

Re: Request for Records on Disciplined Individuals

Dear Mr. Driskill:

This is in reply to your September 24, 1997, request to the Office of Information Practices ("OIP") for an opinion regarding the disclosure of information on several identified individuals who are or were previously employees at hospitals administered by the Hawaii Health Systems Corporation ("HHSC").

**ISSUE PRESENTED**

Where information relating to employee misconduct resulting in the discharge or suspension of the employees may have been removed from an employee's personnel file pursuant to a collective bargaining agreement, but remains elsewhere in the agency's files, whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), the HHSC must make that information available for public inspection and copying.

**BRIEF ANSWER**

Yes. Whether or not it was maintained in a personnel file, the information relating to employee misconduct was created for personnel purposes and should be evaluated in the same light as information contained in a personnel file. Applying

section 92F-14(b)(4)(B), Hawaii Revised Statutes, in a manner consistent with prior OIP opinion letters, the HHSC must disclose the following information related to employment misconduct that results in an employee's suspension or discharge:

- (1) The name of the employee;
- (2) The nature of the employment-related misconduct;
- (3) The agency's summary of the allegations of misconduct;
- (4) Findings of fact and conclusions of law; and
- (5) The disciplinary action taken by the agency.

See Haw. Rev. Stat. § 92F-14(b)(4)(B); OIP Op. Ltrs. No. 95-6 (March 16, 1995); 94-7 (April 28, 1994).

### FACTS

On August 1, 1997, Sandra Oshiro of *The Honolulu Advertiser* wrote to the HHSC and requested all records currently in the possession of the HHSC on several disciplined individuals identified by name and hospital assignment.

In a September 24, 1997, letter to the OIP, the HHSC requested guidance on compliance with the UIPA. In particular, the HHSC asked for confirmation of its understanding that material removed from an employee's personnel file but existing in another file within the agency is still subject to the UIPA, and of its understanding that it need not disclose information that it does not possess. In addition, the HHSC requested guidance as to what information could be disclosed in response to Ms. Oshiro's request, and whether summaries are sufficient.

With its letter, the HHSC provided the OIP with copies of:

- (1) *The Honolulu Advertiser's* August 1, 1997, letter requesting the disciplinary information;
- (2) Information summaries on each individual identified in the request;
- (3) Discipline letters to the individuals identified in the request;
- (4) 42 C.F.R. §§ 483.13, 483.15 (1993);
- (5) Respective hospital policies on Freedom From Abuse and Retaliation;

- (6) Hawaii Administrative Rules § 11-94-15; and
- (7) Section 17.03 (Removal of Derogatory Information from Personnel File), Unit 10 Collective Bargaining Agreement (7/1/93 – 6/30/95), United Public Workers.

In response to an inquiry by the OIP as to its position on disclosure of the requested information, in a November 14, 1997, letter, the HHSC raised no particular objection to disclosure but asserted that it intended to comply with the UIPA. However, in conversations with Sandy Nobunaga of the HHSC, the OIP learned that the HHSC had concerns as to the effect of disclosure upon its employees' privacy interest. In addition, the HHSC raised questions about compliance with the UIPA in light of a collective bargaining agreement with the United Public Workers ("UPW"), which allows an employee to request the removal of derogatory material from the employee's personnel jacket.<sup>1</sup>

In conversations with Ms. Nobunaga, the OIP also learned that while information regarding the disciplinary action taken against an employee may be removed from an employee's personnel jacket under the collective bargaining agreement provision, the information may be retained for other purposes in other files within the agency. In particular, information about patient abuse may be retained to demonstrate compliance with federal and state regulatory requirements. See e.g. 42 C.F.R. § 483.13(c) (1998); Haw. Admin. Rules § 11-94-15(b)(5).

The disciplinary information provided to the OIP with the HHSC's September 24, 1997, letter indicated that each of the identified individuals had been suspended or terminated for employee misconduct. In conversations with the

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<sup>1</sup> Section 17.03 (Removal of Derogatory Information from Personnel File), Unit 10 Collective Bargaining Agreement (7/1/93 – 6/30/95), United Public Workers (later extended through a supplemental agreement), provides:

An employee may request that any derogatory material not relevant to his employment be reviewed and destroyed after two (2) years. The employee's Department Head will determine whether the material is relevant and will decide whether the material will be retained or removed from his personnel jacket. Any decision to retain the material shall be in writing. The employee's employment history record shall not be altered. The decision of the Department Head shall be subject to the provisions of Section 15. GRIEVANCE PROCEDURE, and be processed at Step 3.

OIP, Ms. Nobunaga confirmed that the decisions provided to the OIP are the agency's final determinations as to discipline, and that a thirty-day time period since the conclusion of any grievance procedure, if taken, has passed as to each of the determinations.

In addition, Ms. Nobunaga and her advising deputy attorney general, Ruth Tsujimura, Esq., have informed the OIP of arbitration decisions relating to the issue of an agency's retention of information subject to a collective bargaining agreement provision requiring the removal and destruction of derogatory information.

## DISCUSSION

### **I. GOVERNMENT RECORD**

A government record under the UIPA is defined as "information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. § 92F-3 (1993). Pursuant to the UPW collective bargaining agreement, the HHSC has removed some of the requested information from the personnel files of the individuals named in Ms. Oshiro's request. However, for regulatory and other purposes, the HHSC has maintained that information in files elsewhere. While not kept in the individuals' personnel files, as the requested information is maintained elsewhere by the HHSC, the information constitutes "information maintained by an agency in written . . . form," and is subject to the UIPA.<sup>2</sup> Haw. Rev. Stat. § 92F-3 (1993)(definition of government record); cf. OIP Op. Ltr. No. 91-25 at 5-6 (Dec. 11, 1991)(public record must be made available to inmates for inspection and copying notwithstanding the fact that it is kept in public library area not specifically designated as allowing copying).

The OIP has been given copies of several arbitrators' decisions regarding the State's obligation to remove derogatory information from employees' personnel files in accordance with provisions in collective bargaining agreements. In the latest decision by Patrick K.S.L. Yim, Esq., the State was ordered to apply the provisions

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<sup>2</sup> While an agency cannot be made to disclose information that it does not possess, see e.g., OIP Op. Ltr. No. 97-8 (Sept. 9, 1997), if the information is maintained somewhere within the agency, it is subject to the UIPA.

on the removal and destruction of derogatory personnel information to information contained in both an individual's personnel file and the grievance file maintained by the Department of Human Resources Development ("DHRD"). See In the Matter of the Arbitration Between United Public Workers, AFSCME Local 646, AFL-CIO and State of Hawaii, Department of Human Resources Development, (June 24, 1998) Yim, Arb.

While Mr. Yim's arbitration decision may address the State's obligations under its collective bargaining agreements,<sup>3</sup> it does not affect the HHSC's obligations under the UIPA. The UIPA does not address an agency's duty to maintain (or not to maintain) a record. However, should an agency maintain a record, under the definition for "government record" set forth in section 92F-3, Hawaii Revised Statutes, that record constitutes information subject to the UIPA. Haw. Rev. Stat. § 92F-3 (1993).

## II. EXCEPTIONS TO DISCLOSURE--PRIVACY

Under the UIPA, all government records are open to the public unless an exception under section 92F-13, Hawaii Revised Statutes, applies. See Haw. Rev. Stat. § 92F-11 (1993). In addressing Ms. Oshiro's request for information, the HHSC raised the exception to disclosure at section 92F-13(1), Hawaii Revised Statutes, for government records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy, and the application of section 92F-14(b)(4)(B), Hawaii Revised Statutes.

### A. Generally

Information is exempt from disclosure under section 92F-13(1), Hawaii Revised Statutes, when disclosure would constitute a clearly unwarranted invasion of personal privacy. A determination of whether disclosure would constitute a clearly unwarranted invasion of personal privacy requires a balancing of the public interest in disclosure against the privacy interest of the individual mentioned in the

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<sup>3</sup> The OIP does not address whether the arbitration decision actually does affect the HHSC's obligations under its collective bargaining agreement or whether there is a distinction between the maintenance of disciplinary information for the purposes of keeping a grievance file and the maintenance of disciplinary information for the purpose of demonstrating compliance with federal regulations. Here, the OIP merely notes that notwithstanding any agency obligations under the collective bargaining agreement, it is not relevant to an analysis of the application of the UIPA.

record. Haw. Rev. Stat. § 92F-14(a) (Supp. 1998). A government record is not exempt from disclosure if the public interest in disclosure outweighs the privacy interest of the individual. Haw. Rev. Stat. § 92F-14(a) (Supp. 1998).

### **B. Application of Section 92F-14(b)(4), Hawaii Revised Statutes**

The provisions of section 92F-14(b)(4), Hawaii Revised Statutes, apply to the disciplinary information retrieved by the HHSC from both the employees' personnel files and other agency files. Because some of the disciplinary information was removed from the employees' personnel jackets pursuant to the UPW collective bargaining agreement, the disciplinary information retrieved by the HHSC may not be from the employee's personnel file. However, the records retrieved are copies of the disciplinary decisions that were made for personnel purposes and should be evaluated in the same light as the information contained in a personnel file. See OIP Op. Ltrs. No. 98-5 at 19-20 (Nov. 24, 1998); 95-7 at 9 (March 28, 1995) (employee has significant privacy interest in personnel related information within report which is not contained in the employee's personnel file); see also Dep't of State v. Washington Post, 456 U.S. 595, 102 S.Ct. 1957 (1982) (protection of an individual's privacy should not turn upon the label of the file in which information is kept); Dep't of Air Force v. Rose, 425 U.S. 352, 96 S.Ct. 1592 (1976); Newark v. Saginaw Sheriff, 514 N.W. 2d 213 (Mich. App. 1994).

Section 92F-14(b)(4), Hawaii Revised Statutes, provides that an individual has a significant privacy interest in:

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

- (A) Information disclosed under section 92F-12(a)(14); and
- (B) The following information related to employment misconduct that results in an employee's suspension or discharge:
  - (i) The name of the employee;
  - (ii) The nature of the employment related misconduct;
  - (iii) The agency's summary of the allegations of misconduct;
  - (iv) Findings of fact and conclusions of law; and
  - (v) The disciplinary action taken by the agency;

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

Haw. Rev. Stat. § 92F-14(b)(4) (1998 Supp.).

The OIP previously has held that when the terms of section 92F-14(b)(4)(B), Hawaii Revised Statutes, are met, the agency must disclose: (1) the name of the employee; (2) the nature of the employment-related misconduct; (3) the agency's summary of the allegations of misconduct; (4) the findings of fact and conclusions of law; and (5) the disciplinary action taken by the agency. See OIP Op. Ltrs. No. 95-6 (March 16, 1995); 94-7 (April 28, 1994).

In the present case, each of the named individuals was suspended or terminated for employment misconduct. The HHSC made a final determination as to discipline, and where a grievance procedure was invoked, a thirty-day time period has passed since the conclusion of the grievance procedure.

Therefore, the HHSC must disclose the information set forth in section 92F-14(b)(4)(B), Hawaii Revised Statutes. This includes the name of the employee, the nature of the employment-related misconduct, a summary of the allegations of misconduct, and the disciplinary action taken by the agency. Where findings of fact and conclusions of law exist, they also must be disclosed, as set forth in section 92F-14(b)(4)(B)(iv), Hawaii Revised Statutes.<sup>4</sup> See OIP Op. Ltr. No. 94-3 (Mar. 23, 1994)(where existing record is requested, disclosure of a summary of information is insufficient).

### CONCLUSION

Consistent with the provisions of section 92F-14(b)(4)(B), with regard to each named individual, the HHSC must disclose the following information related to employment misconduct that resulted in the named employees' suspension or discharge:

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<sup>4</sup> The HHSC has not raised, and therefore, the OIP has not considered whether any exceptions to disclosure may apply to any information which might be contained within any findings of fact or conclusions of law.

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- (1) The name of the employee;
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- (3) The agency's summary of the allegations of misconduct;
- (4) Findings of fact and conclusions of law; and
- (5) The disciplinary action taken by the agency.

Yours truly,

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APPROVED:

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LMO:cfy