

Op. Ltr. 03-02 Disclosure of Records of the Crime Victim Compensation Commission

OIP Op. Ltr. No. 05-03 partially overrules this opinion to the extent that it states or implies that the UIPA's privacy exception in section 92F-13(1), HRS, either prohibits public disclosure or mandates confidentiality.

February 7, 2003

Ms. Pamela Ferguson-Brey
Executive Director
Crime Victim Compensation Commission
333 Queen Street, Room 404
Honolulu, Hawaii 96813

Re: Disclosure of Records of the Crime Victim Compensation Commission

Dear Ms. Ferguson-Brey:

This is in response to your request for an opinion concerning access to records, or parts of records, of the Department of Public Safety, Crime Victim Compensation Commission ("Commission").

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), the Commission must make information contained in its files concerning applicants for assistance from the Commission available to the public for inspection and copying.

BRIEF ANSWER

The UIPA contains various exemptions, exceptions, and limitations on access that authorize agencies to withhold access to certain of the information contained in the Commission's records. To the extent that disclosure of information contained in the Commission's files would be a clearly unwarranted invasion of personal privacy, such information may be withheld from disclosure under the UIPA.

Agencies are not required to disclose information which, if disclosed, would cause the frustration of a legitimate government function. Haw. Rev. Stat. § 92F-13(3) (1993). Where disclosure of information contained in the Commission's files would frustrate the Commission's ability to perform its function of assisting victims of violent crimes, the Commission is not required to disclose such information.

Where a personal record contains information furnished by a crime victim to the Commission under an express or implied promise of confidentiality, and where disclosure of such information would reveal the identity of such victim, the Commission may withhold access to that record.

Where a personal record (such as a police report) concerns an open investigation and is obtained from an originating agency (such as a police department), the Commission is not required to grant access to the extent that the record would not be required to be disclosed by the originating agency. Haw. Rev. Stat. § 92F-19(b) (1993).

FACTS

The Commission's mission is to compensate crime victims and public citizens for personal injury or property damage suffered in prevention of a crime or apprehension of an individual. Haw. Rev. Stat. § 351-1 (1993). The Commission's funding sources include court ordered restitution, fees from offenders, inmate wages, and federal funds. Haw. Rev. Stat. § 351-62.5 (Supp. 2002). You have advised the OIP, in a telephone conversation of July 9, 2002, that the Commission recently received a request to access a file maintained by the Commission from an inmate concerning a compensation claim paid by the Commission to a victim pursuant to chapter 351, Hawaii Revised Statutes.

In a telephone conversation with the OIP of January 14, 2003, you described the sort of information contained in the Commission's files that is of concern. That information includes data contained in police reports. You indicated that there is no requirement in chapter 351, Hawaii Revised Statutes, that an alleged perpetrator be convicted for a crime victim to be compensated, and that your office is often required to obtain police reports and other information to make a determination on behalf of an applicant by means of a subpoena. Other documents reviewed by the Commission in making a determination as to compensability include medical records, mental health records, statements of insurance companies as to victims' insurance coverage, medical bills, employer's statements concerning a victim's salary or wages, statements showing payments, temporary disability payments

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pursuant to chapter 392, Hawaii Revised Statutes, documents concerning victims' dependents and documents evidencing expenditures on behalf of victims, such as funeral expenses. These records are obtained from various government agencies, individuals, and private entities.

In the January 14, 2003 telephone conversation with the OIP, you also advised that fear of possible disclosure by the Commission of victim information to an alleged perpetrator could prevent some victims from coming forward. You advised that in many cases, applicants for compensation from the Commission are victims of alleged perpetrators that have not been incarcerated, and that some applicants are participants in a witness protection program.¹

The Commission's application form contains information concerning the name of a victim, a victim's mailing address, date of birth, social security number, sex, marital status, disability status, ethnicity, information concerning the type, date, and location of the crime, the name of the suspect, names of health care providers, employment information, all potential sources of full or partial payment of expenses such as insurance and disability payments, and whether the applicant intends to file a civil lawsuit against the alleged perpetrator ("Applicant Information").²

DISCUSSION

The UIPA governs access to all Hawaii State and county records. A "government record" means "information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. § 92F-3 (1993). The fact that the Commission's records are government records is not being disputed.

The UIPA is based on a presumption of access to government records by the public. Haw. Rev. Stat. § 92F-11 (1993). Access to government records opens up agency processes to public scrutiny and participation, thus ensuring protection of the public's interest. Haw. Rev. Stat. § 92F-2 (1993). There are five general exceptions to access set out at section 92F-13, Hawaii Revised Statutes, which allow flexibility in the application of the open records

¹ Section 28-101, Hawaii Revised Statutes, establishes a witness security and protection program through which the attorney general funds or provides for the security and protection of a government witness. Participation requires determination by the attorney general that the witness is likely to be subjected to intimidation, tampering or retaliation. Haw. Rev. Stat. § 28-101 (1993).

² http://www.ehawaiigov.org/psd/cvcc/pdfs/First_InsertPages3and4.pdf, accessed January 21, 2002.

law to specific circumstances. For purposes of this opinion, the OIP discusses two of those exceptions. The first states that agencies need not disclose "[g]overnment records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy." Haw. Rev. Stat. § 92F-13(1) (1993). The second states that agencies need not disclose "[g]overnment records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function." Haw. Rev. Stat. § 92F-13(3) (1993).

The UIPA also provides for an individual to access personal records maintained by government agencies pertaining to the individual seeking access. Haw. Rev. Stat. § 92F-21 (1993). Access to personal records makes government accountable to individuals concerning information relating to them. Haw. Rev. Stat. § 92F-2(4) (1993). There are five general exemptions to individual access set out at section 92F-22, Hawaii Revised Statutes, two of which the OIP discusses in this opinion, the limitation on "disclosure of which would reveal the identity of a source who furnished information to the agency under an express or implied promise of confidentiality," and "investigative reports and materials, related to an upcoming, ongoing, or pending civil or criminal action or administrative proceeding against the individual." Haw. Rev. Stat. § 92F-22(2), (4) (1993).

I. CLEARLY UNWARRANTED INVASION OF PERSONAL PRIVACY

The UIPA's first exception to access, section 92F-13(1), Hawaii Revised Statutes, permits non-disclosure of information contained in government records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy.

The application of an individual's privacy interest is, under the UIPA, to be balanced by the agency against the public's interest in disclosure. Haw. Rev. Stat. § 92-14(a) (Supp. 2002). The public's interest is in information which sheds light upon the workings of government. OIP Op Ltr. No. 97-19 at 5 (Dec. 30, 1997), citing OIP Op. Ltrs. No. 99-3 at 8 (June 1, 1999); No. 95-24 at 11-13 (Oct. 6, 1995); No. 95-14 at 11 (May 8, 1995); No. 95-10 at 7-8 (May 4, 1995); No. 91-1 at 8 (Feb. 15, 1991); No. 90-10 at 5 (Feb. 26, 1990).

The weight to be given to the public interest in disclosure is set forth in the UIPA's legislative history:

If the privacy interest is not "significant," a scintilla of public interest in disclosure will preclude a finding of a clearly unwarranted invasion of personal privacy.

S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., S.J. 689, 690 (1988); H. Conf. Comm. Rep. No. 112-88, 1988 Reg. Sess., Haw. H.J. 817, 818 (1988).

The UIPA lists several examples of information, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. The following are relevant to records maintained by the Commission:

§ 92F-14 Significant privacy interest; examples. . .

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

- (1) Information relating to medical, psychiatric, or psychological history, diagnosis, condition, treatment, or evaluation, other than directory information while an individual is present at such facility;
- (2) Information identifiable as part of an investigation into a possible violation of criminal law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;
- . . .
- (6) Information describing an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or credit worthiness.

Haw. Rev. Stat. §§ 92F-14(b)(1), (2), (6) (Supp. 2002).

An individual could be determined to have a significant privacy interest in information not listed in section 92F-14(b), Hawaii Revised Statutes.³

³ The OIP notes that section 92F-14(b), Hawaii Revised Statutes, is an nonexhaustive list of "examples of information in which the individual has a significant privacy interest." Haw. Rev. Stat. § 92F-14(b) (Supp. 2002).

Here, the public's interest would be in ensuring that the Commission is carrying out its purpose, which is to aid victims of criminal acts. Haw. Rev. Stat. § 351-1 (1993). When the balancing test is applied, unless disclosure of the Application Information to which privacy rights attach sheds light on how the Commission is fulfilling its statutory obligations, the public interest would not outweigh the privacy interest in the information.

The Application Information, with the exception of the name of the applicant, crime information, name of suspect and whether the victim intends to file a civil lawsuit is information set out in section 92F-14(b), Hawaii Revised Statutes, or is information that has been determined by the OIP, in its previous opinions, to be information in which an individual has a significant privacy interest.⁴ Based on the facts presented, the OIP finds that, in balancing the public interest in disclosure against the significant privacy interests herein, the privacy interests are greater. Thus, disclosure would be a clearly unwarranted invasion of personal privacy.

The information concerning name of applicant, crime information, name of suspect and whether the victim intends to file a civil lawsuit will be addressed elsewhere in this opinion.

On the other hand, disclosure would not be a clearly unwarranted invasion of personal privacy if such information was part of a public record.⁵ If such information were already public record, then disclosure by the Commission would not constitute a clearly unwarranted invasion of personal privacy.

The OIP has previously opined that information not required to be disclosed by section 92F-13(1), Hawaii Revised Statutes, should be segregated from information in otherwise disclosable government records. In the OIP Opinion Letter Number 90-25, the Honolulu Police Department was advised to segregate information concerning a firearms registrant's citizenship, date

⁴ See, OIP Op. Ltrs. No. 02-04 (June 26, 2002) (home address); No. 93-20 (Oct. 21, 1993) (mailing address that cannot be differentiated from a home address should be withheld); No. 99-3 (June 1, 1999) (date of birth); No. 99-2 (social security number); No. 91-15 (Sept. 10, 1991) (marital status). Medical information, criminal law investigation information, employment information and financial information all carry significant privacy interests. Haw. Rev. Stat. § 92F-14(b)(1), (2), (5), (6) (Supp. 2002).

⁵ For example, information as contained in court records and not subject to an order requiring that such records be sealed.

of birth, sex, height, weight, age and social security number.⁶ In the OIP Opinion Letter Number 02-04, the Department of Budget and Fiscal Services was advised not to disclose information concerning citizenship in individually identifiable form, as public interest in the disclosure of such information does not outweigh the individual's significant privacy interest in the information. There, the OIP noted the significant public interest in the level of foreign investment in Hawaii, particularly foreign investment in Hawaii real property. The OIP concluded that this interest was adequately served by the disclosure of information compiled by the City and reported to the City Council of the City and County of Honolulu pursuant to section 8-14.3, Revised Ordinances of Honolulu. The Commission is likewise required to disclose a report of its activities to a legislative body by means of the annual report required by section 351-70, Hawaii Revised Statutes.⁷ As in the OIP Opinion Letter 02-04, the data serves to meet the public interest.

The OIP therefore opines that under the UIPA, the Commission is not required to disclose, in individually identifiable form, home addresses, mailing addresses that cannot be differentiated from home addresses, dates of birth, social security numbers, marital status, medical information, criminal law investigation information, employment information and financial information about a particular crime victim. Where such information is part of a public record, disclosure would not constitute a clearly unwarranted invasion of personal privacy.

⁶ Section 134(b), Hawaii Revised Statutes, was subsequently amended to make such information confidential. Nevertheless, the above analysis concerning privacy interests in citizenship remains valid.

⁷ Section 351-70, Hawaii Revised Statutes, requires that the Commission prepare an annual report:

The commission shall transmit annually to the governor and to the director of public safety, at least thirty days prior to the convening of the legislature a report of its activities under this chapter including a brief description of the facts in each case, and the amount, if any, of compensation awarded, and the names of attorneys and health care providers where they are the applicants. The director of public safety shall, within five days after the opening of the legislative session, transmit the report, together with a tabulation of the total amount of compensation awarded during the prior fiscal year and an estimate of the amount that is reasonably estimated to be required for the next fiscal year, and a legislative bill to appropriate funds for the crime victim compensation special fund for the next fiscal year. The commission shall provide upon request of the governor, the director of public safety, or the legislature, the relevant data, including the names of all applicants for compensation, under this chapter.

II. FRUSTRATION OF A LEGITIMATE GOVERNMENT FUNCTION

The OIP next addresses whether the UIPA's exception for government records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function, under section 92F-13(3), Hawaii Revised Statutes, applies to authorize the Commission to withhold access to certain of its records. The purpose of chapter 351, Hawaii Revised Statutes, is to:

aid victims of criminal acts, by providing compensation for victims of certain crimes or dependents of deceased victims, and for indemnification of private citizens for personal injury or property damage suffered in prevention of crime or apprehension of a criminal.

Haw. Rev. Stat. § 351-1 (1993).

You have advised the OIP that fear of possible disclosure by the Commission of victim information to an alleged perpetrator could prevent some victims from coming forward, or from cooperating with the Commission, thus causing frustration of the Commission's primary function of assisting crime victims. You have also advised the OIP that some of the Commission's files include information about individuals involved in witness protection programs and that such individuals' identities need to be protected. This is especially true given that section 351-31, Hawaii Revised Statutes, limits compensation awards to victims, persons responsible for maintenance of a victim that suffer monetary loss because of the victim's death or injury, relatives of deceased victims who incurred medical or funeral expenses as the result of the victim's death or injury, or dependents of victims of certain violent crimes.⁸ Haw. Rev. Stat. § 351-31 (Supp. 2002).

Thus, the OIP opines that where access to the Commission's records would prevent crime victims from coming forward, and thus cause frustration of the Commission's function of assisting crime victims, the Commission is authorized to withhold access to requested records under section 92F-13(3), Hawaii Revised Statutes.

⁸ The crimes to which chapter 351, Hawaii Revised Statutes, applies are: murder, manslaughter, negligent homicide, negligent injury, assault, kidnapping, sexual assault, abuse of family and household member, and international terrorism. Haw. Rev. Stat. § 351-32 (Supp. 2002).

III. ACCESS TO PERSONAL RECORDS

The UIPA governs disclosure of personal records to the individuals to whom they pertain in part III. The purpose of part III of the UIPA is to "provide for accurate, relevant, timely, and complete government records," and to "[m]ake government accountable to individuals in the collection, use, and dissemination of information relating to them." Haw. Rev. Stat. § 92F-2 (1993).

The OIP notes the possibility that an individual who is alleged to have committed a crime may seek to access a victim statement contained in the Commission's records, alleging that the records are about the alleged perpetrator. Without opining as to whether a particular record maintained by the Commission can be categorized as a personal record, the OIP notes that section 92F-22, Hawaii Revised Statutes, sets out exemptions and limitations on individual access. Two of those exemptions are discussed herein:

§ 92F-22. Exemptions and limitations on individual access. An agency is not required by this part to grant an individual access to personal records, or information in such records:

...

(2) The disclosure of which would reveal the identity of a source who furnished information to the agency under an express or implied promise of confidentiality.

...

(4) Including investigative reports and materials, related to an upcoming, ongoing, or pending civil or criminal action or administrative proceeding against the individual.

Haw. Rev. Stat. § 92F-22(2), (4) (1993).

A. Express or Implied Promise of Confidentiality

Withholding of access to personal records under section 92F-22(2), Hawaii Revised Statutes, is generally limited to the identity of confidential sources, and not the entire record. OIP Op. Ltr. No. 94-27 at 16 (Dec. 30, 1994).⁹ In the OIP Opinion Letter 95-23, the entire record was permitted to be withheld from the subject of the complaint, who discovered the identity of a complainant who had been promised confidentiality. Disclosure of the report itself would have revealed the information provided by the complainant. OIP Op. Ltr. No. 95-23 at 14 (Sept. 12, 1995). In the OIP Opinion Letter Number 95-23, the OIP noted that the agency that made the promise of confidentiality had a confidentiality policy in place. In the case of the Commission's records, the OIP notes that the Commission has adopted an administrative rule concerning the confidentiality of its files, as authorized by section 351-68, Hawaii Revised Statutes:

§23-605-1 Confidentiality. Disclosure of information relating to the psychiatric, medical, personal history, and law enforcement or criminal investigation reports shall not be permitted unless required by court order or otherwise required by state or federal statute.

Haw. Admin. R. § 23-605-1 (2002).

In the case of victim statements, the above-referenced administrative rule requires that confidentiality of the statements be maintained, to the extent permissible by law, or unless a court requires disclosure. Due to the nature of the information furnished by a victim to obtain assistance from the Commission, the identity of the confidential informant will necessarily be known to an alleged or adjudicated perpetrator, who is a personal record requester. If the OIP were to conclude that the victim statement must be disclosed to the requester because the requester has knowledge of the identity of the source, it would defeat the policy underlying section 92F-22(2), Hawaii Revised Statutes, of protecting confidential sources.

⁹ In previous OIP opinion letters, the OIP has referred to decisions construing the Privacy Act of 1974, 5 U.S.C. section 552a, specifically its parallel provision that allows an agency to withhold access to certain personnel records "only to the extent that the disclosure of such material would reveal the identity of a source." 5 U.S.C. § 552a(k)(5) (2002). For example, in May v. Department of Air Force, 800 F.2d 1402 (5th Cir. 1986), the Court noted: "[t]he exemptions from an individual's right of access under the Privacy Act must be narrowly construed" and recommended that "nonexempt information be segregated from exempt information to ensure maximum disclosure." Id. at 1403 (citations omitted). See OIP Op. Ltrs. No. 92-24 at 8 (Dec. 2, 1992), No. 95-4 at 7 (Mar. 3, 1995).

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The OIP therefore opines that the exemption set forth at 92F-22(2), Hawaii Revised Statutes, would authorize the Commission to withhold access to records such as victim statements, unless the information is part of a public record.

B. Reports of Pending Investigations

The Commission is authorized by the UIPA to withhold reports made to law enforcement officials, such as police reports, prior to the time that a proceeding against the individual who is alleged to have committed a crime is concluded, by the exemption set forth at section 92F-22(4), Hawaii Revised Statutes. In the OIP Opinion Letter Number 94-27, the OIP noted that the purpose behind this provision is to prevent the target of a proceeding from gaining premature access to the government's evidence. OIP Op. Ltr. No. 94-27 at 15 (Dec. 30, 1994). You advised the OIP, in a telephone conversation of January 14, 2003, that your office obtains access to police reports by means of a subpoena. The OIP notes that section 92F-19, Hawaii Revised Statutes, restricts access to certain records between government agencies, but authorizes disclosure to another agency if the disclosure is pursuant to an order of a court of competent jurisdiction. Haw. Rev. Stat. 92F-19(a)(7) (1993). Disclosure by the receiving agency of records received pursuant to a court order is also addressed by the UIPA:

An agency receiving government records pursuant to subsection (a) shall be subject to the same restrictions on disclosure of the records as the originating agency.

Haw. Rev. Stat. § 92F-19(b) (1993).

Thus, the UIPA would require the withholding of access to reports of open investigations, such as police reports, by the Commission, to the extent those records would not be disclosed by the originating agency.

CONCLUSION

Records maintained by the Commission are government records, and thus subject to the UIPA. Under the UIPA, all government records are presumed public unless an exception to disclosure at section 92F-13, Hawaii Revised Statutes, applies. The Commission may withhold information from the public if it fits into one of the exceptions at 92F-13, Hawaii Revised Statutes. While the OIP has not reviewed the Commission's files, information concerning individual's privacy is protected from disclosure under section 92F-13(1), Hawaii Revised Statutes. Records may also be

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protected where the Commission believes that access to its records would prevent crime victims from coming forward, and thus cause frustration of the government's function of assisting crime victims, under section 92F-13(3), Hawaii Revised Statutes. Where an individual alleged to be a perpetrator of a crime seeks access to records about that individual, victim statements and investigative reports received pursuant to section 92F-19, Hawaii Revised Statutes, may be withheld pursuant to the authority contained in section 92F-22, Hawaii Revised Statutes.

Sincerely,

Susan R. Kern
Staff Attorney

APPROVED:

Leslie H. Kondo
Director

SRK: ankd

cc: Mr. Les S. Ihara, Chair
Crime Victim Compensation Commission

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