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The Office of Information Practices (OIP) is authorized to issue this advisory opinion under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes (HRS) (UIPA) pursuant to section 92F-42, HRS.

OPINION

Requester: Charles W. Totto, Esq.
Agency: Ethics Commission, City and County of Honolulu
Date: October 5, 2010
Subject: Ethics Commission Opinions (U RFO-G 08-8)

REQUEST FOR OPINION

Requester seeks an advisory opinion on whether the Ethics Commission, City and County of Honolulu, should, under the UIPA, disclose two Advisory Opinions issued by the Commission (Advisory Opinions) in a manner that discloses the identity of the respective employees whose misconduct is discussed.[1]

Unless otherwise indicated, this advisory opinion is based solely upon the facts presented in Requester's letter dated April 14, 2008, and the two Advisory Opinions provided for *in camera* review.

[1] The Commission also asked whether the UIPA would either require or permit it to publish the opinions on its website. The UIPA does not address the publication of records. Thus, the UIPA does not require, prohibit, or place conditions upon the publication of government records on an agency website. Accordingly, this opinion does not contain any further discussion on publication.

QUESTIONS PRESENTED

1. Whether the Commission should disclose in full an Advisory Opinion (Opinion A) that found an ethics violation for a mid-level supervisor (Employee A) for which the Commission recommended discharge where (1) the Commission's recommendation of suspension or discharge is not followed by the appointing authority; or (2) the employee has been suspended or discharged, but the administrative grievance period provided in HRS § 92F-14(b)(4) has not run (Grievance Period).

2. Whether an Advisory Opinion (Opinion B), involving a lower level employee (Employee B) whose identity may be protected under the UIPA's privacy exception, should be withheld in its entirety from public disclosure because the subject matter of the opinion would allow Employee B to be identified.

BRIEF ANSWERS

1. No. Opinion A does not present particular circumstances or facts that would bolster the public's interest in disclosure and outweigh Employee A's significant privacy interest in the misconduct information. Accordingly, the Commission should under the UIPA's privacy exception redact information that may reasonably identify Employee A before disclosing Opinion A.

2. Yes. Opinion B does not present extraordinary facts that heighten the public's interest in disclosure and therefore Employee B's identity should be withheld under the UIPA's privacy exception. Because it is not possible to redact Opinion B to prevent disclosure of Employee B's identity, the Commission should withhold Opinion B from public disclosure in its entirety to prevent disclosure of Employee B's identity.

FACTS

The Commission's Advisory Opinions are published with redaction to prevent disclosure of the identity of the subject employees in accordance with provisions of the Revised Charter of Honolulu and the Revised Ordinances of Honolulu. The Commission had previously asked OIP for an opinion on whether the UIPA permits the Commission to disclose the identity of the subject employees or officers in its advisory opinions where the Commission finds that a violation is (1) committed by a City "officer" as defined by city charter; or (2) results in a Commission recommendation that the employee be suspended or discharged.

OIP noted that its general analysis set out in OIP Opinion Letter Number 96-2[2] could be applied to that question: specifically, that absent suspension or discharge, the identity of the subject employee in the Commission's Advisory Opinion would be protected from disclosure by the UIPA's "clearly unwarranted invasion of personal privacy" exception, **unless the particular circumstances or set of facts bolster the public interest in the disclosure**. Clearly, this balancing is fact dependent and thus must be done on a case-by-case basis. Because the Commission had not presented any specific facts, OIP declined to render a further opinion. The Commission thereafter submitted the instant request for an OIP advisory opinion based upon the facts raised by Opinion A and Opinion B.

In Opinion A, the Commission found that Employee A, a mid-level supervisor, violated ethics laws when he used work time and a city-assigned vehicle to facilitate his large-scale scavenging of recyclables from trash for personal gain. The Commission recommended discharge of Employee A. The Commission seeks an advisory opinion on whether it should, in response to a UIPA request, disclose a copy of Opinion A in full, i.e., without removing individually identifiable information. The Commission seeks an opinion under two scenarios: (1) where

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[2] In its Opinion Letter Number 96-02, OIP also concluded that the Honolulu City Council could not implement a charter or ordinance provision requiring publication of the names of persons referred to in the Commission's opinions. This conclusion was predicated on a finding that where information falls within the UIPA's privacy exception, that information is made confidential by the UIPA. Id. at 2. However, OIP subsequently noted in Opinion Letter 05-03 that its prior opinions had been inconsistent on the issue of whether an agency **may**, or **must**, withhold information falling under the privacy exception, and resolved that inconsistency by concluding that the privacy exception permits but does not require withholding. OIP Op. Ltr. No. 05-03 at 6. OIP further stated that "to the extent that our earlier opinions state or imply that records falling within the privacy exception must be withheld, those opinions are hereby overruled." Id. Opinion Letter 05-03 therefore overruled Opinion Letter 96-02's conclusion that the names of persons referred to in the Commission's opinions **must** be withheld such that a charter or ordinance provision could not require publication of information falling within the UIPA's privacy exception. Specifically, OIP stated in Opinion Letter 05-03:

> Given that the statute is intended to "promote" public access to government records, we do not believe that requiring disclosure of records that could otherwise be withheld is contrary to the UIPA or its intent. [citation omitted] We note, however, that our conclusion is limited. As discussed above, in addition to its primary goal of protecting access, the UIPA is intended to recognize the right to privacy contained in Hawaii's Constitution. Charter provisions or county ordinances that require greater disclosure than is required by the UIPA may run afoul of the UIPA or the Constitution by requiring disclosure of records (or information contained therein) that fall within the constitutional right to privacy.

Employee A has not been discharged as recommended by the Commission; and (2) where Employee A is discharged, but the Grievance Period has not yet run.

In Opinion B, the Commission found that Employee B, a lower-level employee, acted in a manner that violated ethics laws, but that his conduct did not warrant suspension or discharge. With respect to this opinion, the Commission asks only whether Opinion B should be withheld from public disclosure in its entirety because the underlying facts are sufficiently unique that the opinion cannot be reasonably segregated to protect the identity of Employee B.[3]

DISCUSSION

Under the UIPA's privacy exception, section 92F-13(1), HRS, an agency may withhold information in which an individual has a significant privacy interest when disclosure would be a clearly unwarranted invasion of personal privacy, unless that privacy interest is outweighed by the public interest in disclosure. Haw. Rev. Stat. § 92F-14(a). In section 92F-14, HRS, the Legislature provided examples of records in which individuals have a significant privacy interest.

Subsection -14(b)(4) provides that a government employee has a significant privacy interest in information related to employment misconduct, except where that misconduct results in the employee's suspension or discharge and until thirty days has run after any administrative grievance process timely invoked by the employee has been completed. Haw. Rev. Stat. § 92F-14(b)(4). Specifically, section 92F-14(b)(4) reads as follows:

> **§92F-14 Significant privacy interest; examples.** (a) Disclosure of a government record shall not constitute a clearly unwarranted invasion of personal privacy if the public interest in disclosure outweighs the privacy interest of the individual.
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> (b) The following are examples of information in which the individual has a significant privacy interest:
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> * * *
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> (4) Information in an agency's personnel file, or applications, nominations, recommendations, or proposals for public employment or appointment to a governmental position, except:
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> (A) Information disclosed under section 92F-12(a)(14); and
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> (B) The following information related to employment misconduct that results in an employee's suspension or discharge:
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> (i) The name of the employee;

[3] The charges in this case were also made public by the media prior to the issuance of the Commission's opinion.

> (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).

The public interest to be balanced against an individual's significant privacy interest is the public interest in the disclosure of "official information that sheds light on an agency's performance of its statutory purpose" or "upon the conduct of government officials." OIP Op. Ltr. No. 92-17. 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 . . . . In general, this interest is not furthered by disclosure of the subject employees' identities." OIP Op. Ltr. No. 98-5 at 21. Thus, the public interest in shedding light on the agency's operations is generally served by disclosure of the nature of alleged misconduct and how the agency responded to it, without the name of the concerned employee and other details that could reasonably lead to the employee's identification. The public interest in disclosure of the employee's identity, thus, "is a distinct one . . . which lies in holding those public officials accountable for their conduct." Id. There may also be unique instances where disclosure is necessary even though the public interest is unrelated to the employee's identity, because information necessary to review the agency's conduct cannot be de-identified and no other means exists to obtain that information. See OIP Op. Ltr. No. 07-08.[4]

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[4] This opinion concerned disclosure of an agency's response, which is ordinarily a public record, to a Legislative Auditor's report. Specifically, the Office of the Auditor (Auditor) asked if it should, in response to a UIPA request, redact from the agency response individually identifiable employee misconduct information about an audit analyst whose identity could not practicably be redacted. (The employee in this case resigned so that his alleged misconduct did not result in an actual suspension or discharge.) Even assuming the employee would not have been suspended or discharged and therefore had a significant privacy interest in the alleged misconduct information, OIP found that the Auditor could not redact the information under the UIPA's privacy exception. Although the employee's

In balancing a government employee's privacy interest against the public's interest in disclosure, OIP has previously identified and considered several non-exclusive factors based on federal case law interpreting comparable provisions of the federal Freedom of Information Act (FOIA). See OIP Op. Ltr. No. 98-5 at 22 and cases cited therein. A recent federal case more fully expounds on the factors courts should consider in this balance, including the factors previously considered by OIP, and provides a useful framework for such balancing:

> In balancing a government employee's privacy interests against the public's interest in disclosure, a court should consider several factors, including: (1) the government employee's rank: (2) the degree of wrongdoing and strength of evidence against the employee; (3) whether there are other ways to obtain the information; (4) whether the information sought sheds light on a government activity; and (5) whether the information sought is related to job function or is of a personal nature. The factors are not all inclusive, and no one factor is dispositive. * * *
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> **(1) Rank of government employee:** We adopt the United States Court of Appeals for the District of Columbia's rule "that the level of responsibility held by a federal employee," is an "appropriate consideration[]"when analyzing disclosure. Stern, 737 F.2d at 92 (ordering release of censure letter issued against a high-level FBI official, but withholding information regarding the disciplining of two low-level FBI employees). * * *
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> (**2) Degree of wrongdoing and strength of evidence against the employee:** This factor requires a court to examine the degree of wrongdoing allegedly committed by the employee and the strength of the evidence. Strong evidence of wrongdoing, combined with a serious offense, would weigh in favor of disclosure. Thus, in Stern, the court ordered disclosure where the government employee was "a high-level employee who was found to have participated deliberately and knowingly in the withholding of damaging information in an important inquiry," 737 F.2d at 93-94, but not for lower-level employees who "were not in any sense directly responsible . . . but rather were culpable only for inadvertence and negligence." Id. at 92.

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identity was not relevant to the public's interest in reviewing the functioning of the Auditor, OIP found that the public interest outweighed any privacy interest because the alleged misconduct directly impacted the Auditor's audit and thus shed substantial light on the Auditor's performance of its statutory purpose in the context of the subject audit.

(3) Availability of other means to obtain the information: This factor examines whether the government is the only means for obtaining the desired information.

(4) Whether the information sought sheds light on government activity: This factor examines whether the information sought furthers FOIA's main purpose of "opening agency action to the light of public scrutiny," Rose, 425 U.S. at 372. The more the information sought sheds light on what the government is doing, the more this factor favors disclosure. See Reporters Comm., 489 U,S. at 773 ("Official information that sheds light on an agency's performance of its statutory duties falls squarely within [FOIA's] statutory purpose.").

(5) Whether the information is related to job function, or is of a personal nature: This factor is related to the government activity factor because the purpose of FOIA is to shed light on public rather than private activity. FOIA is not a tool to obtain personal information about government employees. Rather, the disclosed information must relate to the employee's performance of his public duties.

Perlman v. United States Dep't of Justice, 312 F.3d 100, 107-08 (2d Cir. N.Y. 2002). OIP believes the Perlman court's analysis of the relevant factors is equally applicable to balancing an employee's privacy interest against the public interest under the UIPA, and adopts it for that purpose.

In this instance, OIP discusses these factors with respect to the disclosure of advisory ethics opinions, which are records that directly address an employee's misconduct. However, these factors are also relevant in determining whether and to what extent information may be withheld from records that are not generated in connection with a personnel matter, and would generally not be subject to the UIPA's privacy exception, i.e., where a particular record contains and thus indirectly reveals potential or actual employee misconduct information. See, e.g., OIP Op. Ltr. No. 07-08 (misconduct by Auditor's employee raised as one objection in agency's response to Auditor's report).

1. Conduct Warranting Suspension or Discharge

The Commission would like guidance regarding the facts or circumstances that would tip the balance in favor of disclosing a full Advisory Opinion, where (1) the Commission's recommendation of suspension or discharge is not followed by the appointing authority; or (2) the employee has been suspended or discharged, but the Grievance Period has not run.

a. Grievance Period Has Not Run

We first address disclosure of an Advisory Opinion where an appointing authority has followed the Commission's recommended suspension or discharge, but the Grievance Period, during which the statute provides that an employee's privacy interest in misconduct information remains significant, has not ended. Haw. Rev. Stat. § 92F-14(b)(4)(B). Given that the statute explicitly provides this Grievance Period, the balance during this defined period must overwhelmingly favor nondisclosure. See OIP Op. Ltr. No. 96-2. Thus, in the absence of extraordinary facts under several of the factors weighed, employee misconduct information should not be disclosed during the Grievance Period.

b. Commission's Recommendation of Suspension or Discharge Not Followed

We next address disclosure of a full Advisory Opinion where the appointing agency has not followed the Commission's recommendation of suspension or discharge. Where an employee does not receive suspension or discharge after a Commission recommendation, the presumption remains that the employee has a significant privacy interest in the misconduct information. Haw Rev. Stat. § 92F-14(b)(4)(B). To overcome this strong presumption, the facts as analyzed under the factors outlined above must weigh heavily in favor of disclosure.

For guidance, we apply these factors in balancing the significant privacy interest of Employee A against the public's interest in disclosure of his identity.

(1) Rank of government employee: Again, this factor looks to the employee's rank and level of responsibility, including whether the employee had direct responsibility over any improper actions taken. Perlman, 312 F.3d at 107; see also OIP Op. Ltr. No. 98-05 at 21-22. Here, Employee A was not a high-level official in his department, although his mid-level supervisory position did allow him to take advantage of both his own relative independence from supervision and his ability to direct the efforts of workers reporting to him in carrying out the activities in question. This factor weighs slightly in favor of disclosure.

(2) Degree of wrongdoing and strength of evidence against the employee: This factor looks to the seriousness of the offense, including whether wrongdoing was done deliberately and knowingly, and whether there is strong evidence of the wrongdoing. Perlman, 312 F.3d at 107; see also OIP Op. Ltr. No. 98-05 at 21-22. In this case, given that the Ethics Commission investigated and found substantial evidence of wrongdoing and determined that the employee knowingly used his supervisory role to commit the wrongdoing at a level warranting suspension or termination, OIP will defer to the Commission's opinion and find this factor to have presumptively been met, which weighs in favor of disclosure. OIP presumes this factor has been met in any case in which the Commission has issued an Advisory Opinion recommending suspension or termination, and yet the issuance of such an advisory opinion is not, by itself, enough to overcome the

employee's significant privacy interest where the employee has not, in fact, been suspended or discharged for employment misconduct. See Haw. Rev. Stat. § 92F-14(b)(4)(B); OIP Op. Ltr. No. 96-2 at 4-7. Thus, this factor alone does not raise the public interest enough to outweigh an employee's remaining privacy interest in being identified as the subject of such an opinion.

(3) Availability of other means to obtain the information: OIP applies this factor more generally to include the question of whether disclosure of the record in the form requested is the only means for the public to obtain information that sheds light on the agency's performance of its functions. In this case, Opinion A can be and has been published in a redacted form that serves the purpose of informing the public of the nature of the alleged misconduct and the agency's response. Cf. OIP Op. Ltr. No. 98-5 at 21. This factor weighs against disclosure.

(4) Whether the information sought sheds light on government activity: This factor examines whether the information sought furthers the purpose of shedding light on an agency's performance of its statutory duties. There is no claim here of any impropriety on the part of the appointing authority that arguably makes the employee's identity relevant in reviewing the agency's action or inaction in dealing with the alleged misconduct. Thus, a redacted Opinion A alone would provide the information necessary to judge the conduct of the agency. The identity of the actual employee under these facts would not shed any more light on what the government is doing. This factor weighs against disclosure.

(5) Whether the information is related to job function, or is of a personal nature: This factor asks whether the information relates to the employee's performance of his public duties. Opinion A concerns Employee's actions taken during work hours and related to his work duties. This factor weighs in favor of disclosure. However, OIP believes that this factor is most relevant when it is answered in the negative; in other words, employment misconduct information will typically relate to job function, but in the atypical situation where the information is largely of a personal nature that will weigh heavily against disclosure.

Weighing these factors as a whole, OIP does not find that the public interest in disclosure of Opinion A in full outweighs Employee A's significant privacy interest set forth in section, 92F-14(b)(4)(B). In particular, although the employee's supervisory position played some role in enabling his actions, the employee is not of such a high rank as to raise the public interest in his identity to a significant degree. Accordingly, Employee A's name and other identifying information should be redacted in response to a UIPA request for Opinion A.

2. Where Identity of Employee Cannot be Protected by Redaction

The Commission also asked for guidance as to whether Opinion B, which did not find conduct warranting suspension or discharge, should be withheld in its entirety under the UIPA. Because the complaint in this case had been made public and because of the unique facts of the case, disclosure of Opinion B, even in redacted form, would likely result in the identification of Employee B with the alleged misconduct.

Although the UIPA would generally require disclosure of a record in redacted form where an individual's identity may be withheld, the record may generally be withheld altogether when it is not possible to disclose it in redacted form without presenting a significant likelihood of revealing the individual's identity. OIP Op. Ltrs. No. 95-07 at 13-14 and 98-01 at 8. We note that, if misconduct information is withheld entirely rather than being disclosed in redacted form, the underlying public interest in knowing about how the agency operates – i.e., in knowing what sort of misconduct was alleged and how agency responded – will not be satisfied. See OIP Op. Ltr. No. 98-05 at 21. However, where misconduct is not at a level that warrants suspension or discharge, we believe that the individual's significant privacy interest outweighs the public interest in disclosure, absent the existence of extraordinary circumstances that would heighten the public interest to a level that compels disclosure. See OIP Op. Ltr. No. 96-2.

In this case, given the lower level rank of the employee and the lower level of the misconduct found, OIP finds that the only factor that weighs in favor of disclosure is that the opinion may be the only source of the information about the agency's conduct. OIP find this factor, by itself, to be insufficient to find an elevated public interest that outweighs the employee's significant privacy interest. Thus, the Commission would not be required to disclose the opinion in either redacted or unredacted form in response to a request made under part II of the UIPA. [5]

OFFICE OF INFORMATION PRACTICES

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[5] Should the **complainant** request a copy of Opinion B, the portion of the opinion reciting the complainant's complaint and observations would be required to be disclosed to the complainant as a personal record under part III of the UIPA, but the remainder of the opinion may be withheld under section 92F-13(1). See OIP Op. Ltr. No. 03-18.