



DAVID Y. IGE  
GOVERNOR

SHAN TSUTSUI  
LIEUTENANT GOVERNOR

**STATE OF HAWAII**  
**OFFICE OF THE LIEUTENANT GOVERNOR**  
**OFFICE OF INFORMATION PRACTICES**

NO. 1 CAPITOL DISTRICT BUILDING  
250 SOUTH HOTEL STREET, SUITE 107  
HONOLULU, HAWAII 96813  
Telephone: (808) 586-1400 FAX: (808) 586-1412  
E-MAIL: oip@hawaii.gov  
www.oip.hawaii.gov

CHERYL KAKAZU PARK  
DIRECTOR

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).

**OPINION**

**Requester:** Civil Beat  
**Agency:** Honolulu Police Department  
**Date:** June 26, 2015  
**Subject:** Names of Officers Terminated for Failed Drug Test  
(APPEAL 13-1)

**REQUEST FOR OPINION**

Requester seeks a decision as to whether the Honolulu Police Department (HPD) properly denied its request under Part II of the UIPA for the names of two officers discharged from HPD for failing HPD's drug test.

Unless otherwise indicated, this decision is based solely upon the facts presented in Requester's e-mail correspondence to OIP dated February 21, 2013, and attached materials; and HPD's letter to OIP dated April 2, 2013.

**QUESTION PRESENTED**

Whether HPD must disclose the names of officers terminated for failing a drug test.

**BRIEF ANSWER**

No. Because drug test information is confidential by law, the identity of a government employee who has failed a drug test may be withheld even when the

employee was terminated for failing the test. HRS § 92F-13(4) (2012); Mandatory Guidelines for Federal Workplace Drug Testing Programs § 2.6(h), 59 FR 29908, 29924 (June 9, 1994); HRS § 329B-6 (2010).

## **FACTS**

Requester made a written request to HPD for the disciplinary records for all officers discharged from HPD from 2000 to 2011. HPD had already destroyed the responsive records under its record retention schedule, but instead provided Requester with the names of all but two of the discharged officers along with a brief description of the reason for the termination. For the remaining two officers, HPD provided the reason for termination – they had failed drug tests – but declined to provide the officers’ names, on the basis that disclosing their identities would violate their medical privacy interest.

## **DISCUSSION**

### **I. Public Employee Misconduct Information Generally**

The UIPA makes government records public, unless an exception to disclosure applies. HRS § 92F-11(a) (2012). Personnel information about government employees may be withheld based on the UIPA’s exception for information whose disclosure would constitute a clearly unwarranted invasion of personal privacy. HRS § 92F-13(1) (2012). Notwithstanding the UIPA’s exceptions to disclosure, subsection 92F-12(a)(14), HRS, is a mandatory disclosure provision that applies to certain types of government employment information. HRS § 92F-12(a)(14) (2012). Additionally, certain information about a government employee’s suspension or discharge as detailed in subsection 92F-14(b)(4)(B), HRS, has been statutorily determined to not carry a significant privacy interest and is thus subject to disclosure. HRS § 92F-14(b)(4)(B) (2012). Because a discharged police officer’s name and the nature of the employment related misconduct that led to the termination fall under subsection 92F-14(b)(4)(B), HRS, and thus cannot be withheld based on employee privacy, they are generally considered public information under the UIPA. E.g. State of Hawaii Organization of Police Officers v. Society of Professional Journalists—University of Hawaii Chapter, 83 Haw. 378 (Nov. 15, 1996) (“SHOPO”); OIP Op. Ltr. No. 97-01.

### **II. Medical Privacy**

In the specific case of the officers whose names were not disclosed, HPD’s claimed ground for withholding the names was not the officers’ privacy interest in personnel information regarding their government employment, but rather their privacy interest in information “relating to medical, psychiatric, or psychological

history, diagnosis, condition, treatment, or evaluation,” another legislatively set example of information whose disclosure would carry a significant privacy interest such that it can typically be withheld under the UIPA’s privacy exception. See HRS § 92F-14(b)(1) (2012).

OIP has previously considered the level of alcohol or drugs found to be in the body as medical information. OIP Op. Ltr. No. F15-01 (finding that toxicology report regarding a deceased motorist carried a significant privacy interest as medical information, which was outweighed in that situation by the public interest in disclosure). HPD’s argument raises a question of legislative intent, specifically, whether the Legislature’s provisions in subsection 92F-14(b)(4), HRS, setting out exactly when an employee loses his or her privacy interest in misconduct information, should be read to imply that a privacy claim for the same information, but based on another reason (such as medical privacy or financial privacy), is outweighed by the public interest in disclosure because the information formed the basis for a finding of employment related misconduct resulting in termination.

However, OIP does not need to reach the question of the Legislature’s intent regarding the application of the UIPA’s privacy exception to such information, because as discussed below, a confidentiality statute regarding drug test results makes the potential applicability of the privacy exception moot.

### **A. Drug Test Information**

The UIPA recognizes confidentiality laws found in other parts of the Hawaii Revised Statutes and allows an agency to withhold government records “which, pursuant to state or federal law . . . are protected from disclosure.” HRS § 92F-13(4) (2012). Although HPD did not raise this as a basis for withholding the officers’ names, OIP takes notice of chapter 329B, HRS, Substance Abuse Testing, which sets uniform standards for substance abuse testing and is intended to (among other things) “protect the privacy rights of persons tested.” HRS § 329B-1 (2010); see HAR § 2-73-15(f) (in an appeal, OIP may take notice of generally accepted facts). Consistent with that purpose, chapter 329B, HRS, provides as follows regarding drug test results:

Any information concerning a substance abuse test pursuant to this chapter shall be strictly confidential. Such information shall not be released to anyone without the informed written consent of the individual tested and shall not be released or made public upon subpoena or any other method of discovery, except that information related to a positive test result of an individual shall be disclosed to the individual, the third party, or the decision maker in a lawsuit, grievance, or other proceeding initiated by or on behalf of the

individual tested and arising from positive confirmatory test result. Any person who receives or comes into possession of any information protected under this chapter shall be subject to the same obligation of confidentiality as the party from whom the information was received.

HRS § 329B-6(c) (2010). OIP concludes that a terminated officer's name in connection with the test result would be "information concerning a substance abuse test" protected by this confidentiality statute.

Chapter 329B, HRS, sets out four exemptions to its regulatory scheme, including one for drug tests "made pursuant to subpart C of the Mandatory Guidelines for Federal Workplace Drug Testing Programs (53 Federal Register 11986)." HRS § 329B-2.5(3) (2010). The federal guidelines, which set out their own set of standards for substance abuse testing and confidentiality, apply not only to federal agency personnel, but also to non-federal employees of a federal contractor or grantee who are directly or indirectly working on the contract or grant. Drug-Free Workplace Act of 1988 Frequently Asked Questions, Federal Department of Labor, <http://www.dol.gov/elaws/asp/drugfree/screenfq.htm>. Federal grant money makes up a small part of HPD's budget, representing 2% of department funding in FY2014. Office of the City Auditor, 2014 Service Efforts and Accomplishments Report and The National Citizen Survey for the City and County of Honolulu (2014), chapter 20, page 195, <http://www.honolulu.gov/cms-oca-menu/site-oca-sitearticles/514-service-efforts-and-accomplishments-report.html>.

It is possible, then, that the officers in question worked directly or indirectly on a federal grant such that their drug tests were administered under federal guidelines instead of chapter 329B, HRS. However, OIP finds it unnecessary to determine whether their drug tests were administered under chapter 329B or under federal guidelines, as both chapter 329B and the federal guidelines provide for confidentiality of test results. See Mandatory Guidelines for Federal Workplace Drug Testing Programs § 2.6(h), 59 FR 29908, 29924 (June 9, 1994); HRS § 329B-6. The drug test information is confidential by law in either instance, so HPD was entitled under section 92F-13(4), HRS, to withhold such information in response to a UIPA request.

## **B. Segregation of Information**

The remaining question is whether HPD's decision to withhold the officers' names but disclose the reason for their termination was a reasonable way to segregate the protected drug test information from the otherwise public information about terminated public employees. See HAR § 2-71-17 (segregation of information under the UIPA should be done in a way that still provides access to public information). HPD could conceivably have withheld the reason for the termination

but not the officers' names. In the absence of other plausible reasons for termination involving information subject to a confidentiality law, however, OIP believes it would be readily possible for members of the public to realize that the officers were terminated for failing a drug test, particularly if HPD correctly fulfilled its obligation under section 2-71-14(b)(2), HRA, to cite the confidentiality law it was relying on to withhold the information.

Choosing as HPD did to redact the officers' names, but not the reason for their termination, could still narrow down the possible identities of the officers as the information about the unnamed officers' termination could be compared to a list of all officers departing HPD employment at the relevant time that would be public information under the UIPA. See HRS § 92F-12(a)(14). Nonetheless, the likelihood of actual identification would still be lower in that case than the likelihood of determining that named officers terminated for an unstated reason, based on an unstated confidentiality law, had failed a drug test. OIP thus finds that HPD's decision to withhold the officers' names and provide the reason for their termination was reasonable under the circumstances, and balanced the competing legislative intents to provide information about the terminated officers to the extent possible without actually violating the applicable confidentiality laws.

### **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, 92F-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 decision also serves as notice that OIP is not representing anyone in this matter. OIP's role herein is as a neutral third party.

## **OFFICE OF INFORMATION PRACTICES**

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Jennifer Z. Brooks  
Staff Attorney

APPROVED:

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Cheryl Kakazu Park  
Director