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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).

OPINION

Requester: Ms. Nellie Ristvedt
Agency: Department of Health
Date: May 26, 2016
Subject: Visitor Permits for the Kalaupapa Settlement (U APPEAL 14-34)

REQUEST FOR OPINION

Requester seeks a decision as to whether, under the Uniform Information Practices Act (Modified), chapter 92F, HRS (UIPA), the Department of Health (DOH) properly denied her request for public access to the government record authorizing persons to visit on specified dates the Kalaupapa Settlement (KS) on Molokai, Hawaii, which was established to house Hansen's Disease patients (Visitor Permit).

Unless otherwise indicated, this decision is based solely upon the facts presented in Requester's e-mail correspondence dated May 11 and August 1, 2014; DOH's response to Requester, dated May 1, 2014, DOH's response to this appeal, dated April 22, 2016, prepared by Deputy Attorney General Jill Nagamine; telephone conversations with Ms. Bev Chang, Acting Administrator, Kalaupapa Settlement (KS), on April 15,¹ May 9 and 11, 2016; and OIP's review of a blank copy

¹ This telephone conversation was between Ms. Chang and Winfred Pong, Esq., the former OIP Staff Attorney to whom this appeal was originally assigned.

of the form entitled “Application for Visitor Permit” (Application), which is attached as Exhibit “A.”

QUESTION PRESENTED

Whether, under Part II of the UIPA, DOH is required to publicly disclose each Visitor Permit for specified dates, upon request.

BRIEF ANSWER

Yes. In accordance with section 92F-12(a)(13), HRS, DOH must disclose the Visitor Permit naming each individual permitted to visit KS (Permittee) after redacting, if provided, the Permittee’s age, home address, and personal emergency telephone number. These items of information about the Permittee are protected from public disclosure under the UIPA’s exception for “[g]overnment records which, if disclosed would constitute a clearly unwarranted invasion of personal privacy.” HRS § 92F-13(1) (2012). A Permittee’s business address and general business telephone number, if provided on the Visitor Permit, must be disclosed because no UIPA exception applies to allow DOH to withhold them. If the Permittee provided a direct work telephone number as an emergency telephone number, the direct work telephone number can be withheld under the UIPA’s exception for “[g]overnment records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function.” HRS § 92F-13(3) (2012).

Except as further explained, it is appropriate for DOH to redact the name and address of the KS resident who is sponsoring the Permittee’s visit to KS (Sponsor) because the “clearly unwarranted invasion of personal privacy” exception protects this information about the Sponsor’s residency at KS. However, where a Sponsor is an employee of DOH or the federal National Park Service (NPS) and is sponsoring persons in the Sponsor’s official capacity and on behalf of the government agency, the Sponsor’s name as a government employee and government address, if applicable, must be disclosed because the “clearly unwarranted invasion of personal privacy” exception does not apply to this government employment information. Also, where Visitor Permits are provided to the Damien Tour (DT) operator accompanying visitors on DT’s guided tours of KS, DOH must disclose the name of the Sponsor, who is the DT operator, because the “clearly unwarranted invasion of personal privacy” exception does not apply to information that is already public.

FACTS

Hawaii law prohibits any person who is not a Hansen’s Disease patient from visiting or staying at KS without written permission by DOH. Specifically, section HRS 326-26, HRS, provides:

§326-26 Persons allowed at places for Hansen's disease patients. (a) No person, not having Hansen's disease, shall be allowed to visit or remain upon any land, place, or inclosure [sic] set apart by the department of health for the domiciles and community facilities of persons affected with Hansen's disease, without the written permission of the director of health, or some officer authorized thereto by the department, under any circumstances whatever, and any person found upon such land, place, or inclosure [sic] without a written permission shall be fined not less than \$10 nor more than \$100 for such offense; provided that any patient resident of Kalaupapa desiring to remain at the facility shall be permitted to do so for as long as the person may choose, regardless of whether the person has been successfully treated.

HRS § 326-26 (2010).

The KS Administrator, who is employed by DOH, may approve Visitor Permits upon request by KS residents submitting completed Visitor Permit Applications. When the DT operator conducts guided tours of KS, she submits Visitor Permit Applications providing only the numbers of persons taking the tours. According to DOH, upon the KS Administrator's approval of a completed Application, the KS Administrator will sign the Visitor Permit Application. Thus, "the application and the permission for a [Permittee] to be in Kalaupapa are in a single document."

Requester made a record request to DOH, dated April 16, 2014, for access to "all Department of Health documents granting permission for someone to be in Kalaupapa on December 10, 11 or 12, in the year 2013," and, in a letter dated May 1, 2014, DOH denied this record request. In its response to this Appeal, DOH asserted that the Visitor Permits "contain confidential information, including the names of patients who sponsor visitors to be their guests at Kalaupapa Settlement, and personal contact information of visitors" and "the requested documents, if disclosed, would constitute a clearly unwarranted invasion of personal privacy in violation of the Hawaii State Constitution, Article I, Section 6." DOH also argued that Permittees' names are protected by the UIPA's "frustration of a legitimate government function" exception because disclosing their names "could thwart future visits that are important to patient-residents" and "frustrate the legitimate government function of DOH to allow people to visit patient-residents." HRS § 92F-13(3) (2012).

DISCUSSION

I. Permittee Information

DOH argued that “[j]ust as commercial airlines, hotels, and recreation facilities do not release the information pertaining to their passengers, guests, and patrons due to the privacy rights of those people, the DOH recognizes that people who travel to visit patients at Kalaupapa have a right to their privacy.” DOH made its argument that public disclosure of Permittee’s names would constitute a clearly unwarranted invasion of personal privacy based upon the State Constitution’s protection of privacy.

As OIP has previously discussed in past opinions, the UIPA’s exception for a clearly unwarranted invasion of personal privacy was intended to implement the right to privacy under Hawaii’s Constitution. See, e.g., OIP Op. Ltr. No. F15-01 at 13 (citing Conf. Comm. Rep. 112-88, 14th Leg., 1988 Reg. Sess., Haw. J.J. 817 (1988)). In OIP Op. Ltr. No. F15-01, OIP explained that “[t]he 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. (citing State of Haw. Org. of Police Officers v. Soc’y of Prof’l Journalists, 927 P.2d 386, 404 (Haw. 1996)). OIP has also concluded that the UIPA’s “privacy exception is broader than and allows protection of records that may not be protected by the Hawaii Constitution’s right to privacy.” OIP Op. Ltr No. 05-03 at 5-6 (citing HRS § 92F-2).

Therefore, OIP shall consider the broader protection of privacy afforded by the UIPA’s “clearly unwarranted invasion of personal privacy” exception rather than the State Constitution’s right to privacy. However, as discussed below, the Legislature has made clear that both the UIPA’s exceptions for a clearly unwarranted invasion of personal privacy and for frustration of a legitimate government function do not apply to certain permit information.

In section 92F-12(a), HRS, the UIPA provides a list of government records that are mandated to be publicly disclosed, “[a]ny provision in this chapter to the contrary notwithstanding.” In particular, section 92F-12(a)(13), HRS, requires public disclosure of certain information concerning individuals who are granted permits by an agency as follows:

§92F-12 Disclosure required. (a) Any other provision in this chapter to the contrary notwithstanding, each agency shall make available for public inspection and duplication during regular business hours:

.....

(13) Rosters of persons holding licenses or permits granted by an agency that may include name, business address, type of license held, and status of the license[.]

HRS §92F-12(a)(13) (2012) (emphases added.). The legislative history for the mandatory disclosure of records listed in section 92F-12(a), HRS, explains that the “list of records (or categories of records)” described in this section, must be disclosed “as a matter of public policy” and that the UIPA’s “exceptions such as for personal privacy and for frustration of legitimate government purposes are inapplicable.” S. Conf. Com. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw., S.J. 689, 690 (1988); H. Conf. Comm. Rep. No. 112-88, Haw. H.J. 817, 818 (1988) (emphasis added).

Unlike stays at private hotels and recreational facilities, Permittees’ visits to KS are restricted by Hawaii law and regulated by the State, and visits are only authorized by a Visitor Permit that is issued by the KS Administrator, a DOH official. See HRS § 326-26 (prohibiting visits to KS without DOH’s written permission). OIP finds that the Visitor Permit is exactly the type of permit record that the Legislature intended to be covered by section 92F-12(a)(13), HRS, so that certain information about the permitted activity must be disclosed as a matter of public policy. See OIP Op. Ltr. No. 92-18 at 4-5 (discussing the purposes of licenses or permits covered by section 92F-12(a)(13), HRS).

As noted above, section 92F-12(a)(13), HRS, requires agencies to disclose rosters with information about permit holders. DOH asserted that it does not maintain a “roster” of persons granted permission to visit KS, and, therefore, would be unable to disclose such a roster as required by section 92F-12(a)(13), HRS. However, OIP has consistently opined that the UIPA requires public disclosure of the same items of information listed in section 92F-12(a)(13), HRS, regardless of the format of the record containing those items of information, in other words, regardless of whether the information is contained on a roster or in other types of government records. See, e.g., OIP Op. Ltr. No. 90-28 (discussing the items of information about revoked contractors’ licenses that must be disclosed from various public licensing records to a national organization); OIP Op. Ltr. No. 91-1 at 9 (concluding that where contractor’s previous licensure information is required by law to be made public, the same information in a license application must also be disclosed). Therefore, OIP believes that the same items of information about Permittees must be publicly disclosed in accordance with section 92F-12(a)(13), HRS, regardless of whether such information is set forth in a roster or in the Visitor Permit.

Consequently, OIP concludes that section 92F-12(a)(13), HRS, applies to the Visitor Permit and requires the disclosure of Permittees’ names and other information about the “type” and “status” of the Visitor Permit, such as the date and KS Administrator’s signature of approval, dates of Permittees’ arrivals and departures and Permittees’ methods of travel (plane, trail, or ocean). See HRS §

92F-12(a)(13) (requiring disclosure of type and status of a permit). Because OIP finds that section 92F-12(a)(13), HRS, requires public disclosure of such permit information in the Visitor Permit “[a]ny other provision in this chapter to the contrary notwithstanding,” the UIPA’s exceptions for “clearly unwarranted invasion of personal privacy” and “frustration of a legitimate government function” do not apply. HRS §§ 92F-12(a)(13), -13(1), (3); see OIP Op. Ltr. No. 92-18 (opining that the privacy exception does not apply to the names of pest control operators and the status of their respective certifications that are required to be disclosed under section 92F-12(a)(13), HRS); OIP Op. Ltr. No. 94-9 (concluding that a commission must disclose the education, training, and work experience of its members, who are government officers, as required by section 92F-12(a)(14), HRS).

If the Permittee provided an age (if a minor), a home address, and personal emergency phone number on the Visitor Permit, such items of personal information are not included in the list of permit information that must be made public under 92F-12(a)(13), HRS. Therefore, OIP does not believe that these items of information are subject to that section’s mandatory disclosure requirements. Instead, as discussed next, OIP finds that these items of personal information are protected by the UIPA’s exception based upon a clearly unwarranted invasion of personal privacy.

Under the UIPA, “[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 interest of the individual.” HRS § 92F-14(a) (2012). OIP has found in other circumstances that an individual has a significant privacy interest in his or her own age, home address, and personal telephone number, and that this significant privacy interest is not outweighed by the public interest. See, e.g., OIP Op. Ltr. No. 98-5 at 23 (privacy exception protects home address and emergency contact information of employee under investigation); OIP Op. Ltr. No. 07-11 (in a marine refuge permit application, the privacy exception protects personal contact information). OIP therefore finds that these items of personal information in the Visitor Permit are protected by the UIPA’s “clearly unwarranted invasion of personal privacy” exception and may be redacted before disclosure of the public information in the Visitor Permit. However, the privacy exception does not apply to an individual’s business address and general business telephone number² if provided on the Visitor Permit. See Id.

II. Sponsor Information

The Sponsor’s name and address are not included in the list of permit information required to be disclosed under section 92F-12(a)(13), HRS. Except as discussed below, OIP believes that a Sponsor has a significant privacy interest in

² If the emergency telephone number is a direct work telephone number, OIP has opined that it is not required to be disclosed under the UIPA’s “frustration of a legitimate government function” exception. OIP Op. Ltr. No. 07-11 fn. 9.

the Sponsor's own name and home address on the Visitor Permit because this information reveals the Sponsor's residency at KS. See OIP Op. Ltr. No. 89-17 at 5 (concluding that the privacy exception protects the names of residents at adult residential care homes). In particular, because Sponsors include KS residents who are Hansen's disease patients, these Sponsors have a significant privacy interest in "[i]nformation relating to [their] medical . . . history, diagnosis, condition, [and] treatment," as the UIPA expressly recognizes. HRS § (92F-14(b)(1) (listing "examples of information in which the individual has a significant privacy interest); see Id.

OIP does not believe that there is a great public interest that would be served by disclosure of most Sponsor's names and home addresses. See OIP Op. Ltr. No. 89-17 at 5. In OIP's opinion, the Sponsors' significant privacy interest in their names revealing their KS residency and, by direct inference, medical information outweighs any public interest in disclosure of their names as KS resident Sponsors. Thus, with the exceptions discussed below, Sponsors' names and home addresses on Visitor Permits are protected from public disclosure under the UIPA's "clearly unwarranted invasion of personal privacy" exception.³

When the Sponsor named on a Visitor Permit is an employee of DOH or NPS and is sponsoring Permittees in an official capacity as that agency's employee and on behalf of that government agency, the employee's name as the Sponsor and the government address must be disclosed. OIP finds that the privacy exception does not apply to those employees acting in their official capacity and on behalf of government agencies. First, the UIPA expressly requires government employees' names to be disclosed "[a]ny other provision in this chapter to the contrary notwithstanding." HRS § 92F-12(a)(14) (2012). Also, OIP does not believe that NPS employees have a significant privacy interest in their names when they are sponsoring Permittees as part of their jobs as NPS employees. See S. Conf. Com. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw., S.J. 689, 690 (1988); H. Conf. Comm. Rep. No. 112-88, Haw. H.J. 817, 818 (1988) (explaining that "[i]f 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").

Lastly, OIP finds that the Sponsor who is the DT operator does not have a significant privacy interest in her name as a Sponsor because she publicly advertises

³ Section 92F-13(4), HRS, does not require disclosure of records that are protected from disclosure by a state law. DOH asserted that "[t]he identities of those patient-residents are safeguarded pursuant to section 325-4, Hawaii Revised Statutes." Because section 325-4, HRS, requires confidentiality of patients' identities in "[r]eports to the department of health provided for by this [HRS] chapter" regarding infectious and communicable diseases, it is not clear that this confidentiality statute applies to the Sponsors' names in Visitor Permits. Nonetheless, Sponsors' names are protected under the UIPA's privacy exception.

her tour services so that information about her residency at KS and her tour services are already public.⁴ Id.; see OIP Op. Ltr. No. 94-21 (concluding that disclosure of records about a former legislator's work injury must be disclosed when the legislator had discussed the work injury with the news media). Thus, OIP concludes that DOH must disclose the name of the DT operator who is a KS resident when she is sponsoring persons for her guided tours of KS.

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 rule does not allow for extensions of time to file a reconsideration with OIP.

⁴ <http://www.damientoursllc.com/about-us.html> (last visited May 11, 2016).

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

OFFICE OF INFORMATION PRACTICES

Lorna L. Aratani
Staff Attorney

APPROVED:

Cheryl Kakazu Park
Director

Application for Visitor Permit

To: Administrator, **Kalaupapa Settlement**

DATE: _____

Request permission to have the following person(s) as my guest(s) at Kalaupapa Settlement.

TRAVEL BY: PLANE TRAIL OCEAN

FROM: _____ TO: _____ STAYING AT: _____
Date of Arrival Date of Departure

Tag#	Name of Guest	Age (if a minor)	Print Sponsor Name(s)	Phone
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____

Above request is granted, Permit issued on _____, SUBJECT TO RULES & REGULATIONS GOVERNING KALAUPAPA SETTLEMENT AND REVOCABLE.

 Administrator, **Kalaupapa Settlement**

I/We have read and understand the instruction for visitors and agree to follow them as a condition for permission to visit Kalaupapa Settlement and hereby acknowledge receiving a copy of The Rules and Regulations. If I will be driving I will provide a copy of my driver's license.

ARRIVAL DATE	PRINT NAME & SIGN	FULL ADDRESS	EMERGENCY PHONE #
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____