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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 sections 92F-27.5 and 92F-42, HRS, and chapter 2-73, Hawaii Administrative Rules (HAR).

OPINION

Requester: Donald Marks, Eric Wilson, and Gary Karagianes
Agency: Hawaii Paroling Authority
Date: October 11, 2018
Subject: Minimum Decision Record (RECON-G 18-01)

REQUEST FOR OPINION

Donald Marks (Marks), Eric Wilson (Wilson), and Gary Karagianes (Karagianes) (collectively "Requesters") previously sought decisions as to whether the Hawaii Paroling Authority (HPA) properly denied under the UIPA their requests for their respective Minimum Decision Record. Those requests were consolidated and resulted in the issuance of OIP Opinion Letter Number F17-04 (Opinion F17-04). The Department of the Attorney General, on behalf of HPA, made a timely request for reconsideration of Opinion F17-04, which was granted on February 22, 2018. Upon reconsideration, OIP overrules in its entirety Opinion F17-04 and withdraws it in favor of this OIP Opinion Letter Number F19-01.

Unless otherwise indicated, this decision is based solely upon the facts presented in the following:

1. As specifically related to Marks: a letter to HPA from Marks dated August 27, 2013; a letter to Marks from HPA dated September 9, 2013; a letter to OIP from Marks dated September 24, 2013, with enclosures; OIP's Notice of Appeal to HPA dated September 30, 2013, with enclosures; a telephone conversation with HPA Paroles and Pardons Administrator Tommy Johnson (Johnson) on October 1, 2013; a letter to OIP from HPA dated October 15, 2013; four letters to OIP from Marks dated respectively

August 17, September 13, October 4, and November 17, 2017, with enclosures; and two letters to OIP from Marks dated respectively January 4 and March 5, 2018, with enclosures.

2. As specifically related to Wilson: two letters to HPA from Wilson dated respectively July 30 and August 30, 2013; a letter to Wilson from HPA dated September 4, 2013; a letter to OIP from Wilson dated January 10, 2014, with enclosures; OIP's Notice of Appeal to HPA dated January 21, 2014, with enclosures; and a letter to OIP from HPA dated February 3, 2014.

3. As specifically related to Karagianes: a letter to HPA from Karagianes dated October 2, 2014; a letter to Karagianes from HPA dated October 10, 2014; a letter to OIP from Karagianes dated October 22, 2014, with enclosures; OIP's Notice of Appeal to HPA dated November 12, 2014, with enclosures; a letter to OIP from HPA dated November 21, 2014; an email to Johnson from OIP dated December 1, 2014, with attachment; a letter to OIP from Karagianes dated November 12, 2017; and two letters to OIP from Karagianes dated respectively February 27 and March 1, 2018, with enclosures.

4. Regarding all three Requesters: telephone conversations with Acting Paroles and Pardons Administrator Andrew Morgan (Morgan) on January 25 and February 14, 2017; a letter to Morgan from OIP dated January 25, 2017, with enclosures; a letter to OIP from Morgan dated January 26, 2017; a letter to Morgan from OIP dated February 15, 2017; HPA's Request for Reconsideration dated July 12, 2017; a letter to OIP from HPA dated July 28, 2017, with enclosures; an email to OIP from HPA dated October 5, 2017, with attachments; a letter to HPA from OIP dated December 15, 2017; two letters to OIP from HPA dated respectively January 16 and 31, 2018, with enclosures; OIP's Granting of HPA's Request for Reconsideration dated February 22, 2018; a letter to OIP from HPA dated February 26, 2018, with enclosures; and an email to OIP dated September 4, 2018, with attachments.

QUESTION PRESENTED

Whether HPA properly denied Requesters' requests for their respective Minimum Decision Record under Parts II and III of the UIPA.

BRIEF ANSWER

HPA properly denied Requesters' requests for their Minimum Decision Record under Parts II and III of the UIPA. OIP finds that the records sought by

Requesters are personal records "about" each corresponding Requester but are not required to be disclosed as personal records because they fall within the exemption to disclosure set out in section 92F-22(1)(B), HRS, of Part III of the UIPA.

Because access to these personal records is being denied under Part III, a review must also be conducted under Part II, the government records section of the UIPA. OIP Op. Ltr. Nos. 05-14 at 6-7; 03-11 at 4, n.6; and 05-16 at 4. Based upon OIP's *in camera* review of the records, OIP finds that section 92F-13(3), HRS, specifically the deliberative process privilege under the frustration exception, permits HPA to withhold the requested records in its entirety.

FACTS

Each Requester requested a copy of his own Minimum Decision Record from HPA pursuant to the UIPA. In response, HPA referenced sections 92F-13(3) and 92F-22(1), HRS, as its statutory authority to withhold. Subsequently, Requesters appealed HPA's denials to OIP. OIP accepted these appeals and sent HPA three separate Notices of Appeal, one regarding each Requester. OIP also provided HPA with a copy of OIP's Appeal Procedures and Responsibilities of the Parties, which included requirements that the agency must submit a written response and an unredacted copy of the records to which access was denied for OIP's *in camera* review.

HPA responded to each appeal by informing OIP that "[each Requester's] request for a copy of the HPA Minimum Decision Record was denied pursuant to HRS § 92F-22(1). In that, the HPA Minimum Decision Record [each Requester is] seeking is considered a 'working paper' of the HPA, and therefore, is not subject to release pursuant to the provisions of HRS § 92F." HPA further stated, "the Minimum Decision Record is not disclosable because [the] Parole Board fills [this] out at [the] hearing, [it] contains their notes. Done in executive session." However, HPA's responses were minimal and failed to explain what information is contained in the Minimum Decision Records, their significance to HPA, and specifically, why HPA believes this information falls within the limited categories of records described in section 92F-22(1), HRS. Moreover, HPA did not include with any of its responses an unredacted copy of the records to which access was denied. The three appeals were thereafter consolidated because they contained similar issues. HAR § 2-73-15(g).

After giving HPA five opportunities to provide the contested records for OIP's *in camera* review and eight opportunities to supplement its argument, and receiving nothing, OIP issued Opinion F17-04, which concluded that under Part III of the UIPA, HPA had not met its burden to justify its nondisclosure of the Minimum Decision Records and must, therefore, disclose these records.

After Opinion F17-04 was issued, HPA timely sought and OIP granted reconsideration of Opinion F17-04. As part of HPA's request for reconsideration, HPA finally provided the records at issue for OIP's *in camera* review. Although an agency's own failure to timely provide justification for its nondisclosure of records does not generally provide it a basis to request reconsideration of an unfavorable OIP opinion, OIP found that other compelling circumstances justified granting reconsideration.[1] HAR § 2-73-19(d).

The record at issue here, entitled "HPA Minimum Decision Record," is a document used by HPA's parole board members to record factual information, such as the time the hearing began, prison facility that currently houses the inmate, initials of the parole board members present, name of the defense attorney present, name of the deputy prosecuting attorney, if present, and names of any witnesses, if present, along with the board's notes, recommendations, and calculations leading to the board's final decision regarding an inmate's imprisonment term. HPA explained that this "internal document [is] prepared after a hearing on the setting of a minimum term but before a decision is made." Parole board members collectively complete this document while they are in "executive session" where in private they deliberate over the various factors and considerations of an inmate's prison term. This internal document is maintained in the respective inmate's file so that future parole board members understand the rationale behind previous decisions. Based upon OIP's *in camera* review of the record and the explanation provided by HPA during the reconsideration process, OIP now understands that, because this document is completed after the inmate's hearing, it contains the immediate impressions of the parole board members after the inmate, defense attorney, deputy prosecuting attorney, and any witnesses have argued their positions and are no longer in the room. This document does not represent the members' final decision, but merely contains their handwritten notes and comments on the recent hearing. After deliberation, the final decision is issued in the Notice and Order of Fixing Minimum Term(s) of Imprisonment form (Notice and Order), which is provided to the Department of Public Safety, the inmate, and the inmate's attorney, and is not at issue here. See HAR § 23-700-22(k).

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[1] One compelling circumstance was the fact that, while the initial three appeals were pending, HPA's long-time administrator took an indefinite leave of absence and an acting administrator was appointed in his place. In contrast to HPA's prior history of typically being prompt and responsive, the acting administrator did not respond to OIP's requests for the records and additional information. Upon the administrator's return from his leave of absence, however, HPA promptly provided OIP with the requested records and information.

DISCUSSION

I. Disclosure of the Minimum Decision Record Under Part III of the UIPA

A. The Minimum Decision Record is a Personal Record Under Part III of the UIPA

The UIPA defines a "personal record" as "any item, collection, or grouping of information about an individual that is maintained by an agency." HRS § 92F-3 (2012) (emphasis added). This includes an individual's educational, financial, or medical records, or items that reference the individual by name or otherwise. Id. An agency is required to provide access under Part III to an "accessible" personal record, which generally means one that is filed by the person's name or other identifying information, or that the agency can otherwise readily find. OIP Op. Ltr. No. 95-19 at 8-9, n.5; see also HRS §§ 92F-3, -21 (2012).

Based upon OIP's *in camera* review of each Requester's Minimum Decision Record, OIP finds that each record is the personal record of each corresponding Requester because the record identifies the specific Requester by name and is "about" him.

B. Section 92F-22(1)(B), HRS, Allows HPA to Withhold Access to the Minimum Decision Record

Part III of the UIPA requires an agency that maintains any accessible personal record to "make that record available to the individual to whom it pertains[,]" unless access to the record is restricted under an applicable Part III exemption as set forth in section 92F-22, HRS.

Of relevance here, section 92F-22(1), HRS, allows criminal law enforcement agencies to withhold access to certain personal records from the individual to whom the record pertains, specifically, "reports" prepared or compiled at any stage of the criminal law enforcement process and states:

> **§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:
>
> (1) Maintained by an agency that performs as its or as a principal function any activity pertaining to the prevention, control, or reduction of crime, and which consist of:
>
> (A) Information or **reports** prepared or compiled for the purpose of criminal intelligence or of a criminal

investigation, **including reports of informers, witnesses, and investigators**; or

(B) **Reports** prepared or compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through confinement, correctional supervision, and release from supervision.

HRS § 92F-22(1) (2012) (emphasis added).

Here, HPA argued that

> [t]he HPA, as the agency with the responsibility to set a defendant's minimum term of imprisonment, grant an inmate's request for parole, supervise the inmate's performance on parole, and determine if an inmate can be discharged from their sentence, among other duties, is an 'agency that performs as its or as a principal function any activity pertaining to the prevention, control, or reduction of crime[.]' HRS sections 92F-22(1), 353-62, and 706-669. The [Minimum Decision Records], which will be submitted separately under seal to OIP for in camera review, are one of many documents prepared as part of the parole board's duty to 'keep and maintain a record of all meetings and proceedings.' [HRS § 353-62(b)(1)].

It is uncontested that HPA is a government agency whose principal function is related to the "prevention, control, or reduction of crime," as one of HPA's enumerated responsibilities is determining the time length of an inmate's imprisonment. See HRS § 706-669(1) (2014) (stating that HPA is charged with "fixing the minimum term of imprisonment to be served before the prisoner shall become eligible for parole" based on the minimum term hearing).

The exemption in section 92F-22(1)(B), HRS, like the one before it in section 92F-22(1)(A), HRS, specifically applies to "reports," which is a term not defined by the UIPA. When a term is not specifically defined by the UIPA, OIP must look to the common dictionary definition of the word. See HRS § 1-14, (addressing statutory interpretation, "[t]he words of a law are generally to be understood in their most known and usual signification, without attending so much to the literal and strictly grammatical construction of the words as to their general or popular use or meaning"); see also OIP Op. Ltr. No. 05-04 at 8, citing Ross v. Stouffer Hotel Co. (Hawaii) Ltd., Inc., 76 Haw. 454, 461 (1994) (stating, "we give the operative words their common meaning unless there is something in the statute requiring a different interpretation").

One definition of "report" is "a formal oral or written presentation of facts or a recommendation for action." Black's Law Dictionary 1414 (9th ed. 2004). Looking

beyond the purely legal context to the "general or popular use or meaning" of "report," the Merriam-Webster Dictionary gives several definitions of "report," including "a usually detailed account or statement." Definition 2a of "report" at www.merriam-webster.com/dictionary/report (last visited August 8, 2018). The "detailed account or statement" definition is consistent with the usage of "report" in section 92F-22(1)(A), HRS, which refers to "reports of informers, witnesses, and investigators." Like the reports of informers, witnesses, and investigators referenced in section 92F-22(1)(A), HRS, the handwritten document entitled "HPA Minimum Decision Record" is an "account or statement" of the collective impressions of the parole board members immediately after the Minimum Term Hearing and is thereafter retained by HPA as a record of the board's collective recommendation for action. OIP, therefore, finds that it is a "report" for the purpose of the UIPA exemption. For that reason and because section 353-62(b)(1), HRS, requires the parole board to keep a record of its proceedings,[2] OIP concludes that the Minimum Decision Record is an internal "report" falling under section 92F-22(1)(B), HRS.

OIP further finds that the Minimum Decision Record is prepared during the process of criminal law enforcement, specifically at the stages of confinement, correctional supervision, and release from supervision. As explained by HPA, the parole board members complete this report during their preliminary decision-making about the length of imprisonment. Moreover, as OIP has previously concluded, the clear intent of section 92F-22(1)(B), HRS, is "to allow criminal law enforcement agencies the ability to maintain the confidentiality of reports, prepared or compiled by or for such agencies related to an inmate, as the agencies deem necessary and appropriate to accomplish their legitimate functions and goals." OIP Op. Ltr. No. 05-14 at 5. Considering this intent, OIP accordingly interprets section 92F-22(1)(B), HRS, under Part III of the UIPA, broadly enough to withhold each respective Minimum Decision Record in its entirety from Requesters as it is a report prepared during the process of criminal law enforcement.

II. Disclosure of the Minimum Decision Record Under Part II of the UIPA

A. Part II Analysis is Required When a Personal Record is Withheld Due to a Part III Exemption

Although a Part II government records analysis is not necessary when a personal record is disclosed to the requester under Part III of the UIPA, this additional analysis is required when a personal record is withheld from the

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[2] Section 353-62(b)(1), HRS, states, "[i]n its operations, the paroling authority shall. . . [k]eep and maintain a record of all meetings and proceedings." HRS § 353-62(b)(1) (2015).

requester due to a Part III exemption. OIP Op. Ltr. No. 05-16 at 4. Even if a record is exempted from disclosure to the personal record requester under Part III, it may be accessible as a government record to any person, including the personal record requester, under Part II of the UIPA. See HRS §§ 92F-11, -12, -13 (2012) (generally requiring disclosure unless an exception applies); see also HRS § 92F-3 (broadly defining "person"). As OIP has opined:

> Where a record falls within an exception to disclosure under part III of the UIPA, governing the disclosure of personal records, the agency must then also determine whether the record may be withheld under part II of the UIPA, which governs the disclosure of general government records. It is likely, however, that many of the records that may be withheld under section 92F-22(1)(B) of Part III of the UIPA would also fall within the "frustration exception" to disclosure under part II of the UIPA. See Haw. Rev. Stat. § 92F-13(3) (1993).

OIP Op. Ltr. No. 05-14 at 6-7; accord OIP Op. Ltr. No. 03-11 at 4, n.6 and OIP Op. Ltr. No. 05-16 at 4.

B. Section 92F-13(3), HRS, Also Allows HPA to Withhold Public Access to the Minimum Decision Record

HPA argued that "HRS section 92F-13(3) also applies to the [Minimum Decision Record]," and more specifically, that the deliberative process privilege form of the frustration exception allows HPA to withhold the requested record. HPA explained as follows:

> The [Minimum Decision Record] is filled out during the HPA's private session, after a hearing involving the inmate and his or her counsel and a deputy prosecutor. In the Requestors' cases, the board was setting minimum terms of imprisonment. When deciding a minimum term of imprisonment, the board members determine what significant criteria and what level of punishment are appropriate for the inmate who just appeared before them. During this private session, the [Minimum Decision Record] is filled out. The [Minimum Decision Record] is placed in the inmates' HPA file, but is kept confidential and is not released to anyone outside of the HPA. The decision of the board is then placed on the [Notice and Order] and sent to the inmate.
>
> . . . .
>
> The [Minimum Decision Record] is thus predecisional and deliberative, as it is filled in during the private session while the board is setting a minimum term in this case. The [Notice and Order], while setting out the HPA's final decision, does not adopt or incorporate the [Minimum Decision Record] by reference. The board members' open discussion

during their private session when setting an inmate's minimum term would be stifled if the [Minimum Decision Record] was disclosed.

When the Legislature enacted the UIPA, it left to OIP and the courts the responsibility of developing the common law interpreting the UIPA. Thus, OIP has issued a long line of opinions since 1989 that recognize and limit the deliberative process privilege as a form of the frustration exception in section 92F-13(3), HRS, which allows an agency to withhold "[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). This privilege provides a standard for resolving the dilemma of balancing the need for government accountability with the need for government to act efficiently and effectively. In particular, it "protects government records which include advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated." OIP Op. Ltr. No. 90-03 at 11, citing NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150, 95 S. Ct. 1504, 57 L. Ed. 2d 159 (1975).

The policy purposes behind the deliberative process privilege are: (1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies or decisions before they are finally adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action. OIP Op. Ltr. No. 90-03 at 11. This privilege applies only when the record is both predecisional (*i.e.*, "antecedent to the adoption of an agency policy") and deliberative (*i.e.*, "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters"). Id. at 12. OIP has further held that the deliberative process privilege may be "lost when a final decision 'chooses expressly to adopt or incorporate [the record] by reference.'" OIP Op. Ltr. No. 90-03 at 12. As with all exceptions to disclosure, OIP construes this privilege narrowly when determining whether internal government communications must be disclosed.

OIP has specifically recognized draft documents as falling within the deliberative process privilege. In OIP Opinion Letter Numbers 90-08 at 7 and 91-16 at 4, OIP found that "[d]raft documents, by their very nature, are typically predecisional and deliberative. They 'reflect only the tentative view of their authors; views that might be altered or rejected upon further deliberation either by their authors or by superiors.'" Exxon Corp. v. Dep't. of Energy, 585 F. Supp. 690, 698 (D.D.C. 1983) (citation omitted). Furthermore, OIP has recognized that this protection for an agency's editorial judgment reflected in successive drafts applies not only to statements of opinion, but also to factual information in a draft document, because

> even if a draft document's contents are factual, the disclosure of the draft would frustrate agency decision-making during the drafting and editing of the document because 'the disclosure of editorial judgments--for example, decisions to insert or delete material or to change a draft's focus or emphasis--would stifle the creative thinking and candid exchange of ideas.'

OIP Op. Ltr. No. 91-16 at 6, quoting Dudman Communications Corp. v. Dep't. of Air Force, 815 F.2d 1565, 1569 (D.C. Cir. 1987). OIP has therefore recognized that "the UIPA does not require the disclosure of a draft of correspondence since disclosure would frustrate agency decision-making in the editing process." OIP Op. Ltr. No. 90-08 at 8.

Essentially, OIP has treated draft documents as a special case in applying the deliberative process privilege, in which even factual material that would not otherwise qualify for the privilege may be withheld as part of a draft document to protect against exposure of the editorial judgment going into the development of the final version of the document. A draft report or letter as discussed in the prior OIP Opinion Letters, or a draft administrative ruling or policy, may be fully withheld to protect an agency's editorial judgment, including purely factual material contained therein or language carried over verbatim into the final version. OIP Op. Ltr. Nos. 90-08 and 91-16. However, OIP has also recognized that a "draft" stamp or title, by itself, does not automatically make a document a draft covered by the deliberative process privilege.[3] Conversely, the absence of a "draft" stamp or title does not mean that a record is not covered by the deliberative process privilege. Rather, "the agency must be able to show 'what deliberative process is involved, and the role played by the documents in issue in the course of that process.'" OIP Op. Ltr. No. 91-16 at 7 (citation omitted).

Based upon OIP's *in camera* review of each Requester's corresponding Minimum Decision Record, OIP finds that each is the record of the parole board members' immediate impressions and opinions after the hearing and their collective deliberations of the appropriate criteria and level of punishment for the inmate. They contain handwritten notes, recommendations, and calculations made before the parole board rendered its final decision regarding the inmate's imprisonment term. For this reason, OIP finds that the Minimum Decision Record is both a predecisional and deliberative document.

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[3] OIP observed that "even if a draft document is predecisional at the time it is prepared, it can lose that status if it is adopted, formally or informally, as the agency position on an issue or is used by the agency in its dealing with the public." OIP Op. Ltr. No. 91-16 at 7. Thus, an agency cannot use a "draft" label to justify withholding policies that it is actually following in its operations.

The Minimum Decision Record is not titled as a draft of the board's final Notice and Order. However, based on what HPA has shown as to the deliberative process involved and the role played by the Minimum Decision Record in that process, as well as OIP's review of both documents, OIP finds that the Minimum Decision Record effectually serves as a draft version of the final Notice and Order. Using the parole board's editorial judgment, the board may insert or delete material or change the focus or emphasis when the final Notice and Order is prepared. In some cases, because the board made its final decision based on only what is noted in the Minimum Decision Record, the Notice and Order replicates language from the Minimum Decision Record so that the predecisional Minimum Decision Record is very similar to the final Notice and Order. In other cases, some of the factors the board noted in the Minimum Decision Record were not considered as part of the board's final decision and thus those factors not considered did not make it into the final Notice and Order. Accordingly, based on HPA's operational use of the predecisional Minimum Decision Record as a draft of the final Notice and Order, OIP concludes that the disclosure of the Minimum Decision Record would frustrate HPA's decision-making function, hinder its editorial judgment, and stifle the creative thinking and candid exchange of ideas when preparing the final Notice and Order.

Finally, none of the Minimum Decision Records were expressly incorporated or adopted by reference in its respective Notice and Order, as none of the Notice and Orders referred to any Minimum Decision Record. If the Notice and Order had expressly incorporated the Minimum Decision Record by reference (*i.e.*, the Notice and Order specifically identified and referred to the corresponding Minimum Decision Record), the Minimum Decision Record would be subject to disclosure. See OIP Op. Ltr. No. 90-08 at 5-6 (advising that a predecisional document's protected status may be lost when an agency's final decision "chooses expressly to adopt or incorporate [the predecisional document] by reference"). However, this was not the case with any of the Minimum Decision Records at issue. Therefore, OIP concludes that each respective Minimum Decision Record in its entirety may be withheld from Requesters under the deliberative process privilege form of the frustration exception set forth in section 92F-13(3), HRS, of Part II of the UIPA.[4]

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[4] OIP initially found in Opinion F17-04 that in light of the Hawaii Supreme Court's decision in De La Garza v. State of Hawaii, 129 Haw. 429, 442, 302 P.3d 697, 710 (Haw. 2013), HPA must provide an inmate,

> timely access to all of the adverse information contained in the HPA file[,] . . . 'soon enough in advance' that the inmate has a 'reasonable opportunity to prepare responses and rebuttal of inaccuracies' . . . [and] [i]n the event that

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RIGHT TO BRING SUIT

Requesters are entitled to seek assistance directly from the courts after Requesters have exhausted the administrative remedies set forth in section 92F-23, HRS. HRS §§ 92F-27(a), 92F-42(1) (2012). An action against the agency denying access must be brought within two years of the denial of access (or where applicable, receipt of a final OIP ruling). HRS § 92F-27(f).

For any lawsuit for access filed under the UIPA, Requesters must notify OIP in writing at the time the action is filed. HRS § 92F-15.3 (2012).

If the court finds that the agency knowingly or intentionally violated a provision under Part III, the personal records section of the UIPA, the agency will be liable for: (1) actual damages (but no less than $1,000); and (2) costs in bringing the action and reasonable attorney's fees. HRS § 92F-27(d). The court may also assess attorney's fees and costs against the agency when Requesters substantially prevail, or it may assess fees and costs against Requesters when it finds the charges brought against the agency were frivolous. HRS § 92F-27(e).

This opinion 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 people who requested the decision. HRS § 92F-43(b) (2012). OIP and the people 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.

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> the HPA file of the inmate includes sensitive, or confidential personal information, the inmate is entitled to disclosure of a reasonable summary thereof.

Having now been presented with additional *in camera* evidence, OIP finds that the facts in De La Garza are distinguishable from the facts in the present cases. De La Garza was decided based on due process requirements, not the UIPA's requirements, and as such it specifically applied to records in an inmate's file *prior to* an upcoming Minimum Term Hearing. By contrast, the records at issue here were created *after* the Minimum Term Hearing they related to, and OIP was not presented with evidence that they were being requested in connection with a still upcoming Minimum Term Hearing. Based upon this factual distinction, OIP believes De La Garza does not apply to the requested records here, and thus concludes that De La Garza does not affect OIP's conclusion that the requested Minimum Decision Records may be withheld under the UIPA's frustration exception.

HRS § 92F-43(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 days in accordance with section 2-73-19, HAR. This rule does not allow for extensions of time to file a reconsideration with OIP.

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

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APPROVED:

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