



DAVID Y. IGE
GOVERNOR

**STATE OF HAWAII
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: oiip@hawaii.gov
www.oiip.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 sections 92F-27.5 and 92F-42, HRS, and chapter 2-73, Hawaii Administrative Rules (HAR).

OPINION

Requester: Sharon Brooks
Agency: Maui Office of Council Services
Date: December 20, 2019
Subject: Transcript and Audio Recording of Executive Meeting
(U APPEAL 17-39)

REQUEST FOR OPINION

Requester seeks a decision as to whether the Maui Office of Council Services (OCS) properly denied Requester's request for the minutes and recording of a Maui County Council (Council) executive session under the Uniform Information Practices Act (Modified), chapter 92F, HRS (UIPA).

Unless otherwise indicated, this decision is based solely upon the facts presented in Requester's letter to OIP dated February 2, 2017, and attached materials; OCS's letter to OIP dated March 10, 2017, and attached materials; Requester's emails to OIP dated June 2 and October 9, 2017, August 15, 2018, and January 16, February 14 and 22, and April 26, 2019; Requester's letter to OIP dated June 17, 2019; Requester's emails to OIP dated September 12, 13, and 16, 2019; OCS's emails to OIP dated September 19 and 30, 2019; OCS's email to Requester dated October 1, 2019, and attached materials; Requester's emails to OIP dated October 16 and 17, 2019; OCS's emails to OIP dated October 17 and 22, 2019; and Requester's letter to OIP dated October 23, 2019.

QUESTION PRESENTED

Whether the UIPA allows OCS to avoid frustrating the purpose(s) of an executive session by withholding portions of the transcript and audio recording of the executive session during which the Council (1) discussed the possible hire of Requester and other employees, including discussion of their past performance, and (2) consulted with its attorney regarding OCS management issues. See HRS §§ 92-9(b), 92F-13(4), and 92F-22(5) (2012) (allowing an agency to withhold records protected by another law in response to either a general government record or a personal record request; and that a board may withhold executive session minutes to the extent disclosure would frustrate the purpose of the executive session).

BRIEF ANSWER

Yes, in part. Part I of chapter 92, HRS (the Sunshine Law), allows a board to hold an executive session closed to the public for a limited list of purposes. HRS §§ 92-4, -5 (2012). The minutes of such an executive session may be withheld so long as necessary to prevent frustration of the executive session, but no longer. HRS § 92-(9)(b); see also HRS §§ 92F-13(4), -22(5) (both allowing an agency to withhold information protected by statute in response to UIPA requests). Most of the discussion in the redacted portions of the transcript fell within one of two permitted executive session purposes, one allowing a closed meeting to consider the “hire, evaluation, dismissal, or discipline” of a government employee where matters affecting individual privacy are concerned (personnel-privacy purpose) and the other allowing a closed meeting for a board to consult with its attorney regarding “the board’s powers, duties, privileges, immunities, and liabilities” (attorney-consultation purpose).¹ HRS § 92-5(a)(2) and (4). However, a small portion of the redacted discussion would not frustrate the purpose(s) of the executive session if disclosed, and OCS must therefore disclose that portion to Requester. Specifically, OCS must disclose certain portions of its discussion about Requester’s employment that do not qualify for the personnel-privacy purpose, including the name and approximate salary of another employee identified in its discussion. OCS must also disclose a redacted version of the requested audio recording, redacting the same portion of the discussion as for the transcript.

FACTS

Requester sought the written transcript and audio recording of an executive session from the Council’s meeting that began at 2:00 p.m. on January 2, 2017 and continued into the early morning hours of January 3, 2017 (Meeting) (Executive Session). The item discussed during the Executive Session was listed on the

¹ The text of the personnel-privacy and attorney-consultation purposes is set out in notes 3 and 4, infra.

Meeting's agenda (Agenda) as Resolution 17-9, "APPOINTING THE STAFF OF THE OFFICE OF COUNCIL SERVICES" (Resolution). The Resolution included a list of the names of staff members proposed to be appointed for full year and (in two cases) six-month terms. Requester's name was not included in that list. Although the Resolution itself was apparently posted online and the Agenda stated that items listed therein could be viewed at the Office of the County Clerk, the Resolution was not attached to the Agenda, and the description of it in the Agenda itself did not name any of the staff members proposed for appointment.

During the public portion of the Meeting, shortly after 1:50 a.m., a councilmember proposed amending the Resolution to add Requester's name to the list of staff members to be appointed. After some discussion, and still without having voted on the motion to amend the Resolution, the Council voted to go into executive session to discuss the Resolution, announcing as its justification for doing so the personnel-privacy and attorney-consultation executive session purposes. During the Executive Session beginning at 2:04 a.m., the Council discussed Requester as well as other employees. The County Clerk, the Director of Council Services (Director), a Legislative Attorney, the Clerk to the Council, the Maui Corporation Counsel, and a Deputy Corporation Counsel, none of whom are Council members, were present for the Executive Session. The nonmembers present during the Executive Session responded to the Council's questions and requests for information during the Executive Session, often at great length. In the reconvened public meeting after the Executive Session had been concluded, at around 3:05 a.m., the Council finally voted on the motion to amend the Resolution to include Requester's name but rejected the proposed amendment. It then voted to pass the Resolution in its original form.

Requester was not at the Meeting, but heard afterward about what had transpired and submitted a written request to OCS on January 4, 2017, for:

- (1) [A] copy of the recording of the [Executive Session] relating to the appointment or employment of [Requester] as legislative counsel with [OCS]; and (2) a copy of the minutes, including the minutes in draft form, of the [Executive Session].

OCS denied Requester's request in full in a Notice to Requester dated February 1, 2017. However, on October 1, 2019, OCS sent requester an amended Notice to Requester and attached a redacted version of the transcript of the Meeting that served as minutes (Transcript), disclosing almost the entirety of the Council's discussion of Requester.

DISCUSSION

Because OCS has now disclosed a redacted version of the Transcript, the disclosed portions of the Transcript are no longer in dispute and this opinion will address only the redacted portions of the Transcript. Requester also seeks an audio recording of the Executive Session. OCS has stated that it also intends to disclose a redacted version of the audio recording of the Executive Session, but given its anticipated need to have that redaction done by a third party, it preferred to wait for OIP's opinion on this appeal before completing that redaction, which it will do in a manner consistent with OIP's opinion. OIP finds that the analysis of whether redactions are justified under the UIPA is the same for the Transcript and the audio recording in this case, so while this opinion will generally refer only to the Transcript, the same information may be properly redacted from both the Transcript and the audio recording.

Requester's appeal as submitted to OIP stated, "This is an appeal of a denial of access to a government record requested under the [UIPA.]" Requester described what occurred during meeting as she understood it, and she concluded by "requesting a determination that the requested records be disclosed to me." In other words, this appeal as submitted called for a determination of whether OCS properly withheld records from Requester under the UIPA. As such, the notice of appeal went to OCS and it was OCS that responded. Because the records at issue are the Transcript and audio recording of an executive session, this appeal does require OIP to examine some Sunshine Law issues that are relevant to disclosure of the Transcript, notably whether the Council properly held the Executive Session and whether disclosure of any part of it would frustrate its purpose. However, it would be inconsistent with OIP's own appeal rules for OIP to find a Sunshine Law violation by the Council in an appeal that the Council had not been offered the opportunity to provide its own position on. See HAR §§ 2-73-12(d) (2012) (requiring Sunshine Law appeal to identify alleged violations by a board), -13 (2012) (requiring OIP to provide agency that is the subject of an appeal with notice of the appeal and a copy of the appeal), and -14 (2012) (requiring agency that is the subject of an appeal to respond to notice by providing a position statement setting out its factual and legal arguments). While OCS and the Council may have common interests in this matter, they are not the same entity. Thus, since this appeal was filed as an appeal of a denial of access to records by OCS rather than as a Sunshine Law appeal alleging violations by the Council, with the result that notice of the appeal was provided only to OCS which responded on its own behalf to the UIPA appeal as submitted, OIP will analyze the Sunshine Law questions that may be raised by the facts of this appeal only insofar as they are relevant to a determination of whether OCS properly withheld records under the UIPA.

I. OIP Need Not Determine Whether the Records Are Personal Records

Requester asserted that the Transcript as a whole is her personal record, requested under Part III of the UIPA, and thus the potentially applicable legal bases to withhold it would be the exemptions to personal record disclosure set out in section 92F-22, HRS. OCS, by contrast, argued in its response to this appeal that no part of the Transcript is Requester's personal record, and the applicable exceptions to disclosure would instead be those for general government record requests, as set out in section 92F-13, HRS.

OIP notes that some portions of the Transcript discuss Requester at length, and others involve discussion of other topics without reference to Requester. Thus, it appears that some part of the Transcript is Requester's personal record as OIP has interpreted that term, while other portions are not. See OIP Op. Ltr. No. F13-01 at 7-16 (discussing what a personal record is and what portion of a report involving multiple topics of discussion is a requester's personal record). However, OIP does not need to make a determination here as to which portions of the Transcript are Requester's personal record. OCS's argument is that the Sunshine Law allows it to withhold the redacted portion of the Transcript, and both the UIPA's exemptions to personal record disclosure and its exceptions to general government record disclosure include a provision allowing an agency to withhold records as permitted by an applicable statute. HRS §§ 92F-13(4), -22(5).

As discussed below, if the Executive Session was properly closed to the public under the Sunshine Law, the applicable disclosure standard is the Sunshine Law's statutory standard for when executive session minutes must be disclosed. See HRS § 92-9 (allowing minutes of executive session to be withheld so long as disclosure would frustrate purpose of executive session). If the Executive Session should have been held as an open meeting, then the UIPA requires the Transcript to be made public upon request. See HRS § 92F-12(a)(15) (2012) (UIPA requires disclosure of transcript of a proceeding open to the public). Thus, whether a request for executive session minutes is made under Part II or Part III of the UIPA, the applicable standard for disclosure is the same and the questions for OIP are whether (1) the discussion reflected in the Transcript was properly held in executive session, and if so, (2) whether its disclosure would frustrate the purpose or purposes for which the executive session was held. Only if the answer to both questions is "yes" may the discussion reflected in the Transcript, or portions thereof, be withheld. See HRS §§ 92-9, 92F-12(a)(15).

II. Was the Executive Session Justified?

A. The Presence of Nonmembers Did Not Alter the Executive Character of the Meeting

Requester argued that the presence of nonmembers of the Council during the Executive Session, who she argued were not necessary to the Council's discussion, removed the executive character of the meeting and turned it into essentially a public meeting to which not everyone was invited. See OIP Op. Ltr. No. 03-12 at 5-7 (determining that the presence in executive session of nonmembers whose presence is not required for meeting's purposes may cause meeting to lose executive character and result in Sunshine Law violation). In several of its previous opinions, OIP has discussed the limits on attendance by nonmembers of a board in an executive session, and the possibility that inclusion of nonmembers without a reason for being present could cause an executive session to lose its executive character. OIP Op. Ltrs. No. 03-12, 03-17, and F19-03. For that reason, OIP has previously recommended that a board going into executive session:

- (1) make a record, when advisable, of the reason a non-board member is present in an executive meeting, preferably before the meeting; and
- (2) if there is a dispute as to whether a particular individual need attend a board meeting, [let] the matter be settled by board vote.

OIP Op. Ltr. No. 03-12 at 7. The Council did not do so in this instance; however, OIP notes that this is a recommended procedure to diminish the likelihood of disputes and not a statutory requirement for the inclusion of nonmembers in an executive session.

OIP has recognized that a board may properly have its attorney in executive session whether the executive session is convened under the attorney-consultation executive session purpose or for one of the other executive session purposes, so it is appropriate for a board's primary attorney to be in attendance whenever it is in executive session. OIP Op. Ltr. No. 03-17, cited with approval in Civil Beat Law Center for the Public Interest v. City & County of Honolulu, 144 Haw. 466, 489, 445 P.3d 47, 70 (Haw. 2019) (CBLC v. Honolulu); OIP Op. Ltr. No. F19-03 at 7. The Transcript reflects that the Corporation Counsel was also answering questions and providing legal advice at some points during the discussion. Thus, he was properly included in the executive session. With regard to the Deputy Corporation Counsel who was also present, OIP has recognized that it is appropriate for all attorneys working on a particular issue to be present in an executive session where that issue is being discussed, even when one of the attorneys is there for learning purposes or in a supervisory capacity and is not speaking during the executive session. OIP Op. Ltr. No. 03-12 at 8-9. It is not clear from the Transcript why this particular Deputy Corporation Counsel was in attendance—he may have had expertise in employment

matters, or he may just have been there for learning purposes to ensure consistency of knowledge within the office—but even without a detailed justification for his presence, OIP finds that the presence of a single Deputy Corporation Counsel in addition to the Corporation Counsel was not unreasonable or inconsistent with the executive character of the meeting.

As for non-attorneys, OIP has recognized that the executive director for an agency overseen by a board and an individual taking notes for minutes may properly be included in an executive session, as may staff members or others who are reporting information or answering questions regarding the matter under discussion. OIP Op. Ltr. No. F19-03 at 7-8. Here, the Legislative Attorney and Director were providing information relevant to the Council's discussion of the management and operation of OCS and the performance of Requester and the other employees whose possible retention was under consideration.² OIP notes Requester's assertion that the Director was new and did not know Requester's work. The Director referred in the Transcript to having "had interactions with [Requester] over the years." OIP does not need to make a determination as to the Director's familiarity with Requester's record because regardless of whether the Director had personal experience with Requester's work, the Director represented OCS at that time and as such was the appropriate person to relay any relevant information from other members of staff and to answer related questions the Council members might have as to OCS's structure or operation. See OIP Op. Ltr. No. F19-03 at 7-8 (determining that the executive director may generally be included in executive session). OIP also rejects Requester's argument that because the Legislative Attorney had been junior to her at OCS, the information he provided regarding her performance was "less than credible" such that the Council could not legitimately seek his input. The Transcript reflects that the Legislative Attorney was in fact reporting information and answering questions regarding Requester's performance during the Executive Session, and Requester's disagreement with his assessment does not make it illegitimate for the Council to have sought his input. Thus, the Director and the Legislative Attorney were properly included in the Executive Session so that the Council could hear information and ask questions relevant to the discussion.

² Requester also argued that the Director and Legislative Attorney were "conflicted" because they were given salary increases in the same meeting where they provided information and answered questions regarding Requester's performance. If Requester believes they had a conflict of interest that should have prevented them from speaking to the topic under discussion, the Maui Board of Ethics would be a more appropriate venue for such a complaint, as the Sunshine Law does not address conflict of interest questions and potential conflicts of interest are thus not a consideration when determining whether the Sunshine Law's requirements were followed.

While the role of the County Clerk and the Clerk to the Council was not specifically explained by OCS, OIP takes notice that the County Clerk's office provides clerical and logistical support to the Council. See HAR § 2-73-15(f) (2012) (stating that OIP may take notice of generally known and accepted facts). Thus, it appears that these two nonmembers were present to take minutes, advise on governing procedures as needed, and provide any other clerical and logistical support required. While the record is not clear as to which of them may have done what in the way of clerical or logistical support, OIP does not find the presence of both the County Clerk and the Clerk to the Council to be unreasonable or inconsistent with the executive character of the meeting. Thus, OIP concludes that the presence of nonmembers in the Executive Session did not cause it to lose its executive character such that it should have been opened to the general public. See OIP Op. Ltrs. No. 03-12, 03-17, and F19-03.

B. An Inadequate Agenda Description of An Item Considered in Executive Session Would Not Require Publication of the Executive Session Minutes

The Agenda item discussed during the Executive Session did not list the names of the employees included in the Resolution, and the Resolution was not an attachment filed as part of the Agenda. The list of names attached to the Resolution therefore cannot be considered part of the Agenda, and it is questionable whether the Agenda as filed was sufficiently detailed to provide adequate public notice under the Sunshine Law to allow the Council to discuss the Resolution during the Meeting in the first place. See HRS § 92-7(a) (Supp. 2018) (stating that a meeting agenda must "list[] all of the items to be considered at the forthcoming meeting"); OIP Op. Ltr. No. 07-02 at 4 (requiring an agenda to "list each item the board intends to consider with sufficient detail and specificity to allow a member of the public to understand what the board intends to consider at the meeting and to decide whether to attend and to participate through oral or written testimony.") OIP is not making a determination here as to whether the agenda description of the Resolution was in fact inadequate, but will assume *arguendo* for the purpose of this discussion that the agenda description was inadequate and thus provided insufficient public notice of the Council's discussion of the Resolution.

OIP has not previously addressed the question of whether an inadequate agenda description of an item discussed in executive session invalidates a board's decision to close its discussion of that item to the public when the requirements for holding the executive session were otherwise met and disclosure of the discussion would frustrate the statutory purpose or purposes of closing the discussion. A board's discussion of an inadequately noticed item, whether in public session or executive session, would indeed violate the Sunshine Law's notice requirement, but it does not necessarily follow that such a violation would require public disclosure of the minutes reflecting that discussion if it was otherwise properly held in executive

session. Inadequate notice of an **executive session** item, the discussion of which would not have been open to public attendance anyway, does not deprive the public of its opportunity to hear the board consider the item; rather, the primary public harm in such a case is that potentially interested members of the public were not given the opportunity to testify on that item, so a remedy for that harm would more appropriately focus on giving the public an opportunity to address the issue that was discussed, perhaps through the board's rescission and reconsideration of any action taken based on insufficient notice.

It would be inconsistent with the Sunshine Law's executive session provisions for OIP to conclude that minutes of a board's discussion in executive session of an inadequately noticed topic should automatically become public even if the minutes' disclosure would frustrate an otherwise applicable executive session purpose and the board followed the Sunshine Law's executive session provisions in voting to close the discussion to the public. See HRS §§ 92-4 (allowing executive sessions and setting out procedures therefor), -5 (enumerating the purposes for which a board may hold an executive session), and -9(b) (allowing a board to withhold executive session minutes where disclosure would defeat the lawful purpose of the executive session). Such a conclusion could require public disclosure based on an unintended flaw in a board's notice of the board's discussion with its attorney of its legal strategy in a pending litigation, or its discussion of sensitive personal information affecting an employee's performance, despite the Sunshine Law's provisions specifically allowing a board to discuss such information in a closed session. OIP therefore concludes that even assuming *arguendo* that the Resolution was not sufficiently described in the Agenda to allow the Council to consider it, such a flaw in notice would not render the Council's decision to convene the Executive Session invalid and require treating the Transcript as minutes of a public meeting.

C. The Council Had A Proper Basis to Convene the Executive Session

The Hawaii Supreme Court (Court) in CBLC v. Honolulu addressed the application and scope of both the personnel-privacy³ and the

³ Section 92-5(a)(2), HRS, the personnel-privacy purpose, allows a board to close a meeting to the public under section 92-4, HRS:

[t]o consider the hire, evaluation, dismissal, or discipline of an officer or employee or of charges brought against the officer or employee, where consideration of matters affecting privacy will be involved; provided that if the individual concerned requests an open meeting, an open meeting shall be held[.]

attorney-consultation⁴ executive session purposes, the steps to be followed in determining whether a board properly discussed an item in executive session, and the standards to apply in determining whether minutes of an executive session must be publicly disclosed. CBLC v. Honolulu, 144 Haw. 466, 445 P.3d 47 (Haw. 2019). The Court noted that a board's decision to "close a meeting to engage in deliberations without risking the invasion of fundamental privacy rights" is properly made "before such deliberations take place." CBLC v. Honolulu at 480, 445 P.3d 61 (emphasis in original). Having entered into a closed session, however, the board is obligated by the Sunshine Law to limit its discussion to topics "directly related to" its purpose for closing the meeting. Id. at 487, 445 P.3d 68, citing HRS § 92-5(b). A determination of whether a board's discussion was properly closed to the public thus requires first examining whether the topic to be discussed fell within the scope of the claimed purpose or purposes for the executive session, and then whether and to what extent the board's discussion and deliberation of that topic were "directly related to" the executive session's purpose or purposes. Id. at 486-87, 445 P.3d at 67-68; see also HRS §§ 92-4, -5.

The Court also noted that disclosure of executive session minutes is required either where the discussion reflected in those minutes should have been held in open session, or where the discussion was properly held in closed session but release of the minutes would no longer frustrate the purpose of the executive session. CBLC v. Honolulu at 489-90, 445 P.3d at 70-71. In addition, the Court distinguished the question of whether an executive session was properly convened under the Sunshine Law's personnel-privacy executive session purpose, to which the standard set out in the UIPA's privacy exception is not directly applicable, from the question of whether any part of the minutes of that executive session must later be disclosed, which is properly analyzed under both the Sunshine Law and the UIPA. Id. at 490 n.18, 445 P.3d at 71 n.18.

OIP will therefore first examine whether the Council was justified in its initial decision to convene an executive session based on its expectation that the subject matter to be discussed fell under specified executive session purposes, bearing in mind that because the Council had not yet had that discussion, it did not know exactly what would be said.

At the time the Executive Session was proposed, the Council knew it would be considering the appointment of OCS's staff, and was aware that would include

⁴ Section 92-5(a)(4), HRS, the attorney-consultation purpose, allows a board to close a meeting to the public under section 92-4, HRS:

[t]o consult with the board's attorney on questions and issues pertaining to the board's powers, duties, privileges, immunities, and liabilities[.]

consideration of two individuals who were to be offered unusually short terms, and consideration of Requester, who had not been included in the Resolution to begin with. Thus, the Council could reasonably anticipate that it would be discussing the potential hire of individual employees, and that in some instances its discussion would go into details of individual employees' performance and past evaluations that were likely to concern their individual privacy. Indeed, OIP finds based on its *in camera* examination of the Transcript that the discussion as a whole largely involved both evaluation of and discussion of the possible hire of individuals, and that individual privacy was concerned.⁵

Given the circumstances leading up to the Resolution, as discussed in the Transcript, the Council also could reasonably anticipate that it would have questions for its attorney falling within the attorney-consultation purpose. In CBLC v. Honolulu, the Court discussed the scope of the attorney-consultation purpose, observing that the attorney-consultation purpose is narrower than the attorney-client privilege, being limited to "questions and issues pertaining to the board's powers, duties, privileges, immunities, and liabilities." CBLC v. Honolulu at 488, 445 P.3d at 69, quoting HRS § 92-5(a)(4). While a board may consult with its attorney regarding the legal ramifications of proposed courses of conduct, as well as to ensure compliance with the Sunshine Law, "an attorney is not a talisman, and consultations in executive sessions must be purposeful and unclouded by pretext." Id. at 489, 445 P.3d at 70. OIP's *in camera* review of the Transcript shows that the Council did indeed have questions for its attorney regarding its powers, duties, and liabilities.

Following the standard set out by the Court in CBLC v. Honolulu, OIP concludes that the Council had a proper basis for invoking the personnel-privacy and attorney-consultation purposes to convene an Executive Session "to engage in deliberations without risking the invasion of fundamental privacy rights" and to avoid risking disclosure of its anticipated consultation with its attorney regarding its powers, duties, and liabilities.

III. Would Disclosure of the Redacted Portions of the Transcript Frustrate the Purpose of the Executive Session?

Having determined that the Executive Session was properly convened, the next questions are (1) to what extent the discussions therein fell within the scope of the claimed executive session purposes, and (2) whether any discussion that was within the scope of the claimed purpose may nonetheless be disclosed on the basis

⁵ OIP will address below the question of whether Requester had a meaningful opportunity to request that any discussion of her be done publicly. See HRS § 92-5(a)(2) (stating that the personnel-privacy purpose requires that "if the individual concerned requests an open meeting, an open meeting shall be held.")

that its disclosure would no longer frustrate the purpose of the executive session. While these are distinct questions from a Sunshine Law perspective, when examining the more limited question of whether minutes must be disclosed under the UIPA, these questions may as a practical matter be combined together to ask simply what portion, if any, of the discussion in the Transcript may be withheld because its disclosure would frustrate the purpose of the Executive Session.⁶

A. Discussion of Requester

OCS has now provided Requester with access to almost all the portions of the Transcript in which the Council considered the question of her hire, so the question of whether disclosure of that portion of the discussion would frustrate the purpose of the Executive Session is no longer at issue in this appeal. However, OCS did redact from the Council's consideration of Requester's hire a two-line reference to another employee's approximate salary on page 6 of the Transcript, and a reference back to Requester during the Council's consideration of the hire of other employees, discussed in subsection B below.

The generally applicable executive session purpose for the Council's consideration of Requester's and other employees' hire was the personnel-privacy purpose. See HRS § 92-5(a)(2). While the discussion of Requester clearly involved consideration of matters affecting privacy and thus fell within the personnel-privacy purpose in that sense, the personnel-privacy purpose specifically provides that where the individual whose privacy is concerned requests an open meeting, an open meeting shall be held. Id. In other words, if the individual being discussed waives his or her right to privacy in the discussion, a board cannot invoke that individual's privacy as its basis for closing the discussion to the public. Here, Requester argued that she was unaware that she would be discussed during the Executive Session and would have requested that the discussion be held in an open meeting if she had known.

While the personnel-privacy purpose does not explicitly require a board to notify the individual whose privacy is concerned when the board anticipates discussing that individual's hire, fire, discipline, or dismissal in executive session, some form of notice to the individual is implicit in the statutory provision giving the individual the opportunity to waive his or her privacy and thus prevent the board from invoking the personnel-privacy purpose as a basis for holding an executive session. An individual with no knowledge that he or she will be the subject of discussion cannot meaningfully choose to waive his or her privacy interest in that discussion. While OIP does not interpret the personnel-privacy purpose to require

⁶ Disclosure of board discussion that was not within the scope of a claimed executive session purpose in the first place obviously would not frustrate the purpose of the executive session.

either explicit notice to the individual concerned or naming the specific individual concerned in a meeting agenda, OIP does interpret it to generally require a board to include an agenda description sufficient to put the individual on notice that he or she is likely to be discussed during a meeting. Alternatively, if the nature of the topic makes such notice impracticable (for instance, where an agenda includes a description of alleged misconduct by a government employee but leaves the employee's identity out to protect his or her privacy), then a board must directly notify or otherwise alert the individual to the possibility that he or she will be discussed in executive session under the personnel-privacy purpose.

As discussed above, the Agenda did not list any names or position descriptions or titles for the employees who would be considered under the Resolution. Further, Requester was aware that the Resolution itself, which did list the names of the employees proposed for appointment, did not include her name. Since Requester was not only not listed on the agenda, but also specifically excluded from the list of names attached to the Resolution as posted online, she had no reason to expect that she would be discussed at the meeting, and thus had no opportunity to waive her privacy interest and request that the discussion be done publicly. Given Requester's appeal in this matter, OIP accepts her assertion that she would have objected to the Council's discussion of her performance in closed session, had she had the opportunity to do so. OIP therefore concludes that the personnel-privacy executive session purpose as applied specifically to the protection of Requester's privacy is not a valid basis for withholding relevant portions of the executive session minutes.

The only portion of the Council's consideration of Requester specifically that OCS is still withholding, on page 6 of the Transcript, is a two-line reference to another employee's name and approximate salary. The Council did not otherwise ask questions about that employee or discuss that employee's hire and did not touch on the employee's performance at all, so OIP finds that the reference was not part of the Council's consideration of that employee's hire but instead was part of its discussion of Requester's possible hire, and specifically of Requester's salary.

As the Court noted in CBLC v. Honolulu,

For "matters affecting privacy" to be involved in a personnel discussion, HRS § 92-5(a)(2), the person at issue must have a "legitimate expectation of privacy" in the information. [Citation omitted.]

People have a legitimate expectation of privacy in "highly personal and intimate" information. [Citations omitted.] Generally, "highly personal and intimate" information may include "medical, financial, educational, or employment records." [Citations omitted.]

CBLC v. Honolulu at 480, 445 P.3d at 61. The Court further observed that while the Sunshine Law and the UIPA “share a similar policy intent, they are different statutes” and thus the analysis of the privacy interest at stake set out by the UIPA’s privacy exception to government record disclosure is not directly applicable to determining whether matters affecting privacy are concerned under the Sunshine Law’s personnel-privacy purpose. Id. at 480, 445 P.3 at 61. Nonetheless, “[r]easonable expectations of privacy will also be affected by existing laws and regulations concerning the matters at issue,” including the “UIPA, which provides that a person does not have a significant privacy interest in ‘[i]nformation disclosed under section 92F-12(a)(14).’” Id. at 481, 445 P.3d at 62.

Section 92F-12(a)(14), HRS, makes government employee names and compensation public, either the exact salary for exempt or excluded employees or the salary range for civil service employees. HRS § 92F-12(a)(14); see also, e.g., OIP Op. Ltr. No. 93-10 (discussing legislative history and intent regarding public employee salary disclosure). OCS has not provided arguments or evidence regarding the exempt or civil service status of the employee whose salary was referenced as being approximately around a two-thousand-dollar range, and the redacted salary reference was in any case not a precise reference to the employee’s actual salary or salary range, but rather an approximation of it to around a narrow range. Even if what was mentioned had been the exact salary of a civil service employee, OIP notes that section 92F-12(a)(14), HRS, sets a floor rather than a ceiling for disclosure of government employee salaries, and the public interest in disclosure may in some instances outweigh an employee’s privacy interest in an exact salary. See OIP Op. Ltr. No. 03-16 (finding that the public disclosure interest outweighed University of Hawaii football coach’s privacy interest in his contract, including his annual salary). More to the point, OIP has also previously concluded that it does not violate the UIPA for a county to disclose exact salaries rather than salary ranges of civil service employees, nor does such a disclosure violate Hawaii’s constitutional right to privacy. OIP Op. Ltr. No. 05-03 at 6-7, citing Nakano v. Matayoshi, 68 Haw. 140, 149, 706 P.2d 814, 819 (1985) (holding that government employees have a reduced expectation of privacy in their salaries, which are of legitimate public concern, and that disclosure of exact salaries does not violate the constitutional right of privacy).

As previously discussed, the personnel-privacy purpose cannot be applied to the Council’s consideration of Requester, and OIP does not believe the reference to another employee’s name and approximate salary, which was raised only to illustrate a point in the Council’s consideration of Requester’s hire, could be considered a discussion of the other employee such that those two lines in the Transcript fell within the personnel-privacy purpose as applied to that employee. Moreover, given the approximate and inexact nature of the reference together with the lack of constitutional privacy protection for the name and exact salary of a

government employee, even if those two lines did constitute a discussion of the other employee potentially falling within the personnel-privacy purpose, the reference to the employee's approximate salary was not "highly personal and intimate" information subject to protection under the personnel-privacy purpose. Because disclosure would not frustrate any executive session purpose, OCS must disclose the two-line reference to another employee's name and salary to Requester. See HRS § 92-9(b).

B. Discussion of Other Employees

OCS completely redacted the portion of the Transcript reflecting the Council's discussion of the potential hire of two other employees, running from pages 13 to 19. These two employees were included in the list of names in the Resolution. Although the Resolution was not incorporated into the Agenda as discussed previously, OIP finds that since the Resolution was posted on a County website the other two employees considered during the Executive Session did have enough notice that they might be discussed during the Executive Session to give them a meaningful opportunity to waive their privacy and request that any discussion of them be held in a public meeting, should they have wished to do so. They did not do so.

OIP's *in camera* review shows that the discussion of these employees' performance involved matters concerning individual privacy and thus was properly done in closed session under the personnel privacy purpose. Based on OIP's *in camera* review, OIP finds that the employees continue to retain a privacy interest⁷ in the Council's discussion of their hire, which also involved discussion of their past job performance. Thus, OIP concludes that the personnel-privacy purpose of the Executive Session as applied to these employees would be frustrated by disclosure of the Council's discussion of them, so OCS properly withheld that portion of the Transcript.

⁷ Requester argued that this portion of the Transcript was the personal record of the individuals discussed therein and as those individuals were friends of hers, she believed "each would like to know the reasons for their truncated appointments." As OIP discussed in section I above, the standard for disclosure here is the same for either a personal record request under Part III of the UIPA or a general government record request under Part II of the UIPA, because in both cases the Sunshine Law provision regarding disclosure of executive session minutes is the controlling law. HRS §§ 92-9, 92F-13(4), 92F-22(5). Even if an employee had a right to obtain as a personal record the minutes of an executive session in which he or she was properly discussed under the personnel-privacy purpose after declining to request an open meeting, in the absence of a written authorization for Requester to act as those employees' representative, Requester could not be considered to be acting on their behalf in making her request.

At one point during its discussion of another employee's hire, though, the Council digressed from that topic and returned briefly to the topic of Requester's possible hire. OIP finds based on its *in camera* review that the Council's initial references to Requester were too intertwined with its discussion of the other employee to allow disclosure of a redacted version, but because of the length of the digression there is a portion of the Transcript that could be disclosed to Requester without frustrating the personnel-privacy purpose as applied to the other employee. Specifically, from the third word of the Legislative Attorney's statement near the bottom of page 16 through the Council Chair's statement on page 17, OIP finds that the Transcript could be disclosed without revealing anything affecting the privacy of an employee other than Requester and thus frustrating the personnel-privacy purpose for holding the Executive Session. As this portion of the Transcript also does not involve consultation with the Council's attorney whose disclosure could frustrate the attorney-consultation purpose, OIP further finds that it must be disclosed to Requester. See HRS § 92-9(b) (stating that minutes of executive session "may be withheld so long as their publication would defeat the lawful purpose of the executive meeting, but no longer.")

C. Discussion of Internal Management Issues and Legal Implications Thereof

The Council discussed internal management issues and their legal implications from approximately pages 9 through 13 of the Transcript. This discussion contained only occasional references to Requester or other named employees, as its focus was on systemic issues and included legal questions to and advice from its attorney about the issues discussed. OCS redacted perhaps two-thirds of this discussion, intermittently from the last line of page 8 and fully from the second half of page 11. OIP finds that the personnel-privacy purpose did not apply to most of this discussion because its focus was on OCS's management at a systemic level and thus this portion of the Executive Session did not involve discussion of matters affecting individual privacy. However, OCS also raised the attorney-consultation purpose as a basis for its redactions to the Transcript, and this is the portion of the Transcript to which that purpose is potentially applicable.

As previously discussed, the attorney-consultation purpose, which is narrower than the attorney-client privilege, applies to a board's consultation with its attorney on "questions and issues pertaining to the board's powers, duties, privileges, immunities, and liabilities." CBLC v. Honolulu at 488, 445 P.3d at 69, quoting HRS § 92-5(a)(4). OIP finds based on its *in camera* review of the Transcript that the redacted discussion involves factual statements about past management practices intertwined with questions and responses from both the Corporation Counsel and the Legislative Attorney regarding both the legal implications of those past practices and the Council's powers and duties with respect to ongoing and future practices. OIP therefore concludes that the redacted discussion fell within

attorney-consultation purpose, and because disclosure at this time would still frustrate that purpose, OCS properly withheld the redacted portions of the Transcript.

RIGHT TO BRING SUIT

Requester is entitled to seek assistance directly from the courts after Requester has 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, Requester 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 in no case 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 a requester substantially prevails, or it may assess fees and costs against Requester 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 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-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 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.

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



Jennifer Z. Brooks
Staff Attorney

APPROVED:



Cheryl Kakazu Park
Director