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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: Haley Parker
Agency: Employees' Retirement System
Date: June 24, 2021
Subject: ERS Investment Report Including Total Distribution Data for Private Equity Funds (U APPEAL 19-11)

REQUEST FOR OPINION

Requester seeks a decision as to whether the State of Hawaii Employees' Retirement System (ERS) properly denied Requester's request under the UIPA for the total distribution data for private equity funds as compiled by consultant Hamilton Lane Advisors (Consultant) and listed in an investment report to ERS dated March 31, 2018 (Consultant Report).

Unless otherwise indicated, this decision is based solely upon the facts presented in Requester's email correspondence to OIP dated November 27, 2018, and a letter to OIP dated January 11, 2019, from Ivan Torigoe, Deputy Attorney General, on behalf of ERS, and attached materials (ERS Response).

QUESTION PRESENTED

May ERS withhold total distribution data from public disclosure under the UIPA on the basis that it is confidential commercial and financial information whose disclosure would frustrate a legitimate government function?

BRIEF ANSWER

Yes. ERS established that the Consultant Report and similar reports are financial information and have commercial value. ERS further established that disclosure of the total distribution data would cause substantial competitive harm to Consultant and would impair ERS's own ability to obtain such information in the future. OIP therefore concludes that the requested total distribution data is confidential commercial and financial information.

In response to Requester's argument that ERS's past disclosure of total distribution data for prior years showed that no real harm would result from disclosure, ERS also provided evidence showing that its prior disclosures had resulted in its partial or complete exclusion from some investment opportunities, thus frustrating its legitimate function of investing the funds entrusted to it. Based on that, OIP further concluded that ERS had established that disclosure would in fact frustrate a legitimate government function, so ERS properly withheld the information under section 92F-13(3), HRS. HRS § 92F-13(3) (2012).

FACTS

Consultant provided to ERS, and ERS posted on its website, a public version of the Consultant Report that did not include the column of total distribution data found in the full Consultant report. Requester then asked ERS to disclose the total distribution data for private equity funds ERS invests in. ERS denied her request, and Requester appealed that denial to OIP. In both her record request to ERS and her appeal to OIP, Requester asserted that total distribution data had previously been published on the ERS website since 2012 and had been provided to her business, upon request, since 2011.

ERS provides retirement allowances and other benefits for State and county public employees. Funding for benefit payments comes from employer and member contributions and ERS's investments, all of which are deposited into the Pension Accumulation Fund. See HRS § 88-114 (2012) (providing that "the pension accumulation fund shall be the fund in which shall be accumulated all contributions made by the State and county and all income from investments and from which shall be paid all benefits"). The ERS's Board of Trustees "shall be trustees of the several funds of the system and may invest and reinvest such funds as authorized by this part and by law from time to time provided."¹ HRS § 88-110 (2012).

¹ As the ERS Response noted, ERS may, through its executive director, appoint a chief investment officer and one or more investment officers, under the direction of the chief investment officer. HRS §88-29, -29.5 (Supp. 2020). These

According to the ERS Response, “[t]he ERS investment portfolio is valued at over \$16.4 billion as of June 30, 2019 and is managed by over 130 investment firms in a combination of separate and commingled accounts.” ERS’s investments include private equity funds that are not required to be registered with the Securities and Exchange Commission (SEC) and therefore are not subject to the SEC’s public disclosure requirements. ERS’s Response quoted the United States Securities and Exchange Commission (“SEC”)’s description of private equity funds as follows:

When you invest in a private equity fund, you are investing in a fund managed by a private equity firm—the *adviser*. Similar to a mutual fund or hedge fund, a private equity fund is a pooled investment vehicle where the adviser pools together the money invested in the fund by all the investors and uses that money to make investments on behalf of the fund[.]

A typical investment strategy undertaken by private equity funds is to take a controlling interest in an operating company or business—the *portfolio company*—and engage actively in the management and direction of the company or business in order to increase its value. Other private equity funds may specialize in making minority investments in fast-growing companies or startups.

ERS Response, quoting Private Equity Funds, U.S. Securities and Exchange Commission, <https://www.investor.gov/introduction-investing/basics/investment-products/private-equity-funds> (last visited June 18, 2021). Private equity funds are not subject to the same disclosure

investment professionals are the core of the ERS Investment Office. The Investment Office’s mission statement is:

The Investment Office of the Employees’ Retirement System of the State of Hawai’i supports the overall goals and objectives of the ERS, particularly through investment portfolio design and management and by gathering investment intelligence on behalf of the ERS Board of Trustees. The Investment Office analyzes and recommends financial investment opportunities for the sole benefit of the ERS members and beneficiaries.

Program, Employees’ Retirement System, <http://ers.ehawaii.gov/investments/program> (last visited May 21, 2021).

requirements as publicly traded funds, and place a premium on maintaining confidentiality:

Unlike the public markets, the Private Equity market has historically operated under a veil of privacy; where making certain information public is viewed by the practitioners as a detriment. Private Equity managers view certain aspects of their business as proprietary and central to their ability to execute and generate attractive returns. As such, these managers will go to great lengths to maintain confidentiality, which they view as a competitive advantage. A manager may opt to deny a new Limited Partner ("LP"), or even remove an existing LP (an investor in previous funds) from their investor base rather than run the risk of having that LP publicly disclose certain fund information, which may include track record and almost always includes underlying portfolio company details. Some fund managers object to the disclosure of fund-level performance information, either outright or by disclosing of sufficient data points enabling their track record to be calculated by a third-party source. Common measurements of private equity performance are internal rate of return (IRR), total value multiple (TVM), and distributions to paid in ratio (DPI). [ERS] formerly disclosed total contributions, distributions, and market value in their voluntary reporting, which enables third party providers to calculate a fund manager's TVM and DPI. The disclosure of top line cash flows and market values may be viewed as problematic for certain managers and could lead to the exclusion of [ERS] from investing in their funds.

Declaration of Paul Yett, Hamilton Lane Advisors, at paragraph 6.

ERS asserted based on public statements by California officials that California's pension fund has been denied multiple opportunities to invest because of a state law requiring California public pension funds to fully disclose all fees associated with their private equity funds. Further, ERS itself was on at least one occasion denied access to a private equity fund it sought to invest in "because that fund's managers have set limits on disclosure of fund data, which ERS could not promise to honor, due to the potential UIPA disclosure of performance data[.]" ERS Response at 10.

ERS has also found itself unable to invest as much as it wished because a fund was over-subscribed, possibly due to ERS's prior publication of the fund's strong performance. According to ERS, the competition for investment opportunities is such that even for prior investors, a fund may decline to allow a further investment, or limit the amount it will allow to be invested, because

there are more would-be investors than the fund can accommodate. In this case, ERS had invested previously in other private real estate funds from the same manager. After ERS published information similar to that sought herein that showed those funds' high internal rate of return, the new similar fund ERS wished to invest in was oversubscribed and ERS was only able to invest half its desired amount.

ERS also asserted that the Consultant Report, along with other records, is the result of work for which it pays Consultant and other consultants sums of over a million dollars each over a five year contract. According to ERS's contract with Consultant, as quoted in the ERS Response,

CONTRACTOR's reports relating to potential or actual investments are copyrighted and contain proprietary and confidential information prepared by CONTRACTOR for multiple clients. Therefore, such reports remain the property of CONTRACTOR.

ERS Response at 6. Thus, in addition to the money ERS itself spends to obtain the information at issue here and similar information in related reports, Consultant also lays claim to a proprietary interest in the information as being a product it sells to multiple clients.

DISCUSSION

ERS asserts that the redacted information at issue in this appeal is confidential commercial or financial information (CCFI), and as such may be withheld under the UIPA's exception for information whose disclosure would frustrate a legitimate government function. See HRS § 92F-13(3) (2012). OIP has an existing analytical framework, set out in numerous opinions beginning with OIP Opinion Letter Number 89-05 and most recently in OIP Opinion Letter Number F17-02, through which it assesses whether information constitutes CCFI whose disclosure would frustrate a legitimate government function.

To find that commercial or financial information is "confidential or privileged," OIP looks to whether its disclosure would either likely (1) impair the government's future ability to obtain necessary information; or (2) substantially harm the competitive position of the person who provided the information. [Citation omitted.]

OIP Op. Ltr. No. F17-02 at 7. However, in response to the United States Supreme Court's 2019 decision in Food Marketing Institute v. Argus Leader Media, 139 S. Ct. 2356 (Argus Leader), OIP will discuss the origins of its

existing CCFI analysis and what effect, if any, Argus Leader may have on it before proceeding to analyze whether the information at issue here may be withheld under the UIPA's frustration exception as CCFI.

I. How to Determine When CCFI May Be Withheld Under UIPA

A. Relationship Between CCFI Analysis Under UIPA and Under FOIA

The UIPA itself does not directly refer to CCFI. Instead, section 92F-13(3), HRS, the UIPA's frustration exception, 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." This exception was intended to encompass many different types of records and information, and CCFI was one of nine types of information specifically listed in the UIPA's legislative history as "examples of records which need not be disclosed if disclosure would frustrate a legitimate government function." Sen. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess, S.J. 1093, 1095 (SSCR 2580). The legislative intent for CCFI to be protected under the UIPA's frustration exception was thus clear, but the UIPA itself provided no statutory framework for determining when information qualified to be withheld on that basis beyond the general concept that its disclosure would frustrate a legitimate government function.

When first presented with the question of whether information claimed to be CCFI could be withheld under the UIPA's frustration exception, OIP looked for guidance to the Uniform Information Practices Code (Model Code),² which was drafted in 1980 by the National Conference of Commissioners on Uniform State Laws, because the UIPA's legislative history had expressed an intent for the Model Code commentary "where appropriate" to "guide the interpretation of similar [UIPA] provisions." H. Stand. Comm. Rep. No. 342-88, 14th Leg., 1988 Reg. Sess, H.J. 969, 972; see also OIP Op. Ltr. No. 89-05 at 10-19 (discussing UIPA's legislative history and interpretation and ultimately adopting CCFI analysis). The relevant Model Code commentary set out tests for determining whether commercial and financial information also qualified as confidential, which resembled those set forth in the then leading federal case, National Parks & Conservation Ass'n v. Morton ("National Parks I"), 498 F.2d 765 (D.C. Cir. 1974), and subsequent federal case law expanding upon it, for determining whether federal records constituted "commercial or financial information obtained from a person and privileged or confidential" under exemption (b)(4) of the federal Freedom of Information Act

² The Model Code lists "confidential commercial and financial information obtained, upon request, from a person" in the section entitled, "Information Not Subject to Duty of Disclosure." Model Code § 2-103(a)(9) at 15.

(FOIA).” 5 U.S.C. § 552(b)(4) (2020). Based upon that commentary and the similar analytical structure in federal caselaw, OIP ultimately adopted the CCFI analysis it has used since that time from the FOIA-based CCFI analysis in National Parks I and subsequent case law expanding on it.

Although OIP’s analysis of whether information is CCFI and as such may be withheld under the UIPA’s frustration exception was originally adopted from federal caselaw interpreting the related FOIA exemption, it must be remembered that OIP’s opinions interpret and apply the UIPA, not FOIA. For this reason OIP has focused on following and developing its own precedents in the years since its early CCFI opinions, rather than seeking to hew to FOIA caselaw and track its further developments regarding CCFI. OIP has notably departed from the FOIA-based analysis of CCFI when it gives a result that is at odds with the actual language of the UIPA. As OIP stated in a recent opinion:

While OIP’s analysis is in many respects similar to that of federal courts interpreting [FOIA], it is not identical. [Citation omitted.] As OIP wrote in [OIP Opinion Letter Number 98-2],

[n]ote that under FOIA, once commercial or financial information is found to be confidential or privileged, the agency is not required to disclose it. Under the UIPA, however, Hawaii state and county agencies must go one additional step and show that this confidential commercial or financial information, if disclosed, would also frustrate an agency’s legitimate government function. OIP Op. Ltr. No. 98-2 at 10.

OIP Op. Ltr. No. F17-02 at 7.

B. Argus Leader and CCFI Analysis Under UIPA

1. Argus Leader Changed FOIA Interpretation of CCFI

Nonetheless, OIP takes note of a significant change in the federal law in this area. In Argus Leader, issued in 2019, the Supreme Court of the United States criticized and rejected the tests set forth in National Parks I for determining CCFI. Noting that FOIA does not provide a definition of the term “confidential,” the court found that “[a]s usual [it must] ask what [the] term’s ‘ordinary, contemporary, common meaning’ was when Congress enacted FOIA in 1966.” Id. at 139 S. Ct. 2362. The court then ruled:

At least where commercial or financial information is both customarily and actually treated as private by its owner and provided to the

government under an assurance of privacy, the information is “confidential” within the meaning of [FOIA] Exemption 4.

139 S. Ct. at 2363. In other words, the court rejected the existing analysis for determining when commercial or financial information is confidential for the purpose of the FOIA exemption in favor of a plain-language reading of the relevant FOIA statutory language, thus effectively expanding the applicability of the exemption to cover all commercial and financial information that its owner considered and treated as private. The National Parks I line of cases that was the original basis for OIP’s existing analysis used to determine whether disclosure of such information would frustrate a legitimate government function for the purpose of the UIPA is no longer the operative model for the purpose of FOIA.

Argus Leader is specifically applicable to interpretation of FOIA, not the UIPA, so its analysis is not binding as applied to a state open record law such as the UIPA. OIP has previously considered FOIA case law as persuasive in interpreting the UIPA, however, and as discussed above adopted its existing analytical framework for CCFI from the same line of FOIA caselaw that Argus Leader has now rejected. OIP will therefore consider, *sua sponte*, (1) whether reconsideration of its existing precedent is appropriate and (2) if so, whether to keep its existing precedent or follow the new FOIA analysis for CCFI set forth in Argus Leader. See HAR § 2-73-19(c) (2012) (allowing OIP to reconsider precedents on its own initiative).

2. Standard for Reconsideration of Precedents

OIP’s rules provide that:

Reconsideration of either a final decision or of a precedent shall be based upon one or more of the following:

- (1) A change in the law;
- (2) A change in the facts; or
- (3) Other compelling circumstances.

HAR § 2-73-19(d) (2012). In this case, the rejection in Argus Leader of the line of federal caselaw OIP relied upon as persuasive in adopting its own analysis does constitute a significant change in the law in this area, even if it is not directly binding for the purpose of UIPA analysis, so OIP will reconsider its existing precedents setting out an analytical framework for CCFI under the UIPA and determine whether that framework should be modified in light of Argus Leader.

3. Which Analysis Better Assesses Frustration

As discussed above, the UIPA's frustration exception is not the same as FOIA's CCFI exemption, which Argus Leader was interpreting. Where FOIA specifically exempts "trade secrets and commercial or financial information obtained from a person and privileged or confidential," the UIPA's exception applies to "[g]overnment records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function" and even the basic intent that the exception should be applied to CCFI is set out in legislative history rather than the statute itself. 5 U.S.C. § 552(b)(4); HRS § 93F-13(3). The statutory wording is very different, because the UIPA's frustration exception is an umbrella concept that the legislative history shows was intended to cover many types of information that in FOIA were given specific exemptions. See SSCR 2580 (setting out examples of types of information that may fall under frustration exception). Rather than setting out specific tests for each type of information or even creating an exclusive statutory list of types of information that might be covered, the UIPA focused on the common thread across these various types of information, that disclosure of the information would frustrate a legitimate government function. Thus, applicability of the UIPA's frustration exception ultimately turns on the essential policy question of whether disclosure would frustrate a legitimate government function, rather than the statutory wording of a particular exception tailored to that type of information.

OIP also notes that insofar as the legislative intent was that OIP and the courts should look for guidance in interpreting the UIPA to the Model Code and its commentary, and ultimately caselaw regarding the FOIA exceptions the Model Code itself drew from, that intent was based on an understanding of how FOIA caselaw treated CCFI and other types of records in 1988 when the UIPA was passed. At that time, the National Parks I line of cases had been the standing model for interpreting CCFI for over a decade. Thus, while OIP could reasonably infer a legislative intent to look to the National Parks I line of cases for guidance when deciding how to analyze CCFI under the UIPA, OIP hesitates to assume a further legislative intent that interpretation of the UIPA should be changed as necessary to follow federal FOIA caselaw through all future changes to FOIA or changes in FOIA interpretation regardless of whether the relevant portion of the UIPA had also changed.

In Peer News LLC v. City and County of Honolulu, 143 Haw. 472, 431 P.3d 1245 (2018) (Peer News), the Hawaii Supreme Court's majority opinion provided guidance as to the application of the frustration exception and used as a starting point the examples found in the UIPA's legislative history. See OIP Op. Ltr. No. F19-05 (explaining the Peer News majority and dissenting opinions). The Court stated, "Although it is not necessary that a record fall within or be analogous to one of the enumerated categories for it to be shielded from disclosure under HRS § 92F-

13(3), the list and text of the Senate Standing Committee report provides guidance as to the provision's operation." Peer News at 143 Haw. 486, 431 P.3d 1259. The Court went on to note that even the expressly enumerated categories of records in SSCR 2580 are not automatically exempt from disclosure, as the frustration exception requires "an individualized determination that disclosure of the particular record or portion thereof would frustrate a legitimate government function." Id. at 143 Haw. 487, 431 P. 3d 1260. While the fact that a record falls into one of the listed categories "may be instructive, an agency must nonetheless demonstrate a connection between disclosure of the specific record and the likely frustration of a legitimate government function, including by clearly describing the particular frustration and providing concrete information indicating that the identified outcome is the likely result of disclosure." Id. OIP Opinion Letter Number 98-2, as discussed above, also established that under the UIPA even when an agency has established that information qualifies as CCFI, it must still establish that its disclosure would frustrate a legitimate government function to be able to withhold it under the UIPA's frustration exception. OIP Op. Ltr. No. 98-2 at 10.

Because the UIPA's frustration exception ultimately requires an agency to establish that disclosure would cause the frustration of a legitimate government function rather than simply establishing that the information meets the plain language of a FOIA statutory provision that doesn't exist in the UIPA, OIP concludes that the Argus Leader approach, being based on a plain-language reading of a FOIA exemption with no direct UIPA counterpart, is an unsuitable analytical approach to determine when disclosure of CCFI would frustrate an agency's legitimate function for the purpose of the UIPA. The Argus Leader approach would inquire only whether commercial and financial information had been treated as private by the person who provided it to the agency, which would in many cases be inadequate to establish that disclosure of the information would result in frustration of a legitimate government function. OIP further concludes that the analysis set out in OIP's previous CCFI opinions, most recently in OIP Opinion Letter Number F17-02, does a better job of determining whether a legitimate governmental function would actually be frustrated by disclosure of commercial and financial information because that analysis assesses whether disclosure would impair the agency's ability to obtain necessary information in the future, thus frustrating the function for which the agency collected that information, or substantially harm the submitter's competitive position, thus frustrating the general government function of maintaining a fair business environment in the state. Further, OIP has emphasized in its application of this analysis that even information apparently qualifying as CCFI does not automatically fall under the frustration exception, because the analysis is always subject to the caveat that the agency must actually assert that disclosure of that information would in fact frustrate a legitimate government function in addition to providing the necessary factual information to establish such frustration. Thus, OIP will decline to modify the approach it has followed in its prior CCFI opinions, and instead will continue to

follow that approach as being more consistent with the UIPA's frustration exception than the "not public" test Argus Leader set out for FOIA's CCFI exemption.

C. CCFI Analysis Applied to Total Distribution Data

ERS asserts that the total distribution data is both commercial and financial information because it is:

(1) information in which ERS' investment consultants have a commercial interest (their stock in trade) (2) information which relates to, or deals with commerce (investment intelligence); and (3) all about financial investments; and (4) sold as a commodity, with intrinsic value.

ERS Response at 14. ERS further asserted that the total distribution data is confidential because Consultant does not disclose the total distribution data that it compiles about private equity funds except to its paying clients, ERS contractually agreed to protect Consultant's confidential information, and disclosure would both impair ERS's ability to enter into future contracts with investment consultants to obtain comparable information, and cause substantial competitive harm to Consultant by allowing Requester and others to obtain its work product for free instead of purchasing it from Consultant.³

ERS has factually established that the Consultant Report and similar reports have commercial value, as evidenced both by the money ERS itself has spent to obtain them and the fact that Consultant sells similar reports, using the same work product, to other clients. OIP's *in camera* review of the redacted total distribution data further indicates that it is also financial information.

OIP finds that ERS has provided sufficient factual evidence to show that disclosure of the total distribution data would cause substantial competitive harm to Consultant, because such disclosure would indeed allow Consultant's competitors to obtain its work product at no cost and resell it to others, thus giving those competitors an unfair advantage in what is clearly a competitive marketplace. OIP further finds that these same facts support ERS's contention that its ability to

³ ERS also argued that the total distribution data qualifies as a trade secret of Consultant's. OIP further takes note that H.B. 930, H.D. 1, S.D. 2, C.D. 1, passed out by the 2021 Legislature and currently awaiting the Governor's signature, would make information of the sort at issue here confidential. While both the pending bill and the trade secret argument could provide additional bases for withholding, OIP does not need to consider the potential retroactive effect of H.B. 930, H.D. 1, S.D. 2, C.D. 1 once signed, or whether the total distribution data qualifies as Consultant's trade secret, because OIP's decision herein already allows ERS to withhold the total distribution data as CCFI whose disclosure would frustrate a legitimate government function.

obtain such information in the future would be impaired, because Consultant would be reluctant to enter into future contracts with a client who would be required to disclose the same information Consultant relies on selling to other clients and that Consultant sought to protect via contract. OIP therefore finds that ERS has met its burden to establish that the total distribution data is CCFI.

Requester argued that ERS had previously disclosed the total distribution data for prior years both on its website and in response to public requests. Requester also argued that similar information is still disclosed by other (unspecified) agencies and in some instances by the (also unspecified) funds themselves. For these reasons, Requester questioned whether disclosure of the total distribution data would in fact frustrate a legitimate government function.

ERS's disclosure of the type of information at issue here in prior years does not waive ERS's ability to deny access to it for the currently requested year, but it does indeed raise a question as to whether disclosure truly would frustrate ERS's legitimate functions if it has not done so in the past. As discussed previously, to withhold CCFI under the UIPA's frustration exception, an agency must establish that its disclosure would in fact frustrate a legitimate government function. Even if information otherwise qualifies as CCFI based on OIP's analysis, if the evidence shows its disclosure would not actually frustrate a legitimate government function, the information cannot be withheld. E.g. OIP Op. Ltr. No. 98-2. However, in response to Requester's argument that the past disclosures show disclosure of such information is harmless, ERS has both argued and provided evidence to support that its past disclosures of similar information did indeed result in a frustration of ERS's primary function of investing the funds entrusted to it as profitably as it can safely achieve. Specifically, ERS pointed to instances where it was fully or partially excluded from participation in desired funds after its prior disclosures of information similar to that at issue here. ERS further pointed to public statements by California officials that California's pension fund has been denied multiple opportunities to invest because of a state law requiring California public pension funds to fully disclose all fees associated with their private equity funds. Based on this evidence, OIP finds that disclosure of the total distribution data would further impair ERS's ability to access the investments of its choice. OIP thus concludes that the total distribution data is CCFI whose disclosure would frustrate a legitimate government function, and as such was properly withheld under section 92F-13(3), HRS.

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.

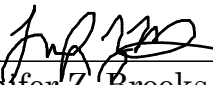
This letter also serves as notice that OIP is not representing anyone in this appeal. OIP's role herein is as a neutral third party.

SPECIAL NOTICE: During the COVID-19 pandemic, Hawaii's Governor issued his Supplementary Proclamation on March 16, 2020, which suspended the UIPA in its entirety. The suspension was continued until May 31, 2020, by the Governor's Sixth Supplementary Proclamation dated April 25, 2020. On May 5, 2020, the Governor's Seventh Supplementary Proclamation (SP7) modified the prior suspension of the UIPA in its entirety and provided that the UIPA and chapters 71 and 72, Title 2, HAR, "are suspended to the extent they contain any deadlines for agencies, including deadlines for OIP, relating to requests for government records and/or complaints to OIP." SP7, Exhibit H. The partial suspensions of the Sunshine Law and UIPA were continued in several subsequent emergency proclamations. The Governor's proclamation dated June 7, 2021, the Twenty-First Proclamation Related to the COVID-19 Emergency (SP21), at Exhibit E, contains some modifications to the prior partial suspension of the UIPA, and mostly retains the partial suspension of the Sunshine Law. SP21 supersedes all prior proclamations related to the COVID-19 emergency, and is effective through August 6, 2021, unless terminated or superseded by a separate proclamation, whichever shall occur first.

The UIPA's Part IV sets forth OIP's powers and duties in section 92F-42, HRS, which give OIP authority to resolve this appeal and have been restored by SP7 through SP21, except for the deadline restriction. Thus, for OIP's opinions

issued while SP21 is still in force, agencies will have a reasonable time to request reconsideration of an opinion to OIP, but a request for reconsideration shall be made by an agency no later than ten business days after suspension of the UIPA's deadlines are lifted upon expiration of SP21 after August 6, 2021, unless SP21 is terminated or extended by a separate proclamation of the Governor. Agencies wishing to appeal an OIP opinion to the court under section 92F-43, HRS, have a reasonable time to do so, subject to any orders issued by the courts during the pandemic, and no later than thirty days after suspension of the UIPA's deadlines is lifted upon expiration of SP21 after August 6, 2021, unless terminated or extended by a separate proclamation of the Governor.

OFFICE OF INFORMATION PRACTICES



Jennifer Z. Brooks
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APPROVED:



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