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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: Clifford Stevenson
Agency: Kauai Police Department
Date: December 22, 2021
Subject: Police Report, Administrative Complaint, and Body Worn Camera Recordings (U APPEAL 19-16)

REQUEST FOR OPINION

Requester seeks a decision as to whether the Kauai Police Department (POLICE-K) was required to disclose a police report of an incident involving Requester, records related to a complaint filed by Requester against five POLICE-K officers, and related body worn camera (BWC) recordings, in response to his record request made under Part III of the UIPA.

Unless otherwise indicated, this decision is based solely upon the facts presented in Requester's emails to OIP dated June 27, 2018, January 2, 2019, February 20, 2019, February 28, 2019, January 24, 2020, April 26, 2020, and April 29, 2020, all with attached email threads; Requester's email to OIP dated April 28, 2020, with attachment and attached email thread; an email from OIP to the County of Kauai, Office of the County Attorney (CORP CNSL-K) and attached materials dated December 10, 2019; emails from OIP to CORP CNSL-K dated December 30, 2019, and February 25, 2020; a letter from CORP CNSL-K to OIP with attachments and records for *in camera* review dated January 23, 2020; a letter from CORP CNSL-K to OIP dated June 8, 2020, with attachments; an email to OIP from CORP CNSL-K dated February 26, 2020, with attachment and attached email thread; an email to OIP from CORP CNSL-K dated February 27, 2020, with attached email thread; an email to OIP from CORP CNSL-K dated March 4, 2020, with

attachments and attached email thread; emails to OIP from CORP CNSL-K dated March 5, 2020, and June 8, 2020, both with attachments; and an email from OIP to Requester dated April 28, 2020, with attached email thread.

QUESTIONS PRESENTED

1. Whether POLICE-K was required to disclose the name, address, and statement and supporting evidence of a witness¹ in a police report.
2. Whether POLICE-K was required to disclose the names and addresses of witnesses² in an investigation into a complaint made by Requester against five POLICE-K officers.
3. Whether the requested BWC recordings of witnesses may be withheld in their entirety.

BRIEF ANSWERS

1. No. At the time the record request was first made, an investigation concerning the incident was still pending and POLICE-K had denied access to the record. However, after this appeal was filed and the County of Kauai Department of the Prosecuting Attorney (PROS ATTY-K) declined prosecution, POLICE-K indicated that it no longer would withhold the police report in its entirety, and agreed to disclose the police report after redaction of the name, address, and statement and supporting evidence of the witness. OIP finds that section 92F-22(1)(A), HRS, allowed POLICE-K to withhold the witness's name, address, and statement and supporting evidence under the UIPA's Part III.

However, OIP's previously adopted analysis requires that, when a record falls within an exemption to disclosure under the UIPA's Part III, it must then be determined whether the record may also be withheld under the UIPA's Part II. For the reasons explained herein, section 92F-13(1), HRS, allows POLICE-K to withhold the witness's name, address, and statement and supporting evidence to avoid a clearly unwarranted invasion of personal privacy of the witness.

¹ POLICE-K referred to the interviewee for the requested police report (Report # 17-20898) as the "victim/witness." For ease of reading, this individual is referred to herein as "witness" in discussion of Report # 17-20898. Whether described as a witness and/or victim, OIP's legal analysis would be the same under the facts of this case.

² POLICE-K referred to the interviewees for two police reports that are part of the administrative complaint (ADM 2017-0495) as the "victims/witnesses." Again, these individuals are referred to herein as "witnesses" for ease of reading. Whether described as witnesses and/or victims, OIP's legal analysis remains the same under the facts of this case.

2. No. The witnesses' statements were part of police reports that became the subject of an administrative complaint filed by Requester against five POLICE-K officers. POLICE-K was entitled to withhold the names and addresses of witnesses in the underlying police reports under Part III of the UIPA based on section 92F-22(1)(A), HRS, and also under Part II of the UIPA based on section 92F-13(1), HRS, to avoid a clearly unwarranted invasion of the witnesses' personal privacy. The portions of the administrative complaint that are not part of the police reports must be disclosed to Requester under the UIPA's Part III.

3. No. POLICE-K may deny Part III access under section 92F-22(1)(A), HRS, and Part II access under section 92F-13(1), HRS, to only the portions of BWC recordings of statements by witnesses that would identify those witnesses, to avoid a clearly unwarranted invasion of the witnesses' personal privacy. In this case, however, most of the recordings may be withheld to protect the witnesses' privacy.

FACTS

Requester made a personal record request dated March 6, 2018, to POLICE-K for a copy of "Video Camera footage and . . . Case Complaint # 17-0495 & Harassment # 17-20898." POLICE-K treated this as a request for two police reports and its Notice to Requester dated the same day (NTR 1) informed Requester that POLICE-K was denying access because police report # 17-0495 did not relate to Requester and police report # 17-20898 (Report # 17-20898) involved a criminal case that was still pending. Requester appealed the denial to OIP on January 2, 2019.

At the time this appeal was filed, OIP also understood Requester to be seeking two police reports. OIP later confirmed that Requester still sought the BWC recordings and that the number 17-0495 in his record request referred not to a police report but to an "administrative number" for a complaint he filed with POLICE-K against five officers (ADM 2017-0495). Although ADM 2017-0495 is a complaint against POLICE-K officers, the BWC recordings in it originated from incidents reported to POLICE-K that resulted in Report # 17-20898 and police report # 17-20897 which is not part of this appeal.

At the time the request was made, Report # 17-20898 was part of an open criminal investigation. PROS ATTY-K subsequently declined to prosecute, and on December 5, 2019, Requester made a second personal record request encompassing Report # 17-20898, ADM 2017-0495 (which POLICE-K still mistakenly thought was a request for a police report), and several other police reports that are not part of this appeal, but not the BWC recordings. POLICE-K sent a second NTR dated December 11, 2019 (NTR 2), which granted access to Report # 17-20898 with redactions, and denied access to police report # 17-0495 pursuant to a mistaken

belief that Requester sought that report rather than ADM 2017-0495.³ Requester informed OIP that he had picked up a copy of Report # 17-20898 on February 12, 2020, that two of four pages were missing or redacted, and that he wished OIP to proceed with this decision as to whether the partial denial was proper. POLICE-K withheld personal information in Report # 17-20898 about the witness, the witness's statement, and written evidence provided by the witness.

After OIP confirmed that Requester sought copies of ADM 2017-0495, Report # 17-20898, and associated BWC recordings, POLICE-K sent Requester an NTR dated March 3, 2020 (NTR 3). NTR 3: (1) granted partial access to ADM 2017-0495, with "select body worn camera recordings of others" withheld under section 92F-13(1), HRS, to protect personal privacy; and (2) withheld names and address of the witnesses in Report # 17-20898 and ADM 2017-0495 under section 92F-13(1), HRS.⁴ Although the NTRs set forth fees for processing Requester's requests, CORP CNSL-K's letter to OIP dated June 8, 2020, stated that POLICE-K would not charge Requester for copies of records provided on a CD or thumb drive in electronic form.

DISCUSSION

I. Treatment of Personal Records Under Part III and Government Records Under Part II of the UIPA

A "[p]ersonal record" is defined in the UIPA as:

any item, collection, or grouping of information about an individual that is maintained by an agency. It includes, but is not limited to, the individual's education, financial, medical, or employment history, or items that contain or make reference to the individual's name, identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or photograph.

HRS § 92F-3 (2012). The UIPA's Part III requires, in sections 92F-21 and 92F-23, HRS, that individuals be provided with access to their personal records upon request, unless the personal record is exempt from disclosure under section 92F-22, HRS.

OIP previously found that a personal record can be "about" two or more persons, in which case it is a "joint personal record." OIP Op. Ltr. No. 05-10 at 4

³ NTR 2 also partially denied and granted access to other records that are not part of this appeal.

⁴ NTR 3 incorrectly cited this exception as section 92F-13(i), HRS.

(citation omitted). See also OIP Op. Ltr. No. F13-01 (discussing how to process a request for joint personal records).⁵

There are five exemptions to the UIPA's personal record disclosure requirements. POLICE-K invoked these two exemptions, which OIP discusses in sections II and III, infra, as applicable to witness statements and supporting evidence, and BWC recordings:

§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[.]
 - ...
- (2) The disclosure of which would reveal the identity of a source who furnished information to the agency under an express or implied promise of confidentiality.

HRS § 92F-22 (2012).

⁵ In the facts of OIP Opinion Letter F13-01 (Opinion F13-01), four employees who filed a workplace violence complaint requested a copy of the resulting investigation. OIP found that the requested record, or portions thereof, constituted a "personal record" to which each requesting individual had access under the UIPA's Part III. Opinion F13-01 set forth the procedure for processing joint personal record requests. The agency: (1) should review the requested record to ascertain what information identifies and is specifically about the individual requesting access, and thereby determine whether all or a portion of the record constitutes that individual's personal record; (2) may withhold the personal record, or portions thereof, when there is an applicable Part III exemption in section 92F-22, HRS; (3) portions of the requested record that do not constitute a personal record because they are not about the requesting individual must be reviewed under the UIPA's Part II to determine whether the requester, as a member of the public, would be entitled to access them as government records; and (4) when applying Part II to information in a government record that is not a personal record, may withhold such portion of the record from public access only when it falls within an exception to disclosure in section 92F-13, HRS. If no Part II exception applies, the agency must disclose that portion of the record.

OIP previously adopted an analysis requiring that, when a record falls within an exemption to disclosure under the UIPA's Part III, it must then be determined whether the record may also be withheld under the UIPA's Part II, which governs the disclosure of government records. OIP Op. Ltr. No. F20-04 at 12, citing OIP Op. Ltr. No. 05-14 at 6-7 (additional citations omitted).

The UIPA defines “[g]overnment record” as “information maintained by an agency in written, auditory, visual, electronic, or other physical form.” HRS § 92F-3 (definition of “[g]overnment record”). There are five exceptions under the UIPA's Part II in section 92F-13, HRS, to the general rule requiring disclosure of government records. POLICE-K invoked the privacy exception at section 92F-13(1), HRS, which allows an agency to deny access to government records “which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy[.]”

The privacy exception requires a balancing of the individual's privacy interest against the public interest in disclosure to determine whether disclosure is appropriate. HRS § 92F-14(a) (2012). The privacy exception only applies when the individual is found to have a significant privacy interest in the record that is not outweighed by the public interest in disclosure. OIP Op. Ltr. No. F13-01 at 19-20, citing HRS § 92F-14(a) (stating that the privacy exception does not apply if the public interest outweighs the individual's privacy interest) (additional citation omitted).

Section 92F-14(b)(2), HRS, states that individuals have a significant privacy interest in information identifiable as part of an investigation into a possible violation of criminal law, except to the extent necessary to prosecute or continue the investigation. OIP has previously concluded that individuals who furnished information as part of a police investigation and third parties mentioned in the report have a significant privacy interest under section 92F-14(b)(2), HRS, in the fact of their involvement. E.g., OIP Op. Ltr. No. F20-04 (discussing POLICE-K's response to a similar request for joint personal records). OIP has also previously concluded that on balance, disclosure of the identities of witnesses in a criminal investigation would constitute a clearly unwarranted invasion of the witnesses' personal privacy. OIP Op. Ltr. No. 95-21 at 22.

II. Report # 17-20898

A. Witness's Statement and Supporting Evidence

Report # 17-20898 included information about Requester, and also included a statement and supporting evidence of one witness. POLICE-K argued the witness's statement and supporting evidence may be withheld from disclosure under the UIPA's Part II. POLICE-K relied on Opinion F13-01 as instructive in its denial of access on the basis that the witness's statement and supporting evidence are the

personal record of the witness and may be withheld under section 92F-13(1), HRS.⁶ However, Opinion F13-01 also stated that an agency must provide a requester with access to the portions of a joint personal record that constitute the requester's personal record under the UIPA's Part III. OIP Op. Ltr. No. F13-01 at 3.

Using the analysis set forth in section I, *supra*, OIP first finds, based on an *in camera* review of Report # 17-20898, that it is, at least partially, Requester's personal record as defined in section 92F-3, HRS, and therefore subject to the UIPA's Part III. HRS § 92F-3. It also is the joint personal record of others named therein. OIP Op. Ltr. No. F13-01. POLICE-K conceded that the witness's statement and supporting evidence are also the joint personal record of Requester but argued they may also be withheld under subsections 92F-22(1)(A) and (2), HRS, which OIP discusses in turn. Because Report # 17-20898 is Requester's personal record, this analysis must start with Part III.

1. Section 92F-22(1)(A), HRS: Information Prepared for Criminal Investigation; Section 92F-13(1), HRS: Information to Withheld to Avoid a Clearly Unwarranted Invasion of Personal Privacy

POLICE-K is an agency that performs activities pertaining to the prevention, control, or reduction of crime as a principal function. OIP Op. Ltr. No. F20-04 at 11. Report # 17-20898 was generated during law enforcement activities. As such, OIP finds that the witness's statement and supporting evidence were prepared or compiled for the purpose of a criminal investigation. HRS § 92F-22(1)(A) (2012). OIP therefore concludes that under section 92F-22(1)(A), HRS, POLICE-K was not required to disclose the statement and supporting evidence as a personal record to Requester. However, this conclusion does not end the discussion.

OIP's previously adopted analysis as explained in section I requires that, when a record falls within an exception to disclosure under the UIPA's Part III, it must then be determined whether the record may also be withheld under the UIPA's Part II. OIP Op. Ltr. No. F20-04 at 12, *citing* OIP Op. Ltr. No. 05-14 at 6-7 (additional citations omitted). OIP must therefore also determine whether Part II exceptions to disclosure apply to the witness's statement and supporting evidence.

⁶ Even apart from the possibility that a record is a joint personal record, the fact that a record could be considered the personal record of one individual does not automatically mean that it falls under the UIPA's privacy exception in response to a government record request, nor did Opinion F13-01 so conclude. OIP assumes POLICE-K intended instead to argue that the records were not Requester's personal records and that the witness statements fell under the UIPA's privacy exception for other reasons.

POLICE-K invoked the privacy exception in Part II at section 92F-13(1), HRS. Individuals have a significant privacy interest in information identifiable as part of an investigation into a possible violation of criminal law, except to the extent necessary to prosecute or continue the investigation. HRS §92F-14(b)(2) (Supp. 2019). OIP previously concluded that individuals who furnished information as part of a police investigation and third parties mentioned in the report have a significant privacy interest under section 92F-14(b)(2), HRS, in the fact of their involvement. E.g., OIP Op. Ltr. No. F20-04 (discussing POLICE-K's response to a similar request for joint personal records). Accordingly, OIP finds here that the witness has a significant privacy interest in the statement and supporting evidence for Report # 17-20898.

Consistent with OIP Opinion Letters Number 95-21, 99-02 and F20-04, where OIP concluded that names, addresses, and other information that would result in the likelihood of actual identification of witnesses could be withheld from disclosure, OIP concludes here that the witness's name and other identifying information, such as the witness's address, should be segregated in Report # 17-20898 before disclosure to the extent that information is reasonably segregable. See OIP Op. Ltr. No. 09-09 (stating that "an agency may withhold an entire record only where the record is not reasonably segregable" (citations omitted)). In this case, the entire witness statement and its supporting evidence may need to be withheld because the witness's identity could easily be determined from the from the content of statement and its supporting evidence. POLICE-K did not object to disclosure of the remainder of Report # 17-20898, i.e., those portions that do not identify the witness, and so those portions must be disclosed after segregation of information that would identify the witness.

2. Section 92F-22(2), HRS: Identity of Confidential Witness

POLICE-K also invoked section 92F-22(2), HRS, which allows agencies to withhold personal records when disclosure would reveal the identity of a source who furnished information to the agency under an express or implied promise of confidentiality. OIP need not determine whether this section applies because section 92F-22(1)(A), HRS, in conjunction with section 92F-13(1), HRS, already protects the witness's identity.

B. Witness's Name and Address

POLICE-K argued that personal information about the witness named in Report # 17-20898 should be withheld, particularly, the witness's name and personal address. OIP has already concluded in section I.A., supra, that the witness's identifying information, including name and address, may be withheld under Part III of the UIPA as a law enforcement record under section 92F-22(1)(A), HRS, and also under Part II of the UIPA based on section 92F-13(1), HRS, to avoid

a clearly unwarranted invasion of witness's personal privacy, and thus OIP need not repeat that analysis here. The previous discussion of the broad applicability of section 92F-22(1)(A), HRS, to witness statements make it unnecessary to determine which specific portions of Report # 17-20898 are protected from disclosure.

Nevertheless, OIP also agrees with POLICE-K's assertion that the witness's address is not information about Requester, and is thus not Requester's personal record under Part III. See OIP Op. Ltr. No. F20-04 at 10, citing OIP Op. Ltr. No. F13-01 at 15 (finding information such as home addresses and residence telephone numbers of witnesses are not "about" the requester and must be analyzed under the UIPA's Part II). Because the witness's address is not Requester's personal record, there is no need to establish a Part III exemption and POLICE-K could properly proceed directly to application of the UIPA's privacy exception under the UIPA's Part II, which, as discussed above, protects the witness's address from disclosure.

II. ADM 2017-0495

The complaint that resulted in ADM 2017-0495 was filed by Requester. OIP therefore finds that a portion of ADM 2017-0495 is Requester's personal record under the UIPA's Part III. HRS § 92F-3 (defining "[p]ersonal record"). See also OIP Op. Ltr. No. F20-02 at 3-4 (finding that the UIPA's Part III applied to at least a portion of the requested investigation because Requester initiated the complaint). ADM 2017-0495 is also the joint personal record of others named therein. OIP Op. Ltr. No. F13-01 at 16.

ADM 2017-0495 consists of the following records that were provided for *in camera* review: five BWC recordings of conversations with Requester and POLICE-K officers; two BWC recordings of conversations with witnesses and POLICE-K officers; audio recordings;⁷ and written records including approximately 61 emails between Requester and POLICE-K employees, some of which included email threads and attachments; one email dated March 19, 2018, between POLICE-K employees; records from Report # 17-20898 and police report # 17-20897 which is not part of this appeal; and documents generated or compiled pursuant to the investigation of ADM 2017-0495 as described in section A, infra, at page 10.

POLICE-K did not argue against disclosing the following records in ADM 2017-0495: the BWC recordings with Requester and POLICE-K officers, the audio recordings of Requester, the emails between Requester and POLICE-K employees; a

⁷ The audio records consist of a two-part audio recording of a telephone call between Requester and a POLICE-K officer, three voicemail messages left by Requester on a POLICE-K telephone line, and copies of emails between POLICE-K employees with these audio recordings attached.

photocopy of Requester's driver license; a copy of an envelope addressed to Requester that was returned by the U.S. Post Office as undeliverable; a bail bond receipt issued to Requester; other records Requester may already have a copy of such as documents generated by the courts; and the March 19, 2018, email described in the previous paragraph. OIP therefore finds that no exemption to disclosure in section 92F-22, HRS, was claimed or applies and copies of these records must be provided to Requester.

POLICE-K asserted that it was authorized under the UIPA to withhold names and addresses of witnesses and recordings of their BWC interviews, and these are discussed in turn, below.

A. Names and Addresses of Witnesses in Written Record

The complaint filed for ADM 2017-0494 arose out of the incidents described in Report # 17-20898, and police report # 17-20897 that is not part of this appeal. POLICE-K presented the same argument for ADM 2017-0494 as it did for Report # 17-20898: that the names and addresses of two witnesses may be withheld as their personal records⁸ under section 92F-13(1), HRS, and also as joint personal records under section 92F-22(1)(A) and (2), HRS. Again, the analysis must start with Part III.

As explained in section II.A.1., supra, POLICE-K is an agency that performs activities pertaining to the prevention, control, or reduction of crime as a principal function. OIP Op. Ltr. No. F20-04 at 11. ADM 2017-0495, which is a complaint against POLICE-K officers, may not have been generated for the prevention, control, or reduction of crime. For the portions of ADM 2017-0494 that did not originate as records prepared or compiled for a criminal investigation, section 92F-22(1)(A), HRS, does not apply to allow withholding. These records include a letter to Requester from POLICE-K confirming receipt of his complaint, a case summary, an internal memorandum with routing cover sheet, and a letter to Requester from POLICE-K that described its conclusion of the investigation. None of these records contain names or identifying information of witnesses. Because these records were generated in response to Requester's complaint that resulted in ADM 2017 0494, and no exemption in section 92F-22, HRS, was raised or applies, OIP concludes that they must be disclosed to Requester.

However, some records in ADM 2017-0494 did originate from incidents reported to POLICE-K that resulted in the creation of Report # 17-20898 and police

⁸ As with Report # 17-20898, OIP assumes POLICE-K intended to argue that the information carried a significant privacy interest in its own right, not simply because it was "about" an individual other than Requester.

report # 17-20897, which were generated for the prevention, control, or reduction of crime. OIP therefore finds that section 92F-22(1)(A), HRS, allowed POLICE-K to withhold these portions of the records in ADM 2017-0495 from disclosure to Requester under the UIPA's Part III.

Again, OIP's conclusion does not end OIP's analysis, and the records being withheld must also be analyzed under the UIPA's Part II exceptions to disclosure. OIP Op. Ltr. No. F20-04 at 12, citing OIP Op. Ltr. No. 05-14 at 6-7 (additional citations omitted). As explained in section I, supra, section 92F-14(b)(2), HRS, recognizes the significant privacy interest in information identifiable as part of an investigation into a possible violation of criminal law, except to the extent necessary to prosecute or continue the investigation. Individuals who furnished information as part of a police investigation and third parties mentioned in the report have a significant privacy interest under section 92F-14(b)(2), HRS, in the fact of their involvement. On balance here, disclosure of the names and addresses that POLICE-K seeks to withhold would constitute a clearly unwarranted invasion of the witnesses' personal privacy. OIP Op. Ltr. No. 95-21 at 22. Consistent with OIP Opinion Letters Number 95-21, 99-02 and F20-04, where OIP found names, addresses, and other information that would result in the likelihood of actual identification of witnesses could be withheld from disclosure, OIP concludes here that the witnesses' names and other identifying information, such as the witnesses' addresses, should be segregated before disclosure.⁹

B. BWC Recordings Are Subject to the UIPA and Disclosable After Segregation of Information Identifying Witnesses

The police departments in Hawaii's four main counties all use BWCs. The Legislature has not passed any specific laws regarding public access to BWC recordings, and OIP has not previously opined on the application of the UIPA to police BWC recordings maintained by government agencies. POLICE-K did not dispute that BWC recordings maintained by government agencies clearly fall within the UIPA's definition of government record at section 92F-3, HRS, and OIP finds that BWC recordings are subject to the UIPA.

There are seven BWC recordings responsive to Requester's request. Conversations between Requester and POLICE-K employees were captured on five of them and POLICE-K is not arguing against their disclosure to him. The other two BWC recordings are witness statements to POLICE-K officers. Based on OIP's *in camera* review of the two BWC recordings with witnesses and POLICE-K officers,

⁹ OIP need not determine whether section 92F-22(2), HRS, also applies because section 92F-13(1), HRS, already protects the witnesses' names and addresses.

OIP finds that each recording is the personal record of the witness featured therein, is the joint personal record of Requester because he is discussed therein, and is also the joint personal record of other individuals who appear or can be heard in the recording. OIP Op. Ltr. No. F13-01 at 16. Specifically, in one video, the witness can be heard and part of the witness's body can be seen, but not the face, due to the fact that the witness and interviewing officer are seated. The officer can also be heard and his hands and part of his arms are visible.¹⁰ The officer and witness appear to be in a workspace in a private commercial setting where others cannot hear them. In the other video, the witness can be seen and heard, the officer can be heard and his hands can be partially seen, and one unidentified individual who did not provide a statement was captured briefly on camera as the officer walked by. This interview also appears to have taken place in a commercial space in an outside area where no one else appears to be nearby.

POLICE-K argued the witnesses' BWC recordings must be withheld in their entirety to protect the witnesses, and invoked sections 92F-22(1)(A) and 92F-22(2), HRS, as allowing it to withhold the BWC recordings. As explained in section I, supra, POLICE-K is an agency that performs activities pertaining to the prevention, control, or reduction of crime as a principal function. OIP Op. Ltr. No. F20-04 at 11. ADM 2017-0495 is a complaint against POLICE-K officers, but the BWC recordings in it originated from incidents reported to POLICE-K that resulted in Report # 17-20898 and police report # 17-20897. OIP therefore finds that the BWC recordings were prepared or compiled for the purpose of a criminal investigation and concludes that under section 92F-22(1)(A), HRS, POLICE-K was not required to disclose it as a personal record.

Again, this conclusion does not end OIP's analysis because, when a record falls within an exception to disclosure under the UIPA's Part III, the agency must then also determine whether the record may be withheld under the UIPA's Part II. OIP Op. Ltr. No. F20-04 at 12 (citations omitted). OIP must next determine whether Part II exceptions to disclosure apply.

POLICE-K invoked section 92F-13(1), HRS, claiming that the privacy exception to disclosure applies in this case. As explained above, the privacy exception requires a balancing of the individual's privacy interest against the public interest in disclosure to determine whether disclosure is appropriate. HRS § 92F-14(a). The privacy exception only applies when the individual has a

¹⁰ While the BWC recordings do depict police officers and thus are also joint personal records of those officers, it does not necessarily follow that those officers have a significant privacy interest in their depiction on the BWC recordings such that the privacy exception might apply to a request under Part II of the UIPA. Here, the officers were acting in their official police capacity and OIP does not find that they have any significant privacy interest in the recordings, nor did POLICE-K argue that they did.

significant privacy interest in the record that is not outweighed by the public interest in disclosure. OIP Op. Ltr. No. F13-01 at 19-20, citing HRS § 92F-14(a) (additional citation omitted).

Individuals have a significant privacy interest in information identifiable as part of an investigation into a possible violation of criminal law, except to the extent necessary to prosecute or continue the investigation. HRS § 92F-14(b)(2). OIP has previously concluded that individuals who furnished information as part of a police investigation have a significant privacy interest under section 92F-14(b)(2), HRS, in the fact of their involvement. E.g., OIP Op. Ltr. No. F20-04 (discussing POLICE-K's response to a similar request for joint personal records). Here, each witness furnished information as part of a police investigation and as such OIP finds each has a significant privacy interest in the BWC recordings of their conversations with the officers.¹¹ Disclosure of unredacted BWC recordings would reveal the witnesses' identities.

OIP has previously concluded that on balance, disclosure of the identities of witnesses in a criminal investigation would constitute a clearly unwarranted invasion of the witnesses' personal privacy. OIP Op. Ltr. No. 95-21 at 22. OIP finds here that witnesses' respective privacy interests in the BWC recordings are greater than the public interest in disclosure. Consistent with OIP Opinion Letters Number 95-21, 99-02 and F20-04, where OIP concluded that names, addresses, and other information that would result in the likelihood of actual identification of witnesses could be withheld from disclosure, OIP concludes here that identifying information about the witnesses in their respective BWC interviews may be withheld from public disclosure. POLICE-K may withhold the BWC recordings of witnesses to the extent the recordings would reveal their identities in order to avoid a clearly unwarranted invasion of their personal privacy. HRS § 92F-13(1).¹²

As a general rule, "an agency may withhold an entire record only where the record is not reasonably segregable." OIP Op. Ltr. No. 09-09 (citations omitted). This would usually require POLICE-K to provide a redacted version of a witness's BWC recording with identifying information segregated to the extent that

¹¹ OIP notes that in other instances, the privacy interest of a witness in a BWC recording may be reduced by the facts of that case. For example, there may be a diminished privacy interest in BWC recordings made on a busy street at noon versus in a private residence. Or, a BWC recording of a high ranking government official acting in an official capacity could reduce that official's privacy interest in the recording and raise the public interest in disclosure.

¹² OIP need not determine whether section 92F-22(2), HRS, also applies because section 92F-22(1)(A), in conjunction with section 92F-13(1), HRS, already protects witnesses' names and addresses.

information is reasonably segregable. Most or possibly all of a BWC recording may generally be withheld, however, if a requester could easily determine a witness's identity from the face, voice, clothing, personal items, and other identifiable features, places, or things. In this case, OIP finds that withholding practically the entire recordings is warranted in order to protect the witnesses' identities.¹³ See OIP Op. Ltr. No. 01-04 at 6-7 (finding that while section 92F-22(2), HRS, normally applies only to a person's identity and not to the information provided by that person, there are instances when it would be appropriate to withhold the entire statement. "For example, when the requester of information already knows the identity of an individual who provided information to the agency, the agency may withhold both the identity and the information provided." (citation omitted)).

Finally, it is important for all agencies maintaining BWC recordings to understand that the conclusion reached here should not be interpreted to allow wholesale withholding of BWC recordings in every situation. Whether, and to what extent, BWC recordings may be withheld must be determined on a case-by-case basis. Here, there is little public interest in disclosure of witness identities. Other cases involving BWC recordings have been the subject of recent and significant local media coverage, and while OIP has not been asked to opine on disclosure of the BWC recordings in those cases, the public interest in those recordings, which involved officer shootings resulting in death or incidents involving high-ranking officials, could be much higher than the public interest here.

¹³ In some instances where copies of BWC recordings have been requested, it is possible there may be a duty to redact by using blurring or voice change to mask the identity. Even if "masking" individuals is not reasonably required, if the agency must redact one part of a recording showing people whose identities are being protected, that would not justify the agency in withholding the entire recording as it could redact it by blanking out the part of the BWC recording being withheld, as with audio or video recordings generally. On the other hand, segregation would not be reasonably possible unless the agency possesses the technology that would allow it to be done in-house with the agency charging for redaction time as allowed under OIP's administrative rules, or by the agency hiring a third party to perform the redaction with the fee chargeable as an "other cost" under chapter 2-71, HAR. In some instances, even hiring a third party to perform the redaction could be an issue if the contents of the BWC recording are extremely sensitive. See OIP's Quick Review: The ABCs of Redaction for more information on redacting records, available on OIP's website at <https://oip.hawaii.gov/training/>.

RIGHT TO BRING SUIT

Requester is entitled to file a lawsuit for access under Part II of the UIPA 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).

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). 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).

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).

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 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



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