

Fernandes/Black proposed revision for 9.12.22 meeting

Here is one possible revision that Kaliko and I have discussed. The likely discussion point is the wrongdoing/criminal factor. It is worded to provide a more objective test that the government can more easily apply. This is narrower than Carrie's suggestion—i.e., allowing more names to be withheld. (1) It focuses only on the wrongdoing of the individual, as opposed to just a showing of wrongdoing that opens up all related names. (2) It focuses on a specific stage of wrongdoing proceedings—i.e., a complaint or informal accusation of wrongdoing is not enough (there must be an actual investigation at minimum).

Original: provided that once disclosure is required, identifying information of public officials or employees without discretionary authority and not making the decision may be withheld without a showing of wrongdoing or criminal conduct.

Revised: provided that once disclosure is required, identifying information of a public official or employee may be withheld if that person lacks discretionary authority, did not make the decision, and is not under investigation for or engaged in wrongdoing or criminal conduct.

Specific example: Employees currently under investigation at DOT for variety of issues. <https://www.staradvertiser.com/2022/08/17/hawaii-news/5-arrests-tied-to-theft-fraud-probe-athanolulu-airport/>. Based on job titles of some of those individuals (“automotive mechanic helper I” and “purchasing technician I”), I suspect that those individuals would qualify as lacking discretionary authority and not making a variety of decisions. But if those individuals were making recommendations of any kind as to how procurement should be handled or any number of other policy issues, then their names should not be withheld because at a minimum they are “under investigation”—even though there is no indictment, conviction, etc. On the flip side, if there was no investigation, those individuals' names would not be disclosed simply because a member of the public made a public record request and accused the employees of theft/fraud, etc.—irrespective of whatever evidence the requester may present as evidence of wrongdoing (we don't need agencies or OIP adjudicating probable cause for wrongdoing just to respond to a records request).

Best,
Brian