



JOSH GREEN, M.D.
GOVERNOR

STATE OF HAWAII
OFFICE OF INFORMATION PRACTICES

CHERYL KAKAZU PARK
DIRECTOR

NO. 1 CAPITOL DISTRICT BUILDING
250 SOUTH HOTEL STREET, SUITE 107
HONOLULU, HAWAII 96813
Telephone: (808) 586-1400 FAX: (808) 586-1412
E-MAIL: qip@hawaii.gov
www.oip.hawaii.gov

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: Employee
Agency: Department of Transportation
Date: October 16, 2023
Subject: Closed Investigation Finding and Conclusions (U APPEAL 21-1)

RE.QUEST FOR OPINION

Employee seeks a decision as to whether the Department of Transportation (DOT) properly denied under Part III of the UIP A (Part III) a copy of the Department of the Attorney General's final findings and conclusions (Findings and Conclusions) in response to a workplace violence complaint he filed against another DOT employee.

Unless otherwise indicated, this decision is based solely upon the facts presented in an email from Employee to OIP dated June 24, 2020, with attachments; an email from OIP to Employee dated July 22, 2020; an email from Employee to OIP dated July 22, 2020, with attachment; an email from OIP to Employee dated July 24, 2020, with attached email thread; a letter from OIP to DOT dated August 10, 2021, with enclosures; a letter from DOT to OIP dated September 15, 2021; a letter from OIP to DOT dated September 30, 2021, with enclosures; and an email from DOT to OIP dated October 4, 2021, with attachments and attached email thread.

UES_ TIQNS PRESENTED

1. Whether all or part of the Findings and Conclusions are the personal record¹ of Employee and subject to Part III.²
2. Whether Employee is entitled to a copy of the portions of the Findings and Conclusions that are his personal record under Part III.
3. Whether any portion of the Findings and Conclusions is not Employee's personal record such that his access to that portion is as a government record³ subject to Part II of the UIPA (Part II).⁴
4. Whether the entire Findings and Conclusions may be withheld under Part H's frustration exception at section 92F-13(3), HRS.
5. Whether Part H's privacy exception at section 92F-13(1), HRS, allows DOT to withhold any portion of the Findings and Conclusions even though it did not clearly argue that the privacy exception applies.

BRIEF ANSWERS

1. Yes. Significant portions of the Findings and Conclusions contain information about Employee and are his personal record. The Findings and Conclusions also contain information about other individuals including persons interviewed and the respondent to the complaint (Respondent), and are the joint personal records of Employee and others named therein under Part III. OIP Op. Ltr. No. F13-01.
2. Yes. Employee is entitled to copies of the portions of the Findings and Conclusions that are about him and are his personal record under Part III, including portions that are the joint personal record of him and others. OIP Op. Ltr. No. F13-01. DOT did not invoke any exemption to disclosure of personal records under

¹ "Personal record" is defined in section I, infra.

² Part III governs access to accessible personal records by individuals requesting records about themselves. HRS§ 92F-21 (2012).

³ A "government record" is "information maintained by an agency in written, auditory, visual, electronic, or other physical form." HRS§ 92F-3 (2012) (definition of government record).

⁴ Part II requires that all government records are public unless an exception to disclosure in section 92F-13, HRS, applies. HRS§ 92F-11 (2012 and Supp. 2022).

section 92F-22, HRS, and OIP concludes that no Part III exemption applies to allow DOT to withhold any portion of Employee's personal record. OIP therefore concludes that Employee's personal record contained in the Findings and Conclusions must be disclosed to him in its entirety.

3. Yes. Portions of the Findings and Conclusions are not Employee's personal record and must be considered government records under Part II for the purpose of his request. These portions include information about Respondent that does not involve Requester, information about a separate complaint filed by another DOT employee against a different DOT employee respondent, and information about the AG investigator assigned to perform the investigation.

4. No. DOT invoked the frustration exception at section 92F-13(3), HRS, as allowing the entire Findings and Conclusions to be withheld. The frustration exception cannot be used to deny access to personal records under Part III. For the portions of the Findings and Conclusions that are not Employee's personal record and are subject to Part II, OIP finds DOT failed to "articulate a real connection between disclosure of the particular record it is seeking to withhold and the likely frustration of a specific legitimate government function." Peer News LLC v. City and County of Honolulu, 143 Haw. 472, 487 (2018) (Peer News). As such, OIP concludes that DOT has not met its burden in section 92F-15(c), HRS, to justify its denial of access to any part of the Findings and Conclusions under section 92F-13(3), HRS.

5. Yes. OIP finds that limited information about the Respondent and about a separate complaint identified in the Findings and Conclusions carries a significant privacy interest and concludes that the information may be withheld in order to avoid a clearly unwarranted invasion of personal privacy. HRS§ 92F-13(1) (2012). See Honolulu Civil Beat, Inc. v. Department of the Attorney General, 151 Hawaii 74, 508 P.3d 1160 (2022) (Civil Beat v. AG) (concluding that an investigation into employee misconduct at the Office of the Auditor must be disclosed, however, section 92F-13(1), HRS, allowed the agency to withhold certain information about others named in the investigation who were not the subjects of the investigation).

FACTS

Employee was a DOT employee at the time he filed a workplace violence complaint against a coworker. The complaint was referred to the Department of the Attorney General (AG) for investigation. After the investigation was completed, but before Employee had made any record request, he received a letter from DOT dated May 27, 2020, informing him that the AG investigation was completed and that "we are not at liberty to share a copy of the investigation or any official disciplinary

documents with you, per the HRS 92F-13 and DSM 04."⁵ Employee also received an email from DOT on May 27, 2020, informing him that the investigation was completed and that "[a]ny corrective action, if action was necessary, has occurred." DOT's May 27 email to Employee further stated that "[i]nformation/corrective action is confidential and therefore will not be revealed. As it is confidential, disclosure would be a violation of one's expectations, of one's rights."

On May 30, 2020, Employee submitted a written request (May 30 Request) to DOT for the "[f]inal Findings and Conclusions for the Attorney General Investigators Office regarding my harassment and hostile work environment complaint ... that I filed against [an employee]." Employee asserted to OIP that he did not receive any response to his May 30 Request and filed this appeal.

DOT was not required to respond to the May 30 Request at the time it was made early in 2020 because the UIPA had been temporarily suspended in its entirety by an emergency proclamation of Governor David Ige in response to the COVID-19 pandemic. Subsequent proclamations mostly restored the UIPA's provisions except that the UIPA and OIP's rules remained "suspended to the extent they contain any deadlines for agencies, including deadlines for the OIP, relating to requests for government records and/or complaints to OIP." On August 5, 2021, Governor Ige issued a proclamation that contained no suspension of the UIPA, and all subsequent COVID-19 proclamations did not contain any UIPA suspensions, so the UIPA and all its deadlines have been in full effect since August 5, 2021.

OIP's Notice of Appeal (NOA) to DOT dated July 29, 2020, explained that Employee's request appeared to be a personal record request subject to Part III, and not a government record request subject to Part II. The NOA further explained that the exceptions to disclosure in section 92F-13, HRS, are not applicable to personal record requests, and that the exemptions to disclosure for personal record requests are found in section 92F-22, HRS. The NOA asked DOT to explain why it believed the May 30 Request was not a personal record request, if that was its position, in its response to this appeal.

For unknown reasons, but perhaps due to the UIPA suspensions in place at that time, DOT did not respond to the NOA. In a letter to DOT dated August 10, 2021, OIP explained that the UIPA was again in full effect and asked that DOT respond to the NOA within ten business days. In a letter dated September 15, 2021, DOT's former Director responded to the NOA stating:

While I understand that [Employee] would like to obtain copies of the records of the completed investigation, specifically the findings and

⁵ OIP understands from review of the *in camera* documents that "DSM" refers to the DOT Department Staff Manual, but OIP did not receive a copy of it.

conclusion, regarding a complaint [he] filed, I am upholding responses previously provided to [him].

The matter involves an investigation into a disciplinary matter involving another employee not personal record[s] regarding [Employee] "himself." As such, I am denying the request in accordance with Section 92F-13(3), of the Hawaii Revised Statutes, as it is Government records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function. However, we can provide a copy of the employee's complaint.

OIP sent DOT another letter dated September 30, 2021, which noted DOT had not provided copies of the requested records for *in camera* review, and again explained that the requested records appeared to be personal records subject to Part III. More specifically, OIP explained that the requested records appeared to be the joint personal records of Employee and others named in the requested records, and OIP provided a copy of OIP Opinion Letter Number F13-01 (Opinion F13-01), which explains how to respond to a request for joint personal records.⁶ OIP offered DOT the chance to provide a more comprehensive response to this appeal within ten business days. DOT thereafter provided copies of the Findings and Conclusions for OIP's *in camera* review but did not submit a further response in support of its position.

Due to the 2022 election of Governor Josh Green and subsequent change in administration, in a letter dated March 23, 2023, OIP provided DOT with a final opportunity to supplement its position within ten business days. OIP provided DOT

⁶ Opinion F13-01 was issued in response to DOT's denial of access to a joint personal record. In the facts of that case, four DOT employees, who were also the complainants in a workplace violence investigation, sought a copy of the investigative report. Opinion F13-01 concluded, among other things, that (1) DOT was required to disclose portions of the report to each requester as a "personal record" under Part III; (2) portions of the report were the "joint personal records" of all four requesters so that Part III required each requester to have access to information in the Report that was about her, even if the same information was also about another individual, unless an exemption applies; and (3) under Part II, DOT must disclose to the requesters the portions of the report that are not "about" any of them if there are no applicable exceptions in section 92F-13, HRS.

with another copy of Opinion F13-01 and a copy of Civil Beat v. AG.⁷ -DOT did not respond.

DISCUSSION

I. **Opinion F13-01's Procedures for Responding to Personal Record Requests**

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).

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 (citation omitted). Opinion F13-01 set forth procedures that agencies must follow when responding to a request for joint personal records. An agency must answer four questions:

- (A) What is the personal record of the individual requesting access under Part III?
- (B) Does any Part III exemption in section 92F-22, HRS, allow the agency to withhold access to the personal record?
- (C) What portion, if any, is a government record subject to the public disclosure requirements of Part II?
- (D) Does any Part II exception in section 92F-13, HRS, allow the agency to withhold a government record that is not a Part III personal record?

⁷ Civil Beat v. AG ruled on the AG's denial of access to the AG's investigation report on allegations of incompetence, deceptive practices, and workplace bullying by high-ranking employees in the Office of the Auditor. The Hawaii Supreme Court held the AG had not established that its report could be withheld under the frustration exception at section 92F-13(3), HRS, because the AG had not explained how disclosure would frustrate its ability to perform a government function. The Court also held that portions of the report could be withheld under the privacy exception at section 92F-13(1), HRS, as discussed in more detail in section V. B, infra.

II. The Findings and Conclusions Are the "Personal Record" of Employee

First, OIP must determine whether the Findings and Conclusions, or portions thereof, are a "personal record" to which the Employee has access under Part III. This requires a close review of the subject matter and contents of the Findings and Conclusions to ascertain what, if any, information therein identifies and is specifically about Employee, and thus constitutes his "personal record." OIP Op. Ltr. No. F13-01.

DOT provided copies of two responsive records for *in camera* review, which together are the Findings and Conclusions: (1) the report for DOT administrative investigation AG #19-2836 regarding Employee's allegations of workplace violence and failure to follow standards of conduct, and (2) the "Review of Findings in Administrative Investigations AG19-2836 and AG19-3281" (Review of Findings).⁸

Several individuals were interviewed for AG #19-2836, including Employee and the Respondent. Information about each individual is contained in the Findings and Conclusions. Upon review, OIP finds that, except for limited portions that are only about the Respondent or other DOT employees as described below, Employee and others are named and referred to throughout most of the Findings and Conclusions regarding the incident leading up to Employee filing a complaint. OIP thus concludes that most of the Findings and Conclusions is the personal record of Employee, or the joint personal record of Employee and others mentioned, because the majority of the information contained therein is about Employee and his involvement in the incident. OIP Op. Ltr. No. F13-01 at 17.

OIP further concludes, however, that the Findings and Conclusions are not entirely Employee's personal record because some limited parts are specifically and exclusively about the Respondent or other DOT employees. Those portions of the Findings and Conclusions that are not Employee's personal record may be redacted to the extent an exception to disclosure applies under Part II. In section V, infra, OIP **will** set out the specific portions of the Findings and Conclusions that are not Employee's personal record and may properly be withheld under Part II.

III. No Exemptions to Disclosure of Personal Records Apply

DOT may withhold the portions of the Findings and Conclusions that are Employee's personal record only to the extent that one or more of Part III's five

⁸ Administrative Investigation AG #19-3281 is the report for an investigation of a complaint filed by a different DOT employee and is not part of the responsive records for this appeal. However, AG #19-3281 is similar in nature to the complaint filed by Requester, and apparently for that reason the Review of Findings includes information for both cases.

exemptions in section 92F-22, HRS, authorizes it to do so.⁹ The UIPA places the burden to justify any denial of access on the agency. HRS § 92F-15(c) (2012). Despite OIP's three letters advising DOT that Employee's request appeared to be a personal record request, DOT did not argue that any Part III exemption authorized it to withhold the Findings and Conclusions.¹⁰ OIP therefore finds that DOT failed to meet its burden to justify withholding any portion of Employee's personal record under Part III. OIP concludes that no Part III exemption applies and that the portions of the Findings and Conclusions that are Employee's personal record must be disclosed to him in their entireties without redactions.

IV. Portions of the Requested Records Are Government Records Subject to the Disclosure Requirements in the UIPA's Part II

For the reasons explained in sections II and III, supra, DOT must provide most of the Findings and Conclusions under Part III as they are the joint personal record of Employee and others and no Part III exemption applies. The remainder of the Findings and Conclusions is a government record subject to Part II for the purpose of Employee's request and Employee is entitled to these portions as a member of the public unless an exception to disclosure applies as set out in section 92F-13, HRS.

⁹ Part III exempts an agency from mandatory disclosure of: (1) records maintained by a law enforcement agency that are either criminal intelligence or investigation information or reports, or reports created at any stage of criminal law enforcement; (2) information that would reveal the identity of a confidential source; (3) testing material or scoring keys used for government hiring or promotion or a licensing or academic examination, to the extent disclosure would compromise the fairness of the process; (4) investigative reports and materials related to an ongoing civil, criminal, or administrative proceeding against the individual; and (5) records protected by statute, judicial decision, or constitutional or statutory privilege. HRS § 92F-22 (2012).

¹⁰ Although DOT did not assert it, OIP notes that section 92F-22(2), HRS, allows an agency to withhold personal records, "[t]he disclosure of which would reveal the identity of a source who furnished information to the agency under an express or implied promise of confidentiality." See OIP Op. Ltr. No. 01-04 (concluding that names and other information that would identify witnesses from a small group of co-workers could be redacted from investigation reports due to promises of confidentiality made to witnesses); OIP Op. Ltr. No. 95-23 (finding that the university could withhold a faculty member's statement alleging a colleague's scientific misconduct when the identity of the faculty member making the statement was known to the colleague and the university had assured confidentiality). Promises of confidentiality are frequently made, at least implicitly, to witnesses in an investigation of alleged workplace misconduct. OIP Op. Ltr. No. F13-01 at 18. However, the burden to justify withholding records lies with the agency. HRS § 92F-15(c). In this case, DOT did not argue or present facts establishing that it made an express or implied promise of confidentiality to any DOT employees interviewed, so the confidential source exemption does not apply.

HRS§ 92F-II. OIP finds that the portions that are government records include generally:

- In AG #19-2836
 - the top half of page 1 including the investigator's assignment section,
 - the findings and conclusions pertaining to Respondent, and
 - the last line on page 1 referencing a complaint by a different DOT employee against another, different DOT employee.
- In the Review of Findings
 - portions specifically pertaining to AG #19-3281, which was a related investigation filed by someone other than Employee against Respondent,
 - information about the AG investigator in his job, and
 - a cover sheet and two attachments consisting of amended witness statements to the extent they are about AG #19-3281 only.

V. Government Records Are Subject to Part H's Exceptions to Disclosure in Section 92F-13, HRS

When applying Part II to information that is not a requester's personal record and is thus analyzed as a government record, an agency may withhold the information from the public only when it falls within an exception in section 92F-13, HRS. If no Part II exception applies, the agency must disclose the government record.

A. The Frustration Exception

There are five exceptions to disclosure¹¹ in Part II of the UIPA. DOT argued that the exception at section 92F-13(3), HRS, applied to allow it to withhold the entire Findings and Conclusions. This 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[.]" HRS § 92F-13(3) (2012).

DOT's response to this appeal indicated that the "matter involves an investigation into a disciplinary matter involving another employee not personal record[s] regarding [Employee] himself" and invoked the frustration exception as allowing it to withhold the Findings and Conclusions in their entirety. DOT did not

¹¹ OIP discusses the UIPA's privacy exception, section 92F-13(1), HRS, in section II. B. The other three Part II exceptions are not relevant here. These exceptions authorize an agency to withhold (1) non-discoverable records pertaining to a legal action involving the State or a county; (2) records protected from disclosure by a State or federal law or court order; and (3) certain legislative records. HRS§ 92F-13(2), (4), (5) (2012).

describe the government function that would be frustrated by disclosure or explain why the entire Findings and Conclusions should be withheld.

As discussed previously, Part II exceptions such as the frustration exception do not apply to a requester's personal records. Thus, the frustration exception cannot provide a basis to withhold the portion of the Findings and Conclusions that constitutes Employee's personal record, which OIP has already determined must be fully disclosed. With respect to the portions constituting a government record and thus potentially subject to the frustration exception, the Hawaii Supreme Court (Court) held in Peer News that the frustration exception cannot be used to withhold government records without a clearly articulated reason. Based on that decision, OIP has previously explained that

in addition to establishing the legitimacy of the contemplated function, the frustration exception requires "an individualized determination that disclosure of the particular record or portion thereof would frustrate a legitimate government function." [Peer News] at 487 (noting also in footnote 26 that "redaction and disclosure of the remainder of the record is appropriate when the portion of a document that qualifies for withholding under one of HRS§ 92F-13's exceptions is reasonably separable from the record as a whole"). The [Peer News] opinion continued:

That a record is of a certain type ... is not alone sufficient to shield the record from disclosure under the provision. While such a designation 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. See OIP Op. Ltr. No. 03-16 at 8 (Aug. 14, 2003) (stating that withholding disclosure of a coaching contract under HRS § 92F-13(3) was not justified because the university "has provided us with no specific examples of or any concrete information as to how disclosure of the contract will frustrate the Athletic Department's ability to function").

In sum, to justify withholding a record under HRS § 92F-13(3), an agency must articulate a real connection between disclosure of the particular record it is seeking to withhold and the likely frustration of a specific legitimate government function. The explanation must provide

sufficient detail such that OIP or a reviewing court is capable of evaluating the legitimacy of the government function and the likelihood that the function will be frustrated in an identifiable way if the record is disclosed. See id. at 8, 16 (stating that "[w]e would be remiss in our statutory duties if we simply accepted UH's statement that disclosure [of the Head Coach's compensation package] will frustrate a legitimate government function without any factual basis to support UH's assertion" that disclosure "could have the impact of frustrating the Athletic Director's ability to maintain a cohesive coaching team and a successful athletic program"). In the absence of such a showing, withholding disclosure under the provision is not warranted.

Id.

OIP Op. Ltr. No. F19-05 at 11-12 (footnote omitted).

There have been cases where OIP upheld an agency's decision to deny access to records of closed investigations under the frustration exception, but in those cases the agencies have both articulated the nature of the potential harm and asserted and provided facts to support that there was an express or implied promise of confidentiality to witnesses. See, Q., g., OIP Op. Ltr. No. 99-07 (concluding that a police department could withhold portions of internal affairs investigation reports containing complainants' and witnesses' identities under section 92F 13(3), HRS, because in that case disclosure would likely frustrate the legitimate government function of investigating alleged violations as witnesses would be less likely to come forward).

Using Peer News as a guide, OIP finds that DOT failed to articulate a real connection between disclosure of the government record portion of the Findings and Conclusions and the likely frustration of a specific legitimate government function. OIP therefore concludes that DOT failed to meet its burden under section 92F-15(c), HRS, to justify its denial of access to the Findings and Conclusions, and further concludes that DOT may not withhold any portion under the frustration exception at section 92F-13(3), HRS.

B. The Privacy Exception

DOT's email to Employee dated May 27, 2020, informed him that the investigation of his complaint was completed and stated that "[i]nformation/corrective action is confidential and therefore will not be revealed. As it is confidential, disclosure would be a violation of one's expectations, of one's rights." This may have

been an unclear attempt to inform Employee that the privacy exception applied to the Findings and Conclusions, but DOT did not invoke the privacy exception in response to this appeal. Nonetheless, despite DOT's failure to assert the privacy exception, a limited discussion of the privacy exception is warranted in light of a recent Court decision also involving disclosure of a different AG investigation report. The privacy exception protects the interests of third parties whose privacy interests may be at stake, rather than the interests of the agency itself as the other Part II exceptions generally do, and one of the UIPA's purposes is to "[b]alance the individual privacy interest and the public access interest[.]" HRS 92F-2(5) (2012). OIP thus will generally raise the privacy exception *sua sponte* when the facts suggest it may be applicable. As explained below, OIP concludes that the privacy exception does allow DOT to withhold some information about Respondent, witnesses, and others to protect the interests of those others named in the portion of the Findings and Conclusions that is not Employee's personal record and thus is subject to the Part II exceptions for the purpose of his request.

The privacy exception allows an agency to withhold records when disclosure "would constitute a clearly unwarranted invasion of individual privacy." HRS § 92F-13(1). To determine whether disclosure would be a clearly unwarranted invasion of personal privacy, an agency must balance the public interest in disclosure against the privacy interests of the individuals named therein. HRS § 92F-14(a) (2012).

1. DOT May Withhold Certain Personnel Information About Respondent

Section 92F-14(b), HRS, sets forth a nonexhaustive list of information in which individuals have a significant privacy interest. Relevant here, section 92F-14(b)(4), HRS, recognizes a significant privacy interest in information in an agency's personnel file,¹² except for the information related to employment misconduct that results in an employee's suspension or discharge. See OIP Op. Ltr. No. 98-05 (finding the significant privacy interest of a police officer who was the subject of an internal affairs investigation outweighed the public interest in disclosure of his identity because he was not suspended or discharged). OIP finds that, in accordance with

¹² Information about government employees can be personnel-related information when it is in an employee's personnel file, and also when it is not physically located in an agency's personnel files but is, in essence, a personnel record by dint of its subject matter and its potential use. Civil Beat v. AG, 151 Haw.74, 80, 508 P.3d 1160, 1166, citing OIP Op. Ltr. No. 98-05 at 20 (concluding that an administrative investigation report kept outside an employee's personnel file is "akin to the information maintained in a personnel file" in part because "[a]n administrative investigation report often is the only investigation with regard to personnel action and discipline, and it provides the basis for any personnel action taken") (additional citation omitted).

Civil Beat v. AG, the Findings and Conclusions are personnel-related information of the Respondent as the subject of an employment-related complaint, and he has a significant privacy interest in them under section 92F-14(b)(4), HRS. Disclosure of Respondent's personnel-related information would constitute a clearly unwarranted invasion of personal privacy unless "the public interest in disclosure outweighs the privacy interests of the individual." HRS§ 92F-14(a).

The Court noted that the balancing test in section 92F-14(a), HRS, is context-specific, and approved the five factors OIP had previously identified as relevant to this balancing test:

- (1) the government employee's rank;
- (2) the "[d]egree of wrongdoing and strength of evidence against the employee";
- (3) whether there are other ways to obtain the information;
- (4) "[w]hether the information sought sheds light on a government activity"; and
- (5) "[w]hether the information is related to job function, or is of a personal nature."

See OIP Op. Ltr. No. 10-03 at 6-7 (Oct. 5, 2010).

These non-exclusive factors are a nice starting point for HRS Section 92F-14(a) balancing.

Civil Beat v. AG, 151 Haw. at 84-85, 508 P.3d at 1170-1171 (footnote omitted).

The facts here are distinguishable from the facts in Civil Beat v. AG, in which the Court found a strong public interest in disclosure of an investigation into employee misconduct. Here, OIP finds no evidence that Respondent is a high-ranking DOT employee, or that he was suspended or discharged, and these factors tip the balance in favor of Respondent's privacy interest. OIP therefore concludes that DOT may withhold the personnel-related information about Respondent that is subject to Part II, i.e. the information that is exclusively about Respondent and not the joint personal record of Respondent and Requester. Specifically, DOT may withhold the findings, if any, against Respondent, and any discipline imposed.

2. Witness Identities Are Part of Employee's Personal Record and Thus May Not Be Withheld Based on Privacy Exception

Civil Beat v. AG involved a Part II request from the media for an investigation report of Office of the Auditor employees prepared by the AG. The Court found that individuals named in the report who were not the subjects of that investigation did not have the "personnel-related" significant privacy interest afforded by section 92F-12(b)(4), HRS, to the subjects of that investigation. Civil Beat v. AG, 151 Haw. at 82-83, 508 P.3d at 1168-1169. However, the Court stated that the public has no interest in knowing the identities of those interviewed and mentioned in the report and cited to OIP Opinion Letter Number 98-05 at page 18, which found that there is little or no public interest in disclosure of information that identifies witnesses and complainants. The Court then found that even though the interviewees in the AG investigation did not have a significant privacy interest in the report as a whole, disclosure of their names would be a clearly unwarranted invasion of their privacy. Id., 151 Haw. at 87, 508 P.3d at 1173 (footnotes omitted).

By contrast, in this case the request was made under Part III, and the witness identities are within the portion of the Findings and Conclusions that is Requester's joint personal record. Thus, as explained in sections III and IV, supra, witness information is not subject to Part II exceptions including the privacy exception. To withhold witness identities under a personal record request, DOT would have had to show that promises of confidentiality had been made under section 92F-22(2), HRS, which it failed to do (see footnote 10). OIP therefore concludes that the request here is distinguishable from the Part II request for an investigation report in Civil Beat v. AG, and as OIP has already explained in sections II and III, supra, Requester is entitled to witness information as his joint personal record.

3. DOT May Not Withhold Information About the AG Investigator Because He Has No Significant Privacy Interest

The portion of the Findings and Conclusions subject to Part II includes the AG investigator's professional background information. OIP finds that the AG investigator was performing his job of investigating the allegations and that he did not have a significant privacy interest in his identity and professional background as the investigator. In addition, the following information about government employees is public without exception:

name, compensation (but only the salary range for employees covered by or included in chapter 76, and sections 302A-602 to 302A-639, and 302A-701, or bargaining unit (8)), job title, business address, business telephone number, job description, education and training background, previous work experience, dates of first and last employment, position number, type of appointment, service computation date, occupational

group or class code, bargaining unit code, employing agency name and code, department, division, branch, office, section, unit, and island of employment, of present or former officers or employees of the agency; provided that this paragraph shall not require the creation of a roster of employees; and provided further that this paragraph shall not apply to information regarding present or former employees involved in an undercover capacity in a law enforcement agency[.]

HRS § 92F-12(a)(14) (2012). OIP therefore concludes that DOT was not entitled to withhold the AG investigator's name and other information because certain employment information about him is required to be public under section 92F-12(a)(14), HRS, and because he had no significant privacy interest in other information about him, which was not information of a highly personal nature. HRS § 92F-14(a).

4. DOT May Withhold Identities of Complainant and Respondent in a Separate Complaint

Finally, the last line on page one of AG19-2836 refers to a separate complaint filed by a different named DOT employee against a different named DOT employee. The reference to this other complaint is not part of Employee's personal record as defined in section 92F-3, HRS, so for the purpose of this request it is subject to Part II. The respondent in this separate complaint has a significant privacy interest in the personnel-related information about him as set forth in section 92F-14(b)(4), HRS, and as explained in Civil Beat v. AG. The complainant in this separate case also has a significant privacy interest in the fact that he is a witness. In balancing the public interest in disclosure against the privacy interests of the complainant and respondent regarding their involvement in that separate complaint, OIP finds there is no particular public interest to outweigh their respective privacy interests. OIP further finds that there is nothing to show that Employee is already aware of their identities. OIP therefore concludes that redaction of their identities is warranted under section 92F-13(1), HRS, to avoid a clearly unwarranted invasion of personal privacy. OIP further concludes that redaction of their names and any other directly identifying information (such as contact information or a unique job title) is sufficient to make them reasonably non-identifiable.

RIGHT TO BRING SUIT

Requester is entitled to seek assistance directly from the courts. 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 UIP A, 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.

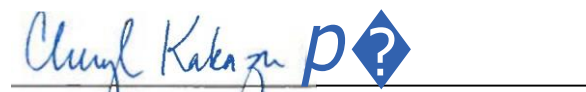
This letter also serves as notice that OIP is not representing anyone in this appeal. OIP's role herein is as a neutral third party.

OFFICE OF INFORMATION PRACTICES



Carlotta Amerino
Staff Attorney

APPROVED:



Cheryl Kakazu Park
Director