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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: Insurance Claimant
Agency: Department of Commerce and Consumer Affairs
Date: May 21, 2024
Subject: Insurance Fraud Investigation Records (U APPEAL 21-32)

REQUEST FOR OPINION

An insurance claimant (Requester) seeks a decision as to whether the Department of Commerce and Consumer Affairs (DCCA) properly denied his request for personal records under Part III of the UIPA.

Unless otherwise indicated, this decision is based solely upon the facts presented in Requester's email to OIP dated April 14, 2021, and attached materials; Requester's email to OIP dated April 30, 2021, and attached email thread and materials; Requester's email to OIP dated June 17, 2021, and attached materials; Requester's email to OIP dated June 18, 2021, and attached email thread and materials; the Department of the Attorney General's (AG) letter to OIP on behalf of DCCA dated July 22, 2021, and enclosed *in camera* records; and the AG's letter to OIP on behalf of DCCA dated April 25, 2024.

QUESTIONS PRESENTED

1. Whether the UIPA allowed DCCA, in response to a personal record request made under Part III of the UIPA, to withhold the responsive records on the basis that DCCA's Insurance Fraud Investigation Branch (the Branch) performs as

a principal function an activity pertaining to the prevention, control, or reduction of crime and the responsive records were information or reports prepared or compiled for the purpose of a criminal investigation. HRS § 92F-22(1)(A) (2012).

2. Whether the UIPA allowed DCCA, in response to a personal record request made under Part III of the UIPA, to withhold the responsive records on the basis that the records were “investigative reports and materials” related to an ongoing criminal investigation . HRS §92F-22(4) (2012).

3. Whether the UIPA allowed DCCA, in response to a personal record request made under Part III of the UIPA, to withhold the responsive records on the basis that DCCA was authorized to withhold the records by sections 431:2-209 and 431:2-409, HRS. HRS §§ 92F-22(5) (2012), 431:2-209 and 431:2-409 (2019).

BRIEF ANSWERS

1. Yes, with some exceptions as detailed below. An agency that performs as a principal function an activity pertaining to the prevention, control, or reduction of crime may withhold from personal record requesters “information or reports prepared or compiled for the purpose of criminal intelligence or of a criminal investigation” in response to a personal record request. HRS § 92F-22(1) (2012). OIP finds that the Branch is such an agency. Based on *in camera* review of the responsive records, OIP further finds that they are personal records of Requester and they consist of information or reports compiled for the purpose of a criminal investigation. Therefore, OIP concludes that this exemption generally applies to the responsive records with the exception of correspondence to or from Requester, as explained below.

2. Yes, with some exceptions as detailed below. An agency may also withhold “investigative reports and materials” in response to a personal record request while an investigation against the requester is still ongoing. HRS § 92F-22(4). Upon *in camera* review of the responsive records, OIP finds that the responsive records consist of investigative reports and materials related to an ongoing investigation against Requester. Therefore, OIP concludes that this exemption also generally applies to the responsive records with the exception of correspondence to or from Requester that was either submitted by Requester himself or previously provided to Requester. OIP concludes that the exemptions found in sections 92F-22(1) and (4), HRS, do not apply to this correspondence.

3. Yes, with some exceptions as detailed below. An agency is also allowed to withhold records in response to a personal record request if such records are authorized to be withheld by statute. HRS § 92F-22(5). DCCA asserted that it was authorized to withhold the records by sections 431:2-209 and 431:2-409(b), HRS, which authorize DCCA to withhold “complaints and investigation reports” and “working papers of examinations, complaints, and investigation reports” if the

Insurance Commissioner (Commissioner) deems doing so prudent. Based on *in camera* review, OIP found that some of the responsive records consisted of reports and working papers of reports, but that the correspondence between Requester and GEICO did not fall under the categories listed in section 431:2-209(e), HRS. Therefore, OIP concludes that sections 92F-22(b) and 431:2-409(b), HRS, provide additional justifications for DCCA to withhold some of the requested records, but do not allow DCCA to withhold the correspondence between Requester and GEICO. OIP thus further concludes that since no exemption to personal record disclosure applies, DCCA must disclose copies of the correspondence between Requester and GEICO.

FACTS

Requester made a personal record request to DCCA dated June 1, 2021, for “any and all information submitted by GEICO”¹ against him or related to him. The record request appears to relate to a dispute between Requester and GEICO after GEICO denied an insurance claim Requester made and placed an “adverse record” against Requester. The responsive records include a report, working papers and materials related to the report, and correspondence between GEICO and Requester.

DCCA denied Requester’s record request on June 16, 2021, citing to sections 92F-13, 92F-22, and 431:2-209, HRS, as its justification. Requester appealed the denial of his record request to OIP.

DISCUSSION

I. Potentially Applicable Exceptions

The UIPA requires a government agency to make any accessible personal record² it maintains “available to the individual to whom it pertains, in a reasonably prompt manner and in a reasonably intelligible form[,]” unless one of the exemptions listed in section 92F-22, HRS, applies. HRS § 92F-21 (2012). DCCA invoked the following exemptions contained in section 92F-22, HRS:

¹ “GEICO” means the Government Employees Insurance Company.

² The UIPA defines a “[p]ersonal record” 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 refer to the individual’s name, identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph.

HRS § 92F-3 (2012).

§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[.]
- ...
- (4) Including investigative reports and materials, related to an upcoming, ongoing, or pending civil or criminal action or administrative proceeding against the individual.
- (5) Required to be withheld from the individual to whom it pertains by statute or judicial decision or authorized to be so withheld by constitutional or statutory privilege.

HRS § 92F-22(1)(A), (4), and (5).

OIP has previously held that, because exemptions to disclosure must be narrowly construed, section 92F-22(4), HRS, “cannot be read to provide blanket protection over all investigative materials per se.” OIP Op. Ltr. No. 09-03 (Opinion 09-03) at 3. In Opinion 09-03, OIP found that agencies may only withhold records or information compiled for law enforcement purposes “where disclosure would in some way frustrate the agency’s ability to prosecute or pursue such actions,” and that investigative materials should be disclosed if no frustration would occur from the disclosure. OIP Op. Ltr. No. 09-03 at 3. In that opinion, OIP concluded that publicly available records or records created by or already provided to the individual generally may not be withheld. OIP noted that records created by or already provided to an individual may only be withheld in rare instances where an agency believes “that disclosure would interfere with the agency’s performance of its functions, such as where notice to the individual that the agency possesses the record, in itself, would jeopardize the agency’s investigation or proceedings.” Id.

While Opinion 09-03 only discussed the exemption found in section 92F-22(4), HRS, the exemption found in section 92F-22(1)(A), HRS, similarly allows withholding of reports and investigative materials from personal record requesters. OIP finds that the logic behind Opinion 09-03’s conclusion that publicly available

records or records created by or already provided to the individual generally may not be withheld would apply equally strongly to the types of records covered by section 92F-22(1)(A), HRS. Therefore, OIP concludes that publicly available records and records already provided to the individual generally cannot be withheld under section 92F-22(1)(A), HRS.

II. Records Compiled for the Purpose of Criminal Investigation May Be Withheld

The Branch is charged with conducting investigations and criminally prosecuting insurance fraud pursuant to section 431:2-402, HRS, which DCCA explained is its principal function. The responsive records were reports and information maintained by DCCA for the purpose of the Branch's ongoing criminal investigation of potential criminal activity and potential prosecution arising from that investigation. Based on that, the AG argued that the exemptions found in sections 92F-22(1) and (4), HRS, authorized DCCA to withhold the records.

OIP finds that the Branch is an agency whose principal function is activities relating to the prevention, control, or reduction of crime. Based on OIP's *in camera* review of the responsive records, OIP further finds that the responsive records were indeed compiled for the purpose of a criminal investigation, and that the responsive records include an investigator's report. Therefore, OIP concludes that the exemption found in section 92F-22(1)(A), HRS, generally applies to the responsive records. However, OIP's *in camera* review of the records showed that some of the responsive records consist of emails and letters from Requester or Requester's attorney on Requester's behalf to GEICO or from GEICO to Requester or Requester's attorney on Requester's behalf. OIP finds that there is no indication that Requester's knowledge that DCCA possessed of copies of correspondence between Requester and GEICO would, in itself, jeopardize the agency's investigation or proceedings, and DCCA did not argue that it would. Because these records were either created by Requester or previously provided to Requester, OIP concludes that the exemption found in section 92F-22(1)(A), HRS, does not apply to the correspondence between Requester and GEICO.

III. Records Relating to an Ongoing Investigation May Be Withheld

DCCA also asserted that at the time the Branch responded to the request, although it did not have sufficient information to prosecute Requester it was still considering prosecution in the future if or when additional information was discovered, and therefore the Branch considered the investigation to still be open. OIP accepts DCCA's assertion that the investigation remained ongoing at the time

DCCA responded to the request,³ and based on OIP's *in camera* review, OIP finds that the responsive records consist of investigative reports and materials relating to an ongoing criminal investigation. Therefore, OIP concludes that the exemption found in section 92F-22(4), HRS, generally applies to the responsive records. However, for the same reasons explained in section II above, OIP finds that disclosure of the correspondence between Requester and GEICO would not jeopardize DCCA's investigation and thus concludes that the exemption found in section 92F-22(4), HRS, does not apply to that correspondence.

IV. Records Protected by Section 431:2-209(e), HRS, May Be Withheld

DCCA also invoked the exemption found in section 92F-22(5), HRS, which allows an agency to withhold a record "required to be withheld from the individual to whom it pertains by statute or judicial decision or authorized to be so withheld by constitutional or statutory privilege." HRS § 92F-22(5). DCCA asserted that the responsive records were provided by GEICO as part of the mandatory disclosures required by section 431:2-409(a), HRS, and therefore DCCA was authorized to withhold such records by sections 431:2-409(b) and 431:2-209, HRS. Section 431:2-409(a), HRS, requires insurers and licensees to provide the Branch with information regarding alleged violations of section 431:2-403, HRS, within sixty days of discovering credible information of such a violation.⁴ Under section 431:2-409(b), HRS, information provided as part of the mandatory disclosures required by section 431:2-409(a), HRS, is "protected from public disclosure to the extent authorized by chapter 92F and section 431:2-209." Section 431:2-209(e), HRS, states:

- (e) The following records and reports on file with the commissioner shall be confidential and protected from discovery, production, and disclosure for so long as the commissioner deems prudent:
 - (1) Complaints and investigation reports;

³ If and when the investigation has closed, that will affect the applicability of the open investigation exemption set out in section 92F-22(4), HRS. However, the other two exemptions and the confidentiality statute raised by DCCA do not include a requirement that an investigation still be open for them to apply, and thus it appears that the closing of the investigation would not ultimately change DCCA's ability to withhold the requested records.

⁴ Section 431:2-403, HRS, defines the offense of insurance fraud. GEICO appears to have submitted a referral regarding the dispute between GEICO and Requester to the Branch for potential insurance fraud. The records in question in this case were submitted by GEICO under section 431:2-409, HRS.

- (2) Working papers of examinations, complaints, and investigation reports;
- (3) Proprietary information, including trade secrets, commercial information, and business plans, which, if disclosed may result in competitive harm to the person providing the information; and
- (4) Any documents or information received from the National Association of Insurance Commissioners, the federal government, insurance regulatory agencies of foreign countries, or insurance departments of other states, territories, and commonwealths that are confidential in other jurisdictions. The commissioner may share information, including otherwise confidential information, with the National Association of Insurance Commissioners, the federal government, insurance regulatory agencies of foreign countries, or insurance departments of other states, territories, and commonwealths so long as the statutes or regulations of the other jurisdictions permit them to maintain the same level of confidentiality as required under Hawaii law.

HRS § 431:2-209(e) (2019).

DCCA specifically asserted that responsive records fall under the protected categories of “complaints and investigation reports” and “working papers of examinations, complaints, and investigation reports.” HRS § 431:2-209(e) (2019). DCCA stated that the Commissioner does not believe it would be prudent to disclose the responsive records whether the investigation is ongoing or not, because disclosure of the records “could jeopardize the Branch’s ability to pursue an action if or when additional information is discovered,” and that even if the investigation were to be closed the responsive records may still be used by the Branch in relation to a future complaint made against Requester.

OIP finds that the responsive records were provided to DCCA by GEICO as part of its mandatory disclosures under section 431:2-409(a), HRS, and that the Commissioner has deemed it prudent that the responsive records be withheld. Therefore, the responsive records are protected from disclosure to the extent that they fall within one or more of the categories listed in section 431:2-209(e), HRS. OIP’s *in camera* review shows that the records withheld include a report on the claim, working papers prepared for the report, and investigative materials related to the report. Because these records were not previously made available to Requester, and these records are investigative materials as part of the Branch’s investigation, OIP concludes that section 431:2-209(e), HRS, applies to the report,

working papers, and investigative materials, and therefore such records may be withheld under section 92F-22(5), HRS.⁵

However, based on its *in camera* review of the records withheld, OIP also finds that the letters and emails to and from Requester are not themselves complaints and investigation reports, nor are they working papers of examinations, complaints and investigation reports. Given that these letters and emails were either from Requester or Requester's attorney on Requester's behalf or sent directly to Requester or Requester's attorney, the letters and emails do not contain proprietary information which, if disclosed to Requester would result in competitive harm. Finally, DCCA did not receive these letters and emails from the National Association of Insurance Commissioners, the federal government, or insurance regulatory agencies of foreign countries or other states. Therefore, OIP concludes that the correspondence between Requester and GEICO does not fall under any of the four categories of records protected by section 431:2-209(e), HRS, so section 92F-22(5), HRS, does not authorize DCCA to withhold the correspondence.

Thus, most of the requested records were protected from disclosure by three separate exemptions: subsections 92F-22(1)(A), (4), and (5), HRS, so DCCA properly withheld them. However, none of those exemptions applied to the letters and emails from Requester and Requester's attorney to GEICO and copies of the letters and emails from GEICO to Requester and Requester's attorney, so DCCA must provide those letters and emails to Requester. If Requester still wants access to those letters and emails, OIP hereby instructs Requester to contact DCCA within twenty business days of the date of this letter to confirm his continued interest so that DCCA can provide an updated Notice to Requester and make arrangements to provide access.

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).

⁵ Upon *in camera* review, some of the records that OIP has concluded may properly be withheld might also be proprietary information which, if disclosed, may result in competitive harm to the provider of the information, which is protected from disclosure under section 431:2-209(e)(3), HRS, but as DCCA did not make this argument, OIP will not address it at this time.

If the court finds that the agency knowingly or intentionally violated a provision under Part III 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 the 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 request for assistance. OIP's role herein is as a neutral third party.

OFFICE OF INFORMATION PRACTICES



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