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STATE OF HAWAII  
OFFICE OF INFORMATION PRACTICES

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August 19, 2019

VIA EMAIL

The Honorable Wes Frysztacki  
Director  
Department of Transportation  
City and County of Honolulu

Ms. [REDACTED]

Re: Appeal of Denial of Access to Records (U APPEAL 20-3)

Dear Director Frysztacki and Ms. [REDACTED]

The Office of Information Practices (OIP) opened a file regarding Ms. [REDACTED]'s (Requester) appeal with respect to the denial by the Department of Transportation Services, City and County of Honolulu (TRANS-HON), of her request for records made under Part III of the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes (HRS) (the UIPA). Specifically, Ms. [REDACTED] indicated that she made a written request to TRANS-HON dated May 28, 2019 for access to "[i]nformation related to the misconduct of [REDACTED] . . . with respect to [REDACTED], during 2017 or 2018, that resulted in his suspension or discharge by the City and County of Honolulu, and/or the termination or non-renewal of his services or contract. . . ."

This appeal file was randomly assigned to OIP's experimental alternative appeal resolution track pursuant to H.R. 104, Regular Session of 2019, in which the Hawaii House of Representatives requested that OIP conduct an alternative appeal resolution pilot program and prepare "short, informal, unenforceable guidance" for files assigned to the alternative appeal resolution track within two weeks of receiving the agency's final response. A copy of H.R. 104 is attached to this letter.

TRANS-HON provided a statement of position dated August 13, 2019, including the records for OIP's *in camera* review, and OIP is now providing informal, unenforceable guidance through this letter.

Termination Letter

One of the records that TRANS-HON provided to OIP for its *in camera* review was TRANS-HON's letter to the individual (Contractor) identified by Requester in her record request to

TRANS-HON and concerning TRANS-HON's termination of Contractor's personal services contract (Termination Letter). OIP's inclination is to find that the Termination Letter is not about Requester and, therefore, is not Requester's personal record. Instead OIP reviewed the Termination Letter in accordance with the public access provisions of Part II of the UIPA.

Initially, OIP is inclined to find that information about Contractor's termination in the Termination Letter must be disclosed to the public because the UIPA requires public disclosure of information about the "duration of the contract" of a contract hire, regardless of "[a]ny other provision in this chapter to the contrary notwithstanding."<sup>1</sup> HRS § 92F-12(a) (2012). Yet OIP is also inclined to find that TRANS-HON may withhold from public access the following information in the Termination Letter:

- 1) Contractor's home address; and
- 2) Two sentences describing the ongoing investigation about Contractor.

These items of information do not concern Contractor's termination and, in OIP's initial inclination, may be withheld under the UIPA exception for "[g]overnment records, which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy" (Privacy Exception). HRS § 92F-13(1) (2012). OIP is further inclined to find that the Contractor has a significant privacy interest in investigation information that outweighs any public interest while the investigation is still ongoing.

TRANS-HON had argued that the records may be withheld under the UIPA exception in section 92F-13(3), HRS, that is based upon the "frustration of a legitimate government function" (Frustration Exception). HRS § 92F-13(3) (2012). OIP is inclined to disagree that the Frustration Exception applies because OIP is not inclined find that public disclosure of the Termination Letter would frustrate a legitimate government function especially since the Termination Letter has already been provided to Contractor.

### Preliminary Summary

OIP is inclined to initially finds that, to a large extent, the Preliminary Summary concerns Requester's allegations about Contractor and, therefore, is a joint personal record of both Requester and Contractor. See OIP Op. Ltr. No. F13-01 (discussing what constitutes a joint personal record in an investigative report about alleged workplace misconduct). TRANS-HON argued that it may

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<sup>1</sup> Section 92F-12(a), HRS provides in pertinent part:

**§92F-12 Disclosure required.** (a) Any other provision in this chapter to the contrary notwithstanding, each agency shall make available for public inspection and duplication during regular business hours:

. . . .

- (10) Regarding contract hires and consultants employed by the agency:
  - (A) The contract itself, the amount of compensation;
  - (B) The duration of the contract; and
  - (C) The objectives of the contract, . . . .

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withhold personal records under the exemption in section 92F-22(4), HRS, but OIP notes that this exemption only applies when the personal records concern an action or proceeding "against the individual" who is requesting the personal records. HRS § 92F-22(4) (2012). In the present case, the Requester is not the individual against whom the investigation, actions or proceedings are directed. Therefore, the exemption in section 92F-22(4), HRS, does not apply.

OIP is inclined to find that the Preliminary Summary contains one sentence setting forth Contractor's statement that is solely Contractor's personal record because it only makes reference to and is only about Contractor. HRS § 92F-3 (2012) (setting forth the definition of the term "personal record"). Thus, it is OIP's initial inclination that Contractor's Statement is not a personal record of Requester, and the provisions in Part III of the UIPA about access to personal records do not apply to Contractor's Statement. Further, with regard to the public access provisions of Part II of the UIPA, OIP is inclined to find that TRANS-HON may withhold, during the investigation, Contractor's statement in the Preliminary Summary under the UIPA's Privacy Exception, which is previously discussed.

OIP's inclinations as stated herein are informal guidance and are not binding on the parties to this appeal. By this letter OIP notifies Requester and TRANS-HON that if any party does not wish to accept this informal guidance as resolving this appeal, that party is requested to so notify OIP in writing within 20 business days of the date of this letter and OIP will issue a binding determination in accordance with its usual procedures at a future time. If OIP does not hear from you within that time, OIP will close this file.

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

If you have any questions concerning this matter, please contact OIP.

Very truly yours,



Lorna Aratani  
Staff Attorney

LLA:za

Attachment

cc: Stephen Atwell, Deputy Corporation Counsel  
Department of the Corporation Counsel

Chris Ovitt, Administrative Services Officer  
Department of Transportation Services



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September 9, 2019

VIA EMAIL

Mr. [REDACTED]

The Honorable Phyllis Shimabukuro-Geiser  
Chairperson  
Department of Agriculture

Re: Investigation Records that are Personal Records (U APPEAL 20-9)

Dear Addressees:

The Office of Information Practices (OIP) opened an appeal regarding Mr. [REDACTED] (Requester) request for an investigation into whether, under Part III of the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes (HRS) (UIPA), the Department of Agriculture (DOA) properly denied his request for various records about certain complaints that were either filed by or against him. This appeal file was randomly assigned to OIP's experimental alternative appeal resolution track pursuant to H.R. 104, Regular Session of 2019, in which the Hawaii House of Representatives requested that OIP conduct an alternative appeal resolution pilot program and prepare "short, informal, unenforceable guidance" for files assigned to the alternative appeal resolution track within two weeks of receiving the agency's final response. A copy of H.R. 104 is attached to this letter.

DOA provided a statement of position dated September 3, 2019 (DOA Statement). The DOA Statement identified four investigative records (Records) that it had withheld and explained that the Records were "concerning an administrative investigation conducted into [Requester's] misconduct" and "he was disciplined for the violations." The DOA Statement further explained that "the Hawaii Government Employees' Association (HGEA) grieved the discipline on [Requester's] behalf and the "grievance is still open and pending arbitration."

Based upon the description of the records requested by Mr. [REDACTED] OIP initially believes that Mr. [REDACTED] is seeking access to personal records, i.e., records "about" himself. See HRS § 92F-3 (defining the term "personal record" as "any item, collection, or grouping of information about an individual that is maintained by an agency"). For personal record requests, specific exemptions to disclosure are found in section 92F-22, HRS.

Mr. [REDACTED]  
The Honorable Phyllis Shimabukuro-Geiser  
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In the DOA Statement, DOA asserted that it did not disclose the requested personal records “because it believes that the H.R.S. 92F-22(4) exemption, ‘including investigative reports and materials, related to an upcoming, ongoing, or pending civil or criminal action or administrative proceeding against the individual’ applies.” OIP’s initial inclination is to find that, because the grievance regarding Requester’s discipline is still ongoing and awaiting arbitration, the Records are related to an ongoing administrative proceeding against the individual and, therefore, may be withheld under the exemption in section 92F-22(4), HRS.

In this particular case, OIP further recommends that Requester consider submitting a new request for the Records after all administrative proceedings have concluded, which is when the exemption in section 92F-22(4), HRS, would no longer apply. If Requester is not satisfied with DOA’s response to his new record request after all administrative proceedings have concluded, Requester may appeal again to OIP.

OIP’s inclination as stated herein is informal guidance and is not binding on the parties to this appeal. A party wishing to proceed under OIP’s usual procedures is requested to so notify OIP in writing within 20 business days of the date of this letter. If OIP does not hear from you within that time, OIP will close this file. If either party chooses to request that OIP proceed under OIP’s usual procedures, OIP will resolve this appeal according to our general “first-in-first-out” policy and cases older than this will be completed first. Depending upon the facts of each appeal, many, but not all, appeals are closed with the issuance of an OIP opinion letter, which could take a year or longer to complete because of OIP’s backlog of cases.

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

If you have any questions concerning this matter, please contact OIP.

Very truly yours,



Lorna Aratani  
Staff Attorney

Attachment



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September 10, 2019

VIA EMAIL

The Honorable Wes Frysztacki  
Director  
Department of Transportation  
City and County of Honolulu

Ms. [REDACTED]

Re: Appeal of Denial of Access to Records (U APPEAL 20-3)

Dear Director Frysztacki and [REDACTED]

In a letter dated August 19, 2019, the Office of Information Practices (OIP) informed you of its short, informal, unenforceable guidance regarding the above-referenced Appeal (Guidance) because this file is assigned to the alternative appeal resolution track pursuant to H.R. No. 104, Regular Session of 2019. A copy of OIP's Guidance is attached for your reference.

OIP's inclinations as stated in the Guidance are informal guidance and are not binding on the parties to this appeal. By this letter, OIP notifies the Department of Transportation (DTS) that if it will disclose records in accordance with OIP's Guidance, DTS should provide a revised Notice to Requester within 10 days of the date of this letter, and also copy OIP. OIP further notifies Requester that if DTS does not choose to disclose the records or Requester is otherwise not satisfied with DTS' response, Requester is requested to so notify OIP in writing within 20 business days of the date of this letter.

If either party chooses to request that OIP proceed under OIP's usual appeal procedures, OIP will resolve this appeal according to our general "first-in-first-out" policy and cases older than this will be completed first. Depending upon the facts of each appeal, many, but not all, appeals are closed with the issuance of an OIP opinion letter, which could take a year or longer to complete because of OIP's backlog of cases.

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cc: Stephen Atwell, Deputy Corporation Counsel  
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