



STATE OF HAWAII
OFFICE OF INFORMATION PRACTICES

DAVID Y. IGE
GOVERNOR

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

CHERYL KAKAZU PARK
DIRECTOR

The Office of Information Practices (OIP) is authorized to issue decisions and advisory opinions under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes (HRS) (the UIPA) pursuant to HRS § 92F-42, and chapter 2-73, Hawaii Administrative Rules (HAR). This is a memorandum opinion and will not be relied upon as precedent by OIP in the issuance of its opinions but is binding upon the parties involved.

MEMORANDUM OPINION

Requester: Dr. Bruce Anderson, Director, Department of Health
Agency: Department of Health
Date: January 9, 2020
Subject: Names of Individuals Sent to Kalaupapa (U RFO-G 19-1)

Requester seeks an opinion on whether the names and other information regarding individuals sent to Kalaupapa must be disclosed under Part II of the UIPA.

Unless otherwise indicated, this advisory opinion is based solely upon the facts presented in Requester's letter to OIP dated May 30, 2019, and attached materials; Requester's letter to Ka 'Ohana O Kalaupapa dated June 7, 2019; and a letter to OIP from Ka 'Ohana O Kalaupapa dated August 5, 2019.

Opinion

Based on a change in the law since OIP issued its Opinion Letter Number 03-19 (Opinion 03-19) – namely the passage of the Omnibus Public Land Management Act of 2009, Public Law 111-11 (2009) (PL 111-11), and an amendment to the definition of protected health information under 45 C.F.R. Parts 160 and 164, which are the medical privacy rules promulgated under the Administrative Simplification subtitle of the Health Insurance Portability and Accountability Act of 1996, Public Law 104-191 (HIPAA) (HIPAA rules) – OIP reconsiders its conclusions in Opinion 03-19 with respect to the disclosure of the names of individuals sent to Kalaupapa through 1969.

OIP now concludes that the names and other information regarding individuals sent to Kalaupapa must be disclosed under the UIPA. Disclosure of the names is now required by federal law and is therefore both authorized by the HIPAA rules and required by the UIPA. See PL 111-11, C.F.R. § 164.512(a) (2016), and HRS § 92F-12(b)(2) (2012). Disclosure of the other information – date of birth, age at admission, and gender – is required under the UIPA because in this specific instance the individuals’ significant privacy interest in that information does not outweigh the public interest in its disclosure. See HRS §§ 13(1), -14 (2012).

Statement of Reasons for Opinion

This opinion request raises the question of whether PL 111-11¹ makes the names of individuals sent to Kalaupapa public by law and thus partially overturns Opinion

¹ The relevant section of PL 111-11 reads as follows:

SEC. 7108. KALAUPAPA NATIONAL HISTORICAL PARK.

(a) IN GENERAL.—The Secretary of the Interior shall authorize Ka ‘Ohana O Kalaupapa, a non-profit organization consisting of patient residents at Kalaupapa National Historical Park, and their family members and friends, to establish a memorial at a suitable location or locations approved by the Secretary at Kalawao or Kalaupapa within the boundaries of Kalaupapa National Historical Park located on the island of Molokai, in the State of Hawaii, to honor and perpetuate the memory of those individuals who were forcibly relocated to Kalaupapa Peninsula from 1866 to 1969.

(b) DESIGN.—

(1) IN GENERAL.—The memorial authorized by subsection (a) shall—

(A) display in an appropriate manner the names of the first 5,000 individuals sent to the Kalaupapa Peninsula between 1866 and 1896, most of whom lived at Kalawao; and

(B) display in an appropriate manner the names of the approximately 3,000 individuals who arrived at Kalaupapa in the second part of its history, when most of the community was concentrated on the Kalaupapa side of the peninsula.

(2) APPROVAL.—The location, size, design, and inscriptions of the memorial authorized by subsection (a) shall be subject to the approval of the Secretary of the Interior.

03-19, which among other things concluded that depending on which agency maintained the names, the names of individuals sent to Kalaupapa fell within the UIPA's exceptions for records whose disclosure would be a clearly unwarranted invasion of personal privacy and for records protected by state or federal law, sections 92F-13(1) and (4), HRS. The opinion request further asks whether, if the names are public information, each individual's date of admission to Kalaupapa, gender, and age at admission would also be considered public information. Ka 'Ohana O Kalaupapa, the organization seeking access to Department of Health (DOH) records for use in creating an accurate list of names for the planned Kalaupapa Memorial, is specifically seeking access to records of individuals admitted to Kalaupapa between 1933 and 1969.²

In Opinion 03-19, OIP concluded based on the applicable laws at that time that health records held by agencies covered by HIPAA are subject to the HIPAA medical privacy rules, which

restrict disclosure of deceased persons' health information (including their status as a Hansen's disease victim) that is in the hands of a HIPAA-covered entity. The health information held by a HIPAA-covered entity may tend to date from within the last few decades, but no matter how old the health information is, its disclosure will be restricted by the HIPAA rules and thus will also fall within an exception to disclosure under the UIPA. See Haw. Rev. Stat. § 92F-13(4) (1993).

OIP Op. Ltr. No. 03-19 at 7-8.

OIP may reconsider a precedent set by a prior OIP decision when at least one of the following is present: "(1) [a] change in the law; (2) [a] change in the facts; or (3) [o]ther compelling circumstances." HAR § 2-73-19(c) and (d). Here, PL 111-11 is a change in the law from when Opinion 03-19 was issued on the specific question of the disclosure of names of individuals sent to Kalaupapa. Requester also brought to OIP's attention an amendment to the HIPAA rules, which now exclude individually identifiable information regarding a person who has been deceased for more than 50 years from the definition of protected health information subject to protection under the HIPAA rules. 45 C.F.R. § 160-103. This, too, represents a change in the law since Opinion 03-19 was issued, as at that time the HIPAA rules applied to

(c) FUNDING.—Ka 'Ohana O Kalaupapa, a nonprofit organization, shall be solely responsible for acceptance of contributions for and payment of the expenses associated with the establishment of the memorial.

² Individuals sent to Kalaupapa between 1866 and 1932 will also be included in the Kalaupapa Memorial but access to DOH records regarding those individuals is apparently not in dispute.

protected health information regardless of its age, so long as it remained in the hands of a covered entity. See OIP Op. Ltr. No. 03-19 at 7-8 (discussing applicability of HIPAA rules to protected health information regardless of age). Based on the change in the law represented by PL 111-11 and the amended definition of protected health information under the HIPAA rules, OIP will reconsider its conclusion in Opinion 03-19 with respect to the names of individuals sent to Kalaupapa during the relevant period.³

Based on the current definition of protected health information under the HIPAA rules, the names of individuals sent to Kalaupapa who have been dead for over 50 years would not fall within the HIPAA rules' protection and thus would not fall within the UIPA's exception for records protected by state or federal law. See 45 C.F.R. § 160.103, HRS § 92F-13(4). OIP concluded in Opinion 03-19 that it should look to the HIPAA rules' privacy standards when determining the applicability of the UIPA's privacy exception to government records not directly covered by HIPAA, reasoning that "the standard of privacy for health information generally should be the same for records held by government agencies, regardless of whether they are directly covered by HIPAA." OIP Op. Ltr. No. 03-09 at 8-9. OIP continues to view HIPAA as setting the privacy standard for medical information, and OIP therefore concludes that the UIPA's privacy exception likewise does not apply to medical information of individuals who have been dead for more than 50 years. See HRS §92F-13(1).

Since the requested names include individuals sent to Kalaupapa as recently as 50 years ago, they presumably include individuals who, even if they are now deceased, died within the last 50 years. Thus, the change to HIPAA's definition of protected health information would not change OIP's conclusion in Opinion 03-19 insofar as it applies to individuals who have not been deceased for more than 50 years. PL 111-11, however, expressly requires the disclosure of the names of 8,000 individuals sent to Kalaupapa over time as part of a public memorial authorized by the law.⁴ The UIPA recognizes state and federal laws authorizing record disclosure: section 92F-12(b)(2), HRS, requires an agency to disclose "[g]overnment records which, pursuant to federal law . . . , are expressly authorized to be disclosed to the person

³ The change to the HIPAA rules' definition of protected health information is likely to also affect OIP's conclusions in Opinion 03-19 with regard to significantly older medical information generally. However, OIP will wait to reconsider its precedent more generally until an appeal file raises the issue.

⁴ PL 111-11 **authorizes** the construction of a public Kalaupapa Memorial, but it **mandates** that such a memorial, if constructed, include the names of 8,000 individuals sent to Kalaupapa. Thus, OIP finds that while PL 111-11 did not require Ka 'Ohana O Kalaupapa to proceed with its plans for a Kalaupapa Memorial to begin with, once Ka 'Ohana O Kalaupapa did begin working toward the creation of the Kalaupapa Memorial, PL 111-11 then **required** that the names be publicly disclosed.

requesting access[.]” OIP therefore concludes that because PL 111-11 authorizes a public memorial displaying the names of individuals sent to Kalaupapa, PL 111-11 is a federal law expressly authorizing disclosure⁵ of those names to the general public for the purpose of section 92F-12(b)(2), HRS.

HIPAA, of course, is a federal law that generally bars the public disclosure of protected health information by a covered entity, and the UIPA also recognizes federal confidentiality laws, as discussed in Opinion 03-19. As a result of these seemingly contradictory laws and the UIPA’s provisions recognizing both federal confidentiality and disclosure laws, the UIPA either requires or bars disclosure of names at issue here based on whether federal law ultimately requires or bars such disclosure. The question presented to OIP, then, is whether PL 111-11 or the HIPAA rules’ general privacy requirement is controlling with respect to the names in question, which will determine whether the UIPA requires their disclosure.

The HIPAA rules allow the disclosure of protected health information “to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law.” C.F.R. § 164.512(a). In published guidance, the Department of Health and Human Services’ Office of Civil Rights, which administers the HIPAA rules, observed that a law (which could be state or federal) mandating disclosure of otherwise protected records falls within this authorization, whereas a law merely authorizing such disclosure does not:

The Privacy Rule permits a covered entity to use and disclose protected health information as required by other law, including state law. See 45 CFR 164.512(a). Thus, where a state public records law mandates that a covered entity disclose protected health information, the covered entity is permitted by the Privacy Rule to make the disclosure, provided the disclosure complies with and is limited to the relevant requirements of the public records law.

However, where a state public records law only permits, and does not mandate, the disclosure of protected health information, or where exceptions or other qualifications apply to exempt the protected health information from the state law’s disclosure requirement, such disclosures are not “required by law” and thus, would not fall within §

⁵ OIP notes Requester’s concern that PL 111-11’s authorization of disclosure is specific to disclosure by Ka ‘Ohana O Kalaupapa in the form of a Kalaupapa Memorial and may not authorize disclosure by Requester or other agencies. However, the UIPA, which was intended among other things to create uniformity in disclosure of government records, does not generally treat records as public in the hands of one entity but confidential in the hands of another. The requirement in PL 111-11 for disclosure of the names at issue on a monument established by Ka ‘Ohana O Kalaupapa is enough to trigger the mandatory disclosure provision in section 92F-12(b)(2), HRS, even when it is disclosure of the names by DOH or another agency that is in question.

164.512(a) of the Privacy Rule. For example, if a state public records law includes an exemption that affords a state agency discretion not to disclose medical or other information where such disclosure would constitute a clearly unwarranted invasion of personal privacy, the disclosure of such records is not required by the public records law, and therefore is not permissible under § 164.512(a).

Health Information Privacy FAQ 506, U.S. Dep't of Health and Human Services website (Aug. 24, 2004), <https://www.hhs.gov/hipaa/for-professionals/faq/506/how-does-the-hipaa-rule-relate-to-freedom-of-information-laws/index.html> (accessed December 18, 2019).

As OIP has already concluded, PL 111-11 requires disclosure of the names at issue now that Ka 'Ohana O Kalaupapa is moving forward with its plans for the Kalaupapa Memorial, and the UIPA in turn mandates disclosure of those names upon request, so OIP concludes that such a disclosure is a disclosure required by both state and federal law and thus is authorized under the HIPAA rules. See C.F.R. § 164.512(a). For purposes of the UIPA, then, the UIPA's exception for records protected from disclosure by federal law does not apply, while the UIPA provision requiring disclosure of government records authorized to be disclosed under federal law does apply. See HRS §§ 92F-12(b)(2) and -13(4). Those names cannot be withheld from Ka 'Ohana O Kalaupapa (or any other requester) under the UIPA.⁶

Finally, with regard to the disclosure of the listed individuals' dates of admission to Kalaupapa, age at admission, and gender, this information is not protected health information potentially subject to the HIPAA rules, so its disclosure is instead governed by the possible applicability of the UIPA's exceptions to disclosure, notably the UIPA's exception for information whose disclosure would be a clearly unwarranted invasion of personal privacy. HRS § 92F-13(1).

The date each individual was admitted to Kalaupapa does not carry a significant privacy interest distinct from the fact that the individual was admitted to Kalaupapa in the first place, which OIP has already found must now be disclosed under the UIPA. However, an individual's gender and age do carry a significant privacy interest as a general rule. E.g. OIP Op. Ltr. No. 05-16 at 9. Such information can be withheld under the UIPA's privacy exception, but only when the public interest in disclosure fails to outweigh the individual's privacy interest. HRS § 92F-14(a) (2012). OIP has often stated that the public interest in disclosure is "the public interest in the disclosure of official information that sheds light on an

⁶ Even if PL 111-11 and the HIPAA rules had directly conflicted with one another, OIP notes that PL 111-11, which is a Congressional enactment rather than an administrative rule, is the more recent law, and is the more specific law, and, therefore, would be the controlling law.

agency's performance of its statutory purpose and the conduct of government officials, or which otherwise promotes governmental accountability." E.g. OIP Op. Ltr. No. 07-07 at 3. OIP has further concluded with respect to deceased individuals that the privacy interest in reputational information, i.e., information affecting how an individual is remembered, does survive death but is affected by death and by the subsequent passage of time. OIP Op. Ltr. No. 03-19 at 12-14.

OIP notes that the privacy interest in an individual's gender and age, while significant, is information of a sort that many people will freely disclose about themselves and thus is not as strong as the privacy interest in, for instance, personal finances, sexual history, medical information, employment evaluations, or similar strongly personal information. With respect to the public interest in disclosure, OIP does not find that disclosure of the listed individuals' gender and age would shed particular light on DOH's current performance, but finds that it would shed light on, and promote governmental accountability regarding, past actions by DOH and its governmental predecessors. Thus, balancing the listed individuals' privacy interest in their age and gender information against the public interest in disclosure, OIP finds that the balance here weighs in favor of disclosure for all the listed individuals, whether still living or previously deceased.

Right to Bring Suit

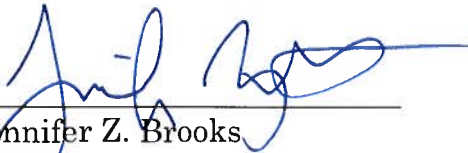
Requester is entitled to seek assistance from the courts when Requester has been improperly denied access to a government record. HRS § 92F-42(1) (2012). An action for access to records is heard on an expedited basis and, if Requester is the prevailing party, Requester is entitled to recover reasonable attorney's fees and costs. HRS §§ 92F-15(d), (f) (2012).

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-3(c). The court shall uphold an OIP decision unless it concludes the decision was palpably erroneous. Id.

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

OFFICE OF INFORMATION PRACTICES



Jennifer Z. Brooks
Staff Attorney

APPROVED:



Cheryl Kakazu Park
Director