



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

MEMORANDUM DECISION

Requester: Stephen Swift
Agency: Department of Health
Date: February 13, 2020
Subject: Solid Waste Complaint Documents (U APPEAL 17-38)

Requester seeks a decision as to whether the Department of Health (DOH) properly denied his request for records under Part II of the UIPA.

Unless otherwise indicated, this decision is based solely upon the facts presented in Requester's emails to OIP dated January 30, 2017 (with attachments), and January 28, 2020; letters from OIP to DOH dated February 1, 2017, and January 9, 2020; letters from DOH to OIP dated February 10, 2017, and January 24, 2020; documents provided by DOH for *in camera* review on June 26, 2019; an email from OIP to Requester dated January 14, 2020; a letter from OIP to Requester dated January 24, 2020; and an email from DOH to OIP dated January 29, 2020.

Decision

DOH properly redacted the names of complainants from records relating to its investigation of an environmental complaint to avoid the frustration of its legitimate government function of enforcement of environmental law. HRS § 92F-13(3) (2012). DOH also properly withheld two emails on the basis that they contained attorney-client privileged communications. HRS § 92F-13(2).

Statement of Reasons for Decision

According to its website, the DOH Solid and Hazardous Waste Branch's mission statement is:

To protect Hawaii's lands from pollutants that endanger people and the environment, and to rehabilitate contaminated lands. To insure environmentally sound and cost-effective management of all solid and hazardous waste generated within the State through promotion of pollution prevention and waste minimization, and development of proactive partnerships with waste generators and the regulated community. By aggressive enforcement of environmental laws and regulations, this branch will assist in the prevention of releases and the threat of release of petroleum, hazardous substances, and other contaminants within our authority.

See <https://health.hawaii.gov/shwb/shwb-mission-statement/>, accessed January 31, 2020.

Requester made a written request to DOH dated January 23, 2017, for "all records pertaining to NOYO Docket #155-SHW-SWS 006 concerning James Nutter, Island Recycling From March 2015 Jan 2017."¹ DOH's Solid and Hazardous Waste Branch sent Requester a Notice to Requester (NTR) dated January 30, 2017, which indicated that it would be withholding access to the portions of the requested records containing "Attorney-client privileged Doc" and "complainant id." DOH cited "92F" as justification for its partial denial. Requester appealed the partial denial to OIP.

OIP's administrative rules require that an agency's response to a record request state the following information when denying all or part of the request: (1) the specific record or parts of the record that will not be disclosed, and (2) the specific legal authorities under which the request for access is denied under section 92F-13, HRS, or other laws. HAR § 2-71-14(b). DOH's NTR did not include specific legal authority for its denial, and OIP therefore finds that its initial response to the record request was not in compliance with chapter 2-71, HAR.

In response to this appeal, DOH indicated it withheld three types of records or information. DOH also informed OIP that, on or about January 1, 2020, it had disclosed additional records to Requester. After this additional disclosure, DOH was

¹ The correct docket number is 15-SHW-SWS 006.

withholding only two categories of records or information from Requester,² which OIP will discuss in the following two sections. However, in response to OIP's query as to whether, given that DOH had made an additional disclosure, he wished to proceed with this appeal, Requester informed OIP that "I want your office to complete the production of documents. One letter is not a file or nor does offer [sic] me any kind sense [sic] that you have done a complete job. Please finish this in a timely manner[.]" OIP does not maintain records of other agencies and thus cannot "complete the production" of DOH's records. OIP therefore treats Requester's response as a request that OIP issue a decision as to whether DOH properly withheld the remaining records and information not already disclosed to him.

I. Complainants' Identities

DOH indicated that it provided Requester with a copy of the complaint with names of the complainants redacted. Requester did not respond to an emailed request from OIP that he verify whether he received the redacted complaint, so OIP presumes that he did. DOH confirmed that it never disclosed the complainants' identities, including while this matter was in a related litigation, *Schnitzer Steel v. DOH and Island Recycling*, which settled after this appeal opened.

In response to this appeal, DOH explained that the redactions of complainants' identities were made on the basis that disclosure would have a "chilling effect on the program as no one will want to report illegal activity" and invoked section 92F-13(3), HRS, which allows an agency to withhold records when disclosure would frustrate a legitimate government function. DOH stated that it "balanced the Requester's right to know vs. effect the disclosure may have on the complainant and the future of the program." OIP was provided with a copy of a redacted email for *in camera* review that purports to be the complaint as provided to Requester, along with an unredacted copy for comparison.

OIP has previously found that the UIPA allows an agency to withhold from public disclosure a complainant's identity to the public (1) under section 92F-13(1), HRS, if the disclosure would invade an individual's right to privacy, or (2) under section

² DOH informed OIP that on or about January 1, 2020, it disclosed to Requester the Notice of Violation and Facts/Penalty Calculations for Docket No. 15 SHW SWS-006, which it had originally withheld. Requester did not refute this. Accordingly, the question of whether that record was properly withheld is moot because the record is no longer being withheld.

92F-13(3), HRS,³ if disclosure would frustrate a legitimate government function. OIP Op. Ltr. No. 89-12. OIP finds that disclosure of complainants' identities for complaints alleging violations of environmental law could have a chilling effect on DOH's ability to receive such complaints, thus frustrating its ability to conduct investigations of alleged illegal activity. OIP therefore concludes that DOH properly invoked section 92F-13(3), HRS, as its basis for redaction of complainants' identifying information.

However, the redactions to the email provided for *in camera* review were apparently made by covering identifying information with white or light-colored paper and this made it unclear at times where redactions began or ended. Section 2-71-17, HAR, which sets forth the proper method for redacting nonpublic information from records, specifically requires that segregation be done in a way that makes it apparent that information has been removed:

§2-71-17 Segregation of information in records. (a) When information in a requested record is not required to be disclosed under section 92F-13, HRS, or any other law, an agency shall assess whether the information is reasonably segregable from the requested record. If the record is reasonably segregable, the agency shall:

- (1) Provide access to the portions of the record that are required to be disclosed under chapter 92F, HRS; and
- (2) Provide a notice to the requester in accordance with section 2-71-14(b) regarding information that is not disclosed.

(b) An agency shall segregate information from a requested record in such a way so that it is reasonably apparent that information has been removed from the record. An agency shall not replace information that has been segregated with information or text that did not appear in the original record.

³ Section 92F-13(1) and (3) state:

§92F-13 Government records; exceptions to general rule. This part shall not require disclosure of:

- (1) Government records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy;
- ...
- (3) Government 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(1), -(3) (2012).

HAR § 2-71-17. In the future, DOH should black out or strike out information to be redacted, or otherwise make its redactions apparent to the reader.

II. Attorney-Client Communications

DOH withheld two email strings which it asserted contain attorney-client privileged communications between it and its attorneys regarding DOH's defense in a pending litigation. The attorney-client privilege⁴ may be invoked under three UIPA exceptions to disclosure, and DOH claimed one of them. Section 92F-13(2), HRS, allows an agency to withhold access to government records "pertaining to the prosecution or defense of any judicial or quasi-judicial action to which the State or any county is or may be a party, to the extent that such records would not be discoverable." See also OIP Op. Ltr. No. F14-01 at 6 (citing OIP Op. Ltr. No. 91-23 at 8-9).

The Department of the Attorney General provides legal counsel to Hawaii State government agencies including DOH. HRS § 26-7 (2009). The two email strings reviewed *in camera* are clearly communications between DOH employees and several deputies Attorney General about a litigation. OIP therefore concludes the emails are covered by the attorney-client privilege, and that DOH properly withheld them under section 92F-13(2), HRS.

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 decision 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

⁴ Hawaii's attorney-client privilege is codified in chapter 626, HRS, Rule 503, Hawaii Rules of Evidence (HRE), and provides that "[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client," where the confidential communications were made between the client and the client's attorney or their respective representatives. Rule 503(b), HRE; see Save Sunset Beach Coalition v. City and County of Honolulu, 102 Haw. 465, 484-85, 78 P.3d 1, 21-22 (2003) (citing Sapp v. Wong, 62 Haw. 34, 38, 609 P.2d 137, 140 (1980), which described how an attorney-client communication becomes privileged).

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