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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-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: Allison Yap
Agency: Hawaii State Ethics Commission
Date: March 3, 2020
Subject: Complaint Records (U APPEAL 20-37)

Requester seeks a decision as to whether the Hawaii State Ethics Commission (SEC) properly denied her request, made under the UIPA, for a copy of records that pertain to a complaint (Complaint Records).

Unless otherwise indicated, this decision is based solely upon the facts presented in emails from Requester to OIP dated December 13, 2019, December 16, 2019 including email string, December 23, 2019, and January 7, 2020; an email from OIP to Requester dated December 23, 2019; a letter with enclosures from OIP to the SEC dated December 23, 2019; an email from the SEC to OIP dated December 23, 2019; an email from OIP to the SEC dated December 23, 2019; a letter from the SEC to OIP dated February 6, 2020; and records provided by the SEC for *in camera* review.

Decision

In accordance with its decision in OIP Opinion Letter Number F20-02, OIP finds that the SEC properly denied Requester's request for a copy of records that pertain to a complaint submitted by Requester. The State Ethics Code, chapter 84, HRS, includes a confidentiality provision that protects from disclosure records that pertain to a complaint submitted to the SEC, and the UIPA allows agencies to withhold records

that are subject to a confidentiality statute, whether they are government records subject to Part II of the UIPA or personal records subject to Part III of the UIPA. HRS § 84-31(b) (2012); HRS §§ 92F-13(4), -22(5) (2012).

Statement of Reasons for Opinion

In an email dated December 10, 2019, Requester made a request for “a copy of public records that pertain to the State Ethics complaint”¹ she had submitted. The SEC’s Executive Director and General Counsel denied the request in an email to Requester dated December 16, 2019, citing sections 84-31(b) and 92F-13(4), HRS,² as justification for doing so. Subsequently, Requester appealed the denial to OIP. The records provided by SEC for OIP’s *in camera* review consist of records that pertain to Requester’s complaint.

In its response to the appeal, SEC asserted that “Requester’s appeal raises the identical issues presented in [OIP’s] Opinion Letter Number F20-02 [Opinion F20-02]” and asked that “OIP again conclude that the [SEC] properly denied Requester’s request.” On February 4, 2020, OIP issued Opinion F20-02, a formal opinion in which the issue was whether the SEC properly denied a requester’s request for a redacted copy of the investigation file that pertained to that requester’s complaint to the SEC. In Opinion F20-02, OIP determined that the Ethics Code includes a confidentiality provision³ that protects SEC investigation files from disclosure prior to the commencement of contested case proceedings or as otherwise agreed to by the SEC and a party. OIP Op. Ltr. No. F20-02 at 3. OIP further opined that the UIPA allows an agency to withhold records that are subject to a confidentiality statute, whether they are government records subject to Part II⁴ of the

¹ In response to a request for clarification from OIP, Requester clarified that she also wanted a copy of any “personal records” maintained by SEC. The UIPA defines a “personal record,” in part, as “any item, collection or grouping of information about an individual that is maintained by an agency.” HRS § 92F-3 (2012).

² In its appeal response the SEC also cited other exceptions to disclosure under Part II of the UIPA as further justification for its denial of access. Because sections 92F-13(4) and 92F-22(5), HRS, allow the SEC to withhold access, OIP need not decide whether the additional exceptions to disclosure also apply.

³ Section 84-31(b), HRS, of the Ethics Code provides that “[t]he commission shall investigate all charges on a confidential basis, having available all the powers herein provided, and proceedings at this stage shall not be public.” HRS § 84-31(b).

⁴ Part II of the UIPA, which governs access to general government records, states, in relevant part, that an agency is not required to disclose “[g]overnment records which, pursuant to a state . . . law . . . are protected from disclosure.” HRS § 92F-13(4).

UIPA or personal records subject to Part III⁵ of the UIPA.⁶ Id. Based on the foregoing, OIP concluded in Opinion F20-02 that the SEC properly denied access to a redacted copy of the investigation file. Id. at 2.

Here, as in Opinion F20-02, a requester has made a request for records relating to a complaint submitted by requester to the SEC. Further, in the instant appeal, as in Opinion F20-02, the SEC has asserted that it has not issued a notice for a contested case hearing in any complaint initiated by Requester, nor has the SEC issued a public document resolving any investigation stemming from any complaint initiated by Requester. Consequently, in accordance with the reasoning and conclusions set forth in Opinion F20-02, OIP finds that the SEC properly denied Requester's request for records that pertain to a complaint initiated by Requester, under Parts II and III of the UIPA.

Right to Bring Suit

Requester is entitled to file a lawsuit for access under Part II of the UIPA within two years of a denial of access to government records. HRS §§ 92F-15, 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).

Requester is entitled to seek assistance directly from the courts under Part III of the UIPA after Requester has exhausted the administrative remedies set forth in section 92F-23, HRS. 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).

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). If Requester decides to file a lawsuit,

⁵ Part III of the UIPA, which governs access to personal records, states that an agency is not required to grant an individual access to personal records when they are "[r]equired to be withheld from the individual to whom it pertains by statute[.]" HRS § 92F-22(5).

⁶ In Opinion F20-02, OIP found that it need not determine which specific portions of the investigation file are subject to Part II and which are subject to Part III, because the confidentiality statute at section 84-31(b), HRS, "controls either way" and requires the SEC to withhold access to the entire investigation file. OIP Op. Ltr. No. F20-02 at 4.

Requester must notify OIP in writing at the time the action is filed. HRS § 92F-15.3 (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 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



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APPROVED:



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