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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). 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: Chad Nishimura
Agency: Department of Transportation
Date: June 30, 2020
Subject: Investigative File (U APPEAL 19-24)

Requester seeks a decision as to whether the Department of Transportation (DOT) properly denied access, under Parts II and III of the UIPA, to an investigative file (Investigative File) relating to his complaint of retaliation.

Unless otherwise indicated, this decision is based solely upon the facts presented in Requester's Request for Assistance to OIP, with attachment, dated May 14, 2019; OIP's letter to Requester dated May 17, 2019; Requester's letter to OIP dated May 22, 2019; and DOT's letter to OIP dated June 5, 2019, with attached Investigative File provided for OIP's *in camera* review (DOT Response).

Decision

The majority of the Investigative File is Requester's personal record, because the subject matter was the investigation of Requester's complaint and Requester was identified throughout. Part III of the UIPA, which governs access by individuals to their personal records maintained by agencies, allowed DOT to withhold access to only those portions of the Investigative File that identified or could allow actual identification of interviewees who were promised confidentiality, under section 92F-22(2), HRS.

Limited portions of the Investigative File are not about Requester, including the State's policies on workplace violence and a list of vacant positions. DOT improperly denied Requester access to these records, as none of the exceptions to disclosure under Part II of the UIPA apply. See HRS § 92F-13 (2012).

Statement of Reasons for Decision

In a letter to Requester dated May 9, 2019, DOT partially denied Requester's request for a copy of his "complete complaint and investigative file." DOT's Office of Civil Rights (OCR) provided Requester with a copy of his interview summary statement. With respect to the remainder of the requested records, DOT stated that "OCR is unable to provide the Report of Investigation [Report], which contains witness statements, findings of fact, and conclusion," based on section 92F-22(2), HRS (allowing an agency to withhold personal records that would reveal the identity of a source who furnished information under an express or implied promise of confidentiality), and section 92F-13(3), HRS (allowing an agency to withhold government records¹ when disclosure would result in the frustration of a legitimate government function).

On May 14, 2019, Requester sought OIP's assistance, and in that request stated that DOT "could easily redact or censor personal identification information from the record and provide me the information regarding my complaint [sic], instead they denied me any access to the investigation file in a complete disregard for transparency." In Requester's letter to OIP dated May 22, 2019, Requester reiterated that he "will accept and be satisfied with a copy in which personal identification information is redacted."

The Investigative File provided for OIP's *in camera* review consisted of the Report prepared by OCR, with attached exhibits; OCR's Notice of Investigation of Internal Complaint addressed to Requester; and a Notice of Rights and Responsibilities form signed by each participant in the investigation.

¹ A government record is "information maintained by an agency in written, auditory, visual, electronic, or other physical form." HRS § 92F-3 (definition of "[g]overnment record").

I. Disclosure of Personal Records under Part III of the UIPA

Part III of the UIPA governs access by individuals to their personal records² maintained by agencies. Agencies are required to disclose personal records to the individual to whom they pertain unless an exemption in section 92F-22, HRS, applies. HRS §§ 92F-21, -22 (2012). As discussed below, DOT only invoked one exemption to disclosure, section 92F-22(2), HRS, which allows an agency to deny an individual access to personal records or information contained therein, “[t]he disclosure of which would reveal the identity of a source who furnished information to the agency under an express or implied promise of confidentiality.”³

Further, a record, or portion thereof, may be the personal record of more than one individual, *i.e.*, a “joint personal record,” and each individual “would have access to [his or her] own respective personal records under Part III of the UIPA, subject to the exemptions therein.” OIP Op. Lr. No. F13-01 at 16 (citations omitted). However, even a record that is primarily the personal record of the requesting individual may contain information that is not “about” the requester and, therefore, is not part of the individual’s personal record. OIP Op. Ltr. No. F13-01 at 15 (“even within an investigative file initiated by a complainant, there may be information that is specifically and exclusively about someone else and should not be considered part of the personal record of the complainant”) (citations omitted).

Based on OIP’s review of the Investigative File, OIP finds that the subject matter was the investigation of Requester’s complaint and it named Requester and other individuals, including the individuals complained about, witnesses, and other DOT employees. Thus, OIP finds that the majority of the Investigative File is Requester’s

² The UIPA defines “personal 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 make reference 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) (setting forth the UIPA’s definitions).

³ Part’s III’s other exemptions to disclosure allow an agency to deny an individual access to personal records, or information contained therein, that consist of: records prepared or compiled for criminal intelligence or investigation, or during any stage of the criminal law enforcement process, by an agency with a principal function of crime prevention, control or reduction (section 92F-22(1), HRS); government testing or examination materials (section 92F-22(3), HRS); investigative materials relating to an upcoming, ongoing, or pending proceeding against the individual (section 92F-22(4), HRS); and records protected by law (section 92F-22(5), HRS).

personal record and his request is therefore subject to Part III of the UIPA. OIP also finds that limited portions of the Investigative File are not about Requester. For example, information that is exclusively about other DOT employees, the State's policies on workplace violence, and the list of vacant positions are not Requester's personal records and, therefore, as discussed below, are government records governed by the disclosure provisions of UIPA's Part II for the purpose of his request.

A. Exemption to Disclosure for Source Promised Confidentiality

DOT asserted that it was not required to grant access to the Investigative File based on the UIPA's exemption to disclosure for personal records "the disclosure of which would reveal the identity of a source who furnished information to the agency under an express or implied promise of confidentiality." HRS § 92F-22(2). DOT stated:

The investigation file contains a Report of Investigation . . . which includes witness statements that were provided under an express promise of confidentiality. The promise of confidentiality is explained and emphasized by investigators throughout the investigative process, starting with the Notice of Investigation. . . . The notice states, "to the extent possible, confidentiality of this complaint and the investigation will be maintained." Additionally, a Notice of Rights and Responsibilities . . . provided to and signed by each participant of the investigation states, "The investigation will be conducted in the most CONFIDENTIAL manner possible." OCR does not provide blanket assurances of confidentiality, as participants are informed that confidentiality is not guaranteed.

During the investigation, participants are verbally told prior to their interviews that the information would be kept as confidential as possible. In the verbal "promise," participants are advised that in most cases, only the investigators and decision maker (DOT's Director or his designee) would have access to information in the investigation file.

DOT Response at 1-2.⁴

⁴ The versions of the Notice of Rights and Responsibilities form referenced above that were signed by the "accused" and "witnesses" further stated:

The Complainant, certain managerial and supervisory personnel, and others, as appropriate, may see the report of findings and determination of the investigation. Further, with appropriate certification or legal order, the report of investigation may be provided to government agencies, courts of law, parties to a grievance, arbitration, lawsuit, or others, if applicable.

DOT further contended:

[S]imply redacting participants' names or portions of their statements from the investigation file would not protect their identities. In this particular case, the Requestor works within a small office and on a shift with an even smaller group of people. . . . Reading any, and especially all of the witness statements would allow the Requestor to ascertain the identify of each interviewee to ascertain the identity of each interviewee rather easily, if not immediately, even if their names were redacted. In this regard, OCR believes that the names and statements of witnesses should not be disclosed in accordance with OIP Op. Ltr. No. 01-04 at 7 (October 29, 2001), which states, "witness statements may also be redacted, but only if (1) the witness received an express or implied promise of confidentiality, and (2) redaction of the statement is necessary to protect the witness' identity."

....

DOT also believes that these promises of confidentiality were made with good cause. During an investigation there are participants who do not want to get involved or provide statement due to the possibility of disclosure. Witnesses tend not to be forthcoming and often fear retaliation for providing statements.

DOT Response at 2.

In this case, based on the Notice of Rights and Responsibilities signed by each individual who was interviewed for the investigation and the oral "promise" DOT stated was given to each participant in the investigation prior to the interview,⁵ OIP finds that the participants furnished information under an express promise of confidentiality. Therefore, OIP concludes that in accordance with section 92F-22(2), HRS, DOT is not required to disclose the identities of the participants to Requester. As noted earlier in this decision, Requester stated that he would accept and be satisfied with a copy from which "personal identification information" was redacted. However, OIP must consider whether redaction of the interviewees' names alone is sufficient to protect their identities.

DOT asserted that "simply redacting participants' names or portions of their statements from the investigation file would not protect their identities." To support its argument, DOT cited OIP Opinion Letter Number 01-04, which concluded that witness statements may be redacted, "but *only* if (1) the witness received an express

⁵ DOT stated that recordings of the interviews, which include the oral promise described above, would be provided to OIP upon request. OIP concluded that it was not necessary to review the recordings to resolve this appeal.

or implied promise of confidentiality, and (2) redaction of the statement is necessary to protect the witness's identity." OIP Op. Ltr. No. 01-04 at 7 (concluding that the names and other information that would identify witnesses coming from a small group of co-workers could be redacted from a sexual harassment investigation report) (emphasis in original). Similarly, here, the DOT stated that the interviewees were in a small work environment with the Requester. Given the realities of regularly working with a small number of co-workers, OIP accepts that Requester would be able to "ascertain the identity of each interviewee rather easily, if not immediately, even if their names were redacted[.]" as DOT contended. Thus, OIP finds that redaction of their names alone would not be sufficient to protect their identities.

OIP has previously advised that "an agency should not give blanket assurances of confidentiality, and that an assurance of confidentiality must be supported by good cause." OIP Op. Ltr. No. 95-23 at 2 (concluding that the university may withhold a faculty member's entire statement alleging a colleague's scientific misconduct when the identity of the author of the statement is known to the accused and the university had assured confidentiality for good cause). In this case, DOT does not appear to have done so, as it stated that it had assured confidentiality to the participants, in writing and orally, but only to the extent possible. DOT stated that during an investigation there are individuals who do not want to get involved or provide statements due to the possibility of disclosure, and that witnesses tend not to be forthcoming and often fear retaliation. As such, DOT contended that it had good cause to provide an assurance of confidentiality to individuals involved in OCR's investigations.⁶ OIP agrees and finds that DOT had good cause to give assurances of confidentiality to the participants.

Based on the foregoing, OIP concludes that DOT is not required to disclose those portions of the Investigative File that could allow actual identification of interviewees who were promised confidentiality, under section 92F-22(2), HRS.⁷

⁶ DOT also contended that OCR handles discrimination complaints based on protected classes, so many of the investigation files contain sensitive information such as allegations of sexual harassment, medical records related to a disability, criminal background information and genetic information. The file at issue did not appear to contain any sensitive information of that type.

⁷ DOT also cited to the frustration exception to disclosure in section 92F-13(3), HRS, of Part II of the UIPA as authority to withhold the participants' statements. HRS § 92F-(13)(3) (2012). The exceptions to disclosure under Part II of the UIPA govern public access to government records, and these exceptions are not applicable to requests for personal records made under Part III of the UIPA. However, OIP notes that insofar as the question may arise as to whether records exempted from disclosure as personal records under Part III must nonetheless be disclosed as government records under Part II, the frustration exception does generally allow an agency to withhold the identity of a confidential source in the same way as does the "confidential source" exemption in section 92F-22(2), HRS.

B. Personal Records that Do Not Identify Confidential Sources

DOT did not assert that any personal record exemption other than the “confidential source” exemption in section 92F-22(2), HRS, applied to disclosure of the Investigative File. However, the Investigative File records DOT withheld from Requester include personal records that do not identify confidential sources and to which none of the other exemptions to disclosure set forth in section 92F-22, HRS, appear to apply (see footnote 3, supra). These records include records or information originally provided by Requester to DOT, or previously provided by DOT to Requester, or are otherwise “about” Requester and do not identify confidential sources. Based on its *in camera* review, OIP concludes that the records listed below or portions thereof are Requester’s personal records to which none of the exemptions in Part III of the UIPA apply:

- 1) Report’s “Complaint” and “Purpose and Scope of Investigation” sections, which name and refer to Requester and describe the complaint and the investigation;
- 2) Report’s “Background Information” section about the Requester’s employment;
- 3) In the Report’s “Findings” section, the “Allegations” subsection and the statements from Requester’s interview in the “Facts/Evidence - Complainant” subsection;
- 4) Report’s “Discussion/Analysis” section, except for interviewee names and statements, which may be redacted for the reasons described in I.A. above;
- 5) Requester’s Discrimination Complaint Form and Requester’s letter to Equal Employment Opportunity Office (EEO);
- 6) Requester’s interview summary statement, a copy of which Requester has confirmed receiving;
- 7) Supplement to Requester’s statement;
- 8) Requester’s statements in Harbors Report;
- 9) Email from DOT employee to Requester, with attached work schedule;
- 10) Letter from DOT employee to Requester;
- 11) Memorandum from OCR to Requester; and
- 12) Notice of Rights and Responsibilities – Complainant Internal Investigation.

Additionally, OIP finds that the Investigative File includes information about Requester that is closely linked to information about other individuals. For example, the Investigative File includes an investigation report by DOT’s Harbors Division prompted by Requester’s hostile work environment complaint (Harbors Report), which preceded the retaliation complaint at issue in this appeal. The “Findings and Conclusion” section of the Harbors Report names both Requester and the individual complained about throughout the section and includes statements by Requester, and, as stated in the title, the investigator’s findings and conclusion about the accused’s actions, based on the investigation. Thus, it is “about” each individual and is a joint

personal record of Requester and the other individual. OIP has previously opined that where “certain information ‘about’ another individual also relates to or is intertwined with information about the requester, such information must be considered to be part of the personal record of each and is not subject to redaction for a request made by either party.” OIP Op. Ltr. No. 05-10 at 4 (concluding that the university must disclose to the alleged victim certain information including the names of the witnesses and the name and photograph of the alleged assailant contained in a campus security report, as the information is the personal record of requester and, therefore, must be disclosed to the requester without segregation).⁸

Based on the facts set forth in the Investigative File, OIP concludes that none of the section 92F-22, HRS, exemptions apply to the Harbors Report’s “Findings and Conclusion” section. Consequently, OIP determines that DOT is required to disclose to Requester the Harbors Report’s “Findings and Conclusion” section, as well as the “Other Evidence” section of the Report, which contains a discussion of and quotations from the Harbors Report’s findings and conclusion.

As mentioned above, some portions of the Report are not Requester’s personal records as they are not “about” Requester, and those portions are subject to the public disclosure requirements and exceptions to disclosure set out in Part II of the UIPA.

II. Disclosure of Government Records under Part II of the UIPA

Part II of the UIPA requires that agencies make government records available upon request, unless the records are protected from disclosure by one of the five exceptions set forth in section 92F-13, HRS. HRS § 92F-11(b) (2012). The only Part II exception to disclosure raised by DOT was the frustration exception. See HRS § 92F-13(3) (setting out the UIPA’s frustration exception).⁹ DOT stated that an internal administrative investigation constitutes a legitimate government function and disclosure of participants’ statements may impair OCR’s ability to conduct a thorough investigation. DOT’s argument does not apply to the records described below,

⁸ OIP Opinion Letter Number F13-01 partially overruled OIP Opinion Letter Number 05-10 to the extent it relied on a rebuttable presumption that the mention of an individual’s name or other identifying particular made the entire document the individual’s personal record.

⁹ Part II’s other exceptions to disclosure allow an agency to withhold access to: government records if disclosure would constitute a “clearly unwarranted invasion of personal privacy” (section 92F-13(1), HRS); a government record if a litigation privilege protects that same information in a lawsuit or quasi-judicial administrative act involving the State or any county (section 92F-13(2), HRS); government records that are protected from disclosure by a state or federal law or by a court order (section 92F-13(4), HRS); and draft working papers or work product of a legislative committee, legislative investigative committees’ records or transcripts that are protected by legislative rule, and legislators’ personal files (section 92F-13(5), HRS).

because they do not include any statements by participants in the investigation. Thus, OIP concludes that the following records are public and DOT is required to provide Requester access to them, as they are not protected from disclosure by any of the exceptions in section 92F-13, HRS:

- 1) “Relevant Policy” section of the Report, which refers to the Department of Human Resource Development (DHRD) Policy 800.002 Workplace Violence Program;
- 2) DHRD Policy 800.002;
- 3) DOT policies; and
- 4) list of vacant Harbor Enforcement Officer positions.

Right to Bring Suit

Requester is entitled to seek assistance directly from the courts 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).

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).

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, 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.

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.

SPECIAL NOTICE: During the COVID-19 pandemic, Hawaii's Governor issued his Supplementary Proclamation on March 16, 2020, which suspended the UIPA in its entirety. The suspension was continued until May 31, 2020, by the Governor's Sixth Supplementary Proclamation dated April 25, 2020. On May 5, 2020, the Governor's Seventh Supplementary Proclamation (SP7) modified the prior suspension of the UIPA in its entirety and provided that the UIPA and chapters 71 and 72, Title 2, HAR, "are suspended to the extent they contain any deadlines for agencies, including deadlines for OIP, relating to requests for government records and/or complaints to OIP." SP7, Exhibit H. On May 18, 2020, the Governor's Eighth Supplementary Proclamation (SP8) at Exhibit H, continued the modified suspension of the UIPA provided in SP7. On June 10, 2020, the Governor's Ninth Supplementary Proclamation (SP9) at Exhibit H, continued the modified suspension of SP8, Exhibit H.

The UIPA's part IV sets forth OIP's powers and duties in section 92F-42, HRS, which give OIP authority to resolve this appeal and have been restored by SP7 through SP9, except for the deadline restriction. Thus, for OIP's opinions issued while SP9 is still in force, agencies will have a reasonable time to request reconsideration of an opinion to OIP, but a request for reconsideration shall be made no later than ten business days after suspension of the UIPA's deadlines are lifted upon expiration of SP9 after July 31, 2020, unless SP9 is terminated or extended by a separate proclamation of the Governor. Agencies wishing to appeal an OIP opinion to the court under section 92F-43, HRS, have a reasonable time to do so, subject to any orders issued by the courts during the pandemic, and no later than thirty days after suspension of the UIPA's

deadline is lifted upon expiration of SP9 after July 31, 2020, unless terminated or extended by a separate proclamation of the Governor.

OFFICE OF INFORMATION PRACTICES



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