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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 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: Julie Mae
Agency: Hawaii County Police Department
Date: July 31, 2020
Subject: Autopsy Report

Requester seeks a decision as to whether the Hawaii County Police Department (POLICE-H) properly denied her request for a copy of an autopsy report under Part II of the UIPA.

Unless otherwise indicated, this decision is based solely upon the facts presented in Requester's email to OIP with attachments dated January 15, 2019; and a letter with exhibits and the requested documents for *in camera* review to OIP from the County of Hawaii Department of the Corporation Counsel on behalf of POLICE-H dated February 20, 2019.

Decision

The autopsy report (Autopsy Report), which includes a toxicology report, contains medical information and psychiatric information including the presence of alcohol, drugs, or other substances. Based on the precedent set in OIP Opinion Letter Number F15-01, the subject of the Autopsy Report (Decedent) retains a privacy interest in his medical information after death. However, based on the analysis set out in that opinion, the public interest in disclosure of the Autopsy Report outweighs the privacy interest of the Decedent therein, so disclosure would not constitute a

clearly unwarranted invasion of Decedent's personal privacy and the Autopsy Report may not be withheld on that basis. HRS §§ 92F13(1), 92F-14(a) (2012).

Surviving family members sometimes have privacy interests in information about a deceased individual that outweigh the public interest in disclosure of all or a portion of an autopsy or toxicology report. Here, however, the Autopsy Report does not contain graphic or similarly sensitive information that surviving family members would have a significant privacy interest in that could warrant withholding access to the Autopsy Report to protect their interests.

Statement of Reasons for Decision

Requester made a request to POLICE-H for a copy of the Autopsy Report.¹ POLICE-H responded in a letter dated December 5, 2018, which stated:

- x Other: We are in receipt of your request for a police report, which we had received on 12/3/18. We are unable to provide the requested police report. Please submit a new request and attach the following documents. A letter signed by the next of kin authorizing you to receive a copy of the requested report and a legal document verifying that party as the next of kin. Please be aware that not all report(s) may be released and the information released within the report(s) may be redacted.²

- x Other: Pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and the Federal Code of Regulations 45CFR164.512(e)(1)(i) [sic], the following documents

¹ When a person dies as a result of an accident or under certain other circumstances described by law, the coroner or deputy coroner is required to make "a complete investigation of the cause of the death" and to perform an autopsy of the decedent's remains if, in the opinion of the coroner, an autopsy is "necessary in the interest of the public safety or welfare." HRS §§ 841-3, -14 (2014). POLICE-H is the "designated coroner" for Hawaii County.

² When a requester seeks records containing information about another individual that fall under the UIPA's privacy exception, the UIPA requires agencies to disclose the records upon a signed consent from the individual whose privacy interest is at stake. See HRS § 92F-12(b)(1) (2012) (requiring agencies to disclose "[a]ny government record, if the requesting person has the prior written consent of all individuals to whom the record refers"); OIP Op. Ltr. No. 10-05 at 2 (finding that records "could not be withheld based on the privacy exception where all persons mentioned in the records had consented in writing to their disclosure"). While consent of surviving family members may be required prior to disclosure of records that would not otherwise be public, because disclosure of the Autopsy Report is required under the UIPA, as explained in section II, infra, it cannot be preconditioned on a signed release.

are required prior to the release of the autopsy report: 1) legal document appointing you as Personal Representative of the decedent's estate and 2) document signed by yourself authorizing the release to you of the decedent's medical records.³

Requester thereafter filed this appeal.

I. OIP's Treatment of Autopsy and Toxicology Reports

POLICE-H invoked section 92F-13(1), HRS, as allowing it to withhold the Autopsy Report in its entirety. This exception to public disclosure under the UIPA allows agencies to withhold "[g]overnment records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy." HRS § 92F-13(1) (2012). To determine whether disclosure would be a clearly unwarranted invasion of personal privacy, the UIPA sets forth a balancing test which provides that "[d]isclosure of a government record shall not constitute a clearly unwarranted invasion of personal privacy if the public interest in disclosure outweighs the privacy interests of the individual." HRS § 92F-14(a) (2012).⁴

Historically, OIP treated privacy interests as extinguishing upon a person's death. OIP Opinion Letter Number 91-32 (Opinion 91-32) discussed the applicability of the UIPA's exceptions to disclosure set out in section 92F-13, HRS,⁵ to information contained in autopsy reports and found that the UIPA required public disclosure of autopsy reports so long as disclosure would not interfere with a pending or prospective law enforcement investigation.⁶ OIP Op. Ltr. No. 91-32 at 6. OIP concluded that deceased individuals did not have a recognizable privacy interest in

³ POLICE-H is a non-covered entity under HIPAA. The portion of its response to the record request which required Requester to provide, pursuant to HIPAA, "1) legal document appointing you as Personal Representative of the decedent's estate and 2) document signed by yourself authorizing the release to you of the decedent's medical records" was not a proper response under the UIPA because, as explained in sections I and II, *infra*, the Autopsy Report is public and not subject to HIPAA's nondisclosure requirements for medical information.

⁴ The public interest to be considered is whether disclosure of information sheds light upon an agency's performance of its statutory duties and upon the actions and conduct of government officials. *E.g.*, OIP Op. Ltr. No. 89-4. Under this balancing test, if an individual's privacy interest in a government record is not "significant," then the record must be disclosed if there is a "scintilla" of public interest. OIP Op. Ltr. No. 95-24 at 10 (citing H. Conf. Comm. Rep. No. 112-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 817, 818 (1988); S. Conf. Comm. Rep. No. 235, Haw S.J. 689, 690 (1988)).

⁵ POLICE-H only argued that section 92F-13(1), HRS, was applicable here.

⁶ POLICE-H did not claim there was a pending or prospective law enforcement investigation.

their autopsy reports, as the right to privacy is generally extinguished upon the individuals' death. OIP Op. Ltr. No. 91-32 at 9.

In 2014, OIP revisited the longstanding precedent in Opinion 91-32 because the legal standard that privacy interests of an individual are extinguished upon death had changed over time, particularly with the passage of the Health Insurance Portability and Accountability Act of 1996, Public Law 104-191 (HIPAA) and the rules promulgated under HIPAA, 45 C.F.R. Parts 160 and 164 (HIPAA rule or Privacy Rule).⁷ After reconsidering the question of whether an individual's privacy interest may survive after death, OIP concluded that reputational privacy interests do continue after death but decrease with the passage of time. OIP Op. Ltr. No. 03-19 (finding an agency may withhold records under the UIPA's privacy exception after the death of the individual, but to a lesser extent than with a living individual, and as affected by the subsequent passage of time).⁸ OIP Opinion Letter Number F15-01 (Opinion F15-01) set forth a detailed analysis of privacy interests of deceased individuals as they relate to autopsy reports and toxicology reports attached thereto using this newer standard under which privacy interests may survive after death.

II. Public Interest in Disclosure Outweighs Surviving Privacy Interest of Decedent So Disclosure is Required

POLICE-H's response to this appeal claimed Decedent continues to have a privacy interest in the medical information in the Autopsy Report. In OIP Opinion Letter Number 03-19, OIP advised that agencies not directly covered by HIPAA (like POLICE-H) that hold comparatively recent health records of deceased persons

⁷ The federal Department of Health and Human Services' (HHS) responses to comments, which accompanied publication of the HIPAA final rule, provide that "to the extent that death records and autopsy reports are obtainable from non-covered entities, such as state legal authorities, access to this information is not impeded by this [HIPAA] rule." 65 Fed. Reg. 82462, 82597 (Dec. 28, 2000). HHS further stated:

HIPAA does not provide HHS with statutory authority to regulate coroners' or medical examiners' re-use or re-disclosure of protected health information unless the coroner or medical examiner is also a covered entity. However, we consistently have supported comprehensive privacy legislation to regulate disclosure and use of individually identifiable health information by all entities that have access to it.

Id. at 82687.

⁸ At the time OIP Opinion Letter Number 03-19 was issued, the Privacy Rule protected health information for as long as an institution maintained the records. A 2013 amendment limited the period of protection for individually identifiable health information about a decedent to 50 years following the date of death of the individual. Privacy Rule, 45 C.F.R. §§ 164.502(f), 160.103 (2013).

should limit disclosure of those records similarly to what the HIPAA rules would require, based on the UIPA's privacy exception. OIP Op. Ltr. No. 03-19 at 8. OIP adopted the following test for determining whether the privacy exception to disclosure applies for information about a deceased individual:

First, for records less than 80 years old, an agency must balance the passage of time against the sensitivity of the information involved to determine how strong the remaining privacy interest is. Second, the agency must balance that privacy interest against the public interest in disclosure, as provided by section 92F-14, Hawaii Revised Statutes. If the public interest in disclosure outweighs the now-reduced privacy interests of the deceased individual, the record may not be withheld under the privacy exception.

Op. Ltr. No. 03-19 at 14 (footnotes and citation omitted).

Applying the two-part test here, POLICE-H asserted that Decedent's privacy interest is significant because (1) he was relatively young, (2) the Autopsy Report includes psychiatric information⁹ and information about intoxicant use; (3) the date of death in 2016 was recent, and (4) the described condition of the body at the time it was found¹⁰ all outweigh any public interest in disclosure. Opinion F15-01 found at page 8 that the presence and level of alcohol or drugs would, arguably, constitute information relating to an individual's medical condition. Following this precedent, OIP finds here that, given the recency of Decedent's passing and the sensitive nature of medical information under section 92F-14(b)(1), HRS,¹¹ Decedent retains a diminished but still significant privacy interest in the Autopsy Report.

The second step in the test is to balance the still significant privacy interest of Decedent against the public interest in disclosure. The Autopsy Report was prepared as part of an investigation required by statute to be conducted by government employees for certain types of deaths. POLICE-H is the "designated coroner" for Hawaii County has a statutory duty to inquire into and make a complete investigation of the cause of death of any person as the result of an accident. HRS § 841-3 (2014). The toxicology reports were prepared in connection with the performance of this statutory duty, and, therefore, the public has a

⁹ There is one short sentence on page 1 of the Autopsy Report summarizing Decedent's psychiatric history.

¹⁰ "Graphic" information in autopsy reports is generally considered during discussion of privacy interests of surviving family members. See section III, infra.

¹¹ Section 92F-14(b)(1), HRS, states that "[i]nformation relating to medical, psychiatric, or psychological history, diagnosis, condition, treatment, or evaluation" is information in which the individual has a significant privacy interest.

legitimate interest in their disclosure as set out in more detail in Opinion F15-01. OIP Op. Ltr. No. F15-01 at 8-9.¹²

Applying the balancing test at section 92F-14(a), HRS, and following the precedent in Opinion F15-01, OIP finds that the public interest in disclosure of the Autopsy Report, including the above-described medical information, is considerable, and outweighs the reduced but still significant privacy interest of Decedent. Thus, disclosure of the Autopsy Report would not constitute a clearly unwarranted invasion of Decedent's personal privacy. OIP therefore concludes that the UIPA requires POLICE-H to disclose the Autopsy Report.

III. Privacy Interest of Decedents' Family Members

OIP next considers the privacy interests of Decedents' surviving family members. POLICE-H's position is that disclosure of the Autopsy Report would have a negative impact on the Decedent's surviving family members for various reasons including the fact that it contains a graphic description of the condition of the body, implies criminal activity, and could bring disrepute upon the family.

First, OIP discusses the standard set in Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 124 S. Ct. 1570, 158 L. Ed. 2d 319 (2004) (Favish) (holding that Exemption 7(C) of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(7)(C),

¹² Opinion F15-01 noted that its finding that toxicology reports for two deceased motorists were public was supported by comments in the Report of the Governor's Committee on Public Records and Privacy (1987) (Governor's Committee Report), a four-volume report setting forth a review, testimony, and recommendations about Hawaii's records law in effect before the UIPA. The Governor's Committee Report played an important role in the Legislature's drafting of the UIPA, and OIP consults it when appropriate. As recognized in OIP's opinion,

the Governor's Committee Report includes a summary of a discussion about medical examiner records and states that "[t]his material is maintained by the counties and at this point is considered public record" though "at least one Committee member has experienced difficulty in obtaining these reports, at least in sensitive cases." Id. Vol. I Governor's Committee Report 131 (1987). Hence, it would appear that the Legislature was aware of the public nature of medical examiner records at the time it enacted the UIPA and could have expressly exempted them from public disclosure, but did not do so. Significantly, as the Legislature declared when it established the UIPA, "it is not the intent of the Legislature that this section [setting forth exceptions to access] be used to close currently available records, even though these records might fit within one of the categories in this section." S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess. Haw. S.J. 689, 691 (1988); H.R. Conf. Comm. Rep. No. 112-88, Haw. H.J. 817, 818 (1988).

OIP Op. Ltr. No. F15-01 at 9.

recognizes “family members’ right to personal privacy with respect to their close relative’s death-scene images”). Favish at 170. With respect to Favish, OIP has stated:

Favish supports family members’ privacy interest in preventing “disclosure of graphic details surrounding their relative’s death,” but not a blanket restriction on disclosure of any information about a deceased person: “Our holding . . . would allow the Government to deny these gruesome requests **in appropriate cases.**” Favish, 541 U.S. at 170-71 (emphasis added). Because the record at issue does not include any photographs or other images of the victim, or any “graphic details” surrounding the victim’s death, Favish is inapposite.

OIP Op. Ltr. No. F15-01 at 10-11, citing OIP Op. Ltr. No. 05-16 at 13.

The Autopsy Report contained one sentence describing the condition of Decedent’s face at the time the body was found which POLICE-H asserted is “graphic.” Having reviewed the Autopsy Report *in camera*, OIP first notes that portions, particularly the first page of the 7-page report, were difficult or impossible to read. That being said, the Autopsy Report contains typically factual information that would be in an autopsy or toxicology report. It does not contain photographs or other images, or any “graphic details” surrounding Decedent’s death, so OIP cannot find a heightened privacy interest of surviving members as set forth in Favish.

Second, OIP has previously recognized that surviving family members **may possibly** have a privacy interest in records that may reveal a decedents’ alleged illegal conduct. OIP Op. Ltr. No. F15-01 at 12 (emphasis added). However, OIP has not heretofore found this privacy interest to be “significant.” Id. POLICE-H argued that, based on the toxicology results and “pathological diagnosis, there is alleged criminal activity and the amount of illegal substances . . . tends to bring disrepute on [Decedent]’s family and negatively portray his surviving family members.” POLICE-H has the burden of proof to justify nondisclosure under section 92F-15(c), HRS, and has not provided any legal authority for finding that disclosure of the Autopsy Report would constitute a clearly unwarranted invasion of the surviving family members’ privacy by bringing them disrepute. OIP’s *in camera* review of the Autopsy Report does not show there is information that would bring disrepute upon the surviving family of Decedent. Accordingly, OIP finds that surviving family members of Decedent do not have a significant privacy interest in information in the Autopsy Report, which was prepared in connection with a death that the coroner had a statutory duty to investigate. Because OIP does not find a “significant” privacy interest, OIP does not reach the balancing test of section 92F-14(a), HRS. As OIP found in section II, supra, there is more than a “scintilla” of public interest in the Autopsy Report, and OIP therefore concludes that disclosure would not constitute a clearly unwarranted invasion of the personal privacy of Decedent’s family. Id. at 14.

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 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.

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. On July 17, 2020, the Governor's Tenth Supplementary Proclamation (SP10) at Exhibit G, continued the modified suspension in SP9, 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 SP10, except for the deadlines restriction. Thus, for OIP's opinions issued while SP10 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 by an agency no later than ten business days after suspension of the UIPA's deadlines are lifted upon expiration of SP10 after August 31, 2020, unless SP10 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 deadlines is lifted upon expiration of SP10 after August 31, 2020, unless terminated or extended by a separate proclamation of the Governor.

OFFICE OF INFORMATION PRACTICES



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