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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: Mr. Lance A. Mizumoto, Chairperson
Agency: Board of Education
Date: April 30, 2018
Subject: Superintendent's Annual Evaluation (U RFO-G 15-2)

On behalf of the Board of Education (BOE), Requester Donald G. Horner, as its then Chairperson, sought an opinion on whether the Superintendent of the Department of Education's (Superintendent) annual evaluation report must be disclosed upon request, and whether the worksheets prepared by the Superintendent or the BOE or both in the course of the annual evaluation process must be disclosed upon request, under Part II of the UIPA.

Unless otherwise indicated, this advisory opinion is based solely upon the facts presented in the BOE's memorandum to OIP dated September 11, 2014, and attached materials.

Opinion

The Superintendent's significant privacy interest in the annual evaluation report is outweighed by the public interest in disclosure, and therefore the annual evaluation report does not fall under the UIPA's privacy exception and must be disclosed upon request, subject to redaction of any specific information that by its nature has a heightened privacy interest and thus is not outweighed by the public interest in disclosure. HRS §§ 92F-13(1) and -14 (2012, Supp. 2017). The final version of the worksheets prepared by the Superintendent and the BOE, which determines the

ratings in the annual evaluation report based on a fixed mathematical formula, must also be disclosed upon request, subject to redaction of any information that by its nature has a heightened privacy interest that is not outweighed by the public interest in disclosure. *Id.* However, draft or preliminary versions of those or similar worksheets, whether prepared by the full BOE or individual BOE members or the Superintendent or others, may be withheld based on the deliberative process privilege, which falls within the UIPA's frustration exception. HRS § 92F-13(3).

Statement of Reasons for Opinion

The BOE attached to its request for an opinion samples of the blank form used for the annual evaluation report, and a blank set of worksheets that are not attached to the annual evaluation report but are prepared in the course of the evaluation process to generate the ratings in the annual evaluation report. The evaluation report calls for an overall rating, and ratings for two subcategories, overall management abilities, and performance objectives and program accomplishments. The overall rating and the two subcategory ratings are each given as one of five possible ratings ranging from Exceptional to Unsatisfactory, accompanied by a written comment. Although the blank form OIP reviewed did not have anything written in the comment section, OIP assumes that the length and level of detail included in that section can vary from one annual evaluation report to another, such that the annual evaluation report would typically be two or more pages when filled out. Part of the nine-page set of worksheets contains fixed blocks to enter brief narrative descriptions of various objectives and the relevant costs and resources, criteria, and constraints for each, and numerical scores for each objective. Those numerical scores collectively determine the Superintendent's rating for performance objectives and program accomplishments in the annual evaluation report. The remainder of the worksheets call for numerical scores for various management factors, which are weighted and tallied to produce a total score that in turn determines the Superintendent's rating for overall management abilities.

OIP understands the BOE to be inquiring about the final worksheets filled out by BOE. However, to provide more complete guidance, OIP will also address the possibility that the BOE as a whole, individual BOE members, the Superintendent, or other BOE staff might fill out preliminary or draft versions of these or similar worksheets in the course of the evaluation process.

The UIPA allows an agency to withhold records that "if disclosed, would constitute a clearly unwarranted invasion of personal privacy." HRS § 92F-13(1). More specifically,

[a]n agency may withhold information from public disclosure where an individual's significant privacy interest outweighs the public interest in disclosure. Haw. Rev. Stat. § 92F-14(a) (Supp. 2006); Haw. Rev. Stat. § 92F-13(1). In balancing the competing interests, the public

interest to be considered is that which sheds light on how the agency is performing its statutory duties. OIP Op. Ltr. No. 04-07 at 7. However, if the privacy interest is not “significant” and there is a scintilla of public interest in disclosure, the information cannot be withheld under the privacy exception. H. Conf. Com. Rep. No. 112-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 817, 818 (1988).

OIP Op. Ltr. No. 07-11 at 5.

Information in an agency’s personnel file carries a significant privacy interest, as do personal evaluations generally. HRS § 92F-14(b)(4) and (8). Thus, government employee evaluations, being both personal evaluations and agency personnel file information, typically can be withheld from public disclosure as there is not typically a public interest in disclosure strong enough to outweigh the employee’s significant privacy interest in the evaluation. For high-ranking officials with substantial responsibilities, though, the balance of interests changes. OIP has previously found a diminished privacy interest, and a heightened public interest, in the evaluation of the University of Hawaii president, concluding that the evaluation could not be withheld under the UIPA’s privacy exception. OIP Op. Ltr. No. 04-07. In that opinion, OIP found that the president had a diminished privacy interest, whereas the public had a heightened interest in his performance, due to his extensive responsibility and high compensation.

He is the CEO of the State’s only public system of higher education, an entity that enjoys semi-autonomous status, and oversees over 45,000 students on three university campuses and seven community college campuses and a budget of approximately \$660 million. UH also receives millions of dollars in research and other types of grants, employs thousands, from administrators and professors to custodians, and significantly contributes to our State’s economy. Moreover, President Dobelle is one of the most highly compensated State employees, earning \$442,000 per year and residing at College Hill.

Id. at 6-7. In reaching its conclusion, OIP also looked at case law from other states involving both school superintendents and college presidents; however, OIP’s opinion addressed only the University of Hawaii president and not the Superintendent. OIP has not previously addressed whether, and to what extent, the Superintendent’s evaluation must be disclosed under the UIPA.

Like the University of Hawaii president, the Superintendent is the head of her agency, the DOE, and she oversees a budget greater than that of the University of Hawaii. According to a DOE website, “[t]he Department operates Hawaii’s public schools on a \$1.9 billion budget comprised primarily of state funds (81 percent), as well as federal, special and trust funds.” The Department’s Budget, Hawaii Department of Education (April 24, 2018),

<http://www.hawaiipublicschools.org/ConnectWithUs/Organization/Budget/Pages/home.aspx>. The Superintendent also oversees considerably more campuses than the University of Hawaii president, as the DOE has 15 complex areas and 256 schools. Organization, Hawaii Department of Education (April 24, 2018), <http://www.hawaiipublicschools.org/ConnectWithUs/Organization/Pages/home.aspx>. However, the Superintendent's salary is lower than that of the University of Hawaii president, at \$240,000 per year. Associated Press, Hawaii Board Hires New Public Schools Superintendent, U.S. News & World Report (May 20, 2017, at 3:11 p.m.), <https://www.usnews.com/news/best-states/hawaii/articles/2017-05-20/hawaii-board-hires-new-public-schools-superintendent>. Because the Superintendent, as the head of her agency, oversees a larger budget and organization than the University of Hawaii president, although with a lesser salary, OIP finds that the balance between individual privacy interest and public interest in disclosure regarding the Superintendent's performance is similar to that for the University of Hawaii president. See also OIP Op. Ltr. No. 95-24 at 13 (concluding that the public interest in agency management survey reports outweighed the agency managers' privacy interests).

Case law indicates that most other states addressing the question have concluded that a school superintendent's evaluation is generally public, but may be subject to the redaction of private or purely personal information. Jensen v. School District, 251 Wis. 2d 676, 688-89, 642 N.W. 2d 638, 643-44 (Wisc. App. 2002) (weighing superintendent's diminished reputational interest, as he was known to be on administrative leave, against public disclosure interest and concluding that evaluation, which exclusively concerned job performance, was public under open record law); Courier-Journal & Louisville Times Company v. Board of Education, 1994 Ky. App. LEXIS 33, 12, 22 Media L. Rep. 1661 (Ky. App. 1994) (weighing superintendent's privacy interest in evaluation against public interest and finding that the evaluation was public under Kentucky's Open Records Act, after redaction of "purely personal information which bears no relationship to the performance and capability of the superintendent in carrying out his duties and responsibilities"); Vindicator Printing Co. v. Julian (July 26, 1994), 7th Dist. No. 93CA252, 1994 Ohio App. LEXIS 3362, at *5-6 (concluding that superintendent's composite evaluation was a public record, while individual evaluation forms completed by school board members were not because they were not meant to be kept); Ridenour v. Board of Education, 111 Mich. App. 798, 805-06, 314 N.W. 2d 760, 764 (Mich. App. 1981) (applying the standard of "clearly unwarranted invasion of an individual's privacy," court balanced superintendent's privacy interest against public interest and found that in the absence of "any specific matter of a private nature" in the evaluation, it was public under the Michigan Freedom of Information Act and thus should not have been discussed in a closed meeting); see also Forrest v. Owen J. Roberts School District, 2011 U.S. Dist. LEXIS 35839 at 55-56 (E.D. Pa. 2011) (concluding that an invasion of privacy claim required that the information concerned not be "of legitimate concern to the public," and superintendent's evaluation did not meet that requirement).

However, based on specific statutory provisions, two other states have found that an evaluation was fully or partly exempt from public disclosure. DA for the Northern District v. School Committee of Wayland, 455 Mass. 561, 918 N.E. 2d 796 (2009) (determining that open meetings law allowed closed session to discuss an individual's "reputation, character, physical condition or mental health" but not "professional competence," whereas public records law exempted employee work evaluations from public disclosure, so school committee should have discussed superintendent's professional competence in an open meeting and then adjourned to executive session to prepare the written evaluation in compliance with the public records law exemption); Copley Press, Inc. v. Board of Education, 359 Ill. App. 3d 321, 834 N.E. 2d 558 (Ill. App. 2005) (applying a complete statutory exemption in Illinois Freedom of Information Act for personnel file information to superintendent's performance evaluations).

Consistent with the approach taken by most other states and with OIP's prior conclusion regarding the evaluation of the University of Hawaii president, OIP finds that the Superintendent has a diminished privacy interest in her annual evaluation report, whereas the public disclosure interest is heightened. As a result, OIP concludes that the public interest in disclosure outweighs the Superintendent's privacy interest, so the Superintendent's annual evaluation report must generally be publicly disclosed. However, if the annual evaluation report includes specific information that, by its nature, has a heightened privacy interest, such information would carry a greater privacy interest and therefore could still be redacted based on the UIPA's privacy exception. For example, redactions could include information of a purely personal nature not directly related to the Superintendent's performance, such as the details of a Superintendent's illness, substance abuse, or family problems that had affected the Superintendent's performance. In such a case, the detailed information about the nature of the Superintendent's medical or family situation could be redacted, while still disclosing the existence of a medical or family issue and its effect on the Superintendent's performance.

Turning to the worksheets filled out by the Superintendent and the BOE, which generate the ratings for the Superintendent's annual evaluation report, it appears that the ratings in the annual evaluation report are determined from the scores for various criteria entered into the worksheets based on a set formula. OIP therefore believes that the worksheets are effectively a more detailed version of the annual evaluation report. Having already concluded that a Superintendent's evaluation generally does not fall under the UIPA's privacy exception, OIP sees no basis to conclude that the possibly more detailed evaluation information in the worksheets filled out by the BOE carries a greater privacy interest, or a lesser public interest, than the information in the annual evaluation report itself. Thus, the worksheets filled out by the BOE would not generally fall under the UIPA's privacy exception; however, to the extent the narrative sections include specific information that has a heightened privacy interest, such information may be redacted based on the UIPA's privacy exception, as with the annual evaluation report itself.

OIP will also consider whether the worksheets may be withheld under the deliberative process privilege that falls within the UIPA's frustration exception. See HRS § 92F-13(3).

Under the UIPA, agencies may withhold access to documents that are both predecisional and deliberative when disclosure would frustrate a legitimate government function. OIP Op. Ltr. No. 00-01 at 5 (Apr. 12, 2000). This authority to withhold access, termed the "deliberative process privilege," is authorized so that agencies can candidly and freely exchange ideas and opinions. Id. at 3-4.

OIP Op. Ltr. No. 04-12 at 6. OIP has previously considered the application of the deliberative process privilege to worksheets that determine a promotion candidate's interview score, and in that context found that the deliberative process privilege does not apply.

In our opinion, score worksheets are not predecisional; on the contrary, they are decisional in nature because the scores, when totaled and adjusted, determine the final rankings of all the [Metropolitan Police Assistant Chief] candidates in the memorandum to Chief Nakamura. See OIP Op. Ltr. No. 91-14 (Aug. 28, 1991) (rating sheets are decisional because they determine which proposal will receive a recommendation for budget funding).

OIP Op. Ltr. No. 94-8 at 14; see also OIP Op. Ltr. No. 95-24 at 21-22 (concluding that government's consultative functions are not significantly harmed by public disclosure of aggregate data compiled from employees' responses to standardized questions in agency management survey reports). Here, too, the worksheet scores, when totaled and combined according to the set formula, determine the final ratings of the Superintendent in the subcategories and overall. Thus, OIP finds that the final worksheets are not predecisional, and thus do not fall within the deliberative process privilege. If, however, the same or similar worksheets were filled out as a draft or preliminary assessment, whether by the BOE as a whole, individual BOE members, the Superintendent, or BOE staff, those worksheets would likely fall under the deliberative process privilege and could be withheld under the UIPA's frustration exception. HRS § 92F-13(3); see also, e.g., OIP Op. Ltr. No. 04-12 at 6.

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



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APPROVED:



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