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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: Mr. Rex Shilo
Agency: Department of Budget and Finance
Date: June 28, 2018
Subject: Interview Materials (U APPEAL 15-27)

Mr. Rex Shilo (Requester) seeks a decision as to whether the Department of Budget and Finance (B&F) properly denied under Parts II and III of the UIPA his request for interview materials used in the job interview process.

Unless otherwise indicated, this decision is based solely upon the facts presented in a record request to B&F from Requester dated December 14, 2014; a Notice to Requester from B&F dated December 22, 2014; an email to OIP from Requester dated April 15, 2015, with attachments; OIP's Notice of Appeal to B&F dated April 17, 2015, with enclosures; a letter to OIP from B&F dated May 7, 2015, with enclosures (First Response); and a letter to OIP from B&F dated May 9, 2018, with enclosures (Second Response).

Decision

OIP finds that some of the records sought by Requester are personal records "about" Requester under Part III of the UIPA and some of the records are government records not about Requester under Part II of the UIPA. As to those records that B&F asserts do not exist because they were never created, OIP declines to require B&F to conduct a search for such records and concludes that B&F's response was proper.

With respect to the personal records about Requester, OIP concludes that B&F may withhold the interview questions and interviewers' notes under section 92F-22(3), HRS. As to the government records responsive to Requester's request for standards and procedures, OIP concludes that the other applicants' names on the Selection Report may be withheld under section 92F-13(3), HRS, but the Guidelines for Recruitment Process, Introduction Sheet, and Interview Ratings must be disclosed as no exception in Part II of the UIPA authorizes nondisclosure. Moreover, information identifying position titles, position numbers, departments, and names of government employees must be disclosed under section 92F-12(a)(14), HRS.

Statement of Reasons for Decision

On December 14, 2014, Requester sought access to

All records pertaining to my job application for the Program Specialist III position in the Unclaimed Property Program within the Financial Administration Division of the Department of Budget and Finance, including but not limited to:

1. All interviewers' notes
2. My overall score and ranking
3. All standards and procedures used for the scoring, ranking and final selection of candidates
4. All information requested and received by the Department via the release of information form I signed and submitted[.]

In response, B&F agreed to disclose Requester's score, but asserted that (1) section 92F-22(3), HRS, allowed it to withhold all interviewers' notes; (2) sections 92F-22(2) and 92F-22(3), HRS, allowed it to withhold his ranking;¹ and (3) section 92F-22(3), HRS, allowed it to withhold all standards and procedures. With regard to Requester's request for "[a]ll information requested and received by the Department via the release of information form I signed and submitted," B&F stated that "Budget and Finance did not conduct [a] reference check on the Requester because he was not being considered to fill the vacancy."

Subsequently, Requester appealed B&F's denial to OIP. OIP accepted his appeal and sent B&F a Notice of Appeal on April 17, 2015. With B&F's First Response,

¹ B&F initially asserted that sections 92F-22(2) and 92F-22(3), HRS, allowed it to withhold Requester's ranking. However, in its Second Response, B&F withdrew this argument when it agreed to disclose Requester's ranking. Accordingly, in this Opinion, OIP will not be discussing the application of section 92-22(2), HRS, as the disclosure of Requester's ranking is no longer a disputed issue and B&F did not argue that it applied to other records.

besides the records specifically requested by Requester, B&F included the interview questions and the Selection Report indicating the scores and ranking of all the applicants for OIP's *in camera* review.

OIP requested further legal authority to justify nondisclosure and invited B&F to supplement its response. In B&F's Second Response, B&F agreed to disclose both Requester's score and ranking, along with a few of its standards and procedures,² but reaffirmed its decision to withhold the remaining requested records and the records it provided with its First Response.

I. The UIPA Does Not Require B&F to Search for Records that Do Not Exist Because They Were Never Created

With respect to Requester's request for "[a]ll information requested and received by the Department via the release of information form [Requester] signed and submitted," in B&F's Second Response, B&F asserted,

We did not provide Mr. Shilo with the information requested and received by the department via the 'Authorization Certificate for Release of Employment Information' that he signed because we did not request information concerning his employment from his current and former employers as he was not being considered to fill the vacancy.

Essentially, B&F argued that the requested records do not exist because they were never created.

OIP has previously opined that when an agency's response to a record request states that no responsive records exist and that response is appealed, OIP normally looks to whether the agency's search for a responsive record was reasonable. OIP Op. Ltr. No. F16-03 at 3; OIP Op. Ltr. No. 97-08. However, in rare instances, when OIP finds that an agency has actual knowledge that the requested record was never

² In this Opinion, OIP will not be discussing the following records because B&F has already agreed to their disclosure. The last five documents, related to Requester's request for standards and procedures, are on the Department of Human Resources Development's (DHRD) website at www.dhrd.hawaii.gov/policies-procedures/ (last visited June 14, 2018).

1. Requester's overall scores and ranking
2. DHRD's policies and procedures regarding "Types of Appointments"
3. DHRD's two "Request for Appointment Approval" forms
4. DHRD's "Education and Employment History" form for applicants
5. DHRD's policies and procedures regarding "Competitive Recruitment for Civil Service Positions"
6. DHRD's policies and procedures regarding "Certification of Eligibles for Civil Service Positions."

created, OIP will conclude that the agency is absolved from having to conduct a search reasonably likely to produce the requested records. OIP Op. Ltr. No. F16-03 at 3.

Here, with regard to B&F's assertion that no record exists, OIP finds it to be credible and made in good faith. As Requester was not being considered, B&F had no need to proceed in the hiring process by obtaining further information regarding Requester. Although Requester had consented to the third parties' release of information, OIP finds that B&F did not seek the information and thus did not maintain such records. OIP declines to require B&F to conduct a search for responsive records knowing that it would be fruitless. OIP Op. Ltr. No. F16-03. OIP concludes that pursuant to the UIPA, B&F properly responded to Requester's request for "[a]ll information requested and received by the Department via the release of information form [Requester] signed and submitted."

II. Distinguishing an Individual's Access to Personal Records and Access to Government Records Under the UIPA

An individual's access to his or her personal records, which is governed by Part III of the UIPA, must be distinguished from the general public's access to government records, which is subject to Part II. As set forth in OIP Opinion Letter Number F13-01, the framework for analysis is as follows:

- (1) What is the "personal record" of the individual requesting access under Part III of the UIPA?
- (2) Does an applicable Part III exemption in section 92F-22, HRS, allow the withholding of access to the personal record?
- (3) What portion, if any, is a government record subject to the public disclosure requirements of Part II of the UIPA?
- (4) Does an applicable Part II exception in section 92F-13, HRS, allow the withholding of access to a government record that is not a Part III personal record?

III. Requester's Access to His Personal Records Under Part III of the UIPA

A. What Are Requester's Personal Records?

First, it must be determined whether the requested records, or portions thereof, constitute "personal records" to which Requester has the right of access under Part III of the UIPA. The UIPA defines a "personal record" as "any item, collection, or grouping of information about an individual that is maintained by an agency." HRS

§ 92F-3 (2012) (emphasis added). This includes an individual's educational, financial, or medical records, or items that reference the individual by name or otherwise. *Id.* An agency is required to provide access under Part III to an "accessible" personal record, which generally means one that is filed by the person's name or other identifying information, or which the agency can otherwise readily find. See HRS §§ 92F-3, -21 (2012).

Based on OIP's *in camera* review of the documents at issue, OIP finds that the interview questions and notes are the personal records of Requester because they identify him by name and are "about" him. As will be discussed in the next section, these personal records must be disclosed to Requester, unless a Part III exemption applies.

B. Do Any Part III Exemptions Allow Withholding of Access to Requester's Personal Records?

Second, having determined that records, or portions thereof, are an individual's personal records, the agency may withhold the personal records from the individual only when there is an applicable Part III exemption as set forth in section 92F-22, HRS. OIP emphasizes that only Part III exemptions, and not Part II exceptions, are considered in analyzing Part III personal records requests.

B&F asserted that the examination exemption set forth in section 92F-22(3), HRS, permits it to withhold all interview questions and notes.³ Section 92F-22(3), HRS, states:

§92F-22 Exemptions and limitations on individual access.

An agency is not required by this part to grant an individual access to personal records, or information in such records:

- ...
- (3) Consisting of testing or examination material or scoring keys used solely to determine individual qualifications for appointment or promotion in public employment, or used as or to administer a licensing examination or an academic examination, the disclosure of which would compromise the

³ B&F also stated that disclosure would "discourage individuals from serving as panel members" as a frustration under section 92F-13(3), HRS of Part II. However, for the reasons set forth in this section, *infra*, OIP finds that the interview questions and notes are personal records subject to review under Part III of the UIPA, not Part II and its exceptions. Moreover, OIP has previously opined that a similar argument that disclosure could lead to an inability to find interviewers did not present a valid basis to withhold names under the UIPA's frustration exception set forth in section 92F-13(3), HRS. OIP Op. Ltr. No. 89-09 at 10-11 (holding that disclosure of the names of admissions committee members will not impair the functions of the committee and would not frustrate a legitimate government function).

objectivity, fairness, or effectiveness of the testing or examination process.

HRS § 92F-22(3) (2012) (emphasis in original and added). In OIP Opinion Letter Number 93-06 at 8, OIP opined that under sections 92F-13(3) and 92F-22(3), HRS,⁴ “agencies are not required to disclose materials used to administer an examination, which if disclosed would compromise the validity, fairness, or objectivity of the examination.”

Here, OIP finds that the records at issue are “examination material.”⁵ HRS § 92F-22(3); see Department of Human Resources Development’s (DHRD) “General Definitions” at www.dhrd.hawaii.gov/wp-content/uploads/2012/11/0102001.pdf (last visited June 20, 2018). OIP further finds that the validity, fairness, and objectivity of the examination, or in this case, interview process, will be compromised if an individual has the benefit of the questions and the interviewers’ notes before his or her interview. As B&F has informed OIP that the interview questions will likely be reused to fill future vacancies, OIP finds that an individual who has the benefit of the questions and notes beforehand will know what to expect and how to prepare and thus is likely to score better than those who did not have the same benefit. Under section 92F-22(3), HRS, therefore, OIP concludes that B&F is permitted to withhold the interview questions and interviewers’ notes.

IV. Public Access to Government Records Under Part II of the UIPA

A. What Government Records are Subject to a Part II Analysis?

In this case, there are some records that are not “about” Requester. These records are considered to be government records that must be examined under Part II of the UIPA to determine whether Requester, as a member of the general public, would be entitled to access these records. We emphasize that Part II, not Part III, applies to those records that are not the individual’s personal record.

Based on OIP’s *in camera* review of the documents at issue, OIP finds that Requester’s request for “[a]ll standards and procedures used for the scoring, ranking and final selection of candidates” is a request for government records subject to Part II of the UIPA.

⁴ OIP Opinion Letter Number 93-06 mistakenly cited to section “92F-22(4),” HRS.

⁵ On June 20, 2018, by telephone conversation, DHRD confirmed that its use of the term “examination” in its “General Definitions” also encompasses “interviews.”

B. Do any Part II Exceptions Allow the Withholding of Government Records?

Notwithstanding any exceptions under Part II, section 92F-12(a), HRS, mandates the disclosure of certain information. Relevant to this case is section 92F-12(a)(14), HRS, which requires certain information pertaining to government employees to be disclosed. As explicitly required by section 92F-12(a)(14), HRS, position titles, position numbers, departments, and names of government employees must be disclosed. Thus, OIP concludes that there is no basis for withholding this information on the standards and procedures documents, namely, the Selection Report and Interview Ratings.

In addition to the standards and procedures available on DHRD's website, B&F submitted the following standards and procedures for OIP's *in camera* review:

1. Guidelines for Recruitment Process
2. Introduction Sheet
3. Ratings and Scores in Selection Report
4. Interview Ratings.

B&F argued that the disclosure of these remaining materials would frustrate its hiring process because disclosure would "compromise the objectivity, fairness, and effectiveness of our testing and examination process. Disclosure may potentially give individuals an unfair competitive advantage." Although B&F did not explicitly cite any provision of the UIPA, it appears that B&F was asserting the frustration exception set forth in section 92F-13(3), HRS, which allows an agency to withhold "[g]overnment 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(3) (2012).

1. Guidelines for Recruitment Process

The Legislature expressly considered examination materials when adopting the UIPA's exception for "[g]overnment 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(3). Specifically, in listing "examples of records which need not be disclosed, if disclosure would frustrate a legitimate government function," the Legislature expressly included "[m]aterials used to administer an examination which, if disclosed, would compromise the validity, fairness, or objectivity of the examination." S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1095 (1988). Here, the Guidelines for Recruitment Process is an intra-agency memorandum written to assist B&F personnel in the recruitment process. Essentially, this document is a concise set of notes used for quick reference regarding the overall recruitment process. It is not necessary to opine as to whether this document should be considered examination

material as OIP finds that it contains no information that would give Requester an unfair advantage. Consequently, OIP concludes that the disclosure of the Guidelines for Recruitment Process would not compromise the validity, fairness, or objectivity of the examination or hiring process, and accordingly, it must be disclosed.

2. Introduction Sheet

OIP has previously opined that an agency may waive the deliberative process privilege by disclosing the contents of a draft report when it permits inspection and copying of the report by persons outside of the agency. See OIP Op. Ltr. No. 92-26. Here, the Introduction Sheet is read to the applicants prior to their interview. It gives a description of the department and job the applicants are applying for, along with a description of the interview process that the applicants are about to undergo. Because Requester, as an applicant, was read this document prior to his interview, he already knows its contents. Consequently, B&F has waived any privileges it otherwise may have been able to claim, and now, must disclose the record. Unlike the interview questions that may be withheld under Part III of the UIPA, OIP finds that Requester will not be given an unfair advantage and the disclosure of the record will not frustrate the recruitment process under section 92F-13(3), HRS. Therefore, the Introduction Sheet must be disclosed to Requester as no Part II exceptions to disclosure apply.

3. Ratings and Scores in Selection Report

OIP has previously held that if the rating and examination scores of applicants can be segregated from all individually identifiable information, the rating and examination scores of the unidentified applicants shall be disclosed. OIP Op. Ltr. No. 95-02 at 4. The names of unsuccessful applicants may be withheld in accordance with section 92F-13(3), HRS. See OIP Op. Ltr. No. 95-02 at 4 (opining that the frustration exception set forth in section 92F-13(3), HRS, protects the names of unsuccessful applicants “[b]ecause the disclosure of the identities of unsuccessful applicants may discourage individuals from applying for a government position”). Moreover, if there is a likelihood of actual identification of an applicant with the respective rating or examination scores even with the identity segregated, then the rating or scores may be withheld in order to protect that individual’s right to privacy. Id., citing OIP Op. Ltr. No. 90-14 at 8.

Here, based on OIP’s *in camera* review of the Selection Report, OIP finds that all individually identifiable information can be segregated from the ratings and scores. Because all of the applicants were unsuccessful, all applicants’ names may be redacted in accordance with section 92F-13(3), HRS. Without the names, OIP finds that there is no way to determine the rating or score for any applicant. Consequently, the rating and examination scores of applicants in the Selection

Report must be disclosed to Requester after segregating all individually identifiable information.

As previously indicated, the additional information contained on the Selection Report, namely, the position title interviewing for, the position number, department, and names of government employees, must be disclosed per section 92F-12(a)(14), HRS.

4. Interview Ratings

In OIP Opinion Letter Number 94-08 at 9-10, OIP concluded that “there is insufficient evidence to support the position that the public disclosure of the rating guidelines would ‘compromise the validity, fairness, or objectivity’” of the examination and interview process. OIP held that “this government record does not fall within the scope of the UIPA exception for ‘frustration of a legitimate’” and accordingly, required disclosure. OIP Op. Ltr. No. 94-08 at 9. This conclusion was based on the rationale that although the rating guidelines revealed the type of background information or answers that applicants must provide in order to receive high scores, there is not enough information on this document alone to give applicants an unfair advantage to prepare responses to the questions asked of them during the interview. Id.

Upon OIP’s *in camera* review of the Interview Ratings, OIP finds that this form contains the titles of criteria categories, but not the actual criteria; a scoring key; and the interviewer’s name. OIP finds that with this information alone, disclosure would not give applicants an unfair advantage in preparing their interview responses. Accordingly, OIP concludes that the titles of criteria categories and the scoring key on the Interview Ratings cannot be withheld under section 92F-13, HRS. With respect to the disclosure of the interviewer’s name, OIP has previously explained that interviewers’ names are required to be disclosed under section 92F-12(a)(14), HRS. As to Requester’s scores on the Interview Ratings, B&F has already agreed to disclose his scores as his personal record. See footnote 2, supra.

Right to Bring Suit

For personal records, 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(e).

For government records, 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), and -27(e) (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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