



STATE OF HAWAII
OFFICE OF INFORMATION PRACTICES

DAVID Y. IGE
GOVERNOR

NO. 1 CAPITOL DISTRICT BUILDING
250 SOUTH HOTEL STREET, SUITE 107
HONOLULU, HAWAII 96813
Telephone: (808) 586-1400 FAX: (808) 586-1412
E-MAIL: oiip@hawaii.gov
www.oiip.hawaii.gov

CHERYL KAKAZU PARK
DIRECTOR

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: Mila Bocalbos
Agency: Department of Commerce and Consumer Affairs, Regulated Industries
Complaints Office
Date: December 27, 2018
Subject: Complaint of Unlicensed Practice (U APPEAL 18-3)

Requester seeks a decision as to whether the Department of Commerce and Consumer Affairs (DCCA), Regulated Industries Complaints Office (RICO), properly denied her request for records under Part II of the UIPA.

Unless otherwise indicated, this decision is based solely upon the facts presented in Requester's letter to OIP dated August 15, 2017, with attached materials, a letter from RICO to OIP dated September 8, 2017, with attached materials, and Requester's letter to OIP dated October 31, 2018.

Decision

Section 92F-14(b)(7), HRS, which recognizes a heightened privacy interest in information about a person's fitness to be granted a license, does not apply directly to the file at issue here, and OIP concludes that it should not be applied by analogy because the subject of the complaint ("Respondent") did not have an equivalent privacy interest in allegations that his actions constituted the practice of dentistry in Hawaii. HRS § 92F-14(b)(7) (Supp. 2017). It was therefore not appropriate to withhold the closed complaint file as a whole on the assumption that the file as a whole carried a significant privacy interest. Instead, the records should have been

examined on an individual basis to determine whether, based on the information contained in them, they fell under one of the UIPA's exceptions to disclosure.

Requester clarified that she was only seeking the complaint, the legal proceedings and negotiation, and the conclusion of the case, not independent medical examinations (IMEs) and the patient information contained therein, which would in any case fall within the UIPA's privacy exception. HRS §§ 92F-13(1) and -14(b)(1) (2012). Thus, RICO may continue to withhold IME records and to redact the patient information from them wherever it appears in other records.

Because OIP found that a witness who filed a statement as a member of the advisory committee was a confidential source, the witness' identity may be withheld under the UIPA's exception for records whose disclosure would frustrate a legitimate government function. E.g. OIP Op. Ltr. No. 05-16; see also HRS § 92F-13(3) (2012). RICO thus may withhold any information that would result in the likelihood of the witness's actual identification, which in this case includes not just the witness's name but also other identifying details such as title, contact information, and letterhead.

Correspondence reflecting settlement negotiations, including attached drafts, was properly withheld under the UIPA's frustration exception. See HRS § 92F-13(3). However, after redaction of the witness and patient information as previously discussed, the remaining correspondence and other records in the file (such as case summary printouts and closing memorandum) do not fall within the UIPA's privacy or frustration exceptions, and thus must be disclosed. See HRS § 92F-13(1) and (3).

Statement of Reasons for Decision

Requester sought records of a closed RICO complaint¹ filed by a third party alleging Respondent had engaged in the unlicensed practice of dentistry in Hawaii by performing IMEs and doing medical record reviews. RICO denied this request in its entirety on the basis that the complaint file was "[i]nformation compiled to determine an individual's fitness to obtain or retain a license" and as such fell within the UIPA's exception for information whose disclosure would be a clearly unwarranted invasion of personal privacy. See HRS § 92F-13(1) and -14(b)(7). After OIP opened this appeal, Requester clarified that she was not interested in receiving copies of IMEs conducted on third parties, or medical or dental information related to the IMEs, and narrowed the scope of her request to "the complaint, the legal proceedings and negotiation, and the conclusion of the case."

¹ OIP has previously found that records of a pending or prospective investigation may be withheld under the UIPA's frustration exception to the extent necessary to prevent interference with the investigation. OIP Op. Ltr. No. 95-21 at 10-12. In the present case, since the file at issue is a closed one, this form of frustration does not apply.

OIP has previously ruled that

[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.

Section 92F-14(b)(7), HRS, specifies that with some exceptions, an individual has a significant privacy interest in "[i]nformation compiled as part of an inquiry into an individual's fitness to be granted or to retain a license . . ." However, the complaint file at issue here did not concern an inquiry into Respondent's fitness to be granted or to retain a license, as he did not have a license and nothing in the file indicated that he was applying for one. Rather, the file concerned an inquiry into whether Respondent's performance of IMEs and other activity constituted an unlicensed practice of dentistry in Hawaii.

Apparently recognizing that section 92F-14(b)(7), HRS, does not on its face apply to records compiled to determine whether a respondent engaged in unlicensed activity, RICO argued in its response to this appeal that "by analogy" Respondent has a privacy interest in the complaint file akin to what a licensee has in records compiled to determine fitness to obtain or retain a license under section § 92F-14(b)(7), HRS. OIP cannot agree with RICO that the privacy standard set out in that section should be applied to records other than those explicitly described therein, on the theory that such records carry the same privacy interest by analogy. OIP has consistently found that the UIPA's purposes and policies require a liberal construction of the UIPA's affirmative disclosure provisions and a narrow construction of its exceptions. OIP Op. Ltr. No. 05-16 at 7, quoting OIP Op. Ltr. No. 93-10 at 2. Consistent with that, OIP cannot assume that where the Legislature specified that a significant privacy interest exists in a particular category of records, such a privacy interest also exists by analogy in other, similar records that do not actually fall within the category of records described by statute.

Nonetheless, OIP recognizes that the list of information carrying a significant privacy interest set out in section 92F-14(b) is not an exclusive list, and OIP can look to those legislatively stated examples when considering whether other information not listed therein may also carry a significant privacy interest based on

its similar level of sensitivity. In this case, OIP is not convinced that information about Respondent here is of a similar level of sensitivity to information about an individual's fitness to be granted or to retain a license such as might be found in a complaint file covered by section 92F-14(b)(7), HRS. Rather, OIP finds that an inquiry into a complaint of unlicensed practice of the sort set out in this complaint file is different in nature from an inquiry into a complaint of professional malpractice or inappropriate conduct, or an examination of an applicant's professional qualifications. In the instant inquiry, for instance, it does not appear that any allegations of incompetence, improper behavior, or other shortcomings in the quality of Respondent's professional performance were raised or examined, nor was there any allegation that he had claimed professional credentials he did not have; rather, the sole question appeared to be whether his activities constituted the practice of dentistry in Hawaii. OIP does not believe a respondent's privacy interest in an inquiry solely into whether the respondent's activities constituted the practice of dentistry is analogous to the privacy interest a respondent might have in an inquiry into allegations of, for example, professional incompetence or improper behavior toward a patient.

OIP notes that for a file involving allegations of poor performance or unprofessional conduct in addition to unlicensed practice, an analogy to the privacy interest set out in section 92F-14(b)(7), HRS, could be reasonable, as in that case the file would include an inquiry into the respondent's competence and professionalism. Because the file at issue here includes no such allegations, though, OIP does not believe it would be appropriate in this instance to assume that Respondent has an equivalent privacy interest in allegations that his actions constituted the practice of dentistry in Hawaii, and therefore concludes that it was not appropriate to withhold the file on the assumption that the file as a whole carried a significant privacy interest. OIP will therefore examine the individual records contained in the file to determine whether, based on the information contained in them, they fell under one of the UIPA's exceptions to disclosure and thus were properly withheld.

Requester clarified that she is only seeking the complaint, the legal proceedings and negotiation, and the conclusion of the case, not IMEs and the patient information contained therein, which would in any case fall within the UIPA's privacy exception. HRS §§ 92F-13(1) and -14(b)(1). Thus, RICO may continue to withhold the IME records and to redact the patient information from them wherever it appears in other records.

RICO asserted that an advisory committee member who acted as a witness in the complaint file has a privacy interest in the member's identity. While the witness may also have a privacy interest in the witness's identity, more to the point, OIP finds that the witness is a confidential source whose identity may be withheld under the UIPA's exception for records whose disclosure would frustrate a legitimate government function. E.g. OIP Op. Ltr. No. 05-16; see also HRS § 92F-13(3). RICO thus may withhold any information that would result in the likelihood of the

witness's actual identification, which in this case includes not just the witness's name but also other identifying details such as title, contact information, and letterhead.

RICO argued that letters reflecting negotiations between RICO and Respondent, and draft versions of an assurance of voluntary compliance exchanged between RICO and Respondent's attorney fell within the UIPA's frustration exception. See HRS § 92F-13(3). Specifically, RICO argued that their disclosure would frustrate its ability to work with respondents by making respondents more reluctant to engage in frank and meaningful discourse with RICO that could lead to a settlement. RICO also noted that those records would be inadmissible as evidence under Rule 408 of the Hawaii Rules of Evidence (HRE). OIP agrees with RICO that the correspondence reflecting settlement negotiations, including attached drafts, was properly withheld under the UIPA's frustration exception. See HRS § 92F--13(3). While Rule 408, HRE, does not apply directly,² the policy behind it of encouraging settlement does support RICO's argument that disclosure of settlement negotiations would frustrate its ability to work with respondents toward settlement.

In addition to the settlement negotiations, the file also includes transmittal statements and correspondence between RICO and Respondent's attorney that could not under the most generous interpretation be described as settlement negotiations or meaningful discourse, as they consisted instead of the notice of complaint and other administrative information and discussion of when Respondent would submit a response. The file also contains the response letter submitted by Respondent's attorney. Although the response letter is substantive, it does not include settlement negotiation, but instead formally sets out Respondent's arguments with respect to the alleged violation. After the redaction of patient identities and other information OIP has already found should be redacted, OIP does not believe that disclosure of either the response letter or the transmittal statements and similar correspondence would frustrate RICO's ability to engage in discourse with or get information from respondents in the future. Given RICO's power to pursue civil action against respondents conducting unlicensed professional activity, RICO is not exclusively reliant on respondents' willingness to cooperate to get responses. See HRS § 487-13 (2008) (unlicensed practice carries fine of \$500 to \$2500 per act, to be collected by DCCA via civil suit). Where a respondent's failure to respond may result in a finding of unlicensed practice and associated penalties, OIP cannot find that a reasonable respondent would be deterred from providing a

² Rule 408, HRE, would not provide a basis to withhold the settlement negotiations under section 92F-13(2), HRS, which is the UIPA's exception for records falling within a discovery privilege, because at the time of the request RICO was not involved or faced with the prospect of a judicial or quasi-judicial action as required for that section to apply. HRS § 92F-13(2); see also OIP Op. Ltr. No. 10-04 at 5 (applying section 92F-13(2), HRS, where records subject to a discovery and evidentiary privilege pertained to the county's defense in ongoing litigation).

response letter justifying his or her actions by the possibility that his or her arguments could be made public. OIP thus concludes that disclosure of the response letter at issue here and the correspondence dealing with administrative and scheduling matters would not frustrate RICO's future ability to get responses from future respondents, so those records do not fall within the UIPA's frustration exception and must be disclosed. See HRS § 92F-13(3).

The file at issue also includes internal administrative information such as printed status summaries and a case route form showing where the file was internally assigned on what date. Apart from its argument that the file as a whole carried a significant privacy interest by analogy as information compiled in an investigation of unlicensed activity, which OIP addressed above, RICO did not specifically address these records, and OIP does not see a basis under the UIPA's frustration or privacy exceptions to withhold the status summaries and the case route form. They therefore must be disclosed.

The file includes a brief Closing Memo summarizing its reason for being opened and its outcome. RICO apparently did not consider this to be a record of the complaint's disposition and did not disclose it. While a brief memorandum of this sort arguably may be a record of the disposition of a complaint for the purpose of section 92F-14(b)(7), HRS, since OIP has already found that section 92F-14(b)(7) does not apply here OIP does not need to determine whether the Closing Memo is a record of the complaint's disposition. Rather, looking purely at the content of the Closing Memo, OIP sees no basis to withhold it under the privacy or frustration exceptions, or any other UIPA exception, and thus it should be disclosed.

Finally, the file contains two different Investigation Reports, each summarizing the allegations and status of the complaint at different stages and recommending further action. After redaction of patient information, identities, and other information as discussed above, OIP does not see a basis to withhold additional information from the Investigation Reports, and thus OIP concludes that they must be disclosed as redacted.

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.

OFFICE OF INFORMATION PRACTICES



Jennifer Z. Brooks
Staff Attorney

APPROVED:



Cheryl Kakazu Park
Director