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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: Michael Carter
Agency: Office of the Ombudsman
Date: May 17, 2019
Subject: Ombudsman Investigation File (U APPEAL 17-25)

Requester seeks a decision as whether the Office of the Ombudsman (Ombudsman) properly denied Requester's request under Part III of the UIPA for case files pertaining to complaints he had filed with that office.

Unless otherwise indicated, this decision is based solely upon the facts presented in Requester's letter to OIP dated November 15, 2016, and attached materials, and Mr. Robin K. Matsunaga's letter to OIP dated December 5, 2016, and attached materials.

Decision

The UIPA allowed the Ombudsman to withhold the requested case files to maintain secrecy regarding its investigations as required by statute. HRS §§ 92F-13(4) and -22(5) (2012); HRS § 96-9(b) (2012).

Statement of Reasons for Opinion

Requester sought "any and all information, notes, final reports, conversations . . . , and any other . . . information" regarding his complaint to the Ombudsman and the Ombudsman's investigation of that complaint. In support of its denial of access to

the requested case file, the Ombudsman argued that it was required by statute to maintain secrecy as to its investigations. Specifically, the Ombudsman quoted subsection 96-9(b), HRS, as follows:

The ombudsman is required to maintain secrecy in respect to all matters and the identities of the complainants or witnesses coming before the ombudsman except so far as disclosures may be necessary to enable the ombudsman to carry out the ombudsman's duties and to support the ombudsman's recommendations.

Based on this requirement, the Ombudsman argued that it could withhold the entirety of the requested file under subsections 92F-13(4), HRS, and 92F-22(5), HRS, which allow an agency to withhold records made confidential by statute in response to a general government records request or a personal records request respectively.

The Ombudsman did not provide a copy of the records to which access was denied for OIP's *in camera* review. See HRS § 92F-15(c) (2012) (agency has burden of proof to justify nondisclosure) and HAR § 2-73-15(c) (OIP may require a party to submit records for *in camera* review); see also OIP Op. Ltr. No. F19-02 at 5, n. 5 (agency that did not provide records for *in camera* review failed to meet its burden to establish that the records fell under exception to disclosure). In this case, however, the comprehensive nature of the confidentiality statute applicable to the Ombudsman's complaint files makes it unnecessary for OIP to review the requested records *in camera* to determine whether they fall within the confidentiality statute.

OIP agrees with the Ombudsman's argument that subsection 96-9(b), HRS, requires it to maintain secrecy of its investigative files. Thus, the Ombudsman was justified under the UIPA in denying access to the requested case file. HRS §§ 92F-13(4) and -22(5); HRS § 96-9(b).

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

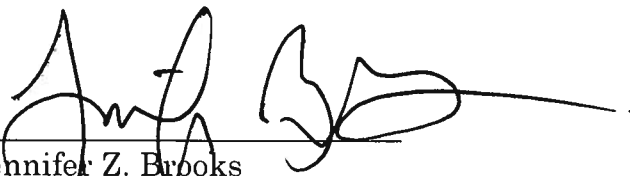
attorney's fees. HRS § 92F-27(d). The court may also assess attorney's fees and costs against the agency when a requester substantially prevails, or it may assess fees and costs against the requester when it finds the charges brought against the agency were frivolous. HRS § 92F-27(e). If Requester decides 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.

OFFICE OF INFORMATION PRACTICES



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APPROVED:



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