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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: Brad Edwards
Agency: Department of Agriculture
Date: June 6, 2019
Subject: Investigation Report Denied in Its Entirety

Requester seeks a decision as to whether the Department of Agriculture (DOA) properly denied his request under Part II of the UIPA for records of two pesticide overspray cases.

Unless otherwise indicated, this decision is based solely upon the facts presented in Requester's emails to OIP dated December 10, 2015, with attachments, and April 11 and 12, 2019; OIP's letters to DOA dated December 11, 2015, January 8, 2016, and November 28, 2016; the Department of the Attorney General's (AG) letters on behalf of DOA to OIP dated January 4 and 8, 2016; the AG's emails on behalf of DOA to OIP dated November 30, 2018, and April 10, 2019; OIP's emails to Requester dated April 11, 2019; OIP's emails to DOA dated November 28, 2018, and April 10, 2019; and Requester's emails to OIP dated April 11, 2019, and April 12, 2019.

Decision

DOA properly invoked the UIPA's frustration exception at section 92F-13(3), HRS, to withhold copies of files for ongoing investigations from disclosure prior to the completion of the investigations. Portions of the investigations could also be withheld under the UIPA's privacy exception because they contain information which, if

disclosed, would constitute a clearly unwarranted invasion of personal privacy. HRS § 92F-13(1) (2012).

Statement of Reasons for Decision

I. FACTS

The DOA administers chapter 149A, HRS, Hawaii Pesticides Law. Violations of the Hawaii Pesticides Law may subject the violators to warning notices, administrative penalties and criminal penalties.

In two requests dated December 2 and 3, 2015, Requester sought copies of two investigations:

- (1) a complaint of an aerial overspray in Paia filed by a construction crew; and
- (2) a complaint of a pesticide overspray by a property owner and the investigation of the complaint. If the investigation was not yet completed, Requester sought a copy of the complaint and the test results for the subject property.

DOA responded with a Notice to Requester (NTR) dated December 8, 2015, which informed Requester that the investigations “have not been closed” and denied access to the requested records based on sections 92F-13(2)¹ and (3),² HRS. Specifically, the NTR stated that DOA was withholding “[i]nformation regarding ongoing cases [that] is not disclosable and must remain confidential until such cases are closed, adjudicated, or settled.” Because both investigations were pending, there was still the possibility that they could lead to penalties ranging from a warning to criminal penalties. In response to this appeal, DOA articulated the possible harms from a premature disclosure of the investigation records to include:

1. Prematurely revealing the government’s case;
2. Alerting other potential defendants;
3. Revealing the evidence compiled by the government;
4. Alerting additional leads;

¹ Section 92F-13(2), HRS, allows agencies to withhold records that would not be discoverable in litigation. See discussion in section IV, supra.

² Section 92F-13(3), HRS, allows agencies to withhold records that must be confidential in order for the agency to avoid the frustration of a legitimate government function. See discussion in section II, supra.

5. Depriving the defendant of a fair trial; and
6. Invading the privacy³ of someone who is the subject of an ongoing investigation.

DOA's response to this appeal stated that it was "constrained by statute" from disclosing the requested records. However, DOA did not cite to any statutes other than the aforementioned UIPA exceptions as its justification for withholding the requested records. Insofar as DOA's intended argument was that the UIPA's exceptions constrained it from disclosing records, OIP notes that the UIPA requires that all government records are public "unless access is restricted or closed by law." HRS § 92F-11(a) (2012). In other words, the UIPA contains a policy favoring openness unless an exception to disclosure applies.⁴ The UIPA's exceptions to disclosure for general government record requests, set forth in section 92F-13, HRS, do not mandate confidentiality, but rather permit an agency to withhold records or information falling within an exception to disclosure. HRS § 92F-13 (2012). DOA argued that three exceptions to disclosure in section 92F-13, HRS, apply here, as discussed in the following three sections.

II. The Frustration Exception

Section 92F-13(3), HRS, 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). The legislative history of this UIPA exception reflects that, among other things, section 92F-13(3), HRS, was intended to permit agencies to withhold access to "[r]ecords or information compiled for law enforcement purposes" if their disclosure would frustrate a legitimate government function. OIP Op. Ltr. No. 91-9 at 4, citing S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1095 (1988). DOA asserted that it needed to withhold records of the requested

³ Section 92F-13(1), HRS, allows agencies to withhold records when disclosure would result in a clearly unwarranted invasion of personal privacy. Privacy was raised as a basis for withholding the records in the response to this appeal. See discussion in section III, supra.

⁴ The DOA's response also correctly noted that it is not required to provide a description of each document being withheld, and an explanation of the reason for nondisclosure. OIP's rules do not require agencies denying access to provide lists or logs of withheld information akin to a privilege log or Vaughn Index. A Vaughn Index is a document typically in spreadsheet form prepared by federal agencies responding to Freedom of Information Act, 5 U.S.C. § 552, requests, in which they list each specific record or portion of a record, and an explanation of "how disclosure would damage the interests protected by the claimed exemption." See Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir 1973), cert. denied, 415 U.S. 977 (1974); see also Citizens Comm'n on Human Rights v. FDA, 45 F.3d 1325, 1326 n. 1 (9th Cir. 1995).

investigations while they were pending in order to protect the target from embarrassment or reputational harm should no chargeable violation be discovered, to prevent the target from obtaining premature access to the government's evidence, and to protect current and future citizen informants from being exposed to pressure or retaliation.

In previous opinions, OIP has found that, prior to the conclusion of an investigation, an agency need not disclose records of the investigation if: a) a law enforcement proceeding is pending or prospective, and b) disclosure of the records could reasonably be expected to cause articulable harm. See OIP Op. Ltr. No. 91-9 (finding that, using federal law as a guideline, an agency need not disclose pending investigation files). Having considered the prospective harms articulated by DOA and reviewed the requested records *in camera*, OIP finds that DOA was justified in not disclosing the records to Requester because, at the time of his request, the DOA had not completed its disposition of the two cases, and DOA adequately articulated the possible harm to the investigation if there was a premature disclosure of the records on these two cases.

III. The Privacy Exception

As OIP has already concluded, the UIPA's frustration exception justified DOA's withholding of all records of the investigation at the time the request was made because the investigation was then still pending. However, DOA also asserted in its response to this appeal that portions of the requested investigation files would be withheld even after the investigation was concluded under the UIPA's privacy exception. Section 92F-13(1), HRS allows an agency to withhold "[g]overnment records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy." Although it is unnecessary for OIP to reach DOA's argument that the privacy exception also protected portions of the investigation files given its earlier conclusion that the entire investigation file could be withheld, OIP will nonetheless address the general applicability of the privacy exception here to assist DOA in the event it receives a new request for the now-closed investigation files.

DOA stated that if a request were made for the records after the investigations closed,⁵ personal information would be redacted before disclosure. Based on OIP's *in camera* review, OIP notes that the records appear to contain information naming individuals identifiable as part of an investigation into a possible law violation.

⁵ This appeal addresses DOA's 2015 denial of access to records and the validity of the justification asserted by DOA at that time. After this appeal was opened, DOA informed OIP that the two files had been closed in 2016 and if Requester now makes a new record request, the records would be disclosed (subject to redaction based on the privacy exception). However, Requester informed OIP that he declined to submit a new request and instead, opted to wait until a decision was issued on this appeal.

Witnesses and complainants have a significant privacy interest in information about their identity in investigation reports. OIP Op. Ltr. No. 98-5 at 18; see also HRS § 92F-14(b)(2) (2012). Thus, if DOA receives a request for the records now that the investigation has concluded, it appears likely that information identifying these individuals could still be withheld under the privacy exception as their privacy interests would outweigh the public interest in disclosure unless they were publicly identified in subsequent legal proceedings.

In addition, home addresses and people's direct work telephone numbers and email addresses most likely may be withheld. OIP has previously found that records that carry a significant privacy interest, such as social security numbers, home addresses and telephone numbers, ethnicity and dates of birth, may generally be redacted under the UIPA's privacy exception. OIP Op. Ltr. No. 07-07. Direct telephone numbers and email addresses (as opposed to an office's general phone line or general mailbox) may be withheld under the UIPA's frustration exception to allow agency staff to efficiently reach other employees or outside contacts. OIP Op. Ltr. No.07-11 at 8, n.14. Thus, OIP generally concurs with DOA that the records include personal information that may be redacted from the closed investigation file before disclosure of the records.⁶

IV. Nondiscoverable Records

DOA asserted that portions of the requested investigation files would be withheld under the UIPA's exception in section 92F-13(2), HRS. Agencies are not required to disclose records that pertain to the prosecution or defense of a judicial or quasi-judicial action in which the State or a county is or may be a party where those records are not discoverable. HRS § 92F13(2) (2012); OIP Op. Ltr. No. 10-04. Specifically, that section provides:

⁶ Page 9 of the January 4, 2016, letter from DOA to OIP is incorrect insofar as it states section 92F-14(b)(2), HRS, is a statutory prohibition against disclosure of records identifiable as part of an investigation into a possible violation of criminal law. First, as OIP has previously stated, "we interpret the exceptions to disclosure in section 92F-13, HRS, to confer on the agency maintaining the particular record the discretion to withhold the record from disclosure. That is, in our opinion, section 92F-13, HRS, contains the exceptions to mandatory disclosure; however, those exceptions do not prohibit agency disclosure." Thus, even a clearly applicable exception to disclosure does not prohibit agency disclosure. Second, section 92F-14(b), HRS, by itself is not a list of exceptions to disclosure; rather, it lists government records or information contained therein which carry a significant privacy interest. When a requested record carries a significant privacy interest, it must be balanced against the public interest in disclosure. HRS § 92F-14(a) (2012). Only when the privacy interest is greater than the public interest in disclosure may the record be withheld under section 92F-13(1), HRS.

§ 92F-13 Government records; exceptions to general rule.

This part shall not require disclosure of:

...

- (2) Government records pertaining to the prosecution or defense of any judicial or quasi-judicial action to which the State or any county is or may be a party, to the extent that such records would not be discoverable[.]”

HRS § 92F-13(2). OIP has previously found that DOA properly withheld the entire investigation files under the UIPA’s frustration exception and thus does not need to make a determination as to whether section 92F-13(2), HRS, provided an additional basis for withholding, but OIP does note that DOA’s reliance on section 92F-13(2), HRS, is misplaced. The exception only applies to records that would not be discoverable in a judicial or quasi-judicial action to which the State or a county is or may be a party. DOA has not presented reasons or grounds to support the argument that the records would not be discoverable.

In conclusion, at the time the record requests were made and responded to, the investigations were still ongoing and DOA was justified in invoking the UIPA’s frustration exception to withhold the files, in order to protect the integrity of the investigation process. However, as the investigations have now been concluded, Requester may make a new request for the closed investigation files. Should DOA receive such a request, OIP notes that it would be justified in redacting personal information under the UIPA’s privacy exception.

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



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APPROVED:



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