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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: Fulfilling the Law Ministry
Agency: Employees' Retirement System, State of Hawaii
Date: June 28, 2019
Subject: Judges' Pension Information

Requester seeks a decision as to whether the Employees' Retirement System (ERS) properly denied his request for records under Part II of the UIPA.

Unless otherwise indicated, this decision is based solely upon the facts presented in an email from Requester to OIP dated July 20, 2016, and attached materials; a letter from ERS to OIP dated August 10, 2016, and attached materials; an email from Requester to OIP dated August 15, 2016, and attached materials; an email from Requester to OIP dated October 26, 2016; an email from Requester to OIP dated December 5, 2016, and attached materials; an email from Requester to OIP dated December 6, 2016; and an email from ERS to OIP dated May 31, 2019.

Decision

ERS does not maintain records of individual retirement accounts, so ERS was not required to search for such records in order to determine that it did not maintain them. ERS's response that it did not maintain the requested records (with the exception of the estimates of service retirement benefits for one judge) was proper under the UIPA. ERS properly withheld that judge's estimates of service retirement benefits. Because the judge had a significant privacy interest in the records that was

not outweighed by the public interest in disclosure, they fell under the UIPA's privacy exception. See HRS §§ 92F-13(1) (2012) and -14(a) and (b)(6) (2012).

Statement of Reasons for Decision

In a request to ERS dated July 11, 2016, Requester asked for

RONALD IBARRA, HAWAII COUNTY CHIEF JUDGE OF THE THIRD JUDICIAL CIRCUIT IRA'S and PENSIONS with all FINANCIAL INSTITUTIONS, NATIONAL BANKING ASSOCIATIONS, ETC. The same and identical UIPA RECORDS REQUEST for MELVIN H. FUJINO, HAWAII COUNTY CIRCUIT COURT JUDGE OF THE THIRD JUDICIAL CIRCUIT [all sic].

ERS denied access to the requested records in its Notice to Requester dated July 20, 2016, on the grounds that it did not maintain records of "IRA's and pensions with financial institutions or national banking associations" for either judge, and that the records of pension eligibility it maintained were protected from disclosure under section 92F-13(1), HRS, the UIPA's exception for information whose disclosure would constitute a clearly unwarranted invasion of personal privacy. In its response to the appeal, ERS further explained that because neither of the judges whose pension information Requester sought was retired, neither one was receiving a pension and thus ERS did not have records of their pensions.¹ However ERS noted that it did have estimates of service retirement benefits it had prepared for one of the judges at that judge's request, essentially pension estimates made at various points in time setting out an estimated monthly payment under a number of different scenarios. These were the records to which ERS denied access based on section 92F-13(1), HRS.

¹ With regard to Requester's request for records of the judges' individual retirement accounts, ERS confirmed to OIP in a separate email that it does not maintain individual retirement accounts for ERS members and has no records or knowledge of investment its members might have outside ERS. See also Comprehensive Annual Financial Report for the Fiscal Year Ended June 30, 2017, ERS, <http://ers.ehawaii.gov/wp-content/uploads/2018/11/CAFR-2017-Web.pdf>, at pages 5-6 and 11 (last visited June 3, 2019) (explaining that ERS is a "qualified defined benefit pension plan" and also administers the State's Social Security Contribution Fund). A defined benefit pension plan "guarantee[s] a specific retirement benefit amount for each participant . . . , which can be based on the employee's salary, years of service or a number of other factors. Employees have little control over the funds until they are received in retirement." How Does a Defined Benefit Plan Differ from a Defined Contribution Plan, Investopedia, <https://www.investopedia.com/ask/answers/032415/how-does-defined-benefit-pension-plan-differ-defined-contribution-plan.asp> (last visited June 3, 2019). Defined benefit plans differ in this way from defined contribution plans, which are "funded primarily by the employee, called the participant, with the employer matching contributions to a certain amount" and "can be invested, at the participant's direction, in select mutual funds, money market funds, annuities or stocks offered by the plan." Id.

The other judge had not requested ERS to prepare an estimate of service retirement benefits, and ERS only prepares such estimates upon request by an individual ERS member.

I. Records Agency Did Not Maintain and Reasonable Search

The UIPA's affirmative disclosure obligations apply to "government records," which by definition are limited to records an agency actually maintains. HRS §§ 92F-3 (2012) (definition of "government record") and -11 (2012). When a requester appeals an agency's statement that it has no records responsive to a record request, OIP normally looks at whether the agency's search for a responsive record was reasonable. OIP Op. Ltr. No. F16-03 at 3, citing OIP Op. Ltr. No. 97-8. Here, ERS searched for records of retirement benefits for the judges in question, and its search turned up pension estimates prepared at the request of one of the judges. Requester has not raised any reason to conclude that ERS's search missed records it should have found or was otherwise not reasonable, and ERS's explanation for why no actual pension records were found and pension estimates were found only for one judge, *i.e.* that ERS does not have pension records for employees who are not retired and it prepares pension estimates only upon request, was a reasonable one. OIP therefore concludes that ERS's search for pension records regarding the two judges was reasonable.

Further, when an agency's staff has actual knowledge that it does not maintain the type of records being requested, it is not required to search for such records. OIP Op. Ltr. No. F16-03. As OIP noted above, ERS administers a public pension plan and Social Security Contribution Fund and does not provide or administer individual retirement accounts. Its staff has actual knowledge that it does not maintain individual retirement accounts or records of members' investments with banks or financial institutions. OIP therefore concludes that ERS does not maintain records of individual retirement accounts for either judge, and it was not required to search for such records in order to determine that it did not have maintain them. ERS's response that it does not maintain the requested records (with the exception of the estimates of service retirement benefits for one judge) was proper under the UIPA.

II. Records Withheld Based on the UIPA's Privacy Exception

ERS withheld the responsive records it did maintain, pension estimates prepared at the request of one of the judges, based on the UIPA's exception for information whose disclosure would constitute a clearly unwarranted invasion of personal privacy. See HRS §§ 92F-13(1). ERS correctly noted that an individual has a statutorily recognized significant privacy interest in "[i]nformation describing an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or credit worthiness." § 92F-14(b)(6). ERS further cited to OIP Opinion Letter Number 90-1 as recognizing that specific information concerning a

government employee's pension benefits carries a significant privacy interest and thus typically falls within the UIPA's privacy exception. OIP Op. Ltr. No. 90-1.

In OIP Opinion Letter Number 90-1, OIP wrote:

Given the clear directive set forth by the Legislature that individuals have a significant privacy interest in information relating to their "finances," "income," and "financial activities," and given the availability of information concerning the operation of the retirement system from other sources that would equally serve the public interest, we conclude that disclosure of a particular public employee's pension benefit income or payout option selected would "constitute a clearly unwarranted invasion of personal privacy" under section 92F-13(1), Hawaii Revised Statutes. Specifically, we conclude based upon the facts present here, that the public interest in disclosure of a particular retired public employee's pension is outweighed by that retiree's significant privacy interest in such data, unless the disclosure is otherwise required by law. See Haw. Rev. Stat. § 92F-14(a) (Supp. 1989). However, we do not mean to suggest that such information is entitled to categorical protection. For example, based upon particularized allegations of fraud in the receipt of such benefits, the public interest in disclosure may well outweigh the individual's privacy interest in such data. Those facts, however, are not present here.

OIP Op. Ltr. No. 90-1 at 8-9. OIP agrees with ERS that the general protection of pension information under the UIPA's privacy exception, as set out in OIP Opinion Letter Number 90-1, also holds true for prospective pension information. OIP finds further support for the applicability of the UIPA's privacy exception to the records at issue in OIP Opinion Letter Number 91-7, which concluded that not-yet-retired government employees' election of a particular pension plan (non-contributory versus contributory) carried a significant privacy interest that was not outweighed by the public interest in disclosure, and thus fell within the UIPA's privacy exception. OIP Op. Ltr. No. 91-7.

OIP Opinion Letter Number 90-1 did note that a government employee's significant privacy interest in pension benefits could be outweighed by the public interest in disclosure in appropriate circumstances, such as where disclosure could shed light on particularized allegations of fraud involving the pension benefits in question. Here, Requester argued that there is a strong public interest in disclosure of information regarding judges' pension information specifically, which outweighs their significant privacy interest in such information because "it is fundamentally critical that those that hold an OFFICE as JUDGES/ADMINISTRATORS are required to produce and provide their pensions, etc., that can and will cause them to become bias and that there is definitely a conflict of interest that would interrupt them to be impartial, and neutral [all sic]."

There is indeed a public interest in knowing where senior public officials' private financial interests lie, which the State recognizes through the general statutory requirement for such officials to file financial disclosure forms. See, e.g., § 84-17(c), HRS, explained in Disclosure of Financial Interests: Who is Required to File?, Hawaii State Ethics Commission, <https://ethics.hawaii.gov/wp-content/uploads/2016/05/FDWhoMustFile.pdf> (last visited June 6, 2019); see also Financial Disclosures 2019, Hawaii State Ethics Commission's Public Documents System, https://hawaiiethics.force.com/public/s/hsecm-fd-public/hsecM_FD_Public__c/00B6A000006PBoZUAW (last visited June 6, 2019). Rule 15, Hawaii Rules of the Supreme Court, sets out a comparable financial disclosure requirement for judges. Financial disclosure statements filed under that rule during the years 2010 through 2017 are publicly available on the Judiciary's website. E.g. 2017 Judicial Financial Disclosure Statements, Hawai'i State Judiciary, <https://www.courts.state.hi.us/2017-judicial-financial-disclosure-statements> (last visited June 6, 2019).

However, the public interest Requester points to in knowing where a judge's financial interests lie would not be served by the disclosure of the records at issue, because those records do not reveal any information about the judge's individual financial holdings. As noted above, ERS administers a public defined benefit pension plan, not individually administered retirement accounts. Consistent with that, OIP found through its *in camera* review of the records at issue that they reflect possible monthly retirement payment amounts under various scenarios and options, not holdings in particular stocks or other investments. Thus, the public interest in knowing where a judge's financial interests lie does not outweigh a judge's significant privacy interest in the pension information contained in the records at issue. See HRS § 92F-14(a) and (b)(6).

Because the pension estimates withheld by ERS carry a significant privacy interest, which is not outweighed by the public interest in disclosure, OIP concludes that ERS properly withheld them under the UIPA's privacy exception, section 92F-13(1), HRS.

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).

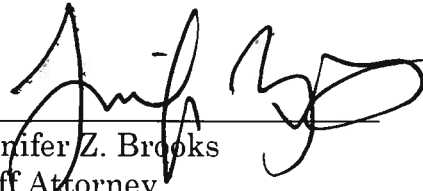
This decision constitutes an appealable decision under section 92F-43, HRS. An agency may appeal an OIP decision by filing a complaint within thirty days of the

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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