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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.

MEMORANDUM DECISION

Requester: Carroll Cox
Agency: Department of Hawaiian Home Lands
Date: June 30, 2015
Subject: Lease File (APPEAL 13-8)

Requester seeks a decision as to whether the Department of Hawaiian Home Lands (DHHL) properly denied access to records from a DHHL lease file under Part II of the UIPA.

Unless otherwise indicated, this decision is based solely upon the facts presented in Requester's e-mail correspondence dated May 7, 2013, and attached materials; DHHL's letter to OIP dated June 10, 2013, and attached materials; and e-mail correspondence to OIP from H.K. Bruss Keppeller, Esq., representing Ms. Flora Beamer Solomon (Lessee), and attached materials.

Decision

The records at issue in this appeal do not include the DHHL lease itself, which is made public without exception by section 92F-12(a)(5), HRS, and the information in the records goes well beyond the information in the lease itself. Thus, OIP looks to the UIPA's exceptions for privacy and for frustration of a legitimate government function and concludes that DHHL properly withheld Lessee's and other addressees' personal post office box numbers, employees' non-public direct telephone numbers, information about a proposed but never completed lease transfer, financial information (with the possible exception of the balance and status of a government

loan), and a specified piece of information regarding a litigant. See HRS § 92F-13(1) and (3) (2012). After that information is redacted, the remainder of the records must be disclosed because they do not fall under any exception to disclosure under the UIPA.

Statement of Reasons for Decision

In a request dated February 13, 2013, Requester asked DHHL for access to “[c]opies of all notice of violations or warning letters, building permits, fines, e-mail, letters or other written communication between the DHHL and Ms. Flora and Malama Solomon, regarding all DHHL leases held by the Solomons.”¹ DHHL responded by disclosing some responsive records, and withholding nearly 100 pages of additional records on the basis of Lessee’s privacy interest.

DHHL argued that the UIPA’s exception for information whose disclosure would be an unwarranted invasion of personal privacy, section 92F-13(1), HRS, applies to the withheld records, that it owed a fiduciary duty to lessees, and that section 10-1-3(d), Hawaii Administrative Rules (HAR) also requires it to withhold “personal data” unless a lessee consents to its release. See HRS § 92F-13(1); HAR § 10-1-3(d). DHHL further argued that disclosure would frustrate its interest in “fostering open and honest communication with its homestead lessees,” and that some portions of the records include Lessee’s confidential business information. See HRS § 92F-13(3).

I. The UIPA Does Not Require Requesters to Establish Standing

Lessee argued that Requester had no standing to request the records because he had not demonstrated a cogent reason for his request. This argument misunderstands the basic nature of the UIPA, which applies upon request by “any person” and requires the disclosure of government records “unless access is restricted or closed by law.” HRS § 92F-11 (2012). In other words, Requester was not obligated to establish any form of standing to make a request for government records, and his failure to do so does not present a basis for denying his access to the requested records.

II. Administrative Rule

The administrative rule cited by DHHL, section 10-1-3(d), HAR, requires it to withhold “personal data” absent consent to its release by the individual concerned. However, Chapter 10, HAR, does not include a definition of “personal data.” OIP notes that the historical notes for section 10-1-3(d) indicate that it is intended to implement the UIPA, and the statutory authority on which it is based is section

¹ OIP’s understanding is that Lessee’s daughter, Ms. Malama Solomon, is not a DHHL lessee for the property at issue in this appeal.

91-2, HRS, a statutory provision of general application that predates the UIPA and requires each agency to adopt a rule describing how the public can obtain information from the agency and the formal and informal rules of practice and procedures used by an agency. See HRS § 91-2 (2012); HAR § 10-1-3(d).

It is well established that an administrative rule that conflicts with a statute, such as the UIPA's provisions, is invalid. E.g. OIP Op. Ltr. No. 93-7 at 5 (finding that an agency's "policy" of withholding inmate medical records is invalid when it conflicts with the UIPA). Nevertheless, it is possible to read section 10-1-3(d), HAR, in a way that does not conflict with the UIPA, which would both be consistent with its intended purpose to implement the UIPA, and avoid a reading that would render the rule invalid. See HRS §91-7(b) (authorizing a court to declare a rule invalid if it finds that it violates constitutional or statutory provisions). "Personal data," which is undefined in chapter 10-1, HAR, must be read in reference to the UIPA to mean information that may be withheld under the UIPA's privacy exception. See HRS §§ 92F-13(1) and -14. Section 10-1-3(d), HAR, thus does not provide an independent basis for withholding records, but instead must be read in reference to section 92F-13(1), HRS, to provide that where DHHL **may** legally withhold lessee records based on the privacy exception, it is **required** to do so, unless the individual concerned consents to the disclosure. The question raised by this appeal is whether DHHL **may** legally withhold the records in question based on the privacy exception in the first place.

III. Mandatory Disclosure of State Leases

As a preliminary matter, OIP notes that section 92F-12(a)(5), HRS, makes leases of state land public, without exception, so the UIPA's privacy exception would not apply to such a lease. HRS § 92F-12(a)(5). However, as the records at issue in this appeal do not include the DHHL lease itself and the information contained in the appeal records goes far beyond the information contained in the lease, OIP will consider the applicability of the UIPA's exceptions to various information contained in the records.

IV. Privacy Exception

The UIPA's privacy exception applies where an individual has a significant privacy interest in information that is not outweighed by the public interest in disclosure. HRS § 92F-13(1) and -14(a) (2012). Where there is no significant privacy interest in the information in question, a "scintilla of public interest" is sufficient to prevent a finding that disclosure would be a clearly unwarranted invasion of personal privacy. E.g. OIP Op. Ltr. No. 89-02 at 3. In other words, in the absence of a significant privacy interest in the information, an agency may not withhold information based on the UIPA's privacy exception. Where a significant privacy interest is present, the information may be withheld unless the public disclosure interest in the information is so great as to outweigh that significant privacy interest. HRS §

92F-14(a). Legislatively provided examples of information in which an individual has a significant privacy interest include medical information, information identifiable as part of a criminal investigation, information about social services or welfare eligibility, personnel information (except for certain information about government employees), individual financial information, and social security numbers. HRS § 92F-14(b) (Supp. 2014). OIP has also recognized the application of the privacy exception to information such as date of birth, home contact information, and ethnicity. E.g. OIP Op. Ltrs. No. 90-28, 90-31, 01-03.

Because of the large volume of records at issue in this appeal and the variety of information reflected in them, OIP will address applicability of the privacy interest by categories of information found in the records.

The file includes correspondence regarding a request by Lessee, subsequently withdrawn, to transfer her lease. OIP has recognized a public interest in disclosure of records showing that a completed transfer of land was done in accordance with relevant law. See OIP Op. Ltr. No. 07-07; see also HRS 92F-12(a)(5) (state lease and record of land transfer are public). However, in this case, the request to transfer the lease was withdrawn and no transfer occurred. OIP finds that Lessee has a significant privacy interest in information about the proposed lease transfer, which was essentially a matter of family succession, whereas there is no strong public interest in that information given that no transfer occurred. See OIP Op. Ltr. No. 91-19 and OIP Op. Ltr. No. 92-17 (opining that the public interest to be considered in balancing these interests is the public interest in the disclosure of official information that sheds light on an agency's performance of its statutory purpose and the conduct of government officials, or which otherwise promotes governmental accountability). Thus, OIP finds that DHHL properly withheld the correspondence relating to the proposed transfer under the UIPA's privacy exception.

The file includes discussion and negotiations between Lessee and DHHL personnel regarding various property improvements being considered by Lessee (and related approval requests), a proposed parcel swap, cinder removal, and possible soil grading. None of these discussions include revealing personal information, and OIP cannot see a significant privacy interest in these negotiations. Which parcel Lessee held under a State lease at a given time is clearly public information. HRS § 92F-12(a)(5); OIP Op. Ltr. No. 91-19. The information is similar to that found in building permit application files, which are public even prior to approval. See OIP Op. Ltr. No. 90-20. Regarding lease files for state land generally, which could be expected to include similar discussions between a lessee and agency personnel, OIP has previously opined that such files should be disclosed after the redaction of personal information such as social security number, date of birth, and (except in certain circumstances) ethnicity. OIP Op. Ltr. No. 07-07. With the exception of information regarding personal finances as discussed below, OIP finds no

significant privacy interest² in the correspondence and related records discussing proposed property improvements, parcel swap, and cinder and soil removal, and related forms such as approval requests and building plans. Those records cannot be withheld under the UIPA's privacy exception.

Portions of the file include financial information, such as actual or estimated amounts spent on various improvements, discussion of Lessee's request for assistance in obtaining a loan, and a statement of account for a loan. All of these carry a significant privacy interest. See HRS § 92F-14(b)(6). For the actual or estimated amounts spent on various improvements, OIP does not find a public interest in the information that would outweigh Lessee's significant privacy interest, so the information may be withheld under the UIPA's privacy exception. For the loan information, it is not clear from the record whether the loan in question was issued by a private lender or by a state government agency – DHHL states that a record it disclosed to Requester was a "DHHL Contract of Loan" with Lessee, but there are references in the record to a bank as a potential lender. If the loan was issued by a non-government lender, the public interest in disclosure would not outweigh Lessee's significant privacy interest in information about the loan, so discussion of the loan and the statement of account for the loan may be withheld under the UIPA's privacy exception. However, if the information relates to a loan issued by a government agency, the loan balance, aged account balances (past due by 30 or more days), and any other charges due, must be disclosed. HRS § 92F-12(a)(8); OIP Op. Ltrs. No. 91-19 at 9 and 89-05. Thus, for a government-issued loan, the loan balance and information about delinquent amounts and other charges cannot be withheld under the UIPA's privacy exception, but other financial information in the file may be withheld under the privacy exception.

The file includes correspondence and reports discussing lease condition violations and whether structures on the property were consistent with existing permits and lease obligations. OIP has previously found a strong public interest in whether the conditions of a lease of state land are being followed, outweighing a lessee's significant privacy interest in that information. OIP Op. Ltr. No. 03-21. Although DHHL argued that such information was analogous to information from a criminal investigation file, a notice of a lease violation is not a criminal proceeding, so OIP finds the analogy to involvement in a criminal investigation unconvincing and instead follows its previous precedent finding a strong public interest in whether the conditions of a lease of state land are being followed. The discussion and reports regarding compliance or non-compliance with lease conditions and the legal

² DHHL lease files of **other lessees** may include revealing personal information as part of the discussion of proposed property improvements (for instance, information about a job loss as the reason additional family members are moving in and need more space), which could carry a significant privacy interest. This opinion is limited to the specific records at issue in this appeal.

status of structures on the property cannot be withheld under the UIPA's privacy exception.

The file includes a reference to verifying Lessee's ethnicity. OIP has previously found that an individual's significant privacy interest in his or her ethnicity is outweighed, when that individual is a DHHL lessee, by the public interest in knowing that DHHL leases are being awarded to qualified individuals. OIP Op. Ltr. No. 91-19. Thus, the reference to Lessee's ethnicity, insofar as it qualifies her for a lease, cannot be withheld under the UIPA's privacy exception.

The file includes correspondence regarding possible endangered plants on Lessee's parcel, and her willingness to allow inspection of the property. OIP finds that Lessee has no privacy interest in whether endangered plants grow on her property, and thus the correspondence on this subject cannot be withheld under the UIPA's privacy exception.

Some correspondence in the file relates to Lessee's request to DHHL for additional land to be added to her current parcel. OIP has previously found the names and application status of homestead lease applicants still on a waiting list for land to be public based on the high public interest in shedding light on DHHL's administration of the waiting list and award of homestead leases. OIP Op. Ltr. No. 89-04. Lessee's request for more land is equivalent to an additional homestead lease application in terms of its effect on DHHL's administration of the waiting list and award of homestead leases, and as such there is a strong public interest in information about that request. Thus, the correspondence relating to Lessee's request for additional land cannot be withheld under the UIPA's privacy exception.

There is correspondence discussing a concluded settlement agreement between DHHL and Lessee. A settlement agreement with the state is a public record. E.g. OIP Op. Ltr. No. 89-10 (concluding that once all parties have settled, settlement agreements with state agency must be released). The references to and discussion of Lessee's settlement agreement with DHHL cannot be withheld under the UIPA's privacy exception.

A 1993 letter from DHHL advised lessees of recent thefts in a specified area. No theft victims were identified, nor were any suspects. Given that no individual was identified as connected to the thefts in any capacity, OIP finds no conceivable privacy interest in DHHL's letter advising area lessees of the thefts. This letter cannot be withheld under the UIPA's privacy exception.

In a letter dated September 26, 1990, to lease selectees giving a litigation update, the opposing party identified in the letter (an individual) has a significant privacy interest in the third paragraph of the letter that set forth primarily information about the opposing party himself, and OIP does not find a public interest to

outweigh his significant privacy interest. The third paragraph may be therefore be redacted under the UIPA's privacy exception.

Finally, the correspondence includes post office box addresses, including Lessee's, as well as what may be direct phone lines of government personnel. Post office box addresses that are not obviously business addresses, such as Lessee's, may be withheld under the UIPA's privacy exception. E.g. OIP Op. Ltr. No. 91-19 at 6. Direct phone lines of government personnel may be withheld if those numbers have not previously been made public. OIP Op. Ltr. No. 07-11 at 7 n. 14.

V. Frustration of a Legitimate Government Function

DHHL argued that its interest in fostering open and honest communication with lessees, including "fostering self-reporting by lessees and voluntary correction of potential lease violations," would be frustrated if its correspondence with lessees could not be generally withheld. See HRS § 92F-13(3). DHHL contends that if lessees' private or personal issues expressed in correspondence can be made public and perhaps discussed in the media, they will be unwilling to communicate frankly with DHHL.

As to lessees' private or personal issues, OIP believes that the frustration interest DHHL proposes is co-extensive with lessees' privacy interest – in other words, where information about a lessee falls under the UIPA's privacy exception, DHHL likewise has a legitimate interest in keeping that information confidential, which would be frustrated by its disclosure. However, as previously discussed, the bulk of the information at issue in this appeal does not fall under the UIPA's privacy exception. With the exception of limited information as outlined above, the correspondence and related records do not include intimate information about Lessee's family, medical condition, or other personal information that would fall under the UIPA's privacy exception. Thus, they also cannot be withheld based on DHHL's interest in keeping Lessee's private information confidential.

OIP does find cogent DHHL's argument that it has a legitimate interest in "fostering self-reporting by lessees." In an appropriate case, where the record showed that a lessee had approached DHHL to self-report a potential violation and proceeded to voluntarily correct it, DHHL could potentially use the frustration exception as a basis to withhold that information. However, the records at issue in this appeal do not indicate such self-reporting by Lessee, and OIP cannot conclude that DHHL's interest in fostering self-reporting of violations would allow DHHL to withhold all discussions of lessees' compliance with lease conditions, in their entirety. Thus, OIP finds that DHHL's frustration argument does not apply in this case.

DHHL also argued that specific information in certain letters fell under the frustration exception as confidential business information, including a discussion of

the carrying capacity of various lots, an agricultural report, and Lessee's plans for ranching on the property. OIP has set out in past opinions when information is considered confidential business information whose disclosure would frustrate a legitimate government function, and thus may be withheld under section 92F-13(3), HRS. When information is submitted to a government agency to obtain a benefit, such as a contract or permit (as is the case here), the information may be withheld as confidential business information only to the extent that its disclosure is likely to cause substantial harm to the competitive position of the submitter. E.g. OIP Op. Ltrs. No. 05-13 and 02-07.

Disclosure is likely to cause substantial competitive harm when (1) the submitter faces actual competition and (2) there is a likelihood of substantial competitive harm. OIP Op. Ltr. No. 02-07 at 9. OIP has in the past found a likelihood of substantial competitive harm from information that would disclose a business's actual profit margin or information (such as a privately compiled database of location of endangered species) compiled by a business that has commercial value to a competitor. See OIP Op. Ltr. 01-02 at 5 (discussion of past OIP opinions regarding competitive harm).

Even assuming that the identified information is commercial or financial information, DHHL has not established, as a necessary element, that Lessee is a business operating in a competitive marketplace. Nor has DHHL established that disclosure of the information in the records would cause substantial competitive harm. The information is not financial and would not allow determination of Lessee's actual profit margin, nor does it appear to be a compilation of information with commercial value. OIP therefore finds that DHHL cannot withhold information based on the confidential business information form of frustration. See HRS § 92F-13(3).

VI. Conclusion

DHHL may redact Lessee's and other addressees' personal post office box numbers, employees' non-public direct telephone numbers, information about a proposed but never completed lease transfer, financial information (with the possible exception of the balance and status of a government loan), and a specified piece of information regarding a litigant. See HRS § 92F-13(1) and (3). After that information is redacted, the remainder of the records must be disclosed because they do not fall under any exception to disclosure under the UIPA.

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).

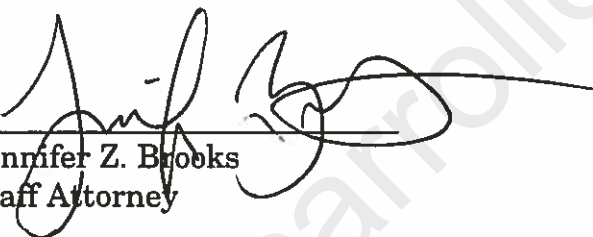
For any lawsuit for access filed under the UIPA, Requester must notify OIP in writing at the time the action is filed. HRS § 92F-15.3 (2012).

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 letter also serves as notice that OIP is not representing anyone in this appeal. OIP's role herein is as a neutral third party.

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