

**Op. Ltr. 95-05 Requirement to Protect from Disclosure If Required By State
or Federal Law**

This opinion was overruled by OIP Op. Ltr. 95-17.

Please note that opinions discussing the deliberative process privilege have been materially affected by the Hawaii Supreme Court's majority opinion in Peer News LLC v. City and County of Honolulu, 143 Haw. 472 (Dec. 21, 2018).

March 9, 1995

Dan A. Colon, Esquire
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City Financial Tower, Suite 2300
201 Merchant Street
Honolulu, Hawaii 96813

Dear Mr. Colon:

Re: DLIR's Division of Occupational Safety and Health
Accident Investigation Records and Reports

This is in reply to your letter to the Office of Information Practices ("OIP") requesting an advisory opinion concerning the above-referenced matter.

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), records and reports compiled by the State Department of Labor and Industrial Relations' Division of Occupational Safety and Health ("DOSH") in connection with the administration and enforcement of chapter 396, Hawaii Revised Statutes, must be made available for inspection and copying.

BRIEF ANSWER

Under section 92F-13(4), Hawaii Revised Statutes, an agency is not required, under part II of the UIPA, to disclose "[g]overnment records which, pursuant to state or federal law . . . are protected from disclosure."

Section 396-14, Hawaii Revised Statutes, provides that no record, statement, or report of any kind obtained, received, or prepared in connection with the administration or enforcement of chapter 396, Hawaii Revised Statutes, "shall be admitted or used, whether as evidence or as discovery, in any civil action growing out of any matter mentioned in the record, determination, statement, or report."

Based upon: (1) the legislative history of this provision, and related provisions in chapter 396, Hawaii Revised Statutes, (2) an Attorney General Opinion interpreting former section 92-51, Hawaii Revised Statutes, and (3) DOSH's own administrative practices, we believe that despite the expansive language in

section 396-14, Hawaii Revised Statutes, it was intended to protect against the admission in evidence or the discovery of the identities of individuals who provide information to DOSH in connection with its enforcement of the State's occupational safety and health law.

We also believe that when the Legislature adopted section 396-14, Hawaii Revised Statutes, it implicitly assumed or intended that since this information would not be discoverable in a civil action in a matter arising out of an incident in which DOSH became involved, the information would not be available to the general public.

Accordingly, we conclude that under sections 92F-13(4) and 396-14, Hawaii Revised Statutes, in response to a request under the UIPA, DOSH should segregate from its records the identities of individuals who furnish information to DOSH and any other information that would result in the likelihood of the actual identification of such individuals. To the extent that other government records (or information contained therein) maintained by DOSH are protected by the exceptions in section 92F-13, Hawaii Revised Statutes, DOSH may also withhold access to that information in response to a request under the UIPA.

FACTS

Your law firm was retained to represent a client who was performing repairs upon electrical power lines connected to the electric company's tower when it collapsed. This accident resulted in alleged serious injuries to your client, requiring bone grafts to the bottom of his feet.

After the DOSH conducted an investigation of the accident, it cited your client's employer for willful violations of safety standards or rules and imposed a \$24,500 fine. These citations and penalties were later amended by DOSH to reflect that the violations were "serious," instead of "willful."

As part of an investigation of possible claims that your client may have against parties other than your client's employer, your law firm requested to inspect DOSH's file prepared in connection with its investigation of the accident. By letter dated January 29, 1993, a copy of which is attached as Exhibit A, DOSH notified you that investigative reports it compiles are protected from disclosure under section 396-14, Hawaii Revised Statutes. However, DOSH provided you with copies of photographs taken by DOSH employees, and copies of the citations and proposed penalties.

By letter to the OIP dated October 13, 1993, you requested an advisory opinion concerning the disclosure of information maintained by DOSH concerning the accident that was not disclosed in response to your request.

DISCUSSION

I. INTRODUCTION

The UIPA states "[e]xcept as provided in section 92F-13, each agency upon request by any person shall make government records available for inspection and copying during regular business hours." Haw. Rev. Stat. § 92F-11(b) (Supp. 1992).¹

Under the UIPA, the term "government record" means "information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. § 92F-3 (Supp. 1992). Information maintained by DOSH in written or other physical form is a "government record," since DOSH is an "agency" for purposes of the UIPA. See Haw. Rev. Stat. § 92F-3 (Supp. 1992).

We now turn to an examination of whether records compiled by DOSH as part of the administration or enforcement of chapter 396, Hawaii Revised Statutes, are protected from disclosure by any of the exceptions in section 92F-13, Hawaii Revised Statutes.

II. GOVERNMENT RECORDS PROTECTED FROM DISCLOSURE BY STATE LAW

Section 92F-13(4), Hawaii Revised Statutes, provides that under part II of the UIPA, an agency is not required to disclose "[g]overnment records which, pursuant to state or federal law . . . are protected from disclosure." As we noted in OIP Opinion Letter No. 93-15 at 5 (Oct. 1, 1993), this exception is similar to an exemption in section 2-103(a)(11) of the Uniform Information Practices Code ("Model Code"), drafted by the National Conference of Commissioners on Uniform State Laws, upon which the UIPA was modeled. The commentary to section 2-103 of the Model Code provides:

Subsection (a)(11) is a catch-all provision which assimilates into this Article any

¹We have previously noted that like the federal Freedom of Information Act and the open records laws of other states, the UIPA's disclosure provisions should be liberally construed, its exceptions narrowly construed, and all doubts resolved in favor of disclosure. See OIP Op. Ltr. No. 93-10 at 2 (Sept. 2, 1993).

As the United States Supreme Court has noted, the purpose of freedom of information laws are to facilitate public access to government information and "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." John Doe Agency v. John Doe Corp., 493 U.S. 146, 151 (1989). Consistent with these purposes, the strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents. Id.; see also Haw. Rev. Stat. §§ 92F-11(b) and 92F-15(b) (Supp. 1992).

federal law, state statute, or rule of evidence that expressly requires the withholding of information from the general public. The purpose of requiring an express withholding policy is to put a burden on the legislative and judicial branches to make an affirmative judgment respecting the need for confidentiality.

Model Code § 2-103 commentary at 18 (1980) (emphasis added).

In OIP Opinion Letter No. 92-6 (June 22, 1992) and OIP Opinion Letter No. 93-15 (Oct. 1, 1993), the OIP also observed that the exception in section 92F-13(4), Hawaii Revised Statutes, is similar to Exemption 3 of the federal Freedom of Information Act, 5 U.S.C. § 552(b)(3) (1988) ("FOIA"), which exempts from disclosure records "specifically exempted from disclosure by statute."

As a result, based upon court decisions construing FOIA's Exemption 3 and the commentary to section 2-103 of the Model Code, in OIP Opinion Letter No. 92-6 at 10, we concluded that: (1) under section 92F-13(4), Hawaii Revised Statutes, "the authority for an agency to withhold access to a government record must generally be found in the language of the statute itself," and (2) resort to a statute's legislative history to find such authority is generally inappropriate. These principles ensure that the Legislature has made "an affirmative judgment concerning the need for confidentiality."

Furthermore, in OIP Opinion Letter No. 93-15, we observed that:

While federal courts have found that federal rules of procedure, which are promulgated by the U.S. Supreme Court, ordinarily do not qualify for protection under Exemption 3, when a rule is subsequently modified and thereby specifically enacted into law by Congress, it may qualify under the exemption. See Fund for Constitutional Gov't v. National Archives & Records Serv., 656 F.2d 856, 867 (D.C. Cir. 1981) (finding Rule 6(e) of the Federal Rules of Criminal Procedure to satisfy Exemption 3's "statute requirement").

OIP Op. Ltr. No. 93-15 at 7.

The Legislature has adopted a statute affecting the disclosure of records, statements, and reports compiled by DOSH. Section 396-14, Hawaii Revised Statutes, provides:

§396-14 Evidence. No record or determination of any administrative

proceeding under this chapter or statement or report of any kind obtained, received, or prepared in connection with the administration or enforcement of this chapter shall be admitted or used, whether as evidence or as discovery, in any civil action growing out of any matter mentioned in the record, determination, statement, or report other than an action for enforcement or review under this chapter.

Haw. Rev. Stat. § 396-14 (1985) (emphases added).

This statute literally provides that no record of "any kind prepared, obtained, or received" in connection with the enforcement of chapter 396-14, Hawaii Revised Statutes, may be admitted or used as evidence, or as discovery, in any civil action growing out of any matter mentioned in the record. [Emphasis added.] What is not immediately clear, is whether this statute was intended to protect such records from disclosure under the State's public records law.

The restrictions of this section were originally adopted by the Legislature in 1969 as an amendment to chapter 96, Hawaii Revised Statutes, the State's former industrial safety law. Act 70, Haw. Sess. Laws 59 (1969). House Standing Committee Report No. 523 on 1969 H.B. No. 284 states:

The purpose of this bill is to prohibit the use of any record, statement or report prepared or obtained by the Department of Labor and Industrial Relations in the course of its administration and enforcement of the industrial safety law in any civil action growing out of any accident or incident mentioned in the record, statement, or report.

Your Committee on Judiciary concurs with your Committee on Labor and Employment Problems in that proper investigation of any industrial accident requires accurate information and statements from witnesses. The assurance that any information given to the Department of Labor will be held confidential and not be used in any civil suit arising out of the accident involved or out of the statement or information given will promote a more effective enforcement of the industrial safety law.

H.R. Stand. Comm. Rep. No. 523, 5th Leg., 1969 Reg. Sess., Haw. S.J. 830 (1969) (emphasis added).

Senate Standing Committee Report No. 970 on 1969 H.B. No.

284 states:

The purpose of this bill is to prohibit the use of any statement, report, or record prepared or obtained by the labor department in the course of its administration of the industrial safety law in any civil suit arising out of any accident or incident mentioned in the statement, report or record except in cases involving the enforcement or review of the safety law.

Effective enforcement of the industrial safety law requires a thorough and exhaustive investigation of each industrial accident. Such an investigation is difficult to attain unless witnesses are assured that information and statements given to the department of labor will be held confidential and not be disclosed in any civil suit arising out of the accident involved.

This proposal, if adopted, will encourage workers and other witnesses to candidly report on any accident and in turn assist the labor department in achieving better safety measures.

S. Stand. Comm. Rep. No. 970, 5th Leg., 1969 Reg. Sess., Haw. S.J. 1254 (1969) (emphasis added).

The Legislature subsequently amended this statute to additionally provide that records, statements, or reports compiled in connection with the enforcement of the industrial safety law shall not be admitted or used "as discovery" in any civil action. See Act 57, Haw. Sess. Laws 245, 255 (1972). The legislative history of Act 57, provides no guidance concerning why the term "discovery" was added to the statute.²

In Attorney General Opinion No. 76-3 (April 19, 1976), the Attorney General examined the interrelationship between section 396-14, Hawaii Revised Statutes, and the former public records law, section 92-51, Hawaii Revised Statutes. The Attorney General opined:

[I]f the identities of witnesses and information and statements obtained from such witnesses in an accident investigation are

²See S. Stand. Comm. Rep. No. 385-72, 6th Leg., 1972 Reg. Sess., Haw. S.J. 910 (1972); S. Stand. Comm. Rep. No. 513-72, Haw. S.J. 965 (1972); H.R. Stand. Comm. Rep. No. 385-72, Haw. H.J. 981 (1972); H.R. Stand. Comm. Rep. No. 618-72, Haw. H.J. 929 (1972).

disclosed simply because no law suit has yet been commenced and such matters are permitted to be inspected as part of the public records of the division, the legislative intent of keeping such matters confidential would be circumvented. Accordingly, the Act construed in light of the legislative intent prohibits disclosure of information relating to the identification of witnesses and information and statements given by them in an accident investigation. To interpret the Act otherwise would frustrate the Legislature's intent of encouraging the giving of information in an accident investigation.

Op. Att'y Gen. Haw. No. 76-3 at 3-4 (emphasis added).

The Attorney General also concluded that section 396-14, Hawaii Revised Statutes, "does not foreclose [DOSH] from publicly disclosing other matters deemed pertinent to accident prevention such as recommended safety measures for prevention of future accidents." Id.

We believe that in using the phrase "admitted or used whether as evidence, or as discovery, in any civil action," the Legislature intended to prohibit the admission as evidence in civil actions information that would identify employees or witnesses who furnished information to DOSH as part of the administration or enforcement of chapter 396, Hawaii Revised Statutes. We likewise believe that section 396-14, Hawaii Revised Statutes, was intended to establish a civil discovery privilege applicable to information that would identify individuals who furnished information to DOSH.

We also agree with the Attorney General that were the identities of witnesses available under a public records law when such information would not be discoverable in the course of civil litigation arising out of a matter which DOSH investigated under chapter 396, Hawaii Revised Statutes, the discovery privilege created by this statute would be frustrated.

As such, while as a general rule the authority to withhold a government record under section 92F-13(4), Hawaii Revised Statutes, must be found in the actual wording of a State statute, we believe that in this case, by establishing a discovery privilege in section 396-14, Hawaii Revised Statutes, the Legislature implicitly assumed and intended that such information would not be available to the general public. We believe that section 396-14, Hawaii Revised Statutes, does sufficiently indicate that the Legislature has made "an affirmative judgment concerning the need for confidentiality." Therefore, we conclude that section 396-14, Hawaii Revised Statutes, qualifies as a state law for purposes of section 92F-13(4), Hawaii Revised Statutes.

Section 396-14, Hawaii Revised Statutes, literally applied, prohibits the admission as evidence or the discovery of a record "of any kind" compiled by DOSH under chapter 396-14, Hawaii Revised Statutes. However, despite this expansive language, we believe that section 396-14, Hawaii Revised Statutes, was not intended by the Legislature to sweep so broadly. The statute's legislative history clearly reflects that the Legislature was concerned that were the identities of individuals who furnished information to DOSH admissible or discoverable, such persons would be deterred from cooperating in DOSH investigations. Such a concern is also reflected elsewhere in chapter 396, Hawaii Revised Statutes. See Haw. Rev. Stat. § 396-8(e)(2) and (f) (1985). Additionally, other records that fall within the express restrictions of section 396-14, Hawaii Revised Statutes, must be publicly posted by the employer. See Haw. Rev. Stat. § 396-10(m) (1985).

Indeed, in response to your UIPA request, DOSH provided you with photographs from its investigation files and copies of the citations issued and penalties assessed, records that would be privileged if the provisions of section 396-14, Hawaii Revised Statutes, were literally applied since these records were prepared, obtained, or received by DOSH in connection with the administration or enforcement of chapter 396, Hawaii Revised Statutes.

Also, we note that under Exemption 7 of the federal Freedom of Information Act, 5 U.S.C. § 552(b)(7) (1988) ("FOIA") the federal courts have found that given the special power of employers over employees, witnesses who have furnished information to the U.S. Occupational Safety and Health Administration, do so under circumstances in which it is reasonable to infer a promise of confidentiality. See Cuccaro v. Secretary of Labor, 770 F.2d 355 (11th Cir. 1985); L & C Transport, Ltd. v. U.S. Dep't of Labor, 740 F.2d 355 (3rd Cir. 1985); Lloyd and Henniger v. Marshall, 526 F. Supp. 485 (D.C. M.D. Fla. 1981); T.V. Tower v. Marshall, 444 F. Supp. 1233 (D.D.C. 1978); Borton, Inc. v. OSHA, 566 F. Supp. 1420 (D.C. E.D. La. 1983).³

Based upon the foregoing authorities, we conclude that under section 396-14, Hawaii Revised Statutes, DOSH may withhold, or segregate from its records, the identities of individuals who furnish information to DOSH, along with any other information that would result in the likelihood of actual identification of those individuals. See Arief v. United States Department of the

³In previous opinion letters, we concluded that under the exception set forth in section 92F-13(3), Hawaii Revised Statutes, an agency may withhold records or information compiled for law enforcement purposes to the extent this information would be protected from disclosure under FOIA's Exemption 7. See OIP Op. Ltr. No. 90-18 (May 18, 1990); OIP Op. Ltr. No. 90-36 (Dec. 17, 1990); OIP Op. Ltr. No. 91-6 (May 2, 1991).

Navy, 712 F.2d 1462, 1468 (D.C. Cir. 1983).

The extent to which other information in records maintained by DOSH is protected from disclosure will depend upon whether such information is protected from disclosure by any of the other exceptions in section 92F-13, Hawaii Revised Statutes.⁴ Should DOSH have questions concerning whether, in a particular case, such information is protected from disclosure, it should contact the OIP for specific guidance.

Finally, we would recommend that the DLIR seek legislative clarification of section 396-14, Hawaii Revised Statutes, so that the statute's express language protects information that would reasonably tend to identify witnesses in an investigation conducted under chapter 396-14, Hawaii Revised Statutes, instead of creating a privilege for records "of any kind" prepared or received in the administration of the occupational safety and health laws. Such legislation would bring the language of this statute into conformity with the legislative intent underlying the statute. At the same time, we recommend that the statute should be clarified so that it indicates that such information is protected from inspection and copying under chapter 92F, Hawaii Revised Statutes, in addition to being protected from discovery or admission into evidence.

CONCLUSION

For the reasons set forth above, we conclude that under sections 92F-13(4) and 396-14, Hawaii Revised Statutes, DOSH should segregate from records compiled as part of an industrial safety investigation the identities of individuals who furnish information to DOSH, along with other information that would result in the likelihood of actual identification of those

⁴In this regard, in several previous opinion letters, we concluded that under section 92F-13(3), Hawaii Revised Statutes, an agency may withhold access to those portions of intra-agency memoranda that are protected by the common law "deliberative process privilege." To be encompassed by this privilege, the information must be predecisional and deliberative. See OIP Op. Ltr. No. 93-13 at 11 (Sept. 17, 1993). The U.S. Supreme Court has stated that examples of information protected by this privilege are predecisional opinions, recommendations, or evaluations of agency subordinates on issues of agency law or policy. Id. This privilege, however, does not protect purely factual information, or the factual portions of otherwise deliberative memoranda. See EPA v. Mink, 410 U.S. 73, 87-88 (1973). In Cuccaro v. Secretary of Labor, 770 F.2d 355 (11th Cir. 1985), the court found that OSHA staff opinions and evaluations were protected by FOIA's exemption 5, which incorporates the common law "deliberative process privilege." Also, under section 92F-13(3), Hawaii Revised Statutes, an agency may withhold access to certain "[r]ecords or information compiled for law enforcement purposes." See OIP Op. Ltr. No. 91-9 (July 17, 1991).

individuals.

Whether other information compiled by DOSH must be made available for inspection and copying will depend on whether other exceptions in section 92F-13, Hawaii Revised Statutes, permit DOSH to withhold access to the same.

If you should have any questions concerning this opinion, please contact me at 586-1404.

Very truly yours,

Hugh R. Jones
Staff Attorney

APPROVED:

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