



DAVID Y. IGE
GOVERNOR

**STATE OF HAWAII
OFFICE OF INFORMATION PRACTICES**

NO. 1 CAPITOL DISTRICT BUILDING
250 SOUTH HOTEL STREET, SUITE 107
HONOLULU, HAWAII 96813
Telephone: (808) 586-1400 FAX (808) 586-1412
E-MAIL: oiip@hawaii.gov
www.oiip.hawaii.gov

CHERYL KAKAZU PARK
DIRECTOR

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).

OPINION

Requesters: Mr. Donald Marks, Mr. Eric Wilson, and Mr. Gary Karagianes
Agency: Hawaii Paroling Authority
Date: June 28, 2017
Subject: Minimum Decision Records
(U APPEAL 14-11; U APPEAL 14-25; and U APPEAL 15-16)

REQUEST FOR OPINION

Requesters seek a decision as to whether the Hawaii Paroling Authority (HPA) properly denied their request for their Minimum Decision Records under Part III of the UIPA. Because each Requester seeks a decision related to his Minimum Decision Record, OIP is consolidating these three appeals, as permitted by section 2-73-15(g), HAR, which authorizes consolidation of appeals that have similar issues or facts, or when the parties are similarly situated.

Unless otherwise indicated, this decision is based solely upon the facts presented in the following:

1. As specifically related to Mr. Marks, a letter to HPA from Mr. Marks dated August 27, 2013; a letter to Mr. Marks from HPA dated September 9, 2013; a letter to OIP from Mr. Marks dated September 24, 2013, with enclosures; OIP's Notice of Appeal to HPA dated September 30, 2013, with enclosures; a telephone conversation with Paroles and Pardons

- Administrator Mr. Tommy Johnson on October 1, 2013;¹ and a letter to OIP from HPA dated October 15, 2013;
2. As specifically related to Mr. Wilson, two letters to HPA from Mr. Wilson dated respectively July 30 and August 30, 2013; a letter to Mr. Wilson from HPA dated September 4, 2013; a letter to OIP from Mr. Wilson dated January 10, 2014, with enclosures; OIP's Notice of Appeal to HPA dated January 21, 2014, with enclosures; and a letter to OIP from HPA dated February 3, 2014;
 3. As specifically related to Mr. Karagianes, a letter to HPA from Mr. Karagianes dated October 2, 2014; a letter to Mr. Karagianes from HPA dated October 10, 2014; a letter to OIP from Mr. Karagianes dated October 22, 2014, with enclosures; OIP's Notice of Appeal to HPA dated November 12, 2014, with enclosures; a letter to OIP from HPA dated November 21, 2014; and an e-mail to Mr. Johnson from OIP dated December 1, 2014, with attachment; and
 4. Regarding all three Requesters, telephone conversations with Acting Paroles and Pardons Administrator Mr. Andrew Morgan² on January 25 and February 14, 2017; a letter to Mr. Morgan from OIP dated January 25, 2017, with enclosures; a letter to OIP from Mr. Morgan dated January 26, 2017; and a letter to Mr. Morgan from OIP dated February 15, 2017.

QUESTION PRESENTED

Whether HPA properly denied Requesters' requests for their Minimum Decision Records under Part III of the UIPA.

BRIEF ANSWER

Under Part III of the UIPA, HPA has not met its burden to justify its nondisclosure of the Minimum Decision Records and must therefore disclose these records. As HPA has provided neither the contested records for OIP's *in camera* review nor an argument that justifies nondisclosure under section 92F-22(1), HRS, OIP has no basis to find, and thus cannot conclude, that the requested records are privileged. Further, in light of the Hawaii Supreme Court's decision in De La Garza

¹ This telephone conversation was between Mr. Johnson and Ms. Mimi Horiuchi, Esq., the former OIP Staff Attorney to whom Mr. Marks' appeal was originally assigned.

² HPA informed OIP that Mr. Morgan was the Acting Administrator after Mr. Johnson took a leave of absence.

v. State of Hawaii, 129 Haw. 429, 442, 302 P.3d 697, 710 (Haw. 2013), HPA must provide an inmate,

timely access to all of the adverse information contained in the HPA file[,] . . . “soon enough in advance” that the inmate has a “reasonable opportunity to prepare responses and rebuttal of inaccuracies” . . . [and] [i]n the event that the HPA file of the inmate includes sensitive, or confidential personal information, the inmate is entitled to disclosure of a reasonable summary thereof.

FACTS

Each Requester requested a copy of his own Minimum Decision Record from HPA under Part III of the UIPA.³ In response, as pertaining to Mr. Wilson and Mr. Marks, in HPA’s letters dated respectively September 4, 2013 and September 9, 2013, HPA specifically referenced section 2-71-14(b), HAR, and section 92F-13(3), HRS, as its statutory authority to withhold. However, in HPA’s letter to Mr. Karagianes dated October 10, 2014, HPA referenced section 92F-22(1), HRS, as its statutory authority to withhold. In all three letters, HPA stated, “the ‘Minimum Decision Record’ [they] are seeking is a ‘working paper’ of the HPA and is not subject to release pursuant to the provisions of HRS § 92F.”

Subsequently, Requesters appealed HPA’s denials to OIP. OIP accepted these appeals and sent HPA three separate Notices of Appeal, one regarding each Requester. Having received OIP’s Notice of Appeal dated September 30, 2013, regarding Mr. Marks, Mr. Johnson told Ms. Horiuchi, per her notes, that the “Minimum Decision Record is not disclosable because [the] Parole Board fills [this] out at [the] hearing, [it] contains their notes. Done in executive session.” Additionally, Mr. Johnson told Ms. Horiuchi that “he checked with HPA’s deputy AG, who said they are working papers.” Thereafter, as related to all Requesters, HPA informed OIP that, “[Requesters] request for a copy of the HPA Minimum Decision Record was denied pursuant to HRS § 92F-22(1). In that, the HPA Minimum Decision Record [they are] seeking is considered a ‘working paper’ of the HPA, and therefore, is not subject to release pursuant to the provisions of HRS § 92F.”⁴

³ Mr. Marks’ record request was dated August 27, 2013. Mr. Wilson’s record request was dated July 30, 2013 and his follow-up request was dated August 30, 2013. Mr. Karagianes’ record request was dated October 2, 2014.

⁴ HPA’s written response pertaining to Mr. Marks was dated October 15, 2013, pertaining to Mr. Wilson, dated February 3, 2014, and pertaining to Mr. Karagianes, dated November 21, 2014.

On December 1, 2014, OIP sent an e-mail to Mr. Johnson, requesting an unredacted copy of the contested records and including as an attachment OIP's Appeal Procedures and Responsibilities of the Parties (Appeal Procedures). On the Appeal Procedures, OIP indicated that "the agency's response must include, for OIP's *in camera* review, an unredacted copy of the records to which access was denied."⁵ HPA neither responded to OIP's e-mail nor provided the requested records for OIP's *in camera* review.

On January 25, 2017, by telephone conversation and in a letter to Mr. Morgan, OIP invited HPA to supplement HPA's initial response and asked PSD to provide an unredacted copy of the contested records for OIP's *in camera* review. Mr. Morgan responded in a letter dated January 26, 2017, "[a]fter reviewing this matter more carefully, I will not make a decision at this time. The matter has been addressed by Tommy Johnson, Paroles and Pardons Administrator, in his letters to [Requesters]." On January 26, 2017, in a telephone conversation, OIP explained to Mr. Morgan that OIP sought further explanation than what Mr. Johnson had provided and that without the contested records for OIP's *in camera* review, OIP cannot determine whether HPA properly withheld the Minimum Decision Records. After this explanation, OIP again asked for HPA's supplemental response and records. Upon Mr. Morgan's request for additional time, OIP then granted his request for the firm deadline of March 14, 2017. OIP followed this conversation with its letter dated January 26, 2017, confirming the March 14, 2017 deadline, and again requesting and explaining the importance of HPA's supplemental response and an unredacted copy of the contested records. HPA did not respond.

DISCUSSION

Part III of the UIPA governs disclosure of a personal record⁶ or information contained therein to the individual to whom it pertains. The UIPA requires that "[e]ach agency that maintains any accessible personal record [to] make that record available to the individual to whom it pertains, in a reasonably prompt manner and

⁵ When OIP opened the appeals of Mr. Marks and Mr. Wilson, it did not initially request the records in dispute for *in camera* review, but requested them later in the appeal process, as allowed under section 92F-42(5) and -(9), HRS, and chapter 2-73, HAR. However, for Mr. Karagianes' appeal, OIP requested an unredacted copy of the contested records at the outset of the appeal on December 1, 2014.

⁶ Under the UIPA, "personal record" means "any item, collection, or grouping of information about an individual that is maintained by an agency. It includes, but is not limited to, the individual's education, financial, medical, or employment history, or items that contain or make reference to the individual's name, identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph." HRS § 92F-3 (2012).

in a reasonably intelligible form[.]” unless access to the record is restricted under section 92F-22, HRS. HRS § 92F-21, -22 (2012).

Section 92F-22, HRS, contains the only exemptions to the UIPA’s required disclosure of personal records. HPA invoked section 92F-22(1), HRS, which states:

§92F-22 Exemptions and limitations on individual access.

An agency is not required by this part to grant an individual access to personal records, or information in such records:

- (1) Maintained by an agency that performs as its or as a principal function any activity pertaining to the prevention, control, or reduction of crime, and which consist of:
 - (A) Information or reports prepared or compiled for the purpose of criminal intelligence or of a criminal investigation, including reports of informers, witnesses, and investigators; or
 - (B) Reports prepared or compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through confinement, correctional supervision, and release from supervision.

HRS § 92F-22(1) (2012) (emphasis in original).

The UIPA places the burden of proof on a government agency to justify its nondisclosure of records when it claims that access to a record is restricted under the UIPA. See HRS § 92F-15(c) (2012). The agency is required to justify its nondisclosure when it responds to OIP’s Notice of Appeal, and the agency’s response must include its “explanation of its position, including the agency’s justification for the denial of access or actions complained of, with citations to the specific statutory sections and other law that support the agency’s position[.]” HAR § 2-73-14(3). If further explanation is needed, “OIP may, orally or in writing, seek any additional information from a party or any other person, and may consider input or relevant materials from any person on pending appeals.” HAR § 2-73-15(e). Additionally, OIP may require any party to submit to OIP the original or a copy of one or more documents necessary for its ruling, including government records at issue in an appeal. See HAR 2-73-15(c); see also HRS § 92F-42(5), -42(9) (2012). OIP may examine the documents *in camera* as necessary to preserve any claimed exception, exemption, or privilege against disclosure. Id.

HPA is placed within the Department of Public Safety (PSD) for administrative purposes only. HRS § 26-14.6(c) (2009). HPA is charged with “fixing the minimum term of imprisonment to be served before the prisoner shall become eligible for parole” based on the minimum term hearing. HRS § 706-669(1) (2014). HPA is required to “establish guidelines for the uniform determination of minimum

sentences which shall take into account both the nature and degree of the offense of the prisoner and the prisoner's criminal history and character. The guidelines shall be public records and shall be made available to the prisoner and to the prosecuting attorney and other interested government agencies." HRS § 706-669(8) (2014). Records related to the inmate are considered by HPA prior to the decision on imprisonment being made.⁷ Included in these records are a copy of the presentence report or investigative report related to the inmate. See HRS § 806-73(b)(3)(B) (Supp. 2016). HPA's rules provide that "an inmate may be afforded the opportunity, subject to security considerations, to consider and review materials the Authority has that pertain to the fixing of the inmate's minimum term." HAR § 23-700-22(g). During the hearing, "[a] verbatim stenographic or mechanical record of the hearing shall be made and preserved in transcribed or untranscribed form." HRS § 706-669(6) (2014). Upon a decision being made, "[t]he Authority shall prepare and provide the Department of Public Safety, the inmate and the inmate's attorney with a written statement of its decision and order." HAR § 23-700-22(k).

If a minimum term has already been set, section 23-700-28, HAR, permits HPA, at its discretion, to reconsider the previously fixed minimum term and hear a request for reduction. As done in the initial minimum term hearing, records related to the inmate are reviewed by HPA in any subsequent hearings, and HPA considers the nine enumerated factors in section 23-700-29, HAR, when making its decision. After a decision on reduction is made, "[t]he Authority shall prepare and provide the Department of Public Safety and the inmate with a written statement of its decision and order." HAR § 23-700-28(b).

As the government agency claiming access is restricted under the UIPA, HPA has the burden to justify its nondisclosure of the Minimum Decision Records. It is uncontested that HPA is a government agency whose principal function is related to the "prevention, control, or reduction of crime" as one of HPA's enumerated responsibilities is determining the time length of inmate imprisonment. The question is whether the records at issue are either "[i]nformation or reports prepared or compiled for the purpose of criminal intelligence or of a criminal investigation" or "[r]eports prepared or compiled at any stage of the process of

⁷ Section 706-669(2), HRS, states:

Before holding the hearing, the authority shall obtain a complete report regarding the prisoner's life before entering the institution and a full report of the prisoner's progress in the institution. The report shall be a complete personality evaluation for the purpose of determining the prisoner's degree of propensity toward criminal activity.

HRS § 706-669(2) (2014).

enforcement of the criminal laws from arrest or indictment through confinement, correctional supervision, and release from supervision.” However, HPA provided only a brief and conclusory denial statement, without explaining how the nature of the contested records justified nondisclosure and application of section 92F-22(1), HRS.

Mr. Johnson informed OIP that the “Minimum Decision Record is not disclosable because [the] Parole Board fills [this] out at [the] hearing, [it] contains their notes. Done in executive session.” He also identified these records as “working papers” protected by section 92F-22(1), HRS.⁸ This minimal context was not adequate to establish that the records were “reports” as described in section 92F-22(1), HRS.⁹ Mr. Johnson’s statements failed to explain what information is contained in the Minimum Decision Records, their significance to HPA, and specifically, why HPA believes this information falls within the limited categories of records described in section 92F-22(1), HRS. Despite eight opportunities to provide supplemental responses, HPA failed to provide additional information after HPA received three separate Notices of Appeal regarding Mr. Marks, Mr. Wilson, and Mr. Karagianes, during the telephone conversation between Mr. Johnson and Ms. Horiuchi on October 1, 2013, during the telephone conversations with Mr. Morgan on January 25 and February 14, 2017, and after HPA received OIP’s letters dated January 25 and February 15, 2017. Moreover, HPA declined to provide the contested records for OIP’s *in camera* review after five separate requests, thus making it impossible for OIP to review the records itself to determine whether they were protected from disclosure. Accordingly, OIP concludes that HPA has not met its burden to justify nondisclosure of the Minimum Decision Records, and the requested records must therefore be disclosed under Part III of the UIPA.

OIP further notes that even if HPA had met its burden to justify nondisclosure under section 92F-22(1), HRS, and OIP had found that HPA properly denied access under that section, HPA would still be bound to disclose the Minimum Decision Records pursuant to the Hawaii Supreme Court’s decision in De La Garza, which requires disclosure of the requested Minimum Decision Records to inmates in the Requesters’ position as a matter of due process under Hawaii’s Constitution.

⁸ Section 92F-22(1), HRS, does not explicitly protect or even refer to “working papers.”

⁹ Even when a record does fall within an exemption to disclosure under Part III of the UIPA, agencies must then also determine whether the record may be withheld under Part II of the UIPA, which governs the disclosure of general government records. See OIP Op. Ltr. No. 05-14 at 6.

Specifically, the Court concluded that,

[w]ithout access to the potentially wide range of information being considered by the HPA, the convicted person may be unable to prepare a response and rebuttal to any adverse information being considered. In addition, the convicted person may be unable to correct any errors contained in the “complete report” obtained by the HPA. Thus, nondisclosure of such information may infringe on the convicted person’s due process right to fairness and a meaningful opportunity to be heard.

In light of the critical nature of the HPA’s determination of the prisoner’s minimum term of imprisonment, due process under Article I, section 5 of the Hawai’i Constitution requires that the prisoner have timely access to all of the adverse information contained in the HPA file. The HPA must disclose such information “soon enough in advance” that the inmate has a “reasonable opportunity to prepare responses and rebuttal of inaccuracies.” In the event that the HPA file of the inmate includes sensitive, or confidential personal information, the inmate is entitled to disclosure of a reasonable summary thereof.

De La Garza at 442, 302 P.3d at 710 (quoting Labrum v. Utah State Bd. of Pardons, 870 P.2d 902, 909 (Utah 1993) (emphasis added).

Thus, OIP’s decision that PSD must disclose the Minimum Decision Records under Part III of the UIPA is consistent with PSD’s due process disclosure obligations regarding those same records.¹⁰

¹⁰ As the Hawaii Supreme Court implicitly recognized in calling for disclosure of a “reasonable summary” when sensitive or confidential personal information is contained in the Minimum Decision Records, De La Garza at 442, 302 P.3d at 710, the safety, protection, and privacy rights of victims and witnesses should not be jeopardized. PSD has not asserted that the Minimum Decision Records at issue here contain sensitive or confidential personal information regarding victims or witnesses, but to the extent that such information is present in other Minimum Decision Records and falls under an exception or exemption to disclosure under the UIPA, such information may be redacted prior to the disclosure of the Minimum Decision Records in response to future requests. OIP has previously provided guidance regarding the redaction of victim and witness information in OIP Opinion Letter Number 99-02 at 9.

CONCLUSION

Despite numerous opportunities to provide additional facts or arguments, HPA failed to do so and did not meet its burden to justify nondisclosure under the UIPA. Accordingly, OIP concludes that HPA is required to disclose to Requesters the requested Minimum Decision Records.

RIGHT TO BRING SUIT

Requesters are entitled to seek assistance directly from the courts after Requesters have 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, Requesters 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, the personal records section of the UIPA, the agency will be liable for: (1) actual damages (but no 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 Requesters substantially prevail, or it may assess fees and costs against Requesters when it finds the charges brought against the agency were frivolous. HRS § 92F-27(e).

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 people who requested the decision. HRS § 92F-43(b) (2012). OIP and the people 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



Liza R.H. Onuma
Staff Attorney

APPROVED:



Cheryl Kakazu Park
Director