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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 sections 92F-27.5 and 92F-42, HRS, and chapter 2-73, Hawaii Administrative Rules (HAR).

OPINION

Requester: Mr. Richard Spacer
Agency: Kauai Police Department
Date: June 10, 2020
Subject: Police Reports (APPEAL 18-18)

REQUEST FOR OPINION

Requester seeks a decision as whether the Kauai Police Department (KPD) properly withheld access to police reports under Part II and Part III of the UIPA.

Unless otherwise indicated, this decision is based solely upon the facts presented in Requester's two emails to OIP dated January 12, 2018, both with attached email chains and materials; Requester's two emails to OIP dated January 16, 2018, both with attached email chains; Requester's email to OIP dated January 29, 2018; Requester's email to OIP dated March 21, 2018; KPD's letter to OIP dated May 2, 2018, with attached materials; Requester's email to OIP dated June 4, 2018; Requester's email to OIP dated July 10, 2018; Requester's email to OIP dated January 14, 2019, and attached email chain; Requester's email to OIP dated September 4, 2019; Requester's email to OIP dated December 11, 2019; and Requester's email to OIP dated December 12, 2019.

QUESTIONS PRESENTED

1. Whether the UIPA allowed KPD, in response to a government record request under Part II of the UIPA, to fully withhold a police report (which was not part of a pending investigation) to avoid an unwarranted invasion of the personal privacy of an individual named in the report? See HRS §§ 92F-13(1) and -14 (2012).

2. Whether the UIPA allowed KPD, in response to a personal record request under Part III of the UIPA, to withhold access to a police report on the basis that it was part of a pending investigation at the time of the request. See HRS §§ 92F-13(3) and -22(1) (2012).

3. Whether KPD responded properly to a government record request under Part II of the UIPA, even though the record it identified as responsive was not the one Requester was seeking.

BRIEF ANSWERS

1. No. The UIPA did not allow KPD to fully withhold a police report in response to a government record request to avoid an unwarranted invasion of the personal privacy of an individual named in the report. OIP Op. Ltr. No. 99-02; see also HRS §§ 92F-13(1) and -14. KPD must disclose the report after redaction of information that would result in the likelihood of actual identification of the victim, which includes the victim's name, address, cell phone number, date of birth, and photographs.

2. Yes. The UIPA allowed KPD to withhold access to a police report that was part of a pending investigation at the time of the request in response to a personal record request. KPD provided sufficient information to establish that it was authorized to withhold personal record access to the report under Part III of the UIPA based on the law enforcement record exemption to disclosure, and also was authorized to withhold government record access to the report under Part II of the UIPA based on the frustration exception to disclosure to avoid impeding an ongoing investigation. See HRS §§ 92F-13(3) and -22(1). The investigation has since closed, however, so in response to a newly made request, KPD would be required to disclose the report after redaction of information that would result in the likelihood of actual identification of individuals named therein. OIP Op. Ltr. No. 99-02.

3. Yes. KPD responded properly to a government record request under Part II of the UIPA by performing a reasonable search based on the information provided to it at the time of its search. See OIP Op. Ltr. No. 97-08 at 5. Even though KPD's search turned up a report that was not the one Requester was seeking, KPD had no notice that the report it had identified was the wrong one until after this appeal was filed, and thus KPD had no obligation to do a new search in the absence of any clarification to the request.

FACTS

I. Correspondence Prior to the Request

On September 11, 2017, Requester directly emailed Ms. Sarah Blane, a Kauai County employee, asking for information from a "KPD incident report for Monday, September 4, 2017." He stated, "I am told officers responded to Larsen's Beach, Lepeuli late morning that day." Ms. Blane sent a reply later that same day saying that she would look into it. Requester sent another email to her on September 19, 2017, asking if she had information regarding his questions.

Ms. Blane responded by email on October 4, 2017, telling Requester she was "no longer KPD's Public Information Officer" but was "still in the Mayor's Office so still able to assist." She also gave him the direct email address for the current KPD point of contact, who was copied on the email, and provided some information regarding a harassment report from the date he inquired about. Requester responded directly to Ms. Blane that same day, giving further information on what he understood to have occurred during the September 4 incident as well as an incident on the previous day, September 3, and asked for "a copy of the report mentioned." She responded by advising him that "copies of police reports are granted through the KPD Records Office" and giving him the phone number for that office.[1]

Presumably in response to the email from Ms. Blane to Requester on which KPD was copied, on October 10, 2017, Lt. Scott Kaui of KPD emailed Requester that he had been "advised . . . to email [Requester] and find out how I can help [him] with questions [he] may have concerning recent reports."

II. The Request and KPD's Response

Requester responded on October 10, 2017, to Lt. Kaui's email with a description of four incidents for which he was seeking police reports and about which he had left a telephone message with KPD's Records Office "[m]onths ago" with no response. The incidents as he listed them were:

(1) "An assault and battery of a Caucasian male allegedly by a local male [on] Valentines Day 2016 on Pila'a Beach[;]"

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[1] As Ms. Blane had already advised Requester by this point that she was now at the Mayor's Office, this was technically a UIPA Request to the Mayor's Office. However, Requester did not raise the adequacy of the Mayor's Office's response as part of this appeal, and it would in any case be proper for an agency that does not maintain records to respond by directing the requester to the agency that does. HAR § 2-71-14(c)(1).

(2) "A second incident . . . detailed in the January 25, 2017 Honolulu Star Advertiser . . . [and] the name of the officer who investigated. Naoshi Grady alleged a group of hostile males told him to leave Waipake Beach where he was fishing. I do not have a date or report number. Mark Zuckerberg owns the land mauka of that Beach[;]"

(3) "September 3, 2017 on Larsen's Beach at Lepuli[.] Sarah Blane stated to me report 2017-18535 was created[;]" and

(4) "On September 4, 2017, two officers from KPD were called by an unknown complainant to Larsen's Beach."

This request forms the basis for Requester's current appeal.

On October 13, 2017, KPD responded to the request with an email advising Requester that, according to the acting records supervisor, he would not be provided access to any reports for the following reasons:

(1) "**2016-10963 Assault**
Pending
2/14/2016 Valentine's Day @ Pilaa beach
Officer M. TAVARES
You are not a party to this case and you would **not** be able to obtain a copy[;]"

(2) "**17-01870 Assault**
Pending
01/25/2017 @ Horner's Beach
Officer M. TAVARES
You are not listed on the report. You would **not** be able to obtain a copy[; and]"

(3) "**17-18535 Harassment**
Pending
09/03/2017 @ Larsens Beach
Officer V. BASUEL II
Case is pending. There are several suspect [sic] in this case, including yourself. Case is still being investigated and has **not** gone to prosecutors [sic] office yet. When investigation is complete and the report is sent to prosecutors, your attorney must 'file for discovery' with prosecutors to get a copy."

KPD did not list or otherwise refer to the requested report from September 4, 2017. KPD's response also did not cite to any provision of the UIPA as a justification for its denial of access to the listed reports as required by section 2-71-14(b), HAR.

III. The Appeal and KPD's Response

Requester subsequently appealed KPD's response to OIP. In his appeal, he asserted that the report dated January 25, 2017, describing an incident at Horner's Beach, was not the one he had requested, explaining that "January 25 is the date of [the referenced article], NOT the date of the incident, which was sometime in 2016" and took place "at Waipake Beach, Kauai" rather than Horner's Beach. He further asserted that he was not at Larsen's Beach on September 4, 2017, but had been there for the incident occurring the preceding day, September 3, and stated, "It seems KPD has merged the incidents of the 3rd and 4th into one event. So, a report from that event DOES involve me as Scott Kaui stated I am a suspect."[2]

In its response to the appeal, KPD listed only two reports as having been withheld, Report Number 2016-01963 (2016 Report) and Report Number 17-18535 (2017 Report). KPD asserted that it did not have any other requested records. Since Requester had stated in his appeal that the report dated January 25, 2017, was not the one he was seeking, OIP assumes that KPD did not list that report as having been withheld because it believed Requester was not interested in obtaining it.

In its Concise Statement of Factual Background, KPD focused on a characterization of Requester, stating among other things that he "has gotten into confrontations with other beachgoers," rather than providing information on the progress of the related investigations or other information to support its arguments.[3] However, in OIP's *in camera* review of the records at issue, OIP found that the 2017 Report itself included additional information regarding the progress of the related investigation.

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[2] Based on OIP's *in camera* review of the 2017 Report, OIP finds that KPD had indeed added an entry for September 4 to the already existing 2017 Report, and thus effectively merged the reports for September 3 and 4 as Requester suggested had happened.

[3] As OIP has previously observed,

> the UIPA has an "any person" standard for disclosure of records in response to general government record requests made under part II of the UIPA, so a requester's identity and reason for making a request are usually not relevant to the requester's access rights for a part II request.

OIP Op. Ltr. No. 10-01 at 2. While the identity of a personal record requester is relevant to establish whether the requested records are "about" the requester, the requester's character and reason for making the request are generally irrelevant for personal record requests as well.

As its basis for withholding the 2016 Report, KPD cited to the UIPA's privacy exception at section 92F-13(1), HRS, offering this explanation:

> It contains information identifiable as part of an investigation into a possible violation of criminal law, and the disclosure . . . is not necessary to prosecute the violation or continue the investigation. As such, disclosure of the report would constitute a clearly unwarranted invasion of personal privacy because . . . the public does not have an interest in the report[.]

As its basis for withholding the 2017 Report, KPD cited to the frustration exception and the litigation privilege exception (but not to any personal record exemption), offering this explanation:

> It is still a pending case and by its nature, must be confidential in order to avoid the frustration of an ongoing police investigation. Although no charging decision has been made, the report pertains to the prosecution of a criminal case to which the County . . . may become a party[.]

IV. Requester's Arguments

In response to KPD's arguments, Requester asserted that KPD "cannot claim [the 2016 Report] . . . cannot be released because it is being investigated, because the statute of limitations has run out." Requester further asserted that the statute of limitations may have run out with respect to the incident reported in a news article, for which KPD asserted it had no report. Regarding KPD's assertion that the privacy exception applied, Requester argued that "the privacy exception does not apply because I stated clearly in my appeal that I would accept redaction of the names and contact information for victims and suspects (and if there were other witnesses named, their names may be redacted as well)[,]" citing to OIP Opinion Letter Number 99-2 as holding that the "privacy interest justifies redacting names, not withholding entire reports."

With respect to KPD's assertion that the litigation privilege exception applied to the 2017 Report, Requester noted that "KPD has not cited any litigation discovery privilege that would justify a reference to HRS [§] 92F-13(2). KPD must prove that [the 2017 Report] 'would not be discoverable' in litigation." And with respect to KPD's assertion that the frustration exception applied to the 2017 Report as part of an ongoing investigation, Requester cited to OIP Opinion Letter Number 91-9 to support his argument that KPD had presented insufficient evidence to justify withholding because the absence of a charging decision, by itself, is not adequate to so demonstrate.

In addition, Requester has more recently argued that the statutory limitation period has run by now for the incidents described in both reports, so they are clearly no longer under investigation; and that KPD had released the video of an unrelated 2017 incident that was the subject of a lawsuit, which he believed was inconsistent with its position regarding the 2017 Report. According to Requester, the video was obtained through discovery.[4]

DISCUSSION

I. Disclosure of the 2016 Report

KPD has not asserted that the 2016 Report related to an ongoing investigation or otherwise fell within the UIPA's frustration exception to disclosure. Rather, KPD's asserted basis for its complete denial of access to any part of the 2016 Report was the UIPA's privacy exception. See HRS § 92F-13(1) and -14.[5] As noted above, Requester has stated that he is not seeking "names and contact information" for victims, suspects, or witnesses listed in the 2016 Report, so disclosure of such information is not at issue in this appeal. Requester has not asserted that the 2016 Report is his personal record; thus, the UIPA exceptions to disclosure of government records, set out in section 92F-13, HRS, are applicable here.

KPD argued that the UIPA's privacy exception allowed it to completely withhold access to the 2016 Report because "[i]t contains information identifiable as part of an investigation into a possible violation of criminal law, and the disclosure . . . is not necessary to prosecute the violation or continue the investigation." In this instance, the only person identified in the report other than the responding officer[6]

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[4] Discovery of records in the course of litigation is a separate and distinct process from access to government records or personal records under the UIPA, and different standards apply. OIP Op. Ltr. No. 95-16.

[5] The privacy exception allows an agency to withhold "[g]overnment records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy." HRS § 92F-13(1). Disclosure of a government record is a clearly unwarranted invasion of personal privacy only when the privacy interest of the individual is not outweighed by the public interest in disclosure. HRS § 92F-14(a). By statute, an individual has a significant privacy interest in "[i]nformation identifiable as part of an investigation into a possible violation of criminal law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation[.]" HRS § 92F-14(b)(2).

[6] OIP does not understand KPD to be asserting that the responding officer also had a significant privacy interest in his identity. Indeed, KPD named the responding officer in its response to Requester.

was the victim, as the suspect was unknown. KPD did not state whose privacy it sought to protect, but in this instance OIP assumes KPD's argument is that disclosure of the report would be an unwarranted invasion of the victim's personal privacy. See HRS §§ 92F-13(1) and 92F-14(a) and -(b)(2) (setting out the UIPA's privacy exception and standards for when information falls within it). Requester correctly cited to OIP Opinion Letter Number 99-02 as setting out the standard for what information generally may be withheld from a police report to protect the privacy of witnesses and other individuals identified in the report. In that opinion, which also involved a government record request for a KPD police report in which the requester was not seeking identifying information about the victim or witnesses,[7] OIP concluded that

> the KPD should segregate such information prior to disclosure of the Police Reports. When doing so, the KPD may redact any information that would result in the likelihood of actual identification. See OIP Op. Ltrs. No. 98-5 at 27-28 (Nov. 24, 1998); 94-8 at 10-11 (May 12, 1994); 95-7 at 11 (March 28, 1995); 95-21 at 23 n. 10 (Aug. 28, 1995); see also Dep't of the Air Force v. Rose, 425 U.S. 352, 380-381, 96 S.Ct. 1592, 1608 (1976). What constitutes identifying information must be determined not only from the standpoint of the public, but also from that of persons familiar with the circumstances involved. See also Dep't of the Air Force v. Rose, 425 U.S. 352, 380-381, 96 S.Ct. 1592, 1608 (1976). Thus, it may be appropriate to redact, among other things, an individual's name, occupation, workplace, home address and telephone number, social security number, date of birth, marital status, any statement that could only be attributed to a particular individual, or even the location of the activity, if disclosure would identify the individual.

OIP Op. Ltr. No. 99-02 at 9. Thus, consistent with OIP Opinion Letter Number 99-02, KPD must disclose the 2017 Report after redaction of information that would result in the likelihood of actual identification of the victim. Here, the information

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[7] OIP reminds KPD that to comply with the UIPA, when responding to UIPA requests for police reports, it must follow the longstanding precedent set out in OIP Opinion Letter Number 99-02 and thus should not have a practice of fully withholding police reports to protect the privacy of individuals named therein.

that could be redacted[8] includes the victim's name, address, cell phone number, date of birth, and photographs.

III. Disclosure of the 2017 Report

A. The 2017 Report as a Personal Record

Based on its initial response to Requester, KPD apparently recognized that the 2017 Report was "about" Requester and thus presumably his personal record. In its response to this appeal, though, KPD cited only to exceptions to disclosure of government records as set out in Part II of the UIPA, and did not cite to any exemption to disclosure of personal records set out in Part III of the UIPA. Thus, it is not clear whether KPD is making an argument that the 2017 Report is not Requester's personal record or whether KPD simply failed to recognize the difference between responding to a request for government records and a request for personal records.

As OIP has previously explained,

> [t]he UIPA defines a "personal record" as "any item, collection, or grouping of information about an individual that is maintained by an agency." HRS § 92F-3 (2012) (emphasis added). This includes an individual's educational, financial, or medical records, or items that reference the individual by name or otherwise. Id. An agency is required to provide access under Part III to an "accessible" personal record, which generally means one that is filed by the person's name or other identifying information, or that the agency can otherwise readily find. OIP Op. Ltr. No. 95-19 at 8-9, n.5; see also HRS §§ 92F-3, -21 (2012).

OIP Op. Ltr. No. F19-01 at 5. A record can be the personal record of more than one individual, as OIP has also previously explained, so that each such individual may access the record as his or her personal record.

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[8] KPD redacted the victim's cell phone number, address, and date of birth from the copy of the 2016 Report provided for OIP's *in camera* review. While OIP did not need to review the redacted information to make a determination in this case, OIP advises KPD that records provided for *in camera* review should be provided unredacted unless otherwise arranged with OIP, and an agency that provides redacted records for OIP's *in camera* review may not have provided enough information to meet its burden to establish that an exception to disclosure applies. See HRS § 92F-15(c) (2012) (stating that an agency has a burden to establish that a claimed exception to disclosure applies).

> When government records, or portions thereof, are about a requesting individual as well as one or more other individuals, those records, or relevant portions, would constitute "joint personal records" of all individuals whom the information is collectively about, and all of the individuals would have access to their own respective personal records under Part III of the UIPA, subject to the exemptions therein. See, e.g., OIP Op. Ltr. No. 03-18, 05-10 (explaining that all individuals have access to a joint personal record about all of them, subject to Part III's exemptions).

OIP Op. Ltr. No. F13-01 at 16.

However, a record that is mostly the personal record of an individual identified therein may still include portions that are not that individual's personal record.

> Information in the requested record that is not about the identified individual does not constitute the individual's personal record. For example, even within an investigative file initiated by a complainant, there may be information that is specifically and exclusively about someone else and should not be considered part of the personal record of the complainant. See, e.g., OIP Op. Ltr. No. 05-10 (concluding that the home addresses and home telephone numbers of witnesses and the alleged assailant in a sexual assault case were not the alleged victim's personal record subject to Part III, and must instead be evaluated as a public records request under Part II); OIP Op. Ltr. No. 03-18 (determining that certain information in an investigative file concerning an individual's complaint against an agency employee was the employee's confidential personnel information, and not part of complainant's personal record).

OIP Op. Ltr. No. F13-01 at 15.

Based on its *in camera* review of the 2017 Report, OIP finds that the 2017 Report named Requester and other individuals and discussed an incident in which Requester was allegedly involved. Thus, OIP finds that the majority of the 2017 Report is Requester's personal record. OIP further finds that limited portions of the 2017 Report are **not** Requester's personal record, including the contact information, social security numbers, dates of birth, and similar personal details[9] for other

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[9] Requester has said he is not seeking identifying information regarding others named in the report, so OIP's understanding is that he is not seeking this information. OIP notes that while KPD did not cite to the UIPA's privacy exception, section 92F-13(1), HRS, it would likely apply to such information about the other individuals.

individuals named in the report. For the reasons discussed below, though, OIP finds it unnecessary to make a more specific finding as to precisely what information in the report is or is not Requester's personal record because it does not affect whether the information must be disclosed to Requester.

KPD cited to two exceptions to disclosure of government records under Part II of the UIPA: (1) the frustration exception, section 92F-13(3), HRS, specifically as applicable to avoid interference with an open investigation, and (2) the litigation privilege exception, section 92F-13(2), HRS. The exceptions to disclosure under Part II of the UIPA, which apply explicitly to requests for government records, are inapplicable to a personal record request made under Part III of the UIPA. See HRS § 92F-13 (allowing agencies to withhold "government records" in specified circumstances).

Nonetheless, although KPD did not raise it, OIP notes the apparent applicability of an exemption to disclosure under Part III of the UIPA, specifically, the exemption for law enforcement records. That exemption reads as follows:

> **§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. Here, the records are maintained by KPD, which OIP finds to be an agency that performs activities pertaining to the prevention, control, or reduction of crime as a principal function. OIP further finds that the 2017 Report is a report prepared or compiled for the purpose of a criminal investigation, and that it includes reports of witnesses and investigators. OIP therefore concludes that based

on section 92F-22(1)(A), HRS, KPD was not required to disclose the 2017 Report[10] to Requester as a personal record.

However, this conclusion does not end OIP's analysis. OIP has previously concluded that

> [w]here a record falls within an exception to disclosure under part III of the UIPA, governing the disclosure of personal records, the agency must then also determine whether the record may be withheld under part II of the UIPA, which governs the disclosure of general government records.

OIP Op. Ltr. No. 05-14 at 6-7; accord OIP Op. Ltr. No. 03-11 at 4, n.6 and OIP Op. Ltr. No. 05-16 at 4. The effect in this case is to return the focus of OIP's analysis to the Part II exceptions to disclosure originally cited by KPD.

B. The 2017 Report as a Government Record

1. Litigation Privilege Exception

KPD argued that the 2017 Report could be withheld based on the UIPA's litigation privilege exception, which allows an agency to withhold "[g]overnment 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) (2012). With respect to this exception,

> OIP has . . . previously opined that the phrase "records would not be discoverable" in section 92F-13(2) refers to those records that fall within judicially recognized privileges, such as the attorney-client or work product privileges. See OIP Op. Ltr. Nos. 89-10, 92-21 and 02-01.

OIP Op. Ltr. No. 10-01 at 4 n.4.

As Requester correctly noted, KPD has not raised any specific litigation privilege that it claims applies here, such as the attorney-client or attorney work product privileges, and no potentially applicable privilege is apparent to OIP. Thus, OIP concludes that the litigation privilege exception does not apply to the 2017 Report.

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[10] Although section 92F-22(1)(A), HRS, will typically apply to a personal record request for a police report and thus the focus of analysis in such requests is typically on the applicability of the Part II exceptions to disclosure, OIP reminds KPD that it must always cite to a basis under Part III of the UIPA when it denies access to a personal record request.

2. Frustration Exception

KPD also argued that it could withhold the 2017 Report under the UIPA's frustration exception because the underlying matter was "still a pending case and by its nature, must be confidential in order to avoid the frustration of an ongoing police investigation."

The UIPA's frustration exception 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." Regarding its application to law enforcement records specifically, OIP has previously opined that

> law enforcement records may be withheld under the exception at section 92F-13(3), HRS, where disclosure would frustrate an agency's legitimate law enforcement function. Haw. Rev. Stat. § 92F-13(3) (disclosure not required for government records that must be confidential "to avoid the frustration of a legitimate government function"); OIP Op. Ltr. No. 89-17 at 5 (legislative history to § 92F-13(3) indicates that "records or information compiled for law enforcement purposes" need not be disclosed if disclosure would frustrate legitimate government function).

OIP Op. Ltr. No. 09-03 at 2-3. OIP has stated that to

> establish that the exception does apply, [an agency] must provide specific facts demonstrating: (1) that a related criminal case is under investigation or is being prosecuted in the courts, and (2) that disclosure of the [records] would in some particular way disrupt or harm that investigation or prosecution. See OIP Op. Ltr. No. 95-21 at 10-12 (Aug. 28, 1995) (to establish that a law enforcement record should be exempt from disclosure because disclosure could reasonably be expected to interfere with enforcement proceedings, courts require an agency to establish that a law enforcement proceeding is pending or prospective; and that disclosure would, in some particular, discernable way, disrupt, impede, or otherwise harm the enforcement proceeding) (citing North v. Walsh, 881 F.2d 1088, 1097 (D.C. Cir. 1989)).

OIP Op. Ltr. No. 98-05 at 10-11.

With respect to the requirement for an agency to provide specific facts demonstrating that a criminal case is actually under investigation[11] or being prosecuted, in OIP Opinion Letter Number 91-09, OIP cited with approval the guidance provided by federal courts interpreting a similar exception to the Freedom of Information Act:

> Exemption 7(A) was not intended to "endlessly protect material simply because [it] is in an investigation file." NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 232 (1974). Rather, Exemption 7(A) is temporal and, as a general rule, may be invoked only as long as an enforcement proceeding is pending or prospective, although there are exceptions. See, e.g., Seegull Mfg. Co. v. NLRB, 741 F.2d 882, 886-87

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[11] In OIP Opinion Letter Number 98-05, OIP stated that "law enforcement records" did not include records of purely civil or administrative proceedings such as the one at issue therein, although in some instances such proceedings could also be connected to a related criminal investigation and thus qualify for that reason. OIP Op. Ltr. No. 98-05 at 10. However, OIP has not been directly presented with a situation in which an agency sought to withhold records of an open civil or administrative proceeding under the UIPA's frustration exception, and thus OIP has never concluded that premature disclosure of investigation records from pending civil or administrative proceedings cannot constitute a frustration of an agency's administrative or civil law enforcement function. By comparison, in previous opinions OIP has recognized the explicit statutory applicability to such proceedings of the UIPA's personal record exemption to disclosure for "investigative reports and materials, related to an upcoming, ongoing, or pending civil or criminal action or administrative proceeding against [an] individual." E.g. OIP Op. Ltr. No. 09-03 (applying open investigation exemption to an architect's request for records of an administrative proceeding against him). OIP has also concluded that the personal record exemption for ongoing proceedings should be interpreted in parallel with the frustration exception as applied to an ongoing investigation, as "frustration of an agency's law enforcement function is also the underlying basis for the [personal record] exemption" for ongoing investigations, and laws *in pari materia* must generally be read together. Id. at 3.

Thus, while civil or administrative law enforcement proceedings are not at issue here, OIP notes that there may be situations in which premature disclosure of a pending administrative investigation could frustrate an agency's legitimate civil law enforcement function, personnel management function, or other non-criminal-law enforcement function, and OIP does not intend this opinion to preclude such an application of the frustration exception when an agency can "demonstrate a connection between disclosure of the specific record and the likely frustration of a legitimate government function, including by clearly describing the particular frustration and providing concrete information indicating that the identified outcome is the likely result of disclosure" as generally required when asserting the UIPA's frustration exception. See Peer News LLC v. City & County of Honolulu, infra, 143 Haw. at 487; 431 P.3d at 1260 (establishing a general standard for what an agency must show to meet its burden to establish the applicability of the UIPA's frustration exception).

(6th Cir. 1984). Under this exemption, a law enforcement proceeding is "prospective" if such a proceeding is a concrete possibility, rather than a mere hypothetical one. See Badran v. Department of Justice, 652 F. Supp. 1437, 1440 (D.C.N.D. Ill. 1987). It may also be invoked where an investigation, though in a dormant stage, "is nonetheless an 'active' one which will hopefully lead to a 'prospective law enforcement proceeding.'" National Public Radio v. Bell, 412 F. Supp. 509, 514 (D.D.C. 1977).

OIP Op. Ltr. No. 91-09 at 6.

With respect to the requirement for an agency to establish that disclosure would disrupt or harm an investigation in some discernable way, OIP again followed the lead of federal courts and observed that

> courts have sustained an agency's withholding of such information as details regarding initial allegations giving rise to an investigation; interviews with witnesses and subjects; an investigator's summary of findings; investigative reports furnished to the prosecuting attorneys; contacts with prosecuting attorneys regarding allegations; prosecutive opinions; and other materials that would permit a target of an investigation to discern the investigation's scope, direction, limits, and sources of information relied upon.

OIP Op. Ltr. No. 91-9 at 6-7. However, courts "will generally not afford protection where the target of the investigation has possession of or submitted the information in question." Id. at 7.

The Hawaii Supreme Court has similarly interpreted the frustration exception as requiring an agency to establish that disclosure of the records would indeed frustrate a legitimate government function to justify withholding those records, even for law enforcement records or other types of records recognized in the UIPA's legislative history as likely to fall within the frustration exception.

> [N]ot even the expressly enumerated categories of records are automatically exempt from disclosure; the report describes the enumerated documents as "examples of records which need not be disclosed, if disclosure would frustrate a legitimate government function." S. Stand. Comm. Rep. No. 2580, in 1988 Senate Journal, at 1095 (emphasis added). Thus, HRS § 92F-13(3) calls for an individualized determination that disclosure of the particular record or portion thereof would frustrate a legitimate government function. That a record is of a certain type--whether that type is deliberative, pre-decisional, or even a type included in or analogous to the examples

> set forth in the Senate Standing Committee Report--is not alone sufficient to shield the record from disclosure under the provision. While such a designation may be instructive, an agency must nonetheless demonstrate a connection between disclosure of the specific record and the likely frustration of a legitimate government function, including by clearly describing the particular frustration and providing concrete information indicating that the identified outcome is the likely result of disclosure. See OIP Op. Ltr. No. 03-16 at 8 (Aug. 14, 2003) (stating that withholding disclosure of a coaching contract under HRS § 92F-13(3) was not justified because the university [of Hawaii] "has provided us with no specific examples of or any concrete information as to how disclosure of the contract will frustrate the Athletic Department's ability to function"). In sum, to justify withholding a record under HRS § 92F-13(3), an agency must articulate a real connection between disclosure of the particular record it is seeking to withhold and the likely frustration of a specific legitimate government function. The explanation must provide sufficient detail such that OIP or a reviewing court is capable of evaluating the legitimacy of the government function and the likelihood that the function will be frustrated in an identifiable way if the record is disclosed. See id. at 8, 16 (stating that [w]e would be remiss in our statutory duties if we simply accepted UH's statement that disclosure [of the Head Coach's compensation package] will frustrate a legitimate government function without any factual basis to support UH's assertion" that disclosure "could have the impact of frustrating the Athletic Director's ability to maintain a cohesive coaching team and a successful athletic program"). In the absence of such a showing, withholding disclosure under the provision is not warranted.

Peer News LLC v. City & County of Honolulu,143 Haw. 472, 487; 431 P.3d 1245, 1260 (2018) [footnote omitted].

Thus, while past OIP opinions have recognized that an agency may be entitled to broadly withhold information from the file on an open investigation to avoid impeding or harming its progress, this application of the frustration exception is not automatic and an agency must provide facts to establish that the investigation is either actively in progress or at least that further progress is a concrete possibility rather than a hypothetical one, and that the information being withheld would potentially give the requester new information about what the agency knows (as compared to information already known to the requester, such as information in news articles with obvious relevance to the topic or in records the requester had given to the agency).

In this case, KPD's justification of why disclosure of the 2017 Report could interfere with an ongoing investigation was its statement that the investigation was still "pending" and there had been no charging decision. KPD relied on the absence of a charging decision to establish that there was actually an ongoing investigation and that the report was not simply a file for which no further investigation was seriously anticipated, left pending until the limitation period expired. OIP agrees with Requester that the absence of a charging decision alone is not enough to establish that an investigation remains open for the purpose of the frustration exception. However, other information in the record, including in the 2017 Report itself, does support KPD's contention that the investigation was still ongoing as of the date it responded to the request.

Requester made his request to KPD on October 10, 2017, and KPD responded on October 13, 2017. The original incident occurred on September 3, 2017, and the first entry in the 2017 Report was from that date. Thus, the investigation was initiated just over a month before KPD responded to Requester, which weighs in favor of it still being active at that time. More importantly, OIP's *in camera* review of the 2017 Report indicated that KPD was still making new entries to the 2017 Report, updating the progress of the investigation, at the time it received and responded to Requester's request. OIP therefore finds that KPD was actively pursuing the investigation at the time it responded to Requester, so the investigation was ongoing for the purpose of the UIPA's frustration exception. OIP further finds that the information in the 2017 Report included details regarding initial allegations giving rise to an investigation, interviews with witnesses and subjects, and an investigator's summary of findings, all information of a type OIP has previously recognized as likely to disrupt the progress of an ongoing investigation, and did not include news articles or records provided by Requester himself. OIP therefore concludes that at the time KPD responded to Requester, it was entitled to withhold access to the 2017 Report on the basis that its disclosure would disrupt the progress of an ongoing investigation and thus frustrate KPD's investigatory function.

OIP examines the propriety of an agency's denial of access to records as of the time the agency responded to the record request, so OIP concludes that KPD properly withheld access to the 2017 Report. However, OIP notes that the investigation of the incident described in the 2017 Report related has apparently closed by this time, so KPD would not be authorized to withhold the 2017 Report on the basis that disclosure would impede the progress of an ongoing investigation in response to a fresh request for the 2017 Report. OIP advises KPD that if Requester makes a new request for the 2017 Report, KPD should follow the standards set out in OIP Opinion Letter Number 99-2 and discussed above with reference to the 2016 Report. In other words, if KPD receives a new request for the 2017 Report from Requester, it should disclose it after redaction of identifying information for individuals other than Requester.

IV. KPD's Search for the Remaining Report

Finally, OIP addresses KPD's assertion that it did not maintain any requested reports other than the 2016 and 2017 Reports. OIP has previously concluded that a reasonable search for records is one reasonably calculated to uncover all relevant documents and that an agency must make a good faith effort to conduct a search for the requested records, using methods that can be reasonably expected to produce the information requested. OIP Op. Ltr. No. 97-08 at 5.

Requester had sought a police report for an "incident described in a Star-Advertiser article from January 25, 2017, incident . . . detailed in the January 25, 2017 Honolulu Star Advertiser[,]" for which his request to KPD gave these details:

> Naoshi Grady alleged a group of hostile males told him to leave Waipake Beach where he was fishing. I do not have a date or report number. Mark Zuckerberg owns the land mauka of that Beach

His request to KPD did not include a copy of the news article he referenced.

KPD responded to this request by listing (and notifying Requester that it would withhold) a police report dated January 25, 2017, for an incident that occurred at a different beach. Requester did not directly notify KPD that the report KPD had identified in its response was not the one he was seeking. However, in his appeal to OIP he complained that the report listed in KPD's response was for the wrong date and beach and attached a copy of the article he had referenced in his request to KPD.

OIP thus finds that within 20 business days[12] after KPD responded to the request, KPD was not provided with the referenced news article or alerted that the report it did identify as being responsive was not the one Requester was seeking. Indeed, KPD was first provided with the article when it received a copy of Requester's appeal, which included the article, months after KPD had responded to the request. KPD's response to the appeal did not directly address Requester's complaint that it had identified the wrong report, except to say that it did not maintain any requested reports other than the 2016 and 2017 Reports.

OIP finds that when conducting its search, KPD had a location but no date or report number for the requested report and would have had to independently look up a separate news article to obtain more information about the requested report.

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[12] When an agency has determined that it needs more information to respond to a request and thus asks a requester for further information, it may treat the request as abandoned if it has not heard from the requester within 20 business days of its response to the request. HAR § 2-71-16 (1998).

KPD's response to Requester's request indicated that the acting records supervisor had searched for the reports listed in Requester's request. Based on the record KPD did identify as being responsive to this portion of the request, OIP finds that for this particular report KPD focused its search on the one date Requester had listed, i.e. the date of the news article he referenced, rather than independently searching the archives of the Star-Advertiser for the referenced article.

OIP finds that based on the information provided to KPD at the time of its search, KPD's search, which turned up a police report regarding an incident at a beach on the date Requester had provided, was reasonable, and that conducting a search "reasonably calculated to uncover all relevant documents" does not require an agency to independently search for a news article published almost nine months previously to supplement or double-check the information provided in a record request. Further, OIP finds that since Requester did not clarify to KPD that its response had identified the wrong police report, KPD was not aware of that complaint until this appeal had already been opened and thus had no notice that the report it had identified was not the one Requester was seeking until after the period when any clarification of the request should have been provided. OIP therefore concludes that KPD had no obligation to do a supplementary search in response to a clarified request, and that KPD's response regarding this portion of the request was proper under the UIPA.

RIGHT TO BRING SUIT

For government records requested under Part II of the UIPA, 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 personal records requested under Part III of the UIPA, Requester is entitled to seek assistance directly from the courts after Requester has 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, Requester 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 of the UIPA, the agency will be liable for: (1) actual damages (but in no case 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 a requester substantially prevails, or it may assess fees and costs against the requester when it finds the charges brought against the agency were frivolous. HRS § 92F-27(e). If Requester decides to file a lawsuit, Requester must notify OIP in writing at the time the action is filed. HRS § 92F-15.3 (2012).

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 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-3(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 request for assistance. OIP's role herein is as a neutral third party.

SPECIAL NOTICE: During the COVID-19 pandemic, Hawaii's Governor issued his Supplementary Proclamation on March 16, 2020, which suspended the UIPA in its entirety. The suspension was continued until May 31, 2020, by the Governor's Sixth Supplementary Proclamation dated April 25, 2020. On May 5, 2020, the Governor's Seventh Supplementary Proclamation (SP7) modified the prior suspension of the UIPA in its entirety and provided that the UIPA and chapters 71 and 72, Title 2, HAR, "are suspended to the extent they contain any deadlines for agencies, including deadlines for OIP, relating to requests for government records and/or complaints to OIP." SP7, Exhibit H. On May 18, 2020, the Governor's Eighth Supplementary Proclamation (SP8) continued the modified suspension of the UIPA provided in SP7. SP8, Exhibit H.

The UIPA's part IV sets forth OIP's powers and duties in section 92F-42, HRS, which give OIP authority to resolve this appeal and have been restored by SP8, except for the deadline restriction. Thus, for OIP's opinions issued while SP8 is still in force, agencies will have a reasonable time to request reconsideration of an opinion to OIP, but a request for reconsideration shall be made no later than ten business days after suspension of the UIPA's deadlines are lifted upon expiration of SP8 after June 30, 2020, unless SP8 is terminated or extended by a separate

proclamation of the Governor. Agencies wishing to appeal an OIP opinion to the court under section 92F-43, HRS, have a reasonable time to do so, subject to any orders issued by the courts during the pandemic, and no later than thirty days after suspension of the UIPA's deadlines is lifted upon expiration of SP8 after June 30, 2020, unless terminated or extended by a separate proclamation of the Governor.

OFFICE OF INFORMATION PRACTICES

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