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The Office of Information Practices (OIP) is authorized to issue decisions under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes (HRS) (the UIPA) pursuant to section 92F-42, HRS, and chapter 2-73, Hawaii Administrative Rules (HAR).

**OPINION**

**Requester:** Mr. Dietrich Knauth  
**Agency:** Employees' Retirement System  
**Date:** June 30, 2022  
**Subject:** Records Relating to Employee Departure (U APPEAL 18-21)

**REQUEST FOR OPINION**

Requester seeks a decision as to whether the Employees' Retirement System (ERS) properly denied Requester's request for records relating to its former chief investment officer's departure under the Uniform Information Practices Act (Modified), chapter 92F, HRS (UIPA).

Unless otherwise indicated, this decision is based solely upon the facts presented in Requester's email to OIP dated March 23, 2018, and attached materials; OIP's letter to ERS dated April 11, 2018, and attached materials; OIP's letter to Requester dated May 2, 2018; an email from Requester to OIP dated May 8, 2018; an email from OIP to Jodi L.K. Yi, Esq., of the Department of the Attorney General (AG) dated May 9, 2018, with attached email thread; an email from the AG to OIP dated May 10, 2018, with attached email thread and attached materials; an email from the AG to OIP dated May 23, 2018, with attached email thread and attached materials; a telephone call with Ms. Yi dated May 24, 2018; an email from OIP to the AG dated May 12, 2020, and attached materials; two emails from the AG to OIP dated May 18, 2020, one with attached email thread; two emails from the AG to OIP dated May 20, 2020, with attached email threads; a telephone call with Clayton Zane, Esq., of the AG on June 2, 2020; an email from the AG to OIP dated June 2, 2020, with attached email thread; a letter from OIP to the AG dated

August 11, 2021, and attached materials; an email from OIP to the AG dated August 13, 2021, and attached materials; an email from the AG to OIP dated August 13, 2021, with attached email thread; an email from the AG to OIP dated August 26, 2021, a letter from OIP to the AG dated May 4, 2022; and a letter from the AG to OIP dated May 18, 2022, with attached materials.

### **QUESTIONS PRESENTED**

1. Whether the UIPA's privacy exception allowed ERS to withhold records including references to a former employee's departure, either as a whole or in part.
2. Whether the UIPA's frustration exception allowed ERS to an withhold email that included a reference to legal advice to ERS from a deputy AG.
3. Whether ERS conducted a reasonable search for responsive records.
4. Whether ERS provided Requester a good faith estimate of fees in response to his request as required by the UIPA.

### **BRIEF ANSWERS**

1. Yes, the UIPA's privacy exception allowed ERS to withhold, in part, records including references to a former employee's departure. The requested records included personnel-related information relating to the former employee, which carried a significant privacy interest. HRS §§ 92F-13(1) (2012) and 92F-14(b)(4) (2012). Information reflecting an action taken by a board at a meeting subject to the Sunshine Law, Part I of chapter 92, HRS, could not be withheld under the UIPA's privacy exception, because the public interest in knowing an action taken by a Sunshine Law board outweighed the employee's privacy interest in that action. HRS §§ 92-9 and -14(a) (2012); OIP Op. Ltr. No. 06-07. An email previously published as part of a news article likewise could not be withheld because the public disclosure interest outweighed the employee's privacy interest. 92F-14(a). However, the public disclosure interest in information about specific conditions placed on the employee in connection with his departure and discussion of a possible exit agreement did not outweigh his privacy interest in such information, so it was properly withheld under the UIPA's privacy exception. HRS §§ 92F-13 and -14(a).

2. Yes, the UIPA's frustration exception allowed ERS to withhold a portion of an email that included attorney-client privileged advice to ERS from a deputy AG. Of the portion not already authorized to be withheld by the UIPA's privacy exception, one paragraph relating to legal advice given to ERS by the AG was attorney-client privileged information that was properly withheld under sections 92F-13(2), (3), and (4), HRS, both in its original form and as part of an

email chain. See OIP Op. Ltr. No. 14-01 at 6 (discussing the UIPA’s recognition of the attorney-client privilege). The remainder of that email and another email forwarding it did not include attorney-client privileged information, so could not be withheld based on the attorney-client privilege as recognized by the UIPA.

3. Yes, ERS conducted a reasonable search for responsive records. While ERS’s initial search was cursory and not reasonably calculated to uncover all relevant documents, ERS’s follow up search was more thorough and together the searches comprised a reasonable search under the UIPA. OIP Op. Ltr. No. 97-8 at 5 (setting out standards for what constitutes a reasonable search).

4. No, ERS did not provide Requester a good faith estimate of fees in response to his request as required by the UIPA. An agency’s written response to a record request is required to include a “good faith estimate of all fees that will be charged to the requester under section 2-71-19[.]” HAR, which authorizes fees for an agency’s search, review, and segregation of records. HAR § 2-71-14(a)(2)(A). Based on the UIPA’s legislative history and the administrative rules implementing the UIPA, the clear purpose of the “good faith” estimate of fees is to provide a requester with sound information about the anticipated agency time required and fees to be paid to process the request as submitted, so the requester can make an informed choice whether to pursue, modify, or even abandon it. It is specifically not intended to be “a vehicle to prohibit access to public records,” and the Legislature instructed OIP to “move aggressively” against such use of the UIPA’s fees. H. Stand Comm. Rep. No. 342-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 969, 972 (1988). OIP does not need to actually find a deliberate intent to inflate its estimate by an agency to conclude that the estimate was not made in good faith; rather, a failure to make even a cursory effort to accurately estimate the volume of responsive records an agency maintains, as OIP finds was the case here, is sufficient by itself to support the conclusion that the agency failed to provide the requester a good faith estimate as required by rule, and thus violated the UIPA.

## FACTS

### **I. Departure of ERS Chief Investment Officer and Media Coverage**

The ERS Board of Trustees met on February 12, 2018, during which it went into executive session to “evaluate the performance of duties and compensation of [ERS] personnel.” ERS, Minutes of the Regular Meeting of the Board of Trustees of the Employees’ Retirement System of the State of Hawaii, February 12, 2018, <https://ers.ehawaii.gov/wp-content/uploads/2018/10/February-12-2018.pdf>. Within days, the media reported that it had fired its chief investment officer (Former CIO) at that meeting. E.g., Kevin Dayton, Honolulu State Pension Fund Trustees Fire Chief Investment Officer, <https://www.staradvertiser.com/2018/02/15/hawaii-news/state-pension-fund-trustees-fire-chief-investment-officer/> (Star-Advertiser

Article). Initial reporting pointed to the Former CIO’s “management style,” citing “[o]fficials familiar with the situation.” Id.

Shortly thereafter, it was reported that the alleged termination came immediately after ERS trust fund losses due to a trading strategy adopted by the Former CIO. Hawaii Free Press, ERS Fires Investment Officer After Losses on VIX Puts (February 15, 2018), <http://www.hawaiifreepress.com/Articles-Main/ID/21153/ERS-Fires-Investment-Officer-After-Losses-on-VIX-Puts>, quoting Wall Street Journal, Hawaii ERS Gambled on Market Calm—Then Everything Changed (February 14, 2018). This drew national attention from the institutional investment media, including Requester.

Notwithstanding ERS’s official stance of not commenting on the situation, subsequent reporting dug further into what had happened and concluded that the theory that ERS had suffered losses due to an investment strategy gone bad was incorrect, and that the reported termination was in fact due to management style, and more specifically clashes between the Former CIO and ERS’s Executive Director (ERS ED). Leanna Orr, Everything You’ve Heard About the Disaster at Hawaii’s Pension Fund Is Wrong — Except the Disaster Part (April 23, 2018), <https://www.institutionalinvestor.com/article/b17wyqq1z770qw/hawaii%E2%80%99s-investment-chief-got-fired-then-the-gossip-started> (Institutional Investor Article). The Institutional Investor Article published an email on the situation from the ERS ED to all employees dated February 15, 2018, which among other things stated that “a condition of [the Former CIO’s] discharge is that he not physically return to our offices.” Id. It did not specify how the email was obtained. Id. It further reported that the situation had given rise to industry speculation not only that a bad investment strategy was the cause, but that given ERS’s silence, an “imagined ‘something’” worse may have been the real cause. Id. Ultimately, the Institutional Investor Article concluded by quoting an unnamed “industry expert” as follows: “There’s a lot of misinformation; the reality doesn’t square with everyone’s worst fears that these exotic things blew them up. The decision had been baked to fire [the Former CIO] well before those reports came in.” Id.

## **II. The Request and ERS’s Initial and Amended Response**

Requester made his record request to ERS for seven categories<sup>1</sup> of “documents relating to the termination of” the Former CIO on February 21, 2018.

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<sup>1</sup> Requester sought (for the preceding six months, in the case of emails):

(1) “All written materials distributed to board members for the January and February investment committee and board of administration meetings;”

In its Notice to Requester dated March 13, 2018 (March 13 NTR), ERS denied the request in full based on the UIPA's exceptions for records whose disclosure would constitute a clearly unwarranted invasion of personal privacy and records that must be confidential to avoid the frustration of a legitimate government function. See HRS § 92F-13(1) and (3) (2012). Requester appealed that denial to OIP on March 23, 2018.

On May 2, 2018, OIP wrote to advise Requester of ERS's clarified position that it had interpreted his request as "seeking only those records related to [the Former CIO's] termination, and since [ERS's] position is that there was no termination, [ERS] advised [Requester] that there were no responsive records."<sup>2</sup> To "ensure that all parties concerned, as well as OIP, are addressing the correct question in this appeal," OIP asked Requester to clarify whether his request was for "records in the seven categories listed[,] but only to the extent that they relate to [the Former CIO's] departure from ERS" in whatever manner. After Requester clarified that OIP had correctly stated the intended scope of his request, OIP emailed the AG on May 9, 2018, to remind ERS that it still needed to submit its response to the appeal "and any responsive records to which access was denied for OIP's *in camera* review, as requested in our Notice of Appeal." OIP instructed the AG to submit those by May 23, 2018, and "[i]f ERS needs to revise its notice based on this clarification of the scope of his request, please go ahead and do that at the same time."

On May 10, 2018, the AG (acting for ERS) emailed OIP to state that ERS had estimated it would require 32 hours of computer search time to locate the requested records excluding category 7, and to ask if it could charge Requester for providing those records for OIP's *in camera* review, and if it could charge Requester at the higher rate charged by the "computer vendor" ERS planned to ask to conduct the search rather than the ten dollar per hour rate authorized for search time in responding to a UIPA request. See HAR § 2-71-31(a)(1). ERS then provided a

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- (2) Emails between the Former CIO and listed members of the ERS Board of Trustees;
  - (3) Emails between those board members and a specified email address;
  - (4) Emails between the Former CIO and the ERS ED;
  - (5) Emails between the ERS ED and specified board members;
  - (6) Emails between the ERS ED and a specified ERS employee; and
  - (7) Emails between listed board members including specified words or phrases.

<sup>2</sup> The March 13 NTR did not state that ERS maintained no responsive records, but instead stated that ERS was denying access to the records it did maintain in full. If ERS believed it maintained no records responsive to the request, ERS was obligated to advise Requester that it could not provide the requested records because it did not maintain them. HAR § 2-71-14(c)(1).

revised Notice to Requester dated May 23, 2018 (May 23 NTR), advising him that the request would be granted in part and denied in part based on an attached list of justifications (including the UIPA's privacy and frustration exceptions). The May 23 NTR did not actually specify the records or information ERS planned to withhold because its stated justifications were for each category of requested records, rather than, for instance, specified emails or specific information within those emails. Nonetheless, ERS estimated fees and costs for the request at \$5,140, including 323 hours of search, review, and segregation time and copy fees for an estimated 1,800 pages.

ERS did not submit a detailed position statement or records for OIP's *in camera* review by May 23. On May 24, 2018, OIP spoke with the AG by telephone and advised that ERS still needed to provide the required *in camera* records, but that given the large number of responsive records it might be acceptable for ERS to provide a representative sample.

### **III. Delay While UIPA Deadlines Suspended by Emergency Order, and Eventual ERS Response**

On May 12, 2020, OIP emailed the AG to summarize the status of the appeal, remind it that ERS had not yet submitted a detailed position statement or *in camera* records for OIP's review, and again offer the possibility that a representative sample of those records might be sufficient to allow OIP to make a determination. In that email, OIP did not set a deadline for ERS's response, due to the pandemic-based suspension of deadlines under the UIPA.<sup>3</sup> In response to that email, the then-assigned Deputy AG began corresponding with OIP by email with questions about the status of the appeal, what a detailed position statement consists of, and relevant law. In a telephone conversation between OIP and the AG on June 2, 2020, the AG advised OIP that ERS estimated it would take 120 hours to put the *in camera* records together and asked whether Requester could be required to pay for ERS's time as a condition of pursuing the appeal, or alternatively whether OIP would pay for ERS's time. OIP advised that an agency cannot require a

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<sup>3</sup> Specifically, OIP wrote with respect to deadlines:

Since the May 5 version of the emergency proclamation has partly restored the UIPA but continues to waive agency deadlines for the duration, I'm not going to set a deadline at this time for ERS to provide us the *in camera* records. However, I did want to alert you that this [is] an issue with this appeal, and we will be setting such a deadline once the emergency proclamations have been lifted. If you are able to get me the *in camera* records before then, I would appreciate that. If you find you need to wait till everyone is back at the office, I do understand that, but will be setting a firm date once that happens.

requester to pay for the agency's time in pulling together records for *in camera* review, that OIP also would not pay for the records, and that providing the *in camera* records was part of an agency's burden to factually establish the applicability of its asserted justification for withholding records. In that conversation, OIP again offered the possibility that a representative sampling of *in camera* records could be provided for OIP's review.

ERS did not provide records for *in camera* review, either in full or a representative sampling, at that time, and the emergency suspension of the UIPA deadlines continued until August 5, 2021. On August 11, 2021, OIP wrote to inform the AG that the suspension of UIPA deadlines had been lifted and to set a deadline for ERS to provide the *in camera* records and detailed justification for withholding.

The AG, on behalf of ERS, finally responded to the appeal in a letter to OIP dated August 26, 2021 (August 26 Response), which included an attached 21 pages of records, or 11 emails, for OIP's *in camera* review, which the response asserted represented all responsive records. The letter did not set out legal or factual arguments to justify withholding those 11 emails, nor did it explain the discrepancy between its earlier estimates of thousands of responsive records and the minimal amount of records it ultimately produced.

On April 16, 2022, OIP wrote to the AG questioning the discrepancy between the minimal number of records produced and ERS's earlier estimates, and asking ERS to explain:

(1) what ERS did to estimate the time it would need for search, review, and segregation when preparing its Notice to Requester, (2) how and when ERS searched for responsive records in responding to this appeal, (3) what steps ERS took to ensure the records subject to this appeal were preserved while the appeal was pending, and (4) any other information you believe is relevant to explain or justify the discrepancy between ERS's previous estimates of the number of responsive records it maintained and the number of responsive records it now claims to maintain.

The AG, on behalf of ERS, provided a response to OIP's April 16 letter and a supplemental response to the appeal in a letter dated May 18, 2022 (May 18 Response). The letter attached an additional 22 pages of responsive records, comprising 8 emails that the AG stated had been "overlooked" in the earlier search for responsive records. The AG asserted that "ERS did not dispose of any records

subject to this appeal” and that it was “not clear how the 1,800 page estimate<sup>4</sup> was determined.”

According to the May 18 Response, ERS made no effort to search for responsive records in 2018, either prior to sending out its notices to Requester or prior to its due date for providing *in camera* records in response to the appeal, but apparently decided for itself, without consulting OIP, that the request and appeal had been abandoned after it sent its May 23 NTR. In June 2020, ERS’s information technology (IT) department advised the AG that it was able to retrieve the requested emails, but it was again unknown how the estimates provided to OIP at that time were determined, and the May 18 Response does not indicate that ERS searched for responsive records at that time. When the emails<sup>5</sup> were ultimately retrieved by ERS’s IT department in August 2021, it was only possible to retrieve all emails sent or received by an account during a block of time, not to filter by sender or receiver or word search.<sup>6</sup> Thus, ERS (through the AG) determined what emails were responsive based on a combination of reviewing subject lines, word searches, and reading individual emails.

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<sup>4</sup> The May 18 Response stated that the 1,800 page estimate could have referred to either “(1) the number of pages of responsive documents; or (2) the number of pages that had to be reviewed in order to identify and segregate responsive documents.” OIP reminds ERS that there is no legal basis for charging a requester copy fees for records that are not actually provided to that requester, as according to this statement ERS intended to do. See HRS § 92-21 (authorizing agencies to charge per page for public records provided to a member of the public); HAR § 2-71-19(a) (authorizing agencies to charge “other lawful fees” in addition to the fees authorized for its search, review, and segregation time). An agency’s per-page copy charge should be based on the number of pages to be actually provided to a requester, not additional pages that were reviewed but withheld or determined to be non-responsive, and not extra pages created in the course of producing the redacted record actually provided to the requester.

<sup>5</sup> According to the May 18 Response, ERS retrieved emails for four email accounts maintained by ERS, and did “not have access to [the Former CIO’s] personal emails or those of the ERS trustees.” As discussed supra, ERS’s obligation was limited to those records it maintains, which would not usually include personal accounts of its employees or trustees. However, as to both those emails and the requested materials provided to the ERS Board of Trustees at its January and February meetings, OIP again reminds ERS of its obligation to notify a requester at the time it responds to a request that it does not maintain specified records, which it should have done here. HAR § 2-71-14(c)(1).

<sup>6</sup> OIP assumes this limitation was because the emails were not retrieved until after they had been electronically archived, and thus the usual email program’s ability to filter by sender, receiver or term was not available in the way it would have been if ERS had done its search in 2018 when it was first told to provide records for *in camera* review.

The May 18 Response also provided the legal argument for withholding requested records that previous responses had omitted. ERS analyzed the strength of the Former CIO’s privacy interest as compared to the public interest in disclosure using the five non-exclusive factors set out in OIP Opinion Letter Number 10-03 as being relevant when analyzing a government employee’s privacy interest in personnel-related information. The Hawaii Supreme Court recently followed that opinion, stating that those factors provided “a nice starting point for HRS Section 92F-14(a) balancing” even though they are not exclusive or dispositive. Honolulu Civil Beat Inc. v. Dep’t of the AG, No. SCAP-21-0000057, 2022 Haw. LEXIS 66 at \*17-\*18 (Apr. 26, 2022) (CB v. AG), citing State Org. of Police Officers v. City & Cty. of Honolulu, 149 Hawai’i 492, 517, 494 P.3d 1225, 1250 (2021) and OIP Op. Ltr. No. 10-03. ERS also argued that the attorney-client privilege applied to protect two emails, without citing to any of the UIPA exceptions OIP has previously recognized as encompassing the attorney-client privilege, as discussed infra.

## **DISCUSSION**

### **I. Whether Records Identified as Responsive Must Be Disclosed**

In its May 23 NTR, ERS cited to the UIPA’s privacy and frustration exceptions, subsections 92F-13(1) and (3), HRS, as its basis for withholding the requested records. In its August 26 Response, ERS cited to sections “92F-03((1). (3), (4) [sic]” and 92F-14(b), HRS, as its justification for withholding information relating to the Former CIO’s departure from the records produced for OIP’s *in camera* review at that time. OIP assumes ERS intended to refer to the UIPA exceptions set out in subsections 92F-13(1), (3), and (4), HRS; however, ERS’s August 26 Response did not provide legal or factual arguments as to why it believed those exceptions to disclosure applied. Finally, ERS’s May 18 Response argued that the responsive records could be variously withheld under the UIPA’s privacy exception, subsection 92F-13(1), HRS, or the attorney client privilege.<sup>7</sup>

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<sup>7</sup> OIP reminds ERS that it must cite to the UIPA to justify withholding records, but notes that OIP has previously concluded that the attorney-client privilege is recognized under the UIPA exceptions set out in section 92F-13(2), (3), and (4), HRS, as explained in OIP Opinion Letter Number F14-01 at 6:

Opinion Letter Number 91-23 determined that various UIPA exceptions to disclosure of government records recognize the attorney-client privilege. Section 92F-13(2), HRS, provides an exception for “[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” as under the attorney-client privilege. Section 92F-13(3), HRS, provides an exception for

As a preliminary matter, OIP notes that the responsive records include both personal contact information and direct business contact information. OIP has previously concluded that both personal contact information and direct business contact information may generally be withheld under the UIPA's privacy and frustration exceptions respectively, assuming it has not been previously made public. E.g., OIP Op. Ltrs. No. F17-05 at 12 and F17-02 at 14-15. Thus, such information may properly be redacted from the responsive records.

### **A. The Privacy Exception Allowed ERS to Withhold a Portion of the Records**

The UIPA's privacy exception allows an agency to withhold records whose disclosure "would constitute a clearly unwarranted invasion of individual privacy." HRS § 92F-13(1). Personnel-related information about government employees<sup>8</sup> is

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"[g]overnment records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function" such as the attorney-client privilege. Section 92F-13(4), HRS, excepts "[g]overnment records, which, pursuant to state or federal law. . . are protected from disclosure" as under the attorney-client privilege. OIP Op. Ltr. No. 91-23 at 8-9.

<sup>8</sup> More specifically, subsection 92F-14(b)(4), HRS, recognizes a significant privacy interest in:

Information in an agency's personnel file, or applications, nominations, recommendations, or proposals for public employment or appointment to a governmental position, except:

- (A) Information disclosed under section 92F-12(a)(14); and
- (B) The following information related to employment misconduct that results in an employee's suspension or discharge:
  - (i) The name of the employee;
  - (ii) The nature of the employment related misconduct;
  - (iii) The agency's summary of the allegations of misconduct;
  - (iv) Findings of fact and conclusions of law; and
  - (v) The disciplinary action taken by the agency;

when the following has occurred: the highest non judicial grievance adjustment procedure timely invoked by the employee or the employee's representative has concluded; a written decision sustaining the suspension or discharge has been issued after this procedure; and thirty calendar days have elapsed following the issuance of the decision or, for decisions involving county police department officers, ninety days have elapsed following the issuance of the decision[.]

HRS § 92F-14(b)(4).

statutorily recognized as an example of information that carries a significant privacy interest, and thus, whose disclosure would constitute a clearly unwarranted invasion of personal privacy unless “the public interest in disclosure outweighs the privacy interests of the individual.” HRS § 92F-14(a). The Hawaii Supreme Court recently discussed the limits of what information about government employees may be considered personnel-type information for the purpose of the UIPA’s privacy exception, drawing a distinction between “information that, though not physically located in any agency’s personnel files, is, in essence, a personnel record” by dint of its subject matter and its potential use, and “information about the day-to-day work<sup>9</sup> of an agency’s personnel.” CB v. AG, 2022 Haw. LEXIS 66 at \*9-\*10 and \*11 n. 8. Here, the responsive records include other information in addition to that directly concerning the Former CIO’s departure; however, to the extent the records do address the Former CIO’s departure, OIP finds that they are personnel-related information of the Former CIO for the purpose of the UIPA’s privacy exception.

### **1. Action Taken by a Board Subject to Sunshine Law**

As discussed above, Requester originally sought records related to the Former CIO’s “termination,” whereas ERS has taken the position that there was no termination. Among the information discussed in the responsive records were references to an action taken with respect to the Former CIO’s employment by ERS’ Board of Trustees, a board subject to part I of chapter 92, HRS, Hawaii’s Sunshine Law, at its meeting held February 12, 2018. Although the motion, discussion, and vote were all done in an executive session closed to the public, OIP has previously concluded that the “motions made and the votes cast by individual members regarding [a board’s former executive director’s] dismissal are no longer protected” once the board has acted, because disclosure at that point would no longer defeat the executive session’s purpose of protecting individual privacy. OIP Op. Ltr. No. 06-07 at 5; see also HRS § 92-9(b) (allowing minutes of an executive meeting to be withheld “so long as their publication would defeat the lawful purpose of the executive meeting, but no longer”). OIP further observed that although the former executive director “may have a privacy interest in the actual vote recorded by individual member that is separate from his interest in the fact that his employment was terminated, OIP believes that the public’s interest here in knowing how board members -- especially elected board members -- are performing their individual functions outweighs that privacy interest.” Id. (footnote omitted).

Here, OIP likewise concludes that the action taken by the ERS Board of Trustees, as reflected in the responsive records, must be disclosed. Once the board’s proposal regarding the Former CIO’s employment became a decision, its disclosure would no longer defeat the executive session’s purpose because the former CIO’s

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<sup>9</sup> ERS has not argued here that employees other than the Former CIO had a privacy interest in the responsive records.

privacy interest in the board's proposed action was outweighed by the public interest in knowing an action actually taken by a Sunshine Law board. ERS must disclose the action taken by its Board of Trustees and all references to the nature of the Former CIO's departure.

## 2. Waiver by Disclosure

OIP has previously found that objections to disclosure are waived when an individual has publicly disclosed information claimed to be private, or when an agency has publicly disclosed information it now objects to disclosing. E.g., OIP Op. Ltr. No. 98-05 at 24-25. Here, as set out in the Facts section I supra, the Institutional Investor Article published an email<sup>10</sup> from ERS's Executive Director to all employees dated February 15, 2018, but did not specify how the email was obtained. The Former CIO was not listed as a recipient of the email, and there is no reason to believe he made it public. There is likewise no evidence that ERS as an agency disclosed the email, but since the email's sender and listed recipients are all internal to ERS, it is clear that someone from within ERS must have passed the email on to a non-recipient, possibly with one or more intermediaries between that disclosure and the disclosure to the news media.

OIP is thus faced with the question of whether the publication of the email in a news article waived ERS's ability to object to disclosure of the email under the UIPA, in the absence of evidence that ERS authorized disclosure of the email or even that the presumed disclosure by a recipient within ERS was made to the news media rather than a private individual who passed it on further. OIP finds that the inference that someone within ERS must have originally disclosed the email to someone outside ERS is insufficient to support a conclusion that ERS itself waived its objections to disclosure.

Nevertheless, OIP also finds that the publication of the email did effectively put its contents into the public realm, which substantially lessened the Former CIO's privacy interest in it. Given the elevated public interest in ERS's handling of the Former CIO's departure, as discussed below, OIP finds that the public interest in disclosure of the email published in the Institutional Investor Article outweighs the Former CIO's privacy interest in its contents, and concludes that the email may not be withheld under the UIPA's privacy exception.

OIP notes that the responsive records also include a copy of the Star-Advertiser Article, which was attached to an email. To the extent ERS is arguing that the Former CIO has a significant privacy interest in a published news article,

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<sup>10</sup> News articles also referred to unnamed sources, sometimes described as an "official" or "trustee," but OIP does not find that such anonymously sourced quotes rise to the level of a potential waiver.

OIP declines to so find, and instead concludes that ERS may not withhold it under the UIPA's privacy exception.

### **3. Information Required to be Public by Section 92F-12(a)(14), HRS**

Specified information about government employees is required to be public “[a]ny other provision in this chapter to the contrary notwithstanding,” and is excluded from the information in which subsection 92F-14(b)(4), HRS, recognizes a significant privacy interest. HRS §§ 92F-12(a)(14) and -14(b)(4)(A). Of relevance here, a government employee's dates of first and last employment are public; thus, the Former CIO's last day of employment must be disclosed. Although not expressly listed in subsection 92F-12(a)(14), HRS, employee leave status is similar to the information mandated to be public and OIP has long held that it cannot be withheld under the UIPA's privacy exception. OIP Op. Ltr. No. 90-17. Here, too, OIP concludes that the Former CIO's leave status prior to his last day of employment must be disclosed.

### **4. Balancing Individual Privacy and Public Interest in Personnel-Related Information**

The remainder of the responsive records do not all comprise personnel-related information. Some, including all the records provided as part of the August 26 Response, are media inquiries (including one from Requester) about the status of the Former CIO with replies and forwards within ERS that reveal no personnel information about the Former CIO or any other employee. The requested records that do include personnel-related information about the Former CIO's departure also include some more general comments in email forwards or replies, which do not refer to the Former CIO or his employment.

The analysis OIP has previously adopted to assess the balance between an individual's significant privacy interest and the public access interest in personnel-type records is set out in OIP Opinion Letter Number 10-03 (Opinion 10-03), and was followed with further discussion in CB v. AG, *supra*. As noted in both Opinion 10-03 and CB v. AG, there are five factors<sup>11</sup> that are typically relevant in assessing this balance, which are neither exclusive nor dispositive, but provide a “nice starting point” for balancing the competing interests. Those factors are often applied to records reflecting some form of actual or alleged employee misconduct, whereas the responsive records here do not refer to any misconduct, either actual or

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<sup>11</sup> The five factors to be considered are (1) the government employee's rank; (2) the degree of wrongdoing and strength of evidence against the employee; (3) whether there are other ways to obtain the information; (4) whether the information sought sheds light on a government activity; and (5) whether the information sought is related to job function or is of a personal nature.

alleged. While media reports suggested some public speculation as to whether any type of misconduct was involved in the Former CIO's departure, OIP notes that the ERS ED was quoted in the Institutional Investor Article as stating that there were "no underlying concerns about fiscal or financial conduct, sexual harassment, or fraudulent or criminal behavior[.]" However, as these factors are not intended to be either exclusive or dispositive, they are still a useful starting point, with greater weight given to the factors that are applicable even where no misconduct has been alleged.

For the first factor concerning a government employee's rank, OIP has previously looked at an employee's administrative responsibilities including number of employees supervised, the amount of public funds overseen by the employee, and the employee's own salary. E.g., OIP Op. Ltr. No. 04-07 at 6-7. OIP finds that as a senior ERS administrator, the Former CIO was not a line-level employee but did not have administrative responsibilities comparable to those of a department head, university president, or similar figure. However, the Former CIO was responsible for overseeing the investment of public funds valued at "over \$16.4 billion as of June 30, 2019." OIP Op. Ltr. No. 21-02 at 3. On balance, then, OIP finds that the first factor weighs in favor of public disclosure.

The second factor regarding the degree of wrongdoing and strength of evidence against the employee is the one whose applicability is questionable in this matter: since nothing in the responsive records or otherwise suggests any wrongdoing by the Former CIO, assessment of the degree of wrongdoing and strength of evidence against him seems irrelevant. The fact that there is no evidence or allegation of any wrongdoing in the responsive records could weigh either against public disclosure, on the theory that the absence of any allegation of wrongdoing is effectively the opposite of strong evidence of serious wrongdoing (which would weigh in favor of disclosure), or in favor of public disclosure, on the theory that there is no information about alleged misconduct in which the Former CIO may have a significant privacy interest. On balance, OIP concludes that this factor does not weigh in favor of public disclosure, but does not particularly weigh against it either. This factor is simply not relevant to the information at issue in this appeal.

The third factor asks whether the information may be obtained through means other than access to the responsive records. As demonstrated by the media coverage of the Former CIO's departure, it was possible to obtain various statements both on and off the record on that subject and even from a leak of at least one internal email, but ERS's internal statements regarding the Former CIO's departure are otherwise unavailable other than through access to the responsive records. Thus, OIP finds that this factor weighs slightly in favor of public disclosure.

The fourth factor looks at whether the information sheds light on a government activity. OIP has previously said in the context of the University of Hawaii that “the specific public interest in disclosure is to allow the public to scrutinize the work of the Board of Regents, which is ultimately responsible for managing the University system, and to review [the university president’s] job performance.” OIP Op. Lt. No. 04-07 at 7. The CB v. AG Court said with regard to this factor:

In Peer News I, we recognized that “the appropriate concern of the public as to the proper performance of public duty is to be given great weight’ when balanced against competing privacy interests.” [Citations omitted.]

CB v. AG, 2022 Haw. LEXIS 66, at \*19. Here, OIP finds that the responsive records shed considerable light on ERS’s management, and in particular, its and its Board of Trustees’ management of senior personnel. In this particular situation, OIP further finds that ERS’s handling of the Former CIO’s departure gave rise to widespread speculation that the Former CIO’s departure was connected to investments of public money gone extremely wrong, which further enhanced the public interest in knowing whether the responsive records offered any support for such a theory. OIP finds that this factor weighs in favor of public disclosure by shedding light on government activity.

The fifth factor asks whether the information is related to job function or is of a personal nature. This factor distinguishes the strength of an employee’s privacy interest in issues involving an employee’s personal life that may be noted in personnel-type records from information purely focused on the employee’s role as an employee. For instance, the CB v. AG Court distinguished “commentary on colleagues’ interpersonal dynamics,” which was related to job function, from gossip about employees’ personal lives, which would be of a personal nature. CB v. AG, 2022 Haw. LEXIS 66, at \*19. None of the information in the responsive records relates to the Former CIO’s personal life; all references to him are focused entirely on his role as a recently-departed employee. Thus, this factor weighs in favor of public disclosure.

Overall, then, OIP finds that the Former CIO’s privacy interest in personnel information in the responsive records is somewhat diminished by his responsibility for billions of dollars of public funds, and that there is a strong public interest in the records insofar as they shed light on ERS’s management, and its oversight of the CIO in particular. However, OIP does not find that the public disclosure interest outweighs the CIO’s privacy interest for all information in the responsive records. In particular, OIP finds that the public disclosure interest in information about specific conditions placed on the Former CIO in connection with his departure and discussion of a possible exit agreement between the Former CIO and ERS do not

outweigh the Former CIO's privacy interest in such information. OIP therefore concludes that information was properly withheld under the UIPA's privacy exception to disclosure. Specifically, paragraph 3 of the email from the ERS ED to members of the ERS Board of Trustees dated February 14, 2018; the last two sentences of paragraph 1 and all of paragraph 2 of the letter dated February 12, 2018, from the Chair of ERS's Board of Trustees to the Former CIO; and paragraph 1 of the email from the ERS ED to members of the ERS Board of Trustees dated February 16, 2018 may be redacted under the UIPA's privacy exception wherever they appear (including as attachments or in email chains).

**B. The Frustration Exception Allowed ERS to Withhold Attorney-Client Privileged Advice From its Deputy AG**

ERS also cited to the UIPA's frustration exception, section 92F-13(3), HRS, as authorizing it to withhold records, and in its May 18 Response argued more specifically that the attorney-client privilege applied to a portion of the responsive records. As noted above including in footnote 7, OIP has previously concluded that the attorney-client privilege is recognized under the UIPA exceptions set out in subsections 92F-13(2), (3), and (4), HRS. OIP Op. Ltr. No. F14-01 at 6. ERS argued that the attorney-client privilege protected an email from the ERS ED to members of the ERS Board of Trustees dated February 14, 2018, both in its original form and together with an email dated February 16, 2018, in which the ERS ED forwarded it to a Board of Trustees member left out of the original. OIP has already concluded that paragraph 3 of that email may be withheld under the UIPA's privacy exception. OIP agrees with ERS that paragraph 1 of the email relates to legal advice from the AG to ERS, and as such concludes it is attorney-client privileged information that may be withheld under section 92F-13(2), (3), and (4), HRS, both in its original form and where it appears as part of an email chain. However, the remainder of that email and the later email forwarding it to an individual Board of Trustees Member do not include attorney-client privileged information, and OIP thus concludes that ERS is not entitled to withhold the remainder based on the attorney-client privilege as recognized by the UIPA.

**II. Whether ERS's Response to the Request and this Appeal Complied with the UIPA and OIP's Administrative Rules Promulgated Thereunder**

The UIPA requires OIP to adopt rules setting forth, among other things, agency procedures for processing record requests, and a process for appeal of denials to OIP. HRS § 92F-42(12) (2012). Those procedures are set forth in chapters 2-71 and 2-73, HAR. Because of the extreme discrepancy between ERS's estimates of the volume of responsive records, as provided to Requester in ERS's May 23 NTR and to OIP in the course of this appeal, and the volume of responsive records ultimately produced by ERS for OIP's *in camera* review, OIP will consider

whether ERS's response to the request and subsequently to this appeal were consistent with the UIPA's requirements, including processes set out in administrative rules as required under the UIPA.

### **A. ERS Conducted a Reasonable Search**

OIP first considers whether the search for responsive records ERS ultimately made was a reasonable one. OIP has previously concluded that a reasonable search 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 which can be reasonably expected to produce the information requested.” OIP Op. Ltr. No. 97-8 at 5. As discussed above, ERS did not search for responsive records until August 2021, at which time its IT staff retrieved all emails sent or received for the relevant addresses during the requested six-month period as a block. This produced tens of thousands of individual emails. ERS' Deputy AG then used a combination of word searches, looking at email headers, and reading individual emails to determine which were responsive.<sup>12</sup> ERS's initial search identified only media inquiries regarding the CIO's departure as responsive, and only after being asked for further explanation did ERS identify additional emails that were clearly responsive and included both the Former CIO's name and likely search terms. While this certainly suggests that ERS's initial search was cursory and not reasonably calculated to uncover all relevant documents, ERS's follow up search does appear to have been somewhat more thorough.

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<sup>12</sup> This method of search was undoubtedly time-intensive. Requester was not seeking all emails from the relevant accounts during the identified time period, but only those between specified mail accounts and relating to the former CIO's departure from ERS. As a general rule, an agency may charge fees based on the actual time required for it to process a record request, even if the agency's record-keeping practices caused it to take more time than it might have with a different system. However, in limited circumstances OIP has previously concluded that an agency cannot require a requester to bear the cost of its record-keeping practices when those practices are inconsistent with UIPA requirements. See OIP Op. Ltr No. 00-02 (concluding that an agency could not charge a requester for its review and segregation time to remove individuals' private information from the agency's final decision that was categorically made public under the UIPA).

Here, similarly, OIP finds that the search time required to identify responsive records would have been significantly less if ERS had located the responsive records to provide for OIP's *in camera* review by May 23, 2018, the deadline OIP set for ERS's appeal response after Requester clarified the scope of his request. At that time, all responsive emails would have been less than a year old, not yet archived, and able to be much more readily filtered by sender or recipient and term-searched to produce only those relating to the limited subject matter of the request. It was ERS's decision to repeatedly delay

Although ERS did not identify any emails sent prior to the Former CIO's departure, OIP does not find the absence of earlier emails to imply either that ERS did not search emails from before that date or that there were additional responsive emails that were disposed of between the time the appeal was filed and ERS's search. Given ERS's assertion that the Former CIO was an at-will employee who could be discharged at any time without cause, it is entirely plausible that ERS's leadership would not have documented in writing, by email or otherwise, potential causes<sup>13</sup> for such a discharge. Lack of such documentation is also consistent with the Former CIO's reported surprise at the ERS Board of Trustees' action, and with ERS's assertion that it had no underlying concerns of any sort of misconduct involving the Former CIO.

OIP further agrees with ERS that it did not "maintain" emails in the non-ERS-provided email accounts of members of the ERS Board of Trustees, thus making it unable to provide such emails except insofar as they also appeared in the email account of the ERS ED or other employee. OIP also notes that the Sunshine Law makes it generally inadvisable for members of a Sunshine Law board to communicate by email, as they risk violating the law by doing so.<sup>14</sup> On the whole,

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providing *in camera* records that ultimately required a time-consuming manual search of all emails, on all topics and to and from all other addresses, for the six-month period at issue. OIP therefore concludes that it would be inequitable for ERS to require Requester to bear the cost of its own decision to delay searching.

<sup>13</sup> While there may well have been emails referring to management or other issues that played a role in ERS's actions with respect to the Former CIO, unless they explicitly connected such issues to the Former CIO's departure (actual or prospective), ERS could reasonably have treated them as non-responsive to the request. A reasonable search under the UIPA is anticipated to be ministerial in nature and capable of being done by a clerical employee, as reflected by the allowable search fee rate. See HAR § 2-71-31 (allowing \$2.50 per 15 minutes for search time, as compared to \$5.00 per 15 minutes for review and segregation of records). Since the request as clarified was for records relating to the Former CIO's departure, deciding whether records that on their face were not related to his departure were nonetheless responsive would have entailed a judgment call not required for a reasonable search under the UIPA.

<sup>14</sup> The responsive records include two emails sent by the ERS ED to all members of the Board of Trustees. While the ERS ED himself is not a member, it appears that at least two members did reply-all to not only the ERS ED but also other members. OIP is not asked in this appeal to determine whether these emails were sent in violation of the Sunshine Law, and given the brief and non-substantive nature of the board member responses, OIP declines to determine *sua sponte* whether they constituted a discussion of board business in violation of the Sunshine Law. However, OIP reminds the ERS Board of Trustees through this opinion to exercise strict caution in its members' email communication with one another to avoid the potential for Sunshine Law violations. See

OIP finds that ERS's two searches together constituted a reasonable search for responsive records and therefore concludes that ERS followed the UIPA's requirements in this regard, albeit not until well after this appeal was filed.

**B. ERS Failed to Provide Requester a Good Faith Estimate of Fees in Response to His Request**

An agency's written response to a record request is required to include a "good faith estimate of all fees that will be charged to the requester under section 2-71-19, [HAR,]" which authorizes fees for an agency's search, review, and segregation of records. HAR § 2-71-14(a)(2)(A). The UIPA's legislative history reflects the intent of the legislative committee that added those fees to the bill that became the UIPA:

It is the intent of your Committee that such charges for search, compilation, and segregation shall not be a vehicle to prohibit access to public records. It is the further intent of your Committee that the Office of Information Practices move aggressively against any agency that uses such charges to chill the exercise of first amendment rights.

H. Stand Comm. Rep. No. 342-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 969, 972 (1988). As noted in OIP's Impact Statement accompanying the draft rules that were promulgated as chapter 2-71, HAR, "[w]hen informed of the estimated fees in the notice, the requester may choose to modify or abandon the request to reduce the fees that will be assessed." § 5-41-14, Impact Statement for Proposed Rules of the Office of Information Practices on Agency Procedures and Fees for Processing Government Record Requests (1998), available at OIP, Impact Statement for OIP's Administrative Rules, <https://oip.hawaii.gov/impact-statement-for-oips-administrative-rules/>.

In other words, the clear purpose of the "good faith" estimate of fees is to provide a requester with sound information about the anticipated agency time required and fees to be paid to process the request as submitted, so the requester can make an informed choice whether to pursue, modify, or even abandon it. The fee estimate is specifically not intended to be "a vehicle to prohibit access to public records," and the Legislature instructed OIP to "move aggressively" against such use of the UIPA's fees.

In response to OIP's inquiry as to how it calculated its estimate in response to the clarified request of \$5,140, including 323 hours of search, review, and segregation time and copy fees for an estimated 1,800 pages of responsive records to

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generally OIP Op. Ltr. No. F19-03 (discussing the legality of board members' email communications).

be at least partially disclosed, ERS responded that its then Deputy AG assisted in preparing the estimate but could not recall how it was reached. ERS was uncertain as to whether the 1,800 pages for which copy fees were to be charged actually represented an estimate of how many pages it anticipated disclosing, or all pages it expected to look at in its search for responsive records. ERS did state that no records were actually reviewed in the course of preparing the estimate.

It can be difficult to provide an exact fee for a record request before the work of searching for, reviewing, and segregating records is performed, especially for a search that results in a voluminous number of responsive documents, and that is why the rule requires an **estimate** rather than an exact accounting of fees. However, that estimate must still be made in good faith. OIP would be remiss in its duties if it accepted as having been made in good faith an estimate of thousands of dollars of fees for hundreds of hours of time, with no explanation of how the estimate was reached and for which the agency did not pull any potentially responsive records to assess what might be in them, how long review might take, what might need segregation, and how long it might take for a full search.

To the contrary, it appears that ERS's estimate was instead intended as "a vehicle to prohibit access to public records," contrary to the UIPA's clear legislative intent. It in fact had that effect, preventing Requester as a practical matter from pursuing access to those records ERS was prepared to disclose while he waited for OIP's decision on his appeal of ERS's partial denial. ERS's repeated delays in providing the responsive records for OIP's *in camera* review, which were based on similarly inaccurate assertions about the volume of responsive records, further support a finding that the estimate was created with an eye more to preventing public access to the responsive records than to accurately informing Requester of the likely cost of pursuing the request based on the fees authorized under the UIPA.

Nonetheless, OIP does not need to actually find a deliberate intent by ERS to inflate its estimate in order to conclude that the estimate was not made in good faith. A failure to make even a cursory effort to accurately estimate the volume of responsive records an agency maintains is sufficient by itself to support the conclusion that the agency failed to provide the requester a good faith estimate as required by rule, and thus violated the UIPA. OIP so concludes in this case.

Given this conclusion and the legislative instruction for OIP to "move aggressively" against bad faith use of the fees allowed under the UIPA, OIP further concludes that notwithstanding ERS's actual time spent on search, review, and segregation, because its estimate of fees was not a "good faith" one as required by section 2-71-14(a)(2)(A), HAR, ERS may not now charge Requester the fees otherwise authorized, assuming he chooses to pursue his request.

## RIGHT TO BRING SUIT

Requester is entitled to file a lawsuit for access within two years of a denial of access to government records. HRS §§ 92F-15, 92F-42(1) (2012). An action for access to records is heard on an expedited basis and, if Requester is the prevailing party, Requester is entitled to recover reasonable attorney's fees and costs. HRS §§ 92F-15(d), (f) (2012).

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

This 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 appeal. OIP's role herein is as a neutral third party.

### **OFFICE OF INFORMATION PRACTICES**

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APPROVED:

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