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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: Robert H. Lee, President
Hawaii Fire Fighters Association
Agency: Honolulu Fire Commission
Date: January 31, 2024
Subject: Evaluations of Fire Chief (U APPEAL 21-17)

Requester seeks a decision as to whether the Honolulu Fire Commission (Commission) properly denied his request for records under Part II of the UIPA.

Unless otherwise indicated, this decision is based solely upon the facts presented in a Request for Assistance from Requester to OIP dated July 14, 2020, with enclosures; a letter from OIP to Requester dated July 28, 2020; a letter from Requester to OIP dated November 4, 2020, with enclosures; an email from the Hawaii Fire Fighters Association (HFFA) to OIP dated November 9, 2020, with attachment; a letter from Requester to OIP dated November 9, 2020; an email from HFFA to OIP dated December 4, 2020; a letter from Requester to OIP dated January 7, 2021; a letter from OIP to Requester dated January 14, 2021; an email from HFFA to OIP dated January 22, 2021; a letter from OIP to the Commission dated February 18, 2021, with enclosures; and a letter from the Commission to OIP dated July 27, 2021, with enclosures including records for OIP's *in camera* review.

QUESTIONS PRESENTED

1. Whether the Commission may withhold final performance evaluations for the Honolulu Fire Chief (Fire Chief) under the UIPA's privacy exception, section 92F-13(1), HRS.

2. Whether the Commission may withhold individual Commissioners' preliminary evaluations of the Fire Chief under the UIPA's privacy exception, section 92F-13(1), HRS.

BRIEF ANSWERS

1. No. Considering the relevant factors together, OIP finds that on balance, the public interest in disclosure outweighs the Fire Chief's privacy interest in final performance evaluations of the Fire Chief. HRS § 92F-14(a) (2012). OIP therefore concludes that the UIPA's privacy exception does not authorize the Commission to withhold the final evaluations, and it must disclose them without redaction under the UIPA. HRS § 92F-13(1) (2012).

2. Yes. OIP finds that on balance, the public interest in disclosure does not outweigh the Fire Chief's privacy interest in individual Commissioners' preliminary evaluations of the Fire Chief. HRS § 92F-14(a). The Commission may therefore withhold the individual evaluations under the UIPA's privacy exception. HRS § 92F-13(1).

FACTS

Requester, in his capacity as HFFA president, made written requests dated July 1 and 29, 2020, for copies of the evaluations for the Fire Chief for the years 2017, 2018, and 2019. Specifically, he requested "the completed performance evaluation" for 2019 (on July 1, 2020) and for 2017 and 2018 (on July 29, 2020). On August 5, 2020, he requested the "current criteria – or an unscored evaluation – utilized specifically for the annual performance evaluation" of the Fire Chief. On October 30, 2020, the Commission denied access to the completed performance evaluations for 2017 and 2018 (Final Evaluations) in a Notice to Requester and denied access to "[i]ndividual Commissioner performance evaluations" for 2019 (Individual Evaluations) in a separate Notice to Requester (collectively NTRs), citing to section 92F-13(1), HRS, as its justification for doing so. The Commission granted access to an unscored evaluation form.

As part of the process for creating a Final Evaluation, each individual Commissioner completes an Individual Evaluation, which according to the Commission is "forwarded to the Commission's legal counsel for compilation, and [does] not reflect subscore corrections or other adjustments based on further Commission discussions." As reflected in the NTRs, the Commission interpreted the request for 2017 and 2018 evaluations as being for Final Evaluations, but it interpreted HFFA's request for "the completed performance evaluation of [the Fire Chief] as conducted by the [Commission] for the year 2019," as being for Individual Evaluations. The Commission also described the request it was responding to as

being dated July 13, whereas the request for the 2019 Final Evaluation that is at issue in this appeal was made on July 1, 2020, so possibly the Commission's response conflated the July 1 request with a different request made by HFFA that is not part of this appeal. In any case, the Commission requested in its response that OIP specifically address both Final Evaluations and Individual Evaluations and provided OIP with the 2019 Individual Evaluations and the 2017 and 2018 Final Evaluations for *in camera* review.¹ OIP will therefore address both the Final Evaluations and the Individual Evaluations in this opinion.

DISCUSSION

I. Privacy Exception as Applied to Government Personnel Information

A. Statutory Requirements

It is uncontested that both the Final Evaluations and the Individual Evaluations are government records subject to the UIPA, and as such must be disclosed unless an exception to disclosure applies. HRS §§ 92F-11 and -13 (2012). The Commission argued that the Final Evaluations and Individual Evaluations could be withheld under the UIPA's privacy exception, section 92F-13(1), HRS, to avoid a "clearly unwarranted invasion of personal privacy." The Commission noted that OIP's only formal opinion requiring disclosure of a government employee's evaluation was OIP Opinion Letter Number 04-07 (Opinion 04-07), which set out relevant factors for making such a determination but specifically did not make any determination as whether the UIPA required disclosure of other government employees' evaluations. According to the Commission, in the absence of specific guidance regarding the Fire Chief it opted to take a cautious approach and withhold the evaluations, pending OIP's determination of whether and to what extent they must be disclosed.

An agency may withhold "[g]overnment records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy." HRS § 92F-13(1). Section 92F-14(b), HRS, provides a non-exclusive list of information in which an individual has a significant privacy interest, which includes "information comprising a personal recommendation or evaluation" and "information in an agency's personnel file, or applications, nominations, recommendations, or proposals for public employment or appointment to a government position[.]" HRS § 92F-14(b)(4), (8) (Supp. 2022). The personnel-related information in which the UIPA recognizes a significant privacy interest includes not just an employee's

¹ Although the Commission did not include the 2019 Final Evaluation in the records provided for *in camera* review, the 2018 and 2017 Final Evaluations are a sufficient example of the information contained in Final Evaluations for OIP to make a determination regarding Final Evaluations generally.

official personnel file but also “information that, regardless of its physical location, is akin to that maintained by an agency in its personnel files.” Honolulu Civil Beat v. Department of the Attorney General, 151 Haw. 74, 80, 508 P. 3d 1160, 1166 (2022) (CB v. AG). Even where an individual has a significant privacy interest in information, disclosure of that information is not a “clearly unwarranted invasion of personal privacy if the public interest in disclosure outweighs the privacy interests of the individual.” HRS § 92F-14(a).

B. OIP and Court Opinions on Personnel Information

In Opinion 04-07, OIP found that the then-president of the University of Hawaii (UH President) had a significant privacy interest in the information contained in his evaluation, but it was “substantially diminished because he is a public figure by virtue of his position as [UH] President[.]” Opinion 04-07 at 6 (footnote omitted), cited in Civil Beat Law Center v. Honolulu Police Commission, 144 Haw. 466, 481; 445 P. 3d 47, 62 (2019) (CBLC v. Commission). OIP noted that “an individual’s privacy interest in information that is ‘highly personal and intimate’ may not be diminished simply because the individual is a public figure.” Id. at 6 n. 11; see also CBLC v. Commission, 144 Haw. at 481, 445 P. 3d at 62 (noting that “[p]eople have a legitimate expectation of privacy in ‘highly personal and intimate’ information.”) However, OIP found that the records at issue did not contain such information. Id. With respect to the public interest in disclosure, OIP found 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 UH President’s] job performance.” Id. at 7.

OIP ultimately found that “the competing privacy interest of [the UH President] and the public’s right to know are very closely balanced” but that the public interest outweighed the UH President’s significant privacy interest. Opinion 04-07 at 12. OIP noted that although the factors considered under the UIPA differ in some ways from those considered in cases from other states discussed in the opinion, “the result reached in those cases, i.e., that the public interest in the evaluation of an upper level public employee outweighs the employee’s privacy interest, is the appropriate result under the UIPA.” Opinion 04-07 at 13. OIP also took note of a Washington case that was “compelling and consistent with our reasoning” and distinguished disclosure of evaluations for most public employees (which the court deemed “offensive to a reasonable person and of small public concern”) from disclosure of an evaluation for a city manager, the city’s “chief executive officer, its leader and a public figure.” Opinion 04-07 at 14, citing Spokane Research & Defense Fund v. City of Spokane, 994 P.2d 267, 270 (Wash. Ct. App. 2000). The Washington court found that a “person in the position of [city manager] cannot reasonably expect that evaluations of the performance of his or her

public duties will not be subject to public disclosure,” and further noted that the position was annually evaluated by the city council in part to determine whether to retain the city manager. Id. The Washington court concluded that since the city council used the evaluation in deciding whether to retain the city manager, “there is a legitimate public interest in the information.” Id.

OIP limited Opinion 04-07 to the evaluation of the UH President at issue therein, and specifically stated that it was not applicable to other evaluation-related records or to evaluations of other employees. However, Opinion 04-07 did set out several factors to be considered when balancing a public official’s privacy interest against the public disclosure interest in an evaluation. In the context of information relating to potential or actual employee misconduct, OIP Opinion Letter Number 10-03 subsequently set out five non-exclusive factors relevant to balancing the public interest in disclosure against the privacy interests of the individual under the UIPA, which the Hawaii Supreme Court has summarized as follows:

- (1) the government employee’s rank;
- (2) the “[d]egree of wrongdoing and strength of evidence against the employee”;
- (3) whether there are other ways to obtain the information;
- (4) “[w]hether the information sought sheds light on a government activity”; and
- (5) “[w]hether the information is related to job function, or is of a personal nature.”

See OIP Op. Ltr. No. 10-03 at 6-7 (Oct. 5, 2010).

These non-exclusive factors are a nice starting point for HRS Section 92F-14(a) balancing.

CB v. AG at 151 Haw. 84-85, 508 P. 3d 1170-71. Although these factors are most applicable in the context of alleged misconduct, the Hawaii Supreme Court described them more broadly as a starting point for “when a government employee’s significant privacy interests in a record are balanced against the public’s interest in the same record’s disclosure.” Id. OIP observed in a recent opinion that although “[t]hose factors are often applied to records reflecting some form of actual or alleged employee misconduct,” even in the absence of any alleged misconduct “they are still a useful starting point, with greater weight given to the factors that are applicable even where no misconduct has been alleged.” OIP Op. Ltr. No. F22-03 at 13-14. Indeed, only one of the five factors directly relates to alleged misconduct and the other four factors include those OIP examined when balancing the privacy interest against the public interest in disclosure of an evaluation in Opinion 04-07. OIP will

therefore start by looking at those five factors, with reference to OIP's analysis in Opinion 04-07 for their specific applicability to an evaluation.

II. Application of Privacy Exception to Evaluations

Looking first at the government employee's rank, the Fire Chief is the chief executive officer responsible for leading the Honolulu Fire Department, which has more than a thousand employees and a fiscal year 2024 budget of almost 147 million dollars. Honolulu City Council, City & County of Honolulu Proposed Operating Budget FY 2024: Honolulu Fire Department, <https://www4.honolulu.gov/docushare/dsweb/Get/Document-314638/1.%20DEPARTMENTAL%20SUMMARY.pdf>. The Fire Chief is thus clearly in a prominent position of high responsibility and influence, and OIP therefore finds that the first factor weighs in favor of public disclosure for both the Final Evaluations and the Individual Evaluations. OIP notes that an employee's reasonable expectation as to whether his or her performance may be discussed publicly, mentioned in Opinion 04-07 as affecting an employee's privacy interest, is effectively encompassed within the "employee's rank" factor: a public employee responsible for leading a department or agency should reasonably expect to publicly answer questions on and be held accountable for the performance of that department or agency. But even for a government employee in a prominent position of high responsibility and influence, a performance evaluation is not public by default; the employee's privacy interest in an evaluation and the public disclosure interest are closely balanced so it is necessary to look at the other factors.

In the absence of any alleged misconduct, the second factor regarding the degree of wrongdoing and strength of evidence against the employee "is simply not relevant to the information at issue in this appeal." OIP Op. Ltr. No. F22-03 at 14. This factor does not weigh for or against public disclosure in this case, for either the Final Evaluations or the Individual Evaluations.

With regard to the third factor, whether there are other ways to obtain the information, OIP finds that for the Final Evaluations, the Commission's assessment of the Fire Chief's performance is only available through access to the responsive records. Thus, this factor weighs in favor of public disclosure for the Final Evaluations. For the Individual Evaluations, however, OIP finds that the Individual Evaluations are not the only way for the public to gain access to the Commission's evaluation of the Fire Chief, because to the extent that the Final Evaluations are publicly available, those provide a better understanding of the Commission's assessment of the Fire Chief's performance than the Individual Evaluations do. Thus, this factor weighs against public disclosure for the Individual Evaluations.

The fourth factor is whether the information sought sheds light on a government activity. As with the evaluation at issue in Opinion 04-07, the involvement of a public board or commission that uses the evaluation in making a determination on whether to retain the evaluated employee as its chief executive tends to increase the public interest in disclosure of an evaluation.² The Final Evaluations at issue here shed light both on the performance of the Fire Commission, which is ultimately responsible for overseeing the Fire Department, and on the Fire Chief's own performance as Fire Chief. OIP therefore finds that this factor weighs in favor of public disclosure for the Final Evaluations. The Individual Evaluations, however, do not shed light on the Commission's performance as a whole since they represent individual Commissioners' views, and for the same reason do not shed so much light on the Fire Chief's performance as the Final Evaluations do. OIP therefore finds that for the Individual Evaluations, this factor weighs against public disclosure.

The fifth factor asks whether the information is related to job function or is of a personal nature. As OIP observed in OIP Opinion Letter Number F22-03,

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.

OIP Op. Ltr. No. F22-03 at 15 (citation omitted). Similarly, for "highly personal and intimate" information, an employee's privacy interest is stronger and thus is likely to outweigh the public disclosure interest in such information. In the context of personnel-type records, "highly personal and intimate" information would be medical information, personal financial information, or other information with a significant privacy interest independent of its status as personnel information. Where an evaluation includes information about an employee's family life, medical

² This appeal does not raise, and OIP therefore does not address, the question of when and to what extent a public board or commission may go into a closed executive session to conduct an evaluation under the Sunshine Law, Part I of chapter 92, HRS, specifically section 92-5(a)(2), HRS. However, to the extent that board or commission discussed the information in an evaluation in either a public meeting or a meeting that should have been public under the Sunshine Law, a record containing that same information may not be withheld from public disclosure under the UIPA. OIP Op. Ltr. No. 91-22; see also HRS § 92F-12(a)(16) (2012) (stating that UIPA exceptions do not apply to information in a "transcript, minutes, report, or summary of a proceeding open to the public").

issues, substance abuse, or similar personal issues that may have impacted job performance, this factor is likely to weigh against public disclosure, at least for that information. By contrast, information in an evaluation about an employee's actions and decisions in the course of the job would carry a lesser privacy interest than information about an employee's personal life. Further, when an evaluation is focused more on the performance of the department or agency led by an employee (for which the employee is held responsible) than on the individual actions or decisions made by the employee in the course of the job, the employee would have even less of a privacy interest in that evaluation.

Based on OIP's *in camera* review of the evaluations, OIP finds that they do not include any "highly personal and intimate" information or information involving the Fire Chief's personal life. OIP also finds that they include almost no information about individual actions or decisions made by the Fire Chief. OIP finds instead that the evaluations are primarily focused on the performance of the Honolulu Fire Department, with the Fire Chief being held responsible for the performance of the department. OIP therefore finds that the fifth factor weighs heavily in favor of disclosure, particularly for the Final Evaluations.

Considering the five factors together, OIP finds that on balance, the public interest in disclosure outweighs the Fire Chief's privacy interest in the Final Evaluations, and therefore concludes that the UIPA's privacy exception does not authorize the Commission to withhold the Final Evaluations. HRS §§ 92F-13(1), 14(a). The Commission must disclose the Final Evaluations without redaction under the UIPA. However, OIP finds that the public interest in disclosure does not outweigh the Fire Chief's privacy interest in the Individual Evaluations. HRS § 92F-14(a). OIP therefore concludes that the UIPA's privacy exception authorizes the Commission to withhold Individual Evaluations under the UIPA. HRS § 92F-13(1).

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 decision constitutes an appealable decision under section 92F-43, HRS. An agency may appeal an OIP decision by filing a complaint within thirty days of

the date of an OIP decision in accordance with section 92F-43, HRS. The agency shall give notice of the complaint to OIP and the person who requested the decision. HRS § 92F-43(b) (2012). OIP and the person who requested the decision are not required to participate, but may intervene in the proceeding. Id. The court's review is limited to the record that was before OIP unless the court finds that extraordinary circumstances justify discovery and admission of additional evidence. HRS § 92F-43(c). The court shall uphold an OIP decision unless it concludes the decision was palpably erroneous. Id.

A party to this appeal may request reconsideration of this decision within ten business days in accordance with section 2-73-19, HAR. This 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

/s/ Jennifer Z. Brooks
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APPROVED:

/s/ Cheryl Kakazu Park
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