



DAVID Y. IGE  
GOVERNOR

**STATE OF HAWAII  
OFFICE OF INFORMATION PRACTICES**

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

CHERYL KAKAZU PARK  
DIRECTOR

The Office of Information Practices (OIP) is authorized to issue decisions under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes (HRS) (the UIPA) pursuant to sections 92F-27.5 and 92F-42, HRS, and chapter 2-73, Hawaii Administrative Rules (HAR).

**OPINION**

**Requester:** Christine Paul Russi  
**Agency:** Hawaii State Ethics Commission  
**Date:** February 4, 2020  
**Subject:** Redacted Investigation (U APPEAL 18-5)

**REQUEST FOR OPINION**

Requester and her spouse (Requester) sought a decision as to whether the Hawaii State Ethics Commission (SEC) properly denied her request for a redacted copy of an investigation file (Investigation) under the Uniform Information Practices Act (Modified), chapter 92F, HRS (UIPA).

Unless otherwise indicated, this decision is based solely upon the facts presented in emails from Requester to OIP dated August 7 and September 4, 2017; emails from the SEC to OIP dated September 5, 2017 with attachment, and September 6, 2017; a letter with enclosures to the SEC from OIP dated September 8, 2017; a letter to OIP from the SEC dated October 27, 2017; and records provided for *in camera* review.

**QUESTION PRESENTED**

Whether the SEC properly denied access to a redacted copy of the Investigation.

## **BRIEF ANSWER**

Yes. The State Ethics Code, chapter 84, HRS (Ethics Code), includes a confidentiality provision at section 84-31(b), HRS, that protects SEC investigation files from disclosure. Sections 92F-13(3) and 92F-22(5), HRS, allow agencies to withhold records that are subject to a confidentiality statute, whether they are government records subject to Part II of the UIPA or personal records subject to Part III.

## **FACTS**

Requester submitted a complaint to the SEC on May 18, 2017, against two former Hawaii State government employees, alleging violations of the Ethics Code. In an email to the SEC dated June 5, 2017, Requester made a request for “a redacted copy of the investigation of our complaint[.]” The SEC denied the request in a Notice to Requester dated June 8, 2017, citing section 92F-13(4), HRS,<sup>1</sup> as its authority to withhold “[c]onfidential investigation materials.” Requester then appealed the denial to OIP. OIP’s *in camera* review of the Investigation shows that it contains written correspondence between Requester and the SEC, and other records of the SEC staff’s work on the Investigation.

## **DISCUSSION**

The UIPA requires generally that agencies must make government records available to the public for inspection and copying, subject to the exceptions to disclosure in section 92F-13, HRS. HRS § 92F-11 (2012 and Supp. 2019). Section 92F-13(4), HRS, which was invoked by the SEC, states that government agencies are not required to disclose “[g]overnment records which, pursuant to a state . . . law . . . are protected from disclosure[.]”

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<sup>1</sup> In response to this appeal, the SEC also invoked section 92F-13(2), and (3), HRS, as allowing it to withhold the redacted investigation. Respectively, these sections allow agencies to withhold records (1) that would not be discoverable, or (2) when disclosure would result in the frustration of a legitimate government function. OIP’s *in camera* review of the Investigation does show that a portion contains attorney work product, which is protected from disclosure under section 92F-13(2), HRS. See OIP Op. Ltr. No. F14-01 at 6 n. 4 (recognizing that documents prepared by an attorney in anticipation of litigation are an attorney’s work product and as such deemed a privileged matter not subject to discovery. Hawaii Rules of Civil Procedure Rule 26(b)(3) (1980)). However, because section 92F-13(4), HRS, allows the SEC to withhold access, OIP need not reach the issue of whether either of these additional exceptions to disclosure apply.

## **I. Confidentiality Statute**

OIP has previously recognized in dicta that SEC investigations are not public because the Ethics Code contains a confidentiality statute that protects SEC investigations. OIP Op. Ltr. No. 98-1 at 7 n. 5, citing HRS § 84-31(b). In relevant part, the Ethics Code states that “[t]he commission shall investigate all charges on a confidential basis, having available all the powers herein provided, and proceedings at this stage shall not be public.” HRS § 84-31(b) (2012).

In accordance with section 84-31(b), HRS, the SEC asserted in response to this appeal that its longstanding practice is to treat all complaints, and all records relating to any investigation of a complaint, as confidential until either the SEC and the respondent reach a settlement agreement that includes publication of the respondent’s name as a condition of settlement, or the SEC issues the public notice of a contested case hearing under section 84-31(c), HRS. This section states that, upon issuance of a notice of hearing, the charge and further statement of alleged violation and the alleged violator’s written response thereto shall become public records. HRS § 84-31(c) (Supp. 2019). OIP agrees that section 84-31(b), HRS, is a confidentiality statute intended to protect SEC investigations from disclosure prior to the commencement of contested case proceedings or as otherwise agreed to by the SEC and a party.

## **II. Personal Records Analysis**

The SEC only invoked exceptions to disclosure of government records under the UIPA’s Part II. However, because Requester lodged the complaint that is part of the Investigation, OIP must also consider the applicability of Part III of the UIPA relating to personal record<sup>2</sup> requests, which are requests for records about the

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<sup>2</sup> The UIPA defines “personal record” as:

any item, collection, or grouping of information about an individual that is maintained by an agency. It includes, but is not limited to, the individual’s education, financial, medical, or employment history, or items that contain or make reference to the individual’s name, identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph.

HRS § 92F-3 (2012) (setting forth the UIPA’s definitions).

individual<sup>3</sup> who is requesting them. Agencies must disclose personal records to the individual they pertain to unless an exemption in section 92F-22, HRS, applies. OIP finds that Part III of the UIPA applies to at least a portion of the Investigation because Requester initiated the complaint. As such, the portion of the Investigation that is “about” Requester is the joint personal record<sup>4</sup> of Requester and others identified therein, such as the individuals who were complained about, Requester’s spouse, individuals who are or were employed at the SEC, and others mentioned briefly. OIP Op. Ltr. No. F13-01 at 16.

Under the analysis set forth in OIP Opinion Letter Number F13-01, which explains how to respond to a request for joint personal records, OIP finds that the Investigation is partly Requester’s joint personal record subject to the UIPA’s Part III and partly a government record subject to Part II. However, OIP need not determine which specific portions of the Investigation are subject to Part II and Part III because the confidentiality statute at section 84-31(b), HRS, controls either way and requires the SEC to withhold access of the entire Investigation.

As discussed above, section 84-31(b), HRS, is a confidentiality statute intended to protect SEC investigations from disclosure prior to the commencement of contested case proceedings or as otherwise agreed to by the SEC and a party. Section 92F-13(4), HRS, which the SEC relied upon, allows an agency to withhold from public disclosure records made confidential by a State statute. OIP therefore concludes that under Part II of the UIPA, section 92F-13(4), HRS, allows the SEC to withhold any portion of the Investigation that is not Requester’s personal record from public disclosure. With respect to the portion that is Requester’s personal record and thus analyzed under Part III of the UIPA, section 92F-22(5), HRS, states that agencies are not required to grant an individual access to personal records when they are “[r]equired to be withheld from the individual to whom it pertains by statute[.]” Consequently, section 92F-22(5), HRS, allows the SEC to withhold any portion of the Investigation that is her personal record from Requester.

OIP distinguishes the decision here from OIP Opinion Letter Number 09-03 (Opinion 09-03). The record requester in Opinion 09-03 was an architect who sought the investigative file for a pending disciplinary proceeding against the architect. The agency invoked the Part III exemption at section 92F-22(4), HRS, which states that an agency need not disclose personal records that include “investigative reports and materials, related to an upcoming, ongoing, or pending civil or criminal action or administrative proceeding against the individual.” OIP

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<sup>3</sup> The UIPA defines “individual” as “a natural person.” HRS § 92F-3.

<sup>4</sup> For an extensive discussion of what constitutes a “joint personal record,” see OIP Opinion Letter Number F13-01.

found that, under section 92F-22(4), HRS, an agency may only withhold records compiled for law enforcement purposes when disclosure would frustrate the agency's ability to prosecute or pursue such actions or proceeding. OIP Op. Ltr. No. 09-03 at 3. OIP concluded that the agency was generally allowed under section 92F-22(4), HRS, to withhold its investigative records, but the responsive records included records that were either public records or records possessed or submitted by the architect. Id. at 4. For those records, OIP found the agency should have provided access unless disclosure would have compromised a legitimate function. Id.

Here, as in Opinion 09-03, the records at issue comprise an investigation file and include records provided to the agency. However, the basis for withholding in Opinion 09-03 was the ongoing investigation exemption set out in section 92F-22(4), HRS. In contrast, a confidentiality statute governs disclosure here. OIP's interpretation of section 92F-22(4), HRS, as being applicable only when disclosure would frustrate the agency's ability to prosecute or pursue an action or proceeding cannot be applied to the confidentiality statute at issue here, which does not include the same limitations as section 92F-22(4), HRS, and, more importantly, is not part of the UIPA and thus cannot be assumed to have been intended to promote the UIPA's policies and purpose. Because the SEC must comply with its confidentiality statute, the SEC may withhold personal records from the subject individual without having to determine whether disclosure of the personal records would result in any frustration of a government function.

### **III. Redaction**

Finally, the fact that Requester explicitly sought a redacted copy of the Investigation is irrelevant because the confidentiality statute at section 84-31(b), HRS, applies to the entire Investigation, and as discussed above, protects both government records and personal records from disclosure. Providing a redacted copy would not protect the identities of those named in the Investigation because the production of redacted pages would itself reveal the existence of an Investigation. Thus, under the UIPA exception in section 92F-13(4), HRS, and the exemption in section 92F-22(5), HRS, the SEC is not required to disclose even a redacted copy of the Investigation because it is protected by the confidentiality statute at section 84-31(b), HRS.

### **RIGHT TO BRING SUIT**

Requester is entitled to file a lawsuit for access under Part II of the UIPA 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).

Requester is entitled to seek assistance directly from the courts under Part III of the UIPA after Requester has exhausted the administrative remedies set forth in section 92F-23, HRS. HRS §§ 92F-27(a), 92F-42(1). 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).

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 Requester when it finds the charges brought against the agency were frivolous. HRS § 92F-27(e).

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 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-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**



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Carlotta Amerino  
Staff Attorney

APPROVED:



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Cheryl Kakazu Park  
Director