LINDA LINGLE
GOVERNOR

JAMES R. AIONA, JR.
LIEUTENANT GOVERNOR

STATE OF HAWAII
OFFICE OF THE LIEUTENANT GOVERNOR
OFFICE OF INFORMATION PRACTICES
NO. 1 CAPITOL DISTRICT BUILDING
250 SOUTH HOTEL STREET, SUITE 107
HONOLULU, HAWAI'I 96813
Telephone: (808) 586-1400 FAX: (808) 586-1412
E-MAIL: oip@hawaii.gov
www.hawaii.gov/oip

PAUL T. TSUKIYAMA
DIRECTOR

This is an appeal of a denial of access to a government record under part III of the Uniform Information Practices Act (Modified) (the "UIPA"), chapter 92F, Hawaii Revised Statutes ("HRS"). Haw. Rev. Stat. § 92F-27.5. The Office of Information Practices ("OIP") is authorized to issue this ruling under section 92F-42(1).

DECISION

Requester: Mr. Paul Herran
Agency: Department of Commerce and Consumer Affairs, Regulated Industries Complaints Office
Date: September 25, 2009
Subject: RICO Investigative Records (APPEAL 10-1)

REQUEST FOR DECISION

Requester seeks a determination on behalf of his client, whom we refer to in this Decision as Architect X,[1] on whether the Regulated Industries Complaints Office, Department of Commerce and Consumer Affairs ("RICO"), properly denied access under part III of the UIPA for any and all files, documents, and other information pertaining to Architect X (the "Investigative Records").[2]

Unless otherwise indicated, this determination is based solely upon the facts presented in Requester's letter dated June 30, 2009 and attached materials, RICO's letter to OIP dated July 21, 2009, and telephone communications with RICO.

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[1] Because the identity of the individual is not relevant to the analysis here, we have chosen not to identify him for purposes of this published Decision.

[2] Requester, as Architect X's legal representative of record, made the written UIPA request to RICO for Architect X's personal records.

QUESTION PRESENTED

Whether RICO properly withheld all investigative records related to its petition for disciplinary action filed against the vocational license of an individual where the administrative proceeding on that petition was ongoing at the time the UIPA request was made.

BRIEF ANSWER

Because an administrative proceeding was ongoing, section 92F-22(4), HRS, generally allowed RICO to withhold access to its investigative report and other materials related to that proceeding. However, certain records that were already public, or that were created by or were in the possession of the individual, should have been disclosed if disclosure would not have frustrated RICO's exercise of a legitimate government function.

FACTS

RICO filed a Petition for Disciplinary Action Against Architect's License on September 26, 2008 (the "Petition") against Architect X's license. The Petition was heard in an administrative hearing held on April 7, 2009. In the interim on February 6, 2009, Requester made the UIPA request to RICO for the Investigative Records and also filed a Demand for Disclosure in the administrative proceeding on the Petition. By letter dated February 13, 2009, RICO responded to the UIPA request. RICO denied access to the records it maintained that were responsive to the request (the "Responsive Records") under section 92F-22(4), HRS, citing to the pending administrative proceeding against Architect X.[3] OIP was provided with and has reviewed a list of the Responsive Records.

DISCUSSION

Under Part III, Disclosure of Personal Records, an agency is not required to grant an individual access to his or her personal records "[i]ncluding investigative reports and materials, related to an upcoming, ongoing, or pending civil or criminal action or administrative proceeding against the individual." Haw. Rev. Stat. § 92F-22(4) (1993). OIP has similarly recognized that an agency may withhold records compiled for law enforcement purposes under part II of the UIPA, which governs general records requests. Specifically, OIP has opined that law enforcement records may be withheld under the exception at section 92F-13(3), HRS, where disclosure

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[3] RICO also denied access to licensing related files, documents, and information on the basis that it did not maintain those records, and directed Requester to the division it believed did. This response was proper under OIP's administrative rules. See Haw. Admin. R. §2-71-14(c)(1) (1999).

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

This frustration of an agency's law enforcement function is also the underlying basis for the exemption at section 92F-22(4). See Stand. Comm. Rep. No. 614-80, Haw. H.J. at 1565 (1980) (legislative history to former chapter 92E, HRS, repealed effective July 1, 1989, which was recodified in substantial part in Part III of the UIPA, stating that purpose of certain specific exemptions to avoid frustration of legitimate government functions). Because OIP believes that the exemptions to disclosure must be narrowly construed, OIP believes that section 92F-22(4) cannot be read to provide blanket protection over all investigative materials per se. See OIP Op. Ltr. No. 95-4 at 7 & n.4 (exemptions provided must be narrowly construed); cf. OIP Op. Ltr. No. 89-17 at 5 (section 92F-13(3) does not protect law enforcement records per se). Rather, consistent with section 92F-13(3), we believe that under section 92F-22(4) agencies may only withhold records or information compiled for law enforcement purposes where disclosure would in some way frustrate the agency's ability to prosecute or pursue such actions or proceeding. See id.; Haw. Rev. Stat. § 1-16 (laws in pari materia construed with reference to each other) (1993); OIP Op. Ltr. No. 94-27 at 3 (legislative history indicates purpose of exemption to prevent individual from using part III of the UIPA to obtain premature access to government's evidence).

Thus, where no frustration would occur, investigative materials should be disclosed. For example, we agree with the federal authorities discussed in OIP Opinion Letter Number 89-17 that publicly available records, or records created by or already provided to the individual, generally should not be withheld. See OIP Op. Ltr. No. 89-17 at 7-8 (federal case law applying federal Freedom of Information Act exemption 7, which similarly protects "records or information compiled for law enforcement purposes," concluded that the exemption will generally not afford protection where the target of the investigation has possession of or submitted the information in question). OIP believes that these records may only be withheld in rare instances where the agency believes that disclosure would interfere with the agency's performance of its functions, such as where notice to the individual that the agency possesses the record, in itself, would jeopardize the agency's investigation or proceedings.[4]

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[4] For example, an agency may withhold access to a record in its investigative file that was created by the individual where he or she is unaware that the agency has the record and disclosure of that fact would frustrate the agency's investigation or law enforcement action by prematurely notifying the individual of that fact. See id. This could

In this case, we find that an administrative proceeding against Architect X was ongoing at the time the UIPA request was made on his behalf. See OIP Op. Ltr. No. 94-27 at 15 n.4. Accordingly, OIP concludes that RICO was generally allowed under section 92F-22(4), HRS, to withhold its investigative records. However, the Responsive Records include many records that are either public records, such as court records, or records possessed or submitted to RICO by Architect X, such as records disclosed to Architect X during the course of the administrative proceeding. For those records, RICO should have provided access unless disclosure would have compromised a legitimate function. However, given that it is unlikely that those records were being sought, RICO may first contact the Requester to confirm that disclosure of those records is desired. If so, RICO may contact OIP for assistance in identifying the records that should be disclosed.

Right to Bring Suit

Requester is entitled to seek assistance directly from the courts after Requester has exhausted the administrative remedies set forth in section 92F-23, HRS. Haw. Rev. Stat. §§ 92F-27(a) (1993) and -42(1) (Supp. 2008). 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). Haw. Rev. Stat. § 92F-27(e) (1993). If Requester files a lawsuit, Requester must notify OIP in writing at the time the action is filed. Haw. Rev. Stat. § 92F-15.3 (Supp. 2008).

By copy of this Decision to the agency, OIP also notifies the agency of its determination that access be given to certain records as set forth above. Haw. Rev. Stat. § 92F-27.5 (b) (1993) (If OIP's decision is to disclose, OIP shall notify agency of its decision "and the agency shall make the record available.").

OFFICE OF INFORMATION PRACTICES

for

Cathy L. Takase
Staff Attorney

APPROVED:

Paul T. Tsukiyama
Director

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include a statement against interest made in an unrelated proceeding where the individual is unaware of the agency's knowledge of that statement. Another example would be where the agency's possession of the record could identify the confidential source of that record.