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

LESLIE H. KONDO
DIRECTOR

OPINION

Requester: Ethics Commission, City and County of Honolulu
Agency: Ethics Commission, City and County of Honolulu
Date: May 11, 2007
Subject: Ethics Advisory Opinion (U RFO-G 06-05)

REQUEST FOR OPINION

The Ethics Commission, City and County of Honolulu (the "Commission"), seeks an advisory opinion on whether the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("HRS") ("UIPA"), requires it to disclose a formal advisory opinion finding a city employee in violation of section 11-104, Revised Charter of Honolulu.

Unless otherwise indicated, this determination is based solely upon the facts presented in the Commission's letter dated January 31, 2006, and attached materials.

QUESTION PRESENTED

Whether the UIPA requires public disclosure of the Commission's advisory opinion that identifies an employee who the Commission concluded had violated ethics laws, where the employee was not suspended or discharged from employment for that misconduct.

BRIEF ANSWER

Yes. Although the employee retains a significant privacy interest in records or information relating to the misconduct in question because the employee was not suspended or terminated, the employee's privacy interest was diminished by the Commission's determination that the employee had engaged in misconduct

warranting suspension. Further, the employing department's handling of the matter by instituting lesser discipline while the Commission was still investigating heightened the public interest. Thus the public interest in information about the employee's misconduct (including the employee's identity) outweighs the employee's privacy interest in this case and requires disclosure of the advisory opinion in full.

FACTS

An employee ("Employee") of the City and County of Honolulu Department of Environmental Services ("Department") was alleged to have violated ethics laws. After investigating the allegations, the Commission issued an advisory opinion in which it concluded that Employee's misconduct was egregious and recommended a five to ten day suspension. However, before the Commission rendered its advisory opinion, the Department issued a written reprimand to Employee relating to the same misconduct. The Department advised the Commission, after the Commission had issued its opinion, that it was legally barred from suspending Employee as recommended because such a suspension would likely constitute employment double jeopardy.

Since that time, a reporter has requested the full text of the Commission's advisory opinion. The Commission favors release of the opinion, but has asked OIP whether such release would entail disclosure of information that is protected from disclosure under the UIPA.

DISCUSSION

The UIPA is not a confidentiality law: its exceptions to disclosure, including the privacy exception, allow but do not require an agency to withhold information that falls within them. See Haw. Rev. Stat. § 92F-13 (1993). Nonetheless, the UIPA's privacy exception is intended to implement Hawaii's Constitutional right to privacy in the context of public access to government records, for which reason OIP advises agencies generally to withhold information that falls within the privacy exception. OIP Op. Ltr. No. 05-03 at 5-7; see also Haw. Rev. Stat. § 92-2 (1993). OIP also notes that section 3-6.3(h), Revised Ordinances of Honolulu, which authorizes the Commission to disclose the name of an officer or employee that it has found in violation of the ethics laws "in accordance with [the UIPA]," does appear to anticipate that the Commission will disclose a violator's identity only to the extent required by UIPA. Thus, OIP takes the question here to be whether the UIPA requires public disclosure of the Commission's advisory opinion, which identifies the Employee.

The Commission contends that because it determined that there was a factual justification for Employee's suspension, the existence of a legal bar to Employee's suspension should not be determinative of Employee's privacy interest

in being identified as a violator. More specifically, the Commission argues that its finding of serious misconduct warranting suspension diminished Employee's privacy interest in the information to the point where it is no longer significant. Alternatively, the Commission argues that even if Employee does retain a significant privacy interest in information relating to Employee's misconduct, that interest is outweighed by the public interest in disclosure.

The UIPA specifically addresses the extent of an employee's privacy interest in information about employee misconduct: there is a significant privacy interest in

> [i]nformation in an agency's personnel file, or applications, nominations, recommendations, or proposals for public employment or appointment to a governmental position, **except . . . information related to employment misconduct that results in an employee's suspension or discharge**. . . .

Haw. Rev. Stat. § 92F-14(b)(4) (Supp. 2006) (emphasis added). The section goes on to provide that misconduct information[1] no longer carries a significant privacy interest

> 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.

Id. Thus, the plain statutory language indicates that an employee's privacy interest in misconduct information does not automatically diminish to insignificance upon a finding by Commission or similar body that suspension or discharge is warranted, but rather when the agency has actually suspended or discharged the employee and the employee has no further avenue for appeal of the decision. In this instance Employee was not actually suspended or discharged, so the plain statutory

---

[1] The section specifically identifies the following misconduct information:

(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.

Haw. Rev. Stat. § 92F-14(b)(4)(B).

language compels OIP's conclusion that Employee retains a significant privacy interest in the misconduct information.

The existence of a significant privacy interest under section 92F-14(b) does not end OIP's inquiry, though. As the Commission correctly observes, an individual's significant privacy interest in information must be balanced against and may be outweighed by the public interest in disclosure. See Haw. Rev. Stat. § 92F-14(a) (1993). The public interest to be considered in balancing these interests is the public interest in the disclosure of official information that sheds light on an agency's performance of its statutory purpose and the conduct of government officials, or which otherwise promotes governmental accountability. See OIP Op. Ltr. No. 91-19; OIP Op. Ltr. No. 92-17.

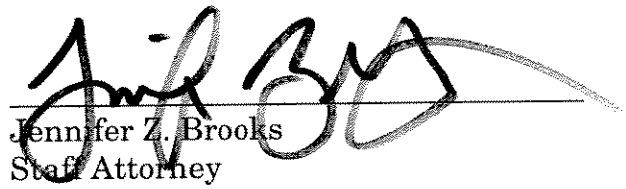
The Commission argues that the egregious nature of the misconduct at issue increases the public interest. However, the Commission considered the nature of the misconduct in recommending Employee's suspension. As discussed above, the UIPA specifically provides that an employee retains a significant privacy interest in misconduct information up to the point where an employee's suspension or termination for such misconduct becomes final. OIP presumes that the legislature took the egregious nature of conduct warranting misconduct or suspension into account when it set out that statutory balance between an employee's privacy interest and the public interest in disclosure. Thus, the egregious nature of Employee's misconduct, by itself, would not increase the public interest in disclosure so as to outweigh Employee's statutorily-affirmed significant privacy interest in the information.

Other factors, however, may increase the public interest in individually identifiable misconduct information. E.g. OIP Op. Ltr. No. 98-5 at 21-22; see also OIP Op. Ltr. No. 07-08 at 4-5. For instance, where the manner in which the government handles alleged misconduct raises questions as to the propriety of the government's actions, there is an increased public interest in the identity of an employee who is alleged to have engaged in misconduct and in how that alleged misconduct was addressed. OIP Op. Ltr. No. 98-5 at 22 (citations omitted) (evidence that the government has failed to investigate adequately heightens the public interest). In this case, when faced with a situation that the Commission subsequently found to violate ethics laws and warrant suspension, the Department did not wait for the Commission's opinion and recommendations before deciding how to address Employee's misconduct even though the Commission is charged with investigating and resolving ethics complaints. Instead, the Department issued a written reprimand to Employee while the Commission's investigation was ongoing, which resulted in the Department's being barred from carrying out the more severe discipline that the Commission recommended as appropriate for the violation. Thus, the manner in which the misconduct was handled here increased the public interest in individually identifiable information concerning that misconduct.

At the same time, Employee's privacy interest, though still significant, is only marginally significant. The Commission's conclusion after investigation that Employee's conduct violated ethics laws and merited suspension greatly diminished Employee's privacy interest in information about that misconduct. As OIP has previously observed, significant privacy interests are not all of equal weight – among the various types of information that carry a significant privacy interest, some information (such as mental health information) is much more sensitive than other information (such as an individual's birth date). OIP Op. Ltr. No. 05-16 at 13 n.17; see also OIP Op. Ltr. No. 05-03 at 6 (the UIPA's privacy interest is broader than Hawaii's constitutional right to privacy). Although OIP is constrained to conclude that Employee's privacy interest remains significant, the fact remains that Employee avoided suspension because of what may be described as a legal technicality rather than because the Commission, the Department, or any other decision-maker made a determination that Employee had not engaged in misconduct warranting suspension. Under these circumstances, Employee's privacy interest in the misconduct information, though significant, is only barely so.

When that privacy interest is weighed against the public interest, particularly the public interest in the information that reveals the Department's handling of the allegations of misconduct against Employee, OIP is of the opinion that the public interest in the misconduct information outweighs Employee's privacy interest. Thus, OIP concludes that the UIPA requires public disclosure of the Commission's full advisory opinion, including those portions that identify Employee.

OFFICE OF INFORMATION PRACTICES



Jennifer Z. Brooks
Staff Attorney

APPROVED:

Leslie H. Kondo
Director