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Honolulu Civil Beat Inc.

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI`I

HONOLULU CIVIL BEAT INC.,

Plaintiff,

vs.

DEPARTMENT OF PUBLIC SAFETY,

Defendant.

CIVIL NO. 1CCV-21-1329
(Other Civil Action)

REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT; and REPLY DECLARATION OF R. BRIAN BLACK

HEARING MOTION
JUDGE: Honorable John M. Tonaki
TRIAL DATE: NONE
HEARING DATE: October 25, 2022
HEARING TIME: 9:30 a.m.

REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Plaintiff Honolulu Civil Beat Inc. (Civil Beat) sought the identity of individuals who died in the custody of Defendant Department of Public Safety (PSD or Department). That should not be a mystery. County coroners must disclose the death notices and autopsy reports requested by Civil Beat. Nothing in the Uniform Information Practices Act (Modified), Hawai`i Revised Statutes (HRS) chapter 92F (UIPA) or the Privacy Rule of the federal Health Insurance Portability and

Accountability Act of 1996 (HIPAA Privacy Rule) requires a different outcome when those same records are requested from PSD.

I. THE HIPAA PRIVACY RULE IS IRRELEVANT HERE.

PSD does not dispute that coroners must disclose the requested records under the UIPA. *E.g.*, Dkt. 43 at 11 ("toxicology reports 'included in or attached to autopsy reports' prepared or maintained by coroners, which are public records").[1] If the UIPA requires disclosure from the coroner, then it requires disclosure from PSD.

The United States Department of Health and Human Services (DHHS) created the HIPAA Privacy Rule and explained that it does not change the analysis under state public records laws. 45 C.F.R. § 164.512(a); 65 Fed. Reg. at 82,482, 82,597; Dkt. 41 (Pl. Mem. in Supp.) at 12-15. In the regulatory history of the HIPAA Privacy Rule's enactment, DHHS stated that HIPAA does not apply when a government entity has records that must be disclosed under a public records law (expressly identifying autopsy reports as an example). Fed. Reg. at 82,597 ("Thus, if a state FOIA law designates death records and autopsy reports as public information that must be disclosed, a covered entity may disclose it without an authorization under the rule."). DHHS intended the new HIPAA Privacy Rule to preserve a government entity's "ability to comply with its existing legal obligations." *Id.* at 82,668; *accord* OIP Op. No. 91-32 (autopsy reports are public records). The only question then is whether the UIPA requires disclosure of these death notices and autopsy reports. But PSD concedes that these are public records under the UIPA. Thus, the HIPAA Privacy Rule is a red herring.

Completely ignoring the regulatory history of the "required by law" exception, PSD references more ambiguous statements on DHHS's website FAQ:[2]

> if a state public records law includes an exemption that affords a state agency discretion not to disclose medical or other information *where such*

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[1] Pinpoint citations refer to the page of the corresponding PDF.

[2] Although PSD refers to this statement by DHHS as a clarification in response to OIP's inquiry in Opinion 12-01, the Opinion makes clear that OIP copied it from DHHS's website FAQ. OIP Op. No. 12-01 at 11.

> *disclosure would constitute a clearly unwarranted invasion of personal privacy*, the disclosure of such records is not required by the public records law, and therefore is not permissible under §164.512(a).

Dkt. 43 at 12 (emphasis added).[3]

PSD argues that the mere existence of HRS § 92F-13(1)—the UIPA privacy exception—gives agencies discretion to disclose or withhold records with protected health information. As the Hawai`i Supreme Court has observed, however, agencies do not have discretion when none of the UIPA exceptions apply; disclosure is mandatory (*i.e.*, "required by law"). *State of Haw. Org. of Police Officers v. City & County of Honolulu*, 149 Hawai`i 492, 504, 494 P.3d 1225, 1237 (2021) ("UIPA requires disclosure unless an exception applies."). If an exception does apply, then agencies have discretion whether to disclose or not, unless a law such as the constitutional right of privacy clearly prohibits disclosure. *Id.* at 508, 494 P.3d at 1241 ("Accordingly, there are three classes of documents under UIPA: (1) documents that must be disclosed, (2) documents that may be disclosed, and (3) documents that may not be disclosed."). Here, there is no agency discretion for the requested death notices and autopsy reports because disclosure does not constitute a clearly unwarranted invasion of personal privacy under the UIPA privacy exception. *E.g.*, OIP Op. No. F15-01; OIP Op. No. 91-32; Dkt. 41 at 6-10.

If the mere existence of a privacy exception—without proof of a clearly unwarranted invasion of personal privacy—were sufficient as PSD argues, it negates DHHS's entire discussion of freedom of information laws as part of the "required by law" exception to the HIPAA Privacy Rule. Similar to the UIPA, the federal Freedom of Information Act (FOIA) has an exception when disclosure "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); *see* S. Stand. Comm.

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[3] The full statement on DHHS's website FAQ is not as ambiguous as the limited portion quoted by PSD. Consistent with the regulatory history cited above, before PSD's excerpted portion, DHHS stated: "Thus, where a state public records law mandates that a covered entity disclose protected health information, the covered entity is permitted by the Privacy Rule to make the disclosure, provided the disclosure complies with and is limited to the relevant requirements of the public records law." OIP Op. No. 12-01 at 11.

Rep. 2580, in 1988 Senate Journal at 1094 (as it concerns the UIPA privacy exception, "case law under the Freedom of Information Act should be consulted for additional guidance"). DHHS explained that the process for FOIA disclosure would not change after the adoption of the HIPAA Privacy Rule.

> If presented with a FOIA request that would result in the disclosure of protected health information, a federal agency must first determine if FOIA requires the disclosure or if an exemption or exclusion would be appropriate. . . . Covered entities subject to FOIA must evaluate each disclosure on a case-by-case basis, as they do now under current FOIA procedures.

65 Fed. Reg. at 82,482.

Properly read in the context of the regulatory history, DHHS's website stated the obvious conclusion that if an agency *may* withhold protected health information under the public records privacy exception—which PSD cannot do for the records here—then the agency *must* withhold the records under the HIPAA Privacy Rule. There is no "case-by-case" analysis if the HIPAA Privacy Rule takes priority merely because there is a FOIA privacy exception. In light of DHHS's official explanation when promulgating the HIPAA Privacy Rule, its FAQ cited by PSD cannot be read as authorizing government agencies to withhold protected health information simply because there is a general privacy exception.[4]

To the extent that PSD claims that OIP's opinions conclude that the HIPAA Privacy Rule categorically exempts all protected health information from the UIPA, such an interpretation overreads the holding of those opinions. OIP has not definitively addressed whether information that *cannot be withheld* under the UIPA privacy exception, as here, must instead be withheld under the HIPAA Privacy Rule.[5] Opinion

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[4] If PSD is relying on the confidentiality statute provision, HRS § 92F-13(4), FOIA also has a comparable provision, which similarly cannot justify withholding based on a circular reference to HIPAA as a purported confidentiality statute. 5 U.S.C. § 552(b)(3).

[5] Opinion 12-01 only addresses the "required by law" exception as it concerns situations where disclosure is not required under the UIPA. OIP Op. No. 12-01 at 15 ("OIP thus concludes that because the UIPA is a general public records law that allows but *does not*

03-05, for example, only addresses the interaction between the UIPA and the HIPAA Privacy Rule in the abstract, not as to specific types of records. Nevertheless, if OIP's opinions are read so broadly, the opinions are palpably erroneous in light of DHHS's clear articulation of the intent of 45 C.F.R. § 164.512(a).[6] HRS § 92F-15(b) (OIP opinions considered precedent "unless found to be palpably erroneous"); *e.g.*, *Peer News LLC v. City & County of Honolulu*, 143 Hawai`i 472, 486, 431 P.3d 1245, 1259 (2018) (holding that 30 years of OIP opinions were "palpably erroneous" because inconsistent with the plain language and legislative history of the UIPA).

Other than overreading the HIPAA Privacy Rule as categorically exempting any of its death-related records from disclosure, PSD's only justification for withholding under the UIPA seems to be an argument about autopsy reports prepared by someone other than a county coroner. Dkt. 43 at 11 ("Autopsy reports prepared by someone other than a coroner, like private toxicology reports, are by implication not public records."). Although it has the burden of proof to justify non-disclosure, PSD has not introduced any evidence in its opposition or in discovery that the records it would disclose here were not authored or maintained by the county coroners. Regardless, Civil Beat expressly limited the scope of its requests to information shared with or received from coroners or other government entities. *E.g.*, Dkt. 41 at 22 (requesting notices provided to county coroner under HRS § 841-3 and reports provided to the U.S. Department of Justice), at 56 (requesting "investigation reports received from coroners"). As PSD concedes, the requested records authored or maintained by the county coroners are public. Dkt. 43 at 11 ("it is the authorship and/or maintenance by the coroner which makes their autopsy and toxicology reports public records").

Civil Beat is not seeking PSD's medical treatment records. The fact that the HIPAA Privacy Rule provides for non-disclosure of health care records for 50 years

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require disclosure of government records containing protected health information, disclosure is not permitted by section 164.512(a) of the Privacy Rule . . . ." (emphasis added)).

[6] Opinion 03-05 and Opinion 03-19 do not even discuss the "required by law" exception to the HIPAA Privacy Rule under 45 C.F.R. § 164.512(a). And Opinion 12-01 addresses the exception without any discussion of DHHS's regulatory history.

after a patient's death does not mean that the fact of death is protected health information. See Dkt. 43 at 4. To the contrary, knowledge of an individual's death would be necessary for an agency to invoke that provision of the HIPAA Privacy Rule, underscoring that the mere fact of death is not protected health information. In the end, however, the definitions and provisions of the HIPAA Privacy Rule are entirely irrelevant if the UIPA otherwise requires disclosure of the requested records.

PSD concedes that, under the UIPA, the county coroners *must* disclose the records that Civil Beat requested. The HIPAA Privacy Rule is clear that if the records cannot be withheld under the state public records law, then the HIPAA Privacy Rule does not require withholding. It does not matter who (coroners or PSD) has these records. The UIPA requires disclosure. These records that are clearly public in the hands of the county coroners do not become suddenly confidential when sent to PSD. PSD has not met its burden of proof to justify nondisclosure, and Civil Beat is entitled to summary judgment.

II. THE COURT CANNOT GRANT SUMMARY JUDGMENT TO THE DEPARTMENT.

PSD's one-sentence request for entry of summary judgment in its opposition to Civil Beat's motion is procedurally defective. Dkt. 43 at 2 & n.1. There are disputed issues of material fact that require additional discovery, and under these circumstances, the Department is required to make a cross-motion.

There are disputed issues of material fact. The Department has the burden of proof on the "covered entity" issue and all other issues to justify its non-disclosure of the requested records. HRS § 92F-15(c). To prevail on its current motion for summary judgment, Civil Beat need not dispute whether, for example, PSD is a covered entity. Thus, Civil Beat moved for summary judgment after taking limited discovery because the Department's non-disclosure could be addressed without delving into many of the complexities of the HIPAA Privacy Rule.[7] Civil Beat assumed solely for purposes of its

[7] As one example, PSD claims that it is justified broadly sharing protected health information for "the purpose of safety, security, or good order." Dkt. 43 at 7 (citing 45 C.F.R. § 164.512(k)(5)(i)). But such exceptions only apply to the "minimum necessary to

motion that the Department was a covered entity under the HIPAA Privacy Rule. Dkt. 41 at 11 n.7.

Thus, Civil Beat's motion for summary judgment did not present to this Court the factual question of whether PSD is a covered entity. There are disputed issues of material fact, however, about whether the entirety of PSD properly qualifies as a covered entity and has operated as such. The Department's conclusory assertions in basic interrogatory responses have not yet been explored in depositions or other discovery because those issues, as discussed above, are irrelevant to Civil Beat's motion. Moreover, the opposition to Civil Beat's motion raises new issues that PSD had not previously disclosed in discovery. For example, after stonewalling in written discovery on questions about why it had previously disclosed the death of individuals in custody before 2020, the Department has now revealed that "[i]n the past, PSD took a different position on the disclosure of inmate death information." Dkt. 43 at 6. If the Court concludes that the HIPAA Privacy Rule takes precedence here, more discovery is required.

Also, a cross-motion is required when, as here, there are new issues that are raised solely in the non-movant's opposition to summary judgment and that are disputed. HRCP 56 requires 18 days notice for a motion for summary judgment. HRCP 56(c). Nothing in *First Insurance* or *Flint* is to the contrary. *See First Ins. Co. v. State ex rel. Minami*, 66 Haw. 413, 420, 665 P.2d 648, 655 (1983); *Flint v. MacKenzie*, 53 Haw. 672, 501 P.2d 357 (1972) (per curiam). In those cases, the court's decision on the issues presented by the moving party for summary judgment on undisputed facts necessarily required judgment for the non-moving party. *E.g.*, *Flint*, 53 Haw. at 674, 501 P.2d at 358 ("To remand the case for lower court consideration of these letters, just to have the case reappear here where the conclusion reached by this court must necessarily be the same, would not be judicially expedient."). That makes sense for disputed issues of law on

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accomplish the intended purpose." *E.g.*, 45 C.F.R. § 164.502(b); 45 C.F.R. § 164.514(d). For purposes of Civil Beat's motion for summary judgment, this Court need not resolve issues regarding the scope of PSD's extensive sharing and its compliance with the "minimum necessary" provisions of the HIPAA Privacy Rule.

undisputed facts, but PSD's opposition asks this Court to rule on disputed issues of fact. Civil Beat's assumption of a fact for the limited purpose of its motion does not mean that the fact is undisputed. If the Court denies Civil Beat's motion for summary judgment, that denial does not inevitably require withholding because, at a minimum, the Court needs to determine PSD's status as a covered entity under HIPAA, an issue not presented by Civil Beat's motion for summary judgment. PSD cannot ambush Plaintiff in its opposition—with only three days to respond—and raise factual issues that were not presented in Plaintiff's motion or in a properly noticed cross-motion.

The Court cannot enter summary judgment for the Department without giving Civil Beat the opportunity to conduct further discovery. Reply Decl. of R. Brian Black, dated October 20, 2022.

CONCLUSION

Based on the foregoing, Civil Beat respectfully requests that the Court grant summary judgment for the Plaintiff and order PSD to disclose the requested records.

DATED: Honolulu, Hawai`i, October 20, 2022

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI`I

HONOLULU CIVIL BEAT INC., Plaintiff, vs. DEPARTMENT OF PUBLIC SAFETY, Defendant.	CIVIL NO. 1CCV-21-1329 (Other Civil Action) REPLY DECLARATION OF R. BRIAN BLACK HEARING MOTION JUDGE: Honorable John M. Tonaki TRIAL DATE: NONE HEARING DATE: October 25, 2022 HEARING TIME: 9:30 a.m.

REPLY DECLARATION OF R. BRIAN BLACK

1. I am the attorney for Plaintiff Honolulu Civil Beat (Civil Beat). I make this declaration based on personal knowledge.

2. To minimize potentially unnecessary and expensive discovery and possibly expedite resolution of this case consistent with HRCP 1(a), Civil Beat moved for summary judgment before completing all discovery because the limited discovery already completed would be dispositive if the "required by law" exception to the HIPAA Privacy Rule applies in this case.

3. In responding to Defendant Department of Public Safety's opposition, filed October 17, 2022, I have had insufficient time to consider specific additional discovery on the issues that are outside the scope of Civil Beat's motion for summary judgment.

4. At a minimum, Civil Beat would evaluate whether to take the depositions of the various individuals who verified interrogatories about the Department's status as

a covered entity and the Department's policies and practices regarding responses to deaths in custody, as well as depositions regarding the Department's reasons for changing its practices in publicly reporting deaths in custody in 2020 and regarding general knowledge of deaths in custody within PSD's correctional facilities. This discovery goes to the issues of whether PSD is a covered entity, whether it complies with the HIPAA Privacy Rule, and whether the fact that an individual has died in custody is protected health information within the meaning of the HIPAA Privacy Rule.

I, R. BRIAN BLACK, do declare under penalty of law that the foregoing is true and correct.

DATED: Honolulu, Hawai`i, October 20, 2022

/s/ R. Brian Black
R. BRIAN BLACK