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**Electronically Filed
FIRST CIRCUIT
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Attorneys for Movant

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

ZACHARY G. SHUMAN, as Special
Administrator for the ESTATE OF
ANGUS SHANE PAUL MITCHELL,
AKA ANGUS S. P. MITCHELL AND
ANGUS MITCHELL; JOLINA
MITCHELL; and MARA GOURDINE,

Plaintiffs,

vs.

THE DEPARTMENT OF THE
MEDICAL EXAMINER; CITY AND
COUNTY OF HONOLULU; and DOES
1-10,

Defendants.

Civil No. 1CCV-24-0000407
(Injunctive Relief)

MOTION FOR LEAVE TO FILE
AMICUS CURIAE MEMORANDUM;
MEMORANDUM OF LAW IN
SUPPORT OF MOTION FOR LEAVE
TO FILE *AMICUS CURIAE*
MEMORANDUM; DECLARATION OF
R. BRIAN BLACK; EXHIBIT 1:
AMICUS CURIAE MEMORANDUM;
NOTICE OF MOTION; and
CERTIFICATE OF SERVICE

NON-HEARING MOTION

JUDGE: Hon. Kevin T. Morikone
TRIAL: NONE

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* MEMORANDUM

Pursuant to Rule 7.2 of the Rules of the Circuit Courts of the State of Hawai'i, and this Court's inherent authority, and based on the pleadings filed in this action, Public First Law Center respectfully seeks leave to file a form of the accompanying *amicus curiae* memorandum concerning the standards for public access to autopsy reports under Hawai'i Revised Statutes chapter 92F.

As an interested member of the public and advocate for open government and access to government records, Movant respectfully requests to be heard because Plaintiffs seek a court order that directly contradicts decades of precedent and practice in Hawai`i concerning the public disclosure of autopsy reports.

DATED: Honolulu, Hawai`i, March 29, 2024

/s/ Robert Brian Black
ROBERT BRIAN BLACK
Attorney for Movant

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MEMORANDUM OF LAW IN
SUPPORT OF MOTION FOR LEAVE
TO FILE *AMICUS CURIAE*
MEMORANDUM

**MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR
LEAVE TO FILE *AMICUS CURIAE* MEMORANDUM**

Public First Law Center (Public First) is a non-profit dedicated to promoting government transparency and responsiveness for the people of Hawai'i. The public has a right of access to government records because "[o]pening up the government processes to public scrutiny and participation is the only viable and reasonable method of protecting the public's interest." Hawai'i Revised Statutes (HRS) § 92F-2. That right takes on greater importance when, as here, it concerns the Medical Examiner's statutory duty to investigate unattended deaths.

The substantive issues raised in this action have the potential to impact the judicial enforcement of other public records requests. Plaintiffs' motion for a temporary restraining order significantly misstates Hawai'i law on this subject. Vague references to medical privacy do not justify withholding autopsy reports. That issue has been well-settled for decades, and decedent's wealth, social status, and philanthropy as

described in the motion do not justify special treatment. By law, public records must be disclosed in a timely fashion, and Plaintiffs' motion presents no basis to withhold the autopsy report (without graphic photographs of the deceased).

Public First, therefore, respectfully requests leave to file the accompanying *amicus curiae* memorandum that addresses the relevant binding precedent.

DATED: Honolulu, Hawai'i, March 29, 2024.

/s/ Robert Brian Black
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Attorney for Movant

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DECLARATION OF R. BRIAN BLACK

DECLARATION OF R. BRIAN BLACK

1. I am the attorney for Movant Public First Law Center (Public First). I make this declaration in support of the Public First's motion for leave to file its *amicus curiae* memorandum based on personal knowledge.

2. Public First is a non-profit dedicated to promoting government transparency and responsiveness for the people of Hawai'i.

3. In furtherance of that mission, Public First has represented numerous parties in public records disputes against State and county agencies under the Uniform Information Practices Act. Public First's cases concerning access to government records are outlined on its website, www.publicfirstlaw.org/case/.

4. Attached as Exhibit 1 is a proposed form of *Amicus Curiae* Memorandum that Public First seeks leave to file.

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

DATED: Honolulu, Hawai`i, March 29, 2024

/s/ R. Brian Black
R. BRIAN BLACK

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*Attorneys for Amicus Curiae
Public First Law Center*

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AMICUS CURIAE MEMORANDUM

JUDGE: Hon. Kevin T. Morikone
TRIAL: NONE

***AMICUS CURIAE* MEMORANDUM**

Public First Law Center (Public First) submits this memorandum concerning the standards for public access to autopsy reports under the Uniform Information Practices Act (Modified), Hawai`i Revised Statutes (HRS) chapter 92F (UIPA). Public First respectfully requests that this Court deny any request to delay public access to the autopsy report of Angus Mitchell (without graphic photographs of the deceased).¹

¹ In Public First's experience reviewing autopsy and toxicology reports from the Medical Examiner over the years, the Medical Examiner does not release photographs or video with its reports. But in the interests of securing timely disclosure of the

I. BACKGROUND

On January 3, 2024, Angus Mitchell died “unexpectedly and suddenly” at his home on Diamond Head. *E.g.*, Dkt. 7 at 20 (Decl. of Zachary G. Shuman, dated March 28, 2024 [Shuman Decl.], ¶ 2); Michelle Broder van Dyke, *Angus Mitchell, Only Child of Hairstylist Paul Mitchell, Dead at 53*, Spectrum News (Jan. 4, 2024), <https://spectrumlocalnews.com/hi/hawaii/news/2024/01/04/hairstylist-angus-mitchell-dead>.² He was found in a pool, and the Honolulu Police Department opened an unattended death investigation while Defendant Department of the Medical Examiner (Medical Examiner) investigated the cause of death. *E.g.*, Dkt. 7 at 21 (Shuman Decl. ¶¶ 4-5); Broder van Dyke, *Angus Mitchell*.

Even in the absence of violence or suspected “foul play,” the Medical Examiner has a statutory obligation to investigate a decedent’s cause of death in such circumstances.

As soon as any coroner or deputy coroner has notice of the death of any person within the coroner’s or deputy coroner’s jurisdiction as the result of violence, or as the result of any accident, or by suicide, or suddenly when in apparent health, or when unattended by a physician, or in prison, or in a suspicious or unusual manner, or within twenty-four hours after admission to a hospital or institution, the coroner or deputy coroner *shall* forthwith inquire into and make a complete investigation of the cause of the death.

HRS § 841-3(a) (emphases added).

II. THE UIPA PROTECTS THE PUBLIC’S RIGHT TO KNOW WHAT THE MEDICAL EXAMINER IS DOING.

The Legislature enacted the UIPA’s broad disclosure mandate to “[p]romote the public interest in disclosure.” HRS § 92F-2(1).

In a democracy, the people are vested with the ultimate decision-making power. Government agencies exist to aid the people in the formation and conduct of public policy. Opening up the government processes to public

autopsy report for the public, Public First includes the caveat here that disclosure should not include graphic photographs even though the Medical Examiner likely would not have disclosed such records in the first place.

² Pinpoint references to the Docket identify the page number of the corresponding PDF.

scrutiny and participation is the only viable and reasonable method of protecting the public's interest. Therefore the legislature declares that *it is the policy of this State that the formation and conduct of public policy – the discussions, deliberations, decisions, and actions of government agencies – shall be conducted as openly as possible.*

HRS § 92F-2 (emphasis added). In other words, government records are presumptively public records. In furtherance of the Legislature's presumption of public access to government records, the UIPA provides: "All government records are open to public inspection unless access is restricted or closed by law." HRS § 92F-11(a). And if there is any dispute about access: "The agency has the burden of proof to establish justification for nondisclosure." HRS § 92F-15(c).

Thus, an agency must prove that each nondisclosure of information is justified by one of the five exceptions to access in HRS § 92F-13. "[B]road, general assertions are generally insufficient to meet this burden of proof." OIP Op. No. F15-01 at 4. And as OIP has explained in numerous opinions, "the UIPA's affirmative disclosure provisions should be liberally construed, its exceptions narrowly construed, and all doubts resolved in favor of disclosure." *E.g.*, OIP Op. No. 05-16 at 6-7.

Thus, when an agency receives a request for records, it cannot pick and choose what to release. If the agency withholds any records within the scope of the request, it must meet its burden of proof to justify denying access.

III. AUTOPSY REPORTS ARE PUBLIC RECORDS.

There are five exceptions to disclosure of public records. HRS § 92F-13. One of those exceptions concerns records "which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy." HRS § 92F-13(1). For an agency to meet its burden under the privacy exception, first, it must prove that an individual has a significant privacy interest in the information to be disclosed. *E.g.*, *State of Hawai'i Org. of Police Officers v. Soc'y of Prof'l Journalists [SHOPO v. SPJ]*, 83 Hawai'i 378, 383-84, 927 P.2d 386, 391-92 (1996) ("If the privacy interest is not 'significant,' a scintilla of public interest in disclosure will preclude a finding of a clearly unwarranted invasion of personal privacy."). Second, the agency must prove that the individual's significant privacy interest outweighs the public interest in disclosure of that information. HRS

§ 92F-14(a); *Peer News LLC v. City & County of Honolulu* [*Peer News I*], 138 Hawai`i 53, 69, 376 P.3d 1, 17 (2016), *abrogated by statute on other grounds*, 2020 Haw. Sess. Laws Act 47.

OIP has long held that “disclosure of an autopsy report would not constitute a clearly unwarranted invasion of the deceased’s privacy.” OIP Op. No. 91-32 at 9. And as discussed in the opinion, the Medical Examiner had long considered autopsy reports to be public documents, even before the Legislature adopted the UIPA. *Id.* at 4 (“The Honolulu Medical Examiner’s Office informed the OIP that it considers an autopsy report a public document unless there is a pending criminal investigation connected with the death.”); *accord* 1 Report of the Governor’s Committee on Public Records and Privacy [Governor’s Report] at 131 (1987) (“This material [medical examiner records] is maintained by the counties and at this point is considered public record.”); 4 Governor’s Report at 17 (summarizing Honolulu Corporation Counsel opinion from 1961 holding that autopsy reports “are public records which are open to the public”).³ The Legislature expressly stated that it did not intend the adoption of the UIPA to hide information that had been publicly available before 1988. Conf. Comm. Rep. No. 112-88, in 1988 House Journal at 818 (“It is not the intent of the Legislature that [the UIPA exceptions] be used to close currently available records, even though these records might fit within one of the categories in this section.”); *accord* OIP Op. No. F15-01 at 3 n.4 (pre-UIPA history of public access to autopsy reports from the Medical Examiner requires that those reports “remain public”).

In 2015, OIP further held that related toxicology reports also must be disclosed. OIP Op. No. F15-01 at 2. “[T]oxicology results are incorporated into or attached to autopsy reports.” *Id.* at 3. To reach this conclusion, OIP found a “diminished but still significant privacy interest in toxicology information,” but concluded that because the coroner “has a statutory duty to inquire into and make a complete investigation of the

³ See *Peer News LLC v. City & County of Honolulu* [*Peer News II*], 143 Hawai`i 472, 481-82, 431 P.3d 1245, 1254-55 (2018) (describing the influence of the Governor’s committee report on the adoption of UIPA); *accord* H. Stand. Comm. Rep. No. 342-88, in 1988 House Journal at 969-70 (referencing the Governor’s committee report); S. Stand. Comm. Rep. No. 2580, in 1988 Senate Journal at 1093 (same)

cause of death . . . the public has a legitimate interest in their disclosure.” *Id.* 8-9. When weighed together, OIP found “that the public interest in disclosure of toxicology information . . . outweigh[ed] the reduced but still significant privacy interests of the [decedent] as that information is maintained in toxicology reports.”⁴ *Id.* at 7. OIP also held that family members of the deceased do not have a “significant” privacy interest in the information contained in either a toxicology or autopsy report. OIP Op. No. F15-01 at 14.

These OIP opinions are binding precedent for this Court unless palpably erroneous.⁵ HRS § 92F-15(b) (“Opinions and rulings of the office of information practices shall be admissible and shall be considered as precedent unless found to be palpably erroneous”). To overrule these opinions, Plaintiffs have the high burden to prove that disclosing autopsy reports to the general public is “plainly erroneous *and* inconsistent with both the letter and intent of the statutory mandate.” *Carlisle v. One Boat*, 119 Hawai`i 245, 253, 195 P.3d 1177, 1185 (2008) (emphasis added). When the Hawai`i Supreme Court has ruled that OIP decisions are palpably erroneous, it is because the decision renders some portion of the UIPA a “nullity” or because the decision is “clearly irreconcilable with the plain language and legislative history” of the

⁴ In 2021, OIP revisited autopsy reports in an informal decision. OIP uses informal decisions when issues are well-settled. *E.g.*, OIP, 2023 Annual Report at 24, <https://oip.hawaii.gov/wp-content/uploads/2024/01/OIP-ANNUAL-REPORT-2023.pdf>. (“Informal opinions do not have the same precedential value as formal opinions because they generally address issues that have already been more fully analyzed in formal opinions.”). As in 2015, OIP required disclosure because the coroner’s statutory duty to investigate cause of death established a legitimate overriding public interest. OIP U Memo 21-02 at 4-5 (attached).

⁵ Although Plaintiffs thoroughly researched other jurisdictions, the *ex parte* motion failed to cite directly adverse and easily accessible Hawai`i precedent. Haw. R. Prof’l Conduct 3.3. OIP opinions are indexed and searchable on OIP’s website (oip.hawaii.gov), Westlaw, and Lexis. *E.g.*, <https://oip.hawaii.gov/laws-rules-opinions/opinions/formal-opinion-letter-summaries-and-full-text/> (listing OIP Op. No. 91-32 under the title “Autopsy Reports” and OIP Op. No. F15-01 under the title “Toxicology Reports”).

UIPA. *Peer News I*, 138 Hawai`i at 67, 376 P.3d at 15; *Peer News II*, 143 Hawai`i at 475, 431 P.3d at 1248.

Moreover, Plaintiffs' extensive citation to cases concerning graphic photographs or audio of decedents is inapposite. Dkt. 7 at 9-11. OIP analyzed most of those cases in its opinions. *E.g.*, OIP Op. No. F15-01 at 11 n.16 ("these cases, like Favish, involved graphic photographs or audio recordings of the deceased; these cases did not hold that all information pertaining to decedents should be withheld to protect their surviving families' privacy interests"). OIP recognized that "Favish supports family members' privacy interest in preventing 'disclosure of graphic details surrounding their relative's death,' but not a blanket restriction on disclosure of any information about a deceased person." OIP Op. No. 05-16 at 13. But if there are no photographs or other graphic images of the decedent, there is no such privacy interest. *Id.*; OIP Op. No. F15-01 at 11; OIP U Memo 21-02 at 7 (factual written description of decedents' face – without photographs – is not "graphic"). Plaintiffs have alleged that the autopsy report contains "medical" information, Dkt. 1 at 6 ¶ 28, but not "graphic" details of the type that would justify invoking *Favish* and the other cases cited.⁶ But even if an autopsy report contained graphic images, that would justify withholding only the graphic images – *i.e.*, the near entirety of the autopsy report must be disclosed.

IV. PLAINTIFFS CANNOT RELY ON THE UIPA EXCEPTIONS.

Plaintiffs erroneously premise their claims on the UIPA. The UIPA is not a confidentiality law that can be used to stop a government agency from disclosing records. *State of Haw. Org. of Police Officers v. City & County of Honolulu*, 149 Hawai`i 492, 505-09, 494 P.3d 1225, 1238-42 (2021) ("There is no right of nondisclosure under UIPA, only agency discretion to utilize the enumerated exceptions."). A plaintiff

⁶ Plaintiffs' *ex parte* motion seeks relief that goes beyond the allegations in the Complaint. *Compare* Dkt. 1 at 8 (requesting injunction against release of "autopsy report"), *with* Dkt. 7 at 14 (requesting injunction against release of "autopsy report and any information related to the cause of death"). The motion also identifies a purported concern about release of photographs and video. *E.g.*, Dkt. 7 at 12 (statement with no evidentiary reference: "Plaintiffs are aware of photographs contained in the autopsy report").

seeking to stop disclosure must rely on “the constitution (or another confidentiality statute if that statute provides a cause of action).” *Id.* at 509, 494 P.3d at 1242.

Thus, for privacy concerns, Plaintiffs’ claims must meet the more stringent standard set by the Hawai`i Constitution. *Id.* at 509-12, 494 P.3d at 1242-45 (“But when an agency has determined that it may or must disclose pursuant to UIPA, any recourse is to the constitution (or, if applicable, a different confidentiality statute). The mere fact that the records relate to a statutory privacy interest recognized by HRS § 92F-14 does not mean that the agency’s decision to disclose violates the constitution . . .”). The constitutional right of privacy only protects information that is highly personal and intimate *and of no legitimate public interest*. *State of Haw. Org. of Police Officers v. Soc’y of Prof’l Journalists*, 83 Hawai`i 378, 398, 927 P.2d 386, 406 (1996) (“if the matter publicized is of a kind that (a) would be regarded as highly offensive to a reasonable person, and (b) is not of legitimate concern to the public”). The heightened privacy standards in the UIPA do not expand the scope of the constitutional right of privacy. *SHOPO v. City & County of Honolulu*, 149 Hawai`i at 510-11, 494 P.3d at 1243-44 (“what the constitutional privacy provision protects remains bedrock”; it is “implemented” – not “defined” – by the Legislature in the UIPA). Plaintiffs cannot satisfy the constitutional standard because, as explained in the various OIP opinions, the public has a legitimate interest in autopsy reports.

For Plaintiffs’ claim that disclosure would frustrate a pending law enforcement investigation, that is simply not Plaintiffs’ call. There is a well-developed body of Hawai`i precedent regarding frustration of pending investigations. *See* HRS § 92F-13(3) (exception for frustration of legitimate government function); *e.g.*, OIP Op. No. 91-32 at 9-12. But a third party cannot force a government agency to claim that disclosure would interfere with a law enforcement investigation. *Peer News I*, 138 Hawai`i at 74-75, 376 P.3d at 22-23 (“HPD has not claimed at any point in this litigation that disclosure of the records at issue would frustrate any legitimate government purpose, and SHOPO, as a third-party intervenor, cannot make that argument on HPD’s behalf.”).

V. THE CITY’S PURPORTED PROMISES OF CONFIDENTIALITY ARE IRRELEVANT.

Plaintiffs claim that the Medical Examiner promised confidentiality. Dkt. 7 at 21 (Shuman Decl. ¶ 6). A government agency cannot bargain away the public’s right of access under the UIPA. *SHOPO v. City & County of Honolulu*, 149 Hawai`i at 520, 494 P.3d at 1253 (“This court settled in SHOPO v. SPI that an agency may not collectively bargain away its duties under UIPA – compliance with the statute is ‘non-negotiable.’”). Thus, any purported promises of confidentiality do not affect the analysis of UIPA exceptions. *Honolulu Civil Beat Inc. v. Dep’t of the Atty Gen.*, 151 Hawai`i 74, 82 n.9, 508 P.3d 1160, 1168 n.9 (2022) (“The State AG cannot override the UIPA’s disclosure requirements by promising interviewees confidentiality.”).

VI. THE UIPA REQUIRES TIMELY DISCLOSURE OF RECORDS.

An express purpose of the UIPA is to “[p]rovide for accurate, relevant, *timely*, and complete government records.” HRS § 92F-2(2) (emphasis added). The Governor’s Report suggested the standard, explaining: “Less obvious perhaps is the importance of ‘timely’ records. It should, however, be readily apparent that unless the record is produced on a relatively contemporaneous basis, it is far less use to the public or the agency. It is also far less likely to be accurate.”⁷ 1 Governor’s Report at 62.

Government records must be disclosed to the public no more than 20 business days after a request. HAR § 2-71-13 (providing for disclosure within 10 business days and allowing an additional 10 business days for “extenuating circumstances”). While the record is not clear whether the deadline for disclosure has expired, the Medical Examiner has delayed its anticipated disclosure date. Dkt. 7 at 21-22 (Shuman Decl.

⁷ As the Hawai`i Supreme Court has recognized in the analogous context of public access to court records: “the right of public access exists to provide members of the public with contemporary information about matters of current public interest so that they may effectively exercise their First Amendment rights, the belated release of records to which the public is rightfully entitled is not an adequate remedy.” *Grube v. Trader*, 142 Hawai`i 412, 428 n.21, 420 P.3d 343, 359 n.21 (2018); *accord Courthouse News Serv. v. Planet*, 947 F.3d 581, 593 (9th Cir. 2020) (“CNS’s reporting on complaints must be timely to be newsworthy and to allow for ample and meaningful public discussion regarding the functioning of our nation’s court systems.”).

¶¶ 9, 12). Plaintiffs cannot be permitted to thwart the express intent of the UIPA with unsupported claims for nondisclosure.

VII. NO ONE IS ENTITLED TO SPECIAL TREATMENT UNDER THE UIPA.

The UIPA applies uniformly to everyone. For example, “to determine whether an individual has a privacy interest in a government record, one examines the type of information therein, rather than the particular characteristics of the individual who is the subject of the record.” OIP Op. No. F15-01 at 13. “The UIPA does not recognize a greater privacy interest for individuals who reside in small, close-knit communities.” *Id.* at 13-14.

Plaintiffs’ wealth and social status – as described in the *ex parte* motion – thus has no bearing here. Dkt. 7 at 5, 22-23 (describing Mr. Mitchell’s ownership of a global beauty products company, his philanthropy in Hawai`i, the family’s grief, and a vague reference to purported impact on an unspecified “unrelated legal action”). OIP has addressed all the generic concerns raised by Plaintiffs, and the Medical Examiner has followed the standards set by OIP for nearly a decade without incident. Plaintiffs’ ability to pay attorneys to file an *ex parte* motion – unsupported by relevant facts and contradicted by the law – does not justify deviating from the legally required timely disclosure of an autopsy report (without graphic photographs of the deceased).

VIII. THE REQUESTERS ARE NECESSARY PARTIES.

If the Court permits this matter to proceed – even though Plaintiffs have not shown a basis for delaying or denying access – the persons who have requested access to the autopsy report are necessary parties. Plaintiffs seek to strip unnamed requesters of their rights under the UIPA.⁸ HRCF 19(a). The Medical Examiner does not represent

⁸ Plaintiffs had an obligation to identify parties after “a diligent and good-faith effort to ascertain the person’s full name and identity.” HRCF 17(d), *see also* HRCF 19(c) (plaintiff must plead the reason for not joining necessary parties). Plaintiffs made no such effort to identify the requesters whose rights Plaintiffs seek to terminate. Dkt. 1 at 2 ¶ 5 (identifying only “Doe” defendants that “may be liable to Plaintiffs” and failing to specify any efforts made to identify unknown defendants). Public record requests are publicly accessible government records, making the identity of requesters easily ascertainable if Plaintiffs had made any effort. OIP Op. No. 96-04 at 6.

the interests of requesters, as reflected in its agreement to delay releasing records that it concluded must be disclosed under the UIPA. Persons who have made a request for the autopsy report have a cause of action under the UIPA that Plaintiffs seek to deny *in absentia*. See HRS § 92F-15(a). Plaintiffs should not be allowed to proceed without all the real parties in interest.

CONCLUSION

Ignoring all Hawai`i precedent, Plaintiffs seek an order from this Court that contradicts more than a half century of public access to autopsy reports. Public First respectfully requests that this Court deny any request to delay public access to the autopsy report of Angus Mitchell (without graphic photographs of the deceased).

DATED: Honolulu, Hawai`i, _____, 2024

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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 section 92F-42, HRS, and chapter 2-73, Hawaii Administrative rules (HAR). This is a memorandum decision and will not be relied upon as precedent by OIP in the issuance of its opinions or decisions but is binding upon the parties involved.

MEMORANDUM DECISION

Requester: Julie Mae
Agency: Hawaii County Police Department
Date: July 31, 2020
Subject: Autopsy Report

Requester seeks a decision as to whether the Hawaii County Police Department (POLICE-H) properly denied her request for a copy of an autopsy report under Part II of the UIPA.

Unless otherwise indicated, this decision is based solely upon the facts presented in Requester's email to OIP with attachments dated January 15, 2019; and a letter with exhibits and the requested documents for *in camera* review to OIP from the County of Hawaii Department of the Corporation Counsel on behalf of POLICE-H dated February 20, 2019.

Decision

The autopsy report (Autopsy Report), which includes a toxicology report, contains medical information and psychiatric information including the presence of alcohol, drugs, or other substances. Based on the precedent set in OIP Opinion Letter Number F15-01, the subject of the Autopsy Report (Decedent) retains a privacy interest in his medical information after death. However, based on the analysis set out in that opinion, the public interest in disclosure of the Autopsy Report outweighs the privacy interest of the Decedent therein, so disclosure would not constitute a

clearly unwarranted invasion of Decedent's personal privacy and the Autopsy Report may not be withheld on that basis. HRS §§ 92F13(1), 92F-14(a) (2012).

Surviving family members sometimes have privacy interests in information about a deceased individual that outweigh the public interest in disclosure of all or a portion of an autopsy or toxicology report. Here, however, the Autopsy Report does not contain graphic or similarly sensitive information that surviving family members would have a significant privacy interest in that could warrant withholding access to the Autopsy Report to protect their interests.

Statement of Reasons for Decision

Requester made a request to POLICE-H for a copy of the Autopsy Report.¹ POLICE-H responded in a letter dated December 5, 2018, which stated:

- x Other: We are in receipt of your request for a police report, which we had received on 12/3/18. We are unable to provide the requested police report. Please submit a new request and attach the following documents. A letter signed by the next of kin authorizing you to receive a copy of the requested report and a legal document verifying that party as the next of kin. Please be aware that not all report(s) may be released and the information released within the report(s) may be redacted.²

- x Other: Pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and the Federal Code of Regulations 45CFR164.512(e)(1)(i) [sic], the following documents

¹ When a person dies as a result of an accident or under certain other circumstances described by law, the coroner or deputy coroner is required to make "a complete investigation of the cause of the death" and to perform an autopsy of the decedent's remains if, in the opinion of the coroner, an autopsy is "necessary in the interest of the public safety or welfare." HRS §§ 841-3, -14 (2014). POLICE-H is the "designated coroner" for Hawaii County.

² When a requester seeks records containing information about another individual that fall under the UIPA's privacy exception, the UIPA requires agencies to disclose the records upon a signed consent from the individual whose privacy interest is at stake. See HRS § 92F-12(b)(1) (2012) (requiring agencies to disclose "[a]ny government record, if the requesting person has the prior written consent of all individuals to whom the record refers"); OIP Op. Ltr. No. 10-05 at 2 (finding that records "could not be withheld based on the privacy exception where all persons mentioned in the records had consented in writing to their disclosure"). While consent of surviving family members may be required prior to disclosure of records that would not otherwise be public, because disclosure of the Autopsy Report is required under the UIPA, as explained in section II, infra, it cannot be preconditioned on a signed release.

are required prior to the release of the autopsy report: 1) legal document appointing you as Personal Representative of the decedent's estate and 2) document signed by yourself authorizing the release to you of the decedent's medical records.³

Requester thereafter filed this appeal.

I. OIP's Treatment of Autopsy and Toxicology Reports

POLICE-H invoked section 92F-13(1), HRS, as allowing it to withhold the Autopsy Report in its entirety. This exception to public disclosure under the UIPA allows agencies to withhold "[g]overnment records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy." HRS § 92F-13(1) (2012). To determine whether disclosure would be a clearly unwarranted invasion of personal privacy, the UIPA sets forth a balancing test which provides that "[d]isclosure of a government record shall not constitute a clearly unwarranted invasion of personal privacy if the public interest in disclosure outweighs the privacy interests of the individual." HRS § 92F-14(a) (2012).⁴

Historically, OIP treated privacy interests as extinguishing upon a person's death. OIP Opinion Letter Number 91-32 (Opinion 91-32) discussed the applicability of the UIPA's exceptions to disclosure set out in section 92F-13, HRS,⁵ to information contained in autopsy reports and found that the UIPA required public disclosure of autopsy reports so long as disclosure would not interfere with a pending or prospective law enforcement investigation.⁶ OIP Op. Ltr. No. 91-32 at 6. OIP concluded that deceased individuals did not have a recognizable privacy interest in

³ POLICE-H is a non-covered entity under HIPAA. The portion of its response to the record request which required Requester to provide, pursuant to HIPAA, "1) legal document appointing you as Personal Representative of the decedent's estate and 2) document signed by yourself authorizing the release to you of the decedent's medical records" was not a proper response under the UIPA because, as explained in sections I and II, *infra*, the Autopsy Report is public and not subject to HIPAA's nondisclosure requirements for medical information.

⁴ The public interest to be considered is whether disclosure of information sheds light upon an agency's performance of its statutory duties and upon the actions and conduct of government officials. *E.g.*, OIP Op. Ltr. No. 89-4. Under this balancing test, if an individual's privacy interest in a government record is not "significant," then the record must be disclosed if there is a "scintilla" of public interest. OIP Op. Ltr. No. 95-24 at 10 (citing H. Conf. Comm. Rep. No. 112-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 817, 818 (1988); S. Conf. Comm. Rep. No. 235, Haw S.J. 689, 690 (1988)).

⁵ POLICE-H only argued that section 92F-13(1), HRS, was applicable here.

⁶ POLICE-H did not claim there was a pending or prospective law enforcement investigation.

their autopsy reports, as the right to privacy is generally extinguished upon the individuals' death. OIP Op. Ltr. No. 91-32 at 9.

In 2014, OIP revisited the longstanding precedent in Opinion 91-32 because the legal standard that privacy interests of an individual are extinguished upon death had changed over time, particularly with the passage of the Health Insurance Portability and Accountability Act of 1996, Public Law 104-191 (HIPAA) and the rules promulgated under HIPAA, 45 C.F.R. Parts 160 and 164 (HIPAA rule or Privacy Rule).⁷ After reconsidering the question of whether an individual's privacy interest may survive after death, OIP concluded that reputational privacy interests do continue after death but decrease with the passage of time. OIP Op. Ltr. No. 03-19 (finding an agency may withhold records under the UIPA's privacy exception after the death of the individual, but to a lesser extent than with a living individual, and as affected by the subsequent passage of time).⁸ OIP Opinion Letter Number F15-01 (Opinion F15-01) set forth a detailed analysis of privacy interests of deceased individuals as they relate to autopsy reports and toxicology reports attached thereto using this newer standard under which privacy interests may survive after death.

II. Public Interest in Disclosure Outweighs Surviving Privacy Interest of Decedent So Disclosure is Required

POLICE-H's response to this appeal claimed Decedent continues to have a privacy interest in the medical information in the Autopsy Report. In OIP Opinion Letter Number 03-19, OIP advised that agencies not directly covered by HIPAA (like POLICE-H) that hold comparatively recent health records of deceased persons

⁷ The federal Department of Health and Human Services' (HHS) responses to comments, which accompanied publication of the HIPAA final rule, provide that "to the extent that death records and autopsy reports are obtainable from non-covered entities, such as state legal authorities, access to this information is not impeded by this [HIPAA] rule." 65 Fed. Reg. 82462, 82597 (Dec. 28, 2000). HHS further stated:

HIPAA does not provide HHS with statutory authority to regulate coroners' or medical examiners' re-use or re-disclosure of protected health information unless the coroner or medical examiner is also a covered entity. However, we consistently have supported comprehensive privacy legislation to regulate disclosure and use of individually identifiable health information by all entities that have access to it.

Id. at 82687.

⁸ At the time OIP Opinion Letter Number 03-19 was issued, the Privacy Rule protected health information for as long as an institution maintained the records. A 2013 amendment limited the period of protection for individually identifiable health information about a decedent to 50 years following the date of death of the individual. Privacy Rule, 45 C.F.R. §§ 164.502(f), 160.103 (2013).

should limit disclosure of those records similarly to what the HIPAA rules would require, based on the UIPA's privacy exception. OIP Op. Ltr. No. 03-19 at 8. OIP adopted the following test for determining whether the privacy exception to disclosure applies for information about a deceased individual:

First, for records less than 80 years old, an agency must balance the passage of time against the sensitivity of the information involved to determine how strong the remaining privacy interest is. Second, the agency must balance that privacy interest against the public interest in disclosure, as provided by section 92F-14, Hawaii Revised Statutes. If the public interest in disclosure outweighs the now-reduced privacy interests of the deceased individual, the record may not be withheld under the privacy exception.

Op. Ltr. No. 03-19 at 14 (footnotes and citation omitted).

Applying the two-part test here, POLICE-H asserted that Decedent's privacy interest is significant because (1) he was relatively young, (2) the Autopsy Report includes psychiatric information⁹ and information about intoxicant use; (3) the date of death in 2016 was recent, and (4) the described condition of the body at the time it was found¹⁰ all outweigh any public interest in disclosure. Opinion F15-01 found at page 8 that the presence and level of alcohol or drugs would, arguably, constitute information relating to an individual's medical condition. Following this precedent, OIP finds here that, given the recency of Decedent's passing and the sensitive nature of medical information under section 92F-14(b)(1), HRS,¹¹ Decedent retains a diminished but still significant privacy interest in the Autopsy Report.

The second step in the test is to balance the still significant privacy interest of Decedent against the public interest in disclosure. The Autopsy Report was prepared as part of an investigation required by statute to be conducted by government employees for certain types of deaths. POLICE-H is the "designated coroner" for Hawaii County has a statutory duty to inquire into and make a complete investigation of the cause of death of any person as the result of an accident. HRS § 841-3 (2014). The toxicology reports were prepared in connection with the performance of this statutory duty, and, therefore, the public has a

⁹ There is one short sentence on page 1 of the Autopsy Report summarizing Decedent's psychiatric history.

¹⁰ "Graphic" information in autopsy reports is generally considered during discussion of privacy interests of surviving family members. See section III, *infra*.

¹¹ Section 92F-14(b)(1), HRS, states that "[i]nformation relating to medical, psychiatric, or psychological history, diagnosis, condition, treatment, or evaluation" is information in which the individual has a significant privacy interest.

legitimate interest in their disclosure as set out in more detail in Opinion F15-01. OIP Op. Ltr. No. F15-01 at 8-9.¹²

Applying the balancing test at section 92F-14(a), HRS, and following the precedent in Opinion F15-01, OIP finds that the public interest in disclosure of the Autopsy Report, including the above-described medical information, is considerable, and outweighs the reduced but still significant privacy interest of Decedent. Thus, disclosure of the Autopsy Report would not constitute a clearly unwarranted invasion of Decedent's personal privacy. OIP therefore concludes that the UIPA requires POLICE-H to disclose the Autopsy Report.

III. Privacy Interest of Decedents' Family Members

OIP next considers the privacy interests of Decedents' surviving family members. POLICE-H's position is that disclosure of the Autopsy Report would have a negative impact on the Decedent's surviving family members for various reasons including the fact that it contains a graphic description of the condition of the body, implies criminal activity, and could bring disrepute upon the family.

First, OIP discusses the standard set in Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 124 S. Ct. 1570, 158 L. Ed. 2d 319 (2004) (Favish) (holding that Exemption 7(C) of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(7)(C),

¹² Opinion F15-01 noted that its finding that toxicology reports for two deceased motorists were public was supported by comments in the Report of the Governor's Committee on Public Records and Privacy (1987) (Governor's Committee Report), a four-volume report setting forth a review, testimony, and recommendations about Hawaii's records law in effect before the UIPA. The Governor's Committee Report played an important role in the Legislature's drafting of the UIPA, and OIP consults it when appropriate. As recognized in OIP's opinion,

the Governor's Committee Report includes a summary of a discussion about medical examiner records and states that "[t]his material is maintained by the counties and at this point is considered public record" though "at least one Committee member has experienced difficulty in obtaining these reports, at least in sensitive cases." Id. Vol. I Governor's Committee Report 131 (1987). Hence, it would appear that the Legislature was aware of the public nature of medical examiner records at the time it enacted the UIPA and could have expressly exempted them from public disclosure, but did not do so. Significantly, as the Legislature declared when it established the UIPA, "it is not the intent of the Legislature that this section [setting forth exceptions to access] be used to close currently available records, even though these records might fit within one of the categories in this section." S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess. Haw. S.J. 689, 691 (1988); H.R. Conf. Comm. Rep. No. 112-88, Haw. H.J. 817, 818 (1988).

OIP Op. Ltr. No. F15-01 at 9.

recognizes “family members’ right to personal privacy with respect to their close relative’s death-scene images”). Favish at 170. With respect to Favish, OIP has stated:

Favish supports family members’ privacy interest in preventing “disclosure of graphic details surrounding their relative’s death,” but not a blanket restriction on disclosure of any information about a deceased person: “Our holding . . . would allow the Government to deny these gruesome requests **in appropriate cases.**” Favish, 541 U.S. at 170-71 (emphasis added). Because the record at issue does not include any photographs or other images of the victim, or any “graphic details” surrounding the victim’s death, Favish is inapposite.

OIP Op. Ltr. No. F15-01 at 10-11, citing OIP Op. Ltr. No. 05-16 at 13.

The Autopsy Report contained one sentence describing the condition of Decedent’s face at the time the body was found which POLICE-H asserted is “graphic.” Having reviewed the Autopsy Report *in camera*, OIP first notes that portions, particularly the first page of the 7-page report, were difficult or impossible to read. That being said, the Autopsy Report contains typically factual information that would be in an autopsy or toxicology report. It does not contain photographs or other images, or any “graphic details” surrounding Decedent’s death, so OIP cannot find a heightened privacy interest of surviving members as set forth in Favish.

Second, OIP has previously recognized that surviving family members **may possibly** have a privacy interest in records that may reveal a decedents’ alleged illegal conduct. OIP Op. Ltr. No. F15-01 at 12 (emphasis added). However, OIP has not heretofore found this privacy interest to be “significant.” Id. POLICE-H argued that, based on the toxicology results and “pathological diagnosis, there is alleged criminal activity and the amount of illegal substances . . . tends to bring disrepute on [Decedent]’s family and negatively portray his surviving family members.” POLICE-H has the burden of proof to justify nondisclosure under section 92F-15(c), HRS, and has not provided any legal authority for finding that disclosure of the Autopsy Report would constitute a clearly unwarranted invasion of the surviving family members’ privacy by bringing them disrepute. OIP’s *in camera* review of the Autopsy Report does not show there is information that would bring disrepute upon the surviving family of Decedent. Accordingly, OIP finds that surviving family members of Decedent do not have a significant privacy interest in information in the Autopsy Report, which was prepared in connection with a death that the coroner had a statutory duty to investigate. Because OIP does not find a “significant” privacy interest, OIP does not reach the balancing test of section 92F-14(a), HRS. As OIP found in section II, supra, there is more than a “scintilla” of public interest in the Autopsy Report, and OIP therefore concludes that disclosure would not constitute a clearly unwarranted invasion of the personal privacy of Decedent’s family. Id. at 14.

Right to Bring Suit

Requester is entitled to seek assistance from the courts when Requester has been improperly denied access to a government record. HRS § 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.

SPECIAL NOTICE: During the COVID-19 pandemic, Hawaii's Governor issued his Supplementary Proclamation on March 16, 2020, which suspended the UIPA in its entirety. The suspension was continued until May 31, 2020, by the Governor's Sixth Supplementary Proclamation dated April 25, 2020. On May 5, 2020, the Governor's Seventh Supplementary Proclamation (SP7) modified the prior suspension of the UIPA in its entirety and provided that the UIPA and chapters 71 and 72, Title 2, HAR, "are suspended to the extent they contain any deadlines for agencies, including deadlines for OIP, relating to requests for government records and/or complaints to OIP." SP7, Exhibit H. On May 18, 2020, the Governor's Eighth Supplementary Proclamation (SP8) at Exhibit H, continued the modified suspension of the UIPA provided in SP7. On June 10, 2020, the Governor's Ninth Supplementary Proclamation (SP9) at Exhibit H, continued the modified suspension of SP8, Exhibit H. On July 17, 2020, the Governor's Tenth Supplementary Proclamation (SP10) at Exhibit G, continued the modified suspension in SP9, Exhibit H.

The UIPA's Part IV sets forth OIP's powers and duties in section 92F-42, HRS, which give OIP authority to resolve this appeal and have been restored by SP7 through SP10, except for the deadlines restriction. Thus, for OIP's opinions issued while SP10 is still in force, agencies will have a reasonable time to request reconsideration of an opinion to OIP, but a request for reconsideration shall be made by an agency no later than ten business days after suspension of the UIPA's deadlines are lifted upon expiration of SP10 after August 31, 2020, unless SP10 is terminated or extended by a separate proclamation of the Governor. Agencies wishing to appeal an OIP opinion to the court under section 92F-43, HRS, have a reasonable time to do so, subject to any orders issued by the courts during the pandemic, and no later than thirty days after suspension of the UIPA's deadlines is lifted upon expiration of SP10 after August 31, 2020, unless terminated or extended by a separate proclamation of the Governor.

OFFICE OF INFORMATION PRACTICES



Carlotta Amerino
Staff Attorney

APPROVED:



Cheryl Kakazu Park
Director

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

ZACHARY G. SHUMAN, as Special
Administrator for the ESTATE OF
ANGUS SHANE PAUL MITCHELL,
AKA ANGUS S. P. MITCHELL AND
ANGUS MITCHELL; JOLINA
MITCHELL; and MARA GOURDINE,
Plaintiffs,

vs.

THE DEPARTMENT OF THE
MEDICAL EXAMINER; CITY AND
COUNTY OF HONOLULU; and DOES
1-10,
Defendants.

Civil No. 1CCV-24-0000407
(Injunctive Relief)

NOTICE OF MOTION

NOTICE OF MOTION

TO: Jason M. Tani
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Attorney for Defendants

NOTICE IS HEREBY GIVEN that the undersigned has filed with the above-entitled court the motion attached hereto. Any response to said motion must be filed and served no later than 10 days after the service date indicated on the attached Notice of Electronic Filing. Pursuant to Rule 6(e) of the Hawai`i Rules of Civil Procedure, if the motion is served by mail, any response to said motion must be filed and served no later than 12 days after the service date indicated on the attached Notice of Electronic Filing or certificate of service.

DATED: Honolulu, Hawai`i, March 29, 2024

/s/ Robert Brian Black
Robert Brian Black
Attorney for Movant

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

ZACHARY G. SHUMAN, as Special
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ANGUS SHANE PAUL MITCHELL,
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CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I, Robert Brian Black, certify that on March 29, 2024, I served the foregoing Motion for Leave to File Amicus Curiae Memorandum; Memorandum of Law in Support of Motion for Leave to File Amicus Curiae Memorandum; Declaration of R. Brian Black; Exhibit 1: Amicus Curiae Memorandum; and Notice of Motion on the following parties through JEFS or by electronic mail:

Jason M. Tani
Christopher P. St. Sure
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Ernest H. Nomura
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Attorney for Defendants

DATED: Honolulu, Hawai'i, March 29, 2024

/s/ Robert Brian Black
Robert Brian Black
Attorney for Movant