No. SCPW-24-0000537

IN THE SUPREME COURT OF THE STATE OF HAWAI`I

HAWAI`I POLICE DEPARTMENT, COUNTY OF HAWAI`I, Petitioner, and THE HONORABLE PETER K. KUBOTA, Judge of the Circuit Court of the Third Circuit, State of Hawai`i, Respondent.	ORIGINAL PROCEEDINGS No. 3CSP-23-0000003 No. 3CSP-23-0000017 (Special Proceedings) CIRCUIT COURT OF THE THIRD CIRCUIT, STATE OF HAWAI`I The Honorable Peter K. Kubota

AMICUS CURIAE BRIEF

Robert Brian Black 7659
Public First Law Center
700 Bishop Street, Suite 1701
Honolulu, Hawai`i 96813
(808) 531-4000
brian@publicfirstlaw.org
Attorney for Amicus Curiae
Public First Law Center

In this dispute about the disclosure of records in response to a litigation subpoena, Petitioner Hawai`i Police Department, County of Hawai`i (HPD) argues that it *must withhold* the requested records to comply with the Uniform Information Practices Act (Modified), Hawai`i Revised Statutes (HRS) chapter 92F (UIPA). Respondent Judge Peter K. Kubota correctly analyzed this issue pursuant to discovery standards, not the UIPA. This case concerns a litigation subpoena, not a UIPA request. The UIPA is not a confidentiality law and has no relevance in discovery. HPD has not established that it has a "clear and indisputable right to relief."

Amicus Curiae Public First Law Center (Public First) respectfully requests that the Court deny the HPD's petition for writ of mandamus.[1]

I. THE UIPA IS NOT A CONFIDENTIALITY LAW.

HPD argues that an order compelling disclosure of government records during an ongoing investigation "contravenes" the UIPA. Dkt. 1 at 5-6.[2] But this Court has rejected the notion that the UIPA *requires* an agency to withhold records that fall within its exceptions. *SHOPO v. City & County of Honolulu*, 149 Hawai`i 492, 508-09, 494 P.3d 1225, 1241-42 (2021). "[N]ondisclosure is only mandatory under UIPA where another law—for instance, a state or federal statute, the constitution, or a court order—independently requires an agency to withhold the sought records." *Id.* at 509, 494 P.3d

---

[1] Government agencies often conflate the UIPA with discovery standards to obstruct access in matters related to high-profile litigation. *E.g.*, *Myeni v. City & County of Honolulu*, No. 1CCV-21-504 Dkt. 51 (motion for protective order to stay discovery into the officer-involved fatal shooting of Lindani Myeni based in part on ongoing investigation exception to the UIPA). In other circumstances, Public First would prefer that the Court definitively address this issue and hold that the UIPA exceptions are not a basis for a government agency to withhold otherwise discoverable records from a party in litigation. But in light of the overriding public importance and urgency of the underlying dispute in this case—determining the actual innocence of an individual incarcerated for over two decades—Public First believes that swift denial of HPD's petition better serves the public interest. This Court will have other opportunities to address the UIPA issue.

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

at 1242.[3] There is no conflict between a government agency's discovery obligations in litigation and the UIPA.

II. GOVERNMENT AGENCIES DO NOT HAVE SPECIAL EXEMPTIONS FROM LITIGATION DISCOVERY.

The Hawai`i Rules of Civil Procedure provide the framework for discovery obligations and objections. *E.g.*, HRCP 26 (discovery scope and limits and protective orders), 45 (standards for subpoenas). The Hawai`i Rules of Evidence define privileges against disclosure. HRE 501 ("Except as otherwise required [by law] and except as provided in these rules or in other rules adopted by the Supreme Court of the State of Hawaii, no person has a privilege to . . . [r]efuse to disclose any matter."). The UIPA is not an exception to litigation discovery under this framework.

HPD's interpretation of the UIPA here makes no sense. HPD claims that the UIPA provides government agencies special privileges to refuse to disclose information—even when there has been no UIPA request. Under HPD's interpretation, a government agency could withhold any number of personnel files, medical records, or business or licensing information because it arguably falls within a UIPA exception. *See, e.g.*, S. Stand. Comm. Rep. No. 2580, in 1988 Senate Journal at 1094-95 (identifying various privacy interests under the privacy exception and potential grounds for the frustration exception). It would not matter whether the records are relevant—or even necessary—for a litigation party's claims or defenses in, for example,

[3] This Court analyzed the plain language of the UIPA and numerous supporting OIP opinions holding that the UIPA is not a confidentiality law. *SHOPO*, 149 Hawai`i at 507-08, 494 P.3d at 1240-41 ("The statutory language here is not prohibitive: that is, HRS § 92F-13 does 'not require disclosure' if an exemption applies, but it does not forbid it, either."). In direct contrast, in *Kema*—when this Court granted a writ for mandamus to stop disclosure of particular records—the underlying statute (the Child Protective Act) expressly provided for confidentiality. *Kema v. Gaddis*, 91 Hawai`i 200, 202 n.2, 982 P.2d 334, 336 n.2 (1999) ("information of any nature which are submitted to the court may be made available to other appropriate persons, who are not parties, only upon order of the court after the court has determined that such access is in the best interest of the child or serves some other legitimate purpose").

a medical malpractice, employment retaliation, or breach of contract case.[4] And no non-governmental party or subpoenaed entity in litigation would be able to invoke similar privilege claims to unilaterally withhold records.[5]

Moreover, OIP has rejected efforts to conflate the UIPA and litigation discovery.[6] OIP Op. No. F20-04 at 7 n.4 ("Discovery of records in the course of litigation is a separate and distinct process from access to government records or personal records under the UIPA, and different standards apply."); *cf.* OIP Op. No. 95-16 at 2 (identifying some differences between the scope of litigation discovery and the scope of public records requests).[7]

The UIPA exceptions are irrelevant to litigation discovery standards.

---

[4] Requiring disclosure in litigation does not mean that a government agency loses all control over release of the records. When properly supported—unlike this case—an agency may seek a protective order under the same procedures and standards available to all parties and subpoenaed entities. *E.g.*, *Cohan v. Ayabe*, 132 Hawai`i 408, 423, 322 P.3d 948, 963 (2014) (protective order must restrict constitutionally protected medical information to use only in the litigation).

[5] No doubt many corporate entities also would prefer to delay discovery while they conducted an internal investigation of their conduct after someone files a claim. *See* OIP Op. No. F20-04 at 14 n.11 (suggesting that the frustration exception for ongoing investigations may not be limited to law enforcement investigations and may extend to any type of investigation).

[6] 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").

[7] Here, the UIPA standards do not change the scope of litigation discovery. But the converse is equally true. The scope of litigation discovery does not change the UIPA standards. Simply because a document is not "relevant to the subject matter involved in the pending action," HRCP 26(b)(1), that does not change whether a government agency must disclose that record to a member of the public in response to a UIPA request. The different standards serve vastly different purposes. The UIPA concerns the government's disclosure obligations to the general public 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." HRS § 92F-2. Discovery obligations concern only the scope of the specific lawsuit to eliminate "trial by surprise." *E.g.*, *Lee v. Elbaum*, 77 Hawai`i 446, 455, 887 P.2d 656, 665 (App. 1993).

III. JUDGES NEED NOT DEFER TO AN AGENCY'S CONCLUSORY ASSERTION OF ONGOING CRIMINAL INVESTIGATION.

The record here does not support a finding that HPD has an ongoing criminal investigation and that disclosure will harm that investigation.[8] The only evidence submitted by HPD to support those two assertions under the UIPA is conclusory. Dkt. 1 at 29-30. HPD Captain Amon-Wilkins simply declares:

> The information requested in the *Subpoena Duces Tecum*, served on August 1, 2024 to Hawaii Police Department, pertains directly to an open and ongoing criminal investigation.
>
> . . .
>
> Releasing records of Police Report D-74774 prematurely could result in loss of witness testimony, tampering with witnesses and/or witness testimony, and/or destruction of evidence that would adversely affect the ability of the HPD to complete its investigation and/or the State to prosecute the matter.

Id. That declaration does not meet the UIPA standards. *E.g.*, OIP Op. No. F20-04 at 16-17 ("application of the frustration exception is not automatic and an agency must provide facts to establish that the investigation is either actively in progress or at least that further progress is a concrete possibility rather than a hypothetical one, and that the information being withheld would potentially give the requester new information about what the agency knows (as compared to information already known to the requester, such as information in news articles with obvious relevance to the topic or in records the requester had given to the agency)").

---

[8] HPD's references to the personal records exceptions (HRS § 92F-22) are irrelevant in this context. *See* Dkt. 1 at 11. Those exceptions only apply to records that are about the specific requester, which would not include the records at issue here. HRS § 92F-3 (defining "personal record"). And even when a personal record exception applies, disclosure to the requester would still be required under the UIPA unless one of the public record exceptions also applies. *E.g.*, OIP Op. No. F22-01 at 6 ("when a record falls within an exemption to disclosure under the UIPA's Part III, it must then be determined whether the record may also be withheld under the UIPA's Part II, which governs the disclosure of government records."). Thus, even if the UIPA were a confidentiality law—which it is not—the only relevant issue would be HPD's ongoing criminal investigation claim under the frustration exception, HRS § 92F-13(3).

As this Court concluded in a comparable context, judges need not and should not simply defer to a law enforcement claim that an ongoing investigation exists and that disclosure of information will harm the investigation. *Grube v. Trader*, 142 Hawai`i 412, 426 & n.18, 420 P.3d 343, 357 & n.18 (2018). Addressing similarly generic factual findings, this Court observed:

> The circuit court's findings here, however, are fully lacking in the specificity required to demonstrate a compelling interest. The findings, which could have been entered partially under seal if necessary to preserve truly confidential matters, provide no details of any ongoing investigations and their relation to the September 9 proceeding. In the absence of such details, there is nothing by which the court could have determined that the asserted interest was of sufficient gravity to displace the strong presumption in favor of openness. Similarly, the findings contain no information regarding how disclosure would impair these investigations or pose a danger to specific individuals.

Id. (footnote omitted) ("The State responded to a series of questions during the November 7 hearing by expressing nonspecific concerns that disclosure might allow a suspect to learn of an investigation and flee, destroy evidence, or harm a witness. The circuit court's findings did not include these details, which would have been too generalized and unsupported to warrant closure in any event.").

Thus, even applying the inapplicable UIPA standards, HPD cannot justify withholding.

CONCLUSION

Amicus Curiae respectfully requests that the Court deny HPD's petition for a writ of mandamus.

Dated: Honolulu, Hawai`i, August __, 2024

Respectfully submitted,

_____

ROBERT BRIAN BLACK
Attorney for Amicus Curiae *Public First Law Center*