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Department of Emergency Services
City and County of Honolulu
3375 Koapaka Street, Suite H450
Honolulu, Hawaii 96819-1869

Re: Report for Quality Improvement Forms

Dear Ms. Bentzien:

This letter responds to your request for an opinion on whether it is appropriate, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("HRS") ("UIPA"), for the Department of Emergency Services ("DES") to disclose Report for Quality Improvement forms ("RQIs") to (1) the public and (2) the United Public Workers Local 646 ("UPW").

ISSUES PRESENTED

I. Whether pursuant to the UIPA, DES must disclose the RQIs to the public.

II. Whether, in the context of a class action grievance, the UIPA requires DES to provide the UPW with access to all RQIs involving Unit 10 employees.

BRIEF ANSWER

I. It is the opinion of this office that certain information within the RQIs may be withheld from the public on the basis that their disclosure would constitute a clearly unwarranted invasion of privacy under the UIPA. Haw. Rev. Stat. § 92F-13(1). Specifically, as discussed more thoroughly below, there are grounds for withholding the portions of the RQIs related to (a) the patient information and (b) the evaluation of the emergency personnel.

In addition to being withheld on the basis of the protection of privacy, the RQIs, or portions thereof, may possibly be withheld from disclosure under section 92F-13(3), HRS, which provides that government records may be withheld where they are of such nature that disclosure would frustrate a legitimate government purpose.

II. Yes. However, only the portion of the RQI that constitutes the DES employee's personal record must be disclosed to the UPW. The portion of the RQI that constitutes the patient's personal record must be redacted prior to disclosing the RQI to the UPW.

BACKGROUND FACTS

The DES provides 24 hour, 7 days a week, pre-hospital emergency care services to the sick and injured. In 1993, DES began its "Continuous Quality Improvement Model" program with the goal of overall improvement in care and services by DES. The RQI was developed to enable all individuals involved with DES services, DES employees as well as physicians, nurses, and hospital staff working with DES personnel, to point out areas in which DES services need attention or to make suggestions for improving DES care and services.[1] The RQI can also be used to report areas in which a DES employee's actions need correction.

The completed RQIs are turned in to the DES Quality Assurance Branch or, in a sealed envelope, to a DES unit supervisor who then transmits it to the DES Quality Assurance Branch. Where the RQI involves the actions of a DES employee, the employee's unit supervisor discusses the matter with the employee and both unit supervisor and employee will write, on the reverse side of the RQI, their understanding of the situation and the solutions. The unit supervisor then sends the RQI back to the Quality Assurance Branch, where it is filed by month and by unit. The Quality Assurance Branch informed OIP that unit supervisors are instructed not to make copies of the RQIs and employees are not given copies of the RQIs. According to the Quality Assurance Branch, there is only one copy of the RQI and that one copy is filed at the Quality Assurance Branch, not in the employee's personnel file.

DISCUSSION

I. EFFECT OF EXPRESS PROMISE OF CONFIDENTIALITY

The blank RQI submitted, as a sample, to OIP contains an express promise of confidentiality on the top of the first page. This promise of confidentiality, however, does not automatically make this record confidential or otherwise exempt from disclosure under the UIPA. The Hawaii Supreme Court has followed the well-

[1] The DES Quality Assurance Branch informed OIP that the RQI form is similar to Event/Incident Reports used by medical facilities for similar purposes.

recognized legal theory that parties may not contract for provisions that are contrary to law. State of Hawaii Organization of Police Officers (SHOPO) v. Society of Professional Journalists-University of Hawaii Chapter, 83 Haw. 378 at 405, 927 P.2d 386 at 413 (Haw. 1996), quoting, Heatherly v. Hilton Hawaiian Village Joint Venture, 78 Haw. 351, 354, 893 P.2d 779, 782 (Haw. 1995).

Also, in previous OIP advisory opinions, OIP has established that it is the UIPA itself that allows an agency to withhold information in government records, not the express or implied promises of confidentiality made by an agency. See OIP Op. Ltr. No. 93-16 (Oct. 1, 1993) (UIPA prohibits disclosure of residential addresses, not the express or implied representations of agency staff or the application form); OIP Op. Ltr. No. 90-2 (Jan. 18, 1990) (agency may not make a promise of confidentiality that would circumvent disclosure requirements of the UIPA). Therefore, the promise of confidentiality included within the RQIs cannot protect from disclosure information that is required to be disclosed by the UIPA.

II. PUBLIC DISCLOSURE OF THE RQI FORMS

Under the UIPA, agencies must make government records available for public inspection and copying unless an exception in section 92F-13, HRS, applies. See Haw. Rev. Stat. § 92F-11(a) and (b) (1993). Based upon the facts provided, it appears that DES may withhold the RQIs, or portions thereof, from public disclosure under two of the UIPA exceptions contained in section 92F-13, HRS.

A. Clearly Unwarranted Invasion of Personal Privacy

The UIPA, in section 92F-13(1), HRS, permits agencies to withhold public access to "[g]overnment records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy[.]" In determining whether there is a clearly unwarranted invasion of personal privacy, the UIPA directs 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." Haw. Rev. Stat. § 92F-14(a).

Based upon the sample RQI and information provided by DES, OIP understands that frequently, if not in every instance, the RQIs contain information regarding, among others, the person treated by DES (the "patient") as well as the DES employees involved in responding to the emergency. Both the patient and the DES employees may have significant privacy interests in the information about them contained in the RQIs. Because the privacy interests of the patient and the DES employees are based upon different information in the RQIs and involve different considerations, the privacy interests are analyzed separately below.

1. The Patient

To assist in the determination of the level of an individual's privacy interest, the Legislature enumerated categories of information in which individuals are deemed to have a significant privacy interest. Haw. Rev. Stat. § 92F-14(b). One such category that individuals are deemed to have a significant privacy interest in is "[i]nformation relating to medical, psychiatric, or psychological history, diagnosis, condition, treatment, or evaluation...." Haw. Rev. Stat. § 92F-14(b)(1).

A review of the form RQI used by DES and information provided by DES indicates that information falling within the foregoing description would be included within the completed RQIs. More specifically, OIP understands that the completed RQIs contain information about the patient, including the patient's name, the patient's medical condition and the treatment rendered by DES employees. In order to protect the patient's significant privacy interest, the UIPA provides that the described information may be withheld unless there is a greater public interest served by disclosing the information. Haw. Rev. Stat. § 92F-13(1) and § 92F-14(a). With respect to information relating to a medical condition, treatment or evaluation, OIP has previously noted that the likelihood of a public interest in disclosure of the information outweighing a person's privacy interest is remote. OIP Op. Ltr. No. 03-05 (Apr. 11, 2003) (comparing the UIPA's privacy exception as it applies to medical information with the Health Insurance Portability and Accountability Act of 1996).

Moreover, in addition to the UIPA, the medical privacy rules promulgated under the Administrative Subtitle of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") may dictate that the information regarding the patient's medical condition, treatment or evaluation be withheld from disclosure. See Haw. Rev. Stat. § 92F-13(4) (1999). While it is outside of OIP's jurisdiction to determine whether HIPAA applies to DES,[2] OIP has opined that even agencies not covered by HIPAA, i.e., non-"covered entities," should treat health records in a manner similarly to how HIPAA requires those records to be maintained. OIP Op. Ltr. No. 03-19 (Dec. 6, 2003). In other words, where records are confidential under HIPAA if maintained by a HIPAA covered entity, the UIPA's privacy exception almost always will allow the records to be withheld from disclosure. Id.

However, the UIPA's privacy exception, like HIPAA, applies to "individually identifiable" health records. If the information regarding the patient's medical condition, treatment or evaluation contained in the RQI is not "individually identifiable," i.e., it does not identify the patient, either specifically by name or through other information contained in the RQIs, the patient does not have a significant privacy interest in the information. Even where the RQI contains the

[2] DES should consult with its attorney regarding whether it is a "covered entity" under HIPAA or otherwise subject to HIPAA.

patient's name or other information from which somebody can identify the patient, if the RQI can be "de-identified," i.e., the patient's name and other identifying information can be segregated, the patient similarly has no significant privacy interest in the record. Where an individual has no significant privacy interest in a record, the record must be disclosed if there is a scintilla of public interest. Here, given that disclosure of the record will allow the public to review DES employees' performance and DES' management of its employees, the portion of the RQIs relating to the patient is likely public, with the medical information de-identified.

2. DES Employees

Likewise, with regard to the DES employee, the UIPA provides that a person has a significant privacy interest with regard to "[i]nformation in an agency's personnel file...." Haw. Rev. Stat. § 92F-14(b)(4). Upon information received from DES, it is our understanding that the completed RQIs would in fact include information related to the evaluation of the DES employee's performance as well as recommendations related to his or her performance. In our opinion, while not maintained in the DES employee's file, such information is akin to information customarily found in the employee's personnel file. See OIP Op. Ltr. Nos. 99-1 (Jan. 26, 1999); 98-5 (Nov. 24, 1988); 95-7 (March 28, 1995). Therefore, in order to protect the DES employee's recognized significant privacy interest, information related to his or her evaluation or recommendation may be withheld unless it is found that a greater public interest is served by disclosing the information. Haw. Rev. Stat. § 92F-13(1) and §92F-14(a). In this case, OIP believes that the public interest in disclosure is to allow scrutiny of the DES employee's performance and sufficiency of the emergency services being provided by DES employees, as well as review of the DES Quality Assurance Branch's management of its employees.

In balancing the privacy interest and the public interest in disclosure, it is the opinion of OIP that under these circumstances the DES employees' privacy interest prevails and the RQIs may be withheld from public disclosure.

Similar to the patient information discussed above, the DES employee's privacy interest would be protected if RQIs were de-identified. It is OIP's opinion, however, that the RQIs are records that likely cannot be "de-identified" due to the fact that, by cross-referencing information therein with information from other sources, including public records, the identity of the DES employee can be determined even if his or her personal information, such as name, social security number and employee number, is redacted from the RQI. For example, by determining the time and location of an incident, a third party could, in all likelihood, determine which DES employees responded to the incident and, therefore, the identity of the DES employee referenced in the RQI. For that reason, it is OIP's opinion that the portion of the RQIs relating to the DES employees, including any evaluation or comment about their performance, may be withheld from public disclosure.

B. Frustration of a Legitimate Government Function

Under Haw. Rev. Stat. § 92F-13(3), agencies are not required to disclose "[g]overnment records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function."

DES has expressed a concern that disclosing the RQIs would have a chilling effect on those persons providing comments as to the DES employees' performance and recommendations. In order to be effective in its purpose, the RQIs require candid input and evaluation from various persons involved in the emergency service process. To the extent that the disclosure of the RQIs would frustrate DES' ability to evaluate its employees, obtain input about their performance and to address the concerns raised about their performance, OIP believes that disclosure of the identity of the non-DES employees whose names appear on the RQIs would frustrate a legitimate DES function. Accordingly, section 92F-13(3), HRS, allows for the withholding of the names of the non-DES employees whose comments and statements appear in the RQIs from public disclosure.

However, the paucity of actual information provided precludes OIP from rendering a formal opinion on whether the comments and statements by the non-DES employees contained in the RQIs may be withheld under the frustration of a legitimate government function exception. We will address that issue should the question arise and an actual RQI with specific factual circumstances be submitted for our consideration.

III. DISCLOSURE TO THE UPW

The UPW is entitled to access to the RQIs in the same manner and to the same extent as any member of the public. In addition to the access described above, section 89-16.5, HRS, also requires disclosure of portions of the records to the UPW. In pertinent part, the statute provides that the UPW "shall be allowed access to an employee's personal records which are relevant to the investigation or processing of a grievance." Haw. Rev. Stat. § 89-16.5 (1993) (emphasis added). While chapter 89, HRS, does not define the types of records that are "an employee's personal records" and the legislative history relating to section 89-16.5, HRS, provides no direct guidance, OIP notes that section 89-16.5, HRS, was enacted by the 1988 Legislature as section 2 of Act 262, the act which created the UIPA. Because of that fact and OIP's presumption that the Legislature, in enacting section 89-16.5, HRS, considered the other provisions of Act 262, which included the UIPA and the definitions contained therein, OIP believes that it is appropriate to look to the UIPA's definition of "personal records" for guidance.

The UIPA defines the term "personal records" to include any record containing information "about an individual." Haw. Rev. Stat. § 92F-3 (1993). OIP believes that such a definition is consistent with the apparent intent of section 89-

16.5, HRS, i.e., to allow the UPW access to the records relating to the UPW member who is the subject of an investigation or grievance. Therefore, to the extent that the RQI contains information relating to a DES employee's performance, it is OIP's opinion that the RQI is that DES employee's "personal record."

OIP previously concluded that, where a record contains information "about" different individuals, the record is a joint personal record, and the portions of the record that are "about" somebody other than the individual requesting the record, in certain circumstances, may not be the requester's personal record. See OIP Op. Ltr. No. 03-18 (Nov. 12, 2003); OIP Op. Ltr. No. 95-19 (Aug. 1, 1995). More specifically, OIP instructed:

> If a record and/or information contains an individual's name or other identifying particular, there is a presumption that it is a personal record entirely accessible to the requester (subject to the exemptions in section 92F-22, HRS). However, this presumption can be rebutted if it can be shown that certain information is not "about" the requester, but is "about" someone else, and in the interest of protecting personal privacy, it would be a violation of part II of the UIPA to disclose the other person's information to the requestor.

OIP Op. Ltr. No. 03-18 at 9. In other words, where (1) a record contains information about two individuals, (2) the information that is "about" the first individual is separate from and not intertwined with the information "about" the second individual, and (3) disclosure of the information "about" the second individual would be a clearly unwarranted invasion of that individual's privacy, the portion of the record containing the information about the second individual is not part of the first individual's personal record.

In this case, because it appears that the RQIs generally contain information about the patient as well as the DES employee, OIP believes that the RQIs are joint personal records, i.e., they are the patient's personal record and the DES employee's personal record. OIP assumes that a portion of the RQI is "about" the patient and is not "about" the DES employee. If true, the portion of the RQI that is "about" the patient and not "about" the DES employee, which if disclosed would be an unwarranted invasion of the patient's privacy, is not the DES employee's personal record and disclosure of the portion of the RQI that is the patient's personal record to the UPW is in accordance with part II of this opinion.

With respect to the portion of the RQI that is "about" the DES employee, it is OIP's opinion that, where the UPW is investigating or processing a grievance, it must be disclosed to the UPW in accordance with section 92F-12(b)(2), HRS. Records (or, in this case, the portion of the record) subject to disclosure under section 92F-12(b)(2), HRS, are not subject to segregation or redaction based upon any of the UIPA exceptions, including the privacy exception, section 92F-13(1),

HRS. However, where the constitution or a statute outside of the UIPA requires certain information to be withheld, that information should be segregated from the RQIs before the UPW is allowed access to the records. The OIP, therefore, recommends that DES consult the Office of the Corporation Counsel or the Department of the Attorney General as to whether any information contained in the portion of the RQI that are the DES employee's personal record, such as the information about the patient that may be intertwined with information about the DES employee, must be withheld from disclosure by the constitutional right of privacy or another law.

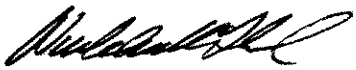
IV. EFFECT OF SECTION 624-25.5, HRS

Under section 624-25.5, HRS, the proceedings and the records of "peer review committees of medical, dental or optometric staffs in hospitals having the responsibility of evaluation and improvement of the quality of care rendered in the hospital" are protected from discovery. In our opinion, this statutory section does not apply to the RQI form because the DES is not a "hospital."[3]

CONCLUSION

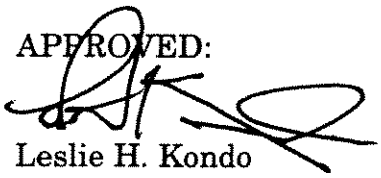
It is our opinion that portions of the RQIs may be withheld from public disclosure by the UIPA's exceptions for "personal privacy" and "frustration of legitimate government function." However, those portions of the RQIs which could not lead to the identification of the patient involved should not be withheld from public disclosure. With regard to disclosing the RQIs to the UPW, under the UIPA analysis, OIP would again opine that the RQIs are personal records and must be disclosed to the UPW pursuant to chapter 89, HRS, but only to the extent that the RQI constitutes the personal record of the DES employee and after redaction of the personal records of the patient.

Very truly yours,



Wintehn K. T. Park
Staff Attorney

APPROVED:



Leslie H. Kondo
Director

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[3] It is a cardinal rule of statutory construction that the words used in a statute are to be understood in their "general or popular use or meaning." Haw. Rev. Stat. § 1-14 (1993). The term "hospital" is defined in Black's Law Dictionary 664 (5th ed. 1979) as "[a]n institution for the treatment and care of sick, wounded, infirm, or aged persons; generally incorporated."