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November 18, 2005

Mr. Brian Luton
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1136 Union Mall, Suite 600
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Re: Request for Opinion (RFO-P 05-009)

Dear Mr. Luton and Ms. Ferguson-Brey:

Mr. Brian Luton made a request to the Crime Victim Compensation Commission ("CVCC") for records pertaining to the criminal case that resulted in his conviction for murder and also resulted in an award of compensation to the victim's family. CVCC's only responsive record is a file in its computer database summarizing the application and award of compensation. CVCC denied access to this record, and Mr. Luton then appealed the denial to OIP under the Uniform Information Practices Act, chapter 92F, Hawaii Revised Statutes ("UIPA").

ISSUES PRESENTED

I. May CVCC withhold all of its records, without regard to their actual content, under the UIPA's exception for frustration of a legitimate government function?

II. May information that was part of the public record at a public trial be withheld under the UIPA's privacy exception?

III. Does the victim's death eliminate her privacy interest in the information in this record that would, for a living person, fall within the UIPA's privacy exception?

BRIEF ANSWER

I. No. Information in a record may only be withheld if it falls under a specific exception to disclosure; if no exception applies, the information must be disclosed. Haw. Rev. Stat. § 92F-11 (1993).

II. No. Generally, information that is part of the public record from a public trial no longer carries a significant privacy interest.

III. No. The deceased victim retains a diminished privacy interest in the information in this record that would, for a living person, fall within the UIPA's privacy exception, and that remaining privacy interest is not outweighed by the public interest in disclosure.

FACTS

Mr. Luton was brought to trial for the crime that formed the basis for this CVCC award[1] and, after a three-year interruption for the appeal of an evidentiary ruling, ultimately convicted. As a result, some information regarding the victim and the victim's family became part of the public court record. Because the crime and subsequent trial attracted media attention, information that came out during the court proceedings was also reported in newspaper accounts of the trial and appeal.[2] The victim's husband also made his identity and his relationship to the victim public in a letter to the editor published in the Honolulu Advertiser on May 19, 2000 and still available online.[3]

A primary function of CVCC is to provide monetary assistance to the victims of violent crime and their families. In the course of applying for such assistance, a

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[1] Cr. No. 93-1185, State of Hawaii vs. Brian Luton.

[2] See Linda Hosek, Luton meant to kill, says prosecutor, Honolulu Star-Bulletin, June 23, 1997, at http://starbulletin.com/97/06/23/news/story1.html; "Jury finds man guilty of murder of visitor," Newswatch, Honolulu Star-Bulletin, July 2, 1997, at http://starbulletin.com/97/07/02/news/briefs.html. (The Honolulu Advertiser's internet archives only date back to 1999. See http://the.honoluluadvertiser.com/current/help/backissues, accessed October 4, 2005.)

[3] See Norm Hammink, "Judge Simms erred in releasing rapist," Letters to the Editor, Honolulu Advertiser, May 19, 2000, at http://the.honoluluadvertiser.com/2000/May/19/letters.html.

crime victim or victim's family member may need to provide home contact information, medical information about the victim's injuries, information substantiating the expenses resulting from the crime, or other types of information to support the application.

In 2002, Mr. Luton requested records pertaining to the criminal case and the CVCC's award of compensation to the victim's family. In this case, CVCC's only responsive record was a file in its computer database summarizing the application (including information about the victim and the applicant) and award of compensation. CVCC denied access to this record, and Mr. Luton then appealed the denial to OIP.

DISCUSSION

I. PROCEDURAL BACKGROUND

CVCC's written denial of Mr. Luton's request cited section 92F-13(1) and (3), HRS. In response to OIP's invitation to supplement its reasons for denying the record or provide additional information supporting the denial, in January 2005, CVCC provided OIP with a letter that stated in conclusory fashion that CVCC's decision to deny access was supported by OIP Opinion Letter Number 03-02 and that disclosure of the record would be a clearly unwarranted invasion of personal privacy on the part of the victim's family. On March 4, 2005, CVCC sent OIP a copy of the requested record for OIP's *in camera* review, with an accompanying letter reiterating its stated reasons for withholding.

After *in camera* review of the disputed record, OIP wrote to CVCC on March 31, 2005, noting that CVCC's cited reasons for withholding the record did not justify withholding the entire record. An agency bears the burden to justify its denial of access to government records, which CVCC's initial responses failed to do. See Haw. Rev. Stat. § 92F-15(c) (1993). However, CVCC's responses were apparently based on the erroneous belief that OIP Opinion Letter Number 03-02 allowed it to withhold all its records without regard to content. OIP therefore offered CVCC another opportunity to more fully explain its basis for wholly denying access to the record. After a series of extensions, CVCC responded with a letter dated June 23, 2005, arguing that it was entitled to withhold the entire record, with attached letters from the Sex Abuse Treatment Center, the Office of the Prosecuting Attorney, and an individual, all advocating complete confidentiality of CVCC records.[4]

[4] References in this opinion to CVCC's arguments or position refer specifically to CVCC's June 23 letter and its attachments.

II. PERSONAL RECORD DISCLOSURE

The database record at issue is the requester's "personal record," and thus is subject to part III of the UIPA. See Haw. Rev. Stat. §§ 92F-3 and -21 (1993). Section 92F-22, HRS, provides the exclusive list of exceptions to disclosure of a personal record. CVCC did not raise any of the section 92F-22 exceptions in its initial response to the requester or in two earlier letters to OIP justifying its denial of access, but in its June 23 letter it argued that the record was a report prepared or compiled "at any state of the process of enforcement of the criminal laws" and thus could be withheld under section 92F-22(1)(B). Given the broad personal record exception in section 92F-22(1)(B), it was appropriate for CVCC to withhold the record under part III of the UIPA. We caution CVCC, however, to cite paragraph 92F-22(1)(B) as a basis for denial of a personal records request when it receives a request for a report that contains the requester's name.

CVCC argues that the record is also a personal record of the victim and her surviving family, which entitles them to keep it private. This argument is based on a misunderstanding of what a "personal record" is under the UIPA. See Haw. Rev. Stat. §§ 92F-3 and -21 (1993) (definition of personal record and right to access personal record). The fact that a record is an individual's "personal record" means that individual can request it under part III of the UIPA, which, among other differences, provides different and often broader access rights than part II of the UIPA and also provides individuals a right of correction that is not available under part II of the UIPA. See generally Haw. Rev. Stat. §§ 92F-21 to -28 (1993 and supp. 2004). An individual has no right, however, to restrict disclosure of his or her "personal record." Rather, the privacy exception to disclosure under part II of the UIPA generally controls the extent to which personal information must be disclosed. Haw. Rev. Stat. §§ 92F-13(1) and -14 (1993 and supp. 2004).

III. GOVERNMENT RECORD DISCLOSURE

When a record is not required to be disclosed as a personal record because an exception to personal record disclosure applies, the question becomes whether the record must be disclosed under part II of the UIPA, or whether an exception to disclosure applies to all or part of the record. See Haw. Rev. Stat. § 92F-11 (1993) (disclosure required unless an exception applies).

A. Frustration

1. As a Basis for Withholding All CVCC Records

Under the UIPA, government records are open to the public unless an exception to disclosure applies. Haw. Rev. Stat. § 92F-11 (1993)[5]. CVCC nonetheless argues that the UIPA's exception for records whose disclosure would frustrate a legitimate government function allows it to withhold all of its records. See Haw. Rev. Stat. § 92F-13(3) (1993). CVCC contends that disclosure of any CVCC record, regardless of the actual sensitivity of its contents, will re-traumatize victims and deter them from coming forward, thus frustrating CVCC's primary function of assisting crime victims.[6] To support this contention, CVCC points to the attached letters. The letters address in general terms the importance of confidentiality to encourage victims to come forward, and the expectation of privacy that victims have. However, the letters do not explain why disclosure of victim information would be traumatic when the specific information to be disclosed was made a matter of public record during the course of the offender's trial. Nor do the letters explain why the disclosure of information that is at best loosely related to the victim, such as the offender's name or administrative notations in the record[7], would have traumatic effects to a victim or the victim's family.

CVCC similarly expressed concern, in the context of OIP Opinion Letter Number 03-02, that "fear of possible disclosure by the Commission of victim information to an alleged perpetrator could prevent some victims from coming forward, or from cooperating with the Commission, thus causing frustration of the Commission's primary function of assisting crime victims." See OIP Op. Ltr. No.

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[5] (a) All government records are open to public inspection unless access is restricted or closed by law.
(b) Except as provided in section 92F-13, each agency upon request by any person shall make government records available for inspection and copying during regular business hours.
* * *

Haw. Rev. Stat. § 92F-11 (1993).

[6] We understand CVCC to argue that the disclosure of even its blank application forms would frustrate its ability to assist crime victims.

[7] CVCC's argument in part seems to be that the applicants are confidential informants. OIP has a body of opinions on the subject of disclosure of the identity of a confidential informant as a form of frustration. See, e.g. OIP Op. Ltr. No. 99-7 at 4-5. However, as noted below, the purpose of that protection is to prevent identifying the informant as the source of the information provided to the agency; thus, an agency would generally be permitted to withhold the identity of the informant and information contained in the record that would create a likelihood of actual identification, rather than withholding an entire record. Id. at 6. The confidential informant argument provides no basis to redact information that would not identify the informant.

03-02 at 8 (Feb. 7, 2003). As OIP noted in that opinion, the frustration exception would apply where disclosure of CVCC's records would prevent crime victims from coming forward. The question CVCC presents here is whether CVCC's purpose of assisting victims would be frustrated by allowing any public access, no matter how limited, to its records, or whether CVCC must show that disclosure of the specific information in requested records would cause frustration of its function of assisting crime victims.

CVCC's argument may be based on its unduly limited view of the public's interest in access to government records: CVCC stated, in its letter, that "[p]ublic interest in how CVCC spends its money is served by the annual reports the agency prepares and distributes." OIP reminds CVCC that the UIPA, which applies to all government agencies, including CVCC, reflects a policy of openness in government as stated by the Legislature in the UIPA itself:

> 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 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 action of government agencies—shall be conducted as openly as possible.

Haw. Rev. Stat. § 92F-(2). The UIPA's purposes are to:

> (1) Promote the public interest in disclosure;
> (2) Provide for accurate, relevant, timely, and complete government records;
> (3) Enhance governmental accountability through a general policy of access to government records;
> (4) Make government accountable to individuals in the collection, use, and dissemination of information relating to them; and
> (5) Balance the individual privacy interest and the public access interest, allowing access unless it would constitute a clearly unwarranted invasion of personal privacy.

Id. Thus, as OIP has consistently opined,

> In determining whether government records must be made available for public inspection and copying under the UIPA, we observe at the outset that like the federal Freedom of

> Information Act, 5 U.S.C. 552 (1988) [("FOIA")], and the open records laws of other states, the UIPA's affirmative disclosure provisions should be liberally construed, its exceptions narrowly construed, and all doubts resolved in favor of disclosure.

OIP Op. Ltr. No. 93-10 at 2 (citing John Doe Corp. v. John Doe Agency, 493 U.S. 146 (1986); Department of the Air Force v. Rose, 425 U.S. 352, 361-63 (1976); Seminole County v. Wood, 512 So.2d 1000 (Fla. Dist. Ct. App. 1987); City of Monmouth v. Galesburg Printing and Pub. Co., 494 N.E.2d 896 (Ill. App. 3 Dist. 1986); Title Research Corp. v. Rausch, 450 So.2d 933 (La. 1984); Hechler v. Casey, 333 S.E.2d 799 (W. Va. 1985); Laborers Intern. Union of North America Local 374 v. City of Aberdeen, 642 P.2d 418 (Wash. 1982); Bowie v. Evanston Comm. Consul. School Dist., 538 N.E.2d 557 (Ill. 1989); and Lucas v. Pastor, 498 N.Y.S.2d 461 (N.Y. A.D. 2 Dept. 1986)).

Although the UIPA's policy of openness must "must be tempered by a recognition of the right of the people to privacy," as expressed in the UIPA's privacy exception, the burden remains on an agency to establish that a requested record (or information contained therein) is protected from disclosure by one of the UIPA's exceptions. Haw. Rev. Stat. §§ 92-2 and -15(c) (1993). OIP simply cannot interpret the UIPA to protect information that, by itself, neither falls within the privacy exception nor is in any way sensitive.

We note that CVCC may confidently promise confidentiality of applicants' identities under the UIPA's frustration exception, and the UIPA's privacy exception will generally protect private information that is not already public record. OIP declines to conclude that notwithstanding these protections, victims will fail to apply for a financial benefit because they fear possible public disclosure of, for instance, information that has already been made public at trial, CVCC's internal administrative notations, or an **offender**'s name. OIP similarly declines to conclude that the disclosure of information that is already public record, internal administrative notations from CVCC records, or an offender's name, will re-traumatize victims. Thus, OIP cannot conclude that CVCC is justified in withholding the entirety of its records based on the speculation that less than total confidentiality of all of its records – whatever they contained – would deter victims from seeking CVCC's assistance. Rather, CVCC, like all other agencies, must establish that an exception to disclosure under the UIPA applies to a requested record as a whole or to information within a record that CVCC seeks to redact. See Haw. Rev. Stat. § 92F-15(c) (1993).

2. Confidential Sources

CVCC states that it expressly and implicitly promises confidentiality to CVCC applicants.[8] CVCC argues that disclosure of CVCC records to an offender would reveal an applicant's identity, and it would be impossible to segregate or redact the information to avoid this result.

Based on CVCC's representation that applicants would be reluctant to apply for assistance if it meant disclosure of their identities, it is OIP's opinion that under the UIPA's frustration exception, section 92F-13(3), HRS, CVCC may protect the identities of applicants who were promised confidentiality.[9] However, OIP cannot agree with CVCC's assertion that it would be impossible to segregate the record so as to avoid disclosure of the applicant's identity. "The UIPA does not specifically protect [confidential sources'] statements from disclosure unless that disclosure would reveal the identity of a [source] who received a promise of confidentiality." OIP Op. Ltr. No. 01-04 at 7. As OIP explained in OIP Opinion Letter Number 99-07 at page 6,

> [I]n cases where a person's identity may be withheld from disclosure under the "frustration" exception, identifying information in addition to the person's name may be redacted, if

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[8] CVCC actually argued that its database would fall under section 92F-22(2), an exception to personal records disclosure for records whose disclosure would reveal the identity of a confidential source. As previously noted, CVCC may withhold the report from disclosure as the requester's personal record under section 92F-22(1)(B); thus, the possibility that the report might also fall under another exception to personal record disclosure need not be addressed. However, because information whose disclosure would reveal the identity of a confidential source also falls within the frustration exception to disclosure of government records under part II of the UIPA, OIP will consider CVCC's confidential source argument as an argument based on the frustration exception set out in section 92F-13(3).

[9] There is no indication here that the applicant's identity was testified to in open court, and in any case it is not clear whether a confidential source's identity would be waived by the source's public testimony. E.g. Parker v. Dept. of Justice, 934 F. 2d 375 (1991) (confidential source's testimony at trial does not waive an agency's ability to protect the source's identity under FOIA); see also OIP Op. Ltr. No. 90-18 at 6-8 (neither death of informant nor fact that investigation was closed and informant's identity generally known prevented agency from applying frustration exception to confession). In Irons v. F.B.I., the court interpreted opinions from other courts as upholding a refusal to disclose information about source identity even when source was publicly known. Irons v. F.B.I., 880 F. 2d 1446, 1448 (1989) (citing L&C Marine Transport, Ltd. V. U.S., 740 F. 2d 919, 925 (11th Cir. 1984); Radovich v. U.S. Attorney, 658 F. 2d 957, 960 (4th Cir. 1981); Lame v. D.O.J., 654 F. 2d 917, 925 (3rd Cir. 1981); Lesar v. D.O.J., 636 F. 2d 472, 491 (D.C. Cir. 1980)). In Irons, though, there was no dispute regarding such information because the government did not contest the requester's right to records that "reveal no more than what the . . . sources have already revealed at trial," and in fact the court implied that the requester was entitled to information actually disclosed in prior public testimony. Irons, 880 F. 2d at 1448, 1457.

> disclosure would result in the "likelihood of actual identification" of the person. See, e.g., OIP Op. Ltr. No. 94-8 at 11 (May 12, 1994). This identifying information is particular to the facts of a case, and what may be redacted must be determined on a case-by-case inquiry.

In the record at hand, the applicant's name, phone number, address, and relationship to victim would result in the likelihood of actual identification of the applicant, and therefore may be withheld. However, CVCC's summary statement that it would be impossible to segregate or redact the identifying details does not seem warranted as to the remaining information in the application. For instance, clearly the administrative information or the offender's name sheds no light on the applicant's identity. Even the information about the victim, which presumably was provided by the applicant, does not appear to shed any light on the identity of the applicant. Cf. OIP Op. Ltr. No. 01-04 (Requester worked in a close environment with witnesses, so content of witness statements would likely have allowed requester to actually identify which witness made what statement). Thus, CVCC's interest in protecting an applicant's identity does not permit CVCC to withhold more than the information whose disclosure would result in the "likelihood of actual identification" of the applicant, which in this instance is limited to the applicant's name, phone number, address, and relationship to the victim.

B. Privacy

1. Information that is of Public Record

The first pieces of information in the record are the victim's name, date of birth, age, sex, marital status, and race. When this information is not already a matter of public record, a victim's name, date of birth, age, sex, marital status, and race all carry a significant privacy interest and, in the absence of an even stronger public interest, may all be redacted. E.g. OIP Op. Ltr. No. 90-25 at 7. Some of the information in this particular record, however, is already public record: in addition to court records from the perpetrator's trial, multiple newspaper accounts published the victim's name, age, sex, and marital status. OIP previously opined that "disclosure would not be a clearly unwarranted invasion of personal privacy if such information was part of a public record," giving in a footnote the example of information contained in open court records. OIP Op. Ltr. No. 03-02 at 6, 6 n. 5.

CVCC argues that an individual's right to privacy is not waived as to facts that have become a matter of public record through testimony in a public court proceeding. However, the federal Freedom of Information Act ("FOIA") cases that CVCC cites to support this argument merely hold that an individual's public testimony does not waive the individual's right to privacy as to **other, related**

facts that were not part of the testimony.[10] Kiraly v. F.B.I., 728 F. 2d 273, 279 (6th Cir. 1984) (district court and then appeal court adopted conclusion from Scherer, infra, that **nontestimonial** information remains protected); Brown v. F.B.I., 658 F.2d 71, 75 (2d Cir. 1981) ("While it is true that [kidnapping victim] **cannot suppress those facts which have become a matter of public record**, she retains her right to privacy as to other personal matters.")(emphasis added); Scherer v. Kelley, 584 F.2d 170, 176 (7th Cir. 1978) ("Because a person may have given testimony at a trial on a specific topic does not mean that all information offered by that source upon a guarantee of confidentiality automatically becomes available to the person to whom it relates. The **nontestimonial** information may be far more damaging. . . . "); Coleman v. F.B.I., 13 F. Supp. 2d 75, 80 (D.D.C. 1998)("An individual who testifies at trial does not waive this privacy interest **beyond the scope of the trial record**.")(emphasis added); In fact, insofar as they discuss information that is of public record, the cases cited by CVCC acknowledge that facts that are part of the public record after being testified to in a public court proceeding carry no significant privacy interest. Brown, 658 F. 2d at 75; Coleman, 13 F. Supp. 2d at 80.

CVCC also argues that information that is available in public records may still carry a privacy interest in appropriate circumstances. In support of this argument, CVCC relies on D.O.J. v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 109 S. Ct. 1468, 103 L. Ed. 2d 774 (1989), which held that, under the FOIA exception for information compiled for law enforcement purposes that could reasonably be expected to constitute an unwarranted invasion of personal privacy, the Federal Bureau of Investigation ("FBI") could withhold a computerized compilation of an individual's state "rap-sheet" information that included a 30 to 40 year old criminal offense. The Reporters Committee Court concluded that under FOIA, disclosure of a piece of information that is of public record could still be an unwarranted invasion of personal privacy when the difficulty of finding the information in court or other public records is so great that the information is in "practical obscurity." Id. at 489 U.S. 762 and 780.

Hawaii has not adopted the Reporters Committee analysis and it is unclear that the analysis would be the correct one to determine privacy interests under the UIPA's privacy exception.[11] It is certainly clear that given the same sort of

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[10] CVCC also cited Irons, supra, in support of this argument. Irons deals entirely with protection of information provided by a confidential source, rather protection of information for privacy reasons, and in any case Irons, like the other cases cited by CVCC, does not support protection of information contained in public testimony: "the plaintiffs are not entitled to information furnished . . . by confidential sources, **beyond what has been actually disclosed in the source's prior public testimony**." Irons, supra, at 1457.

[11] From its first opinion, OIP has looked to FOIA for guidance on the UIPA in general and the privacy exception in particular. See OIP Op. Ltr. No. 89-1 at 5 ("The UIPA's legislative

information at issue in Reporters' Committee – a computerized compilation of criminal history containing a conviction from several decades ago – Hawaii law would require disclosure. OIP Op. Ltr. No. 95-15, citing Haw. Rev. Stat. § 846-9 (supp. 2004). We note also that the UIPA's purpose, discussed above, together with section 94-7, HRS[12], which is a law in pari materia with the UIPA as to the effect passage of time has on the privacy interest in government records, suggests that under Hawaii law the passage of time actually decreases an individual's privacy interest in public records. See OIP Op. Ltr. No 03-19 at 13 (for records of deceased individuals, the reputational and family related privacy expectations that survive death diminish with the passage of time).

However, we need not decide whether information that is of public record could ever fall within the UIPA's privacy exception because it is clear that the information here has not fallen into the sort of "practical obscurity" described in Reporters Committee. The record sought in Reporters Committee was a federal compilation of information provided by the states, not available elsewhere in a convenient summary form, and which the FBI was only authorized to disclose to a limited pool of recipients. Reporters Committee, 489 U.S. at 757-759, 763-764. The Reporters Committee court concluded that without the FBI's compilation, a check of the individual's criminal history would entail "a diligent search of courthouse files, county archives, and local police stations throughout the country." Id. at 489 U.S. 764.

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history suggests that '[t]he case law under the Freedom of Information Act should be consulted for additional guidance' regarding an individual's privacy interest. S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S. J. 1093, 1094 (1988)."). Indeed, OIP has long followed the Reporters Committee Court's analysis of the public interest in disclosure of government records when balancing the public interest against a significant privacy interest. E.g. OIP Op. Ltr. No. 89-4 at 5. However, there are differences between the UIPA and FOIA and thus interpretations of the UIPA do not always follow FOIA case law. E.g. OIP Op. Ltr. No. 97-7 at 2 and 6-7. Reporters Committee deals with FOIA's Exemption 7(C), which protects disclosures from law enforcement records that "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C), quoted in Reporters' Committee, 489 U.S. 749, 756. The UIPA's privacy exception is similar but more limited, protecting only disclosures that "**would** constitute a **clearly** unwarranted invasion of personal privacy." Haw. Rev. Stat. § 92F-13(1) (1993). We note also that the Reporters Committee court's analytic focus on records created through the federal government's role as a national clearinghouse of personal information would generally be inapplicable to records of an individual state.

[12] Section 94-7, Hawaii Revised Statutes, reads in part:

All restrictions on access to government records which have been deposited in the state archives, whether confidential, classified, or private, shall be lifted and removed eighty years after the creation of the record.

CVCC's record is not a compilation of different events from different times and places akin to an FBI rap sheet.[13] Nor is the information in the CVCC record currently in "practical obscurity": the information became public record at a highly publicized trial less than a decade ago, and remains readily available in newspaper accounts found on the internet. Even if the Reporters Committee standard was applied to extend the UIPA's privacy exception to information that is of public record, it is OIP's opinion that the information in question here would not meet that standard and thus may not be withheld under the UIPA's privacy exception.

2. Information about Deceased Individuals

CVCC notes that the victim's husband is now deceased, as well as the victim herself, but argues that they retain a right to privacy.[14] OIP has previously opined that "death is relevant to the balance between privacy interests and the public interest in government records, but does not eliminate all privacy interests relating to the deceased." OIP Op. Ltr. No. 03-19 at 13. CVCC, which failed to cite to or apply the test set out by OIP in its Opinion Letter Number 03-19,[15] did not explain how information in the record at issue might affect the victim's remaining reputational privacy interest. As to the privacy interests of family members, CVCC argued based on Favish that disclosure of death scene images, autopsy results,

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[13] Indeed, it is unlikely that any **state** records represent a compilation of information about an individual from all states and territories similar to FBI rap sheets, since state agencies, unlike federal agencies, do not act as a clearinghouse for information from across the nation.

[14] CVCC cites Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 124 S. Ct. 1570, 158 L. Ed. 2d 319 (2004) to support the idea that a deceased person has not lost the right to privacy. Favish does not in fact support that idea, because the court expressed no position on whether deceased individuals themselves retained any right to privacy after death: "The family does not invoke Exemption 7(C) on behalf of [decedent] in its capacity as his next friend for fear that the pictures may reveal private information about [decedent] to the detriment of his own posthumous reputation or some other interest personal to him. If that were the case, a different set of considerations would control." Favish, 541 U.S. at 166. Rather, the Favish holding set out surviving family members' own privacy interest in preventing the publication of distressing photographs. Id. at 170. ("[W]e hold that FOIA recognizes surviving family members' right to personal privacy with respect to their close relative's death-scene images.") Id.

[15] "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."

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

photographs, and similar records could invade the privacy interests of surviving family members.

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. However, OIP will apply its balancing test to determine the victim's remaining privacy interest in information that, were she living, would carry a significant privacy interest. In this instance, where the victim has a significant remaining privacy interest or her surviving family members have a significant privacy interest in information within the record, there is no indication that the public interest in such information would be so strong as to outweigh it. See OIP Op. Ltr. No. 03-19.

IV. SPECIFIC PORTIONS OF RECORD

The top section of the record contains information about the victim. Because the victim's name, age, sex, and marital status are public record, that information no longer carries a significant privacy interest and may not be withheld under the UIPA's privacy exception[16]. See Haw. Rev. Stat. §§ 92F-13(1) and -14(a) (1993 and supp. 2004). Assuming that the victim's race and date of birth were not part of the public record, the victim's race and date of birth would have carried a significant privacy interest while she was alive. OIP Op. Ltr. No. 91-19 at 6-7; OIP Op. Ltr. No. 90-25 at 7. Applying OIP's balancing test to determine the remaining privacy interest in information, we note that it has been somewhat over a decade since the victim's death. The privacy interest in an individual's date of birth and ethnicity are essentially reputational – they relate to how an individual is viewed by others rather than to, for example, an individual's interest in being left alone – and thus the privacy interest in this information is of a sort that may survive death. Birthday and ethnicity, although they do carry a privacy interest, are not particularly sensitive information[17], and the victim's death has undoubtedly diminished her privacy interest in the information; on the other hand, the public

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[16] Nor does any other exception apply. As discussed above, CVCC must justify withholding each piece of information within the record, and may not withhold the entire record on the theory that disclosure of any part of any record it maintains would frustrate its legitimate functions by deterring applicants. See Haw. Rev. Stat. § 92F-15(c) (1993).

[17] Many types of information that carry a significant privacy interest, but clearly all such information is not of equal sensitivity. We note that an individual's birthday and ethnicity are commonly known to that person's friends and colleagues.

interest in this information is very slight. Thus, balancing the minimal public interest against the victim's diminished but still extant privacy interest, OIP concludes that the victim's date of birth and ethnicity may be withheld under the UIPA's privacy exception. See id.; see also OIP Op. Ltr. No. 03-19 at 14.

The record goes on to provide the applicant's name, relationship to the victim, address, and telephone number. As noted above, CVCC has stated that applicants provide information under an express or implied promise of confidentiality. CVCC may therefore redact the applicant's name, relationship to the victim, address and telephone number, based on the UIPA's exception for information whose disclosure would frustrate a legitimate government function. See Haw. Rev. Stat. § 92F-13(3) (1993).

The record next contains administrative information: entries for investigator, file location, crime date, crime type, county, advocacy, application date, reference source, "adm desc date," decision, and status (apparently a code). CVCC has not argued that disclosure of this information would interfere with its ability to process cases.[18] CVCC has failed to justify how disclosure of this administrative information would result in the frustration of a legitimate government function or an unwarranted invasion of personal privacy. Thus, the administrative information must be disclosed.

The same section of the record contains entries for award amount (total and subcategories). CVCC argues that disclosure of the award amount and the disposition of those funds would frustrate its legitimate government function by discouraging victims from applying for aid. This argument is apparently based on the theory that an offender should only be able to access information such as the amount of an award if the offender wishes to know it to make payment, and even in that case, the offender can learn the amount in another way. However, the UIPA does not require a requester to provide a reason for requesting government records, nor does it discriminate between government record requesters. E.g. OIP Op. Ltr. No. 90-29 at 13. Additionally, as OIP has often noted, there is a strong public interest in knowing how public money is spent. E.g. OIP Op. Ltr. No. 94-28 at 6 and opinions cited therein. CVCC's argument that its annual reports provide all the financial information that the public needs to know misunderstands the basic purpose of the UIPA: the UIPA is intended to make government accountable to the people by giving the people the ability to access government records beyond the limited information that an agency may choose to publish. See Haw. Rev. Stat. § 92F-2 (1993). CVCC has failed to justify how disclosure of the award amount (total and subcategories) would result in the frustration of a legitimate government

[18] Again, OIP notes that CVCC cannot withhold all its records on the theory that disclosure of any part of any record would deter applicants.

function or an unwarranted invasion of personal privacy. See Haw. Rev. Stat. §§ 92F-13(1) and (3) and 92F-14(a) (1993). Thus, the award amount (total and subcategories) must be disclosed.

Moving to the lower portion of the record, we note that CVCC has failed to justify withholding the perpetrator's name and "age type," and it is difficult to imagine how disclosure of this information would violate the perpetrator's privacy interest[19] or interfere with CVCC's legitimate functions. The perpetrator information, therefore, must be disclosed.

In the case description section of the record, the first four sentences give only information that is already a matter of public record (including the brief description of the victim's injury). As discussed above, the UIPA's privacy exception generally does not apply to information that is already of public record, because such information no longer carries a significant privacy interest. See Haw. Rev. Stat. §§ 92F-13(1) and (14). Thus, there is no basis to redact this segment under the UIPA's privacy exception, and the information must be disclosed.

The next two sentences, a description of non-compensated expenses, carry a significant privacy interest because they reflect personal financial information of the victim's survivors and, insofar as they list medical expenses, medical information of the victim herself. See Haw. Rev. Stat. § 92F-14(b)(1) and (6) (supp. 2004). Although the victim and her husband (who was among her survivors) are now deceased, medical information and personal financial information are fairly sensitive.[20] The passage of approximately a decade since the victim's death (and, presumably, less time since her husband's) combined with that relatively strong privacy interest, result in a somewhat diminished but still significant privacy interest. Although there is some public interest in this information, which was CVCC's basis for making an award of public funds, OIP concludes that in this case the public interest does not outweigh the significant privacy interest. See Haw. Rev. Stat. §§ 92F-13(1) and (14)(a); see also OIP Op. Ltr. No. 03-19 at 14. This segment may therefore be redacted based on the UIPA's privacy exception.

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[19] Although an individual's age carries a significant privacy interest, the listing for "age type" gives a code rather than an age and is not specific enough to carry any significant privacy interest. We note also that, in this instance, the perpetrator's age at the time of the trial is a matter of public record and the perpetrator himself is the requester.

[20] OIP notes that the information contained in an individual's medical and personal financial records, unlike birthday and ethnicity, would not be commonly known to friends or colleagues.

The remaining two sentences of the case description describe the award that was paid, the disposition of the awarded funds to the applicant[21] and two organizations, and a brief justification for the award. The portion of the funds awarded to the applicant and CVCC's reason, given in the last sentence, for making the award that it did to the applicant, do represent personal financial information of the applicant. Haw. Rev. Stat. § 92F-14(b)(6). However, given the strong public interest in knowing how public money is spent, OIP concludes that the public interest outweighs the applicant's privacy interest in the actual portion of the award that was paid to the applicant and CVCC's justification for the award. See, e.g. OIP Op. Ltr. No. 94-28 at 6 and opinions cited therein.

At the bottom of the record is a section titled "Hearing Summary," which contains what appear to be administrative codes summarizing the result of the hearing. The Hearing Summary carries no apparent privacy interest, nor has CVCC provided any argument that disclosure of those codes would interfere in some particular way with one of its legitimate functions. Accordingly, the codes must be disclosed.

CONCLUSION

Information in a record may only be withheld if it falls under a specific exception to disclosure; if no exception applies, the information must be disclosed. Haw. Rev. Stat. § 92F-11 (1993). In this case, the applicant was promised confidentiality, so the applicant's identity may be withheld under the UIPA's exception for information whose disclosure would frustrate a legitimate public function. See Haw. Rev. Stat. § 92F-13(3) (1993). The information in the record that became part of the public court record from a public trial no longer carries a significant privacy interest, and cannot be withheld based on the UIPA's privacy exception. See Haw. Rev. Stat. §§ 92F-13(1) and -14(a). The deceased victim's remaining privacy interest in the information in this record that would, for a living person, fall within the UIPA's privacy exception is not outweighed by the public interest in disclosure, so that information may be withheld. See id. Other information (such as administrative codes, the award amount, and the offender's name) that does not fall within an exception to disclosure must be disclosed. See Haw. Rev. Stat. § 92F-11 (1993).

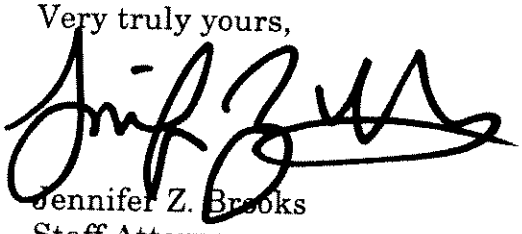
In reviewing this file, OIP noted that the letters attached by CVCC as support for its arguments were apparently based on a misunderstanding of the situation at hand. Specifically, the letters appeared to assume that the information at issue in this opinion is confidential victim information that has not been previously published, whereas in fact the information at issue is either victim

[21] The applicant is not named in this section, nor is there anything in the two sentences that would serve to identify the applicant.

information that has become part of the public record already, or information that does not make any reference to the victim (e.g., the offender's name or internal administrative information). In fact, the letter writers appeared to be under the misimpression that information about victims and applicants that has previously been kept confidential might now become public. Given CVCC's expressed concern that applicants will be reluctant to come forward if any information from a CVCC record – even the offender's own name – were released to the offender, it seems counterproductive for CVCC to foster the idea that OIP may order the release of sensitive victim information that has never yet been made public. As OIP has previously advised CVCC, where victim or applicant information is of the type that carries a significant privacy interest, it will fall under the privacy exception unless it has already become part of the public record (thus reducing the privacy interest to insignificance) or the public interest is so strong as to outweigh the privacy interest, which is a rare situation. See Haw. Rev. Stat. §§ 92F-13(1) and -14(a); see also OIP Op. Ltr. No. 03-02. (In addition, as was the case with this record, when an applicant has been promised confidentiality the applicant's identity may be withheld. See Haw. Rev. Stat. § 92F-13(3) (1993)). OIP therefore suggests that to address its concern that would-be applicants may be frightened away by the possibility of disclosure, CVCC should emphasize to those persons or organizations it has spoken to about this issue that this opinion relates to disclosure of victim information that is already part of the public record, not information that has heretofore been kept confidential.

If you have further questions about this matter or about the UIPA in general, please feel free to contact OIP.

Very truly yours,



Jennifer Z. Brooks
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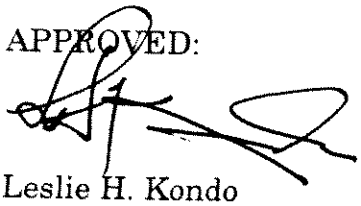
APPROVED:



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