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IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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HONOLULU CIVIL BEAT INC.,
Plaintiff-Appellant,

vs.

DEPARTMENT OF THE ATTORNEY GENERAL
Defendant-Appellee.

SCAP-21-0000057

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CAAP-21-0000057; CASE NO. 1CC161001743)

APRIL 26, 2022

OPINION BY RECKTENWALD, C.J., CONCURRING IN PART AND DISSENTING
IN PART, IN WHICH McKENNA, J., JOINS

I. INTRODUCTION

I agree with much of the Majority's analysis, but would accord greater weight to the privacy interests of non-supervisory employees at the Office of the Auditor. Although I would disclose the bulk of the Department of the Attorney General's (DAG) report, I reach this conclusion only after

balancing the significant privacy interests of the employees who, through no fault of their own, were caught up in its investigation.

In short, I agree with the Majority that the public has a compelling interest in the DAG's report on the Office of the Auditor (the Report) to the extent that it sheds light on the DAG's investigation and the Auditor's performance of its statutory and constitutional duties. However, I depart from the Majority inasmuch as I conclude that employee-witnesses who were interviewed - that is, those who were not subjects of the investigation - have significant privacy interests in the Report's contents. The Majority's holding to the contrary is inconsistent with the plain language and purposes of the Uniform Information Practices Act. I cannot agree that employees have only an insignificant interest in personnel-related matters - especially, as here, where those matters are caught up in an employment-misconduct investigation.

Because I conclude that the employee-witnesses have significant privacy interests in the Report, I would balance those interests against the public's interest in disclosure. See Hawai'i Revised Statutes (HRS) § 92F-14(a) (2012); Org. of Police Officers v. City & Cnty. of Honolulu, 149 Hawai'i 492, 505, 494 P.3d 1225, 1238 (2021). There are significant portions of the Report which contain notes of interviews with the

employee-witnesses - the details of which are often personal or embarrassing to the individuals discussed. Because the public has only a slight interest in knowing the identity of these individuals, I would protect their privacy by redacting their positions and professional backgrounds in addition to their names. But given the strong public interest in the substance of what they said, I would otherwise disclose the notes.

In sum, the Majority and I end up in much the same place, but take very different paths in getting there. Accordingly, I respectfully dissent in part.

II. BACKGROUND

In April 2015, responding to complaints of workplace harassment and discrimination made by current and former Auditor employees to then-Senate President Donna Mercado Kim, the DAG launched an investigation of Acting Auditor Jan Yamane, Deputy Auditor Rachel Hibbard, and General Counsel and Human Resources Manager Kathleen Racuya-Markrich (collectively, the Subjects). The resulting Report, completed in April 2016, spans some 563 pages and appears to document every email sent or received by the investigator and every interview he conducted. To understand this case, a closer look at the contents of the Report is necessary.

The first twenty-nine pages of the Report detail the steps taken by the investigator in launching the investigation.

They describe how he liaised with the relevant legislators, referenced internal Auditor policy documents, and contacted the Subjects. They also describe, point by point, the wide-ranging complaints - two anonymous and three named - that led to the investigation.

The subsequent approximately 300 pages recount the investigator's interviews with the complainants and other employees and summarize the documents and email chains he reviewed. The investigator's notes are often dry but sometimes embarrassing. They cover routine office functions - including long descriptions of contracting/procurement and leave slips - but they also include water-cooler gossip and details about the toxic work environment.

The Report next details the investigator's research into salary practices and his contact with several representatives of government agencies that had recently been audited. It then describes multi-day interviews with each of the Subjects, during which they generally denied or downplayed the allegations.

The Report concludes with a ten-page section titled "FINDINGS" (Findings), wherein the investigator reduces hundreds of pages of interviews and research into a succinct, bullet-point list of policy violations and employment misconduct

committed by each of the Subjects. For example, the Report includes Findings such as:

RACUYA-MARKRICH failed to investigate or assign for investigation the discrimination complaint filed by [an employee] relating to YAMANE as prescribed in the Personnel Guide. No investigatory report was located.

. . .

HIBBARD violated the House Disruptive Behavior policy and created an offensive work environment for [an employee] through harassment. . . .

. . .

YAMANE violated the office's zero tolerance discrimination and harassment policy by making a discriminatory comment

. . .

Audit report findings are sensationalized and the reports issued overly focus on negative findings.

Each finding included the specific incidents, if any, that underlay it.

Honolulu Civil Beat Inc. (Civil Beat) requested that the DAG disclose the Report. The DAG refused. Civil Beat sued under HRS chapter 92F (the Uniform Information Practices Act or UIPA).¹ The circuit court granted summary judgment to the DAG. On appeal, we vacated the judgment and remanded to the circuit court.² See Honolulu Civ. Beat Inc. v. Dep't of Att'y Gen., 146 Hawai'i 285, 298-99, 463 P.3d 942, 955-56 (2020). The circuit court again granted summary judgment to the DAG - with new

¹ The Honorable Keith K. Hiraoka presided.

² The Honorable John M. Tonaki presided on remand.

reasoning - and Civil Beat again appeals. We now consider whether either of two exceptions to UIPA's general mandate of disclosure - the Privacy Exception in HRS § 92F-13(1) (2012)³ or the Frustration Exception in HRS §92F-13(3)⁴ - shields the Report from disclosure.

III. DISCUSSION

A. The Public Interest in the Report Dictates that It Must, for the Most Part, Be Disclosed

An important step in determining whether and to what extent a document must be disclosed is identifying the public interest in its disclosure.

Subject to exceptions, UIPA establishes a baseline that all government records are open for public inspection. HRS § 92F-11(a) (2012). One exception shields government records where disclosure "would constitute a clearly unwarranted invasion of personal privacy." HRS § 92F-13(1). The law provides examples of - but does not exclusively enumerate - records in which an individual has a significant privacy interest. See HRS § 92F-14(b) (Supp. 2015). Where a privacy interest is significant, it triggers a balancing test: the

³ HRS § 92F-13(1) reads: "This part shall not require disclosure of: (1) Government records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy[.]"

⁴ HRS § 92F-13(3) reads: "This part shall not require disclosure of: . . . (3) Government records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function[.]"

document may be withheld unless the individual's privacy interests are outweighed by the public interest in disclosure. HRS § 92F-14(a); Org. of Police Officers, 149 Hawai'i at 505, 494 P.3d at 1238 (citing Peer News LLC v. City & Cnty. of Honolulu, 138 Hawai'i 53, 76, 376 P.3d 1, 24 (2016) (Pollack, J., concurring)); see also Majority 9-10.

In particular, UIPA seeks to protect the people's interest in "the formation and conduct of public policy" by "[o]pening up the government processes to public scrutiny and participation." HRS § 92F-2 (2012). Thus, like the federal Freedom of Information Act (FOIA), UIPA demands the disclosure of information - unless otherwise provided - that "she[ds] light on an agency's performance of its statutory duties or otherwise let[s] citizens know what their government is up to." U.S. Dep't of Def. v. Fed. Labor Rels. Auth., 510 U.S. 487, 497 (1994) (quoting U.S. Dep't of Just. v. Reps. Comm. for Freedom of Press, 489 U.S. 749, 773 (1989)) (internal quotation marks omitted). In the context of employment-misconduct investigations, the Office of Information Practices (OIP) has recognized that the public interest "generally lies" in (1) "confirming that the [agency] is properly investigating" and (2) "holding . . . public officials accountable for their conduct." See OIP Op. Ltr. No. 98-05, at 21 (Nov. 24, 1998).

Here, the Report implicates both of these interests. The Office of the Auditor is created by the Hawai'i Constitution and tasked with certifying the government's financial statements and auditing "the transactions, accounts, programs and performance of all departments, offices and agencies of the State and its political subdivisions." Haw. Const. art. VII, § 10. Its head is appointed by both houses of the legislature and can only be removed for cause by a two-thirds vote of a joint session. Id. Simply put, it is a constitutionally significant body with an important role in how the government functions as a whole.

It is noteworthy here that the legislature asked a law-enforcement agency housed within the executive branch to launch an investigation of the Auditor, whom the legislature alone has the power to appoint and remove. Cf. Bowsher v. Synar, 478 U.S. 714, 731-32 (1986) (suggesting that because the Comptroller General could only be removed by Congress, that office was part of the legislative branch). The Report thus implicates the legislature's oversight role over the Auditor and is imbued with a considerable public interest as the account of a controversy involving both the legislative and executive branches. In short, it sheds light on the DAG's investigation of the Auditor as well as the Auditor's ability to carry out the duties entrusted to it by statute and the state constitution.

The public's interest in this information must be afforded significant weight.

Accordingly, I agree with the Majority that our analysis must begin with the compelling interest of the people in understanding how the government conducts their business. And although I conclude that this interest requires the disclosure of the bulk of the Report, I do so only after balancing the significant privacy interests of the individuals it implicates. Only by recognizing both the public interest and the individual privacy interests in the Report can we carry out the balancing prescribed by UIPA.

B. Government Employees Have Significant Privacy Interests in the Contents of Misconduct Investigations

Government employees do not surrender their privacy when they walk into the office. The Majority reads UIPA in large measure to protect only those employees who are investigated for misconduct, but this result is unduly restrictive and inconsistent with UIPA. Specifically, UIPA's text recognizes that State employees retain a significant privacy interest in their everyday work activities - all the more so when those activities are caught up in an investigation of their colleagues' misconduct.

Here, the Auditor employees have significant privacy interests in the Report for at least two related reasons.

First, government employees retain an interest in personnel records that document their daily work activities. Second, Auditor employees have significant privacy interests by virtue of their status as witnesses and participants in a government investigation of employment misconduct.

First, just like private employees, government employees have an interest in keeping their work lives at work. This commonsense observation is supported by the text of UIPA. The examples of significant privacy interests in HRS § 92F-14(b) include "[i]nformation in an agency's personnel file" and "[i]nformation comprising a personal recommendation or evaluation." As OIP has recognized, these examples bring within the Privacy Exception "personnel-related information within a report not contained in the employee's personnel file." See OIP Op. Ltr. No. 98-05, at 19.

Much of the information in the Report is personnel related and deserving of protection. Among the sensitive details the Report documents: an analyst was made to sit at a receptionist's desk and take calls as a form of punishment; Yamane slammed a ream of paper on a table to scold an employee; and a particular employee may or may not have been unfriendly (this last topic was discussed ad nauseum across numerous interviews). The Report discusses employees' work evaluations, demotions, promotions, and other employees' opinions about them.

It covers minor infractions of leave policies. It discusses who was popular or unpopular and who sat together at lunch.

The Majority acknowledges that UIPA protects personnel-related records even if they are not physically located within an agency's personnel files. Majority at 11-12. Moreover, it finds that the Report was a personnel-related record as to the Subjects because (1) it touches on "classic human resources concerns" and (2) it was initiated by "a unit of government with power over the auditor." Id. at 15-16. However, as to the other Auditor employees, the Majority concludes that "the Report is not these employees' personnel-related information," in part because it "would be out of place in any one of the non-Subjects' personnel files." Majority at 18. In short, the Majority appears to conclude that only employees being investigated or those who are the "focus" of a document have significant privacy interests. See Majority at 17. ("The Report does mention Office of the Auditor workers other than the Subjects. But these folks are not its focus." (footnote omitted)).

This limitation is found nowhere within UIPA's text. To the contrary, UIPA protects "[i]nformation in an agency's personnel file." HRS § 92F-14(b)(4) (emphasis added). It notably does not protect information in an employee's personnel file. And it does not provide that one's privacy interests

depend on whether they are being investigated or are the focus of a document. Appropriately so: the Majority's reading affords more protections to employees suspected of misconduct than those merely going about their day-to-day business. Here, that means affording a significant privacy interest to those accused of harassment, but not those whom they are accused of harassing.

The Majority further strains to protect information about "minor misconduct by non-Subjects" while revealing almost all other information about them. Majority at 27. That is because this information is "akin to the information maintained in a personnel file." Id. at 28 (quoting OIP Op. Ltr. No. 98-05, at 19). It is not clear to me why this information is akin to that found in a personnel file, but other information - for example, whether an employee was promoted or demoted, liked or disliked, reprimanded or rewarded - is not.⁵

Once again, the Majority reads limits into UIPA that unduly restrict the privacy rights of employees. It does not justify why employees only have significant privacy interests when they are suspected of misconduct. And it fails to

⁵ On the other hand, I agree with the Majority's decision to redact summaries of the performance appraisals of individual employees because those individuals' privacy interests outweigh the public interest in that information. Majority at 26-27. I also agree that information relating to medical conditions should be redacted, consistent with HRS § 92F-14(b) (1). Majority at 31-32.

recognize that UIPA protects personnel-related information as such. This result is both unwise and unnecessary.

The second reason that the Auditor employees possess significant privacy interests in the Report is that, in addition to protecting personnel-related information in general, UIPA specifically provides for individual privacy interests in employment-misconduct investigations. Although HRS § 92F-14(b)(4) provides a privacy interest in personnel records, subsection (B) states that individuals have no significant privacy interests in certain "information related to employment misconduct that results in an employee's suspension or discharge." (Emphasis added.) The clear implication is that "information related to employment misconduct" constitutes personnel-related information, which is imbued with a privacy interest to the extent it does not result in such discipline. In other words, the legislature recognized within UIPA's text that employment investigations touch on sensitive areas implicating significant privacy interests for both subjects and witnesses.

This view is shared by both the OIP and the federal courts. The OIP has recognized that government employees who participate in employment-misconduct investigations have significant privacy interests in the fact of their participation and the information they share. See OIP Op. Ltr. No. 98-05, at

17-18 (recognizing a significant privacy interest in administrative investigation reports prepared in response to internal and external complaints about police officers).⁶ And, even without the explicit statutory basis provided by HRS § 92F-14(b)(4)(B), federal courts interpreting FOIA have come to the conclusion that government-employment investigations are protected. See OIP Op. Ltr. No. 98-05, at 17-18 (collecting cases); see also Pub. Emps. for Env't Resp. v. U.S. EPA, 926 F. Supp. 2d 48, 60 (D.D.C. 2013) ("To the extent that the report contains information revealed by interviewees who spoke candidly so that [an employee's misconduct] allegations could be addressed, those persons have a compelling privacy interest in non-disclosure."). This holding comports with the commonsense understanding that when employees speak to investigators about their coworkers' wrongdoing, the witnesses' privacy interests in those conversations are significant.

⁶ The Majority asserts that OIP Opinion Letter No. 98-05 does not support my position because that opinion letter "presumed that only the subject of an administrative investigation could have a significant privacy interest in it as personnel-related information." Majority at 19 n.12. To the contrary, that opinion letter recognized "the substantial privacy interest of a source in a government investigation," specifically citing to federal cases involving workplace-misconduct investigations. See OIP Op. Ltr. No. 98-05, at 17-18 (citing Housley v. U.S. Dep't of Treasury, 697 F. Supp. 3, 5 (D.D.C. 1988), for the proposition that "co-workers and supervisors who voiced opinions concerning an employee's conduct had a substantial interest in seeing that their participation in the investigation was not disclosed"). Rather than presuming that non-subjects in government investigations had no significant privacy interests, it specifically found that "information which identifies witnesses and complainants is exempt from disclosure under [HRS §] 92F-13(1) . . . as information which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy." Id. at 17.

The Majority's view comes down to an atomistic reading of UIPA's privacy protections that denies employees significant privacy interests in a document to the extent they are "not its focus," it was "not drafted because of them," it would not help in "employment-related decisions about them," and/or it would be "out of place in any one of . . . [their] files." Majority at 17-18. As discussed, these limitations are inconsistent with the plain language of the statute: UIPA protects "[i]nformation in an agency's personnel file," not information about particular employees located in their particular files. HRS § 92F-14(b) (4) (emphasis added).

Moreover, the legislature intended UIPA as a "useful framework for handling records questions," not an exhaustive enumeration of recognized privacy interests. Conf. Comm. Rep. No. 112-88, in 1988 House Journal, at 817-19, 1988 Senate Journal, at 689-91. Rather than setting out a laundry list of individual privacy interests, the legislature "prefer[red] to categorize and rely on the developing common law." S. Stand. Comm. Rep. No. 2580, in 1988 Senate Journal, at 1094. HRS § 92F-14 evinces this intent: it announces - including in its title - that it contains only "examples" of significant privacy interests. In other words, while I fully agree with the Majority that UIPA establishes a strong presumption of disclosure, Majority at 6-7, the exemptive provisions - HRS §§

92F-13 and 92F-14 - are not narrowly worded statutes. Parsing them as the Majority does fails to give effect to the legislature's purpose of establishing a common law framework that balances both public and individual interests. To the extent the Majority applies this unduly narrow reading to limit the privacy interests of government employees in their day-to-day lives at the office, I respectfully disagree.

C. The Employees' Privacy Interests Must Be Weighed Against the Public Interest in the Interview Notes

The Majority concludes that because the employees' privacy interests in the Report are not significant, these interests are eclipsed so long as there is more than a scintilla of public interest in the Report's disclosure. Majority at 25. Thus, the Majority chooses to redact only the names of the employee-witnesses. Majority at 29-30. Because I conclude that the employees' privacy interests are significant, I find that it is necessary to balance these interests against that of the public. In my view, this balance dictates that not only their names, but also identifying details such as their professional backgrounds, educations, and job titles must be obscured.

In balancing the interests in the Report, the question is not whether the public interest outweighs the privacy interests in the document as a whole, but rather how this balance applies to each part of the Report. See Mead Data

Cent., Inc. v. U.S. Dep't of Air Force, 566 F.2d 242, 260 (D.C. Cir. 1977) (finding that "[t]he focus of the FOIA is information, not documents"). Thus, each portion must be considered within the context of the entire document.

First, the Report's introductory materials, which outline the steps that the investigator took, serve the public interest that the Majority identifies in "assessing the manner in which the government investigates complaints and allegations of wrongdoing." Majority at 20-21. And the Findings succinctly capture the most well-founded and serious allegations in the Report; thus, their release serves the public interest in assessing how the Auditor's office carried out its official duties. But once these materials are released, the importance of the remaining sections - the extensive interview notes compiled by the investigator - is diminished.

To be sure, these notes retain an appreciable public interest. Their disclosure would allow the public to evaluate the DAG's investigation for itself. Further, learning the perspectives of individual employees provides the public an opportunity to independently assess the weight of the evidence against the Subjects. These interests are not trivial.

However, in light of the information disclosed through the introductory materials and the Findings - and the bulk of the interview notes, which I would release - the public has only

a minor interest in the identities and backgrounds of the employees interviewed. The Majority describes information about the employee-witnesses' professional backgrounds and job titles as "helpful contextualizing information." Majority at 30 n.17. But given what is already disclosed, the public interest in these details is diminished. It will help the public contextualize the investigation and its conclusions only slightly to know what position a particular employee occupied within the Auditor's office. And on the other hand, as discussed, these employees have significant privacy interests in keeping their identities from being disclosed.

The Majority proposes to anonymize these employees by only redacting their names.⁷ But this result does not adequately protect their identities. Rather, I would redact not only the names of the employee-witnesses but also identifying information such as the positions they occupied, their current roles or occupations as of the time of the investigation, their

⁷ The Majority's decision to redact the names of the employee-witnesses is inconsistent with its conclusion that they have no significant privacy interests in most of the Report. The Majority asserts that the public has a "cognizable interest in helpful contextualizing information about interviewees' positions." Majority at 30 n.17. The witnesses' names are perhaps the most helpful contextualizing information about them, since learning the names of the employee-witnesses would allow readers to cross-reference their contributions in different parts of the Report and assist in deciding what weight to give their statements. In other words, the public has more than a scintilla of interest in the names of the non-subject employees. The Majority's conclusion that the employees have no significant privacy interests in the Report would compel it to also release their names. This result illustrates the improvidence of the Majority's position.

professional backgrounds, and where they went to school.⁸ This modest step would further protect these employees' identities while only slightly hindering the utility of the Report, as redacted, to the public.

Anonymity is not an on/off switch that can be achieved by simply blacking out the names of those sought to be protected. Cf. Dep't of Air Force v. Rose, 425 U.S. 352, 381-82 (1976) ("[R]edaction cannot eliminate all risks of identifiability But redaction is a familiar technique in other contexts and exemptions to disclosure under the [FOIA] were intended to be practical workable concepts." (footnote omitted)). The Supreme Court has therefore condoned the "deletion of personal references and other identifying information," in addition to names, to protect individuals' privacy. Id. at 381 (emphasis added).

Thus, balancing the privacy interests in a document with the public interest in its disclosure entails a choice about how extensively to anonymize the persons described. The more details about a person that a document contains, the wider the circle of people becomes who can identify them. Cf. id. at

⁸ To the extent the public's understanding of the Report is aided by understanding which witnesses were relatively higher-level employees who, for example, had others reporting to them, this information emerges in the content of their interviews, from their description of their work lives and their roles at the office. I do not object to disclosing the employees' descriptions of their duties, only their backgrounds.

380 (holding that "what constitutes identifying information . . . must be weighed not only from the viewpoint of the public, but also from the vantage of those who would have been familiar" with a matter). In sum, the level of redaction required will depend on the public interest involved; the privacy interests implicated; and the extent to which the details sought to be disclosed would identify those described to their personal relations, colleagues, and the public at large.

In this case, the public interest in the employees' identities, as discussed, is not so weighty as to require that their professional backgrounds be disclosed, even though they may provide helpful context.⁹ This information would immediately identify the employees to those who know them or were familiar

⁹ In some circumstances, identifying information may be of sufficient importance that it must be disclosed, notwithstanding the privacy interests involved. For example, in News-Press v. U.S. Department of Homeland Security, the court held that the addresses of Federal Emergency Management Agency (FEMA) aid recipients had to be disclosed, even though they might be identifying, because disclosure served "the public interest in determining whether FEMA has been a proper steward of billions of taxpayer dollars." 489 F.3d 1173, 1196 (11th Cir. 2007).

On the other hand, there may be situations where the sensitivity of the information implicated and the ability of others to identify those involved justifies the withholding of entire documents or portions of documents. So, for example, in Alirez v. National Labor Relations Board, the Tenth Circuit held that interview notes generated as part of an employment investigation were "highly intimate and personal" and had to be withheld in their entirety because, "[e]ven sanitized, these documents would enable Mr. Alirez, and others who had specific knowledge of these incidents, to identify readily the informant and persons discussed in each document." 676 F.2d 423, 427-28 (10th Cir. 1982); see also Sorin v. U.S. Dep't of Just., 280 F. Supp. 3d 550, 566 (S.D.N.Y. 2017) (citing Alirez and observing that "courts have permitted witness interviews to be withheld in full . . . after noting the danger that even redacted witness statements might facilitate the speaker's identification"), aff'd, 758 F. App'x 28 (2d Cir. Dec. 6, 2018).

with the Auditor during the time period covered by the Report. And even members of the public who might take the time to cross-reference this information, for example by examining the employees' LinkedIn pages, could likely identify at least some of those described.

Succinctly, although this information may help somewhat to contextualize the employee-witnesses' contributions to the Report, this public interest is not so significant as to outweigh the privacy interests of the non-subject employees in their identifying information. For that reason, it must be redacted.

In sum, the Majority goes astray to the extent that it holds employees have no significant privacy interests in the bulk of the Report. And although I find that this privacy interest is, for the most part, outweighed, it dictates that at least the employees' patently identifying personal information must be redacted. Moreover, the Majority's failure to recognize the privacy interests of employee-witnesses in misconduct investigations will have a deleterious impact on future cases where these interests are implicated. UIPA provided for open government; it did not provide that State employees must go to work in a fishbowl.

IV. CONCLUSION

I respectfully disagree with the Majority's view that government employees who have been harassed by their supervisors have no significant privacy interests in the details of that harassment. And although the Report is imbued with a compelling public interest, this interest does not justify disclosing obviously identifying information about the Auditor's employees. Accordingly, and for the reasons mentioned above, I respectfully dissent in part.

/s/ Mark E. Recktenwald

/s/ Sabrina S. McKenna