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NO. CAAP-22-0000506

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

STATE OF HAWAII

HAWAII GOVERNMENT EMPLOYEES)	CIVIL NO. 1CCV-21-0001304
ASSOCIATION, AFSCME, LOCAL 152,)	(DECLARATORY JUDGMENT)
AFL-CIO; and, UNITED PUBLIC)	
WORKERS, AFSCME, LOCAL 646,)	APPEAL FROM:
AFL-CIO,)	(1) ORDER GRANTING
)	DEFENDANT DEPARTMENT OF
Plaintiffs-Appellants,)	PUBLIC SAFETY, STATE OF HAWAII'S
)	AMENDED MOTION TO DISMISS,
vs.)	FILED ON NOVEMBER 29, 2021
)	[Dkt. 17], FILED ON MARCH 31, 2022
)	[Dkt. 37]; and (2) FINAL JUDGMENT
DEPARTMENT OF PUBLIC SAFETY,)	FILED ON AUGUST 2, 2022 [Dkt. 48]
STATE OF HAWAII; JOHN DOES 1-10;)	
JANE DOES 1-10; DOE PARTNERSHIPS)	
1-10; DOE CORPORATIONS 1-10; DOE)	
GOVERNMENTAL AGENCIES AND)	
DOE ENTITIES 1-10;)	
)	
Defendant-Appellee.)	
)	
)	JUDGE: HON. LISA W. CATALDO
)	
)	
)	

PLAINTIFFS-APPELLANTS' OPENING BRIEF

and

APPENDICES "A," - "C."

and

CERTIFICATE OF SERVICE

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PLAINTIFFS-APPELLANTS' OPENING BRIEF

I.

INTRODUCTION

This case is about whether a public employer can be held responsible after intentionally disclosing confidential medical and health information of hundreds of employees to non-privileged co-workers. Two (2) public sector unions represented the collective interests of their members by attempting to enforce the privacy interests of State employees under Chapter 92F, HRS, and alternatively, through negligence claims. The Circuit Court erred, as a matter of law, that: (1) Chapter 92F, HRS permits the State to disclose employees' medical and health information without consequence; (2) extended the holding in *Organization of Police Officers v. City and County of Honolulu*, 149 Hawai'i 492, 494 P.3d 1225 (2021) without basis; (3) ruled that Chapter 92F, HRS immunized the State from negligence based claims; and (4) held that Public Sector unions lack standing as an organization, to assert the privacy interests and negligence claims of their members.

II.

STATEMENT OF THE CASE

A. Factual Background.

On August 5, 2021, the Governor of the State of Hawaii, issued an Emergency Proclamation which ordered:

. . . All State and county departments, offices, and agencies shall ensure, consistent with law, that any documentation related to vaccination status or test results obtained for purposes of this section are not disclosed to individuals other than as necessary to ensure compliance with this Proclamation or as required by law or court order. (Emphases added)

See, Emergency Proclamation Related to the COVID-19 Response, August 5, 2021, Dkt. 20, in 1CCV-21-0001304, at pdf Page#7; see also, Complaint Filed on October 25, 2021, at ¶45, Dkt. 1 in 1CCV-21-0001304, at pdf Page#10.

On August 12, 2021, every employee within the Department of Public Safety ("DPS") was notified that they had to complete a COVID-19 Vaccination and Mandatory Testing, including an Attestation Form. Dkt. 25, in 1CCV-21-0001304, at pdf Page#2. The purpose of the Attestation Form was make sure that all employees were fully vaccinated, partially vaccinated or unvaccinated for COVID-19. Id. The form had to be submitted to the Department by August

16, 2021. Id. Employees who did not complete and submit the form were subject to discipline, “up to and including termination.” Dkt. 25, in 1CCV-21-0001304, at pdf Page#4.

On August 19, 2021, at 1:39 a.m., SHELLEY D. HARRINGTON, an employee with Appellee DPS, and its Human Resources Officer, sent an email to 260 DPS employees who were unvaccinated and vaccinated. See, Dkt. 3, in 1CCV-21-0001304, at pdf Pages #2-5 (redacted); Complaint, ¶20, Dkt. 1 in 1CCV-21-0001304, at pdf Page 6. SHELLEY D. HARRINGTON revealed the identity and vaccination status of 260 employees in the DPS department based on their responses to the “COVID-19 Vaccination Status Attestation” form to other DPS employees who were unvaccinated and vaccinated. See, Dkt. 3, in 1CCV-21-0001304; Dkt 4, in 1CCV-21-0001304; Complaint, ¶22-¶23, Dkt. 1, in 1CCV-21-0001304, at pdf Page#6. At no time did Defendant DPS, by and through SHELLEY D. HARRINGTON, have the permission or consent (direct or indirect) of any of the unvaccinated or vaccinated employees to disclose their vaccination status to any other DPS employee. Dkt. 4, in 1CCV-21-0001304; Complaint, ¶24, Dkt. , in 1CCV-21-0001304, pdf Page#6.

The Appellee’s Director admitted HARRINGTON disclosed the vaccination status to hundreds of other employees:

Upon learning her mistake, the DHRO immediately initiated an email recall via Outlook, but the recall process did not cancel all distributions. **She also sent an email to all the recipients apologizing for her mistake** and promised to be diligent in ensuring the proper sending selection. (Emphases added)

Dkt. 5, in 1CCV-21-0001304, at pdf Page#3.

B. Procedural Background.

On or about October 25, 2021, the Appellants filed the Complaint as a Declaratory Judgment action under Sec. 632-1, Hawaii Revised Statutes (“HRS”). Dkt. 1, in 1CCV-21-0001304. The Complaint alleged: Count I, Invasion of Privacy, under Sec. 92F-14, HRS (Dkt. 1, in 1CCV-21-0001304, at pdf Page #8-10); Count II, Negligent Supervision (Id., at pdf Page #10-12); Count III, Negligence (Id., at pdf Page #12-13); and Count IV, Injunctive Relief (Id., at pdf Page #13-15).

On or about November 23, 2021, Defendant, Department of Public Safety, State of Hawaii (“DPS”), filed their Motion to Dismiss. Dkt. 15, in 1CCV-21-0001304.

On or about November 29, 2021, DPS filed its Amended Motion to Dismiss. Dkt. 17, in 1CCV-21-0001304.

On or about January 3, 2022, Appellants filed their Memorandum in Opposition to Defendant Department of Public Safety, State of Hawaii's Amended Motion to Dismiss Filed on November 29, 2021. Dkt. 19, in 1CCV-21-0001304.

On or about January 11, 2022, the Hon. Lisa W. Cataldo, Judge of the First Circuit Court, State of Hawaii, held the hearing on the DPS' Amended Motion to Dismiss. Dkt. 37, in 1CCV-21-0001304; Appendix "A," attached hereto.

On or about March 31, 2022, the Hon. Lisa W. Cataldo, Judge of the First Circuit Court, State of Hawaii, filed the Order Granting Defendant Department of Public Safety, State of Hawaii's Amended Motion to Dismiss, filed on November 29, 2021. Dkt. 37, in 1CCV-21-0001304; Appendix "A," attached hereto.

On or about August 2, 2022, the Final Judgment was filed. Dkt. 48, in 1CCV-21-0001304; Appendix "B," attached hereto.

The Notice of Entry of Judgment was filed on August 2, 2022. Dkt. 50, in 1CCV-21-0001304; Appendix "B," attached hereto.

On or about August 22, 2022, the Appellants filed their Notice of Appeal, appealing the: (1) Order Granting Defendant Department of Public Safety, State of Hawaii's Amended Motion to Dismiss, filed on November 29, 2021 [Dkt. 17], Filed on March 31, 2022 [Dkt. 37]; and (2) Final Judgment Filed on August 2, 2022 [Dkt. 48]. Dkt. 1, in CAAP-22-0000506.

III.

STATEMENT OF POINTS OF ERROR

A. Conclusions of Law (Right/Wrong).

(1) Alleged error #1, the Circuit Court misinterpreted the scope of Section 92F-14, HRS and Chapter 92F, HRS.

(a) The alleged error occurred in the Transcript of Proceedings [Dkt. 36] of January 11, 2022 ("TOP"):

THE COURT: If an agency discloses - - if the judiciary were to disclose my health information to the public, I would have no right of action?

MS. FURMAN: Not under 92F.

TOP: [Dkt. 36], page 7, lines 1-4 (“page #: line#”).

* * *

THE COURT: Okay. And I'm opening up the – the possibilities, Ms. Furman. I just really want to understand the State's position. I'm not confining myself to any relief under 92F. What are my -- what are my -- what avenues are available to me? 92F has recognized -- and I think generally the constitution recognizes -- let's -- significant privacy interests of citizens. If the State discloses my private information, which I allege is -- I have a significant privacy interest in, what avenues are available to me? As I read your briefs, basically the State is saying I can follow up with HPD, but civilly I don't have any cause of action, not just under 92F, but I have no legal remedy for that disclosure. Is that the State's position?

TOP [Dkt. 36]: 7-8:14-3.

(b) The alleged error occurred in the First Circuit Court’s Order Granting Defendant Department of Public Safety, State of Hawaii’s Amended Motion to Dismiss, Filed on November 29, 2021, filed on March 31, 2022 [Dkt. 37, in 1CCV-21-0001304, at pdf Pages #2-4]:

Plaintiffs argue that their individual members have a “right to privacy under Section 92F-14(b) . . . as well as a right to enforce that right” pursuant to HRS 92F-19. Opp. at 6-8. While section 14(b) sets forth examples of information in which an individual has a significant privacy interest, the Supreme Court has determined that nothing in that section or HRS section 92F-13 prohibits the disclosure of such information.

* * *

Rather, the UIPA allows an agency to withhold those records (or information contained in those records) if an exception to disclosure provided by statute applies. An agency, therefore, has the discretion to publicly disclose records that could otherwise be withheld under the UIPA.”) (italics added; underscore in original).

Further, section 93F-19 is inapplicable as it relates to disclosure of information from one agency to another agency.

(c) The alleged error was objected to by the Appellants in their Memorandum in Opposition to Defendant Department of Public Safety, State of Hawaii’s Amended Motion to Dismiss Filed on November 29, 2021, Filed on

January 2, 2022 [Dkt. 19, in 1CCV-21-0001304, at pdf Pages #17-20]; see also, TOP [Dkt. 36]: 11:3-18; 12-15:17-5.

(2) Alleged error #2, the Circuit Court expanded the application of the Hawaii State Supreme Court’s decision in *Organization of Police Officers v. City and County of Honolulu*, 149 Hawai’i 492, 494 P.3d 1225 (2021).

(a) The alleged error occurred at TOP [Dkt. 36] of January 11, 2022 (“TOP”):

THE COURT: All right. And, again, I apologize for my inartful questioning. My point is really this: 92F, you'd agree with me, does recognize that there is a significant privacy interest to medical information?

MS. FURMAN: Yes, it does, medical information.

THE COURT: All right. How would an individual union member, if they believe they had a cognizable claim, what is the mechanism available to them to protect that interest?

TOP [Dkt. 36]: 5-6: 22-7.

(b) The alleged error occurred in the First Circuit Court’s Order Granting Defendant Department of Public Safety, State of Hawaii’s Amended Motion to Dismiss, Filed on November 29, 2021, filed on March 31, 2022 [Dkt. 37, in 1CCV-21-0001304, at pdf Page #4]:

Plaintiffs argue that *SHOPO* is inapplicable to this case because *SHOPO* involved an effort to prevent disclosure of records and the present dispute seeks to “hold the Defendant responsible for the actual, unlawful, disclosure of . . . private, medical, COVID-19 vaccination status.” Opp. at 12-13. This is a distinction without a difference: “There is no right of nondisclosure under UIPA, only agency discretion to utilize the enumerated exceptions. Because there is no ‘right’ at issue in order for the court to issue relief . . . the circuit court correctly dismissed all of SHOPO’s UIPA claims in the August 13, 2018 Order.” *SHOPO*, 149 Hawai’i at 509 (italics added). (Footnote omitted)

(b) The alleged error was objected to by the Appellants in their Memorandum in Opposition to Defendant Department of Public Safety, State of Hawaii’s Amended Motion to Dismiss Filed on November 29, 2021, Filed on

January 2, 2022 [Dkt. 19, in 1CCV-21-0001304, at pdf Pages #17-20]; TOP [Dkt. 36]: 9-10:23-23; 11:3-18; 12:1-15.

(3) Alleged error #3, the Circuit Court dismissed all Negligence based claims in the Complaint. [Dkt. 37, in 1CCV-21-0001304, at pdf Page #4].

(a) The alleged error occurred at TOP [Dkt. 36] of January 11, 2022 (“TOP”):

THE COURT: If an agency discloses - - if the judiciary were to disclose my health information to the public, I would have no right of action?

MS. FURMAN: Not under 92F.

TOP [Dkt. 36]: 7:1-4.

* * *

THE COURT: Okay. And I'm opening up the – the possibilities, Ms. Furman. I just really want to understand the State's position. I'm not confining myself to any relief under 92F. What are my -- what are my -- what avenues are available to me? 92F has recognized -- and I think generally the constitution recognizes -- let's -- significant privacy interests of citizens. If the State discloses my private information, which I allege is -- I have a significant privacy interest in, what avenues are available to me? As I read your briefs, basically the State is saying I can follow up with HPD, but civilly I don't have any cause of action, not just under 92F, but I have no legal remedy for that disclosure. Is that the State's position?

TOP [Dkt. 36]: 7-8:14-3.

(b) The alleged error occurred in the First Circuit Court’s Order Granting Defendant Department of Public Safety, State of Hawaii’s Amended Motion to Dismiss, Filed on November 29, 2021, filed on March 31, 2022 [Dkt. 37, in 1CCV-21-0001304, at pdf Page #4].:

Having decided this Motion on the issue of organizational standing (and finding that Plaintiffs’ members do not have a private right of action under HRS ch. 92F), the Court need not address Defendant’s HRCF 12(b)(6) arguments.

(c) The alleged error was objected to by the Appellants in their Memorandum in Opposition to Defendant Department of Public Safety, State of Hawaii’s Amended Motion to Dismiss Filed on November 29, 2021, Filed on

January 2, 2022 [Dkt. 19, in 1CCV-21-0001304, at pdf Pages #19-26]; see also, TOP [Dkt. 36]: 10:4-23; 11:3-18; 20-22:14-10.

(4) Alleged error #4, the Circuit Court misstated the law regarding organizational standing.

(a) The alleged error occurred at TOP [Dkt. 36] of January 11, 2022 (“TOP”):

THE COURT: I do, Mr. Hong. And I looked at your complaint, paragraph 11C, and this was an issue raised in the reply. On page 4 of the complaint it sets forth the standing requirements for plaintiffs as organizations to bring the claim. It does include the part that says the claims asserted and the relief requested requires the participation of individual members in the present claim. Do you see that? Are you familiar with that?

TOP [Dkt. 36]: 22:12-20.

(b) The alleged error occurred in the First Circuit Court’s Order Granting Defendant Department of Public Safety, State of Hawaii’s Amended Motion to Dismiss, Filed on November 29, 2021, filed on March 31, 2022 [Dkt. 37, in 1CCV-21-0001304, at pdf Page #2 and 4]:

Addressing these requirements, Plaintiffs allege in part that their “members would otherwise have standing to sue in their own right under Sec. 92F-14, HRS.” Complaint at ¶ 11.

* * *

Having decided this Motion on the issue of organizational standing (and finding that Plaintiffs’ members do not have a private right of action under HRS ch. 92F), the Court need not address Defendant’s HRCF 12(b)(6) arguments.

(c) The alleged error was objected to by the Appellants in their Memorandum in Opposition to Defendant Department of Public Safety, State of Hawaii’s Amended Motion to Dismiss Filed on November 29, 2021, Filed on January 2, 2022 [Dkt. 19, in 1CCV-21-0001304, at pdf Pages #9-17]; TOP [Dkt. 36] 19-22:1-10; 26-27:20-15.

IV.
STANDARD OF REVIEW

The First Circuit Court’s Order Granting Defendant Department of Public Safety, State of Hawaii’s Amended Motion to Dismiss, Filed on November 29, 2021, filed on March 31, 2022 [Dkt. 37, in 1CCV-21-0001304], is reviewed *de novo*. *Ryan v. Herzog*, 142 Hawai’i 278, 284, 418 P.3d 619, 625, 2018 WL 2127079 (2018); *Goran Pleho, LLC v. Lacy*, 144 Hawai’i 224, 236, 439 P.3d 176, 188, 2019 WL 1553582 (2019).

V.
ARGUMENT

A. Statutory interpretation.

In *Moranz v. Harbor Mall, LLC*, 150 Hawai’i 387, 502 P.3d 488, 2022 WL 104213 (2022), the Court reaffirmed that:

As we stated in *Alvarado*, “this court is bound to construe statutes so as to avoid absurd results.” 92 Hawai’i at 517, 993 P.2d at 551. Therefore, a statutory interpretation that is “rational, sensible[,] and practicable ... is preferred to one which is unreasonable[,] impracticable ... inconsisten[t], contradict[ory], and illogical[].” *Id.* (quoting *Keliipuleole v. Wilson*, 85 Hawai’i 217, 221–22, 941 P.2d 300, 304–05 (1997)).

Moranz v. Harbor Mall, LLC, 150 Hawai’i 387, 398, 502 P.3d 488, 499, 2022 WL 104213 (2022).

B. Chapter 92F, HRS, provides for a private right of action based on unlawful disclosures.

The stated purpose of Chapter 92F, HRS, includes holding government accountable for the dissemination of information in which employees have a “significant privacy interest.” Sec. 92F-2(4), HRS. In *Honolulu Civil Beat v. Department of the Attorney General*, 151 Hawai’i 74, 508 P.3d 1160 (2022), the Hawaii State Supreme Court noted that, what is in a particular record implicates an individual’s “significant privacy interest.” *Id.*, 151 Hawai’i, at 81-82, 508 P.3d, at 1167-1168. Whether an employee’s “significant privacy interest” is involved, “It turns, rather, on whether a record’s information about them implicates their personal significant privacy interests. (Emphasis included)” *Id.*, 151 Hawai’i, at 82, 508 P.3d, at 1168.

It is unchallenged that medical and health information has been statutorily identified as “personal records” in which employees have a “significant privacy interest.” Sec. 92F-14(b)(1)

and Sec. 92F-14(b)(4), HRS; *Honolulu Civil Beat v. Department of the Attorney General*, 151 Hawai'i 74, 88, 508 P.3d 1160, 1174 (2022), "But the **individuals** whose disabilities, **health**, and **bodies are discussed - even in passing** - by the Report **have a 'significant privacy interest' in those discussions.** (Emphases added)" The Court held that, with respect to medical information contained in personnel files:

Given these considerations, **significant privacy interests outweigh the public's interest in the disclosure of information concerning health, disability, and body size.** Disclosing this information would be a "clearly unwarranted invasion of personal privacy." See HRS § 92F-13(1).

Honolulu Civil Beat Inc. v. Dep't of the Attorney Gen., 151 Hawai'i 74, 88, 508 P.3d 1160, 1174, 2022 WL 1223622 (2022).

In the present case, the disclosure of the vaccination status of 260 employees violated their "significant privacy interests."

C. The Circuit Court committed grave error in overextending the SHOPO decision.

The Circuit Court committed grave error because it extended the application of the decision in *Organization of Police Officers v. City and County of Honolulu*, 149 Hawai'i 492, 494 P.3d 1225 (2021) ("*SHOPO*"), without any basis. See, Order Granting Defendant Department of Public Safety, State of Hawaii's Amended Motion to Dismiss, Filed on November 29, 2021, filed on March 31, 2022 [Dkt. 37, in 1CCV-21-0001304, at pdf Pages #2-4]. The *SHOPO* decision is expressly limited in its scope and application. Id., 149 Hawai'i at 505, 494 P.3d, at 1238, "**We hold** that there is **no private right of action** under UIPA for **a party seeking to prevent the release of documents.** (Emphases added)" In its analysis of whether Chapter 92F, HRS, allows for a private right of action, the Court clearly stated:

Based on this test, there is **no implied cause of action** under UIPA for SHOPO to **sue to prevent the release of records.**

* * *

But neither legislative intent nor the underlying purposes of the legislative scheme indicate that a party in SHOPO's position is able to **sue to prevent the disclosure** of public records. **UIPA simply provides no right of nondisclosure.** (Emphases added)
Organization of Police Officers v. City and County of Honolulu, 149 Hawai'i 492,

506-507, 494 P.3d 1225, 1239-1240 (2021); see also, 149 Hawai'i at 509, 494 P.3d, at 1242, "In sum, taking the *Cort* factors together, SHOPO has **no right of action to sue to demand nondisclosure**. (Emphasis added)"

The Court in *SHOPO*, set out the factors to determine whether a private right of action exists:

This court has followed suit. In *Rees v. Carlisle*, 113 Hawai'i 446, 153 P.3d 1131, (2007), we explained that "we apply *Cort*'s first three factors in determining whether a statute provides a private right of action though understanding that **legislative intent appears to be the determinative factor.**" Id. at 458, 153 P.3d at 1143 (quoting *Whitey's Boat Cruises, Inc. v. Napali-Kauai Boat Charters, Inc.*, 110 Hawai'i 302, 313 n.20, 132 P.3d 1213, 1224 n.20 (2006)).

* * *

Legislative intent is given the greatest weight. In this case, there is a clear and obvious indicator of legislative intent: UIPA already provides for particular kinds of enforcement actions. "A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies." *Reliable Collection Agency*, 59 Haw. at 510, 584 P.2d at 111 (quoting *Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458, 94 S.Ct. 690, 38 L.Ed.2d 646 (1974)). (Emphasis added)

Org. of Police Officers v. City & Cnty. of Honolulu, 149 Hawai'i 492, 506-507, 494 P.3d 1225, 1239-1240, 2021 WL 4236732 (2021).

Chapter 92F, HRS was intended to allow employees to pursue unlawful disclosures of their records in which they have a "significant privacy interest." In 1988, the Legislature stated:

* * *

7. Judicial Enforcement.

* * *

There is also a need to provide a remedy for those whose records are inappropriately disclosed. While this bill does not address this issue, **except as to personal records**, it is subject for immediate attention at future sessions. (Emphases added)

* * *

See, *Journal of the House of Representatives*, Fourteenth Legislature, Regular Session of 1988, at 818 [Dkt. 24, in 1CCV-21-0001304, at pdf Page #4].

The vaccination status of the 260 employees was a “personal record” as defined in Sec. 92F-3, HRS:

"Personal record" means any item, collection, or grouping of information about an individual that is maintained by an agency. It includes, but is not limited to, the individual's education, financial, **medical,** or employment history, or **items that contain or make reference to the individual's name,** identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph. [L 1988, c 262, pt of §1] (Emphases added)

The intent and purpose of Chapter 92F, HRS, was to identify and protect government employees from the disclosure of personal records in which they had a “significant privacy interest.” The difference between the decision in *SHOPO* and the present case is that, unsolicited, the Appellee released the vaccination status of 260 employees. [Dkt. 21, in 1CCV-21-0001304]. The mass email disclosed the vaccination status of every recipient. It made them vulnerable to ridicule, shunning, harassment and humiliation. An individual actually spoke up and objected to the release of his vaccination status as a violation of his significant privacy interest. Dkt. 22 in 1CCV-21-0001304. Appellee proffered a poor excuse for the unlawful release and refused to recognize any violation of the 260 employees’ significant privacy interest. Dkt. 23 in 1CCV-21-0001304. The Appellee also preempted any possible criminal charge by validating the unlawful release. Dkt. 23, in 1CCV-21-0001304, pdf Page#2-3.

The Circuit Court’s dismissive pronouncement that the Plaintiffs’ had no private cause of action following the unlawful disclosure of “personal records,” (Dkt. 37, in 1CCV-21-0001304, at pdf Page#4) leads to the absurd result that Section 92F-14(b)(1), HRS and the promise of the former Governor and Attorney General (Dkt. 20, in 1CCV-21-0001304, at pdf Page#7) were, in reality, hollow and meaningless. The absurdity of the Circuit Court’s Order, is more fully revealed, if in this case, the email went out to every HIV/AIDS positive employees and revealed their identity to each other. According to the Circuit Court’s Order, no one would suffer any consequence. In the present case, as in this example, the only people who suffer any consequences for the unlawful release of confidential, personal records, are the individual employees, who now have no recourse, according to the Circuit Court. Also, according to the Circuit Court’s interpretation, the statutory promises reflected in Chapter 92F, HRS, the promise

of the former Governor and Attorney General were merely promises which were never meant to be kept. *Schmidt v. HSC, Inc.*, 131 Hawai'i 497, 508, 319 P.3d 416, 427, 2014 WL 144533 (2014), "Finally, '[t]he legislature is presumed not to intend an absurd result, and legislation will be construed to avoid, if possible, inconsistency, contradiction, and illogicality.'" *Kim v. Contractors License Bd.*, 88 Hawai'i 264, 270, 965 P.2d 806, 812 (1998). Therefore, "[d]eparture from the literal construction of a statute is justified" if "such a construction yields an absurd and unjust result obviously inconsistent with the purposes and policies of the statute." *Leslie v. Bd. of Appeals of Cnty. of Hawai'i*, 109 Hawai'i 384, 393, 126 P.3d 1071, 1080 (2006) (internal quotation marks omitted)."

The Court should overturn the Circuit Court's decision because it leads precisely to this absurd result.

D. The Circuit Court gravely erred in dismissing the Negligence based claims.

The Circuit Court dismissed all Negligence based claims. Dkt. 37, in 1CCV-21-0001304, at pdf Page #4. The legal duty alleged in Count II, Negligent Supervision, was based on Sec. 92F-14(b), HRS, the restriction regarding the release of the confidential personal medical and health records to 260 employees. Dkt. 1, in 1CCV-21-0001304, pdf Pages#10-12. In Count III, Negligence, alleged malfeasance, based on *In re Bevins*, 28 Haw. 733, 741-43, 1925 WL 3155, at page 4 (1925) and the unlawful violation of the 260 employees' "significant privacy interest." Dkt. 1, in 1CCV-21-0001304, at pdf Pages #12-13. The Appellants alleged that the Appellee failed to properly supervise its employee and committed "malfeasance" by wrongfully releasing "personal records" concerning COVID-19 vaccination status to 260 employees. Dkt. 1, in 1CCV-21-0001304, at 12-13.

In determining whether a legal duty exists, the Hawaii State Supreme Court noted:

A prerequisite to any negligence action is the existence of a duty owed by the defendant to the plaintiff. *Lee v. Corregedore*, 83 Hawai'i 154, 158, 925 P.2d 324, 328 (1996). The existence of a duty is entirely a question of law. See *Hao v. Campbell Estate*, 76 Hawai'i 77, 80, 869 P.2d 216, 219 (1994) (citation omitted). **Whether a duty exists is a "question of fairness that involves a weighing of the nature of the risk, the magnitude of the burden of guarding against the risk, and the public interest in the proposed solution."** *Id.* (citation omitted). This court has chosen to impose tort duties reluctantly:

In considering whether to impose a duty of reasonable care on a defendant, we recognize that duty is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection. **Legal duties are not discoverable facts of nature, but merely conclusory expressions that, in cases of a particular type, liability should be imposed for damage done.** In determining whether or not a duty is owed, **we must weigh the considerations of policy which favor the appellants' recovery against those which favor limiting the appellees' liability. The question of whether one owes a duty to another must be decided on a case-by-case basis.** However, **we are reluctant to impose a new duty upon members of our society without any logical, sound, and compelling reasons taking into consideration the social and human relationships in our society.** (Emphases added)

McKenzie v. Hawai'i Permanente Med. Group, Inc., 98 Hawai'i 296, 301, 47 P.3d 1209, 1214 (2002) (citations omitted).

Molfino v. Yuen, 134 Hawai'i 181, 184–85, 339 P.3d 679, 682–83, 2014 WL 5905007 (2014).

There are “logical, sound, and compelling reasons taking into consideration the social and human relationships in our society” to impose a legal duty on the Appellee to adequately supervise its employees and for its administrative employees to perform their job competently. The Circuit Court gravely erred because it believed, as a matter of law, neither mattered.

(1) Count II, Negligent Supervision.

Generally, a Negligent Supervision claim is simply a negligence claim. In *Doe Parents No. 1 v. State, Dept. of Educ.*, 100 Hawai'i 34, 58 P.3d 545, 2002 WL 31667426 (2002), as amended (Dec. 5, 2002), the Court reaffirmed that:

We have repeatedly held that the STLA “should be **liberally construed** to effectuate its purpose to **compensate the victims of negligent conduct of state officials and employees in the same manner and to the same extent as a private person in like circumstances.**” *Breed v. Shaner*, 57 Haw. 656, 665, 562 P.2d 436, 442 (1977) (citing *Rogers v. State*, 51 Haw. 293, 296–98, 459 P.2d 378, 381–82 (1969) (refusing to “emasculate” the STLA by broadly construing the “discretionary function” exception to include “operational level acts” of state employees)); cf. *Hawaii Community Federal Credit Union v. Keka*, 94 Hawai'i 213, 229, 11 P.3d 1, 17 (2000) (“ ‘Remedial statutes are liberally construed to

suppress the perceived evil and advance the enacted remedy.’ ” (Quoting *Cieri v. Leticia Query Realty, Inc.*, 80 Hawai’i 54, 68, 905 P.2d 29, 43 (1995) (brackets omitted)). (Emphasis added)

Doe Parents No. 1 v. State, Dept. of Educ., 100 Hawai’i 34, 66–67, 58 P.3d 545, 577–78, 171 Ed. Law Rep. 964, 2002 WL 31667426 (2002), as amended (Dec. 5, 2002).

The Court noted that the elements of Negligent Supervision include proof of: “a negligent act of the employee, in other words, a breach of a duty that is the legal cause of plaintiff’s injury; and 2) that the negligent act was within the employee’s scope of employment” (citations omitted)). *Doe Parents No. 1 v. State, Dept. of Educ.*, 100 Hawai’i 34, 67, 58 P.3d 545, 578, 171 Ed. Law Rep. 964, 2002 WL 31667426 (2002), as amended (Dec. 5, 2002). If the alleged acts arose under the STLA’s intentional tort preclusion of “assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights[,]” then those negligence actions would be barred. *Id.* In the present case, Chapter 92F, HRS does not immunize the Appellee from the negligent act of failing to supervise its employee.

(2) Negligence and Malfeasance.

Negligence and Malfeasance, is a cause of action that attempts to hold the Appellee’s employee responsible for a wrongful and unlawful act. *In re Bevins*, 28 Haw. 733, 741, 1925 WL 3155, at *4. The Court noted that the act may be the result of “ignorance or inattention or recklessness as well as of conscious and intentional wrongdoing.” *Id.*

The Appellee admitted that its administrative employee while performing her duties did not pay attention to what she was doing. Dkt. 23, in 1CCV-21-0001304, at pdf Pages#2-3, “Instead of placing the email addresses in the ‘bcc’ field of the message, she *mistakenly* placed them in the ‘cc’ field. Address [sic] placed in the ‘bcc’ field would have been invisible to the recipients on the email, but not in the ‘cc’ field.” In 2021, the suggestion that an individual didn’t know how to use email, is far fetched and question of fact. Because after making the “mistake” she emailed the same 260 individuals, twice, without any difficulty. Dkt. 23, in 1CCV-21-0001304, at pdf Page#3.

(3) Circuit Court gravely erred.

In this case, the Circuit Court erred by summarily dismissing Counts II and III. The Circuit court erred because the Negligence claims are based on the actions of administrators. In Count II, the administrator's action of failing to supervise its Human Resources employee, was negligent. In Count III, the Human Resources employee who didn't pay attention to what she was doing, or was not competent to perform the duties of her job was negligent. The Circuit Court misinterpreted Chapter 92F, HRS as barring any Negligence actions. However, Counts II and III, allege negligence in the performance of her duties. This case is not similar to *Molfino v. Yuen*, 134 Hawai'i 181, 339 P.3d 679, 2014 WL 5905007 (2014) which involved the creation of duty to keep accurate records, where no statutory duty to keep accurate records existed. The Negligence Counts go to how high positioned employees failed to follow the statutory protections against the release of statutorily protected medical and health information.

Chapter 92F, HRS does not create another exception to the State Tort Liability Act. Chapter 92F, HRS and the decision in *SHOPO* do not combine to create an immunity from negligent acts. The Circuit Court was gravely wrong in summarily dismissing the Plaintiffs' negligence claims.

E. The Plaintiffs had Organizational Standing.

Generally, “ ‘[c]omplexities about standing are barriers to justice; in removing the barriers the emphasis should be on the needs of justice. (Citations omitted)’ Our touchstone[,] *Life of the Land* concluded, therefore ‘remains ‘the needs of justice.’ ” (Citations omitted.) *Asato v. Procurement Policy Bd.*, 132 Hawai'i 333, 342, 322 P.3d 228, 237, 2014 WL 594080 (2014).

The Circuit Court gravely erred in finding that the Appellants, as public sector bargaining unit representatives, did not have standing to bring the Chapter 92F, HRS claim and Negligence based claims against the Appellee. Dkt. 37, in 1CCV-21-0001304 37, at pdf Page #2. The decision in *Hawaii Med. Ass'n v. Hawaii Med. Serv. Ass'n, Inc.*, 113 Hawai'i 77, 148 P.3d 1179, 2006 WL 2578956 (2006), is instructive:

An association may sue on behalf of its members—even though it has not itself been injured—when:

- (a) its members would otherwise have standing to sue in their own

right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. (Citations omitted)

Hawaii Med. Ass'n v. Hawaii Med. Serv. Ass'n, Inc., 113 Hawai'i 77, 95, 148 P.3d 1179, 1197, 2006 WL 2578956 (2006).

(1) Members' individual lawsuits.

State employees have an individual right to privacy under Section 92F-14(b), Hawaii Revised Statutes ("HRS") as well as a right to enforce that right. A "person" who can assert their statutory rights under Chapter 92F, HRS, includes an "individual" and "association." The interest sought to be protected is set out in relevant part, in Sec. 92F-14, HRS:

§92F-14 Significant privacy interest; examples. (a) **Disclosure of a government record shall not constitute a clearly unwarranted invasion of personal privacy** if the public interest in disclosure outweighs the privacy interest of the individual.

(b) **The following are examples of information in which the individual has a significant privacy interest:**

(1) **Information relating to medical, psychiatric, or psychological history, diagnosis, condition, treatment, or evaluation, other than directory information while an individual is present at such facility;**

* * *

(4) **Information in an agency's personnel file, or applications, nominations, recommendations, or proposals for public employment or appointment to a governmental position, except:**

* * *

Emphases added.

The plain and ordinary meaning of Sec. 92F-14(b), HRS, is that individuals have a "significant privacy interest" in the type of documents listed. *Panado v. Bd. of Trustees, Employees' Ret. Sys.*, 134 Hawai'i 1, 10-11, 332 P.3d 144, 153-54 (2014); see also, Sec. 1-16, HRS, *Laws in pari materia*, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called upon in aid to explain what is doubtful in another."; *State v. Young*, 107 Hawai'i 36, 40, 109 P.3d 677, 681 (2005); *In re AS*, 130 Hawai'i

486, 501–02, 312 P.3d 1193, 1208–09, 2013 WL 1284349 (Ct. App. 2013), aff'd, 132 Hawai'i 368, 322 P.3d 263, 2014 WL 594113 (2014).

Chapter 92F, HRS, imposed an affirmative duty on the Appellee, as with other State agencies, NOT to disclose those records in which employees have a “significant privacy interest.” Section 92F-19, HRS, specifically prohibits:

§92F-19 Limitations on disclosure of government records to other agencies. (a) **No agency may disclose** or authorize disclosure of government records to any other agency **unless the disclosure is:**

* * *

(10) **To the** department of human resources development, county personnel agencies, or **line agency personnel offices for the performance of their respective duties and functions, including** employee recruitment and examination, classification and compensation reviews, the administration and auditing of personnel transactions, **the administration of training and safety,** workers' compensation, and employee benefits and assistance programs, and for labor relations purposes; or

* * *

(b) **An agency receiving government records pursuant to subsection (a) shall be subject to the same restrictions on disclosure of the records as the originating agency.**

Emphases added.

Section 92F-19(a)(10), HRS, specifically restricts employees' medical information from being released within the same department to employees that aren't associated with any human resources responsibilities.

Section 92F-14(b), HRS, lists the documents in which individual employees have a significant privacy interest, including medical records and information in their personnel file. Section 92F-19, HRS, is an example how State agencies, like the Appellee, have an established duty NOT to release information to other governmental agencies. Sec. 92F-19(b), HRS. Finally, the Legislature clearly recognized that Chapter 92F, HRS, gave individual employees the right to pursue the unlawful disclosure of their “personal records.” See, Dkt. 24, in 1CCV-21-0001304.

In this case an individual employee did object to the Appellee’s wrongful disclosure. Dkt. 22, in 1CCV-21-0001304. Individual employees have a statutory right to hold the Appellee accountable for unlawfully releasing their vaccination or non-vaccinated status to other employees.

(2) The privacy interests of its members are germane to the organization's purpose.

Public employees have the right of self-organization and able to choose their union to bargain collectively over wages, hours and “other terms and conditions of employment.” Sec. 89-3,HRS. As “exclusive representatives” for State employees, Appellants negotiate wages, hours, and other “terms and conditions” of work. Sec. 89-9(a), HRS.

In the present case, the Appellant made the COVID-19 vaccination status of its employees, a term and condition of employment. On August 12, 2021, the Defendant sent a memo to all employees titled, “**VACCINATION AND MANDATORY TESTING FOR PSD EMPLOYEES** (Emphasis in original).” See, Dkt. 25, in 1CCV-21-0001304, at pdf Page#2. In the memo, the Appellee clearly made COVID-19 vaccination a condition of continued employment:

This directive is being issued to implement Governor Ige’s Emergency Proclamation, dated August 5, 2021, relating to vaccination and testing for State employees.

Effective August 16, 2021, all PSD employees and volunteers must attest whether they are (1) fully vaccinated for COVID-19; (2) partially vaccinated for COVID-19 (including receipt of one dose of a two-dose course of vaccination); or (3) not vaccinated for COVID-19.

* * *

Unless exempted from the COVID-19 testing (*see below exemptions*), **any unvaccinated employee who refuses to undergo a mandatory COVID-19 testing will be deemed to be insubordinate and shall be subject to immediate termination.** (Emphases added)

* * *

See, Dkt. 25, in 1CCV-21-0001304, at pdf Page#2.

In her mass email of August 19, 2021, at 1:39 a.m., SHELLEY D. HARRINGTON, an

employee with Defendant PSD and its Human Resources Officer, confirmed to 260 PSD employees who were unvaccinated and vaccinated, that their employment status was being threatened:

If you fail to comply with the weekly attestation and testing requirement, **then the action listed in the Director’s directive dated August 12, 2021, will be forthcoming.** (Emphases added)

Dkt. 21, in 1CCV-21-0001304, at pdf Page#4.

Exposing their medical, COVID-19 vaccination status to 260 other employees and threatening every employee’s employment status in the mass email, directly affected the “terms and conditions” of work. The Appellant organizations have the statutory authority to protect the employment status from unfounded threats of termination. See, generally, Sec. 89-9(d), HRS, “Further, this subsection shall not preclude negotiations over the procedures and criteria on promotions, transfers, assignments, demotions, layoffs, suspensions, terminations, discharges, or other disciplinary actions as subjects of bargaining during collective bargaining negotiations or negotiations over a memorandum of agreement, memorandum of understanding, or other supplemental agreement; provided that such obligation shall not compel either party to agree to a proposal or make a concession.” Additionally, in the Governor’s August 5, 2021 Emergency Proclamation, with respect to state employees, he invoked Sec. 89-9(d)(8), HRS, making the attestation a term and condition of employment. See, Dkt. 20, in 1CCV-21-0001304, at pdf Page#6. The Appellant organizations have a fundamental, statutory interest in protecting members’ employment status, including their vaccination status.

(3) Neither the claims asserted nor the relief requested requires the participation of individual members.

The present action was brought as a Declaratory Judgment action requesting the Court to find as a matter of law that the Appellant’s actions were unlawful and prevent it from happening again. See, Complaint, filed on October 25, 2021, Section V, at pages 15-16, Dkt. 1, in 1CCV-21-0001304, at pdf Pages#13-15. The relief requested goes specifically toward protecting the “significant privacy interests of its members.” Id. The Prayer for Relief, seeks, in part, damages for the Appellants’ as organizations:

V. PRAYER FOR RELIEF

71. Wherefore, Plaintiffs pray that this Court:

* * *

g. Award Plaintiffs their compensatory, economic and consequential damages;

* * *

Pursuant to Rule 8, Hawaii Rules of Civil Procedure (“HRCP”) although inartfully stated, the Appellant organizations sought damages for themselves as representative organizations.

The Circuit Court gravely erred in finding that the Appellants, as public sector bargaining unit representatives did not have standing to bring the Chapter 92F, HRS claim and Negligence based claims against the Appellee. Dkt. 37, in 1CCV-21-0001304 37, at pdfPage #2.

VI.

RELEVANT STATUTES

Pursuant to Rule 28(B)(8), Hawaii Rules of Appellate Procedure, the relevant constitutional provisions, statutes and regulations are set forth in Appendix “C,” attached hereto.

VII.

CONCLUSION

The First Circuit Court gravely erred because its decision ignored the legislative intent of Chapter 92F, HRS. It overruled the unambiguous language in Sec. 92F-14(b)(1) and Sec. 92F-14(b)(4), HRS. It overruled the Governor and Attorney General’s promise to keep employees’ COVID-19 vaccination status confidential. It overextended the application of the Hawaii State Supreme Court’s decision in *Organization of Police Officers v. City and County of Honolulu*, 149 Hawai’i 492, 494 P.3d 1225 (2021). By judicial fiat, the Circuit Court negated the clear and unambiguous language in Sec. 92F-14(b), HRS, the Governor and Attorney General’s commitment of confidentiality of vaccination records, and immunized government employers when they release, unsolicited, records in which employees have a “significant privacy interest.” *Peer News LLC v. City & Cnty. of Honolulu*, 143 Hawai’i 472, 489, 431 P.3d 1245, 1262, 2018 WL 6715464 (2018).

This case is not about parties seeking disclosure or trying to prevent disclosure of

“personal records.” *SHOPO, supra*. This case is not about balancing the public interest in disclosure against the privacy interest of the employee. *Honolulu Civil Beat v. Department of the Attorney General*, 151 Hawai’i 74, 508 P.3d 1160 (2022). This case is not about creating a new cause of action based on extending the language in Chapter 92F, HRS. *Molfino v. Yuen*, 134 Hawai’i 181, 339 P.3d 679, 2014 WL 5905007 (2014)

This case is about an unambiguous statutory commitment and commitment by the Governor and Attorney General to keep vaccination records confidential and not broadcast to 260 employees. This case is about the negligent stewardship of confidential, medical vaccination records, the knowing release of such information and the Appellee, covering up for their glaring mistake.

The First Circuit Court was wrong, as a matter of law, by shielding the State from any responsibility for violating the privacy rights of 260 State employees. Will this breach of the “significant privacy interest” of 260 employees continue to go unanswered? Is the statutory promise of privacy set out in Chapter 92F, HRS and the express promises made by the Governor and Attorney General purposefully meaningless?

VIII.

STATEMENT OF RELATED CASES

The undersigned certifies that Appellants’ counsel is unaware of any related case known to be pending in the Hawaii courts or agencies.

DATED: Hilo, Hawai’i, January 26, 2023.

Respectfully submitted,

/s/ Ted H. S. Hong

TED H. S. HONG

Attorney at Law

Attorney for Plaintiffs-Appellants
HAWAII GOVERNMENT EMPLOYEES
ASSOCIATION, AFSCME, LOCAL 152,
AFL-CIO; and, UNITED PUBLIC
WORKERS, AFSCME, LOCAL 646, AFL-
CIO

APPENDIX “A”

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

HAWAII GOVERNMENT EMPLOYEES)	CIVIL NO. 1CCV-21-0001304 LWC
ASSOCIATION, AFSCME, LOCAL 152,)	(Declaratory Judgment)
AFL-CIO; and UNITED PUBLIC WORKERS,)	
AFSCME, LOCAL 646, AFL-CIO,)	ORDER GRANTING DEFENDANT
)	DEPARTMENT OF PUBLIC SAFETY,
Plaintiffs,)	STATE OF HAWAII'S AMENDED MOTION
)	TO DISMISS, FILED ON NOVEMBER 29,
vs.)	2021
)	
DEPARTMENT OF PUBLIC SAFETY,)	
STATE OF HAWAII; JOHN DOES 1-10;)	
JANE DOES 1-10; DOE PARTNERSHIPS)	
1-10; DOE CORPORATIONS 1-10; DOE)	
GOVERNMENTAL ENTITIES and DOE)	
ENTITIES 1-10,)	
)	
Defendants.)	
)	

ORDER GRANTING DEFENDANT DEPARTMENT OF PUBLIC SAFETY,
STATE OF HAWAII'S AMENDED MOTION TO DISMISS, FILED ON NOVEMBER 29, 2021

The Court held a hearing on Defendant Department of Public Safety, State of Hawaii's Amended Motion to Dismiss, filed November 21, 2021 [Dkt. 17] ("Motion") on January 11, 2022, and thereafter took the Motion under advisement. Upon review of the Motion and the memoranda submitted in opposition to and in support of the Motion [Dkts. 19 and 30], consideration of the arguments of counsel at the hearing, taking

judicial notice of the records and files herein, and good cause appearing therefor, the Court grants the Motion as detailed below.

The Motion raises issues about this Court's subject matter jurisdiction—and more specifically, whether Plaintiffs have organizational standing—as well as whether the operative Complaint fails to state any claims.

An organization may sue on behalf of its members if “(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Hawaii Medical Ass’n v. Hawaii Medical Service Ass’n, Inc.*, 113 Hawai‘i 77, 95, 148 P.3d 1179, 1197 (2006) (citations omitted). Addressing these requirements, Plaintiffs allege in part that their “members would otherwise have standing to sue in their own right under Sec. 92F-14, HRS.” Complaint at ¶ 11.

In order to enforce chapter 92F, Uniform Information Practices Act (Modified) (“UIPA”), “a cause of action must emanate from UIPA itself, the substantive law” sought to be enforced. *Organization of Police Officers v. City and County of Honolulu*, 149 Hawai‘i 492, 506, P.3d 1225 (2021) (“*SHOPO*”). Plaintiffs argue that their individual members have a “right to privacy under Section 92F-14(b) . . . as well as a right to enforce that right” pursuant to HRS 92F-19. Opp. at 6-8. While section 14(b) sets forth examples of information in which an individual has a significant privacy interest, the Supreme Court has determined that nothing in that section or HRS section 92F-13

prohibits the disclosure of such information. *SHOPO*, 149 Hawai'i at 508-509. As the Supreme Court explained:

UIPA requires disclosure of public records unless an exception applies; one of those exceptions lies where disclosure would constitute "a clearly unwarranted invasion of personal privacy." HRS § 92F-13. In turn, HRS § 92F-14(a) provides that "[d]isclosure of a government record shall not constitute a clearly unwarranted invasion of personal privacy if the public interest in disclosure outweighs the privacy interest of the individual." HRS § 92F-14(b) supplies a list of examples of information in which an individual has a "significant privacy interest." One of those examples is "[i]nformation in an agency's personnel file." HRS § 92F-14(b)(4).

Id. at 504. However, the Court continued:

The statutory language here is not prohibitive: that is, HRS § 92F-13 does "not require disclosure" if an exemption applies, but it does not forbid it, either. The statute does not, for instance, say that such records "shall not be disclosed," language used in other statutes.

Id. at 507 (italics added); *see also id.* at 508 citing with approval to opinions issued by OIP, i.e., OIP Op. Ltr. No. 05-03, at 1 (Jan. 19, 2005) ("While the UIPA confers on an agency the discretion to withhold certain types of records (or certain types of information contained in records), *it does not require an agency to deny access to those records.*"); OIP Op. Ltr. No. 05-18, at 3 (Dec. 9, 2005) ("*[G]enerally, the UIPA is a discretionary statute and does not require an agency to withhold a record.*"); OIP Op. Ltr. No. 06-04, at 4 (June 14, 2006) ("If disclosure 'would constitute a clearly unwarranted invasion of personal privacy' of that third party, it is our opinion that the agency may, and generally should, exercise its discretion to withhold that personal information under section 92F-13(1)." (emphases added)); OIP Op. Ltr. No. 07-11, at 1 n.3 (Sept. 25, 2007) ("OIP notes that the UIPA is not a 'confidentiality statute' that requires an agency to withhold records. Rather, the UIPA allows an agency to withhold those records (or information contained in those records) if an exception to disclosure provided by statute applies. An

agency, therefore, has the discretion to publicly disclose records that could otherwise be withheld under the UIPA.”) (italics added; underscore in original).

Further, section 93F-19 is inapplicable as it relates to disclosure of information from one agency to another agency.

Plaintiffs argue that *SHOPO* is inapplicable to this case because *SHOPO* involved an effort to prevent disclosure of records and the present dispute seeks to “hold the Defendant responsible for the actual, unlawful, disclosure of . . . private, medical, COVID-19 vaccination status.” Opp. at 12-13. This is a distinction without a difference: “There is no right of nondisclosure under UIPA, only agency discretion to utilize the enumerated exceptions. Because there is no ‘right’ at issue in order for the court to issue relief . . . the circuit court correctly dismissed all of SHOPO’s UIPA claims in the August 13, 2018 Order.” *SHOPO*, 149 Hawai‘i at 509 (italics added).¹

For these reasons, the Court grants the Motion. Having decided this Motion on the issue of organizational standing (and finding that Plaintiffs’ members do not have a private right of action under HRS ch. 92F), the Court need not address Defendant’s HRCP 12(b)(6) arguments. The parties did not address and the Court need not resolve at this time whether there is another cognizable basis for Plaintiffs to assert organizational standing or for individual members to assert claims against Defendant.

¹ Plaintiffs’ reliance on legislative history from 1988 in support of their assertion that “the Legislature clearly recognized that Chapter 92F, HRS, gave individual employees the right to pursue the unlawful disclosure of their ‘personal records’”[] (Opp. at 8) is unavailing in light of the Supreme Court’s analysis in *SHOPO*.

The Court grants Plaintiffs leave to amend their Complaint with any filing to be made within 30 days of the date of this Order.

DATED: Honolulu, Hawai'i, March 31, 2022.

/s/ Lisa W. Cataldo



JUDGE OF THE ABOVE-ENTITLED COURT

Hawai'i Government Employees Association, AFSCME, Local 152, AFL-CIO, et al. v. Department of Public Safety, State of Hawai'i, et al.; Civil No. 1CCV-21-0001304 (LWC); Order Granting Defendant Department of Public Safety, State of Hawaii's Amended Motion to Dismiss, Filed on November 29, 2021

APPENDIX "A"

APPENDIX “B”

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STATE OF HAWAI'I

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

HAWAI'I GOVERNMENT EMPLOYEES
ASSOCIATION, AFSCME, LOCAL 152,
AFL-CIO; and, UNITED PUBLIC
WORKERS, AFSCME, LOCAL 646,
AFL-CIO,

Plaintiffs,

vs.

DEPARTMENT OF PUBLIC SAFETY,
STATE OF HAWAI'I; JOHN DOES 1-10;
JANE DOES 1-10; DOE
PARTNERSHIPS 1-10; DOE
CORPORATIONS 1-10; DOE
GOVERNMENTAL AGENCIES AND
DOE ENTITIES 1-10,

Defendants.

CIVIL NO. 1CCV-21-0001304 LWC

FINAL JUDGMENT

FINAL JUDGMENT

On October 25, 2021, Plaintiffs HAWAI'I GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO and UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO ("Plaintiffs") filed herein a Complaint against Defendant DEPARTMENT OF PUBLIC SAFETY, STATE OF HAWAI'I ("Defendant").

On November 23, 2021, Defendant filed Defendant's Motion to Dismiss and on November 29, 2021, Defendant filed Defendant's Amended Motion to Dismiss.

On January 11, 2022, a hearing was held on Defendant's Amended Motion to Dismiss.

On March 31, 2022, the Court issued its Order Granting Defendant Department of Public Safety, State of Hawai'i's Amended Motion to Dismiss, Filed on November 29, 2021 ("Order"). In the Order, the Court granted Plaintiffs leave to amend their Complaint with any filing to be made within 30 days of the date of the Order. However, Plaintiffs did not file an amended complaint within 30 days of the date of the Order.

Therefore, pursuant to the Order Granting Defendant Department of Public Safety, State of Hawai'i's Amended Motion to Dismiss, Filed on November 29, 2021, which was filed on March 31, 2022, Rule 58 of the Hawai'i Rules of Civil Procedure, and consistent with the Hawai'i Supreme Court's ruling in Jenkins v. Cades Schutte Fleming & Wright, 76 Hawai'i 115, 869 P.2d 1334 (1994),

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered herein in favor of Defendant DEPARTMENT OF PUBLIC SAFETY, STATE OF HAWAI'I and against Plaintiffs HAWAI'I GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO and UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO.

This final judgment is entered as to all claims raised by the parties and resolves all claims by and against the parties herein. No other parties or claims remain.

DATED: Honolulu, Hawai'i, August 2, 2022.

/s/ Lisa W. Cataldo



Judge of the Above-Entitled Court

APPROVED AS TO FORM:

/s/ Ted H. S. Hong
TED H. S. HONG
Attorney for Plaintiffs

Hawai'i Government Employees Association, AFSCME, Local 152, AFL-CIO, et al. v. Department of Public Safety, State of Hawai'i, et al.; Civil No. 1CCV-21-0001304 (LWC); **Final Judgment**

APPENDIX “C”

VI.

RELEVANT STATUTES

Sec. 1-16 Laws in pari materia. Laws in pari materia, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called in aid to explain what is doubtful in another. [CC 1859, §11; RL 1925, §11; RL 1935, §12; RL 1945, §11; RL 1955, §1-21; HRS §1-16]

Sec. 89-3 Rights of employees. Employees shall have the right of self-organization and the right to form, join, or assist any employee organization for the purpose of bargaining collectively through representatives of their own choosing on questions of wages, hours, and other terms and conditions of employment, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion. An employee shall have the right to refrain from any or all of such activities, except for having a payroll deduction equivalent to regular dues remitted to an exclusive representative as provided in section 89-4. [L 1970, c 171, pt of §2; am L 1981, c 180, §3; am L 2000, c 253, §94; am L 2005, c 245, §§4, 8; am L 2007, c 294, §2; am L Sp 2008, c 5, §1; am L 2010, c 106, §2]

§89-9 Scope of negotiations; consultation. (a) The employer and the exclusive representative shall meet at reasonable times, including meetings sufficiently in advance of the February 1 impasse date under section 89-11, and shall negotiate in good faith with respect to wages, hours, the amounts of contributions by the State and respective counties to the Hawaii employer-union health benefits trust fund to the extent allowed in subsection (e), and other terms and conditions of employment which are subject to collective bargaining and which are to be embodied in a written agreement as specified in section 89-10, but such obligation does not compel either party to agree to a proposal or make a concession.

(b) The employer or the exclusive representative desiring to initiate negotiations shall notify the other party in writing, setting forth the time and place of the meeting desired and the nature of the business to be discussed, sufficiently in advance of the meeting.

(c) Except as otherwise provided in this chapter, all matters affecting employee relations, including those that are, or may be, the subject of a rule adopted by the employer or any director, shall be subject to consultation with the exclusive representatives of the employees concerned. The employer shall make every reasonable effort to consult with exclusive representatives and consider their input, along with the input of other affected parties, prior to effecting changes in any major policy affecting employee relations.

(d) Excluded from the subjects of negotiations are matters of classification, reclassification, benefits of but not contributions to the Hawaii employer-union health benefits trust fund, recruitment, examination, initial pricing, and retirement benefits except as provided in section 88-8(h). The employer and the exclusive representative shall not agree to any proposal that would be inconsistent with the merit principle or the principle of equal pay for equal work pursuant to section 76-1 or that would interfere with the rights and obligations of a public employer to:

- (1) Direct employees;

- (2) Determine qualifications, standards for work, and the nature and contents of examinations;
- (3) Hire, promote, transfer, assign, and retain employees in positions;
- (4) Suspend, demote, discharge, or take other disciplinary action against employees for proper cause;
- (5) Relieve an employee from duties because of lack of work or other legitimate reason;
- (6) Maintain efficiency and productivity, including maximizing the use of advanced technology, in government operations;
- (7) Determine methods, means, and personnel by which the employer's operations are to be conducted; and
- (8) Take actions as may be necessary to carry out the missions of the employer in cases of emergencies.

This subsection shall not be used to invalidate provisions of collective bargaining agreements in effect on and after June 30, 2007, and except as otherwise provided in this chapter, shall not preclude negotiations over the implementation of management decisions that affect terms and conditions of employment that are subject to collective bargaining. Further, this subsection shall not preclude negotiations over the procedures and criteria on promotions, transfers, assignments, demotions, layoffs, suspensions, terminations, discharges, or other disciplinary actions as subjects of bargaining during collective bargaining negotiations or negotiations over a memorandum of agreement, memorandum of understanding, or other supplemental agreement; provided that such obligation shall not compel either party to agree to a proposal or make a concession.

Violations of the procedures and criteria so negotiated may be subject to the grievance procedure in the collective bargaining agreement.

(e) Negotiations relating to contributions to the Hawaii employer-union health benefits trust fund shall be for the purpose of agreeing upon the amounts which the State and counties shall contribute under section 87A-32, toward the payment of the costs for a health benefits plan, as defined in section 87A-1, and group life insurance benefits, and the parties shall not be bound by the amounts contributed under prior agreements; provided that section 89-11 for the resolution of disputes by way of arbitration shall not be available to resolve impasses or disputes relating to the amounts the State and counties shall contribute to the Hawaii employer-union health benefits trust fund.

(f) The repricing of classes within an appropriate bargaining unit may be negotiated as follows:

(1) At the request of the exclusive representative and at times allowed under the collective bargaining agreement, the employer shall negotiate the repricing of classes within the bargaining unit. The negotiated repricing actions that constitute cost items shall be subject to the requirements in section 89-10; and

(2) If repricing has not been negotiated under paragraph (1), the employer of each jurisdiction shall ensure establishment of procedures to periodically review, at least once in five years, unless otherwise agreed to by the parties, the repricing of classes within the bargaining unit. The repricing of classes based on the results of the periodic review shall be at the discretion of the employer. Any appropriations required to implement the repricing actions that are made at the

employer's discretion shall not be construed as cost items. [L 1970, c 171, pt of §2; am L 1975, c 31, §1 and c 164, §1; am L 1980, c 253, §6; am L 1984, c 254, §1; gen ch 1985; am L 1986, c 156, §1; am L 1987, c 27, §4; am L 1988, c 399, §4; am L 1993, c 364, §§16, 17; am L 1998, c 115, §13; am L 1999, c 100, §2; am L 2000, c 253, §98; am L 2002, c 232, §2; am L 2004, c 10, §4; am L 2005, c 245, §§6, 8; am L 2007, c 58, §§1, 3 and c 294, §2; am L Sp 2008, c 5, §1; am L 2010, c 106, §2; am L 2013, c 98, §2; am L 2018, c 10, §1]

[Sec. 92F-2] Purposes; rules of construction. 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.

The policy of conducting government business as openly as possible must be tempered by a recognition of the right of the people to privacy, as embodied in section 6 and section 7 of article I of the constitution of the state of Hawaii.

This chapter shall be applied and construed to promote its underlying purposes and policies, which 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. [L 1988, c 262, pt of §1]

[Sec. 92F-3] General definitions. Unless the context otherwise requires, in this chapter: "Agency" means any unit of government in this State, any county, or any combination of counties; department; institution; board; commission; district; council; bureau; office; governing authority; other instrumentality of state or county government; or corporation or other establishment owned, operated, or managed by or on behalf of this State or any county, but does not include the nonadministrative functions of the courts of this State.

"Government record" means information maintained by an agency in written, auditory, visual, electronic, or other physical form.

"Individual" means a natural person.

"Person" means an individual, corporation, government, or governmental subdivision or agency, business trust, estate, trust, partnership, association, or any other legal entity.

"Personal record" means any item, collection, or grouping of information about an individual that is maintained by an agency. It includes, but is not limited to, the individual's education, financial, medical, or employment history, or items that contain or make reference to the

individual's name, identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph. [L 1988, c 262, pt of §1]

Sec. 92F-14 Significant privacy interest; examples. (a) Disclosure of a government record shall not constitute a clearly unwarranted invasion of personal privacy if the public interest in disclosure outweighs the privacy interest of the individual.

(b) The following are examples of information in which the individual has a significant privacy interest:

(1) Information relating to medical, psychiatric, or psychological history, diagnosis, condition, treatment, or evaluation, other than directory information while an individual is present at such facility;

(2) Information identifiable as part of an investigation into a possible violation of criminal law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

(3) Information relating to eligibility for social services or welfare benefits or to the determination of benefit levels;

(4) Information in an agency's personnel file, or applications, nominations, recommendations, or proposals for public employment or appointment to a governmental position, except:

(A) Information disclosed under section 92F 12(a)(14); and

(B) The following information related to employment misconduct that results in an employee's suspension or discharge:

(i) The name of the employee;

(ii) The nature of the employment related misconduct;

(iii) The agency's summary of the allegations of misconduct;

(iv) Findings of fact and conclusions of law; and

(v) The disciplinary action taken by the agency;

when the following has occurred: the highest nonjudicial grievance adjustment procedure timely invoked by the employee or the employee's representative has concluded; a written decision sustaining the suspension or discharge has been issued after this procedure; and thirty calendar days have elapsed following the issuance of the decision or, for decisions involving county police department officers, ninety days have elapsed following the issuance of the decision;

(5) Information relating to an individual's nongovernmental employment history except as necessary to demonstrate compliance with requirements for a particular government position;

(6) Information describing an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

(7) Information compiled as part of an inquiry into an individual's fitness to be granted or to retain a license, except:

(A) The record of any proceeding resulting in the discipline of a licensee and the grounds for discipline;

(B) Information on the current place of employment and required insurance coverages of licensees; and

- (C) The record of complaints including all dispositions;
- (8) Information comprising a personal recommendation or evaluation;
- (9) Social security numbers; and
- (10) Information that if disclosed would create a substantial and demonstrable risk of physical harm to an individual. [L 1988, c 262, pt of §1; am L 1993, c 191, §1; am L 1995, c 242, §1; am L 2004, c 92, §4; am L 2014, c 121, §2; am L 2015, c 140, §1; am L 2020, c 47, §3]

Sec. 92F-19 Limitations on disclosure of government records to other agencies. (a) No agency may disclose or authorize disclosure of government records to any other agency unless the disclosure is:

- (1) Necessary for the performance of the requesting agency's duties and functions and is also:
 - (A) Compatible with the purpose for which the information was collected or obtained; or
 - (B) Consistent with the conditions or reasonable expectations of use and disclosure under which the information was provided;
- (2) To the state archives for the purposes of historical preservation, administrative maintenance, or destruction;
- (3) To another agency, another state, or the federal government, or foreign law enforcement agency or authority, if the disclosure is:
 - (A) For the purpose of a civil or criminal law enforcement activity authorized by law; and
 - (B) Pursuant to:
 - (i) A written agreement or written request, or
 - (ii) A verbal request, made under exigent circumstances, by an officer or employee of the requesting agency whose identity has been verified, provided that such request is promptly confirmed in writing;
- (4) To a criminal law enforcement agency of this State, another state, or the federal government, or a foreign criminal law enforcement agency or authority, if the information is limited to an individual's name and other identifying particulars, including present and past places of employment;
- (5) To a foreign government pursuant to an executive agreement, compact, treaty, or statute;
- (6) To the legislature, or a county council, or any committee or subcommittee thereof;
- (7) Pursuant to an order of a court of competent jurisdiction;
- (8) To authorized officials of another agency, another state, or the federal government for the purpose of auditing or monitoring an agency program that receives federal, state, or county funding;
- (9) To the offices of the legislative auditor, the legislative reference bureau, or the ombudsman of this State for the performance of their respective functions;
- (10) To the department of human resources development, county personnel agencies, or line agency personnel offices for the performance of their respective duties and functions, including employee recruitment and examination, classification and compensation reviews, the administration and auditing of personnel transactions, the administration of training and safety, workers' compensation, and employee benefits and assistance programs, and for labor relations purposes; or
- (11) Otherwise subject to disclosure under this chapter.

(b) An agency receiving government records pursuant to subsection (a) shall be subject to the same restrictions on disclosure of the records as the originating agency. [L 1988, c 262, pt of §1; am L 1993, c 250, §2; am L 1994, c 56, §21]

Sec. 632-1 Jurisdiction; controversies subject to. [(a)] In cases of actual controversy, courts of record, within the scope of their respective jurisdictions, shall have power to make binding adjudications of right, whether or not consequential relief is, or at the time could be, claimed, and no action or proceeding shall be open to objection on the ground that a judgment or order merely declaratory of right is prayed for; provided that declaratory relief may not be obtained in any district court, or in any controversy with respect to taxes, or in any case where a divorce or annulment of marriage is sought. Controversies involving the interpretation of deeds, wills, other instruments of writing, statutes, municipal ordinances, and other governmental regulations may be so determined, and this enumeration does not exclude other instances of actual antagonistic assertion and denial of right.

[(b)] Relief by declaratory judgment may be granted in civil cases where an actual controversy exists between contending parties, or where the court is satisfied that antagonistic claims are present between the parties involved which indicate imminent and inevitable litigation, or where in any such case the court is satisfied that a party asserts a legal relation, status, right, or privilege in which the party has a concrete interest and that there is a challenge or denial of the asserted relation, status, right, or privilege by an adversary party who also has or asserts a concrete interest therein, and the court is satisfied also that a declaratory judgment will serve to terminate the uncertainty or controversy giving rise to the proceeding. Where, however, a statute provides a special form of remedy for a specific type of case, that statutory remedy shall be followed; but the mere fact that an actual or threatened controversy is susceptible of relief through a general common law remedy, a remedy equitable in nature, or an extraordinary legal remedy, whether such remedy is recognized or regulated by statute or not, shall not debar a party from the privilege of obtaining a declaratory judgment in any case where the other essentials to such relief are present. [L 1921, c 162, §1; RL 1925, §2918; RL 1935, §4220; RL 1945, §9971; am L 1945, c 74, §1; RL 1955, §228-1; HRS §632-1; am L 1972, c 89, §1(a) to (c); gen ch 1985]

NO. CAAP-22-0000506

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

STATE OF HAWAII

HAWAII GOVERNMENT EMPLOYEES)	CIVIL NO. 1CCV-21-0001304
ASSOCIATION, AFSCME, LOCAL 152,)	(DECLARATORY JUDGMENT)
AFL-CIO; and, UNITED PUBLIC)	
WORKERS, AFSCME, LOCAL 646,)	APPEAL FROM:
AFL-CIO,)	(1) ORDER GRANTING
Plaintiffs-Appellants,)	DEFENDANT DEPARTMENT OF
vs.)	PUBLIC SAFETY, STATE OF HAWAII'S
)	AMENDED MOTION TO DISMISS,
)	FILED ON NOVEMBER 29, 2021
)	[Dkt. 17], FILED ON MARCH 31, 2022
DEPARTMENT OF PUBLIC SAFETY,)	[Dkt. 37]; and (2) FINAL JUDGMENT
STATE OF HAWAII; JOHN DOES 1-10;)	FILED ON AUGUST 2, 2022 [Dkt. 48]
JANE DOES 1-10; DOE PARTNERSHIPS)	
1-10; DOE CORPORATIONS 1-10; DOE)	
GOVERNMENTAL AGENCIES AND)	
DOE ENTITIES 1-10;)	
Defendant-Appellee.)	
)	
)	JUDGE: HON. LISA W. CATALDO
)	
)	
)	

CERTIFICATE OF SERVICE

I hereby certify that on this date, written below, a true and correct copy of Plaintiffs-Appellants Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO; and, United Public Workers, AFSCME, Local 646, AFL-CIO's Opening Brief and Appendices "A," - "C," were duly served upon the party listed below by electronic means through the Judiciary

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DATED: Hilo, Hawaii, January 26, 2023.

/s/ Ted H. S. Hong

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AFL-CIO; and, UNITED PUBLIC WORKERS,
AFSCME, LOCAL 646, AFL-CIO