NO. CAAP-22-0000506

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAI'I

STATE OF HAWAI'I

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|---|---|
| HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO; and, UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO,<br><br>Plaintiffs-Appellants,<br><br>vs.<br><br>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 AGENCIES AND DOE ENTITIES 1-10;<br><br>Defendant-Appellee. | CIVIL NO. 1CCV-21-0001304<br>(DECLARATORY JUDGMENT)<br><br>APPEAL FROM:<br>(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]<br><br>JUDGE: HON. LISA W. CATALDO |

**PLAINTIFFS-APPELLANTS' REPLY BRIEF**

**and**

**CERTIFICATE OF SERVICE**

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# PLAINTIFFS-APPELLANTS' OPENING BRIEF

## I.

## INTRODUCTION

The issue in this case is whether an organization can seek a legal remedy on behalf of its members, after the release of private information in violation of Chapter 92F, HRS. The First Circuit Court interpreted Chapter 92F, HRS, in a manner that leads to an absurd or unjust result. The First Circuit Court gravely erred in extending 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*"), beyond the intent and language of the statute and the clear, unambiguous language in the opinion.

## II.

## ARGUMENT

A. The Circuit Court's Interpretation leads to an absurd or unjust result.

Statutory interpretation should not lead to an absurd or unjust result:

> Moreover, it is well-settled that "**[s]tatutory construction dictates that an interpreting court should not fashion a construction of statutory text that ... creates an absurd or unjust result**." *Dines v. Pacific Ins. Co., Ltd.*, 78 Hawai'i 325, 337, 893 P.2d 176, 188 (1995) (citation omitted). The facts of this case do not indicate that construing the term "issuance" to mean the date of mailing, as evidenced by the postmark, leads to an absurd or unjust result. (Emphasis added)
>
> *Nihi Lewa, Inc. v. Dep't Of Budget And Fiscal Services*, 103 Hawai'i 163, 168, 80 P.3d 984, 989, 2003 WL 22931318 (2003).

The Circuit Court interpreted Chapter 92F, HRS, to preclude any organization or private cause of action **after** the release of information in which individuals had a statutorily protected "significant" private interest. However, the Legislature's intent and purpose in adopting Chapter 92F, HRS, was to hold entities accountable for the wrongful release of protected information. Section 92F-2, HRS, states in relevant part:

> **[§92F-2] Purposes; rules of construction.**
>
> * * *
>
> 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:

* * *

(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] (Emphases added)

The State ignores that part of the holding in *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), which noted when Courts interpret the UIPA, "Legislative intent is given the greatest weight." The State also ignores the legislative intent that Chapter 92F, HRS allowed employees to pursue unlawful disclosures of records in which they have a "significant privacy interest:"

* * *

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 Legislature allowed individuals to bring criminal and civil actions for violations of Chapter 92F, HRS. Section 92F-17, HRS, allows affected individuals wronged by the release of confidential information to bring a criminal action. Section 92F-27, HRS, specifically allows affected persons to bring a civil action and lists available remedies:

**§92F-27 Civil actions and remedies**.

* * *

(d) In **any action brought under this section** in which the court determines that the agency knowingly or intentionally violated a provision of this part, the

agency **shall be liable to the complainant in an amount equal to the sum of**:

> (1) **Actual damages sustained by the complainant as a result of the failure of the agency to properly maintain the personal record**, but in no case shall an individual complainant entitled to recovery receive less than the sum of $1,000; and
>
> (2) The **costs of the action together with reasonable attorney's fees** as determined by the court.

(e) The **court may assess reasonable attorney's fees and other litigation costs reasonably incurred against the agency in any case in which the complainant has substantially prevailed**, and against the complainant where the charges brought against the agency were frivolous.

(f) An action may be brought in the circuit court where the complainant resides, **the complainant's principal place of business is situated**, or the complainant's relevant personal record is situated. No action shall be brought later than two years after notification of the agency denial, or where applicable, the date of receipt of the final determination of the office of information practices. [L 1988, c 262, pt of §1; am L 1989, c 192, §8; am L 2012, c 176, §5] (Emphases added)

The Circuit Court erred because it went beyond the language of the statute and created a new exception that precluded government employees from holding the employer accountable for the unlawful release of their private information. 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]; TOP [Dkt. 36]: 11:3-18; 12-15:17-5.

The absurd and unjust result of the Circuit Court's Order is that its interpretation of Chapter 92F, HRS does not allow private causes of action. The intent of the Legislature reads contrary to the Circuit Court's Order. The purpose of Chapter 92F, HRS is contrary to the Circuit Court's Order. The plain, ordinary and unambiguous language of the Chapter 92F, HRS, reads to the contrary. There is nothing that allows the Circuit Court to judicially legislate a new limitation on civil actions under Chapter 92F, HRS.

B. The *SHOPO* opinion is narrow and specific.

The Circuit Court committed grave error because it expanded or 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), to preclude **all** private causes of action under Chapter 92F, HRS. 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 opinion and application of the *SHOPO* is narrow and specific. 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)"

> The Court unequivocally ruled:
>
> 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 did not rule on the issue of whether a governmental agency can be held accountable for the release of confidential information. The Appellee argues that the *SHOPO,* case comprehensively forecloses any private cause of action. Answering Brief ("AB") [Dkt.44] at 9. The Circuit Court blithely dismissed the Appellants' argument as a "distinction without a difference."

The Circuit Court and Appellee's analysis of the *SHOPO* case lacks any support in the law. The *SHOPO* decision was limited to whether an employee, through its representative organization, could preemptively, stop the anticipated release of documents in which employees may have had a "significant privacy interest." *SHOPO*, 149 Hawai'i 492, 506-507, 494 P.3d 1225, 1239-1240 (2021); 149 Hawai'i at 509, 494 P.3d, at 1242. There is no broad, expansive language that allowed the Circuit Court to legislate an interpretation of Chapter 92F, HRS, that aggrieved government employees had no cause of action after confidential information had been

released.

The Circuit Court erred because its sweeping prohibition runs contrary to the intent of the Legislature. *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 Court's prohibition directly contradicts the purpose of the statute as indicated in Sec. 92F-2(5), HRS. The Circuit Court's decision also ignores the doctrine of *in pari materia*, by overlooking the statutory language in Sec. 92F-27, HRS. See, 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." Instead of using similar statutes within Chapter 92F, HRS, as a guideline to interpret Sec. 92F-14, HRS, the Circuit Court, took an unprecedented and unsupported step by extending the application of the *SHOPO* decision to bar any action for the wrongful release of confidential information.

The Circuit Court's decision leads to an absurd and unjust result because it renders the statutory assurances of a government employee's privacy interest meaningless. Under the Circuit Court's interpretation, an employee's statutory privacy interest is only "window dressing." The Circuit Court's interpretation of Chapter 92F, HRS, only assures government employees that they have a significant privacy interest in personal, confidential information about themselves and their families. But the employee cannot hold the agency accountable for the release of that information. See, "Cape Fear" (1991), Director Martin Scorsese, a convicted felon uses private information to seek vengeance against his former public defender. If a Judge's or the Court's Judicial Assistant's ("JA") personal, private confidential information was intentionally, negligently or incompetently released, including where his or her children went to school, emergency contact information or the make, model, license plate number of the car and the Judiciary assigned parking stall, which that the Judge or JA uses, that information could be abused with unfortunate results. According to the First Circuit Court, the only remedy under Chapter 92F, HRS, available to the Judge or JA, would be to take comfort and solace in the "good intentions" that the information released was supposed to be private and confidential under Chapter 92F, HRS.

The First Circuit Court's interpretation legislates a comprehensive prohibition were there

is none. It stretches the holding in *SHOPO* beyond the language in the opinion to justify its comprehensive prohibition. It ignores Legislative intent, the purpose of Chapter 92F, HRS and the related statutes, which leads to absurd and unjust result.

C. Organizational Standing.

Recently, the Hawaii State Supreme Court noted that:

> **Standing is about the role of courts in a democratic society** – a service to our tripartite system that **favors the courtroom as a space to resolve controversy**. *Life of the Land v. Land Use Comm'n*, 63 Haw. 166, 172, 623 P.2d 431, 438 (1981). Standing has a prudential spirit. *Tax Found.*, 144 Hawai'i at 196, 439 P.3d at 148. (Emphasis added)
>
> *Office of Hawaiian Affairs v. Kondo*, No. SCAP-21-0000701, 2023 WL 2780668, at *4 (Haw. Apr. 5, 2023).

The Court further noted:

> Hawai'i has a declaratory action framework that advances access to the justice system. HRS **Chapter 632's purpose is to "afford relief from the uncertainty and insecurity attendant upon controversies over legal rights ... with a view to making the courts more serviceable to the people**." HRS § 632-6 (2016). **Our declaratory action laws are "liberally interpreted and administered**." Id.
>
> In declaratory actions, HRS § 632-1(a) (2016) covers subject matter jurisdiction, and HRS § 632-1(b) covers standing. See *Tax Found. of Hawai'i v. State*, 144 Hawai'i 175, 186–88, 439 P.3d 127, 138–40 (2019). (Emphases added)
>
> *Office of Hawaiian Affairs v. Kondo*, No. SCAP-21-0000701, 2023 WL 2780668, at *3 (Haw. Apr. 5, 2023).

The First Circuit Court gravely erred by holding that Chapter 92F, HRS, bars government employees from any private right of action, which means that as employee organizations, the Appellants have no standing. AB, at 10-11; *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).

The statutory framework of Chapter 92F, HRS, *in pari materia,* demonstrates that the Legislature intended individual employees to be able to enforce their right to privacy, in both contexts of criminal and civil responsibility. Section 92F-27, HRS, specifically grants an "individual" or "complainant" the authority to file a civil action. Section 92F-17, HRS, details the circumstances under which an individual can pursue criminal action against the officer or

employee of an agency who wrongfully releases personal, confidential information. See also, Sec. 662-2, HRS, "The State hereby waives its immunity for liability for the torts of its employees and shall be liable in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages." State employees have an individual right to privacy under Section 92F-14(b), HRS, and can enforce that right.

The Circuit Court and Appellee rely on an unsupported interpretation of Chapter 92F, HRS, that the agency from which the information is released, has the exclusive authority to decide whether to not to pursue any further action, civil or criminal, against itself, to protect an employee's privacy right. Under this interpretation the unjust result would be that the government agency could usurp an employee's privacy rights and unilaterally decide when, where and under what circumstances it would assert an employee's privacy rights, against itself. The absurd and unjust result of the Circuit Court's decision is evident. Chapter 92F, HRS, expressly recognizes individual employees are able to support and advocate for their privacy rights.

The First Circuit Court gravely erred by holding that the Appellants lacked "organizational standing" because individual government employees have no private cause of action to enforce their privacy rights under Chapter 92F, HRS.

D. Negligence Based Claims and Legal Duty.

The Circuit Court and Appellee's interpretation of whether a legal duty exists that prohibits the unlawful release of confidential information was wrong as a matter of law. In *Castro v. Melchor*, 142 Hawai'i 1, 414 P.3d 53, 2018 WL 1282418 (2018), the Supreme Court noted a legal duty exists when:

> 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**.

> *Castro v. Melchor*, 142 Hawai'i 1, 15–16, 414 P.3d 53, 67–68, 2018 WL 1282418 (2018), citing *Ah Mook Sang v. Clark*, 130 Hawai'i 282, 291, 308 P.3d 911, 920 (2013).

Both Chapter 92F, HRS and the Executive Proclamation expressly recognize a legal duty to maintain and not release employees' confidential personal information. Here, the Appellants alleged that the Appellee failed to keep the personal health information of its employees, confidential. Section 92F-2(5), HRS, specifically requires Appellee to restrict access to confidential personal information. Section 92F-17, HRS, makes it a criminal offense to release such information. Additionally, Sec. 92F-27(d), HRS, establishes a specific duty to "maintain" personal records. The definition of "maintain" includes:

> **1.** To keep in existence or continuance; preserve; retain; . . . **2.** To keep in due condition, operation, or force; keep unimpaired: . . .
>
> *The Random House Dictionary of the English Language* (unabridged), 1971, at 865.

In the present case, the Appellee's legal duty to "maintain" confidential personal information includes preserving and keeping such information.

The Emergency Proclamation Related to the COVID-19 Response, August 5, 2021 [Dkt. 20] unambiguously instructed all State departments, ". . . 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.

Appellants did not allege that the Emergency Proclamation was a separate, independent cause of action or legal duty. The Emergency Proclamation was a reaffirmation of the existing legal duty to keep vaccination records confidential. Appellee is estopped from arguing that the Emergency Proclamation had no legal effect.

The doctrine of Quasi-estoppel prohibits the Appellee from repudiating its clearly stated position that all departments and agencies were required to keep employee vaccination status confidential. In the decision, *In re Grievance Arbitration Between State Org. of Police Officers*,

135 Hawai'i 456, 353 P.3d 998, 2015 WL 3946787 (2015), the Court described the breadth of "quasi-estoppel:"

> Under the doctrine of *quasi-estoppel*, a party is estopped from taking "a position inconsistent with a previous position if the result is to harm another." *UHPA II*, 66 Haw. at 221, 659 P.2d at 725; see also, e.g., *Godoy v. Haw. Cnty*., 44 Haw. 312, 320, 354 P.2d 78, 82 (1960) ("But there is a species of equitable estoppel, sometimes called quasi-estoppel, which has its basis in election, waiver, acquiescence, or even acceptance of benefits and which **precludes a party from asserting to another's disadvantage, a right inconsistent with a position previously taken by him. No concealment or misrepresentation of existing facts on the one side, no ignorance on the other, are necessary ingredients**." (quoting *Hartmann v. Bertelmann*, 39 Haw. 619, 627–28 (Haw.Terr.1952)). (Emphases added)
>
> *In re Grievance Arbitration Between State Org. of Police Officers*, 135 Hawai'i 456, 467, 353 P.3d 998, 1009, 2015 WL 3946787 (2015); see also, *Harrison v. Casa De Emdeko, Inc.,* 142 Hawai'i 218, 232, 418 P.3d 559, 573, 2018 WL 1958866 (2018), "Furthermore, '[u]nlike equitable estoppel, an estoppel by acquiescence does not require a showing of detrimental reliance or prejudice.'"

The doctrine of "quasi-estoppel" precludes the Appellee from now claiming that the Emergency Proclamation had no legal effect. The disingenuousness of the Appellee is amplified because the Attorney General of the State of Hawaii signed and approved the Proclamation. [Dkt. 20], in 1CCV-21-0001304, at pdf Page#7).

Both Chapter 92F, HRS and the Emergency Proclamation document a clear, unambiguous and recognized "public policy" against the release of confidential personal information.

Appellee's argument, that the *In re Bevins* 28 Haw. 733, 1925 WL 3155 (1925), decision is limited to impeachment proceedings also lacks merit. AB, at 11, ft.nt.4. The Court defined "malfeasance" as including "ignorance or inattention or recklessness as well as of conscious and intentional wrongdoing." *In re Bevins,* 28 Haw. 733, 741, 1925 WL 3155. The general definition of "malfeasance" includes:

> **1.** The **performance** by a public official **of an act that is legally unjustified, harmful or contrary to law**; . . . (Emphasis added)
>
> *The Random House Dictionary of the English Language* (unabridged), 1971, at 868.

In the present case, the existence of a legal duty, i.e., public policy not to release the vaccination status to co-workers is plainly set out in Chapter 92F, HRS and reaffirmed in the Emergency Proclamation. The Circuit Court gravely erred, by ruling as a matter of law, that there had to be a specific, expressly worded statute, that created an unequivocal duty and cause of action, or the present lawsuit had to be dismissed. Sec. 662-2, HRS. The Appellee's officer published the vaccination status of 260 employees, unvaccinated and vaccinated, among each other. 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.

The First Circuit Court gravely erred and was wrong as a matter of law, that the Appellee's employee who wrongfully released the personal and confidential information, should escape any responsibility.

## III.

## CONCLUSION

Appellee's counsel avoids addressing the question whether the First Circuit Court's Decision and Order about the statutory promise of privacy set out in Chapter 92F, HRS and the express promise made by the Governor and Attorney General in the Emergency Proclamation was meaningless. Without the opportunity to hold anyone accountable, then the assurances of privacy under Chapter 92F, HRS, are merely illusory. The question facing the Intermediate Court of Appeals, is whether it will continue the illusion.

Appellants respectfully request 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, filed on or about March 31, 2022, be vacated and reversed.

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DATED: Hilo, Hawai'i, April 24, 2023.

Respectfully submitted,

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**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 Reply Brief, was duly served upon the party listed below by electronic means through the Judiciary Electronic Filing and Service

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