No. CAAP-22-0000506

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

HAWAI`I GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO, and UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO,
Plaintiffs-Appellants,

and

DEPARTMENT OF PUBLIC SAFETY, STATE OF HAWAI`I; JOHN DOES 1-10; JANE DOES 1-10; DOE PARTNERSHIPS 1-10; DOE CORPORATIONS 1-10; and DOE GOVERNMENTAL AGENCIES AND DOE ENTITIES 1-10,
Defendants-Appellees.

ORIGINAL PROCEEDING
CIVIL NO. 1CCV-21-0001304
(Declaratory Judgment)

CIRCUIT COURT OF THE FIRST CIRCUIT, STATE OF HAWAI`I

The Honorable Lisa W. Cataldo, Circuit Court of the First Circuit, State of Hawai`i

AMICUS CURIAE BRIEF

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This case concerns an alleged invasion of privacy when Defendants-Appellees Department of Public Safety et al. (Department) disclosed information purportedly about members of Plaintiffs-Appellants Hawai`i Government Employees Association and United Public Workers (Unions) in an internal e-mail. The Unions claim that the Uniform Information Practices Act (Modified), Hawai`i Revised Statutes (HRS) chapter 92F (UIPA) provides a private right of action for unlawful government agency disclosures. Dkt. 38 at 14.[1] The Department claims that the Unions' complaint is entirely foreclosed by the Hawai`i Supreme Court's decision regarding UIPA in *State of Hawai`i Organization of Police Officers v. City & County of Honolulu* [*SHOPO v. City & County of Honolulu*], 149 Hawai`i 492, 494 P.3d 1225 (2021). Dkt. 44 at 10-11. Neither party is correct.

I. UIPA IS NOT A CONFIDENTIALITY LAW.

UIPA is a tool for the public to obtain access to government records; it is not a law that makes government records confidential. *SHOPO v. City & County of Honolulu*, 149 Hawai`i at 509, 494 P.3d at 1242 ("There is no right of nondisclosure under UIPA, only agency discretion to utilize the enumerated exceptions."); OIP Op. No. 07-11 at 2 n.3 ("the UIPA is not a "confidentiality statute" that requires an agency to withhold records"); OIP Op. No. 05-18 at 3 n.3 (an agency policy of releasing records protected by the UIPA privacy exception "is not prohibited by the UIPA"); OIP Op. No. 05-04 at 5 ("we consider the UIPA exceptions to disclosure to be permissive, not mandatory."); OIP Op. No. 04-12 at 2 n.3; OIP Op. No. 03-03 at 5 n.5.[2] "[N]ondisclosure is only mandatory under UIPA *where another law* — for instance, a state or federal statute, the constitution, or a court order — independently requires an agency to withhold the sought records." *SHOPO v. City & County of Honolulu*, 149 Hawai`i at 509, 494 P.3d at 1242 (emphasis added).

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[1] Pinpoint citations refer to the page of the corresponding PDF.

[2] "Opinions and rulings of the office of information practices shall be admissible and shall be considered as precedent unless found to be palpably erroneous . . . ." HRS § 92F-15(b).

The Unions argue that a government agency's disclosure of information identified in HRS § 92F-14 ("Significant privacy interest; examples") is an actionable violation of UIPA. Dkt. 38 at 14-18; Dkt. 54 at 6-11. In that regard, the Unions' claim is indistinguishable from the claim in *SHOPO v. City & County of Honolulu*. In that case, SHOPO sought a declaration that the Honolulu Police Department would violate UIPA by disclosing certain disciplinary information. 149 Hawai`i at 499, 494 P.3d at 1232. As it concerned the asserted UIPA violations, the Hawai`i Supreme Court recognized that "UIPA grants county police officers a privacy interest in their personnel files," but that "UIPA simply provides no right of nondisclosure."[3] *Id.* at 506-07, 494 P.3d 1239-40.

Thus, there is no cause of action *under UIPA* to sue a government agency for purported wrongful disclosure of information. If it were otherwise, government agencies (the only entities subject to UIPA) would be liable for disclosing the same information that a private person could disclose with impunity. *See SHOPO v. City & County of Honolulu*, 149 Hawai`i at 510, 494 P.3d at 1243 (noting the "absurdity" of different constitutional privacy standards for the public and private sector).

The Unions do not have a cause of action to stop disclosure of information *by invoking UIPA*.

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[3] The Unions also incorrectly conclude that disclosure of information subject to a "significant privacy interest" violates UIPA. Dkt. 54 at 6 ("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 Hawai`i Supreme Court has held that mere recognition of a significant privacy interest in HRS § 92F-14 does not justify an agency withholding information from the public. *Peer News LLC v. City & County of Honolulu*, 138 Hawai`i 53, 68, 376 P.3d 1, 16 (2016) ("once a 'significant privacy interest' is recognized, it must be balanced against the public interest in disclosure to determine whether disclosure of the information would constitute a 'clearly unwarranted invasion of privacy.'"). Agencies are *required* by UIPA to disclose information subject to a significant privacy interest recognized in HRS § 92F-14 when releasing the information would not be a *clearly unwarranted* invasion of privacy. HRS §§ 92F-11(a), -13(1), -14(a). Thus, a government agency cannot withhold records from the public by simply referencing a significant privacy interest.

II. *SHOPO v. CITY & COUNTY OF HONOLULU* DID NOT PRECLUDE ALL REFERENCE TO UIPA FOR INVASION OF PRIVACY CLAIMS.

Other laws may provide a private right of action when a government agency is alleged to have wrongfully disclosed records to the public.

> [T]here are three classes of documents under UIPA: (1) documents that must be disclosed, (2) documents that may be disclosed, and (3) documents that may not be disclosed. . . . *Parties seeking to enjoin the release of information protected by the constitution (or another confidentiality statute if that statute provides a cause of action) may sue to prevent disclosure for documents under category (3)* . . . .

SHOPO v. City & County of Honolulu, 149 Hawai`i at 508-09, 494 P.3d at 1241-42 (italics added). Thus, even if the Unions may not have a claim by invoking UIPA, that would not preclude the Unions' constitutional claim for invasion of privacy.[4] *See, e.g.*, *SHOPO v. Soc'y of Prof'l Journalists* [*SHOPO v. SPJ*], 83 Hawai`i 378, 927 P.2d 386 (1996) (adjudicating a union's constitutional claim to prevent disclosure of members' records in response to a UIPA request).

A claim for violation of the right of privacy in article I, section 6 of the Hawai`i Constitution parallels the common law tort for invasion of privacy. *Id.* at 398, 927 P.2d at 406; *Pac. Radiation Oncology, LLC v. Queen's Med. Ctr.*, 138 Hawai`i 14, 19, 375 P.3d 1252, 1257 (2016) ("[T]he [article I, section 6] right of privacy encompasses the common law right of privacy or tort privacy." (alterations in original)). The Hawai`i Supreme Court thus has considered the Restatement (Second) of Torts in defining the scope of protected information under the constitutional right of privacy. *Id.*

> [O]ne who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his [or her] privacy, if the matter publicized is of a kind that (a) would be regarded as highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.

Id.

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[4] The Unions' complaint described the cause of action not only as premised on UIPA, but also as an "unlawful invasion of the privacy interests" of Unions' members. Cir. Dkt. 1 at 10 ¶ 42. The Unions also invoked the constitutional right of privacy during the motion to dismiss hearing. Dkt. 36 at 26-27.

UIPA standards do not define the constitutional right of privacy. The constitutional right of privacy is a "floor" that provides "bedrock" privacy protections. *SHOPO v. City & County of Honolulu*, 149 Hawai`i at 510-11, 494 P.3d at 1243-44. That protective floor applies equally to disclosures by government entities and private persons. *Pac. Radiation Oncology*, 138 Hawai`i at 19, 375 P.3d at 1257. The Legislature also cannot redefine the scope of constitutional privacy. *SHOPO v. City & County of Honolulu*, 149 Hawai`i at 510, 494 P.3d at 1243 ("the plain language of the constitutional provision and the intent of the drafters do not support the contention that the legislature, while obligated to take steps to protect privacy, is empowered to reconstitute what the constitutional provision itself protects").

But statutory provisions are one factor that may be considered in determining whether an individual has a legitimate expectation of privacy in particular information. *Civil Beat Law Ctr. for the Pub. Interest Inc. v. City & County of Honolulu*, 144 Hawai`i 466, 481, 445 P.3d 47, 62 (2019) ("Reasonable expectations of privacy will also be affected by existing laws and regulations concerning the matters at issue."). Other considerations may include: the person claiming the privacy interest; the person's level of discretionary and fiscal authority in government; and whether the information is already in the public domain. *Id.* at 480-82, 445 P.3d at 61-63. The constitutional protections are specific to the particular circumstances of the disclosure. *Id.* at 480-81, 445 P.3d at 61-62 ("While general conceptions of privacy may provide a useful template for a person's reasonable expectations, these expectations will necessarily differ on a case-by-case basis, depending on the person and the topic of discussion.").

As a consequence, the Unions' complaint may state a claim for invasion of privacy under the Hawai`i Constitution, even if it does not state a claim under UIPA.[5]

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[5] In *SHOPO v. City & County of Honolulu*, the Hawai`i Supreme Court recognized that SHOPO's claim under the constitutional right of privacy to block disclosure of the redacted disciplinary arbitration decision and investigation report of a police officer was barred by precedent. 149 Hawai`i at 511, 494 P.3d at 1244 ("*SHOPO v. SPJ*'s constitutional holding — that 'information regarding a police officer's misconduct in the course of his or her duties as a police officer is not within the protection of Hawai'i's constitutional right to privacy' - remains good law."). Public First is not aware of any

The Hawai`i Supreme Court's interpretation of UIPA in *SHOPO v. City & County of Honolulu* protects legitimate privacy rights of individuals and is not "absurd." *See, e.g.*, Dkt. 38 at 17-18.

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Respectfully submitted,

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comparable precedent that addresses the disclosure of medical information in an internal departmental communication as alleged here. *Cf. Nakano v. Matayoshi*, 68 Haw. 140, 149, 706 P.2d 814, 819 (1985) (required non-public disclosure of personal financial information for government employees constitutional because compelling state interest in regulating ethics) ("any expectation of financial privacy a public official in the above category may have possessed has been qualified by Article XIV needs no belaboring.").