

THE CIVIL BEAT
LAW CENTER FOR THE PUBLIC INTEREST

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VIA ELECTRONIC MAIL

November 14, 2022

Hawaii Correctional Systems Oversight Commission
hcsoc@hawaii.gov

**Re: Testimony Regarding Reporting of Deaths in Department of Public Safety
Facilities (November 17, 2022 Meeting, Agenda Item VIII)**

Dear Chair Patterson and members of the commission,

Basic information about individuals who die in the custody of the State Department of Public Safety should be public.

A circuit court judge recently confirmed that the Department cannot withhold the identity of individuals who die in the Department's custody. See attached order. The HIPAA Privacy Rule does not require withholding of that information.

It would be helpful for the community and for the Department if an established procedure existed for consistent posting of this information publicly. The attached proposal is marked as an amendment to Act 278 (2022) and would provide prompt disclosure of the simplest information regarding deaths within correctional facilities, while preserving the Department's concerns about interference with criminal investigations into those deaths.

During the 2022 legislative session, the Department informed legislators that it had no objection to the attached proposal. In this proposal, the Department would be required to post death reports on its website within 9 days after an incarcerated person dies. That posting would provide the deceased's name; gender; age; and the date, time, and location of death. There would be no exception to permit the Department to withhold this basic information when a person dies in its custody. For later reporting, however, when the official cause of death has been determined, the Department would be able to withhold additional details to the extent that it would materially interfere with an ongoing criminal investigation or was prohibited by law from disclosure.¹

¹ For example, regarding a state law that prohibits disclosure, the Department may claim that the clinical mortality review referenced in subsection (c)(1) cannot be disclosed because it is a "peer review" proceeding under HRS § 624-25.5(c).

The Law Center suggests a further revision to this proposal. During the legislative session, the Department requested a 7-day delay to notify next of kin. Without changing that outside limit, there is no reason to delay public notice when notification takes less than 7 days. Accordingly, the Law Center proposes a further revision of subsection (b):

“The report in subsection (a) shall be publicly posted on the department’s website promptly after notification of next of kin, but no later than seven days after submission to the governor, and include the following information”

I don’t know the Department’s position regarding this further revision.

The proposal serves the strong interest in public oversight of deaths in government custody, while preserving the Department’s investigatory interests.

Thank you for the opportunity to submit testimony.

Respectfully,

A handwritten signature in blue ink, appearing to read 'R. Brian Black', written in a cursive style.

R. Brian Black

Enclosures: 11/14/22 Order in *Honolulu Civil Beat v. Dep’t of Public Safety*
Proposed Legislation

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Attorney for Plaintiff
Honolulu Civil Beat Inc.

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

HONOLULU CIVIL BEAT INC.,

Plaintiff,

vs.

DEPARTMENT OF PUBLIC SAFETY,

Defendant.

CIVIL NO. 1CCV-21-1329
(Other Civil Action)

ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT

HEARING MOTION

JUDGE: Honorable John M. Tonaki
TRIAL DATE: NONE
HEARING DATE: October 25, 2022
HEARING TIME: 9:30 a.m.

**ORDER GRANTING IN PART AND DENYING IN PART
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

Plaintiff Honolulu Civil Beat Inc. (Civil Beat) filed its Motion for Summary Judgment on August 30, 2022, pursuant to Hawai'i Rules of Civil Procedure 56 and 57, and a reply memorandum in support of that motion on October 20, 2022. Defendant Department of Public Safety (Department) filed a memorandum in opposition to the motion on October 17, 2022. The parties were heard on Tuesday, October 25, 2022, at 9:30 a.m. in the Circuit Court of the First Circuit before the Honorable John M. Tonaki.

Plaintiff was represented by R. Brian Black. Defendant was represented by deputy attorney general Lisa M. Itomura. The Court has carefully reviewed the motion, the memoranda in support and opposition, and the exhibits and declarations, and has heard and considered oral arguments on the motion presented by counsel. Based on the record, Civil Beat's motion is hereby GRANTED IN PART AND DENIED IN PART.

The Court finds that there is no genuine issue of material fact in dispute.

In general, under the Uniform Information Practices Act (Modified), Hawai'i Revised Statutes (HRS) chapter 92F (UIPA), autopsy and toxicology reports prepared by coroners pursuant to HRS chapter 841 are public records that must be disclosed on request. The names of deceased individuals are a part of the process that results in the preparation of coroner reports and therefore are public as well. Similarly, autopsy and toxicology reports prepared by coroners in other jurisdictions pursuant to statutory authority are likewise public records. OIP Op. No. F15-01; OIP Op. No. 91-32. The U.S. Department of Health and Human Services' Privacy Rule under the federal Health Insurance Portability and Accountability Act of 1996 allows covered entities to disclose protected health information when "required by law", including when required by freedom of information laws such as the UIPA. 45 C.F.R. § 164.512(a); 65 Fed. Reg. at 82,482, 82,597.

IT IS ORDERED that, pursuant to the UIPA, the Motion is GRANTED in that the Department must disclose from the requested records concerning individuals who died in the Department's custody in 2020 and 2021: (1) the names of individuals who have died in the Department's custody; and (2) autopsy reports received from county

coroners. The Motion is DENIED in that the Department is not required to disclose information regarding an individual's medical treatment while in the Department's custody.

DATED: Honolulu, Hawai'i, November 14, 2022.

/s/ John M. Tonaki



JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

/s/ Lisa M. Itomura
CRAIG Y. IHA
LISA M. ITOMURA
*Deputy Attorneys General for Defendant
Department of Public Safety*

§353-G Correctional facility and community

correctional center deaths; reporting. (a) Within forty-eight hours, the director shall report to the governor, and the governor shall report to the legislature, the death of any:

(1) Correctional facility or community correctional center employee who:

(A) Dies on the grounds of or while on duty at a correctional facility or community correctional center where Hawaii inmates reside; or

(B) Sustains an injury on the grounds of or while on duty at a correctional facility or community correctional center where Hawaii inmates reside that causes the death of the employee; or

(2) Hawaii inmate who is incarcerated in a state or contracted correctional facility or community correctional center.

(b) The report in subsection (a) shall be publicly posted on the department's website within seven days of submission to the governor and include the following information:

(1) The name of the decedent;

~~(2)~~ The gender and age of the decedent;

~~[[2]3)~~ Whether the decedent was an inmate or an employee;

~~[[3]4)~~ The location ~~[of]~~ where the death or injury leading to the death occurred; and

~~[[4]5) The date and time of the death[;].~~

~~[(5) The cause of death; and~~

~~—(6) Any indication of sexual assault leading to the death;~~

~~provided that when the official cause of death has been determined, the director shall immediately report the official cause of death to the governor, and the governor shall immediately report the official cause of death to the legislature.]~~

(c) ~~[Within thirty days of a death described in subsection (a)]~~When the official cause of death has been determined, the director shall submit a report to the governor, and the governor shall submit the report to the legislature, that shall include the following information:

(1) [e] the clinical mortality review conducted in response to the death, including correctional actions to be taken[.];

(2) the cause of death; and

(3) any indication of sexual assault leading to the death.

(d) ~~[The director may disclose the decedent's name or other information not specified in subsection (b); provided that the director shall not disclose information protected from disclosure by state or federal law.]~~ The information in subparagraphs (c) (2) and (c) (3) shall be open to public inspection, unless:

(1) the information is protected from disclosure by state or federal law, provided that the report shall cite the state or federal law the director relied upon to withhold disclosure; or

(2) the information would materially impair an ongoing criminal investigation.