

May 18, 1990

MEMORANDUM

TO: Jane H. Howell, Deputy Corporation Counsel
Department of Corporation Counsel
City and County of Honolulu

FROM: Lorna J. Loo, Staff Attorney

SUBJECT: Videotaped Recording of Grace Imura-Kotani's Confession

This is in response to your request for an advisory opinion regarding public disclosure of the videotaped recording of Grace Imura-Kotani's confession ("videotaped confession") during and after the related police investigation.

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), the Honolulu Police Department ("HPD") is required to make the videotaped confession of Grace Imura-Kotani ("Imura-Kotani") available for public inspection and duplication, either while the police investigation is ongoing or when it is closed.

BRIEF ANSWER

The HPD is not required to make Imura-Kotani's videotaped confession available for public inspection and duplication under section 92F-13(3), Hawaii Revised Statutes, because disclosure would frustrate a legitimate government function. Specifically, the public disclosure of a confession when the investigation is open would frustrate the police investigation in that particular case. Furthermore, public disclosure before court proceedings might deprive the defendant of a right to a fair trial or impartial jury. After the investigation is closed, public disclosure of a witness statement made to the police, such as a confession, will frustrate the ability of the police to obtain

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valuable information in other cases because disclosure would likely inhibit other individuals from being candid and providing incriminating details in their statements to the police. Therefore, whether in a written, auditory, visual, electronic, or other physical form, Imura-Kotani's confession is not required to be made public because disclosure would frustrate the HPD's legitimate function of law enforcement.

The UIPA exception to public disclosure based on personal privacy involves a balancing of the public interest in this disclosure and the privacy interests of the individual. Federal case law indicates that a deceased individual would not have a privacy interest and, depending on the circumstances, the individual's surviving family members may or may not have a privacy interest in a personal record of the deceased individual. However, we need not address the privacy interests of the surviving family members since public disclosure is not required under the exception for frustration of a legitimate government function.

FACTS

On July 31, 1989, at the HPD's main station, Imura-Kotani admitted to HPD employees that she had killed her husband, State Representative Roland Kotani. Her confession was recorded by HPD employees on videotape. Early the next morning, after making her statement, Imura-Kotani shot and killed herself in a women's restroom at the HPD station.

The HPD's investigation into Roland Kotani's homicide ("investigation") is still open, and the videotaped confession constitutes part of the evidence in this investigation. Currently, the HPD is keeping this videotaped confession confidential, in accordance with its standard policy of maintaining the confidentiality of all confessions, unless made public as part of a court proceeding.

The HPD has received requests from representatives of several television news programs for public disclosure of the videotaped confession. You requested an advisory opinion regarding whether the videotaped confession is required to be made public under the UIPA either while the investigation is ongoing or when it is eventually closed.

DISCUSSION

The UIPA defines a "government record" to be "information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. § 92F-3 (Supp. 1989) (emphasis added). The videotaped confession of Imura-Kotani is a "government record" since it provides information in an electronic, visual, and auditory form and is maintained by the HPD, a government agency. Consequently, the UIPA's principles govern the disclosure of this videotape.

The UIPA sets forth the general rule that "[a]ll government records are open to public inspection unless access is restricted or closed by law." Haw. Rev. Stat. § 92F-11(a) (Supp. 1989). The UIPA, in section 92F-13, Hawaii Revised Statutes, also sets forth exceptions to its general rule of public access, two of which are relevant to the issue presented. In pertinent part, this section provides:

§92F-13 Government records; exceptions to general rule. This chapter shall not require disclosure of:

- (1) Government records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy;

. . . .
- (3) Government records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function;

Haw. Rev. Stat. § 92F-13(1), (3) (Supp. 1989). For purposes of clarity, the exceptions created by section 92F-13(1) and (3), Hawaii Revised Statutes, shall be separately addressed below.

I. Frustration of a Legitimate Government Function

Under the exception set forth in section 92F-13(3), Hawaii Revised Statutes, a government agency is not required to make a government record available for public inspection and duplication if disclosure "would frustrate a legitimate government function."

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Haw. Rev. Stat. § 92F-13(3) (Supp. 1989). Unlike the UIPA's privacy exception, the application of this exception does not depend upon a balancing of the public interest in disclosure against the government interest in confidentiality. Consequently, even where there may be public interest in the disclosure of a certain government record, that public interest is not a factor in determining whether disclosure would frustrate a legitimate government function. See OIP Op. Ltr. No. 90-11 (Feb. 26, 1990) (application of this exception to university program reviews).

On the other hand, this exception cannot be invoked whenever it just so happens that public disclosure of records or information would be "frustrating" to a government agency. Rather, the State Legislature had some very definite ideas regarding instances which would rise to the level of "frustration of a legitimate government function." Haw. Rev. Stat. § 92F-13(3) (Supp. 1989); see OIP Op. Ltr. No. 90-2 (Jan. 18, 1990) (application of exception to project proposals).

In particular, the UIPA's legislative history lists "examples of records which need not be disclosed, if disclosure would frustrate a legitimate government function." S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1095 (1988). Although this list is not exhaustive, it does expressly include "[r]ecords or information compiled for law enforcement purposes." Id.

In comparison, the federal Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), in pertinent part, does not mandate disclosure of:

[R]ecords or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, . . . (D) could reasonably be expected to disclose the identity of a confidential source
. . . .

5 U.S.C. § 552(b)(7) (1988). Although the UIPA does not contain identical language, case law applying this FOIA exemption is

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instructive in interpreting the "frustration of a legitimate government function" exception under the UIPA as applied to "records or information compiled for law enforcement purposes."

According to FOIA case law, public disclosure of evidence in an ongoing criminal investigation would interfere with the investigative proceeding in that case. E.g., *Murphy v. FBI*, 490 F. Supp. 1138 (D.D.C. 1980); see generally James T. O'Reilly, Vol. 2 Federal Information Disclosure § 17.07 (1989). In *Murphy*, the court held that the videotaped recordings of meetings between undercover agents and Congressmen who were under investigation were protected from disclosure during the ongoing criminal investigation since "release of the tapes would prematurely reveal the government's case, thereby injuring the government's efforts to pursue enforcement actions." For instance, disclosure could "alert other potential defendants as to the nature of the evidence held against them." 490 F. Supp. at 1143.

Like the videotaped recording of the meeting in *Murphy*, a videotaped confession constitutes evidence in a law enforcement investigation. The police may publicly report that an individual has confessed to a crime, and this limited disclosure about the existence of the confession generally would not impede the police investigation of that crime. However, the confession itself, whether in a written, auditory, visual, electronic or other physical form, if publicly disclosed during the investigation, would "definitively reveal exactly what evidence the government has compiled" and jeopardize the remaining course of the investigation. *Id.* For example, an individual confessing to a crime may have described other evidence, which if exposed, would alert the public about additional leads that the police may be pursuing. It is also possible that in confessing, an individual may have mentioned other participants involved in the crime and disclosure would then alert these individuals of any evidence against them. In these ways, public disclosure of a confession would frustrate the legitimate law enforcement function of the police in an ongoing criminal investigation. See Reporters Committee for Freedom of the Press, *Tapping Officials' Secrets: A State Open Government Compendium* (1989) (noting other states' laws under which confessions would be kept confidential while the related investigation is ongoing).

In addition, public disclosure of any confession before court proceedings commence could deprive the defendant of a right

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to a fair trial or an impartial jury. For instance, federal and state case law has held that a criminal defendant would be deprived of due process when the defendant is tried in a community that viewed a disclosed recording of the defendant's confession. Rideau v. Louisiana, 373 U.S. 723, 83 S. Ct. 1417, 10 L. Ed. 2d 663 (1963) (defendant's right to an impartial jury); see also In re Pacific and Southern Company, Inc., 361 S.E.2d 159 (Ga. 1987) (defendant's right to a fair trial). Further, until the criminal court proceedings have come to a final conclusion and all appeal rights are exhausted, an individual could retract or challenge the confession previously made to law enforcement officials.¹

After an investigation is closed, public disclosure of an incriminating statement to the police, such as a confession, would also frustrate police investigative functions because disclosure would discourage candor from other individuals voluntarily providing statements to the police. Generally, investigatory statements, whether provided by witnesses, informants, or confessors, if automatically disclosed to the public after the related police investigation, would inhibit the flow of incriminating information to a law enforcement agency. E.g., Kiraly v. FBI, 728 F.2d 273 (6th Cir. 1984). This effect would result even where the individual making the statement is deceased. Id.

In Kiraly, the court noted that disclosure about informants would result in their being "placed in the position of subjecting themselves or their family to potential retribution, and, hence, would discourage other informants from providing information in furtherance of an agency's law enforcement purposes. Id. at 278. Consequently, the court held that to ensure the willingness of other informants to provide incriminating information, records about an FBI informant were protected from disclosure after the related investigation and conviction, although this particular informant was deceased and his identity was known. Id. at 279; see also OIP Op. Ltr. No. 89-12 (December 12, 1989) (disclosure of the identities of complainants who reported alleged zoning

¹It is also important to note that where the defendant remains silent during prosecution or verbally provides a confession in court, the confession previously obtained by law enforcement officials may never become a part of the court record. Of course, if the confession is made part of the evidence in public court proceedings, the UIPA would not apply, and the record would be public.

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violations would frustrate an agency's law enforcement function because agencies would be less likely to receive incriminating information at the initiative of private citizens).

Statements provided by witnesses, informants, or confessors substantiate and corroborate other evidence gathered by the police in their investigation of a crime and, therefore, greatly assist the police in the performance of their legitimate law enforcement functions. Yet, the automatic public disclosure of a confession, or any other witness statement, after the investigation may discourage candor from other individuals providing self-incriminating or other information. The inability of law enforcement officials to obtain detailed evidence in witness statements, including confessions, would directly frustrate the investigative function of the police.

A statement provided by a witness, informant, or confessor may be subject to disclosure in court proceedings (either "in camera" or in a courtroom open to the public). Yet, the likelihood of this is still less prohibitive than automatic disclosure to the general public upon completion of the investigation. See Irons v. FBI, 880 F.2d 1446 (1st Cir. 1989). In Irons, the court held that the FBI may keep confidential the information provided by informants under the FOIA exemption in 5 U.S.C. § 552(b)(7)(D), although the informants had testified at trial concerning their communications with the FBI. The court in Irons noted that this FOIA exemption mainly seeks to protect law enforcement agencies in their efforts to obtain information in their investigation of crimes. Id. at 1453. The court stated:

[O]ne need not believe that sources make fine spun risk-benefit calculations (e.g., "I'll talk to the FBI if I'll only run the risk of eventually testifying and being cross-examined, but I won't talk if an FOIA requestor can get the information"). One need only, and more reasonably, believe that, as a general matter, the more confidential information that appears in public (contrary to the true desire of the source), the harder it becomes for the law enforcement agency to recruit confidential sources.

Id. at 1454 (emphasis added). Similarly, if a confession is immediately disclosed to the public after the completion of the investigation, it will be more difficult for the police to obtain

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valuable self-incriminating information from other individuals in the future.

Accordingly, the public disclosure of Imura-Kotani's confession, whether in a written, auditory, visual, electronic, or other physical form, is not required since disclosure would discourage other persons from candidly providing statements about a crime and would, therefore, frustrate the HPD's legitimate government function of law enforcement. Applying the rationale in Kiraly, the death of the individual who provided the information does not lessen the frustration since the frustration results from disclosure's effect on other individuals.

II. Personal Privacy

Under the UIPA, the exception based on personal privacy involves a balancing of interests. Specifically, "[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 interests of the individual." Haw. Rev. Stat. § 92F-14(a) (Supp. 1989). According to the UIPA's legislative history, "[i]f the privacy interest is not `significant', a scintilla of public interest in disclosure will preclude a finding of a clearly unwarranted invasion of personal privacy." S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 690 (1988); H. Conf. Comm. Rep. No. 112-88, Haw. H.J. 817, 818 (1988).

The UIPA states that an individual has a significant privacy interest in "[i]nformation 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." Haw. Rev. Stat. § 92F-14(b)(2) (Supp. 1989). As evidence in the HPD's investigation of the death of Roland Kotani, the videotaped confession belongs in this category of records described in section 92F-14(b)(2), Hawaii Revised Statutes. Therefore, an individual would ordinarily have a significant privacy interest in this government record pursuant to this provision. This significant privacy interest would be balanced against the public

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interest in the disclosure of the confession to determine whether disclosure is required under the UIPA.²

The UIPA does not specifically state whether an individual has a significant privacy interest once the individual is deceased. The UIPA's legislative history suggests that federal "case law under the Freedom of Information Act should be consulted for additional guidance" in analyzing an individual's privacy interest. S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1094 (1988). Under FOIA case law, the majority rule is that death extinguishes an individual's privacy rights. Office of Information and Privacy, U.S. Dep't. of Justice, Freedom of Information Case List 433 (1989) ("FOIA Case List"); e.g., Diamond v. FBI, 707 F.2d 75, 77 (2d Cir. 1983); Rabbitt v. Dep't. of the Air Force, 383 F. Supp. 1065, 1070 (S.D. N.Y. 1974), on motion for reconsideration, aff'd and rev'd on other grounds, 401 F. Supp. 1206, 1210; but see Kiraly v. FBI, 728 F.2d 273 (6th Cir. 1984) (the court found no case law directly holding that the FOIA privacy exemption immediately lapses upon death and consequently, applied the exemption to protect information about a deceased FBI informant).

Applying the majority rule supported in FOIA case law, a deceased individual is not considered to have a privacy interest that is attributed to living individuals. Therefore, the significant privacy interest in criminal investigative records declared in section 92F-14(b)(2), Hawaii Revised Statutes, is not recognized for deceased individuals.

Furthermore, FOIA case law has indicated that surviving family members may not have a significant privacy interest in a deceased individual's record unless their own privacy interests are directly intertwined with the record. See Marzen v. Dep't. of Health and Human Services, 632 F. Supp. 785 (N.D. Ill. 1986), aff'd, 825 F.2d 1148 (7th Cir. 1987); Journal-Gazette Company, Inc. v. U.S. Dep't. of the Army, Civil Action No. F 89-147 (N.D. Indiana, Jan. 8, 1990); see generally FOIA Case List 433. Consequently, the privacy interests of surviving family members may or may not apply to a deceased individual's records depending upon the particular circumstances. However, we need not address

²We believe that under the UIPA an agency's disclosure reporting that an individual has confessed to a particular crime does not invade the individual's privacy as might disclosure of the confession itself.

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that issue in the facts presented since public disclosure of the videotaped confession is not required under the exception in section 92F-13(3), Hawaii Revised Statutes, for frustration of a legitimate government function.

CONCLUSION

Imura-Kotani's videotaped confession is not required to be made public under the UIPA exception based upon frustration of a legitimate government function either before or after the HPD's investigation is closed. Public disclosure when the investigation is open would frustrate the investigative function of the police by prematurely revealing the evidence that the police have in the case. Public disclosure before court proceedings could deprive the defendant of the right to a fair trial or impartial jury. Public disclosure after the investigation is closed frustrates the ability of the police to obtain valuable incriminating information. Like statements made by witnesses or informants, a confession provides valuable information to corroborate and substantiate evidence in police investigations. Public disclosure of an investigatory statement to the police, such as a confession, would likely inhibit other individuals from being candid and providing incriminating information in their statements to the police.

Federal case law indicates that a deceased individual would not have a privacy interest and, depending on the circumstances, the individual's surviving family members may or may not have a privacy interest in a personal record of the deceased individual. However, we need not address the privacy interests of the surviving family members since public disclosure of the videotaped confession is not required under the exception for frustration of a legitimate government function.

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cc: Honorable Harold Kawasaki
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APPROVED:

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