

May 2, 1991

MEMORANDUM

TO: The Honorable Yukio Kitagawa
Chairperson, Board of Agriculture

ATTN: Calvin W. S. Lum, D.V.M.
Animal Industry Division
Department of Agriculture

FROM: Hugh R. Jones, Staff Attorney

SUBJECT: Investigative Reports Concerning Molokai Ranch Ltd.
And Perreira Ranch

Your two letters dated December 5, 1990, to the Honorable Warren Price, III, have been forwarded to the Office of Information Practices ("OIP") for a reply, pursuant to established protocol. In your correspondence to the Attorney General, you requested advice concerning whether the Department of Agriculture, Division of Animal Industry, may disclose two reports concerning possible violations of the State's Animal Diseases and Quarantine Law, and the federal Animal Welfare Act.

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), reports prepared by the Department of Agriculture ("DOA") concerning possible violations of State and federal agriculture laws by Molokai Ranch Ltd. and the Perreira Ranch, are protected from disclosure to the public.

OIP Op. Ltr. No. 91-6

Calvin W. S. Lum
May 2, 1991
Page 2

BRIEF ANSWER

Under section 92F-13(3), Hawaii Revised Statutes, agencies are not required to disclose "[r]ecords or information compiled for law enforcement purposes" the disclosure of which would frustrate a legitimate government function. The DOA has indicated that disclosure of the reports would not interfere with a potential law enforcement proceeding, and no such proceeding is contemplated by the DOA. Further, disclosure of the reports will not reveal the identity of a confidential source, deprive an individual of the right to an impartial adjudication, or reveal confidential law enforcement techniques or procedures. Therefore, we conclude that disclosure of the reports would not frustrate a legitimate government function.

Additionally, because the two investigative reports concern agricultural operations owned by corporations, and because under the UIPA only "natural persons" have cognizable privacy interests, we conclude that disclosure of the two investigative reports would not constitute "a clearly unwarranted invasion of personal privacy." Haw. Rev. Stat. § 92F-13(1) (Supp. 1990).

Accordingly, because access to the two investigative reports is neither "closed [n]or restricted by law," they must be made available for inspection and copying under the UIPA, "upon request by any person." Haw. Rev. Stat. § 92F-11(a) and (b) (Supp. 1990).

FACTS

On October 31, 1990, the State Veterinarian, Dr. Calvin W. S. Lum was informed by representatives of the U.S. Department of Agriculture ("USDA") that it was investigating Molokai Ranch Ltd. ("Wildlife Park") for possible violations of the federal Animal Welfare Act. The corporation which operates the Wildlife Park has been granted an exhibitor's license by the USDA and a permit by the DOA to import exotic animals. Although the State does not have an animal welfare statute similar to the federal Animal Welfare Act, the DOA nevertheless considers violations of the federal law as a factor bearing upon the Wildlife Park's State permit.

In response to findings set forth by USDA personnel in two separate inspection reports, the DOA conducted its own inspection

Calvin W. S. Lum
May 2, 1991
Page 3

of the Wildlife Park's operations, and Dr. Lum made two separate site evaluations on November 8 and 14, 1990. By letter dated November 23, 1990, Dr. Lum reported his findings and conclusions which resulted from his inspections to the USDA's, Animal Care Division's Western Sector Office.

In a telephone conversation with the OIP on December 17, 1990, Dr. Lum stated that his investigation of the Wildlife Park was concluded, or was at least in abeyance, and that disclosure of his report would not interfere with a potential law enforcement proceeding, and in fact, no such proceeding was contemplated. A Big Island freelance journalist has requested a copy of Dr. Lum's report to the USDA dated November 23, 1990.

In an entirely unrelated matter, the DOA received a complaint concerning possible disease related cattle deaths at Perreira Ranch (the "Ranch") in the County of Maui. The Ranch is owned by the Department of Hawaiian Homelands, and is leased to and operated by Maui Factors, Inc. In response to this complaint, the State Deputy Veterinarian visited the Ranch on October 25, 1990, to determine whether the death of Ranch livestock was caused by transmissible or communicable disease. In an inspection report dated October 30, 1990, the Deputy State Veterinarian concluded that the livestock deaths at the Ranch were not caused by transmissible disease. Rather, this report concluded that the livestock deaths resulted from overstocking of the pasture and seasonal dryness.

The Maui Humane Society has requested the DOA to make available a copy of the Deputy State Veterinarian's inspection report concerning the Ranch. In a telephone conversation with the OIP on December 17, 1990, Dr. Lum stated that disclosure of the October 30, 1990 report would not interfere with a potential law enforcement proceeding, and that no such proceeding was likely.

Your letters dated December 5, 1990 to the Honorable Warren Price, III, requested an opinion concerning whether the DOA is prohibited from disclosing the inspection reports concerning the Wildlife Park and the Ranch.

DISCUSSION

I. INTRODUCTION

OIP Op. Ltr. No. 91-6

Under the State's new open records statute, "[a]ll government records are open to public inspection unless access is restricted or closed by law." Haw. Rev. Stat. § 92F-11(a) (Supp. 1990). Specifically, "[e]xcept as provided by section 92F-13, each agency . . . shall make government records available for inspection and copying." Haw. Rev. Stat. § 92F-11(b) (Supp. 1990). Thus, we must determine whether any of the UIPA's exceptions to public access apply to the two investigative reports. If not, the reports must be made available for inspection and copying by the public.

II. FRUSTRATION OF A LEGITIMATE GOVERNMENT FUNCTION

Section 92F-13(3), Hawaii Revised Statutes, provides that an agency is not required by the UIPA to disclose "[g]overnment records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function." The legislative history of this UIPA exception establishes that it applies to certain "[r]ecords or information compiled for law enforcement purposes." See S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1095 (1988).

In OIP Opinion Letter No. 90-36 (Dec. 17, 1990), we concluded that the law enforcement record exception set forth by the federal Freedom of Information Act, 5 U.S.C. § 552(b)(7) (Supp. 1990), provides guidance in determining whether the disclosure of a record compiled for law enforcement purposes would result in the frustration of a legitimate government function under the UIPA. Under Exemption 7 of FOIA, records or information compiled for law enforcement purposes are protected from disclosure only to the extent that their disclosure:

(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, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority . . . and, in the case of a record or information compiled by criminal law enforcement authority in the course

Calvin W. S. Lum
May 2, 1991
Page 5

of a criminal investigation . . . information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual.

5 U.S.C. § 552(b)(7) (Supp. 1990).

In OIP Opinion Letter Nos. 89-17 (Dec. 27, 1989) and 90-36 (Dec. 17, 1990), we observed that federal courts applying Exemption 7 of FOIA have concluded that the disclosure of a record compiled for law enforcement purposes generally will not interfere with a potential law enforcement proceeding, where the target of the investigation is in possession of the information contained in the record.

Since Dr. Lum's report concerning the Ranch was delivered to a federal agency, the USDA, the OIP contacted the USDA's FOIA office to determine whether disclosure of the report could reasonably be expected to interfere with any USDA law enforcement proceeding against the Wildlife Park. The USDA's FOIA Office informed the OIP that Dr. Lum's report would not be withheld under Exemption 7 of the FOIA because disclosure would not interfere with a law enforcement proceeding. Additionally, the USDA FOIA Office indicated that Dr. Lum's letter recounts and disputes the USDA's findings set forth in USDA Form 18-8, entitled "Inspection of Animal Facilities, Site or Premises" a copy of which is provided to the animal facility being inspected, or any other person upon request under the FOIA. Accordingly, disclosure of Dr. Lum's inspection report concerning the Wildlife Park would not disclose any confidential information compiled by a federal law enforcement investigation.

Since the DOA has indicated to the OIP that disclosure of the two investigative reports would not interfere with a DOA enforcement proceeding, and indeed, no such proceedings are probable, it would be difficult for the OIP to conclude that the disclosure of the two investigative reports could reasonably be expected to interfere with a potential law enforcement proceeding. Additionally, based upon our review of the two

OIP Op. Ltr. No. 91-6

Calvin W. S. Lum
May 2, 1991
Page 6

reports, their disclosure will not disclose the identity of a confidential source, deprive an individual of a right to an impartial adjudication, or reveal confidential law enforcement techniques or procedures. Accordingly, we conclude that the disclosure of the two investigative reports will not result in the frustration of a legitimate government function, within the meaning of section 92F-13(3), Hawaii Revised Statutes.

III. CLEARLY UNWARRANTED INVASION OF PERSONAL PRIVACY

The UIPA also does not require the disclosure of "[g]overnment records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy." Haw. Rev. Stat. § 92F-13(1) (Supp. 1990). Importantly, under the UIPA, only "natural persons" have a cognizable privacy interest in government records. See Haw. Rev. Stat. § 92F-2 (Supp. 1990) ("[i]ndividual means natural person"). Thus, the UIPA's personal privacy exception does not apply to information in government records concerning corporations, partnerships, business trusts, or governmental agencies. Accordingly, the Wildlife Park and the Ranch, both of which are owned and operated by corporations, do not have recognizable privacy interests in the subject government records. Therefore, the disclosure of these government records would not result in a clearly unwarranted invasion of personal privacy under section 92F-13(1), Hawaii Revised Statutes.

CONCLUSION

We conclude that both of the investigative reports at issue must be made available for public inspection and copying under the UIPA. Although an agency is not required to disclose government records or information compiled for law enforcement purposes when doing so may result in the frustration of a legitimate government function, drawing upon Exemption 7 of the FOIA for guidance, we conclude that the disclosure of the two investigative reports will not result in the frustration of a legitimate government function.

Similarly, because only natural persons have cognizable privacy interests under the UIPA, and because both the Wildlife Park and the Ranch are owned and operated by corporations, we conclude that the disclosure of the investigative reports will not result in a clearly unwarranted invasion of personal privacy under the UIPA.

Calvin W. S. Lum
May 2, 1991
Page 7

Hugh R. Jones
Staff Attorney

HRJ:sc

cc: Dr. Diane E. Shepherd
Maui Humane Society

Dr. William DeHaven
USDA Animal Care Division, Western Sector

APPROVED:

Kathleen A. Callaghan
Director