November 18, 1992

The Honorable Charles T. Toguchi
Superintendent
Department of Education
Queen Liliuokalani Building
1390 Miller Street
Honolulu, Hawaii 96813

Attention: Mr. Albert S. Yoshii
Personnel Director

Dear Mr. Toguchi:

Re:Disclosure of Criminal History Record Information
Obtained from the Federal Bureau of Investigation

This is in response to your letter to the Office of Information Practices ("OIP") requesting an advisory opinion regarding whether the State of Hawaii Department of Education ("DOE") must publicly disclose criminal history record information that the DOE obtains from the Federal Bureau of Investigation ("FBI").

## ISSUE PRESENTED

Whether under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes, ("UIPA"), the DOE must make available for public inspection and copying criminal history record information contained in FBI identification records, which the FBI provides to the DOE under the condition that the DOE comply with the FBI's restrictions on subsequent disclosure of the information.

## BRIEF ANSWER

According to federal law, the FBI's disclosure of its identification records to the DOE for criminal history checks "is subject to cancellation if dissemination is made outside the receiving departments or related agencies." 28 U.S.C. □ 534 (b) (1988) . Based upon this federal provision, we conclude that, if the DOE was required to publicly disclose any part of

the FBI identification records that it maintains, the FBI would likely discontinue its disclosure of these records to the DOE.

Consequently, public disclosure of these records, and the FBI's refusal to provide them to the DOE as a result, would frustrate the DOE's ability to obtain and review applicants' and employees' criminal history records under section 846-43, Hawaii Revised Statutes. Therefore, although conviction data is available for public inspection and copying when contained in other records, we believe that the DOE is not required to disclose conviction data or any other information from FBI identification records that the DOE maintains because these records, in their entirety, fall within the scope of the UIPA exception for "[ g] overnment 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(3) (Supp. 1991).

The "frustration of a legitimate government function" exception does not apply to criminal history record information that the DOE obtains and maintains from sources other than FBI identification records. With regard to criminal history record information that is derived from sources other than FBI identification records, the DOE must make conviction data available for public inspection and copying, and comply with the limitations on the dissemination of non-conviction data set forth in chapter 846, Hawaii Revised Statutes. Haw. Rev. Stat. □846-9 (1985) and □92F-13(4) (Supp. 1991).

## FACTS

In accordance with administrative rules adopted by the DOE under section 846-43, Hawaii Revised Statutes, when an individual applies for employment, or has been employed after July 1, 1990, by the DOE in a position involving close proximity to children, the DOE requires that individual to give written consent to the DOE to conduct a criminal history check. See section 8-7-3, Hawaii Administrative Rules (1992) . The DOE is authorized by statute to refuse to employ an applicant, or may terminate an employee hired after July 1, 1990, when the DOE finds that, because of the nature and circumstances of a crime for which the individual was convicted, the individual poses a risk to the health, safety, or well-being of children. Haw. Rev. Stat. □846-43
(Supp. 1991).

To facilitate the DOE's criminal history check of an employee or applicant pursuant to section 846-43, Hawaii Revised Statutes, the Hawaii Criminal Justice Data Center"HCJDC") will

perform a search of its own criminal history records, and also request the FBI to provide a FBI identification record about the individual that the HCJDC will transmit directly to the DOE.[1]. An FBI identification record, also referred to as a "rap sheet," sets forth a compilation of criminal history record information, indexed by name, taken from fingerprint cards and other reports submitted by criminal justice agencies to the FBI. 28 C.F.R. □16.31 (1991) (definition of identification record).

It is the DOE's and the HCJDC's understanding that, as a condition of receiving FBI identification records for the DOE's review, the DOE must comply with the FBI's restrictions on subsequent disclosure of these records. On behalf of the DOE, the HCJDC wrote to the FBI to inquire about the FBI's restrictions on the DOE's subsequent disclosure of FBI identification records. In a letter dated November 28, 1990, addressed to former HCJDC Director Steven Vidinha, Melvin D. Mercer, Jr., of the FBI, explained:

> An FBI Identification Division (ID) record is a compilation of criminal history record information consisting of arrests and the dispositional and sentencing information arising therefrom. We make no distinction between "arrest records" and "conviction records." Our records are maintained and disseminated under the authority of Title 28, United States Code, Section 534, which provides that the exchange of these records shall be with "and for the official use of authorized officials of the Federal Government, the States, cities, and penal and other institutions." The term "other institutions" has been interpreted to mean governmental institutions. Identification records, including any conviction information shown on such records, are not considered public information and should not be released to private entities unless authorized by Federal statute.

Letter from Melvin D. Mercer, Jr., to Steven Vidinha, former HCJDC Director (Nov. 28, 1990) (emphasis in original). A copy of Mr. Mercer's letter is attached as Exhibit "A."

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[1]According to the HCJDC, while the HCJDC maintains criminal history data obtained from agencies within the State, it does not input or maintain in its own records the data from FBI identification records that are obtained for the DOE's criminal history checks.

You requested the OIP to render an advisory opinion regarding whether the UIPA requires the DOE to make criminal history record information contained in FBI identification records available for public inspection and copying when the FBI furnishes this information to the DOE under the condition that the DOE does not publicly disseminate the information.

## DISCUSSION

The FBI identification records that the DOE receives and maintains are "government records" because they constitute "information maintained by an agency in written . . . form." Haw. Rev. Stat. § 92F-3 (Supp. 1991). 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. 1991). Section 92F-13, Hawaii Revised Statutes, sets forth exceptions to this general rule and, in pertinent part, 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;
>
> (4) Government records which, pursuant to state or federal law including an order of any state or federal court, are protected from disclosure; . . . .

Haw. Rev. Stat. § 92F-13(1), (3), and (4) (Supp. 1991).

Chapter 846, Hawaii Revised Statutes, specifically restricts the dissemination of "non-conviction data," which, by definition, includes information about arrests without dispositions, acquittals, dismissals, and indefinitely postponed proceedings. Haw. Rev. Stat. § 846-9 (limitations on dissemination) and § 846-1 (definition) (1985); see also Haw. Rev. Stat. § 846-8 (1985) (exceptions to limitations on dissemination). Consequently, we find that non-conviction data

constitute "[ g] overnment records which, pursuant to state or federal law . . . are protected from disclosure." Haw. Rev. Stat. □92F-13(4) (Supp. 1991).

In contrast, as we noted in previous advisory opinions, conviction data is not subject to the statutory restrictions upon dissemination that apply to non-conviction data. Haw. Rev. Stat. □ 846-9 (1985). Thus, we concluded that conviction data must be made available for public inspection when contained in gubernatorial pardons, see OIP Opinion Letter No. 89-7 (Nov. 20, 1989); massage therapist license license applications, see OIP Opinion Letter No. 91-1 (Feb. 15, 1991); and board and commission applications, see OIP Opinion Letter No. 91-8 (June 24, 1991).

However, with regard to the disclosure of its identification records, the FBI apparently does not make a distinction between conviction and non-conviction data contained in such records. Instead, the FBI informed the HCJDC that "[i]identification records, including any conviction information shown on such records, are not considered public information and should not be released to private entities unless authorized by Federal statute." See Exhibit "A" (emphasis added).

According to the FBI, section 534 of title 28, United States Code, governs the FBI's maintenance and dissemination of criminal history record information. In pertinent part, this federal statute provides:

> **□534. Acquisition, preservation, and exchange of identification records and information; appointment of officials**
>
> (a) The Attorney General shall--
> (1) acquire, collect, classify, and preserve identification, criminal identification, crime, and other records;
>
> . . . .
>
> (4) exchange such records and information with, and for the official use of, authorized officials of the Federal Government, the States, cities, and penal and other institutions.
>
> (b) The exchange of records and information authorized by subsection (a) (4) of this section is

> subject to cancellation if dissemination is made outside the receiving departments or related agencies.

28 U.S.C. □534 (1988) (emphasis added).

Although this federal statute describes the consequences that would occur if "dissemination [of FBI identification records] is made outside the receiving departments or related agencies," this statute does not expressly prohibit or restrict the disclosure of this information to the public. Id. See also OIP Op. Ltr. No. 92-6 (June 22, 1992) (the authority to withhold must generally be found in the language of the statute itself). Consequently, we find that FBI identification records are not "[ g] overnment records which, pursuant to state or federal law . . . are protected from disclosure." Haw. Rev. Stat. □92F-13(4) (Supp. 1991).

Next, we consider whether the UIPA's "frustration of a legitimate government function" exception applies to FBI identification records, including conviction data contained therein. In previous opinion letters, we set forth the criteria that the OIP uses to determine whether a record constitutes "confidential commercial or financial information" that would be protected under this UIPA exception. As one of the criteria, we examine whether public disclosure of the requested commercial or financial information is likely "to impair the government's ability to obtain necessary information in the future." See, e.g., OIP Op. Ltr. No. 91-16 (Sept. 19, 1991), quoting National Parks and Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974). In the facts presently before us, this particular criteria is also relevant in determining whether other government records, besides commercial and financial information, would fall within the scope of the "frustration of a legitimate government function" exception.

Based upon section 534(b) of title 28, United States Code, we believe that if the DOE was required to publicly disclose any part of the FBI identification records that it receives and maintains, including conviction data, the FBI would likely discontinue its practice of furnishing these records to the DOE for its use in conducting criminal history checks. As a result, the DOE's "ability to obtain necessary information" from the FBI for its criminal history checks would be "impaired." Therefore, although conviction data is available for public inspection and copying when contained in other records, we believe that the UIPA does not require the DOE's public disclosure of conviction data or any other information from the FBI identification records because the disclosure of these records would result in

the "frustration of a legitimate government function," namely the DOE's ability to obtain applicants' and employees' criminal histories from the FBI in order to perform criminal history checks under section 846-43, Hawaii Revised Statutes. Haw. Rev. Stat. □92F-13(3) (Supp. 1991).

We note that the "frustration of a legitimate government function" exception does not apply to criminal history record information that the DOE obtains from sources other than FBI identification records, specifically, from the HCJDC's database containing only statewide criminal history record data. With regard to criminal history record information that is not obtained from FBI identification records, the DOE must make conviction data available for public inspection and copying, and comply with the limitations on the dissemination of non-conviction data set forth in chapter 846, Hawaii Revised Statutes.

In addition, parts of the FBI identification records may arguably fall within the UIPA's "clearly unwarranted invasion of personal privacy" exception. See Haw. Rev. Stat. □92F-13(1) (Supp. 1991). In comparison, the United States Supreme Court held that, as a categorical matter, the Freedom of Information Act, 5 U.S.C. □552, protected FBI identification records from disclosure because they constituted law enforcement records the disclosure of which would result in an unwarranted invasion of personal privacy. United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989). However, we need not address whether the UIPA's "clearly unwarranted invasion of personal privacy" exception would specifically apply to FBI identification records maintained by the DOE since we find that these records are not required to be disclosed in order to "avoid the frustration of a legitimate government function." Haw. Rev. Stat. □92F-13(3) (Supp. 1991).

Finally, we wish to point out that the UIPA was recently amended by the addition of section 92F-4, Hawaii Revised Statutes, which provides that an agency is not required to comply with a UIPA provision when the agency's compliance with that provision would cause the agency to lose or be denied federal funding, services, or other assistance from the federal government. Act 118, 1992 Haw. Sess. Laws 197. The FBI's provision of identification records to the DOE for its criminal history checks may be considered "assistance from the federal government." If so, under section 92F-4, Hawaii Revised Statutes, the DOE would not be required to publicly disclose FBI identification records since such disclosure would result in the

FBI's refusal to provide assistance in the form of its identification records. Because we find that the FBI identification records are protected by at least one of the UIPA exceptions to disclosure, we find it unnecessary to express a conclusion concerning the application of this new UIPA section.

## CONCLUSION

Under the federal statute governing the FBI's disclosure of identification records, 28 U.S.C. □534, the FBI would likely discontinue its practice of providing the DOE with identification records for criminal history checks if the DOE subsequently makes any part of these records available for public inspection and copying. As a result, the public disclosure of any part of FBI identification records maintained by the DOE would frustrate the DOE's ability to obtain and review applicants and employees' criminal histories. We conclude, therefore, that the DOE is not required to disclose conviction data or any other information contained in FBI identification records because these records, in their entirety, fall within the scope of the UIPA exception for "[ g] overnment 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(3) (Supp. 1991).

However, as for criminal history record information that is derived from sources other than FBI identification records, the DOE must make conviction data available for public inspection and copying, and comply with the limitations on dissemination of non-conviction data set forth in chapter 846, Hawaii Revised Statutes. Haw. Rev. Stat. □846-9 (1985) and □92F-13(4) (Supp. 1991).

Very truly yours,

Lorna J. Loo
Staff Attorney

APPROVED:

Kathleen A. Callaghan
Director

LJL: sc
Attachment