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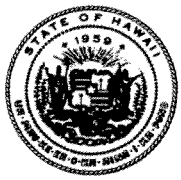

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September 21, 1993

Sonia Faust
Deputy Attorney General
Department of the Attorney General
Kekuanao'a Building
465 South King Street, 2nd Floor
Honolulu, Hawaii 96813

Attention: Heidi M. Rian
Deputy Attorney General

Dear Ms. Faust:

Re: DOH's Disclosure of Identity of an Individual Having an Infectious or Communicable Disease to the HPD

This is in reply to your memorandum to the Office of Information Practices ("OIP") dated August 10, 1993. In your memorandum, you requested an advisory opinion concerning whether the State of Hawaii Department of Health ("DOH") must disclose the identity of a patient diagnosed as having a sexually transmitted disease ("STD") to the City and County of Honolulu Police Department ("HPD").

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), the DOH must disclose the identity of a patient ("client") diagnosed as having a STD to the HPD, when the information is requested in connection with the HPD's investigation of an alleged sexual assault.

FACTS

A client of one of the DOH's health clinics recently alleged that she was sexually assaulted by a temporary DOH employee. The client filed a report with the HPD and was consulted by a HPD detective.

A second DOH health clinic client has anonymously complained that she, too, was sexually assaulted by the temporary DOH employee. According to your memorandum dated August 10, 1993, the second clinic client "made it very clear that she does not want to disclose her identity, and she did not want to go to the police."

The date that the second DOH health clinic client alleges she was assaulted is the same date that the first DOH health clinic patient alleged that she was assaulted. DOH health clinic staff have been able to determine the identity of the second client by examining the appointment log of the temporary DOH employee who allegedly perpetrated the alleged assaults, since the appointment log listed only two appointments with female patients on the date of the alleged assaults.

The HPD detective assigned to investigate the report filed by the first DOH health clinic client has requested to inspect the DOH's appointment records for the date of the alleged assaults, so that the detective can ascertain the identity of the second client.

According to your memorandum to the OIP requesting an opinion, neither of the two clinic patients who were allegedly assaulted have been diagnosed as having AIDS related complex or human immunodeficiency virus ("HIV"), thus provisions of section 325-101, Hawaii Revised Statutes, regarding the confidentiality of records regarding persons having AIDS or HIV do not apply to the facts in this case.

DISCUSSION

Under the UIPA, an agency is not required to disclose "[g]overnment records which, pursuant to state or federal law . . . are protected from disclosure." Haw. Rev. Stat. § 92F-13(4) (Supp. 1992).

Section 325-4, Hawaii Revised Statutes, restricts the DOH's disclosure of information concerning the identity of patients being treated for infectious and communicable diseases, and provides:

> **§ 325-4 Identity of patients safeguarded.** Reports to the department of health provided for by this chapter shall not be made public so as to disclose the identity of persons to whom they relate except as necessary to safeguard the public health against those who disobey the rules relating to these diseases or to secure conformity to the laws of the State.
>
> Reports to the department of health of persons who had or have diseases or conditions transmittable by blood or blood products may be disclosed by the department to any blood bank to enable it to reject as donors those individuals, any law to the contrary notwithstanding. In addition, the department may disclose to any blood bank information on persons suspected by physical symptoms, clinical examination, or laboratory evidence of having diseases or conditions transmittable by blood or blood products, any law to the contrary notwithstanding.

Haw. Rev. Stat. § 325-4 (Supp. 1992) (emphasis added).

It is not immediately clear whether the provisions of section 325-4, Hawaii Revised Statutes, apply only to the "reports" that must be made to the DOH under chapter 325, Hawaii Revised Statutes,[1] or whether they also apply to other records maintained by the DOH that would identify a person for whom such a report has been filed. An examination of the legislative history of this provision leads us to the conclusion that it was intended to prohibit the DOH from disclosing the identity of

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[1]Section 325-2, Hawaii Revised Statutes, requires physicians, laboratory directors, and health care providers having a client suspected of being affected by a disease declared to be communicable or dangerous to the public health to report the incidence or suspected incidence of such disease or condition to the DOH in writing or in the manner specified by the DOH. Under section 325-3, Hawaii Revised Statutes, the director of the DOH is given authority to determine which other persons shall report to the DOH communicable diseases or conditions dangerous to the public health. Persons who fail to report such information under either of these statutes may be fined an amount not to exceed $1,000 per violation.

individuals diagnosed as having an infectious or communicable disease, except under certain circumstances.

When the above provision was originally adopted as part of the Laws of the Territory of Hawaii in 1927, it appears the Territorial Legislature intended it to give authority to the DOH to withhold the identity of individuals with communicable diseases, and was not intended to prohibit the Board of Health from disclosing this information.[2] See S. Stand Comm. Rep. No. 131, 14th Terr. Leg, 1927 Reg. Sess., Haw. S.J. 480 (1927) (rejecting a penalty for disclosure because it was intended by the Board of Health "as authority for refusing to divulge the reports so made, and not as a prohibition upon them").

However, when subsequently amended, it appears that the Legislature understood the disclosure restrictions to be ones creating a prohibition on public disclosure. See H.R. Stand. Comm. Rep. No. 1040, 14th Leg., 1987 Reg. Sess., Haw. H. J. 1604 (1987) "[t]his clarifies that the [DOH] can disclose records only if the patient actually had or has had a blood transmitted disease") (emphasis added); see also, S. Stand. Comm. Rep. No. 568, 14th Leg., 1987 Reg. Sess., Haw. S. J. 1129 (1987) ("[t]his bill would allow the [DOH] to inform the blood bank of persons who have or are suspected of having diseases or conditions transmittable by blood").

Given the foregoing legislative history of section 325-4, Hawaii Revised Statutes, in our opinion, under section 92F-13(4), Hawaii Revised Statutes, the DOH should withhold from public inspection and copying, the identity of any client identified in

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[2]Act 117, of the Session Laws of the Territory of Hawaii amended chapter 70 of the Revised Laws of Hawaii to create a new section to read as follows:

> Sec. 933A. Reports to the Board of Health provided for by this chapter shall not be made public so as to disclose the identity of the persons to whom they relate except in so far as may be necessary to safeguard the public health against those who disobey the rules and regulations relating to these diseases or to secure conformity to the laws of the Territory.

reports to the department under chapter 325, Hawaii Revised Statutes.

Section 92F-19(a)(3), Hawaii Revised Statutes, permits (but does not require) an agency to disclose government records that are otherwise confidential under the UIPA under the following condition:

> (3) To another agency, another state, or the federal government, or a foreign law enforcement authority, if the disclosure is:
>
> (A) For the purpose of a civil or criminal law enforcement activity authorized by law; and
>
> (B) Pursuant to:
>
> (i) A written agreement or written request, or
>
> (ii) A verbal request made under exigent circumstances, by an officer or employee of the requesting agency whose identity has been verified, provided that such request is promptly confirmed in writing. . . .;

Haw. Rev. Stat. § 92F-19(a)(3) (Supp. 1992) and Act 250 Haw. Sess. Laws ___ (1993).

However, in OIP Opinion Letter No. 92-22 at 8-9 (Nov. 18, 1992), we opined that section 92F-19(a), Hawaii Revised Statutes, was not intended to authorize the inter-agency disclosure of government records protected from disclosure by specific state statutes including, but not limited to, section 325-4, Hawaii Revised Statutes.

Additionally, section 92F-17, Hawaii Revised Statutes, makes it a criminal offense for any officer or employee of an agency to "intentionally disclose[] or provide a copy of a government record, or any confidential information explicitly described by specific confidentiality statutes, to any person or agency with actual knowledge that disclosure is prohibited."

CONCLUSION

For the foregoing reasons, we conclude that the DOH may not disclose the identity of a client diagnosed with a STD to the HPD for the purpose of a criminal law enforcement activity, at least in the absence of an order from a court of competent jurisdiction requiring the DOH to disclose such information.

If you should have any questions regarding this opinion, please contact me at 586-1404.

Very truly yours,

Mimi K Horiuchi for
Hugh R. Jones
Staff Attorney

APPROVED:

Mimi K Horiuchi for
Kathleen A. Callaghan
Director
HRJ:si