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October 1, 1993

Mr. Nelson M. Sakamoto
Director of Human Resources
Research Corporation of the University of Hawaii
2800 Woodlawn Drive, Suite 200
Honolulu, Hawaii 96822

Dear Mr. Sakamoto:

Re: Disclosure of Medical Information Maintained by the Hyperbaric Treatment Center to the Hawaii County Fire Department

This is in reply to your memorandum dated July 21, 1993, requesting the Office of Information Practices ("OIP") to provide the Research Corporation of the University of Hawaii ("RCUH") with an advisory opinion concerning the above-referenced matter.

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), a physician employed in the RCUH's Hyperbaric Treatment Center ("Center") may disclose medical information concerning a Hawaii County Fire Rescue Specialist to the Hawaii County Fire Department ("HCFD"), without such individual's written consent.

BRIEF ANSWER

No. Under section 92F-13(4), Hawaii Revised Statutes, an agency is not required to disclose government records that are protected from disclosure by State or federal law.

Rule 504, Hawaii Rules of Evidence, chapter 626, Hawaii Revised Statutes, provides that a patient has a privilege to refuse to disclose, and to prevent any other person from disclosing confidential communications made for the purpose of

diagnosis or treatment of the patient's physical, mental, or emotional condition.

We believe that a physician-patient relationship existed between the HFDC employee and Center physicians. Since Center physicians have recorded their medical opinions in government records maintained by the Center, and given the facts presented, we believe that the patient could make a prima facie showing that the information was not intended to be disclosed to third persons. Therefore, we find that the information requested by the HCFD is protected from disclosure under section 92F-13(4), Hawaii Revised Statutes.

Additionally, since the information in question is protected from disclosure by State law, it is our opinion that neither section 92F-12(b)(2), Hawaii Revised Statutes, nor section 92F-19(a), Hawaii Revised Statutes, would permit the RCUH to provide the information requested to the HCFD, in the absence of the HCFD employee's written consent, or a court order requiring the RCUH to disclose the information. OIP Op. Ltr. Nos. 90-10 (Aug. 8, 1992) and 92-22 (Nov. 18, 1992).

We recommend that the HCFD consult with the Hawaii County Corporation Counsel to determine whether, under federal and State laws, it may require its employee to submit to a medical examination for the purpose of determining the employee's fitness for duty.

FACTS

A Fire Rescue Specialist employed by the HCFD recently suffered from decompression sickness (the "bends") after an open water dive. The Fire Rescue Specialist's position description requires the individual to "don[] diving gear for underwater searches of drowning victims or to locate and retrieve lost articles and other property." However, the employee suffered the bends after a non-work connected open water dive, but later began exhibiting symptoms of the bends when the individual was at the fire station.

The Fire Rescue Specialist was transported to the RCUH's Hyperbaric Treatment Center ("Center") for medical treatment. The RCUH operates the only hyperbaric treatment chamber within

the State of Hawaii.[1] While at the facility, the HCFD employee consulted and was treated by two physicians, Dr. Letisha A. Smith, the Center's Chief Medical Officer, and Dr. Charles Turner.

At the request of the HCFD employee, in a letter dated June 15, 1993, the Center's Chief Medical Officer, Dr. Letisha A. Smith, notified the HCFD that the employee would be unable to return to work until June 26, 1993. After being discharged from the Center, the employee contacted Dr. Smith, who in turn requested Dr. Turner to contact the employee. In a conversation with Dr. Turner on August 19, 1993, Dr. Turner informed the OIP that he had contacted the HCFD employee and they discussed his medical prognosis. During this conversation, Dr. Turner informed the employee that the Center could not disclose information to his employer without his written consent, mentioning the physician-patient privilege.

In a letter to Dr. Smith dated July 19, 1993, Nelson M. Tsuji, Fire Chief, HCFD, requested Dr. Smith to provide a medical opinion concerning whether the employee was able to continue his diving activities, or whether restrictions would be necessary:

> In your best medical opinion, is [the employee] able to continue his diving activities? In the event that you feel that restrictions are necessary, please indicate. Our concern is that [the employee] not be placed in any danger while performing his duties.

Letter from Chief Nelson M. Tsuji to Dr. Letisha A. Smith, dated July 19 1993.

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[1]Decompression sickness occurs when gases inside the body begin to expand under rapid pressure changes and when trapped air expands into the tissues, causing bubbles to form and become lodged in the joints, muscles, nervous system, heart, and lungs. A hyperbaric chamber returns a person affected by decompression sickness to a high pressure environment where the bubbles are recompressed and allowed to slowly assimilate back into the tissues. The gas then leaves the body through the respiratory tract as pressure is returned to normal.

Apparently, based upon observations made while the HCFD employee was receiving medical treatment at the Center, and based upon his previous medical history, Dr. Smith provided the employee with a medical opinion concerning further diving activities. This medical opinion was recorded in Center records on the employee's date of discharge.

On July 21, you contacted the OIP by telephone, and spoke with an OIP Staff Attorney, seeking assistance in determining whether the Center could respond to Chief Tsuji's letter dated July 19, 1993. The OIP informed you that because of the circumstances and issues involved, the RCUH should seek an advisory opinion from the OIP under section 92F-42(2), Hawaii Revised Statutes. By memorandum dated July 21, 1993 to the OIP you requested the OIP to provide you with an advisory opinion concerning whether the RCUH could disclose the information requested by Chief Tsuji.

DISCUSSION

I. INTRODUCTION

Except as provided in section 92F-13, Hawaii Revised Statutes, each agency upon request by any person must make government records available for inspection and copying. Haw. Rev. Stat. § 92F-11(b) (Supp. 1992). The term "government record," means "information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. § 92F-3 (Supp. 1992). The RCUH is an "agency," for purposes of the UIPA, and its records are subject to its provisions and restrictions. See OIP Op. Ltr. No. 90-27 (July 19, 1990).

Under section 92F-13, Hawaii Revised Statutes, an agency is not required to disclose:

> (1) Government records, which if disclosed, would constitute a clearly unwarranted invasion of personal privacy;
>
> . . . .
>
> (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), (4) (Supp. 1992).

For reasons which will become clear below, we shall confine our discussion to whether the information requested by the HCFD is protected from disclosure under section 92F-13(4), Hawaii Revised Statutes.[2]

II. RECORDS PROTECTED FROM DISCLOSURE BY STATE LAW

In OIP Opinion Letter No. 92-6 (June 22, 1993), we examined the exception in section 92F-13(4), Hawaii Revised Statutes, in detail, and consulted a similar exception in the Uniform Information Practice Code ("Model Code") upon which the UIPA was modeled, and a similar exception in the federal Freedom of Information Act, 5 U.S.C. § 552(b)(3) (1988) ("FOIA"), for guidance.

Section 2-103(a)(11) of the Model Code applies to "information that is expressly made non-disclosable under federal or state law or protected by rules of evidence." The commentary to this Model Code section provides:

> Subsection (a)(11) is a catch-all provision which assimilates into this Article any federal law, state statute, or rule of evidence that expressly requires the withholding of information from the general public. The purpose of requiring an express withholding policy is to put a burden on the legislative and judicial branches to make an affirmative judgment respecting the need for confidentiality.

Model Code § 2-103 commentary at 18 (1980) (emphasis added).

We also noted in our previous opinion that Exemption 3 of FOIA does not require federal agencies to disclose records that are:

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[2]The RCUH's disclosure of the requested information would likely constitute "a clearly unwarranted invasion of personal privacy," since individuals have a significant privacy interest in "[i]nformation relating to medical, psychiatric, psychological history, diagnosis, condition, treatment, or evaluation," see section 92F-14(b)(1), Hawaii Revised Statutes, and because the public interest in the disclosure of such information generally does not outweigh the privacy interests of an individual. However, the OIP need not embark upon an extended analysis of this question.

> [S]pecifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires the matters to be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

5 U.S.C. § 552(a)(3) (1988).

A. Status of Physician-Patient Privilege as a State Law that Protects Government Records from Disclosure

The Hawaii Rules of Evidence, chapter 626, Hawaii Revised Statutes, were enacted by the Legislature and became effective on January 1, 1981. Article V of chapter 626, Hawaii Revised Statutes, creates and establishes certain privileges, and of principal concern given the facts presented, is the physician-patient privilege, Rule 504, Hawaii Rules of Evidence:

> **Rule 504 Physician-patient privilege.**
> (a) Definitions. As used in this rule:
> (1) A "patient" is a person who consults or is examined or interviewed by a physician.
> (2) A "physician" is a person authorized, or reasonably believed to be authorized by the patient to be authorized, to practice medicine in any state or nation.
> (3) A communication is "confidential" if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the physician, including members of the patient's family.
> (b) General rule of privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of the patient's physical, mental, or emotional condition, including drug and alcohol addiction, among oneself, the patient's physician, and persons who are participating in the diagnosis or

> treatment under the direction of the physician, including members of the patients family.
>
> (c) Who may claim the privilege. The privilege may be claimed by the patient, the patient's guardian or conservator, or the personal representative of a deceased patient. The person who was the physician at the time of the communication is presumed to have the authority to claim the privilege but only on behalf of the patient.

Haw. R. Evid. 504(a),(b) and (c) (emphasis added).

In our opinion, the privileges established in article V of chapter 626, Hawaii Revised Statutes, constitute a "state law" within the meaning of section 92F-13(4), Hawaii Revised Statutes, that protects a government record from disclosure. Aside from the fact that parallel provisions of the Model Code support our conclusion, so too do federal court decisions under FOIA's Exemption 3.

While federal courts have found that federal rules of procedure, which are promulgated by the U.S. Supreme Court, ordinarily do not qualify for protection under Exemption 3, when a rule is subsequently modified and thereby specifically enacted into law by Congress, it may qualify under the exemption. See Fund for Constitutional Gov't v. National Archives & Records Serv., 656 F.2d 856, 867 (D.C. Cir. 1981) (finding Rule 6(e) of the Federal Rules of Criminal Procedure to satisfy Exemption 3's "statute requirement"). Since the Hawaii Rules of Evidence have been codified by statute, and are statutorily based, we believe that the privileges established in article V of chapter 626, Hawaii Revised Statutes, satisfy the "state law" requirement of section 92F-13(4), Hawaii Revised Statutes.[3]

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[3]See also, 81 Am. Jur. 2d Witnesses § 474 (1992) ("where the record contains privileged communications, it is immaterial that the keeping of such record is required by law, or that there may exist a common-law or statutory right of inspection of public records"); Roberts v. City of Palmdale, 20 Cal. Rptr.2d 330 (Cal. 1993) (finding records covered by an evidentiary privilege to be exempt from disclosure under open records act exception for records protected from disclosure pursuant to state or federal law, including provisions of the evidence code relating to privilege).

B. Applicability of Physician-Patient Privilege to Communications Between HCFD Employee and Center Physicians

We must now turn to a consideration of whether communications between the Center physicians and the HCFD employee are covered by the physician-patient privilege established by Rule 504, Hawaii Rules of Evidence, chapter 626, Hawaii Revised Statutes.

The essential elements of communications that are privileged under the physician-patient privilege are: (1) the relationship of doctor-patient; (2) information acquired during this relation; and (3) the necessity and propriety of information to enable the doctor to treat the patient skillfully in a professional capacity. State v. More, 382 N.W.2d 718 (Iowa App. 1985).

We are persuaded that a physician-patient relationship existed between the HCFD employee and Center physicians, since the employee was examined and treated for the bends. The fact that the physician was publicly employed does not affect the applicability of the privilege. Id.; see also, McCormick on Evidence, § 99 at 373 (4th ed. 1992).

Since the purpose of suppressing material facts learned by a physician "is the encouragement thereby given to the patient freely to disclose all matters which may aid in the diagnosis and treatment of disease and injury," McCormick on Evidence, § 99 at 369 (4th ed. 1992), the privilege has traditionally been held to apply to information conveyed to the physician by the patient.

However, the modern trend appears to include statements of fact or opinion expressed by a physician to a patient in the course of a professional visit, and to data acquired by examination and testing. See Bryant v. Modern Woodman of America, 125 N.W. 621 (Neb. 1910); State v. More, 382 N.W.2d 718 (Iowa App. 1985) ("communication" includes "all knowledge and information gained by the physician in the observation and personal examination of the patient"); McCormick on Evidence § 100 at 375-376 (4th ed. 1992). As noted in 81 Am. Jur. 2d Witnesses § 470 at 415 (1992):

> Even though a statute making privileged communications between a physician and a patient does not in terms apply to communications from the physician to the patient, this result is commonly brought about by judicial construction, and a statement of fact or opinion expressed by a

> physician to a patient in the course of a professional visit, based upon a relation of facts by the patient or upon a physical examination by the physician is considered as much a part of a privileged communication as the facts or statements upon which it is based. If a physician were to be permitted to disclose what he said to the patient, the patient's privilege to prevent disclosure of a communication by him to the physician or the result of an examination would be of little use, for by indirection a disclosure of the nature of the disease or physical condition would in many instances be made.

To our knowledge, no Hawaii appellate court decision has expressly considered whether Rule 504 of the Hawaii Rules of Evidence extends to medical opinions expressed to the patient by the physician. Nevertheless, the express language of the rule, previous Hawaii court decisions, and the rule's predecessor statute lead us to conclude that the privilege does extend to such communications, provided that other elements of the privilege are established.

First, Rule 504 provides that the confidential communications that are privileged are those "among oneself, the patient's physician, and persons who are participating in the diagnosis or treatment under the direction of the physician."[4] Additionally, the Hawaii Supreme Court has noted that "the purpose of having the privilege is to allow free communication between patients and physicians in order to facilitate their treatment." State v. Swier, 66 Haw. 448, 451 (1983) (emphasis added). Furthermore, the predecessor statute to Rule 504, Hawaii Rules of Evidence, section 621-20.5, Hawaii Revised Statutes, prohibited a physician from divulging, in a civil case, "any information which may have been acquired while attending a patient" without the patient's consent. Doe II v. Roe II, 3 Haw. App. 233 (1982).

Accordingly, we believe that Rule 504, Hawaii Rules of Evidence protects confidential communications between physicians

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[4]Webster's Ninth New Collegiate Dictionary at 80 (1988) defines the term "among" in pertinent part as follows:

> **2 :** in company or association of <living ~ artists> . . . **6 a:** through the reciprocal acts of <quarrel ~ themselves>

and patients, including medical opinions and advice provided to the patient, provided that other elements of the privilege are established by the person asserting the privilege.

We must now determine whether the medical opinion furnished to the HCFD employee by a Center physician consists of a "confidential communication." A communication is confidential "if it is not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview." Haw. R. Evid. 504(a)(3).

According to Drs. Smith and Turner, no third persons, or strangers were present when the Center physicians provided the HCFD employee with the medical opinion. Further, Dr. Turner's telephone conversation with the employee subsequent to his discharge in which the physician-patient privilege was discussed strongly supports a conclusion that the communication was intended to be confidential. Also, none of the other exceptions to the privilege appear to apply given the facts presented. See Haw. R. Evid. 504(d).

Since the privilege belongs to the patient, the burden of proving its applicability rests with the patient. In Re: Doe, 8 Haw. App. 161, 165 (1990). However, based upon the facts presented, we believe that the HCFD employee could make prima facie showing that communications between the employee and Center physicians are encompassed by the physician-patient privilege. Accordingly, for the reasons set forth above, we believe that if the employee elects to assert the privilege,[5] the information is protected from disclosure (in the absence of court order) under section 92F-13(4), Hawaii Revised Statutes, for records or information protected from disclosure by State law.

III. INTER-AGENCY DISCLOSURE OF CONFIDENTIAL GOVERNMENT RECORDS

Under section 92F-19(a), Hawaii Revised Statutes, an agency may disclose government records that are otherwise confidential

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[5]Based upon the contents of your memorandum requesting an advisory opinion, we understand that it is the patient's present intention to assert the existence of the privilege.

under part II of the UIPA[6] to other agencies, under certain narrowly defined circumstances.

While section 92F-19(a)(10), Hawaii Revised Statutes, codified by Act 250, Session Laws of Hawaii 1993, might arguably permit the RCUH to disclose the information requested to the HCFD, in previous OIP opinion letters, we concluded that the Legislature did not intend section 92F-19(a), Hawaii Revised Statutes, to authorize the inter-agency disclosure of government records that are protected from disclosure by specific confidentiality statutes. See OIP Op. Ltr. No. 92-22 at 8-9 (Nov. 18, 1992).

Because we find that Rule 504, Hawaii Rules of Evidence, chapter 626, Hawaii Revised Statutes, is a statute that protects government records from disclosure, we find the provisions of section 92F-19(a), Hawaii Revised Statutes, inapplicable to the facts presented.

IV. COMPELLING CIRCUMSTANCES AFFECTING THE HEALTH AND SAFETY OF ANY INDIVIDUAL

The UIPA provides that "[a]ny provision to the contrary notwithstanding each agency shall also disclose . . . [g]overnment records pursuant to a showing of compelling circumstances affecting the health or safety of any individual." Haw. Rev. Stat. § 92F-12(b)(3) (Supp. 1992).

In OIP Opinion Letter No. 92-10 at 11-12 (Aug. 1, 1992), based upon the UIPA's legislative history, we concluded that section 92F-12, Hawaii Revised Statutes, was not intended to require an agency to disclose government records that are protected from disclosure by specific state statutes. Accordingly, we do not believe that under the facts presented in this case, the RCUH may disclose information to the HCFD under section 92F-12(b)(2), Hawaii Revised Statutes.

Nevertheless, because we have not yet examined this UIPA provision with any depth, we believe that it is appropriate to provide guidance in this opinion letter to State and county agencies concerning its scope.

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[6]See Haw. Rev. Stat. § 92F-19(a)(11) (Supp. 1992) and Act 250, 1993 Haw. Sess. Laws ___ (agency may disclose to other agencies government records that are otherwise subject to disclosure under this chapter).

Section 92F-12(b)(2), Hawaii Revised Statutes, is substantially the same as section 552a(b)(8), of the Federal Privacy Act ("Privacy Act"). Under the Privacy Act, federal agencies are generally prohibited from disclosing an individual's personal records without the individual's consent, unless one of the Privacy Act's exemptions permits the disclosure. Exemption (b)(8) of the Privacy Act permits the disclosure of an individual's personal records "to a person pursuant to a showing of compelling circumstances affecting the health and safety of an individual."

Both the Senate and House reports on the Privacy Act indicate that this exemption was intended to be limited to "life or death" emergency situations:

> This subsection is designed to protect an employee or agency from being in technical violation of the law when they disclose personal information about a person to save the life or protect the safety of that individual in a unique emergency situation. The subsection requires a showing, which should be documented, of compelling circumstances affecting the health or safety of the person, or enabling identification for purposes of aiding a doctor to save such person's life. The discretion authorized here is intended to be used rarely . . . .

S. Rep. No. 93-1183, 93rd Cong., 2d Sess. (1974), reprinted in 1974 U.S.C.C.A.N. 6916, 6985; see also, H.R. Rep. No. 93-1416, 93rd Cong., 2d Sess. (1974) ("[t]he Committee is of the view that special consideration must be given to valid emergency situations, such as an airline crash or epidemic, where consent cannot be obtained because of time and distance and instant action is required").

Against this legislative backdrop, in DePlanche v. Califano, 549 F. Supp. 685, 704 (D.C. W.D. Mich 1982), the court held that despite the sworn declaration by a non-custodial parent that his children were being neglected, Exemption (b)(8) of the Privacy Act would not authorize the Social Security Administration to disclose the current addresses of his minor children.

Accordingly, notwithstanding our conclusion that section 92F-12(b)(2), Hawaii Revised Statutes, does not authorize the disclosure of information protected by Rule 504, Hawaii Rules of Evidence, we believe that it is also inapplicable to the facts

presented, since there is no showing that because of an emergency, and due to the time and distance involved, written consent of the HCFD employee cannot be obtained.

Finally, the HCFD may wish to confer with the Hawaii County Corporation Counsel concerning whether, under federal or State employment laws, it may require the HCFD Fire Rescue Specialist to submit to a medical examination for the purpose of determining the employee's fitness to perform employment related duties. While the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 through 12213 (1990), does place restrictions upon employee medical examinations, our research indicates that such examinations may be required by an employer, under certain circumstances, when the employee returns to work after an injury or illness.

Regulations adopted by the U.S. Equal Employment Opportunity Commission ("EEOC") provide:

> (c) A covered entity may require a medical examination (and/or inquiry) of an employee that is job related and consistent with business necessity. A covered entity may make inquiries into the ability of an employee to perform job related functions.

29 C.F.R. § 1630.14(c) (1992).

The EEOC's interpretative guidance concerning this regulation provides:

> This section permits employers to make inquiries or require medical examinations (fitness for duty examinations) when there is a need to determine whether an employee is still able to perform the essential functions of his or her job. The provision permits employers an other covered entities to make inquiries or require medical examinations necessary to the reasonable accommodation process described in this part.

EEOC, Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act, at B-55 (Jan. 1992).

Accordingly, we recommend that the HCFD consult with the Hawaii County Corporation Counsel concerning whether, under the

circumstances, the HCFD may require the employee involved to submit to a medical examination.

CONCLUSION

Based upon the facts presented, we conclude that the HCFD employee involved could make a prima facie showing that the information requested by the HCFD is protected by the physician-patient privilege under Rule 504, Hawaii Rules of Evidence.

Because we believe that the information is protected from disclosure under section 92F-13(4), Hawaii Revised Statutes, in the absence of the employee's written consent, and because we find sections 92F-12(b)(2) and 92F-19(a), Hawaii Revised Statutes, do not authorize the RCUH to disclose the information, the RCUH should not disclose the information requested by the HCFD unless the employee consents to the disclosure, or unless it is ordered to disclose the information by a court of competent jurisdiction.

Please contact me at 586-1404 if you should have any questions regarding this opinion.

Very truly yours,

Hugh R. Jones
Staff Attorney

APPROVED:

Kathleen A. Callaghan
Director

HRJ:si
c: Honorable Nelson M. Tsuji, HCFD
Honorable Richard Wurdeman, Hawaii Corporation Counsel
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