

November 29, 1999

Stephen L. Thompson
District Manager
Department of Land and Natural Resources
Division of Boating and Ocean Recreation
333 Queen Street, Suite 300
Honolulu, Hawaii 96813

Re: Identities of Informants

Dear Mr. Thompson:

This letter is in response to your request dated August 11, 1999, for an opinion on the above-referenced matter.

ISSUE PRESENTED

Whether the Department of Land and Natural Resources ("DLNR") harbor staff must publicly disclose the names of persons reporting violations.

BRIEF ANSWER

No. Agencies are not required to disclose information which, if disclosed, would cause the frustration of a legitimate government function. Haw. Rev. Stat. §92F-13(3) (1993). Disclosure of the identities of informants would likely chill the DLNR's ability to perform its function of investigating possible permit violations in the future because individuals will be less likely to come forward with information if they know their identities will be revealed to the alleged violators.

FACTS

According to your letter, the DLNR's Division of Boating and Ocean Recreation is responsible for the management of State small boat harbors on Oahu. At two of these harbors, Ala Wai Small Boat Harbor and Keehi Small Boat Harbor, a limited number of tenant vessels may be used for principal habitation ("live-aboard"). Hawaii Administrative Rules allows one hundred

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twenty-nine live-aboard permits to be issued at Ala Wai Small Boat Harbor, and thirty five live-aboard permits to be issued at Keehi Small Boat Harbor. §13-231-26(f), HAR. There is often a waiting list for live-aboard permits because the demand for permits exceeds the maximum allowed number of permits to be issued. There is an on-going problem of people without permits living on vessels moored at Ala Wai and Keehi Small Boat Harbors.

The DLNR is made aware of these violators primarily by harbor tenants, usually live-aboards with proper permits. Informants have expressed concerns about disclosure of their identities by the DLNR because they fear retribution. The DLNR would like to use information provided by harbor tenants on illegal live-aboards to evict illegal live-aboards.

In a telephone conversation on November 2, 1999, you confirmed that the harbor staff conducts civil law enforcement when following up on leads from permitted tenants. In addition, there may be instances when the Police Department for the City and County of Honolulu ("Police Department"), as well as law enforcement officers with the DLNR's Division of Conservation and Resources Enforcement Division ("DOCARE"), may conduct criminal law enforcement activities incident to leads provided by properly permitted tenants.

There has not been a record request for names of persons reporting alleged illegal live-aboards. The DLNR fears, however, that if it must make informants' names public, it will chill the DLNR's ability to receive such tips in the future.

DISCUSSION

I. INTRODUCTION

Records of all State and county agencies are public unless access is restricted or closed by law. Haw. Rev. Stat. §92F-11(a) (1993). There are five exceptions to the general rule of disclosure under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"). These are for: (1) information which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy; (2) information pertaining to the prosecution or defense of any judicial or quasi-judicial action to which the state or any county is or may be a party, but only to the extent such records would not be discoverable; (3) information which, if disclosed, would cause

the frustration of a legitimate government function; (4) information that is protected by a state or federal law or court order; and (5) certain legislative papers. Haw. Rev. Stat. §92F-13 (1993).

II. FRUSTRATION OF A LEGITIMATE GOVERNMENT FUNCTION

The DLNR has invoked the UIPA exception to disclosure of records which, if disclosed, would cause the frustration of a legitimate government function.

The DLNR is responsible for management of State small boat harbors on Oahu under Chapter 200, Hawaii Revised Statutes and Title 13, Chapter 231, Hawaii Administrative Rules. The OIP believes that the DLNR civil law enforcement operations pertaining to alleged violators at the rules permitting proper permitting of vessels are legitimate government functions under these laws.

The DLNR asserts that if it must disclose names of informants, its legitimate government functions will be frustrated, because the fear of retribution will discourage private citizens from coming forward with information. When applying the “frustration” exception to informants’ identities in the past, the OIP found that:

[b]y taking appropriate actions against violations, a government agency performs a legitimate government function of enforcing the laws it administers. To perform this function, an agency may rely to a large extent on the complaints of private citizens to notify the agency of possible violations.

A policy of keeping complainants’ identities confidential encourages the flow of information that is necessary for agencies’ enforcement of laws. . . .
OIP Op. Ltr. No. 89-12 at 3 (Dec 12, 1989) (identities of persons reporting alleged zoning violations may be withheld from disclosure under “frustration” exception).

The OIP Opinion Letter Number 89-12 went on to state that:

[m]andatory public access to information about complainants' identities would frustrate agencies' legitimate enforcement function because agencies would be less likely to receive incriminating information at the initiative of private citizens. The identities of complainants would, therefore, be exempt from public access under the UIPA exception contained in section 92F-13(3), Hawaii Revised Statutes, based on the frustration of a legitimate government function.

OIP Op. Ltr. No. 89-12 at 3 (Dec 12, 1989).

In another OIP Opinion, the issue was raised as to whether the Honolulu City Council should require the Ethics Commission of the City and County of Honolulu ("Commission") to disclose identities of persons requesting advisory opinions from the Commission. The Commission issues advisory opinions on alleged violations of standards of conduct in the Revised Charter of the City and County of Honolulu and the Revised Ordinances of the City and County of Honolulu. Requesters of advisory opinions from the Commission are like informants or complainants in other situations because, by requesting advisory opinions from the Commission, they are informing the Commission of possible violations. If a violation is found, the Commission recommends discipline. Commission advisory opinions are available to the public in redacted form, with all information that may identify individuals discussed in the advisory opinion, including requesters and subjects, redacted. The Commission provided evidence to the OIP that disclosure of the requesters' identities would discourage future requesters from requesting advisory opinions and providing information. The OIP opined that, because the Commission relies on requesters to inform it of possible violations, disclosure of their identities would frustrate the Commission's ability to investigate alleged violations. OIP Op. Ltr. No. 96-2 (July 16, 1996).

In this case, DLNR has asserted that as part of its function of enforcing laws and administrative rules, it relies on tenants with permits for information on illegal live-aboards. The DLNR also asserts that disclosure of these informants' identities is likely to have a chilling effect on the reporting of possible violations, and that informants have expressed fears of retaliation if their identities are disclosed. Therefore, consistent with our prior opinions, we opine here that the DLNR has discretion to withhold from disclosure complainants' identities under section 92F-13(3), Hawaii Revised Statutes, because disclosure would likely frustrate the DLNR's legitimate government function of investigating alleged violations.

II. CRIMINAL LAW ENFORCEMENT

The DLNR stated that there may be circumstances when a tip about an illegal live-aboard leads to a criminal investigation into other matters. Criminal investigations are not at issue here, but the OIP felt it may be helpful to mention the treatment of informants' identities when there is a criminal investigation.

A. Frustration of a Legitimate Government Function

The OIP has opined that information which, if disclosed, would interfere with ongoing criminal proceedings is protected from disclosure under the "frustration" exception. In the OIP Opinion Letter Number 95-21, we followed the federal view under the Freedom of Information Act ("FOIA") that agencies may withhold:

records or information compiled for law enforcement purposes to the extent that disclosure 'could reasonably be expected to interfere with enforcement proceedings.' The application of this Exemption requires the agency to establish that: (1) a law enforcement proceeding is pending or prospective; and (2) disclosure of the documents would, in some particular, discernable way, disrupt, impede, or otherwise harm the enforcement proceeding. . . . [This exemption] may be invoked as long as the proceeding remains pending, or so long as the proceeding is fairly regarded as prospective or as preventative. . . . If the agency establishes the existence of a pending or prospective enforcement proceeding, it must then show that the disclosure of records or information compiled for law enforcement purposes could reasonably be expected to interfere with enforcement proceedings:

if disclosure would . . . potentially subject witnesses or other[s] providing information to the agency to reprisal or harassment, . . . or chill the willingness of individuals providing information to the agency to do so.

OIP Op. Ltr. No. 95-21 at 11-12 (Aug. 28, 1995) (citations omitted).

When both prongs of the test set forth in the OIP Opinion Letter Number 95-21 are met, it would be appropriate for DOCARE and the Police Department to withhold from disclosure complainants' identities under section 92F-13, Hawaii Revised Statutes, when disclosure would likely frustrate the legitimate government function of investigating alleged criminal activities.

B. Clearly Unwarranted Invasion of Personal Privacy

In the OIP Opinion Letter Number 95-21, the OIP followed the federal premise under FOIA that identities of witnesses and other individuals who supplied information that are mentioned in criminal law enforcement records are generally protected from public disclosure. OIP Op. Ltr. No. 95-21 at 18-21 (Aug. 28, 1995). Further research shows that this is rule is still followed today. See Anderson v. U. S. Dep't of Justice, 1999 U.S. Dist., LEXIS 4731 (D.D.C. 1999); Voinche v. FBI, 46 F. Supp. 2d 26 (D.D.C. 1999). Federal courts have stated that the significant privacy interests of informants can only be overcome in situations such as when there is compelling evidence of illegal activity by the agency. OIP Op. Ltr. No. 95-21 at 22 (Aug. 28, 1995); Voinche v. FBI, 46 F. Supp. 2d 26, 33 (D.D.C. 1999).

The OIP noted in the OIP Opinion Letter Number 95-21, that in some jurisdictions, records of closed law enforcement investigations may be available in their entirety. However, in balancing the public interests in disclosure of informants' identities against the privacy interests of those named individuals, the OIP believes disclosure would constitute a clearly unwarranted invasion of personal privacy. OIP Op. Ltr. No. 95-21 at 22 (Aug. 28, 1995).

CONCLUSION

The DLNR relies on information from tenants with live-aboard permits to perform its legitimate government function of investigating alleged permit violations. If identities of these informants were made public, it would likely chill the DLNR's ability to obtain such information in the future, thus impairing its ability to investigate alleged violations. Therefore, the DLNR

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may withhold disclosure of informant's identity under section 92F-13(3),
Hawaii Revised Statutes.

Very truly yours,

Carlotta M. Dias
Staff Attorney

APPROVED:

Moya T. Davenport Gray
Director

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