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LESLIE H. KONDO
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May 26, 2005

Mr. Thomas L. Read, Administrator
Offender Management Office
Department of Public Safety
919 Ala Moana Boulevard, 4th Floor
Honolulu, Hawaii 96814

Re: Withholding of Inmate Records and Regulations on Inmate Access Rights

Dear Mr. Read:

This is in response to your request to the Office of Information Practices ("OIP") for an opinion on the above-referenced matters under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("HRS") ("UIPA"). Specifically, we have construed your request to raise the following issues:

ISSUES PRESENTED

I. Whether section 92F-22(1)(B) of the UIPA allows the Department of Public Safety ("PSD") to preclude a prison inmate's review of any records in the inmate's institutional file compiled during the course of the inmate's incarceration.

II. Whether PSD can require inmates to deliver any UIPA request for records to PSD by regular U.S. mail.

III. Whether PSD may impose restrictions on an inmate's rights afforded under the UIPA.

BRIEF ANSWERS

I. No. Section 92F-22(1)(B), by its express language, only allows PSD to withhold records that constitute "reports" prepared or compiled during the criminal law enforcement process.

II. Yes. PSD may require inmates to deliver their UIPA requests to PSD via regular U.S. mail. It is our opinion that such regulation is valid under the UIPA because this requirement does not deny or restrict the inmates' ability to make such requests, but only regulates the manner in which the requests are made.

III. Yes. It is our opinion that PSD may place restrictions on inmates' rights under the UIPA under the same standard applicable to the imposition of restrictions on inmates' constitutional rights, i.e., where those restrictions are reasonably related to legitimate penological interests.

FACTUAL BACKGROUND

Based upon our conversations with you and the materials and correspondence received from you, we understand the relevant underlying facts to be as follows: PSD would like to update and amend certain regulations related to inmates' requests for, and access to, records in their correctional institution files. During your initial telephone inquiry to this office, we specifically discussed the records maintained by PSD relating to the inmate grievance and appeals process.[1] We understand that an inmate is given copies of his or her grievance complaint at the time it is filed and the response made to the grievance by PSD at the time the response is issued. A copy of the response is also included in the inmate's institutional file. Despite the fact that inmates are given copies of these records, they later request access to the copies of the records maintained in their respective institutional files.

During our conversation, you first raised the question of whether these records may be withheld under section 92F-22(1)(B) once they are compiled in the inmate's institutional file. If they must be disclosed, you asked whether PSD may place restrictions on inmates' access to records, such as limiting the frequency of the requests made to review these records or the timeframe for fulfilling these requests.

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[1] The inmate grievance system allows an inmate to submit a grievance where the inmate believes an injustice or unfair treatment has been inflicted as a result of "inconsistent, coercive, or disciplinary application of a policy or rule by correctional personnel or the Adjustment or Program Committee." PSD Policy No. 493.12.03 at §§ 2.2.c; 3.1 (4/3/92). The system seeks to provide "prompt resolution on an inmate grievance, supported by well considered reasons . . . to ensure the rights of the inmate and to ease any sense of frustration and ill-treatment." PSD Policy No. 493.12.03 at § 3.1.

You noted that in one instance, an inmate requested review of his multi-volume grievance files five times between January and March of this year. This creates difficulties because personnel must be assigned to escort the inmate to a secure area and to guard the inmate during the review of these records.

You subsequently asked whether PSD may restrict the methods inmates can use to deliver their UIPA requests to PSD. You stated that inmates often submit UIPA requests to PSD through the correctional facilities' internal mail systems or by handing the request to a guard or other PSD employee.[2] As a result, UIPA requests have been lost or delayed in reaching the proper party to respond. To alleviate these problems, PSD would like to require that inmates make all UIPA requests to PSD via regular U.S. mail.

You have also asked generally for an opinion regarding the scope of the records that may be withheld under section 92F-22(1)(B) and whether there are other statutes that would require PSD to allow review or copying of records that may be withheld under this section of the UIPA. In response to our request for additional documentation, you have provided us with copies of relevant policies contained in PSD's Corrections Administration Policies & Procedures Manual (the "Policies Manual"). Specifically, you have provided us with a copy of (1) Policy No. COR.05.02 (3/8/93), entitled Sentenced Felon Inmate Case Record Management; (2) Policy No. COR.15.02 (12/15/92), entitled Correspondence, and (3) Policy No. 493.12.03 (4/3/92), entitled Inmate Grievance and Appeals Process.

DISCUSSION

I. SCOPE OF SECTION 92F-22(1)(B) EXCEPTION

We first address whether section 92F-22(1)(B) allows PSD to preclude an inmate's review of **any** records prepared or compiled during the course of the inmate's incarceration that are contained in the inmate's file. We believe that the express language of this section limiting withholding to "reports" cannot be extended to protect "any" record in an inmate's institutional file. Further, we believe that this section was intended to allow PSD to maintain the confidentiality of reports that are prepared or compiled by or for PSD with respect to an inmate during the enforcement process where confidentiality is necessitated by legitimate penological interests. Accordingly, it is our opinion that reports that are made public for other reasons may not be withheld under this section.

[2] We understand that each facility has an internal mail system intended to be used by inmates "for communication and requests from inmates for staff" within each correctional facility.

Part III of the UIPA requires an agency that maintains any accessible personal record to "make that record available to the individual to whom it pertains[,]" unless access to the record, or information contained in such record, is restricted under section 92F-22. Haw. Rev. Stat. §§ 92F-21 and -22 (1993). The legislature created certain restrictions on individual access under Part III, recognizing the need to secure the confidentiality of certain records or information to protect legitimate governmental and private interests that could be harmed by their disclosure. See Haw. Rev. Stat. § 92F-22 (1993);[3] cf. United States DOJ v. Julian, 486 U.S. 1, 8 (1988) (Congress created exemptions to federal Freedom of Information Act ("FOIA") realizing "that legitimate governmental and private interests could be harmed by release of certain types of information." (quoting FBI v. Abramson, 456 U.S. 615, 621 (1982))). In accordance with the general policy of broad disclosure under the UIPA and the specific policy of government accountability "to individuals in the collection, use, and dissemination of information relating to them[,]" however, the exemptions provided must be narrowly construed. Haw. Rev. Stat. § 92F-2 (1993); see OIP Op. Ltr. No. 95-4 at 7 n.4.

Of relevance here, section 92F-22(1)(B) allows criminal law enforcement agencies[4] to deny an individual access to certain personal records, specifically, "reports" prepared or compiled at any stage of the criminal law enforcement process:

> An agency is not required by this part to grant an individual access to personal records, or information in such records:
>
> (1) Maintained by an agency that performs as its or as a principal function any activity pertaining to the prevention, control, or reduction of crime, and which consist of:
>
> * * *
>
> (B) **Reports** prepared or compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through confinement, correctional supervision, and release from supervision.

Haw. Rev. Stat. § 92F-22(1)(B) (1993) (emphasis added). Because the language of this subsection expressly limits its terms to "reports," we must conclude that the

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[3] See legislative history to former chapter 92E, HRS, repealed effective July 1, 1989, which was recodified in substantial part in Part III of the UIPA. Stand. Comm. Rep. No. 614-80, Hawaii H.J. at 1565 (1980) (purpose of certain specific exemptions to avoid frustration of legitimate government functions). Conf. Comm. Rep. No. 46-80, Hawaii S.J. at 973 (1980) (one purpose of provisions "to secure the confidentiality of personal records.").

[4] PSD is a criminal law enforcement agency for purposes of this section. See OIP Op. Ltr. No. 95-11.

legislature did not intend this exemption to be construed to include any records or information in an inmate's file. Cf. Haw. Rev. Stat. § 92F-22(1)(A) (1993) (exempting "information or reports prepared or compiled"); Haw. Rev. Stat. § 92F-22(4) (1993) (exempting "investigative reports and materials").

You have asked specifically whether PSD may withhold copies of an inmate's grievance complaint and the response issued by PSD once they are filed in the inmate's institutional file. It is our opinion that neither of these records may be withheld under section 92F-22(1)(B). First, even if the term "report" was read broadly enough to encompass the inmate's grievance complaint, we believe that section 92F-22(1)(B) cannot reasonably be read to cover a report prepared by the inmate himself. We believe that the clear intent of this exemption is to allow criminal law enforcement agencies the ability to **maintain** the confidentiality of reports, prepared or compiled by or for such agencies related to an inmate, as the agencies deem necessary and appropriate to accomplish their legitimate functions and goals. See supra note 3 and accompanying text; 5 U.S.C. § 552a(j)(2)(C); 28 C.F.R. § 16.97.[5] To construe this exemption otherwise, moreover, would not serve to promote any underlying purpose or policy of the UIPA. See Haw. Rev. Stat. § 92F-2.

Second, even though PSD's responses to grievances could be deemed reports,[6] we believe for the same reasons that section 92F-22(1)(B) cannot reasonably be read to exempt reports, such as the grievance responses, that are specifically intended and directed to be disclosed to the inmate by PSD's own regulation. See supra note

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[5] Such an intent is clear under exemption (j)(2)(C) of the federal Privacy Act, 5 U.S.C. § 552a, which we have previously noted is nearly identical to section 92F-22(1)(B). See OIP Op. Ltr. No. 93-7; OIP Op. Ltr. No. 95-11. Unlike section 92F-22(1)(B), however, exemption (j) of the Privacy Act provides that a criminal law enforcement agency may promulgate rules to exempt from access any system of records within the agency covered by an exemption. 5 U.S.C. § 552a(j)(2)(C). In so doing, the agency must state in the rule itself the reasons why those records are to be exempt. See Turner v. Ralston, 567 F. Supp. 606, 607 (1983). In justifying the exemption of certain of its records, the federal Bureau of Prisons stated its need (1) to avoid compromise of legitimate law enforcement activities and Bureau of Prisons responsibilities; (2) to protect the internal processes by which Bureau personnel are able to formulate decisions and policies with regard to prisoners; (3) to prevent disclosure of information to inmates that would jeopardize legitimate correctional interests of security, custody, or rehabilitation; and (4) to permit receipt of relevant information from other agencies. See 28 C.F.R. § 16.97.

[6] See OIP Op. Ltr. No. 95-11 (proposed Sex Offender Custody Level Review form, completed by inmate's case manager, containing information regarding the inmate's background and behavior, and used by program administrator to make recommendation on inmate's classification, found to be a report prepared or compiled for purposes of section 92F-22(1)(B)).

1.[7] Accordingly, it is our opinion that PSD may not, under section 92F-22(1)(B), withhold either the grievance complaint filed by an inmate or the response issued by PSD.

You have also asked for a general opinion regarding what records in an inmate's institutional file may be withheld under section 92F-22(1)(B) and if other statutes require PSD to allow review or copying of such records. We have reviewed the list of the types of records that may be contained in an inmate's institutional file, as set forth in Policy No. COR.05.02, entitled Sentenced Felon Inmate Case Record Management. See Policy No. COR.05.02 at §4.1.a. We understand that PSD would like to create a clear policy for each correctional institution to follow that would expressly direct which personal records may be withheld from an inmate and which may not. Although we cannot offer a definitive opinion without an actual review of each record, we do offer the following general guidance.

First, PSD must ascertain which records in an inmate's institutional file are governed by other sections of the HRS. As you know, access to and review and correction of "criminal history record information" are controlled by chapter 846, HRS, not chapter 92F. PSD must, therefore, comply with the access and disclosure provisions under that chapter with respect to "criminal history record information." See Haw. Rev. Stat. § 92F-12(b)(2) (1993) (disclosure required for records expressly authorized to be disclosed pursuant to statute); Haw. Rev. Stat. § 92F-13(4) (1993) (disclosure not required for records protected from disclosure pursuant to state law). Further, as we have previously opined, access to an inmate's medical records is governed by chapter 622, HRS. See OIP Op. Ltr. No. 93-7. With respect to other statutes that may govern disclosure of records held by PSD in an inmate's institutional file, we advise PSD to consult with its deputy attorney general to identify, and for advice regarding application of, those statutes.

Second, for the remaining records in an inmate's institutional file, PSD must first determine whether the record constitutes a report that PSD may withhold under section 92F-22(1)(B) in line with the reasoning set forth in this letter. We note, based upon the list contained in Policy No. COR.05.02 alone, that there appear to be many records that would likely fall within the exception. Where a record falls within an exception to disclosure under part III of the UIPA, governing the disclosure of personal records, PSD must then also determine whether the record may be withheld under part II of the UIPA, which governs the disclosure of general government records. It is likely, however, that many of the records that may be

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[7] Cf. Julian, 486 U.S. 1 (court required disclosure under FOIA of inmates' presentence reports, except as to certain matters, where Federal Rules of Criminal Procedure and Parole Commission and Reorganization Act of 1976 required qualified disclosure of the same information).

withheld under section 92F-22(1)(B) of Part III of the UIPA would also fall within the "frustration exception" to disclosure under part II of the UIPA. See Haw. Rev. Stat. § 92F-13(3) (1993). Section 92F-13(3) exempts from disclosure "[g]overnment records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function." Id.

For all records not governed by a specific statute that PSD would like to withhold, PSD may, if desired, submit a sample of that record for our review and assistance in determining whether the record may properly be withheld under sections 92F-22(1)(B) and 92F-13.

II. REGULATING DELIVERY METHOD FOR UIPA REQUESTS

We next address the issue of whether PSD can require that inmates deliver UIPA requests to PSD via regular U.S. mail. The proposed regulation seeks to prohibit delivery by use of the correctional facilities' internal mail systems, designed and implemented for other purposes, or by handing such requests to any PSD employee. We have reviewed the PSD policy related to inmate correspondence and find that it provides inmates liberal, almost unlimited, use of the U.S. mail system. See Policy No. COR.15.02. Given this policy, the proposed regulation would not result in denying or restricting the inmates the ability to make UIPA requests, but would simply allow PSD to impose a more uniform and accountable method for delivery so that the agency may more efficiently and effectively receive and respond to requests made.

The UIPA and its administrative rules allow for and provide reasonable regulations on the manner in which requests are made and access provided. See Haw. Rev. Stat. § 92F-11 (1993); Haw. Rev. Stat. § 92F-18(a), (b)(9), (b)(10) & (b)(11) (1993) (directing agencies to issue instructions and guidelines to effectuate UIPA, including designation of certain persons to be responsible for the agencies' records and procedures for requests for access to records); Haw. Rev. Stat. § 92F-21 (1993); Haw. Admin. R. (allowing agencies to require submission of a formal request during regular business hours). It is our opinion that the proposed PSD regulation is a reasonable regulation on the manner in which inmates make UIPA requests and is therefore valid under the UIPA.

III. RESTRICTIONS ON UIPA RIGHTS

Lastly, we address the issue of whether PSD may impose restrictions on the rights afforded inmates under the UIPA.[8] In particular, you have asked whether

[8] See OIP Op. Ltr. No. 90-34 (inmate in state correctional facility falls within the definition of "person" to whom rights are granted under the UIPA).

PSD may limit the number of requests made by an inmate to review his institutional file[9] and whether PSD must strictly comply with the time limitations imposed by the UIPA or by OIP's administrative rules in responding to that request.[10] This issue requires a determination of how to apply the UIPA, a statute of general application, in a prison setting. See Gates v. Rowland, 39 F.3d 1439 (9th Cir. Cal. 1994) (issue was how to apply The Americans with Disabilities Act of 1990 ("ADA") in a prison setting).

We agree with the reasoning of the Ninth Circuit Court of Appeals in Gates v. Rowland in which the court addressed the ability of a prison institution to restrict rights afforded to prisoners under the ADA. In accordance with Gates, it is our opinion that PSD may impose reasonable restrictions and limitations on an inmate's statutory rights granted by the UIPA, just as it may reasonably restrict an inmate's retained constitutional rights, to satisfy and accommodate both the needs and objectives of the correctional institution and the provisions of the UIPA, a statute of general application. See Bell, 441 U.S. at 546 ("There must be a 'mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application.'" (quoting Wolff v. McDonnell, 418 U.S. 539, 556 (1974))); Gates, 39 F.3d 1439 (applying this reasoning to also limit prison inmates' rights under statute of general application).

It is well established that the "fact of confinement as well as the legitimate goals and policies of the penal institution limits [the] retained constitutional rights" of prison inmates. See Bell v. Wolfish, 441 U.S. 520, 545-46 (1979) ("'Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.'" (quoting Price v. Johnston, 334 U.S. 266, 285 (1948))). In applying

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[9] The UIPA does not place any restrictions on the number of requests that may be made under its provisions.

[10] Responses to UIPA requests for records must be made within certain timeframes specified by statute or administrative rule. For general record requests made under Part II of the UIPA, an agency must generally disclose records required to be disclosed in their entirety within a reasonable time not to exceed ten business days. Haw. Admin. R. § 2-71-13(a). Other timeframes apply where only portions of the records will be disclosed and where extenuating circumstances exist. See Haw. Admin. R. § 2-71-13. For personal record requests made under Part III of the UIPA, an agency must generally permit the individual to review of a record required to be disclosed and to have a copy made within ten working days following the date of the request. Haw. Rev. Stat. § 92F-23 (1993). The statute provides that this period may be extended for an additional twenty working days if the agency, within ten days, provides the individual an explanation of unusual circumstances causing the delay. Id. Part III of the UIPA, governing personal records, also contains other timeframes related to the rights granted to an individual to correct and amend his or her personal records. See Haw. Rev. Stat. §§ 92F-24 and -25.

the ADA in a prison setting, the court in Gates found that "just as constitutional rights of prisoners must be considered in light of the reasonable requirements of effective prison administration, so must statutory rights applicable to the nation's general population be considered in light of effective prison administration." Id. at 1446. The court reasoned as follows:

> The Act was not designed to deal specifically with the prison environment; it was intended for general societal application. There is no indication that Congress intended the Act to apply to prison facilities irrespective of the considerations of the reasonable requirements of effective prison administration. It is highly doubtful that Congress intended a more stringent application of the prisoners' statutory rights created by the Act than it would the prisoners' constitutional rights.

Id. at 1446-47. The court accordingly deemed "the applicable standard for the review of the Act's statutory rights in a prison setting to be equivalent to the review of constitutional rights in a prison setting, as outlined by the [United States] Supreme Court in Turner v. Safley, 482 U.S. 78, 96 L. Ed. 2d 64, 107 S. Ct. 2254 (1987)." Id. at 1447.

This same reasoning applies to the UIPA: The UIPA was not designed to deal specifically with a prison environment, but was intended for application to general society. See, e.g., Haw. Rev. Stat. § 92F-11(b) (1993) (allows in-person inspection of agency records). Further, the legislature gave no indication that it intended the UIPA to apply to correctional facilities irrespective of considerations within the province of prison administration. And, it is highly doubtful that the legislature intended a more stringent application of inmates' statutory rights under the UIPA than that afforded to inmates' constitutional rights.[11] Accordingly, it is similarly our opinion that regulations that restrict inmates' UIPA rights may be imposed where those regulations meet the standard set forth in Turner.

The United States Supreme Court held in Turner "that a prison regulation impinging on inmates' constitutional rights 'is valid if it is reasonably related to legitimate penological interests.'" Lewis v. Casey, 518 U.S. 343, 361 (1996) (quoting Turner, 482 U.S. at 89). The Court identified four factors "relevant in deciding whether a prison regulation affecting a constitutional right that survives incarceration withstands constitutional challenge: whether the regulation has a

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[11] See generally State v. Timoteo, 87 Haw. 108, 114 (1997) (finding that if certain constitutional rights may be waived with the strong policies behind these rights, then defendant "should certainly be capable in this instance of waiving a statutory right such as the statute of limitations." (quoting United States v. Wild, 551 F.2d 418, 424-25 (D.C. Cir.) (footnotes omitted), cert. denied, 431 U.S. 916 (1977))).

'valid, rational connection' to a legitimate governmental interest; whether alternative means are open to inmates to exercise the asserted right; what impact an accommodation of the right would have on guards and inmates and prison resources; and whether there are 'ready alternatives' to the regulation." Overton v. Bazzetta, 539 U.S. 126 (2003) (citing Turner, 482 U.S. at 89-91).[12] In making this determination, the Court has repeatedly stated that substantial judicial deference must be given "to the professional judgment of prison administrators, who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them." Overton, 539 U.S. at 132; see Turner, 492 U.S. at 89 (deference given to prison administrators to avoid hampering their ability to anticipate problems and adopt solutions concerning institutional operations).

The Court has in various cases involving prison regulations noted the following as legitimate penological interests of prison institutions: (1) maintaining and promoting internal security;[13] (2) maintaining internal order and discipline;[14] (3) securing institutions against unauthorized access or escape;[15] and (4) "rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody."[16] Applying the Turner standard, the Court has found reasonable regulations related to those interests that resulted in delays in receiving legal materials and assistance;[17] that limited prison visitation;[18] that limited receipt of mail;[19] and that limited face-to-face communications between inmates and journalists.[20]

Based on the foregoing, it is our opinion that PSD may place restrictions on inmates' rights under the UIPA where PSD can provide a reasonable basis for the restriction based upon legitimate penological interests. See Gates, 39 F.3d at 1448 (prison authorities provided a reasonable basis for restricting HIV-infected inmates from food service assignments based upon the potential violence due to the

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[12] The state need not prove the validity of prison regulations under this standard. Rather, the prison inmate has the burden of showing that a challenged regulation is unreasonable under Turner. Overton, 539 U.S. at 132.

[13] Overton, 539 U.S. at 133.

[14] Procunier v. Martinez, 416 U.S. 396, 404 (1974).

[15] Id.

[16] Id.

[17] Lewis, 518 U.S. at 362.

[18] Overton, 539 U.S. 126.

[19] Bell, 441 U.S. 520.

[20] Pell v. Procunier, 417 U.S. 817 (1974).

perceived threat of infection to other inmates). Thus, with respect to your specific inquiry, it is our opinion that PSD may limit the frequency of UIPA requests made by an inmate and provide its own UIPA compliance procedures and timeframes for response as long as its regulations are reasonably related to legitimate penological interests under the standard set forth in Turner.[21]

CONCLUSION

The UIPA does not permit PSD to make a blanket denial of access to inmates for all records in their institutional files. PSD may require that inmates deliver UIPA requests via regular U.S. mail and may restrict inmates' rights under the UIPA as long as the regulation to be imposed meets the standard set forth in Turner.

Very truly yours,

Cathy L. Takase
Staff Attorney

APPROVED:

Leslie H. Kondo
Director

[21] We note again that access to and review and correction of an inmate's "criminal history record information" is specifically protected and provided for by chapter 846 and, therefore, is outside the purview of the UIPA and the scope of this letter.