

December 10, 1990

MEMORANDUM

TO: The Honorable George W. Sumner
Director of Public Safety

FROM: Hugh R. Jones, Staff Attorney

SUBJECT: Inmate Access to Department of Public Safety Policy
and Procedure Manual

This is in reply to a memorandum dated November 25, 1989, from Harold Falk, Director of Corrections, requesting an advisory opinion concerning a proposed administrative policy concerning inmate and ward access to various policies and procedures of the Department of Public Safety.

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), inmates or wards at state correctional facilities are entitled to inspect and copy policies and procedures of the Department of Public Safety.

BRIEF ANSWER

Under the UIPA, unless a government record is protected from disclosure by one of the statutory exceptions to public access set forth at section 92F-13, Hawaii Revised Statutes, it must be made available for inspection and copying "upon request by any person." Haw. Rev. Stat. § 92F-11(b) (Supp. 1989). Based upon the express statutory definition of the term "person," and authorities interpreting open records statutes similar to the UIPA, we conclude that inmates or wards in state correctional facilities are "person[s]" within the meaning of sections 92F-3 and 92F-11(b), Hawaii Revised Statutes.

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Under the UIPA, notwithstanding any provision to the contrary, each agency must make available for inspection during regular business hours, "rules of procedure, substantive rules of general applicability, statements of general policy, and interpretations of general applicability adopted by the agency." Haw. Rev. Stat. § 92F-12(a)(1) (Supp. 1989). Based upon section 91-1, Hawaii Revised Statutes, we conclude that "rules of procedure" and "substantive rules of general applicability" under the UIPA include agency rules adopted under the State Administrative Procedure Act. Accordingly, administrative rules relating to the corrections system, which are compiled at title 17, subtitle 2, chapters 200 through 207, Hawaii Administrative Rules, must be made available for the inspection of "any person."

Additionally, based upon our review of the PSD Policy and Procedure Manual, several of the policies contained therein, by express reference, constitute "interpretations of general applicability" within the meaning of section 92F-12(a)(1), Hawaii Revised Statutes. An agency statement is interpretative if it explains, clarifies, or implements existing agency statutes or rules.

Lastly, with respect to those PSD policies which are neither "rules" nor interpretative statements, we conclude that under section 92F-11(a) and (b), Hawaii Revised Statutes, they must be made available for the inspection of "any person" unless their disclosure would result in the frustration of a legitimate government function. See Haw. Rev. Stat. § 92F-13(3) (Supp. 1989). Based upon authorities interpreting Exemption 2 of the federal Freedom of Information Act, we conclude that as to PSD policies which are neither "rules" or "interpretations of general applicability," such policies must be made available for inspection and copying unless: 1) the policies are "predominately internal," and 2) their disclosure would risk the circumvention of agency statutes or regulations, including those adopted for the protection of the security of correctional facilities.

FACTS

The Department of Public Safety ("PSD"), formerly known as the Department of Corrections, has compiled and maintains a two volume manual entitled "Department of Corrections Policies and Procedures Manual" ("Manual"). Many of the policies contained in this Manual set forth the PSD's policies concerning the conduct

of prison personnel, including matters relating to employee attendance, restrictions on outside employment, duties and responsibilities, employee uniforms, dress codes, restrictions on inmate contact, and employee disciplinary action. Other policies contained in the Manual relate to the fiscal management of correctional institutions, inmate records, safety and sanitation, security and control, food services, inmate rights, inmate programs, activities and services, and inmate rights to communication, mail, and visitation. The Manual contains over 220 PDS policies, as well as multiple "Special Orders," "Administrative Notices," and "Director's Memorandums."

The PSD has formulated a proposed administrative policy concerning inmate access to the policies and procedures contained in the Manual. Under this proposed policy, inmates would be 1) permitted to inspect certain policies in their entirety; 2) permitted to inspect summaries of other policies; and 3) denied any access entirely to still other policies.

In its request to the Office of Information Practices ("OIP"), the PSD requests advice concerning whether its proposed policy concerning inmate access to policies contained in the Manual comports with the provisions of the UIPA.

DISCUSSION

I. DEFINITION OF "ANY PERSON" INCLUDES INMATES OR WARDS

Under the UIPA, "[a]ll government records are open to public inspection unless access is restricted or closed by law." Haw. Rev. Stat. § 92F-11(a) (Supp. 1989). Thus, unless a government record is protected from disclosure by one of the statutory exceptions to public access set forth at section 92F-13, Hawaii Revised Statutes, "each agency upon request by any person shall make government records available for inspection and copying during regular business hours." Haw. Rev. Stat. § 92F-11(b) (Supp. 1989) (emphasis added). Under the UIPA, a "person" is defined as "an individual, corporation, government, or governmental subdivision or agency, business trust, estate, trust, partnership, association, or any other legal entity." Haw. Rev. Stat. § 92F-3 (Supp. 1989).

Like the UIPA, the federal Freedom of Information Act, 5 U.S.C. § 552 (1989) ("FOIA"), also employs the "any person"

access principle, thus, "the identity of a requesting party has no bearing upon the merits of his or her FOIA request." U.S. Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 109 S. Ct. 1468, 1480, 103 L. Ed. 2d 774 (1988).¹ Under this "any person" access standard, corporations, associations of all kinds, individual employees of agencies, members of Congress, prisoners, and private citizens are equal "any person" requesters. See generally, Doherty v. Department of Justice, 596 F. Supp. 423, 427 n.4 (S.D.N.Y. 1984) (reviewing legislative history), aff'd on other grounds, 775 F.2d 49 (2d Cir. 1985). Indeed, as pointed out by one commentator, "the most prolific of all FOIA requesters [a federal prison inmate] had an admirable litigation record against many federal agencies." J. O'Reilly, Federal Information Disclosure § 5.04 at p. 5-15, n. 12 (1985). Similarly, inmates in state correctional facilities have been held to be "any person" requesters under various state open records laws. See, e.g., Mithrandir v. Department of Corrections, 416 N.W.2d 352, 354 (Mich. App. 1987) ("it is undisputed that [an inmate] is a "person" within the meaning of the FOIA); In the Matter of Faulkner, 529 N.Y.S.2d 255 (1988).

Therefore, we conclude that under the UIPA, an inmate is a "person" within the meaning of sections 92F-3 and 92F-11(a) and (b), Hawaii Revised Statutes. Accordingly, an inmate's access rights under the UIPA are equal to those of the general public. Therefore, we now turn to an examination of whether the policies contained in the PSD's Manual must be accessible to the public, including inmates, under the provisions of the UIPA.

II. PUBLIC ACCESS TO PSD POLICIES AND PROCEDURES

As part of the UIPA, in section 92F-12, Hawaii Revised Statutes, the Legislature set forth a list of government records which it declared shall be made available for public inspection and copying "[a]ny provision to the contrary notwithstanding." Haw. Rev. Stat. § 92F-12(a) (Supp. 1989). The legislative history of the UIPA reaffirms that as to these records, the UIPA "exceptions such as for personal privacy and for frustration of legitimate government purpose are inapplicable." S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 690

¹See also, Aronson v. U.S. Department of Housing & Urban Dev., 833 F. 2d 182, 186 (1st Cir. 1987) ("Congress granted the scholar and scoundrel equal rights of access to agency records").

(1988); H.R. Conf. Comm. Rep. No. 112-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 817 (1988).

Among other things, section 92F-12(a), Hawaii Revised Statutes, provides:

§ 92F-12 Disclosure required. (a) Any provision to the contrary notwithstanding each agency shall make available for public inspection and duplication during regular business hours:

(1) Rules of procedure, substantive rules of general applicability, statements of general policy, and interpretations of general applicability adopted by the agency;

Haw. Rev. Stat. § 92F-12(a)(1) (Supp. 1989).

This provision was taken, without substantial revision, from section 2-101 of the Uniform Information Practices Code drafted by the National Conference of Commissioners on Uniform State Laws ("Model Code"). The commentary² to section 2-101 of the Model Code provides:

Under this section, the "law of the agency" must be made available to the public. In other words, an agency may not maintain "secret law" relating to its own decisions and policies. This section is similar in general requirement to Sections (a)(1), (2) and of the federal Freedom of Information Act The affirmative disclosure responsibility extends to agency policies, rules and adjudicative determinations and procedures. In addition, this section mandates disclosure in the form in which the records are used or relied upon by the agency

Nothing in the section requires an agency to make rules or to formalize its decision-making processes. Nor does it require an agency to reduce

²The legislative history of the UIPA instructs those interpreting its provisions to consult the Model Code's commentary for guidance in construing similar provisions of the UIPA. See H.R. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. H.J. 969, 972 (1988).

its rules or policies to written or other permanent form. If preferred, an administrative procedure act or similar legislation could serve those purposes. [Emphases added.]

As noted above, the UIPA requires the public availability of an agency's "rules of general applicability" and "statements of general policy." Importantly, the State's Administrative Procedure Act, chapter 91, Hawaii Revised Statutes, defines "rule" as "each agency statement of general . . . applicability and future effect that implements, interprets, or prescribes law or policy." Haw. Rev. Stat. § 91-1(4) (1985). Significantly, however, the term "rule" "does not include regulations concerning only the internal management of an agency and not affecting private rights or of procedures available to the public." Haw. Rev. Stat. § 91-1(4) (1985). In light of this statutory definition of the term "rule," it would appear that along with an agency's interpretations of general applicability, section 92F-12(a)(1), Hawaii Revised Statutes, requires the public availability of administrative rules adopted by an agency under chapter 91, Hawaii Revised Statutes.

**A. PSD Policies Which By Their Terms, Are
"Interpretations of General Applicability"**

We note that the supervision and management of state correctional facilities was at one time delegated to the Department of Social Services and Housing, which promulgated administrative rules under chapter 91, Hawaii Revised Statutes. These rules are compiled at title 17, subtitle 2, chapters 200 through 207, Hawaii Administrative Rules, and pursuant to section 92F-12(a)(1), Hawaii Revised Statutes, must be made available for the inspection and copying by the public. Additionally, several of the policies and procedures contained in the PSD Manual, by express reference, interpret or implement title 17, subtitle 2, Hawaii Administrative Rules. These policies constitute "interpretations of general applicability adopted by an agency" within the meaning of section 92F-12(a)(1), Hawaii Revised Statutes, and must be made available for public inspection. An agency statement is "interpretative" if it explains, clarifies, or implements agency statutes or regulations. See generally, 1 Davis Administrative Law Treatise § 5.14 (2d ed. 1978); American Federation of Government Employees v. U.S., 622 F. Supp. 1109, 1116 (D.C. Ga. 1984). Such statements "only provide a

clarification of statutory language . . . and remind[s] affected parties of existing duties." Chamber of Commerce v. OSHA, 636 F.2d 464, 469 (D.C. Cir. 1980).

For example, title 17, subtitle 2, chapter 203, subchapter 1 of the Hawaii Administrative Rules is entitled "Correspondence," and sets forth the general rights and privileges of inmates to send and receive correspondence to and from persons approved by the facility administrator. The stated purpose of PSD Policy Number 493.15.02 is "to provide guidelines for the monitoring of inmate and ward correspondence" and to "supplement Administrative Rules of the Corrections Program." We believe that this PSD policy constitutes an "interpretation of general applicability," yet the PSD does not list this policy as one which will be made available for inmate inspection either in its entirety or in summary form. Even assuming that such policy is not interpretative, for the reasons more fully discussed below, the policy is not protected from disclosure under the UIPA.

B. PSD Policies Which Are Neither "Rules" Nor "Interpretations"

Based upon our review, most of the policies contained in the PSD's Manual are neither rules adopted under chapter 91, Hawaii Revised Statutes, nor agency statements interpreting the same. Two Hawaii Supreme Court decisions appear to indicate that administrative policies relating to the management and operation of state correctional facilities are primarily matters of internal management, which are exempt from the rulemaking requirements of the State Administrative Procedure Act. Thus, in Tai v. Chang, 58 Haw. 386, 387, 570 P.2d 563, 564 (1977), the court held that an unpublished rule relating to the transfer of inmates was exempt from the rulemaking procedures and publication requirements of chapter 91, Hawaii Revised Statutes. In Chang, the Supreme Court relied upon the legislative history of the State's Administrative Procedure Act, which indicated that the Legislature considered "matters relating to the operation and management of state and county penal . . . institutions [to be] primarily a matter of internal management" excluded from the definition of "rule" under section 91-1(4), Hawaii Revised Statutes. Chang, 55 Haw. at 387.

Similarly, in Holdman v. Olim, 59 Haw. 346, 581 P.2d 1146 (1978), the court held that a corrections "directive," which
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required all female visitors at state correctional facilities to wear undergarments, was primarily a matter of internal management, and thus, exempt from the rulemaking provisions of chapter 91, Hawaii Revised Statutes.

Some persons have argued that the above-cited Hawaii court decisions exempt the operation of state correctional facilities from the rulemaking requirements of chapter 91, Hawaii Revised Statutes. Still others, including inmates and those that represent them, continue to assert that PSD policies affecting inmate rights must be enacted under chapter 91, Hawaii Revised Statutes to be valid. Because the OIP does not have the jurisdiction to decide whether an agency policy is, or should be, a "rule" within the meaning of chapter 91, Hawaii Revised Statutes, we shall assume, for purposes of our analysis the remaining policies in the PSD Manual are not, or need not be "rules" under chapter 91, Hawaii Revised Statutes, and therefore, are not within the scope of section 92F-12(a)(1), Hawaii Revised Statutes. Even assuming this is the case, we are constrained to conclude that the policies and procedures contained in the PSD Manual must be made available for public inspection unless they are protected from disclosure by one of the exceptions to public access set forth at section 92F-13, Hawaii Revised Statutes. See Haw. Rev. Stat. § 92F-11(a) and (b) (Supp. 1989).

In examining the UIPA's statutory exceptions to public access, the only potentially applicable exception which would shield the PSD's policies and procedures from public inspection is that which does not require an agency to make available "[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. 1989). Resort to case law applying Exemption 2 of the FOIA, while not controlling, provides significant guidance in determining whether the disclosure of any of the PSD's policies and procedures would result in the frustration of a legitimate government function.

Among other things, Exemption 2 of the FOIA, has been held to protect from required agency disclosure, records "related solely to the internal personnel rules and practices of an agency," the disclosure of which would risk the circumvention of a statute or agency regulation. In Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051 (D.C. Cir. 1981), the court

fashioned a two-part test for determining which sensitive materials are exempt from mandatory disclosure under Exemption 2. This test requires both that a requested document be "predominately internal" and that its disclosure "significantly risks circumvention of agency regulations or statutes." Crooker, 670 F.2d at 1073-74.

Since the time of the Crooker decision, a growing body of cases has expressly applied both parts of this test, providing some guidance as to the kinds of information that will qualify for protection under those standards. Specific guidance on what constitutes an "internal" document may be found in Cox v. Department of Justice, 601 F.2d 1, 5 (D.C. Cir. 1979). In Cox, an inmate in a federal penitentiary sought access to a U.S. Marshalls' manual which gave details regarding the U.S. Marshalls' weapons and handcuffs, and its transportation of prisoners. In deciding that the Manual was predominantly "internal," the court stated:

The undisclosed material [sought by Cox] does not purport to regulate activities among members of the public. Nor does it set standards to be followed by agency personnel in deciding whether to proceed against or to take action affecting members of the public.

Cox, 601 F.2d at 5.

Among other agency records that have been found to be predominately internal, or designed to establish practices for agency personnel, were portions of a Federal Bureau of Prisons manual which summarized procedures for security of prison control centers, including escape prevention plans, control of keys and locks within a prison, instructions regarding transportation of federal prisoners, and the arms inventory maintained in the facility. See Miller v. Department of Justice, Civil No. 87-0533, slip op. at 1-2 (D.D.C. Jan. 31, 1989).

With respect to the second prong of the Crooker test, authorities have found that the disclosure of certain correctional procedures would significantly risk circumvention of the law. For example, in the Cox case, the court found that the disclosure of prison weapon, handcuffing, and transportation security procedures satisfied this standard. Similarly, in the Miller decision, cited above, the court found that portions of

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Bureau of Prisons custodial manual describing procedures for the security of prison control centers "would necessarily facilitate efforts by inmates to frustrate [the Bureau's] security precautions." Similarly, in Crooker v. Bureau of Prisons, Civil No. 86-0510, slip op. at 3-4 (D.D.C. Feb. 27, 1987), the court held that information concerning prison post orders, handcuff procedures, security, arming of officers, and alarm procedures may be withheld under Exemption 2 of the FOIA.

Based upon decisions of the federal courts applying Exemption 2 of the FOIA, it is our opinion that section 92F-13(3), Hawaii Revised Statutes, would permit the PSD to withhold from public inspection those policies and procedures which are 1) predominately internal, and 2) the disclosure of which would significantly risk the circumvention of agency regulations concerning the security of the prisons or the control of inmates. Thus, in establishing a policy concerning inmate inspection of PSD policies, the PSD must apply the principles set forth in this opinion to each of the policies in its two volume manual to determine whether any particular policy must remain confidential to avoid "the frustration of a legitimate government function."

Turning to an examination of the policies and procedures set forth in the PSD's Manual submitted for our review, the OIP is not in a position to express an opinion on each and every policy contained in this two volume, 19 chapter set. However, based upon the principles set forth above, the OIP can provide general guidance to the PSD, using a few specific PSD policies by way of example.

PSD Policy Number 493.09.03 entitled "Meals, Staff and Guests," which under the PSD's proposed policy would be available to inmates only in summary form, sets forth the persons that are entitled to free meals at correctional facilities. Although this policy may be "predominately internal," we cannot discern how its disclosure would enable an inmate to frustrate correctional facilities security precautions. Similarly, PSD Policy Number 493.02.13, entitled "Monetary Donations to Inmate/Ward Trust Funds," another policy which would apparently be available to inmates only in summary form, sets forth guidelines and controls upon monetary donations to inmate trust funds. We do not believe that it can be asserted that the disclosure of this policy would pose a legitimate security risk.

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Additionally, chapter 3 of the PSD Manual sets forth a variety of the PSD's personnel rules. Among other matters, this chapter sets forth policies concerning employee uniforms, outside employment, promotional criteria, vacation leave, disciplinary action, an employee ethics code, personal appearance and dress, on-the-job training and grievance procedures. While such policies also appear to be "predominately internal" insofar as they do not purport to regulate the activities of the public, it is difficult to believe that the disclosure of such policies would frustrate a prison's security or the control of inmates.

Should the PSD need further guidance concerning public access to a particular policy, the OIP shall be in a position to provide more specific guidance upon request.

CONCLUSION

We conclude that inmates and wards in state correctional facilities are "person[s]" within the meaning of the UIPA. Furthermore, we conclude that under the UIPA, upon request by any person, the PSD must make available for inspection and copying "rules" adopted under the State Administrative Procedure Act, and agency interpretative statements which explain, clarify, or implement existing statutes or regulations. As to PSD policies which are neither "rules" nor interpretative statements, they must be available for inspection under the UIPA unless such policies are "predominately internal" and their disclosure significantly risks circumvention of agency statutes or regulations, including those adopted for the security of a correctional facility.

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cc: George Iranon
Deputy Director for Corrections

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