December 17, 1990

MEMORANDUM

TO: The Honorable Alvin K. Fukunaga
Director of Public Works, County of Maui

FROM: Hugh R. Jones, Staff Attorney

SUBJECT: Public Inspection of Notices of Violation Issued by the Department of Public Works

This is in reply to your letter dated December 18, 1989, requesting an advisory opinion concerning public access to Notices of Violation.

ISSUES PRESENTED

I. Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), Notices of Violation issued by the Department of Public Works ("DPW"), which notify a property owner or lessee of alleged violations of the Maui County zoning, housing, building, electrical or plumbing codes, must be made available for public inspection and copying.

II. Whether, under the UIPA, information compiled by the DPW after the expiration of the period for a property owner's or lessee's voluntary correction of violations noted in a Notice of Violation is subject to public inspection and copying.

BRIEF ANSWER

We conclude that Notices of Violation issued by the DPW are subject to public inspection and copying under the UIPA. Although under section 92F-13(3), Hawaii Revised Statutes, agencies are not required to disclose "[r]ecords or information -

compiled for law enforcement purposes" which if disclosed could reasonably be expected to interfere with enforcement proceedings, such a threat is not present where, as here, the target of any possible enforcement proceeding is in possession of the pertinent government record.

Similarly, public inspection of Notices of Violation will not reveal the identity of, or information furnished to the DPW by, a confidential source, or disclose techniques and procedures for law enforcement investigations or prosecutions which could reasonably be expected to risk circumvention of the law. Nor could disclosure of these records reasonably be expected to endanger the life or physical safety of any individual. Under these circumstances, despite the fact that a Notice of Violation is a "[r]ecord . . . compiled for law enforcement purposes," we conclude that its disclosure will not result in "the frustration of a legitimate government function," under the UIPA.

Furthermore, although under the UIPA, individuals have a significant privacy interest in "information identifiable as part of an investigation into a possible violation of criminal law," we conclude that the disclosure of Notices of Violation issued by the DPW would not constitute "a clearly unwarranted invasion of personal privacy," under section 92F-13(1), Hawaii Revised Statutes. The UIPA declares that the disclosure of a government record shall not constitute a clearly unwarranted invasion of privacy if the public interest in disclosure outweighs the privacy interests of the individual. Haw. Rev. Stat. § 92F-14(a) (Supp. 1989).

In applying the UIPA's balancing test to these government records, in our opinion, there is a significant and overriding public interest in the disclosure of government records which shed light upon an agency's performance or nonperformance of its duties. Without access to Notices of Violation issued by the DPW, the public is deprived of an important means of determining whether the DPW is performing its obligation to enforce the Maui County zoning, housing, building, electrical and plumbing codes.

Lastly, at least in the City and County of Honolulu, Notices of Violation issued regarding particular properties have been traditionally available for public inspection. It was not the intention of the Legislature that the UIPA's exceptions be used to close access to records which were available before the

passage of the Act. Accordingly, we conclude that information set forth in the DPW's Notices of Violation must be made available for public inspection and copying under the UIPA.

II. With respect to information compiled by the DPW after the period for a property owner's or lessee's voluntary correction of a code violation has expired, without a concrete factual context, the OIP is unable to express any definitive opinion on this issue. Generally speaking, however, if this information is compiled in preparation for an enforcement proceeding, and if its disclosure could reasonably be expected to interfere with the enforcement investigation or prosecution; would reveal the identity of, or information furnished by a confidential source; or would reveal law enforcement techniques or procedures that would risk circumvention of the law, it would be protected from public disclosure under section 92F-13(3), Hawaii Revised Statutes. Similarly, the UIPA does not require an agency to disclose government records which are subject to the attorney-client privilege or the attorney work-product doctrine.

FACTS

Section 19.46.020 of the Maui County Code provides that it is the DPW's duty to enforce the provisions of title 19, article II of the Maui County Code, entitled "Comprehensive Zoning Provisions." A violation of the zoning provisions of title 19, article II of the Code is punishable as a misdemeanor. See Maui County Code Þ 19.46.030 (1987). Similarly, it is the obligation of the DPW to enforce the provisions of Maui County's housing, building, electrical and plumbing codes. Violations of these codes are also punishable as a misdemeanor. See Maui County Code §§ 16.08.260, 16.16.420, 16.20.090, and 16.24.070 (1987).

As an administrative practice, before the referral of an alleged zoning, housing, building, electrical or plumbing code violation to the Department of the Prosecuting Attorney, the DPW sends to the owner or responsible lessee of a nonconforming property a "Notice of Violation" (hereinafter "NOV"). The NOV informs the owner or responsible lessee that the subject property is in violation of the zoning, housing, building, electrical or plumbing codes, describes the nature of the violation, and includes a reference to the pertinent code or ordinance. Additionally, the NOV requests the owner or responsible lessee to correct or remove the violation by the date specified in the NOV,

and informs the owner or lessee that the failure to do so will result in the referral of the matter to the Prosecuting Attorney for appropriate action. A copy of an NOV is attached as Exhibit "A." To the extent possible, a copy of the NOV is posted at the subject property, and in the case of building code violations, the law requires such posting. See Maui County Code § 16.24.050 (1987).

If voluntary correction of the alleged violations does not result from the issuance of an NOV, the matter is referred to the Department of the Prosecuting Attorney for the commencement of an enforcement proceeding. Occasionally, upon referral of a violation to the Prosecuting Attorney, the Prosecuting Attorney requests the DPW to gather further information, or to conduct a further investigation, in preparation for an enforcement action.

The DPW requests an advisory opinion concerning the public's right, if any, to inspect and copy NOVs under the UIPA. Additionally, the DPW requests advice concerning public access to information it compiles after such time as the period for the voluntary correction of alleged violations has expired.

DISCUSSION

I. INTRODUCTION

The UIPA, the State's new open records law, sets forth the general rule that "[a]ll government records are open to inspection unless access is closed or restricted by law." Haw. Rev. Stat. § 92F-11(a) (Supp. 1989). Thus, except as provided by section 92F-13, Hawaii Revised Statutes, each agency must "make government records available for inspection and copying during regular business hours." Haw. Rev. Stat. 92F-11(b) (Supp. 1989). Section 92F-13, Hawaii Revised Statutes, sets forth two exceptions to the general rule of required agency disclosure which merit consideration in connection with the issues presented by this opinion.

II. FRUSTRATION OF A LEGITIMATE GOVERNMENT FUNCTION

Section 92F-13(3), Hawaii Revised Statutes, provides that the UIPA does not require agencies to disclose "[g]overnment records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate

government function." In OIP Opinion Letter No. 89-17 (December 27, 1989), we discussed the application of this UIPA exception and established, based upon the Act's legislative history, that it applies to certain "[r]ecords or information compiled for law enforcement purposes." See S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1095 (1988).

In our opinion, information contained in a NOV constitutes "information compiled for law enforcement purposes," since it sets forth information compiled by the DPW in connection with its enforcement of the zoning, housing, building, electrical and plumbing codes. However, this does not end our analysis, since not all law enforcement records, if disclosed, will result in the frustration of a legitimate government function under section 92F-13(3), Hawaii Revised Statutes.

In OIP Opinion Letter No. 89-17, relying upon similar provisions of the federal Freedom of Information Act, 5 U.S.C. Þ 552(b)(7) (Supp. 1989)("FOIA"), and case law interpreting the same, we concluded that "Notice[s] of Deficiencies," sent by the Department of Health to adult residential care homes which set forth violations of regulations enacted for the health and safety of home residents, were not protected from disclosure under the UIPA's "frustration" exception. In that opinion, we concluded that Exemption 7 of FOIA, while not controlling, provides useful guidance in applying the UIPA's exception for law enforcement records which, if disclosed, would frustrate a legitimate government function.

Under Exemption 7 of FOIA, records or information compiled for law enforcement purposes are protected from disclosure only to the extent that their disclosure:

> (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person to a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority . . . and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation . . . information

> furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual.

5 U.S.C. § 552(b)(7) (Supp. 1989).

With respect to FOIA's Exemption 7(A), it was intended to apply "whenever the Government's case in court--a concrete prospective law enforcement proceeding--would be harmed by the premature release of evidence or information not in the possession of known or potential defendants." Goldschmidt v. United States Department of Agriculture, 557 F. Supp. 274, 277 (D. D.C. 1983) (emphasis added). Other cases in which a claim of Exemption 7(A) has been made also focus on whether the release of withheld documents would permit the target of the investigation to discern the scope and nature of the government's case, or to affect evidence or impede an investigation. See, e.g., NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 98 S. Ct. 2311, 57 L. Ed. 2d 159 (1978).

As with the Notices of Deficiencies considered in OIP Opinion Letter No. 89-17, it would be difficult for us to conclude that the disclosure of NOVs issued by the DPW "could reasonably be expected to interfere with enforcement proceedings," when the alleged code violators are served with copies of such notices. In such a case, a potential target of an investigation or enforcement action would only be permitted access to information that is already in the potential target's possession.

The case of Cunningham v. Health Officer of Chelsea, 385 N.E.2d 1011 (Mass. App. 1979) also offers some guidance in resolving the question presented. In Cunningham, the court held that "inspection reports," which identified housing code violations on several properties owned by two property owners, were public records. Although the court in Cunningham noted that the state's public records law protected from disclosure "investigatory materials necessarily compiled out of the public view by law enforcement or other investigatory officials," it

reasoned that that housing code inspection reports were not "compiled out of the public view." Specifically, the Cunningham court noted that state law required that copies of any investigation or inspection report, and any written order or notice to the owner issued by the board of health be sent to "the occupants of all affected premises." Cunningham, 385 N.E.2d at 1012. The court also stated that there was no indication that disclosure of the housing code inspection reports would prejudice a prospective enforcement proceeding, that confidential investigative techniques would be revealed, or that citizens would be discouraged from cooperating with authorities. Id.

The Goldschmidt case, cited above, also supports a conclusion that the disclosure of NOVs issued by the DPW will not result in the interference with enforcement proceedings. In Goldschmidt, the court concluded that "inspection reports," prepared by the Department of Agriculture, which noted conditions in meat or poultry plants which the inspector believed to be in violation of applicable regulations, would not "interfere with enforcement proceedings" if disclosed.

In Goldschmidt, the Department of Agriculture objected to the disclosure of the inspection reports, on the basis that if they were made public before the plant had an opportunity to informally correct alleged violations, "voluntary compliance" would be frustrated. The Goldschmidt court held that because the alleged violator was customarily given a copy of the inspection reports, their disclosure would not interfere with enforcement proceedings. Additionally, in response to the agency's suggestion that disclosure of the inspection reports would discourage voluntary correction of violations, the court reasoned that just the opposite may be true, stating, "[c]ommon sense suggests that the possibility of adverse publicity would be at least as likely to encourage compliance with regulations as discourage it." Goldschmidt, 557 F. Supp. at 278. Further, the court reasoned that:

> Congress never intended 7(A) to be so broad as to prohibit disclosure where, as here, publicity surrounding an establishment's violations "interferes" with enforcement by embarrassing the establishment so that it drags its heels in remedying its compliance. Such a broad application would enable an agency to withhold investigatory records in

> almost all cases; it is difficult to imagine a situation in which publicity surrounding an investigation might not have some detrimental effect on the target's behavior or attitude.

Goldschmidt, 557 F. Supp. at 278.

Lastly, the decision of the Supreme Court of Illinois in Lopez v. Fitzgerald, 390 N.E.2d 835 (Ill. 1979), deserves attention in resolving the issue presented. In Lopez, individuals sought access to building "inspection reports" concerning buildings in which they resided under the state's Local Records Act and under the City of Chicago's Municipal Records Act. The individuals seeking access alleged that the building inspection reports were "public records" under these state and local records laws. Consistent with the County of Maui's practice, if an investigation revealed building code violations, the City of Chicago sent a written notice of such fact to the owner, occupant, lessee, or the person in possession of the premises. Such notice provided the owner or lessee with an opportunity to correct the noted violations, and failing the same, the matter would be referred to the corporation counsel for prosecution.

The Lopez court held that the public was not entitled to inspect or copy the building inspection reports compiled by the City of Chicago. First, the court found that both the Local Records Act and Municipal Records Act were not public access laws, but rather were laws concerning whether records "should be preserved by a unit of government." Lopez, 390 N.E.2d at 838-839. The court then found that the inspection reports were not records available at common law. The court reached this conclusion on the basis that the inspection reports were "investigatory records" and were only the first stage in the process of finding building code violations and ensuring their correction.

Additionally, the court concluded that under the common law, the disclosure of these investigatory records before the building owner received notice of the alleged violations and a compliance hearing, would violate the privacy of such building owners:

> To release initial and unevaluated investigation reports threatens privacy interests. Public

> disclosure of such reports would also tend to impair the efficiency of day-to-day activities of and investigations by the Department of Buildings. In absence of factors supporting disclosure other than a general policy of openness in government and the plaintiff's interest in the condition of buildings, and in the face of countervailing factors, investigative reports are not open to public access.

Lopez, at 841 (emphases added).

The Lopez court noted that in Citizens for Better Care v. Department of Public Health, 215 N.W.2d 576 (Mich. App. 1974), the Michigan Court of Appeals ordered the disclosure of nursing home safety investigative reports, but distinguished the Michigan decision on the basis that the investigative reports in the Citizens case had already been disclosed to the nursing home operators, the targets of the investigation. See Lopez at 841.

In our opinion, the facts in the Lopez case can be distinguished from those presented here. First, the court's decision was controlled by the common law, not by statutory provisions, like the UIPA, which presume that a government record is public unless access is closed or restricted by law. Secondly, at issue in Lopez were investigatory records which had not been disclosed to the target of the investigation, the building owners.

As discussed above, most authorities who have considered the issue have held that the disclosure of records or information compiled for law enforcement purposes will not interfere with an enforcement proceeding where the target of the investigation is in possession of the records or information is question. Therefore, in our view, the rationales of the Goldschmidt, Citizens, and Cunningham cases present a better approach under the UIPA for determining whether the disclosure of law enforcement records "could reasonably be expected to interfere with a law enforcement proceeding."

Accordingly, we conclude that the disclosure of NOVs issued by the DPW could not reasonably be expected to interfere with a law enforcement proceeding. Additionally, we do not believe that the disclosure of NOVs issued by the DPW would result in the disclosure of the identity of, or information furnished by, a

confidential source, deprive an individual of a right to a fair trial, or disclose techniques and procedures for law enforcement investigations that could reasonably be expected to risk circumvention of the law. Similarly, we do not believe that the disclosure of NOVs could reasonably be expected to endanger the life or physical safety of any individual. Accordingly, although NOVs issued by the DPW constitute "[r]records or information compiled for law enforcement purposes," we conclude that their disclosure will not result in the frustration of a legitimate government function under section 92F-13(3), Hawaii Revised Statutes. We now turn to an examination and application of the UIPA's privacy exception to public access.

III. CLEARLY UNWARRANTED INVASION OF PRIVACY

The UIPA also does not require the disclosure of "[g]overnment records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy." Haw. Rev. Stat. § 92F-13(1) (Supp. 1989). Under the UIPA, the "[d]isclosure of a government record shall not constitute a clearly unwarranted invasion of personal privacy if the public interest in disclosure outweighs the privacy interests of the individual." Haw. Rev. Stat. § 92F-14(a) (Supp. 1989).

Under this balancing test, "if a privacy interest is not `significant,' a scintilla of public interest in disclosure will preclude a finding of a clearly unwarranted invasion of personal privacy." H. Conf. Comm. Rep. No. 112-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 817, 818 (1988); S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw S.J. 689, 690 (1988). Indeed, the legislative history of the UIPA's privacy exception indicates this exception only applies if an individual's privacy interest in a government record is "significant." See id. ("[o]nce a significant privacy interest is found, the privacy interest will be balanced against the public interest in disclosure").

In section 92F-14(b), Hawaii Revised Statutes, the Legislature set forth examples of information in which an individual has a "significant privacy interest." Section 92F-14, Hawaii Revised Statutes, provides in pertinent part:

> (b) The following are examples of information in which the individual has a significant privacy interest:

. . . .

(2) Information identifiable as part of an investigation into a possible violation of criminal law, except to the extent that disclosure is necessary to prosecute the violation or continue the investigation . . . .

Haw. Rev. Stat. § 92F-14(b)(2) (Supp. 1989) (emphasis added).

For purposes of our analysis, we shall assume, without deciding, that an NOV is "information identifiable as part of an investigation into a possible violation of criminal law,"[1]1 and that an alleged zoning, building or housing code violator has a "significant" privacy interest in such information under the UIPA. If the public interest in the disclosure of this information outweighs an individual's significant privacy interest in the same, it must be made available for public inspection and copying under the UIPA. See Haw. Rev. Stat. § 92F-14(a) (Supp. 1989).

In previous OIP advisory opinions, we concluded that the "public interest" to be considered under the UIPA's balancing test is the public interest in the disclosure of "[o]fficial information that sheds light on an agency's performance of its statutory duties," see OIP Op. Ltr. No. 90-7 (Feb. 9, 1990), and in information which sheds light upon the conduct of government officials, see OIP Op. Ltr. No. 90-17 (Apr. 24, 1990). Two of the basic policies served by the UIPA are to "[p]romote the public interest in disclosure" and to "[e]nhance governmental accountability through a general policy of access to government records." See Haw. Rev. Stat. § 92F-2 (Supp. 1989).

Further, in enacting the UIPA, the Legislature declared that "it is the policy of this State that the formation and conduct of public policy--the discussions, deliberations, decisions, and

[1]Arguably, an NOV is not "part of an investigation" into a possible violation of criminal law, but rather, is the product or result of such an investigation. See, e.g., Caledonia Publishing Company v. Walton, 573 A.2d 296, 300 (Vt. 1990) (arrest and citation records are the result of the detection and investigation of crime, not "part of such detection and investigation"); Op. Att'y Gen. Fla. No. 80-96 (1980) (arrest report not an investigatory record, but is the "fruit" of an investigation).

action of government agencies--shall be conducted as openly as possible." Haw. Rev. Stat. § 92F-2 (Supp. 1989). Thus, the public interest to be considered in applying the UIPA's balancing test is the public interest in disclosure of information which sheds light upon an agency's performance of its duties and the conduct of government officials, or which otherwise promotes governmental accountability. On the contrary, however, in previous OIP advisory opinions, we reasoned that this "public interest," in the usual case, is "not fostered by disclosure of information about private citizens that is accumulated in various government files but that reveals little or nothing about any agency's own conduct." OIP Op. Ltr. No. 89-16 (Dec. 27, 1989), quoting, U.S. Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 109 S. Ct. 1468, 1481, 103 L. Ed. 2d 774, 796 (1989).

Applying the above principles to NOVs issued by the DPW, we conclude that there is a significant public interest in their disclosure under the UIPA. Specifically, the disclosure of this government record would reveal information concerning the DPW's performance of its obligation to enforce codes enacted for the health, safety, and welfare of the public. Without the disclosure of these records, the public is left "in the dark" concerning whether the DPW takes action in response to citizen complaints and is otherwise performing its duty to enforce these laws. The disclosure of these government records would further the UIPA's core purpose of enhancing governmental accountability by providing access to government records which shed light on the conduct of agencies and their officials. On these facts, under the UIPA, the "public interest in disclosure" of these government records is at a zenith.

Furthermore, based upon information provided by the Building Safety Division of the Building Department of the City and County of Honolulu, it appears that the NOVs that the agency maintains have been traditionally open to public inspection, unless a violation was the subject of current litigation. Likewise, the fact that NOVs are often publicly posted, and in the case of a building code violation, must be posted, support our conclusion. The legislative committee reports to the UIPA state, "[i]t is not the intention of Legislature that section [92F-13] be used to close currently available records, even though these records may fit within one of the categories in this section." H. Conf. Comm. Rep. No. 112-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 817,

818 (1988); S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 690 (1988). Thus, it would appear that closing access to these records under one of the exceptions in section 92F-13, Hawaii Revised Statutes, would be contrary to the legislative intent behind the UIPA's exceptions to public access.

Accordingly, we conclude that the disclosure of the information contained in an NOV would not "constitute a clearly unwarranted invasion of personal privacy," under section 92F-13(1), Hawaii Revised Statutes, because the public interest in disclosure of such information outweighs any privacy interest an individual may have in such information. Additionally, withholding access to these records by the public would appear to be contrary to the Legislature's intention that the UIPA not be applied in such a manner to close access to currently available records.

With respect to information compiled by the DPW after the period for a property owner's or lessee's voluntary correction of a code violation has expired, without a concrete factual context, we would be unable to express any definitive opinion concerning the disclosure or non-disclosure of this information. Generally, if this information is being compiled in preparation for an enforcement proceeding by the Prosecuting Attorney, and if its disclosure could reasonably interfere with an enforcement investigation or prosecution, would reveal the identity of, or information furnished by, a confidential source, or would reveal law enforcement techniques or procedures that would risk circumvention of the law, it would be protected from disclosure by section 92F-13(3), Hawaii Revised Statutes. Further, some of this information may involve inter-agency communications between the DPW and the Prosecuting Attorney and be subject to the attorney-client privilege or the attorney work-product doctrine.

However, without a specific factual setting and a review of the pertinent government records, this office can only make the most general of observations set forth above concerning access to information compiled by the DPW after the period for voluntary compliance has expired. Such determinations need to be made on a case-by-case basis. Should the DPW receive a request to inspect information it has compiled in contemplation of an enforcement proceeding, it should contact the OIP for specific guidance concerning its disclosure obligations under the UIPA.

CONCLUSION

Although an NOV contains information compiled for law enforcement purposes, in our opinion, its disclosure would not result in the frustration of a legitimate government function under section 92F-13(3), Hawaii Revised Statutes. Because the potential target of an enforcement proceeding is provided with a copy of such notice, and because such notices are often publicly posted, their disclosure could not reasonably be expected to interfere with an enforcement proceeding.

Additionally, the disclosure of an NOV would not constitute a clearly unwarranted invasion of personal privacy under the UIPA. Although individuals have a significant privacy interest in this government record, that interest is outweighed by an overriding public interest in assuring that regulations enacted for the health, safety, and welfare of the public are being enforced. Without public access to these government records, the public lacks any meaningful way of confirming whether those responsible for the enforcement of such regulations take appropriate action upon citizen complaints.

Further, it appears that at least in the City and County of Honolulu, such records have been traditionally open to public inspection. It was not the intention of the Legislature that the UIPA be used to close access to records which were made available before the passage of this new public records law.

With respect to information compiled by the DPW after the period for voluntary correction of alleged code violations has expired, the OIP is unable to render a definitive opinion concerning this issue without a concrete factual setting. However, generally speaking, an agency is not required by the UIPA to disclose government records if public access to the same could reasonably interfere with an enforcement investigation or prosecution, would reveal the identity of, or information furnished by, a confidential source, or would reveal law enforcement techniques or procedures that would risk circumvention of the law.

Hugh R. Jones
Staff Attorney

HRJ:sc
Attachment
cc: The Honorable Glenn Kosaka
Maui County Corporation Counsel

APPROVED:

Kathleen A. Callaghan
Director