

December 31, 1991

The Honorable Kathleen N. A. Watanabe
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County of Kauai
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The Honorable Howard H. Tagomori
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Ms. Sharon L. Kimura

Dear Ms. Watanabe, Chief Tagomori and Ms. Kimura: Re:

Disclosure of Autopsy Reports

This is in response to the requests for opinions received by the Office of Information Practices ("OIP") from the Kauai Office of the County Attorney, the Chief of Police of the County of Maui, and Ms. Sharon L. Kimura concerning the disclosure of autopsy reports.

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), autopsy reports maintained by the Medical Examiner's Office, City & County of Honolulu ("Honolulu Medical Examiner's Office"), and by the police departments of Kauai, Maui, and Hawaii counties, should be made available for public inspection and copying.

BRIEF ANSWER

Under the UIPA, agencies are not required to disclose "[g] overnment records which, pursuant to state or federal law

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. . . are protected from disclosure." Haw. Rev. Stat. §92F-13(4) (Supp. 1991). Our research disclosed no provision of chapter 841, Hawaii Revised Statutes, entitled "Inquests, Coroners," that expressly prohibits the disclosure of autopsy reports. Accordingly, it is our opinion that autopsy reports are not protected from disclosure by section 92F-13(4), Hawaii Revised Statutes.

Additionally, under the UIPA, agencies are not required to disclose government records that would constitute a "clearly unwarranted invasion of personal privacy." Haw. Rev. Stat. §92F-13 (1) (Supp. 1991) . In section 92F-14 (b) (1), Hawaii Revised Statutes, the Legislature indicated that individuals have a significant privacy interest in information relating to their medical history, condition, treatment, or diagnosis.

However, in previous advisory opinions, the OIP determined that the UIPA's personal privacy exception only applies to living individuals, and that an individual's death extinguishes any privacy interest that the individual may have had in government records. See OIP Op. Ltr. Nos. 90-18 (May 18, 1990); 90-26 (July 19, 1990) . Consequently, under the UIPA, deceased individuals do not have a recognizable privacy interest in their autopsy reports.

Moreover, absent unusual circumstances, we believe that, under the UIPA, surviving family members do not have a privacy interest in an autopsy report about a deceased relative. However, if an autopsy report contains information identifying a living individual, the privacy interest of that living individual must be balanced against the public interest in the disclosure of the autopsy report to determine whether disclosure would constitute a clearly unwarranted invasion of such living individual's privacy. Accordingly, we conclude that the UIPA's personal privacy exception generally does not protect autopsy reports from public inspection and copying.

Additionally, the UIPA does not require agencies to disclose "[r] ecords or information compiled for law enforcement purposes," the disclosure of which would result in the frustration of a legitimate government function. See S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1095 (1988).

Using Exemption 7 of the federal Freedom of Information Act, 5 U.S.C. §552(b) (7) (1988), and case law from other

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jurisdictions for guidance, we believe that, when used in connection with a pending law enforcement investigation, the premature disclosure of an autopsy report "could reasonably be expected to interfere with law enforcement proceedings" by giving the target of the investigation premature access to the government's case in court. Thus, we conclude that autopsy reports that are connected with a pending or prospective law enforcement investigation may be withheld from disclosure under section 92F-13(3), Hawaii Revised Statutes. However, we believe that upon the conclusion of the investigation and subsequent prosecution, if any, the autopsy report should be made available for public inspection and copying, because, under these circumstances, disclosure could not reasonably be expected to interfere with potential enforcement proceedings.

FACTS

By letter dated July 5, 1989, the Kauai Office of the County Attorney requested an OIP advisory opinion concerning whether, under the UIPA, it must disclose the autopsy report concerning a traffic accident fatality to an insurance company investigating the accident.

Additionally, the Chief of Police of the County of Maui, in a letter dated July 11, 1989, requested an OIP advisory opinion concerning the disclosure of autopsy reports to the Molokai General Hospital ("Hospital") when an autopsy is performed upon a patient who died at the Hospital, or when the autopsy was performed at the Hospital.

Finally, in a letter dated July 19, 1991, Ms. Sharon L. Kimura requested the OIP's assistance in obtaining a copy of her deceased brother's autopsy report from the Honolulu Medical Examiner's Office.

Pursuant to section 841-3, Hawaii Revised Statutes, if an individual dies "as the result of violence, or as the result of any accident, or by suicide, or suddenly when in apparent health, or when unattended by a physician, or in prison, or in a suspicious or unusual manner, or within twenty-four hours after admission to a hospital or institution," the coroner or deputy coroner is required to make a complete investigation of the cause of death. Autopsy reports are requested by the coroner, the coroner's physician, the prosecuting attorney, or the Chief of Police of the City and County of Honolulu, if deemed necessary because an individual's death has occurred under one

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of the circumstances listed in section 841-3, Hawaii Revised Statutes. Haw. Rev. Stat. § 841-14 (Supp. 1991).

The Neighbor Island police chiefs and the Honolulu Medical Examiner's Office are designated as county coroners under section 841-1, Hawaii Revised Statutes. Therefore, autopsy reports are maintained by the Medical Examiner's Office for deaths occurring on Oahu, and maintained by the police departments on the islands of Kauai, Maui, and Hawaii for deaths occurring on the Neighbor Islands.

In the City and County of Honolulu, autopsies are performed by the Chief Medical Examiner, who is a physician, or by another member of the Honolulu Medical Examiner's Office who is a physician. Therefore, in the City and County of Honolulu, the autopsy report is also the coroner's report. On the Neighbor Islands, the chiefs of police are the designated coroners. However, because the police chiefs are not physicians, they must rely on a physician or pathologist to perform the autopsy and prepare the autopsy report. Autopsies in Kauai and Hawaii Counties are performed by the pathologists at Wilcox Hospital and Hilo Hospital, respectively. In Maui County, however, physicians from the Honolulu Medical Examiner's Office are sent to Maui to perform the autopsies. In each of the Neighbor Island counties, autopsy reports submitted to the Neighbor Island police chiefs become coroner's reports.

Currently, policies regarding the disclosure of autopsy reports vary among the counties. The Honolulu Medical Examiner's Office informed the OIP that it considers an autopsy report a public document unless there is a pending criminal investigation connected with the death. If there is an ongoing criminal investigation, the autopsy report is kept confidential, and family members are not allowed to inspect the autopsy report. However, once the criminal investigation is completed and the criminal case has gone to a grand jury for indictment, we are informed that the autopsy report is made available for public inspection.

According to our research, in Maui County, autopsy reports are disclosed on a "need-to-know" basis. If a death has resulted in a criminal investigation, the Maui County Chief of Police will consult with the Maui County Prosecutor's Office when making the decision whether to disclose an autopsy report in response to a public request.

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In Hawaii County, if the death has resulted in a criminal investigation, the autopsy report is kept confidential until the investigation is completed. Upon completion of the investigation, the autopsy report is given to the deceased's next-of-kin and any other requests for copies of the autopsy report, including requests made by insurance companies investigating the death, are referred to the next-of-kin.

As in Maui County, the Kauai Police Department also consults with the Kauai Prosecutor's Office before disclosing an autopsy report connected with a pending criminal investigation. However, in situations where the death is not connected with a criminal investigation, the Kauai Police Department will permit the family of the deceased individual to obtain a copy of the autopsy report. According to our investigation, Kauai County requires any third party requesting a copy of an autopsy report to present a written authorization from the family of the deceased individual.

DISCUSSION

I. INTRODUCTION

The UIPA, the State's new public records law, generally provides that "[a] ll government records are open to public inspection unless access is restricted or closed by law." Haw. Rev. Stat. § 92F-11(a) (Supp. 1991). The term "government record" is defined in section 92F-3, Hawaii Revised Statutes, as "information maintained by an agency in written, auditory, visual, electronic, or other physical form." Under the UIPA, "[e] xcept as provided in section 92F-13, 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. 1991).

The autopsy reports maintained by the Honolulu Medical Examiner's Office and the police departments of the counties of Kauai, Maui, and Hawaii constitute "government record[s]" within the meaning of section 92F-3, Hawaii Revised Statutes. Consequently, autopsy reports maintained by each county are subject to the provisions of the UIPA.

Preliminarily, we note that the Honolulu Medical Examiner's Office considers autopsy reports to be "public" government records unless connected with an ongoing criminal investigation. Therefore, it is necessary to consider the legislative history

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of the UIPA which states that "[i] t is not the intent of the Legislature that this section [92F-13] be used to close currently available records, even though these records might fit within one of the categories in this section." S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 690 (1988), H. Conf. Comm. Rep. No. 112-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 817, 818 (1988) . Based upon this legislative history, it appears that autopsy reports maintained by the Honolulu Medical Examiner's Office should remain public. However, unlike the Honolulu Medical Examiner's Office, the police departments of the counties of Kauai, Maui, and Hawaii have not, in the past, considered autopsy reports to be public government records. Moreover, this policy of nondisclosure is still in effect despite the enactment of the UIPA in 1989. Consequently, in order to ensure uniformity, we need to determine whether all autopsy reports in the State of Hawaii will be public under the UIPA. Accordingly, we now turn to a consideration of the UIPA's exceptions to required disclosure.

Three of the UIPA exceptions listed in section 92F-13, Hawaii Revised Statutes, may apply to protect autopsy reports from disclosure. Section 92F-13, Hawaii Revised Statutes, provides in pertinent part:

□9²F-13 Government records; exceptions to general rule. This chapter shall not require disclosure of:

- (1)Government records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy;
-
- (3)Government records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function;
- (4)Government records which, pursuant to state or federal law including an order of any state or federal court, are protected from disclosure; . . .
- . . .

Haw. Rev. Stat. □92F-13(1), (3), and (4) (Supp. 1991).

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For purposes of clarity, we shall separately examine the applicability of each of the above exceptions to autopsy reports maintained by the various counties.

II. RECORDS PROTECTED FROM DISCLOSURE BY STATE OR FEDERAL LAW

Chapter 841, Hawaii Revised Statutes, entitled "Inquests, Coroners," governs autopsy procedures and reports in the State of Hawaii. Section 841-14, Hawaii Revised Statutes, specifically describes the circumstances under which an autopsy is performed. Section 841-9, Hawaii Revised Statutes, establishes a fee for certified copies of a coroner's report, and provides:

§841-9 Fees. Upon the application by other than governmental agencies for a certified copy of any coroner's report and inquest, the coroner or deputy coroner shall collect the sum of \$2 as a governmental realization for the preparation and issuance of the same. . . .

Haw. Rev. Stat. §841-9 (1985) (emphasis added).

Our research disclosed no State or federal law that expressly prohibits the disclosure of autopsy reports prepared by county coroners. Indeed, section 841-9, Hawaii Revised Statutes, appears to recognize that autopsy reports will be disclosed to the public. Therefore, it is our opinion that section 92F-13(4), Hawaii Revised Statutes, does not authorize the counties to withhold autopsy reports from public access.

III. CLEARLY UNWARRANTED INVASION OF PERSONAL PRIVACY

Section 92F-13(1), Hawaii Revised Statutes, does not require agencies to disclose "[g] overnment records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy." While in section 92F-14(b) (1), Hawaii Revised Statutes, the Legislature recognized that individuals have a significant privacy interest in certain medical information, in previous OIP opinion letters we concluded that the right of personal privacy applies only to living individuals, and that an individual's privacy interest in government records is extinguished upon the individual's death.

See OIP Op. Ltr. Nos. 90-18 (May 18, 1990) and 90-26 (July 19, 1990) . OIP Opinion Letter No. 90-18 further observed that "surviving family members may not have a significant privacy

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interest in a deceased individual's record unless their own privacy interests are directly intertwined with the record." OIP Op. Ltr. No. 90-18 at 9.

We recognize that, in rare cases, certain autopsy reports may contain information which identifies living individuals. In these special circumstances, the privacy interests of the living individuals may outweigh the public interest in disclosure of the autopsy report. Thus, where an autopsy report contains information concerning a living individual, it is necessary to balance such individual's privacy interests against the public interest to determine whether disclosure would be a "clearly unwarranted invasion of personal privacy." Haw. Rev. Stat. §92F-14 (a) (Supp. 1991).

Recent case law supports the OIP's previous conclusion that deceased individuals do not have protectible privacy interests in government records. In Joe Swickard v. Wayne County Medical Examiner, 475 N.W.2d 304, 438 Mich. 536 (1991), the Michigan Supreme Court held that the right to privacy is a personal right and ceases with the death of the individual. The Court found that the disclosure of an autopsy report and toxicology test results concerning a suicide victim, who was the Chief Judge of the Michigan 36th District Court, would not constitute an invasion of the deceased judge's privacy. It also found that the autopsy report would not reveal any private facts concerning the surviving family members. Thus, the Court held that the reports should be made available for public inspection.

While a few legal authorities in other states have found that autopsy reports are "confidential,"¹ we believe that these cases represent the minority view and that the decision of the court in the Swickard case, and in the cases cited in OIP Opinion Letter No. 90-18 are more persuasive in light of the policies underlying the UIPA. Additionally, as with other state and federal freedom of information laws, the UIPA's

¹See Globe Newspaper v. Chief Medical Examiner, 533 N.E. 2d 1356, 1357 (Mass. 1989) (autopsy reports are confidential medical records); Nev. Att'y Gen. Op. No. 82-12 (June 15, 1982) (there is no public interest in the disclosure of autopsy reports that is sufficient to outweigh the public policy of confidentiality of personal medical information).

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exceptions to required disclosure should be narrowly construed. See, e.g., Dep't of the Air Force v. Rose, 425 U.S. 352, 361-62 (1976); Wilson v. Freedom of Information Commission, 435 A.2d 353 (Conn. 1980); Detroit Free Press, Inc. v. Oakland County Sheriff, 418 N.W. 2d 124 (Mich. App. Ct. 1987).

Accordingly, consistent with our previous determination in OIP Opinion Letter No. 90-18 (May 18, 1990), we conclude that the right to privacy is a personal right that is generally extinguished upon an individual's death. Thus, it is our opinion that the disclosure of an autopsy report would not constitute a clearly unwarranted invasion of the deceased's privacy. However, as noted earlier, when an autopsy report contains information identifying a living individual, the privacy interest of the living individual must be balanced against the public interest in disclosure of the autopsy report to determine whether disclosure of the autopsy report will be a clearly unwarranted invasion of such living individual's personal privacy.

IV. FRUSTRATION OF LEGITIMATE GOVERNMENT FUNCTION

Under section 92F-13(3), Hawaii Revised Statutes, agencies are not required to disclose government records which, if disclosed, would result in the "frustration of a legitimate government function." The legislative history of this UIPA exception states that it applies to certain "[r] ecords or information compiled for law enforcement purposes." S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1095 (1988).

A. Law Enforcement Exemption Under the Federal Freedom of Information Act

In previous OIP opinion letters, we found that the law enforcement record exception contained in the federal Freedom of Information Act, 5 U.S.C. § 552(b) (7) (1988) ("FOIA"), provides useful guidance in determining whether the disclosure of records or information compiled for law enforcement purposes would result in the frustration of a legitimate government function under the UIPA. See OIP Op. Ltr. Nos. 91-6 (May 2, 1991); 90-36 (Dec. 17, 1990); 89-17 (Dec. 27, 1989). Exemption 7(A) of the FOIA provides, in pertinent part, that records or information compiled for law enforcement purposes are protected from required disclosure to the extent that disclosure "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b) (7) (A) (1988).

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Case law interpreting Exemption 7(A) has established that, generally, this exemption only applies as long as the relevant law enforcement proceeding is pending or prospective. See Barney v. IRS, 618 F.2d 1268, 1273-74 (8th Cir. 1980) (Exemption 7(A) will not apply once enforcement proceedings are either concluded or abandoned); Kilroy v. NLRB, 633 F.Supp. 136, 142-43 (S.D. Ohio 1985) (Exemption 7(A) only applies when a law enforcement proceedings is pending), aff'd, 823 F.2d 553 (6th Cir. 1987); Marzen v. HHS, 632 F. Supp. 785, 805 (N.D. Ill. 1985) (Exemption 7(A) applies where disclosure would interfere with law enforcement proceedings "pending, contemplated, or in the future").

We believe that an autopsy report prepared during the course of a law enforcement investigation or being used in the course of such an investigation constitutes a record "compiled for a law enforcement purpose." However, because there are situations where the criminal investigation does not commence until some period of time after the autopsy is performed, under such circumstances it could be argued that these autopsy reports were not "compiled for a law enforcement purpose."

The question whether a record was "compiled" for a law enforcement purpose was addressed in John Doe Agency v. John Doe Corp., 493 U.S. 146 (1989) . In John Doe, the United States Supreme Court held that a record need not have been originally compiled for law enforcement purposes in order to qualify for the law enforcement record exemption under the federal Freedom of Information Act. The Court found that "[a] compilation, in its ordinary meaning, is something composed of materials collected and assembled from various sources or other documents." John Doe at 476. In order to qualify for the law enforcement exemption under the federal FOIA, "documents need only to have been compiled when the response to the FOIA request [was] made." Id. at 477. Thus, records that were not originally compiled for a law enforcement purpose are eligible for protection under FOIA's Exemption 7 if later used in the course of a law enforcement investigation.

Authorities from other states also provide useful guidance in determining whether the disclosure of records or information compiled for law enforcement purposes would result in the frustration of a legitimate government function.

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B. Authorities From Other States

In a lengthy opinion detailing the history of autopsy report disclosure practices in Florida, the Florida Attorney General noted that autopsy reports are required to be made and maintained by the Medical Examiner's Office pursuant to section 406.13, Florida Statutes. Fla. Att'y Gen. Op. No. 78-23 (Feb. 21, 1978). Thus, the opinion concluded that autopsy reports fit the "broad" definition of "public record" under the Florida Public Records Law, chapter 119, Florida Statutes. In making its determination concerning the public disclosure of autopsy reports, the opinion examined the "police secrets rule" in section 119.07(1), Florida Statutes, and concluded that:

[T]his exception is applied only where the effect would be to significantly impair or impede the enforcement of the law and enable violators to escape detection. It would appear that in certain unusual cases, the medical examiner's autopsy report could contain information which if disclosed would defeat the very purpose of the report. Under such circumstances, the medical examiner could be justified in withholding those portions of the report which, if publicized, would significantly impair the ability of law enforcement officers to apprehend those suspected of committing the crime. This is not to say that the entire report should be suppressed until an investigation is complete; rather, only those portions of the report which would clearly fall within the rule could be withheld until such time as its release would not endanger a pending investigation.

Fla. Att'y Gen. Op. No. 78-23 (Feb. 21. 1978).

Like Florida, the Wisconsin Court of Appeals, in Journal/Sentinel, Inc. v. Aagerup, 429 N.W.2d 772 (Wis. App. 1988), held that autopsy reports which are part of a law enforcement detection effort may be withheld from public inspection. Although recognizing that exceptions to the general policy of disclosure of government records are rare, the court stated that "some autopsies are invaluable strategies for crime detection" and, thus, "records pertinent to ongoing criminal investigations may implicate an overriding public interest in preserving secrecy." Id. at 775 (emphasis added).

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In State ex rel. Dayton Newspapers, Inc. v. Rauch, 465 N.E.2d 458 (Ohio 1984), the Supreme Court of Ohio held that autopsy reports "are exempt from disclosure as specific investigatory work product under section 149.43(A)(2)(c), Ohio Revised Code," because "[t]he autopsy is, in itself, an investigation." Rauch at 459. The Court also recognized that "the confidentiality of the contents of an autopsy report is essential to its effective use in further investigation by law enforcement personnel." Id. However, because of the brevity of the opinion, we cannot determine whether, in Ohio, autopsy reports not connected with a criminal investigation should be made public or whether autopsy reports are public at the conclusion of a law enforcement investigation.

Based on foregoing authorities, we believe that autopsy reports used in connection with law enforcement investigations are protected from required disclosure under section 92F-13(3), Hawaii Revised Statutes. Disclosure of the autopsy reports in pending or prospective enforcement proceedings could reasonably be expected to interfere with enforcement proceedings by permitting the targets of an investigation to have premature access to the government's evidence or by assisting them in eluding detection. Therefore, we conclude that when connected with a civil or criminal law enforcement investigation, autopsy reports may be withheld from public inspection and copying under section 92F-13(3), Hawaii Revised Statutes. However, once the investigation and subsequent prosecution, if any, is concluded, we believe that autopsy reports should be made available for public inspection.

CONCLUSION

Previous OIP opinion letters have established that the right to privacy is a personal right that is generally extinguished upon an individual's death. Accordingly, under the UIPA, deceased individuals do not have a recognizable privacy interest in their autopsy reports. However, if a living individual is mentioned in an autopsy report, disclosure of that report, under the UIPA, will depend upon a balancing of the privacy interests of that living individual against the public interest in disclosure of the autopsy report.

We further conclude that under the UIPA's "frustration of a legitimate government function" exception, autopsy reports connected with an ongoing law enforcement investigation may be kept confidential. However, once the investigation and the

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subsequent prosecution, if any, has concluded, it is our opinion that the autopsy report must be made available for public inspection and copying under the UIPA.

Very truly yours,

Stella M. Lee
Staff Attorney

APPROVED:

Kathleen A. Callaghan
Director

SML: s c

c: Alvin I. Omori, M.D.
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