

October 13, 1994

Mr. Gregory Barnett
Maui Community Correctional Facility
600 Waiale Drive
Wailuku, Hawaii 96793

Dear Mr. Barnett:

Re: Access to PSD Policies Concerning Court Appearance and
Transport of Inmates and Protective Custody Management

This is in reply to your letter to the Office of Information Practices ("OIP") requesting an advisory opinion concerning your right to inspect and copy the above-referenced policies of the Department of Public Safety, Corrections Division ("PSD").

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), the PSD must make policy number COR.08.01, entitled "Court Appearance and Transport of Inmates," and policy number COR.11.03, entitled "Protective Custody Management," available for public inspection and copying.

BRIEF ANSWER

Under part II of the UIPA, an agency is not required 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." Haw. Rev. Stat. § 92F-13(3) (Supp. 1992).

Based upon principles set forth in OIP Opinion Letter No. 90-34 (Dec. 10, 1990), and federal court decisions interpreting Exemption 2 of the federal Freedom of Information Act, 5 U.S.C. § 552 (1988), we believe that the PSD may withhold public access to policy number COR.08.01 which sets forth security measures for the transportation of inmates in State correctional facilities.

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We reach this conclusion because this policy is "predominately internal," and because the disclosure of this policy would significantly risk the circumvention of agency statutes and regulations, or prison security measures. Public access to this policy would likely "benefit those attempting to violate the law and avoid detection."

In contrast, for the reasons set forth below, we do not believe that public disclosure of PSD policy number COR.11.03 would result in the frustration of a legitimate government function by significantly risking the circumvention of prison security measures. This policy sets forth criteria to be applied in determining whether an inmate should be segregated from the prison population for the inmate's safety; due process procedures for inmates who have been involuntarily segregated; procedures for documenting an inmate's placement in protective custody; and procedures for the review of an inmate's placement in protective custody and the inmate's release from protective custody. Therefore, it is our opinion that PSD policy number COR.11.03 should be made available for inspection and copying upon request by any person.

FACTS

In a letter to the OIP dated August 18, 1993, you stated that you requested the PSD to permit you to inspect and copy PSD policy numbers COR.08.01 and COR.11.03 entitled "Court Appearance and Transport of Inmates," and "Protective Custody Management," respectively, and that your request was denied by the PSD. In your letter, you requested the OIP to hear an appeal under section 92F-15.5, Hawaii Revised Statutes.

In a letter to you dated September 1, 1993, the OIP advised you that pending the adoption of rules that set forth the procedures applicable to the hearing and disposition of appeals under section 92F-15.5, Hawaii Revised Statutes, the OIP has been providing the individuals who have been denied access to government records with advisory opinions under section 92F-42(3), Hawaii Revised Statutes.

In a letter dated September 1, 1993 to Mr. Eric Penarosa, PSD Deputy Director for Corrections, the OIP directed the PSD's attention to two advisory opinions issued by the OIP concerning the extent to which PSD policies and procedures must be made available for inspection and copying. (See Exhibit "A"). In the OIP's letter to the PSD, we advised the PSD that in OIP Opinion Letter No. 90-34 (Dec. 10, 1990) and OIP Opinion Letter No. 91-30 (Dec. 23, 1991), based upon federal court decisions under the federal Freedom of Information Act, we concluded that the PSD may

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withhold access to those policies and procedures that have not been adopted as administrative rules which meet both of the following tests:

1. The policy or procedure is "predominately internal," i.e., directed at agency staff and does not regulate members of the public or establish standards for agency personnel in deciding to proceed against or take action affecting members of the public; and
2. The disclosure of the policy or procedure would significantly risk the circumvention of agency regulations or statutes, or policies concerning the control of inmates or prison security.

The OIP requested the PSD to carefully examine the two policies that you requested to inspect and copy, and determine whether the two policies satisfy both of the above-quoted tests.

We also instructed the PSD that should it believe that the two policies satisfy both of the above-stated tests, it should provide the OIP with a copy of the policies so that the OIP could review them and provide you with an advisory opinion.

In a letter to the OIP dated September 9, 1993 that was received by the OIP on September 20, 1993, the PSD's Deputy Director for Corrections stated that he concurred with the agency's decision to deny access to PSD policy numbers COR.08.01 and COR.11.03, because in the opinion of the PSD, they are protected from public disclosure under section 92F-13(3), Hawaii Revised Statutes. (See Exhibit "B"). The PSD also provided the OIP with copies of the two policies, as the OIP had requested.

DISCUSSION

I. INTRODUCTION

The UIPA, the State's public records law, states that "[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. 1992).¹ Under the UIPA, the term "government record," means "information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. § 92F-3 (Supp. 1992).

We now turn to an examination of whether PSD policy numbers COR.08.01 and COR.11.03 are protected from disclosure under section 92F-13(3), Hawaii Revised Statutes, the only exception that would permit the PSD to withhold these government records.

II. RECORDS THAT MUST BE CONFIDENTIAL IN ORDER TO AVOID THE FRUSTRATION OF A LEGITIMATE GOVERNMENT FUNCTION

Under section 92F-13(3), Hawaii Revised Statutes, an agency is not required 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. 90-34 (Dec. 10, 1990), we examined whether PSD policies and procedures that have not been adopted as rules under chapter 91, Hawaii Revised Statutes, must be confidential in order for the government to avoid the frustration of a legitimate government function.

We concluded that federal court decisions applying Exemption 2 of the federal Freedom of Information Act, 5 U.S.C. § 552(b)(2) (1988) ("FOIA"), provided useful guidance in determining whether an agency's internal policies must remain confidential in order for the government to avoid the frustration of a legitimate government function. Exemption 2 of FOIA permits agencies to withhold records "related solely to the internal personnel rules and practices of an agency."

In Founding Church of Scientology v. Smith, 721 F.2d 828 (D.C. Cir. 1983), a leading case under FOIA's Exemption 2, the court articulated the following test for determining whether information is exempt under FOIA's Exemption 2:

First, the material withheld should fall within the terms of the statutory language as a personnel rule or practice of the agency. Then, if the material relates to trivial

¹In OIP Opinion Letter No. 90-34 (Dec. 10, 1990), we concluded that an inmate is a "person," for purposes of the UIPA, and that an inmate's right to inspect and copy government records is neither enhanced nor diminished by the fact that such person is an inmate in a State correctional facility.

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administrative matters of no genuine public interest, exemption would be automatic under this statute. If withholding frustrates legitimate public interest, however, the material should be released unless the government can show that disclosure would risk circumvention of lawful agency regulation.

Scientology, 721 F.2d at 830 n.4.

Since the disclosure of trivial administrative matters of no genuine public interest generally would not result in the "frustration of a legitimate government function," we believe that in determining whether an agency's internal rule or practice is protected from disclosure under section 92F-13(3), Hawaii Revised Statutes, the proper analysis is one that focuses upon whether disclosure of the policy significantly risks the circumvention of agency statutes or regulations, or the security of state correctional facilities and the safety of personnel employed therein. This is especially true since the federal courts have admonished that "a reasonably low threshold should be maintained for determining whether withheld administrative material relates to a significant public interest." Scientology, 721 F.2d at 830-31 n.4.

In Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051 (D.C. Cir. 1981) (en banc), 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 the requested document be "predominately internal" and that its disclosure "significantly risks circumvention of agency regulations or statutes." Id. at 1074. The concern in such a case is that a FOIA disclosure should not "benefit those attempting to violate the law and avoid detection." Id. at 1054.

In the years since Crooker, a growing body of decisions has expressly applied both parts of this test, providing some guidance as to the kinds of information that will qualify for protection under these standards.

A. Predominate Internality Test

With respect to the first part of the Crooker test, in Cox v. Dep't of Justice, 601 F.2d 1 (D.C. Cir. 1979), the court provided specific guidance on what constitutes an "internal" document, holding protectible information which:

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does not purport to regulate activities among members of the public . . . [and] does [not] . . . set standards to be followed by agency personnel in deciding whether to proceed against or take action affecting members of the public. Differently stated, the unreleased information is not "secret law" the primary target of [the FOIA's] disclosure provisions.

Cox, 601 F.2d at 5.

In Cox, an inmate at a federal penitentiary made a FOIA request to the United States Marshal's Service for a copy of the Manual for United States Marshals. After the inmate filed suit, the agency disclosed the manual after segregating or sanitizing portions of the manual dealing with the caliber of weapon and length of barrel on the weapon used by Marshals; the amount of ammunition they used; the number of rounds they are issued; the type of handcuffs used and the combinations matching the handcuffs; the place where the keys are secured; the radio transmission and receiving frequencies of operational units; arrangement of prisoners during their transportation, including the use of restraining devices; the position of weapons on security personnel while transporting prisoners; and the inspection of prisoners during transport for objects used to break open handcuffs.

The court in Cox held that the withheld portions of the manual satisfied the test of "predominate internality," finding that such information "is of legitimate interest only to members of the Marshal's staff."

Based upon our examination of PSD policy numbers COR.08.01 and COR.11.03, we believe that both of these policies are "predominately internal," in that they do not purport to regulate activities among members of the public and do not set standards to be followed by agency personnel in deciding whether to proceed against or take action affecting members of the public.

COR.08.01 contains procedures to be followed by PSD staff in transporting inmates for court appearances, for community service or workline programs, for hospital transport, and for transferring an inmate to another facility or jurisdiction. This policy contains security measures to be followed, including items concerning inmate and vehicle searches, the use of restraints, the dress of PSD personnel in transporting inmates on airlines, and the use and location of weapons while transporting inmates by airplane. The policy also describes procedures to be followed in

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the event of an inmate's escape.

PSD policy COR.11.03 sets forth guidelines to be followed by PSD personnel in placing an inmate in protective custody, or for separating an inmate from the general population when the inmate requests or requires protection from other inmates, including: (1) criteria for determining whether an inmate should be placed in protective custody; (2) procedures for documenting the placement of an inmate in protective custody; (3) standards for the placement of sentenced felons in protective housing; (4) due process rights of inmates involuntarily transferred to protective custody; (5) inmate rights and privileges while confined in protective custody; (6) procedures and standards to be followed in reviewing the need for the inmate to continue in protective custody; (7) procedures applicable to the release of inmates from protective custody; and (8) the inspection of protective custody operations on a periodic basis.

As we noted in OIP Opinion Letter No. 90-34 at 7 (Dec. 10, 1990), Hawaii court decisions appear to indicate that administrative policies relating to the management and operation of State correctional facilities are primarily matters of internal management. Based upon our review of the two policies involved in this case, we believe that they are "predominately internal."

B. Risk of Circumvention of Agency Statutes or Regulations Test

In determining whether the disclosure of a record would significantly risk the circumvention of agency statutes or regulations, the federal courts have not required the agency to demonstrate that the disclosure of the record would risk the circumvention of specific statutes or regulations. Rather, the courts have applied a relaxed standard, permitting the agency to withhold records when disclosure of the records would cause them to "lose the utility they were intended to provide," Dirksen v. HHS, 803 F.2d 1456, 1458 (9th Cir. 1986) (guidelines for processing medicare claims), or where disclosure of the record "would render [it] operationally useless." National Treasury Employees Union v. Customs Serv., 802 F.2d 525, 530 (D.C.Cir. 1986) (records used to evaluate federal job applicants).

In determining whether the disclosure of COR.08.01 would significantly risk the circumvention of statutes or agency regulations, federal court decisions provide significant guidance on this question. In Crooker v. Federal Bureau of Prisons, Civ. No. 86-0510 (D.D.C. Feb. 27, 1987), the court upheld the Federal Bureau of Prison's ("BOP") withholding of a record under FOIA's

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Exemption 2 that contained prison handcuff procedures, security and arming of officers, and alarm procedures. Similarly, in Miller v. Dep't of Justice, Civil No. 87-0533 (D.D.C. Jan. 31, 1989), a copy of which is attached as Exhibit "C," the court held that under FOIA's Exemption 2, the BOP could withhold portions of its "Custodial Manual," that contained policies and procedures concerning riot control, escape prevention, searches of offenders, standards for taking inmate population counts, instructions on the transportation of federal prisoners, and instructions regarding the operation of BOP buses, arms, and restraining and controlling equipment. See Miller, slip. op at 2.

Based upon the foregoing authorities, we believe that the public disclosure of PSD policy number COR.08.01 would significantly risk the circumvention of prison security measures, and would likely render the transportation procedures operationally useless for their intended purpose. Therefore, we conclude that under section 92F-13(3), Hawaii Revised Statutes, this PSD policy is protected from required agency disclosure under the UIPA, since its disclosure would frustrate the legitimate government function of ensuring the safety and security of inmates, PSD personnel, and the general public while transporting inmates.

With respect to COR.11.03, we do not believe that the disclosure of this PSD policy would render the policy operationally useless, nor would it significantly risk the circumvention of prison security measures. This policy sets forth criteria to be applied in determining whether an inmate should be segregated from the general prison population for the inmate's own protection, as well as standards for determining whether an inmate is not qualified to be placed in protective custody. It also sets forth due process procedures for inmates who have been involuntarily transferred to protective custody, and procedures for reviewing an inmate's continued placement in protective custody. In our opinion, the disclosure of the contents of this policy would not significantly risk the circumvention of agency statutes or regulations, or prison security, or "benefit those attempting to violate the law and avoid detection."

Accordingly, it is our opinion that COR.11.03 is not a government record that "must be confidential in order for the government to avoid the frustration of a legitimate government function" under section 92F-13(3), Hawaii Revised Statutes. Therefore, we believe this record must be made available for inspection and copying upon request by any person.

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CONCLUSION

For the reasons explained above, we conclude that under section 92F-13(3), Hawaii Revised Statutes, the PSD may withhold access to policy number COR.08.01, entitled "Court Appearance and Transportation of Inmates." In our opinion, this government record is predominately internal, and its disclosure would significantly risk the circumvention of agency statutes or regulations, or prison security measures which would result in the frustration of a legitimate government function.

In contrast, we conclude that the disclosure of policy number COR.11.03, entitled "Protective Custody Management," would not significantly risk the circumvention of agency statutes or regulations, or prison security measures. We do not believe that the disclosure of this policy would "benefit those attempting to violate the law and avoid detection." Therefore, we believe this policy should be made available for inspection and copying upon request.

Please contact me at 586-1400 if you should have any questions regarding this matter.

Very truly yours,

Hugh R. Jones
Staff Attorney

APPROVED:

Kathleen A. Callaghan
Director

HRJ:sc

Attachments

c: Honorable George Iranon
Eric Penarosa
John Campbell, Jr., Deputy Attorney General