

August 1, 1995

Honorable J.P. Schmidt
Corporation Counsel
County of Maui
200 South High Street
Wailuku, Maui 96793

Attention: Kelly A. Cairns
Deputy Corporation Counsel

Dear Mr. Schmidt:

Re: Disclosure of Police Commission File to
Complaining Party

This is in reply to a letter dated June 21, 1995 to the Office of Information Practices ("OIP") from Deputy Corporation Counsel Kelly A. Cairns requesting an advisory opinion concerning the above-referenced matter.

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), the individual filing a complaint with the Maui County Police Commission ("Commission") in case no. MPC 94-51 must be permitted to inspect and copy the Commission's file on the complaint, when the Commission has closed its investigation and found it could not substantiate the complaint after an independent investigation.

BRIEF ANSWER

Yes. Part III of the UIPA, entitled "Disclosure of Personal Records," governs an individual's right to inspect and copy the individual's "personal records," whereas part II of the UIPA governs an agency's disclosure of government records to the public generally. Thus, under the UIPA, the individual's right to inspect the individual's "personal records" is governed by standards different than those governing the public's right to inspect "government records."

The term "personal record" includes "any item, collection, or grouping of information about an individual that is maintained

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by an agency." Haw. Rev. Stat. § 92F-22 (Supp. 1992). Federal court decisions under the federal Privacy Act of 1974 ("Privacy Act"), which establishes a framework similar to part III of the UIPA, have found that a personal record is about an individual, even if the record contains information about third persons. Based upon our examination of the Commission's records in this case, the OIP believes that the Commission's investigation report is a personal record of both the complainant and the complained against police officer, since it contains a collection or grouping of information that is "about" both the complainant and the police officer.

In the absence of the Commission's submission of other evidence which supports a conclusion that any individual mentioned in the Commission's investigations supplied information under an express or implied promise of confidentiality, the OIP concludes that none of the exemptions in section 92F-22, Hawaii Revised Statutes apply, and that the Commission must, upon request, permit the complainant to inspect and copy the Commission's investigative report.

FACTS

Deputy Corporation Counsel Cairns requested an opinion from the OIP as to whether an individual who filed a complaint ("Complainant") with the Commission against a Maui County Police Department ("MPD") officer must be permitted, upon request, to inspect and copy the Commission's file concerning her complaint.

After an investigation, the Commission determined that it could not substantiate the complaint based upon the evidence presented. In her letter to the OIP dated June 21, 1995, Deputy Corporation Counsel Cairns advised the OIP that the officer requested, and the Commission did provide the officer with, a copy of the file under part III of the UIPA. Deputy Corporation Counsel Cairns' letter also stated that the Commission is anticipating a request from the Complainant for a copy of the Commission's file, which precipitated the request to the OIP for an opinion.

In connection with the preparation of this opinion, Deputy Corporation Counsel Cairns provided the OIP with a copy of the Commission's file upon the complaint for our in camera examination, upon which the following summary is based.

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On November 14, 1995, the Complainant, a California resident, filed a complaint with the Commission alleging that an MPD officer treated her rudely and belligerently during an encounter with the police officer on Hana Highway near milepost 27. The Complainant alleged that her van was parked on the side of the road and that she did not realize that her left rear tire was on the white line. The Complainant alleged that her companion and the companion's daughter crossed the road to buy some coconuts when the officer pulled alongside and began screaming at her to move her vehicle. The Complainant also alleged that the officer screeched his tires, did a three-point turn, got out of his car and continued to yell at the Complainant. The officer eventually cited the Complainant for illegal parking. The Complainant alleged that the officer's rude behavior caused her companion's daughter to begin crying.

In reply, the officer denied shouting at the Complainant, or screeching his tires or turning his police car abruptly. The officer alleged that he observed the Complainant's vehicle protruding onto Hana Highway and had observed several near-miss collisions. The officer also alleged that he asked the Complainant if the vehicle belonged to her and to move the vehicle. The officer further alleged that the Complainant ignored his request and walked away from him toward a nearby coconut stand. At this point, the officer decided to issue the Complainant a citation. The officer denied getting out of his vehicle and yelling at the Complainant, and alleged that the Complainant's companion and the Complainant began verbally abusing the officer.

Interviews conducted by the Commission indicate that a witness to the encounter between the police officer and the Complainant corroborated the officer's allegation that the Complainant's vehicle obstructed the roadway. This witness also indicated that the officer spoke in a normal tone of voice and that the operator of the vehicle did not obey the officer's command to move the vehicle. The witness stated that: (1) the officer pulled into a driveway ahead of the Complainant's vehicle and walked back to the illegally parked vehicle; (2) the Complainant's companion was "mouthing off" to the officer; and (3) the officer did not screech his tires and did not shout during the encounter.

The Commission's investigative report contains summaries of the Complaint's allegations, the officer's response to the

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allegations, a summary of an interview of a witness to the encounter, and the investigator's conclusion. Appended to the report is a copy of the Complainant's sworn complaint, a copy of the citation issued to the Complainant, and written statements from the officer and another officer with whom the Complainant had an encounter at the police station. Also appended to the report is a copy of a photograph of the Complainant's vehicle, submitted by the Complainant, showing the left rear tire of her vehicle protruding onto the roadway, and another photograph generally displaying the vicinity of the encounter. Finally, attached to the Commission's report are copies of letters to the Complainant and the officer notifying the parties that after an independent investigation, the Commission could not substantiate the allegations based upon the evidence presented.

DISCUSSION

I. INTRODUCTION

The principal purposes of part III of the UIPA are to "[m]ake government accountable to individuals in the collection, use, and dissemination of information relating to them," and to "[p]rovide for accurate, relevant, timely, and complete government records." Haw. Rev. Stat. ~~§ 92F~~ (Supp. 1992).

The Committee of Rights, Suffrage and Elections of the 1978 Constitutional Convention of the State of Hawaii noted, in discussing a proposed privacy amendment to the Constitution of the State of Hawaii, that "the right to privacy should ensure that at the least an individual shall have the right to inspect records to correct information about himself." Standing Committee Report No. 69, Vol. I Proceedings of the 1978 Constitutional Convention of the State of Hawaii at 674 (emphasis added).

Congress has also stressed the importance of the individual's right¹ to inspect records that are about the individual:

¹The commentary to the Uniform Information Practices Code ("Model Code") adopted by the National Conference of Commissioners on Uniform State Laws, and upon which the UIPA was modeled, reflects that Article III of the Model Code "establishes a statutory framework similar to the Federal Privacy Act." Model Code § 3-101 commentary at 21 (1980).

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The Committee believes that the size of the Federal Government, the sheer number of personal records it must handle, and the growing complexities of information technology require that the full protections against abuses of the power of the government to affect the privacy of the individual and the confidentiality of personal information must depend in part upon the participation of the individual in monitoring the maintenance and disclosure of his own file.

To this end, we agree with members of the numerous respected study bodies that an individual should have the right to discover if he is the subject of a government file, to be granted access to it, to be able to assure the accuracy of it, and to determine whether the file has been abused by improper disclosure.

The Committee agrees with the conclusion of one government study that "In the majority of cases, the citizen's right of access to information kept on him by the Federal Government will not interfere with the ongoing program of the agency. In addition, giving the individual a right of access will often be a desirable adjunct to any other system designed to insure file accuracy."

Furthermore, your Committee adopts the timely observation by one scholar from the Council on Science of Technology study that "giving the individual maximum ability to examine what the Government knows on the person should help promote citizen confidence in activities of the Federal Government and is essential to assure that notions of due process are employed when decisions are made on the basis of personal information."

S. Rep. No. 93-1183, 93rd Cong., 2d Sess. (1974) (emphasis added).

The question presented must be resolved under part III of the UIPA, entitled "Disclosure of Personal Records," sections 92F-21 through 92F-28, Hawaii Revised Statutes², which governs an individual's right to inspect and copy the individual's accessible "personal records." When an individual requests access to the individual's personal records, an agency must permit the individual to review the records and have a copy made within 10 working days, unless the records are exempt from disclosure under section 92F-22, Hawaii Revised Statutes. Haw. Rev. Stat. ~~§ 92~~(Supp. 1992).

II. PERSONAL RECORD DEFINED

Under the UIPA, the term "personal record," means:

[A]ny item, collection, or grouping of information about an individual that is maintained by an agency. It includes, but is not limited to, the individual's education, financial, medical, or employment history, or items that contain or make reference to the individual's name, identifying number, symbol, or other identifying particular assigned to the individual, such as a fingerprint or voice print or a photograph.

Haw. Rev. Stat. ~~§ 92~~F-3 (Supp. 1992) (emphases added).

As noted, the commentary to the Model Code reflects that its Article III establishes a statutory framework similar to the

²The UIPA's legislative history reflects that:

[T]he very important right to review and correct one's own record is not confused with general access questions.

S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 691 (1988); H.R. Conf. Comm. Rep. No. 112-88, Haw. H.J. 817, 818 (1988) (emphasis added).

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Privacy Act, and the OIP notes that the definition of "personal record" is nearly identical to the term "record" in the Privacy Act.³ Federal courts examining this definition have found that to be a "record" under the Privacy Act, the information must identify an individual.

Consistent with Guidelines adopted by the U.S. Office of Management and Budget ("OMB") implementing the Privacy Act⁴, the Court of Appeals for the Third Circuit has adopted a broad interpretation and held that a "record" "encompasses any information about an individual that is linked to that individual through an identifying particular" and is not "limited to

³Under section 552a(a)(4) of the Privacy Act, the term "record" means:

[A]ny item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph.

⁴Guidelines issued by the U.S. Office of Management and Budget do not limit the term "record" to information that is "personal" or specifically about an individual's characteristics or qualities:

[Record] includes individual identifiers in any form including, but not limited to, fingerprints, voice-prints and photographs

. . . .

The term "record" was defined "to assure the intent that a record can include as little as one descriptive item about an individual. (Congressional Record, p. S21818, December 17, 1974 and p.H12246, December 17, 1974).

OMB Guidelines, 40 Fed. Reg. 28,948, 28,951-52 (1975).

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information which taken alone directly reflects a characteristic or quality." Quinn v. Stone, 978 F.2d 126, 133 (3rd Cir. 1992) (out-of-date home addresses on roster and time card information held to be records covered by the Privacy Act).

Courts in other circuits have adopted a more narrow construction of the term, such that a "record" "must reflect some quality or characteristic of the individual involved." Boyd v. Secretary of the Navy, 709 F.2d 684, 686 (11th Cir. 1983); see also Topurdize v. U.S. Information Agency, 772 F. Supp. 662, 664 (D.D.C. 1991); Unt v. Aerospace Corp., 765 F.2d 1440, 1448-49 (9th Cir. 1985).

Furthermore, federal courts have determined that under the Privacy Act, a "record" is about an individual, even if the record contains information about third persons. In Voelker v. IRS, 646 F.2d 333, 335 (8th Cir. 1981), the court held that:

[T]here is no justification for requiring that information in a requesting individual's record meet some separate 'pertaining to' standard before disclosure is authorized [and i]n any event, it defies logic to say that information properly contained in a person's record does not pertain to that person, even if it may also pertain to another individual.

See also Topurdize v. USIA, 772 F. Supp. 662 (D.D.C. 1991).

The U.S. District Court for the District of Columbia has also ruled that the definition of "record" in the Privacy Act does not require every page of the records at issue to contain the individual's name, finding that a "record" exists so long as "any item, collection, or grouping of information contains the individual's name." Wanda Henke v. Dep't of Commerce, slip op., Civil No. 94-189 (D.D.C. May 26, 1995).

Based upon our examination of the Commission's file in this case, we believe that even under the more restrictive definition of the term "record" imposed by the federal courts, the Commission's investigative file is a personal record of both the complaining party and the MPD officer against whom the complaint was lodged, and that it is an "accessible" personal record.⁵

⁵While the term "accessible" was left undefined by the

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In particular, the report contains the Complainant's name, home address, telephone number, occupation, age, weight, place of employment, date of birth, and ethnicity. This information certainly qualifies as information about the Complainant's personal qualities or characteristics. In addition to her statement to the Commission, the investigative report contains the statements of the police officers and other third persons that contain information "about" the Complainant, including statements allegedly made by the Complainant during her encounter with the police officer, and concerning the Complainant's demeanor. In short, we believe that the investigative report contains an item, collection, or grouping of information that is "about" the Complainant and, therefore, the OIP concludes that the investigative report is the Complainant's personal record.

III. APPLICATION OF EXEMPTIONS IN PART III OF THE UIPA

The OIP believes that section 92F-22(2), Hawaii Revised Statutes, does not apply to the facts presented here, nor would any of the other exemptions in section 92F-22, Hawaii Revised

(..continued)

Legislature, the Model Code does contain a definition of this term:

- (1) "Accessible record" means a personal record, except a research record, that is:
 - (i) maintained according to an established retrieval scheme or indexing structure on the basis of the identity of, or so as to identify, individuals; or
 - (ii) otherwise retrievable because an agency is able to locate the record through the use of information provided by a requester without an unreasonable expenditure of time, effort, money or other resources.

Model Code § 1-105(1) (1980). While the Commission's file does not appear to be maintained based upon an indexing structure on the basis of the identity of the Complainant, we believe that the Commission is able to locate it through the use of information provided by the Complainant with a reasonable amount of effort. The fact that the Commission was able to retrieve the file for the police officer supports this conclusion.

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Statutes, permit the Commission to withhold its file from the Complainant.

In previous opinion letters we concluded, based upon court decisions interpreting a similar exemption in the Privacy Act, that this exemption only permits an agency to withhold information that would identify a source, and generally does not protect information furnished by such a source. See OIP Op. Ltr. No. 95-4 at 6-7 (Mar. 3, 1995) and cases cited therein.

Based upon our examination of the Commission's file, we were not able to identify any evidence that would substantiate a finding that any of the persons cooperating in the Commission's investigation provided information under an express promise of confidentiality.

Further, in only one instance does the Commission's file reveal information that would arguably permit a finding that a person submitted information to the Commission under an implied promise of confidentiality. Specifically, it appears that the Complainant's companion on the date of the incident provided information to a Commission investigator in a conference call in which the Complainant simultaneously participated. During this conference call, the Commission's file indicates that the Complainant's companion declined to identify herself to the Commission.

While this provides some indicia of a possible implied promise of confidentiality, the fact that the Commission provided the entire contents of its file to the police officer complained against strongly militates against a finding that the Commission considered the Complainant's female companion to be a source who supplied information under an implied promise of confidentiality. Furthermore, it would not appear that any of the information in the Commission's file would actually identify the Complainant's companion and, therefore, be exempt from disclosure under section 92F-22(2), Hawaii Revised Statutes.

Accordingly, unless the Commission provides further evidence to the OIP that would suggest that one of the individuals mentioned in its investigation report furnished information under an express or implied promise of confidentiality, we are constrained to conclude that section 92F-22(2), Hawaii Revised Statutes, does not apply in this case.

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Deputy Corporation Counsel Cairns pointed out that under section 92F-14(b)(4), Hawaii Revised Statutes, information in the file may not be available to the general public under the freedom of information provisions of part II of the UIPA.⁶ However, as the requester would be seeking access to her personal record, part III of the UIPA controls access, not part II.⁷ The fact that the Complainant's personal record is combined with the officer's personal record does not remove them from a part III analysis as parts II and III of the UIPA establish different standards concerning the disclosure of government records and personal records respectively.

Therefore, the OIP concludes that the exceptions in section 92F-13, Hawaii Revised Statutes (part II), do not afford a basis to withhold information from the individual to whom it pertains under part III of the UIPA.

Article III of the Model Code (upon which the UIPA was modeled), does include an exemption for "information that does not relate directly to the requester, and, which if disclosed, would constitute a clearly unwarranted invasion of another individual's personal privacy." Model Code § 3-106(a)(3) (1980). However, there is no statutory exemption from disclosure based upon a clearly unwarranted invasion of personal privacy in part III of the UIPA. Therefore, as this was excluded from the UIPA, we decline to extend the law to recognize such an exemption.

CONCLUSION

Based upon our in camera examination of the Commission's file in this case, it is the OIP's opinion that the file is a personal record of both the Complainant and the officer against

⁶Section 92F-14(b)(4), Hawaii Revised Statutes, requires the public availability of information about police misconduct, only if the officer is terminated, and the officer has exhausted all non-judicial grievance adjustment procedures timely invoked. See Act 232, Session Laws of Hawaii 1995.

⁷See also Haw. Rev. Stat. § 92F-13 (Supp. 1992 & Comp. 1993) ("[t]his part shall not require disclosure of"); Haw. Rev. Stat. § 92F-22 (Supp. 1992 & Comp. 1993) ("[a]n agency shall not be required by this part to grant an individual access").

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whom the complaint was lodged in this case. Furthermore, in the absence of any additional evidence submitted by the Commission that would support a finding that any individual furnishing information to the Commission in this case did so under an express or implied promise of confidentiality, the OIP is constrained to conclude that none of the exemptions in section 92F-22, Hawaii Revised Statutes, would permit the Commission to withhold its file from the Complainant, should the Complainant make a request therefor.

Please contact me at 586-1404 if you should have any questions regarding this opinion.

Very truly yours,

Hugh R. Jones
Staff Attorney

APPROVED:

Moya T. Davenport Gray
Director

HRJ:sc