

**Op. Ltr. No. 95-21 HPD Police Report No. X-248000 Concerning the Unattended  
Death of Bradley D. Kosbau on July 11, 1987**

OIP Op. Ltr. No. 05-03 partially overrules this opinion to the extent that it states or implies that the UIPA's right to privacy exception in section 92F-13(1), HRS, either prohibits public disclosure or mandates confidentiality. To the extent that it holds that an individual's privacy interest is extinguished by death, this opinion was also partially overruled by OIP Opinion Letter Number 03-19, which concluded that an individual's privacy interest in health information and reputational and family related privacy interests survive death but diminish with the passage of time.

August 28, 1995

Honorable Darolyn H. Lendio  
Corporation Counsel  
City and County of Honolulu  
City Hall, First Floor  
Honolulu, Hawaii 96813

Attention: Donna M. Woo  
Deputy Corporation Counsel

Dear Ms. Lendio:

Re: HPD Police Report No. X-248000 Concerning  
the Unattended Death of Bradley D. Kosbau  
on July 11, 1987

This is in reply to a letter to the Office of Information Practices ("OIP") from Deputy Corporation Counsel Donna M. Woo requesting an advisory opinion. Ms. Woo asked whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), the above-referenced police report, and related reports, must be made available for inspection and copying as requested by Paul David Wellstone, a United States Senator from the State of Minnesota, on behalf of the decedent's mother.

#### **ISSUE PRESENTED**

Whether, under the UIPA, Honolulu Police Department ("HPD") Report No. X-248000, and supplemental reports concerning the unattended death of Bradley Kosbau in July 1987, must be made available for public inspection and copying when the HPD's investigation has been closed, the death ruled a suicide, and a law enforcement proceeding involving this death is neither pending nor a concrete possibility.

#### **BRIEF ANSWER**

##### **I. FRUSTRATION OF A LEGITIMATE GOVERNMENT FUNCTION**

Part II of the UIPA provides that an agency is not required to disclose government 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). The legislative history of this exception reveals that it applies to certain "[r]ecords or information compiled for law enforcement purposes."

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A determination of whether records or information compiled for law enforcement purposes is protected from disclosure under section 92F-13(3), Hawaii Revised Statutes, must generally be made on a case-by-case basis after carefully examining the informational content of the records at issue.

In analyzing this issue, the OIP has turned for guidance to the law enforcement record exemption in the federal Freedom of Information Act, 5 U.S.C. § 552(b)(7) (1988) ("FOIA") because: (1) Congress intended it to provide a workable and balanced formula to protect law enforcement information, while balancing policies promoting open government, and (2) courts in other states have employed FOIA's Exemption 7 as a guideline in applying similar exemptions in those state's open records laws.

Because a law enforcement proceeding in connection with the death of Mr. Kosbau is not a reasonable possibility at this time, the OIP concludes that disclosure of HPD Report No. X-248000, and supplemental reports "could not reasonably be expected to interfere with enforcement proceedings," within the meaning of FOIA's Exemption 7(A).

Additionally, because the OIP has been presented with no evidence to suggest that disclosure of these records would: (1) reveal the identity of or information furnished by a confidential source, (2) impair an individual's right to a fair trial, (3) disclose techniques and procedures for law enforcement investigations and prosecutions, or (4) endanger the life or safety of any individual, the OIP concludes that such records are not law enforcement records that must remain confidential within the meaning of section 92F-13(3), Hawaii Revised Statutes.

However, the OIP emphasizes that while it does not believe that the disclosure of the records involved in this investigation would result in the frustration of a legitimate government function, after applying FOIA's Exemption 7 for guidance, the OIP does not imply that records of other HPD investigations must be disclosed. Whether records are protected under FOIA's Exemption 7 must be determined on a case-by-case basis, after carefully examining the informational content of the records in each case.

## **II. CLEARLY UNWARRANTED INVASION OF PRIVACY-SEGREGATION**

For the reasons explained in this opinion, the OIP believes that individuals who furnished information to the HPD as part of the investigation of a possible homicide, and third parties

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mentioned in the reports involving the death of Mr. Kosbau, have a significant privacy interest in the fact of their involvement in the investigation, and in the fact that they themselves were of investigatory interest. Therefore, the OIP concludes that the disclosure of the names, addresses, and other identifying information concerning these individuals would constitute "a clearly unwarranted invasion of personal privacy," under section 92F-13(1), Hawaii Revised Statutes.

Accordingly, the OIP recommends that the HPD segregate or sanitize from the police reports at issue information that would result in the likelihood of actual identification of individuals who furnished information in connection with its investigation, or who were of investigatory interest. After such information has been segregated from the records, we conclude that they must be made available for inspection and copying during regular business hours.

## FACTS

### **I. INTRODUCTION**

On July 11, 1987, a Waikiki apartment building groundskeeper notified the apartment building's resident manager that he had found a body in the apartment building's parking lot. The groundskeeper noticed that a gun was folded in the victim's arms, and that the victim's head appeared to be damaged. The resident manager called the HPD using 911, and notified the HPD that a body had been discovered in the parking lot of the apartment building.

When Sergeant Roy Gonsalves of the HPD arrived at the scene, the resident manager informed Sergeant Gonsalves that based upon his appearance, the decedent could be one of the tenants of the building. Sergeant Gonsalves observed that the victim appeared to be lifeless with massive head injuries, possibly as a result of the discharge of a handgun the victim had clutched in his hand which was resting on his chest. A tenant of the apartment building was retrieved by the resident manager, and he identified the victim as Bradley Kosbau. The victim was pronounced dead at 6:57 a.m. by an emergency medical physician and his body was taken to the City and County morgue. The HPD later positively identified the victim as Bradley Kosbau through a fingerprint comparison.

### **II. RECORDS PREPARED**

Following an investigation, the HPD concluded that Mr. Kosbau's injuries were self-inflicted and closed its investigation. A variety of police reports and records were

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prepared as a result of the HPD's investigation of Mr. Kosbau's death. First, at the request of the OIP, the HPD provided OIP with a copy of HPD Police Report No. X-24800, along with various follow-up reports, witness statements, and attachments. Second, the HPD has an 18-page "Closing Report" dated January 9, 1989, in which the death of Mr. Kosbau was found to be a suicide, and the investigation closed.

**A. Initial Police Report**

1. Report No. 1

Attached to the initial police report is a four page report prepared by HPD Officer Dennis Nagayama containing facts he observed when he arrived at the scene and met with Sgt. Roy Gonsalves, the first HPD officer to arrive at the scene, along with two witness statements. The report contains the names, addresses, business and residence telephone numbers of the decedent, the resident manager of the apartment building who reported the incident, and of the apartment building's groundskeeper, along with their written statements.

2. Report No. 2

Also attached to the initial police report is a two-page follow-up report made by HPD Officer Debra Tandal, who arrived at the scene after Officer Nagayama and Sgt. Gonsalves. The follow-up report contains factual observations made by Officer Tandal, and the name, address, and transcribed statement of the victim's roommate.

3. Report No. 3

Sergeant Gonsalves also completed a two-page follow-up report setting forth observations he made when he arrived on the scene.

4. Report No. 4

Another follow-up report was prepared by Officer Stephen Genova, another HPD officer who responded to the scene.

5. Report No. 5

Report No. 5 is a crime lab "Work Request" form submitted by Detective J. Ledbetter requesting the crime lab to test fire the .357 Magnum revolver confiscated at the scene, and delivering scrapings from the hands of the victim along with paraffin casts of the decedent and the decedent's roommate for

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analysis for possible nitrates. The Work Request form contains the results of tests conducted by the HPD's crime laboratory.

6. Report No. 6

Report No. 6 contains photographs of fingerprints taken from the victim and the positive confirmation that the prints were those of Mr. Kosbau.

7. Report No. 7

Report No. 7 is a two-page Crime Scene Investigation Report completed by HPD Evidence Specialist Kathryn Bob, describing evidence recovered at the scene, along with sketches and photographs taken at the scene and at the City Morgue.

8. Report No. 8

Report No. 8 is a four-page follow-up report dated July 11, 1987 prepared by Detective Joseph Ledbetter who was assigned to investigate and to continue an investigation begun by Detective John Woo. This report contains observations made by the Detective upon arrival at the scene, along with information relayed by Detective Woo obtained from interviews with the victim's roommate, and other persons who accompanied the victim in the hours preceding the victim's death. Detective Ledbetter's follow-up report also contains: (1) the weight and height of the victim, as recorded by a medical examiner investigator, (2) a description of the weapon confiscated at the scene, (3) the results of a weapon registration check conducted by Detective Ledbetter, and (4) a description of lab tests ordered by Detective Ledbetter, and (5) a sketch made at the scene.

9. Report No. 9

Report No. 9 is a one-page Crime Scene Investigation Report dated August 5, 1987, prepared by HPD Evidence Specialist Sarah Charbonneau, describing photographs taken at the scene.

10. Report No. 10

Report No. 10 is a ten-page Crime Scene Investigative Report which was prepared by an HPD Evidence Specialist describing photographs taken at the scene in a related case involving the alleged theft of an item from the body of the decedent. The report describes each of the photographs taken and attached to the report are copies of the photographs.

11. Report Nos. 11 and 12

Report Nos. 11 and 12 are further Work Request forms submitted by Detective Isabelo requesting the HPD's crime lab to attempt to find fingerprints on a note discovered in the victim's apartment, and that contain the results of chemical tests conducted on the note.

12. Report Nos. 13 through 15

Report Nos. 13 through 15 are three HPD Property Reports marked "Evidence" describing the weapon and cartridges recovered at the scene, and a note recovered from the victim's apartment.

13. Report No. 16

Report No. 16 is another Work Request form submitted by Detective Isabelo on September 2, 1987 requesting the HPD's crime lab to test paraffin casts taken of the right hand of an HPD criminologist before and after test firing the weapon recovered from the scene. The Work Request form also contains the results of tests conducted to determine the presence of nitrates.

**B. HPD Closing Report**

The HPD's Closing Report dated January 9, 1994 is 18 pages in length and contains the results of interviews with the apartment building manager, Mr. Kosbau's co-workers, and other third persons involved in the HPD's investigation, including the results of two polygraph tests conducted on persons interviewed by the HPD. This report also contains a summary of the investigation, and Homicide Detective John Isabelo's conclusion that Mr. Kosbau died as a result of a self-inflicted gunshot wound to the head. Because the closing report indicates a disposition of "case closed" and there being no evidence to the contrary, the OIP finds that the HPD's investigation is closed.

**III. REQUESTS FOR DISCLOSURE**

By letter to Deputy Corporation Counsel Donna M. Woo dated August 25, 1993, Honorable Paul David Wellstone, U.S. Senator for the State of Minnesota, requested a clarification of whether the police reports prepared in connection with Mr. Kosbau's death are available for inspection and copying under the UIPA, stating:

On July 14, 1993, I sent a letter to Chief Nakamura of the Honolulu Police asking him for an update on the status of the Kosbau investigation under HPD Report No. X-24800. The inquiry was made on behalf of . . . the mother of Brad Kosbau.

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On August 17, 1993, Chief Nakamura informed my office that the case was classified as a suicide, and that the city charter prohibits the release of such reports, except to agencies within the criminal justice system.

Letter from United States Senator Paul David Wellstone to Donna M. Woo, Deputy Corporation Counsel, dated August 25, 1993.

By letter to the OIP dated September 23, 1993, Deputy Corporation Counsel Donna M. Woo requested the OIP to provide the City with an advisory opinion concerning the availability of the police reports prepared in connection with the investigation of Mr. Kosbau's death under the UIPA. Ms. Woo stated that "[t]he Honolulu Police Department report on this death has not been closed, although the case is not being actively pursued at this time." Additionally, Ms. Woo's letter stated that "Mr. Kosbau's death was investigated as an unattended death which was later classified as a suicide." Subsequently, the HPD closed its investigation of Mr. Kosbau's death.

## DISCUSSION

### **I. INTRODUCTION: GUIDING PRINCIPLES**

The UIPA, the State's public records law, states "[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). 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); see also Kaapu v. Aloha Tower Dev. Corp., 74 Haw. 365, 378 n.10 (1993).

At the outset, it is useful to note a few principles that guide our resolution of the issue raised by this opinion request. First, our construction of the UIPA must be guided by the policy favoring disclosure and its exceptions to required agency disclosure must be narrowly construed. See OIP Op. Ltr. No. 93-10 at 2, n.1 (Sept. 2, 1993).<sup>1</sup> This rule of construction,

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<sup>1</sup>As the United States Supreme Court has noted, the purpose of freedom of information laws are to facilitate public access to government information and "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." John Doe Agency v. John Doe Corp., 493 U.S. 146, 151 (1989). Consistent with these purposes, the strong presumption



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however, is not determinative. Indeed, although the UIPA was intended as a general matter to promote openness in government, see section 92F-2, Hawaii Revised Statutes, the UIPA also recognizes competing interests, and the need for some governmental records to remain confidential. See Haw. Rev. Stat. § 92F-13 (Supp. 1992). Finally, as with similar state and federal open records laws, under the UIPA, the burden of establishing that a government record is protected by one of the Act's exceptions is upon the agency. Haw. Rev. Stat. § 92F-15 (Supp. 1992).

With these principles in mind, we turn to an examination of whether, under any of the exceptions in section 92F-13, Hawaii Revised Statutes, the police reports prepared in connection with the death of Mr. Kosbau may be withheld from inspection and copying. Only two exceptions in section 92F-13, Hawaii Revised Statutes, would arguably permit the HPD to withhold access to the records involved in the facts of this case: the "frustration of a legitimate government function" and "clearly unwarranted invasion of personal privacy" exceptions.

## II. FRUSTRATION OF LEGITIMATE GOVERNMENT FUNCTION

Under section 92F-13(3), Hawaii Revised Statutes, an agency is not required by the UIPA to disclose "[g]overnment records that, by their nature, must be confidential in order to avoid the frustration of a legitimate government function."

In Senate Standing Committee Report No. 2580, dated March 31, 1988, the Legislature set forth examples of information that may be withheld by an agency if its disclosure would result in the frustration of a legitimate government function. Among other examples, the Legislature mentioned "[r]ecords or information compiled for law enforcement purposes." Id. In determining whether disclosure would result in the frustration of a legitimate government function, in previous opinion letters, the OIP has applied the six standards set forth in Exemption 7 of the federal Freedom of Information Act, 5 U.S.C. § 552(b)(7) (1988) ("FOIA") for guidance<sup>2</sup>, a copy of which is attached as Exhibit "A." (. . .continued)  
in favor of disclosure places the burden on the agency to justify the withholding of any requested documents. Id.; see also, Haw. Rev. Stat. §§ 92F-11(b) and 92F-15(b) (Supp. 1992).

<sup>2</sup>The OIP's reliance upon FOIA's Exemption 7 for guidance in construing the UIPA's exception for law enforcement records is consistent with decisions by courts in other states when construing open records law exceptions for law enforcement records. See, e.g., Citizens for Better Care v. Dep't of Public Health, 215 N.W.2d 576 (Mich. 1974); Lodge v. Knowlton, 391 A.2d 893 (N.H. 1978) (in absence

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FOIA's Exemption 7, as with its other exemptions, was intended by Congress to provide a workable and balanced formula to protect information that must remain confidential in order to protect legitimate government functions.<sup>3</sup> Also, we observe that in 1986, Congress created an entirely new mechanism for protecting certain especially sensitive criminal law enforcement matters, to prevent "tipping off" an investigation's subject of the very existence of an investigation.<sup>4</sup> Such a danger is not

(.continued)

of legislative standards, FOIA's Exemption 7 adopted for guidance) Williams v. Superior Court, 5 Cal. Rptr.2d 142 (1984); Board of Trustees of Woodstock Academy v. Freedom of Information Commission, 436 A.2d 266 (1980); see also H.R. Stand. Comm. Rep. No. 342-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 969, 972 (1988) ("[w]ith regard to law enforcement records, your Committee considered the concerns from the police department and the press, and deleted this from the subparagraph in its entirety, adopting similar language from the federal [FOIA]"). OIP does not believe the Legislature intended to give categorical protection to all records or information compiled for law enforcement purposes. Had it meant to do so, it could have expressly provided an exemption for law enforcement records in section 92F-13, Hawaii Revised Statutes. Additionally, extending categorical protection to all law enforcement records would not be consistent with the purposes and policies underlying the UIPA. The open records laws of many other states also appear to incorporate, to some degree, the standards of FOIA's Exemption 7. See Alaska Stat. § 09.25.120 (Supp. 1991); D.C. Code Ann. § 1-1524(a)(3) (Supp. 1991); Ill. Rev. Stat. ch. 116, § 207(c) Supp. 1992); N.Y. Public Officers Law art. 6, § 87.2(e) (McKinney 1992).

<sup>3</sup>See H.R. Rep. No. 1497, 88th Cong., 2nd Sess. 6 (1966).

<sup>4</sup>Exclusion (c)(1) of the FOIA provides:

Whenever a request is made which involves access to records described in subsection (b)(7)(A) and --

(A) the investigation or proceeding involves a possible violation of criminal law; and

(B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement

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presented in the facts of this case, but in the context of other criminal law enforcement activities, the OIP believes that, in certain criminal investigations, tipping off an investigatory subject to the very existence of an investigation presents a fundamental danger to criminal law enforcement functions.

An analysis as to whether records must be disclosed or remain confidential must be made on a case-by-case basis, after a careful consideration of the informational content of such records. A conclusion by the OIP that the records involved in this case must be disclosed under the standards set forth in FOIA's Exemption 7 does not imply that records of other law enforcement investigations must also be disclosed. With this important observation in mind, we now turn to the application of FOIA's Exemption 7 to the records prepared by the HPD in this case.

**A. Interference with Enforcement Proceedings: Exemption 7(A)**

Exemption 7(A) of FOIA permits the withholding of records or information compiled for law enforcement purposes to the extent that disclosure "could reasonably be expected to interfere with enforcement proceedings." The application of this Exemption requires the agency to establish that: (1) a law enforcement proceeding is pending or prospective; and (2) disclosure of the documents would, in some particular, discernable way, disrupt, impede, or otherwise harm the enforcement proceeding. North v. Walsh, 881 F.2d 1088, 1097 (D.C. Cir. 1989).

(..continued)

proceedings,

the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.

5 U.S.C. § 552(c) (1988) (emphases added).

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The legislative history as well as judicial interpretations of congressional intent make clear that Exemption 7(A) was not intended to "endlessly protect material simply because it [is] in an investigatory file." NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 232 (1978). Rather, Exemption 7(A) is temporal in nature and, as a general rule, may be invoked as long as the proceeding remains pending, or so long as the proceeding is fairly regarded as prospective or as preventative.<sup>5</sup> See Seegull Mfg. Co. v. NLRB, 741 F.2d 882, 886-87 (6th Cir. 1984); Barney v. IRS, 618 F.2d 1268, 1273-74 (8th Cir. 1980) (once enforcement proceedings are "either concluded or abandoned, exemption 7(A) will no longer apply"); Church of Scientology v. Internal Revenue Service, 816 F. Supp. 1138, 1157 (W.D. Tex. 1993) ("[o]nce the investigation has concluded and there is no reasonable possibility for future law enforcement proceedings related to the requested documents, the documents lose Exemption 7(A) status").

If the agency establishes the existence of a pending or prospective enforcement proceeding, it must then show that the disclosure of records or information compiled for law enforcement purposes could reasonably be expected to interfere with enforcement proceedings:

if disclosure would inform the party being investigated of the scope or direction of the agency's investigation; potentially subject witnesses or other providing information to the agency to reprisal or harassment; permit the target of the investigation to develop defenses that would enable the violations to go unremedied; permit the party being investigated to destroy or alter evidence; or chill the willingness of individuals providing information to the agency to do so.

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<sup>5</sup>Exemption 7(A) of FOIA may also be invoked where: (1) an investigation, although in a dormant stage, "is nonetheless an 'active' one which will hopefully lead to a 'prospective law enforcement proceeding,'" see National Public Radio v. Bell, 412 F. Supp. 509, 514 (D.D.C. 1977), or (2) after an investigation is closed, the disclosure could be expected to interfere with an related, pending enforcement proceeding. New England Medical Ctr. Hosp. v. NLRB, 548 F.2d 377, 386 (1st Cir. 1976); Freedburg v. Dep't of the Navy, 581 F. Supp. 3, 4 (D.D.C. 1982). Exemption 7(A) remains viable throughout the duration of long-term investigations. See Dickerson v. Dep't of Justice, 999 F.2d 1426 (6th Cir. 1993) (affirming District Court ruling that the FBI's investigation into the 1975 disappearance of Jimmy Hoffa remains ongoing).

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See Robbins Tire & Rubber, 437 U.S. 214, 239-242 (1978); North v. Walsh, 881 F.2d 1088, 1097 (D.C.Cir. 1989); Alyeska Pipeline Co. v. U.S. E.P.A., 856 F.2d 309, 312-313 (D.C. Cir. 1988).

The OIP has noted that under FOIA's Exemption 7(A), the federal courts have sustained an agency's withholding of such information as:

details regarding initial allegations giving rise to an investigation; interviews with witnesses and subjects; an investigator's summary of findings; investigative reports furnished to the prosecuting attorneys; contacts with prosecuting attorneys regarding allegations; prosecutive opinions; and other materials that would permit a target of an investigation to discern the investigation's scope, direction, limits, and sources of information relied upon.

OIP Op. Ltr. No. 91-9 (July 18, 1994).

Based upon information provided to the OIP by the HPD, it appears that a law enforcement proceeding relating to the HPD's investigation of Mr. Kosbau's death is no longer a concrete or reasonable possibility, as the HPD classified his death as a suicide and the investigation has been closed. As such, the disclosure of police reports concerning Mr. Kosbau's death could not "reasonably be expected to interfere with enforcement proceedings."

**B. Protection of Individual's Right to Fair Trial:  
Exemption 7(B)**

Exemption 7(B) of FOIA permits the withholding of information to the extent that it would "deprive any person of a right to a fair trial or an impartial adjudication."

Since it appears that the HPD has determined that the decedent died of self-inflicted wounds and as discussed above, a law enforcement proceeding connected with matters referenced in the police reports is no longer a reasonable possibility, the OIP does not believe that disclosure of the reports would deprive any person of the right to a fair trial.

**C. Unwarranted Invasion of Personal Privacy: Exemption  
7(C)**

Under Exemption 7(C) of FOIA, an agency may withhold records or information that "could reasonably be expected to constitute an unwarranted invasion of personal privacy." The OIP shall

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address the extent to which disclosure of the reports in this case would result in an invasion of privacy in section III of this opinion below.

**D. Disclosure of Identity and Information Furnished by a Confidential Source: Exemption 7(D)**

Exemption 7(D) of FOIA permits the withholding of information that "could reasonably be expected to disclose the identity of a confidential source . . . and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation . . . information furnished by a confidential source." [Emphases added.] The OIP has not been presented with any evidence that would suggest that disclosure of the reports would: (1) reveal the identity of or information furnished to the HPD by a confidential source.<sup>6</sup> Nor, based upon its examination of the records, has the OIP found any evidence to suggest that individuals cooperating in the HPD's investigation did so under an express promise of confidentiality, or under circumstances in which such a promise may reasonably be inferred.

**E. Techniques and Procedures for Law Enforcement Investigations: Exemption 7(E)**

Exemption 7(E) of FOIA permits an agency to withhold records or information compiled for law enforcement purposes, that would "disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure

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<sup>6</sup>In United States Department of Justice v. Landano, \_\_\_ U.S. \_\_\_, 113 S. Ct. 2014 (1993), the court held that not all information received from sources in the course of a criminal investigation is entitled to a presumption of confidentiality. However, the court held that narrowly defined circumstances can provide a basis for inferring confidentiality for sources in a criminal investigation.

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could reasonably be expected to risk circumvention of the law."  
5 U.S.C. § 552(b)(7)(E) (1988).

The rationale behind Exemption 7(E) "is that investigatory agencies should not have to disclose their modus operandi, as such disclosure might enable potential violators to become familiarized with, and hence able to circumvent, effective law enforcement procedures." Wilkinson v. FBI, 663 F. Supp. 336, 349 (D.C. C.D. Cal. 1986).

While the language of FOIA's Exemption 7(E) is quite broad, the federal courts have interpreted the provision to impose a general requirement that these investigatory techniques and procedures not be already well known to the public. See Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 15 (Dec. 1987) (citing S. Rep. No. 221, 98th Cong., 1st Sess. 25 (1983) (citing in turn, H.R. Rep. No. 180, 93d Cong. 2d Sess. 12 (1974)). Thus, authorities have advised that "agencies should avoid burdening the Court with techniques commonly described in movies, popular novels, stories or magazines and television." Albuquerque Publishing Co. v. Department of Justice, 726 F. Supp. 851, 858 (D. Ariz. 1989). Well known techniques such as fingerprinting and ballistic tests have been found not to be protected under FOIA's Exemption 7(D). See Ferguson v. Kelly, 448 F. Supp. 919, 926 (D.C. N.D. Ill. 1978); Wilkinson v. FBI, 663 F. Supp. 336, 348 (D.C. C.D. Cal. 1986).

Based upon the OIP's review of the records maintained by the HPD in this case, and because no evidence to the contrary has been offered, the OIP believes that the investigation techniques and procedures and crime lab tests employed by the HPD in this case are already well known to the public through movies, popular novels, magazines, or television, and as such, disclosure of the investigative reports in this case would not, in our opinion, disclose confidential investigatory techniques and procedures.

**F. Danger to the Life or Safety of an Individual:  
Exemption 7(F)**

Exemption 7(F) of FOIA permits the withholding of information that "could reasonably be expected to endanger the life or physical safety of any individual." Because the OIP has not been presented with any evidence to suggest that disclosure of the reports in this case would threaten the safety of an individual, and because our examination of such reports did not reveal any such a possibility, the OIP does not believe that the reports in this case would be protected by this prong of Exemption 7.

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Accordingly, it is the OIP's opinion that in this particular case, disclosure of the police reports concerning the unattended death of Mr. Kosbau would not result in the frustration of a legitimate government function, by causing any of the harms sought to be prevented by FOIA's Exemption 7.

The OIP now turns to an examination of whether disclosure of the reports prepared in this case would be a "clearly unwarranted invasion of personal privacy" under the UIPA.

### **III. CLEARLY UNWARRANTED INVASION OF PERSONAL PRIVACY**

In adopting the UIPA, the Legislature stated that the policy of conducting governmental business as openly as possible must be tempered "by a recognition of the right of the people to privacy" under the Hawaii Constitution. Haw. Rev. Stat. § 92F-2 (Supp. 1992).

Consistent with this policy, under the UIPA, an agency is not required to disclose "[g]overnment records, which if disclosed, would constitute a clearly unwarranted invasion of personal privacy." Haw. Rev. Stat. § 92F-13(1) (Supp. 1992). 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. 1992).

The UIPA's legislative history indicates that the UIPA's privacy exception applies only if an individual's privacy interest is significant. See H. Conf. Comm. Rep. No. 112-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 817, 818 (1988); S. Conf. Comm. Rep. No. 235, Haw. S.J. 689, 690 (1988) ("[o]nce a significant privacy interest is found, the privacy interest will be balanced against the public interest in disclosure"). 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." Id.

#### **A. Privacy Interest of Decedent Bradley Kosbau**

The OIP has noted in other OIP opinion letters that the UIPA's personal privacy exception only applies to information concerning an "individual," which term is defined under the UIPA as "a natural person." See generally OIP Op. Ltr. No. 92-17 (Sept. 2, 1992), and authorities cited therein.

Additionally, the OIP has noted that the right to privacy is a personal right, and that the majority view is that the right to privacy is a right that is extinguished upon a person's death.



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See OIP Op. Ltr. No. 90-18 (May 18, 1990) (videotaped confession of Grace Imura-Kotani before committing suicide at police department); OIP Op. Ltr. No. 90-26 (July 19, 1990) (deceased welfare recipients); OIP Op. Ltr. No. 91-32 (Dec. 31, 1991) (autopsy reports); see also, McDonnell v. U.S., 4 F.3d 1227, 1257 (3d Cir. 1993) (deceased persons have no privacy interest in the disclosure of their identities in law enforcement records).

Accordingly, the OIP finds that the victim, Mr. Bradley Kosbau, does not have a significant privacy interest in records maintained by the HPD relating to his death.

**B. Privacy Interests of Suspects, Witnesses, and Third Parties Mentioned in the Investigation Reports**

In section 92F-14(b), Hawaii Revised Statutes, the Legislature provided examples of government records (or information contained therein) in which an individual possesses a significant privacy interest. Section 92F-14(b)(2), Hawaii Revised Statutes, provides that an individual has a significant privacy interest in "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 to continue the investigation." Haw. Rev. Stat. § 92F-14(b)(2) (Supp. 1992); see generally OIP Op. Ltr. No. 92-19 (Oct. 7, 1992).

However, the examples set forth in section 92F-14(b), Hawaii Revised Statutes, do not comprise an exhaustive listing; the Legislature specifically instructed that "case law under the [federal] Freedom of Information Act should be consulted for additional guidance." S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1094 (1988).

1. Privacy Rights of Suspects

After analyzing FOIA's Exemption 7(C), the OIP previously concluded that an individual who is suspected of criminal wrongdoing, and who has been neither arrested nor charged with an offense, has a privacy interest in this fact and that, generally, the disclosure of the name of an individual who is merely suspected of criminal activity would constitute a clearly unwarranted invasion of personal privacy under the UIPA. See OIP Op. Ltr. No. 92-19 (Oct. 7, 1992)

Under FOIA's Exemption 7(C), federal agencies are not required to disclose information compiled for law enforcement purposes, the release of which "could reasonably be expected to constitute an unwarranted invasion of personal privacy." Recent court decisions applying FOIA's Exemption 7(C) have found that

possible suspects, witnesses, and those interviewed as part of a criminal law enforcement investigation have a significant privacy interest in: (1) the fact that they are mentioned in law enforcement investigation records, (2) information revealing that they cooperated in an investigation, or (3) the fact that they were possible "suspects" in such an investigation.

Courts interpreting the FOIA have also found that "suspects" or the identities of persons who are subject to "investigatory interest" have substantial privacy interests in their identities.<sup>7</sup>

For example, in the case of Senate of Puerto Rico v. Department of Justice, 823 F.2d 574 (D.C. Cir. 1987), the court examined whether information (compiled by the U.S. Justice Department's Civil Rights Division in an investigation of the deaths of two Puerto Rican political activists) must be publicly available under the federal FOIA in response to a FOIA request by the Senate of Puerto Rico's Judiciary Committee. The court upheld a finding by the district court that information identifying the subjects of the investigation was exempt under FOIA's Exemption 7(C), and noted that "[t]here is little question that disclosing the identity of targets of law enforcement investigations can subject those identified to embarrassment and potentially more serious reputational harm." Id. at 588.

Similarly, in SafeCard Services, Inc. v. Securities and

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<sup>7</sup>See McDonnell v. United States, 4 F.3d 1227, 1255 (3rd Cir. 1993) (suspects have "obvious privacy interest in not having their identities revealed"); Maynard v. CIA, 986 F.2d 547, 566 (1st Cir. 1993) ("potential for harassment, reprisal or embarrassment" if names of individuals investigated by FBI disclosed); Davis v. United States Dep't of Justice, 968 F.2d 1276, 1281 (D.C. Cir. 1992) ("embarrassment and reputational harm" would result); Antonelli v. FBI, 721 F.2d 615, 618 (7th Cir. 1983) ("revealing that a third party has been the subject of an FBI investigation is likely to constitute an invasion of [personal privacy]") cert denied, 467 U.S. 1210 (1984); Fund for Constitutional Gov't v. National Archives & Records Serv., 656 F.2d 856, 861-66 (D.C. Cir. 1981) (identities of those investigated but not charged must be withheld unless "exceptional interests militate in favor of disclosure"); Baez v. United States Dep't of Justice, 647 F.2d 1328, 1338 (D.C. Cir. 1980) ("There can be no clearer example of an unwarranted invasion of privacy than to release to the public that another individual was the subject of an FBI investigation"); Bast v. Department of Justice, 665 F.2d 1251, 1254 (D.C. Cir. 1981) (Exemption 7(C) recognizes "stigma potentially associated with law enforcement investigations and affords broad[] privacy rights to suspects").

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Exchange Commission, 926 F.2d 1197 (D.C. Cir. 1991), the court held that under FOIA's Exemption 7(C), the Securities and Exchange Commission properly deleted the names and addresses of suspects mentioned in written interviews of customers listed in stock transaction records used in an investigation of the manipulation of SafeCard stock. The court found that suspects have significant privacy interests implicated by the release of their names in connection with a criminal investigation.

Furthermore, in situations where one individual requests, from a law enforcement agency, records about another named individual (for example, records about the investigation of "Citizen X,"), except where such third person is deceased, or the investigation was officially acknowledged (for example by an arrest or indictment), law enforcement agencies must generally refuse to confirm or deny whether such records exist. This response, colloquially known as a "Glomar denial" or "Glomarization." Glomarization in the privacy context is appropriate because disclosure of the mere fact that an individual is mentioned in a law enforcement file carries a stigmatizing connotation. See, e.g., Fund for Constitutional Government v. National Archives & Records Service, 656 F.2d 856, 865 (D.C. Cir. 1981) ("the disclosure of [the fact that specific individuals were the subjects of a criminal investigation] would produce the unwarranted placing of the named individuals in the position of having to defend their conduct in the public forum); Baez v. Dep't of Justice, 647 F.2d 1328, 1338 (D.C. Cir. 1980) ("There can be no clearer example of an unwarranted invasion of privacy than to release to the public that another individual was the subject of an FBI investigation.").

However, the facts presented herein do not involve such a third-party request, where an individual is seeking access to investigatory records about living individuals who may have been subjects of an investigation. Rather, the requester in the facts presented is seeking investigation records relating to the unattended death of an individual and thus a "glomar" response would not be appropriate in this case.

## 2. Privacy Rights of Witnesses and Third Parties

Turning to a consideration of whether witnesses or other individuals who supplied information to the HPD as part of a potential homicide investigation involving the death of Mr. Kosbau have a significant privacy interest in not having their names revealed in connection with the HPD's investigation of Mr. Kosbau's death, we find that court decisions under FOIA's Exemption 7(C) are also instructive, since section 92F-14(b), Hawaii Revised Statutes, does not categorically provide that witnesses in a civil or criminal law enforcement investigation have a significant privacy interest in their status as such.

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In the Senate of Puerto Rico case cited above, the court noted that witnesses involved in a law enforcement investigation by the Justice Department's Civil Rights Division "have a substantial privacy interest in seeing that their participation remains secret." Senate of Puerto Rico, 823 F.2d at 588. The court noted that "those cooperating with law enforcement should not now pay the price of full disclosure of personal details." Id.; accord McDonnell v. U.S., 4 F.3d 1227, 1255 (3rd Cir. 1993) (FBI interviewees and witnesses have a substantial privacy interest because disclosure could result in embarrassment and harassment); Manna v. U.S. Dep't of Justice, 51 F.3d 1158 (3rd Cir. 1995) ("We have held that . . . interviewees and witnesses involved in criminal investigations, not just suspects, have a "substantial privacy interest" in nondisclosure of their names "because disclosure may result in embarrassment and harassment"); Putnam v. U.S. Dep't of Justice, 873 F. Supp. 705 (D.D.C. 1995) (Exemption 7(C) "recognizes that the stigma of being associated with any law enforcement investigation affords broad privacy rights to those who are connected in any way with such an investigation"); Massey v. F.B.I., 3 F.3d 620 (2nd Cir. 1993); United States Steel Corp. v. Department of Labor, 558 F. Supp. 80 (W.D. Pa. 1983); KTVY-TV v. United States, 919 F.2d 1465, 1469 (10th Cir. 1990); Cuccaro v. Secretary of Labor, 770 F.2d 355, 359 (3rd Cir. 1985); New England Apple Council, Inc. v. Donovan, 725 F.2d 139, 144-45 (1st Cir. 1984); see also Halloran v. Veterans Administration, 857 F.2d 315, 321 (5th Cir. 1989) ("many of the non-suspects who are identified or referred to in the transcripts have discernible privacy interests in not having their thoughts, comments, and views regarding their work, their job performance, and their co-workers, clients, and friends released to the public"); Nadler v. U.S. Dep't of Justice, 955 F.2d 1479 (11th Cir. 1992) ("a source in a government investigation has a strong interest in keeping the investigation private").

Similarly, in Landano v. U.S. Department of Justice, 956 F.2d 422, 426 (3rd Cir. 1992) rev'd on other grounds, \_\_\_ U.S. \_\_\_ (1993), after surveying decisions by other federal appellate courts, the court noted that witnesses and non-suspects who are identified in records compiled in the course of a criminal investigation have "obvious privacy interests in not having their identities revealed." The court reasoned:

Criminal investigations turn up a myriad of details about the personal lives of witnesses and interviewees and for some, disclosure of the fact of cooperation with the investigation may itself result in reprisals or strained personal relationships. Moreover, as this case demonstrates, many

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people may have reason to seek out and question those who have supplied information in the course of a criminal investigation.

Landano, 956 F.2d at 426.

Moreover, in the SafeCard Services case above, the court held that under FOIA's Exemption 7(C), the Securities and Exchange Commission properly deleted the names and addresses of third parties and witnesses mentioned in written interviews of customers listed in stock transaction records used in an investigation of the manipulation of SafeCard stock. SafeCard argued that access to the names and addresses of potential witnesses would provide the public with insight into the SEC's conduct with respect to SafeCard and "short selling practices" in particular. Noting that it had rejected such claims in the past because "the type of information sought is simply not very probative of an agency's behavior or performance," the court found that the disclosure of the names and addresses of witnesses "could reasonably be expected to constitute an unwarranted invasion of personal privacy."

Additionally, after examining the U.S. Supreme Court's decision in Reporters Committee for Freedom of the Press v. U.S. Dep't of Justice, 489 U.S. 749 (1989) (see OIP Op. Ltr. No. 89-16 (December 27, 1989)), the court held as follows:

Prior to Reporters Committee, this court had many a time resolved particularized inquiries in favor of withholding the names and addresses of private individuals appearing in law enforcement files. We now hold categorically that, unless access to the names and addresses of private individuals appearing in files within the ambit of Exemption 7(C) is necessary in order to confirm or refute compelling evidence that an agency is engaged in illegal activity, such information is exempt from disclosure. No such evidence of agency misconduct appearing in this case, the agency need not disclose the names and addresses redacted from the documents at issue here.

Safecard Services, 926 F.2d at 1206 (emphasis added). Thus, the court held that as a categorical matter, the names and addresses of witnesses mentioned in records compiled for law enforcement purposes are exempt from disclosure under Exemption 7(C) (unwarranted invasion of personal privacy), in the absence of compelling evidence of illegal conduct on the part of the government.

3. Application of Public Interest Balancing Test

Under section 92F-14(a), Hawaii Revised Statutes<sup>8</sup>, "[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."

In assessing the "public interest" in disclosure under the UIPA's balancing test, the OIP has previously opined that the interest to be considered is the public interest in the disclosure of information that sheds light upon the actions or decisions of government agencies, or their officials. OIP Op. Ltr. No. 89-16 (Dec. 27, 1989). In the usual case, this public interest "is not fostered by disclosure of information about private citizens accumulated in various governmental files but that reveals little or nothing about an agency's own conduct." Id. at 5, quoting U.S. Dep't of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 773 (1989). As the U.S. Supreme Court stated in Reporters Committee:

This basic policy of "'full agency disclosure unless information is exempted under clearly delineated statutory language,'" *Department of Air Force v. Rose*, 425 U.S. at 361 (quoting S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965)), indeed focuses on the citizens' right to be informed about "what their government is up to." Official information that sheds light upon an agency's performance of its statutory duties falls squarely within that statutory purpose. That purpose, however, is not fostered by the disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct. In this case--and presumably in the typical case in which one private citizen is seeking information about another--the requester does not intend to discover anything about the conduct of the agency that has possession of the requested records.

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<sup>8</sup>See also Haw. Rev. Stat. §92F-2 (Supp. 1992) (purpose of UIPA is to "balance individual privacy interest and public access interest, allowing access unless it would constitute a clearly unwarranted invasion of personal privacy").

Id. at 773.

In assessing the public interest in disclosure of information about suspects and witnesses, federal courts since Reporters Committee have held that the identities of individuals assisting in criminal investigations, and those of suspects, would not shed alight upon the government's conduct, and that the privacy interests of such individuals outweighs the public interest in disclosure. See Putnam v. U.S. Dep't of Justice, 873 F. Supp. 705, 715 (D.D.C. 1995); Manna v. U.S. Dep't of Justice, 51 F.3d 1158, 1166 (3rd Cir. 1995) (absent proof of governmental misconduct, court need not linger over the balance); McDonnell v. U.S., 4 F.3d 1227 (3rd Cir. 1993) (connection between disclosure and interest in scrutinizing government action not enough to override the individual's privacy interest in nondisclosure); Massey v. F.B.I., 3 F.3d 620 (2nd Cir. 1993) (disclosure of identities of private persons involved or possibly implicated in criminal investigations would be even less likely to shed light upon the FBI's performance of its public duties); SafeCard Services, Inc. v. Securities and Exchange Commission, 926 F.2d 1197 (D.C. Cir. 1991) (holding that as a categorical matter, unless access to the names and addresses of private individuals appearing in files within the ambit of Exemption 7(C) is necessary in order to confirm or refute compelling evidence that an agency is engaged in illegal activity, such information is exempt from disclosure).

While it appears that in some other states, records associated with closed law enforcement investigations may be available in their entirety, including the names of witnesses, and suspects<sup>9</sup>, in accordance with the UIPA's legislative history that case law under the FOIA be consulted for guidance, the OIP believes that on balance, the disclosure of the identities of "suspects" (or persons of investigatory interest) and witnesses or third persons mentioned in such records would constitute a clearly unwarranted invasion of personal privacy.

Because the OIP believes that information concerning the names, addresses, and other identifying information<sup>10</sup> concerning

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<sup>9</sup>See, e.g., Memphis Publishing v. Holt, 710 S.W.2d 513 (Tenn. 1986). We also note that records relating to criminal law enforcement investigations are entirely closed under the open records laws of a few other states. See generally, Police Records: A Guide to Effective Access in the 50 States & D.C., News Media and the Law (Fall 1992).

<sup>10</sup>In previous opinions, the OIP concluded that when an agency segregates individually identifiable data from a record under section 92F-13(1), Hawaii Revised Statutes, the agency may

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these witnesses and third persons may be reasonably segregable from records maintained by the HPD, the OIP finds that this information should be segregated, or "sanitized" from HPD records, and that the records then be made available for inspection and copying.<sup>11</sup>

### CONCLUSION

Because a criminal law enforcement proceeding involving the death of Mr. Kosbau is no longer a reasonable possibility, and there is no evidence to suggest that disclosure of the HPD's records relating to his death would reveal the identity of any confidential source, techniques or procedures for law enforcement investigations, impair an individual's right to a fair trial, or endanger the life or safety of any individual, the OIP concludes that the records are not records compiled for law enforcement purposes that must be confidential in order to avoid the frustration of a legitimate government function.

In contrast, the OIP finds that disclosure of the names, addresses, and other identifying information concerning individuals who either furnished information to the HPD as part of its investigation or were connected with the investigation would constitute a clearly unwarranted invasion of personal privacy. Therefore, the OIP concludes that the HPD should segregate from its records any information that would reasonably identify such persons, and then make the records available for inspection and copying under the UIPA.

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

Very truly yours,

(..continued)

segregate all information that would result in the likelihood of actual identification. See OIP Op. Ltr. No. 94-8 at 10-11 (May 12, 1994); OIP Op. Ltr. No. 95-7 at 11 (March 28, 1995).

<sup>11</sup>The OIP is available to assist the HPD in determining what information must be segregated to prevent the actual identification of such persons, or may, upon request of the public, independently review the information segregated by the HPD to determine whether the HPD has segregated more than is necessary to prevent the identification of such persons.



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# **EXHIBIT A**