

March 11, 1997

Ms. Marsha E. Kitagawa
Director, Public Affairs Office
The Judiciary
417 South King Street
Honolulu, Hawaii 96813

Dear Ms. Kitagawa:

Re: Photograph of Deceased Former Employee

This is in response to your request to the Office of Information Practices ("OIP") for an advisory opinion regarding the above-referenced matter. Specifically, you have asked whether the Judiciary's photograph of Mr. Michael Lau, now deceased, must be publicly disclosed pursuant to the news media's request.

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), the Judiciary must make the photograph of a former employee, Michael Lau, now deceased, available for public inspection and copying upon request.

BRIEF ANSWER

Under the UIPA, there are two exceptions to public disclosure which warrant consideration.

First, 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) (1993). Based on relevant case law, the OIP finds that an individual's privacy interests expire upon the individual's death. Therefore, any privacy interest that Mr. Lau may have in the photograph is extinguished. Furthermore, Mr. Lau's surviving family members do not have any privacy interest in the photograph.

Second, the UIPA does not require agencies to disclose "[g]overnment records that, by their nature, must remain confidential in order for the government to

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avoid the frustration of a legitimate government function." Haw. Rev. Stat. § 92F-13(3) (1993). However, under the facts presented to the OIP, we find that public disclosure of Mr. Lau's photograph will not frustrate any government function.

Therefore, the OIP concludes that, under the UIPA, there are no applicable exceptions to public disclosure, hence, the photograph is a public record that is open to inspection and copying.

FACTS

It is a matter of public record that, as reported by media organizations, on August 11, 1996, Mr. Michael Lau committed suicide with a gun after allegedly fatally shooting several individuals in his neighbor's home. Soon after this incident, you received a request from a media organization requesting a copy of Mr. Lau's employment identification photograph. You then requested an advisory opinion from the OIP as to whether the photograph may be released to the press. You informed the OIP that the Judiciary did not object to disclosing this record nor was the Judiciary conducting any law enforcement activities related to Mr. Lau's alleged crimes.

Both you and the Office of the Sheriff advised OIP that the Office of the Sheriff maintains physical custody of photographs taken of Judiciary employees for employment identification purposes. The photograph of Mr. Lau, taken in 1986, is a frontal face and shoulder photograph taken for employment identification purposes when Mr. Lau was previously employed with the Judiciary.

You and the Office of the Sheriff have also advised the OIP that the Judiciary, under certain circumstances, has control of the employees' identification photograph files. The Judiciary's control includes the authority to release photographs to the public.

DISCUSSION

I. DEFINITION OF GOVERNMENT RECORDS

The UIPA sets forth the general rule that "all government records are open to public inspection unless access is restricted or closed by law." Haw. Rev. Stat. § 92F-11(a) (1993). 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 (1993) (emphasis added). Hence, we must examine whether or not the photograph is maintained by the Judiciary, and furthermore, is the Judiciary an agency maintaining the record in visual form.

Because the Office of the Sheriff, a division of the Department of Public Safety, is another government agency and has physical possession or custody of the photograph, we first must determine whether the Judiciary, for the purposes of the UIPA, is an agency that maintains the photograph. The OIP has previously advised in OIP Opinion Letter Nos. 91-5 (April 15, 1991), 91-29 (Dec. 23, 1991), 95-8 (May 8, 1995), and 95-20 (Aug. 21, 1995) that the UIPA does not define the meaning of the term "maintain." However, the Uniform Information Practices Code ("Model Code"), drafted in 1980 by the National Conference of Commissioners on Uniform State Laws, which chapter 92F was based, does contain a definition of this term. Model Code § 1-105(6) (1980). The Model Code's definition of the term "maintain" provides key guidance to its use herein and would be consistent with the legislative purposes underlying the UIPA. See OIP Op. Ltr. No. 91-5 at 6 (April 15, 1991).

Section 1-105(6) (1980) of the Model Code defines the term "maintain" as to "hold, possess, preserve, retain, store or administratively control." The Model Code commentary¹ explains as follows:

"Maintain" is defined in Section 1-105(6) to sweep as broadly as possible. It includes information possessed or controlled in any way by an agency. The administrative control component of the definition is especially important since it prevents an agency that does not have physical custody of government records from evading its obligations under this Code.

Model Code § 1-105 commentary at 9 (1980) (emphasis added).

¹The legislative history of the UIPA instructs those applying its provisions to consult the Model Code's commentary, where appropriate, in guiding the interpretation of similar UIPA provisions. See H. Stand. Comm. Rep. No. 342-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 969, 972 (1988).

In OIP Opinion Letter No. 92-25 (Dec. 22, 1992), we noted that the term "control" has different meanings depending on the context in which it is used, and that for the most part:

[I]t refers to the "power or authority to manage, direct, or oversee," or "to exercise restraining or directing influence over," and also relates to "authority over what is not in one's physical possession." See OIP Op. Ltr. No. 91-5 at 7 and cases cited therein; see also Biben v. Card, 119 F.R.D. 421, 425 (W.D. Mo. 1992); M.L.C. v. North American Philips Corp., 109 F.R.D. 124, 136 (S.D.N.Y. 1992) ("control includes legal right of producing party to obtain documents from other sources upon demand").

OIP Op. Ltr. No. 92-25 at 4 (Dec. 22, 1992).

The Judiciary's "administrative control" is evidenced by its authority to authorize the photograph's release although it is not a record in the Judiciary's physical possession. Therefore, based upon the foregoing, the OIP finds that the Judiciary "maintains" the record because the Judiciary has administrative control of the photograph.

The remaining determination is whether the Judiciary is an "agency" maintaining a "visual record." The UIPA's definition of "agency" excludes "the nonadministrative functions of the courts of the State," but does encompass the court's administrative functions. OIP Op. Ltr. No. 90-4 at 5 (Jan. 29, 1990). As the photograph of Mr. Lau was taken and used for the Judiciary's personnel functions and there is no evidence that the photograph was used for nonadministrative Judiciary functions, we find that the record falls under the administrative functions of the court. See generally OIP Op. Ltr. Nos. 90-4 (Jan 29, 1990) (certified driver's abstracts are the court's administrative records); and 93-8 (Aug. 2, 1993) (personnel and record keeping functions are administrative tasks); but see OIP Op. Ltr. No. 95-20 (Aug. 21, 1995) (traffic citations used as charging documents are nonadministrative court records).

Thus, because Mr. Lau's identification photograph is a visual record maintained by an agency, the OIP concludes that it is a "government record"

subject to the UIPA. Although the photograph is a government record, the next question is whether the photograph is protected from disclosure under one of the UIPA's exceptions to disclosure.

II. EXCEPTIONS TO DISCLOSURE

The UIPA mandates that "[e]xcept as provided in section 92F-13, Hawaii Revised Statutes, 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) (1993). Section 92F-13, Hawaii Revised Statutes, lists the following five exceptions to disclosure of government records: (1) government records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy; (2) government records that would not be discoverable in a judicial or quasi-judicial action to which the State or county is or may be a party; (3) government records which, by their nature, must be kept confidential to avoid the frustration of a legitimate government function; (4) government records that are protected from disclosure by State or federal law, including State or federal court orders; and (5) inchoate and draft working papers of legislative committees.

Of these exceptions to disclosure, the OIP finds that the exceptions for "clearly unwarranted invasion of personal privacy" and the "frustration of a government function" warrant discussion in your inquiry.

A. Clearly Unwarranted Invasion of Personal Privacy

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) (1993). A clearly unwarranted invasion of personal privacy is determined through a balancing test in which "[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) (1993). Under this balancing test, the public's interest in disclosure of a government record does not outweigh the individual's significant privacy interest if the information within the record "reveals little or nothing about the agency's own conduct." OIP Op. Ltr. No. 89-16 at 5, 6 (Dec. 27, 1989) quoting United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 at 773; 103 L. Ed. 2d 774 at 796; 109 S. Ct. 1468 at 1482 (1989). However, "if a privacy

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

The OIP has previously opined that a deceased individual does not have any significant privacy interest in a government record that refers to him or her because such an interest may only be attributed to a living individual. See OIP Op. Ltr. Nos. 90-18 (May 18, 1990) (videotaped confession before committing suicide not applicable to personal privacy exception although other exception (frustration of government function) found to be applicable); 91-32 (Dec. 31, 1991) (autopsy reports found to be disclosable); 91-33 (Dec. 31, 1991) (ambulance report form of the deceased found to be disclosable); and 95-21 (Aug. 28, 1995) (no privacy interest for deceased in police report of his suicide).² Hence, any privacy interest that Mr. Lau may have had in the Judiciary's photograph of him is extinguished by his death.

Generally, only the living individual to whom a record refers may have a privacy interest in that record. See OIP Op. Ltr. No. 91-32 at 9 (Dec. 31, 1991). However, even if the record does not contain references to other living persons that would be protected under the UIPA, surviving family members may have privacy interests that courts are willing to protect. In analyzing the federal Freedom of Information Act ("FOIA") cases, the U.S. Department of Justice, Office of Information and Privacy, has stated that for the purpose of protecting the privacy interests of surviving family members, a record (or information) may be withheld from public disclosure where the record (or information) would disclose "particularly sensitive, often graphic, personal details about the circumstances surrounding an individual's death" or "if release of the information would cause a 'disruption of their peace of minds.'" The Office of Information and Privacy, U.S. Department of Justice, Freedom of Information

²But see OIP Op. Ltr. No. 90-26 (July 19, 1990) (deceased welfare recipient's record held not publicly disclosable pursuant to non-UIPA State law requiring non-disclosure of welfare records.

Act Guide & Privacy Act Overview 224, 225 (1996).³ See also Badhwar v. United States Dept. of the Air Force, 829 F.2d 182, 186 (D.C. Cir. 1987) (autopsy reports from aircraft accident might "shock the sensibilities of surviving kin"); Marzen v. HHS, 825 F.2d 1148, 1154 (7th Cir. 1987) (deceased infant's medical records describing the infant's deteriorating medical condition and the parents' anguished reactions are exempt because the records' release "would almost certainly cause infant Doe's parents more anguish"; The New York Times Company v. National Aeronautics and Space Administration, 782 F. Supp. 628, 632 (U.S. Dist. Ct., D.C. 1991) (audio tape of astronauts' voices during the Space Shuttle Challenger explosions is exempt from public disclosure to protect family members' right to privacy from the "barrage of mailing and personal solicitations . . . [and] also to a panoply of telephone calls from media groups as well as a disruption of their peace of mind every time a portion of the tape is played within their hearing").

Of particular note, the federal courts have recognized the significant privacy interests of murder victims' families in photographs of the victims. See Hale v. United States Dep't of Justice, 973 F.2d 894, 902 (10th Cir. 1992), cert. granted, vacated, & remanded on other grounds 509 U.S. 918 (1993) (no "public interest in the photographs of the deceased victim, let alone one that would outweigh the personal privacy interests of the victim's family."); KTVY-TV v. United States, No. 87-1432-T, Slip Op. at 9 (W.D. Okla. May 4, 1989), aff'd per curiam, 919 F.2d 1465 (10th Cir. 1990) (where a postal employee shot and killed several people, the court wrote that "[t]he privacy rights asserted--those of the survivors and family of the victims in not having photographs of the bodies of the victims and clinical descriptions of their wounds being divulged--are patent and compelling and within the protection of [FOIA]").

In those cases in which surviving family members' privacy interests have been recognized by federal courts, the government records themselves are directly connected with the decedents' death or manner of death. In Mr. Lau's case, the identification photograph is completely unrelated to his death; it was taken specifically for employment purposes approximately ten years before his death. Because the photograph does not depict or directly relate to Mr. Lau's

³In our examination of this issue, we rely upon the UIPA's legislative history which suggests that federal "case law under the Freedom of Information Act [5 U.S.C. § 552 (1994)] should be consulted for additional guidance" in analyzing an individual's privacy interest. OIP Op. Ltr. No. 90-18 at 9 (May 18, 1990).

death, the OIP concludes that Mr. Lau's surviving family members do not have a privacy interest in his employment photograph.

Therefore, neither Mr. Lau (deceased) nor his surviving family members may assert that disclosure of the photograph would be a clearly unwarranted invasion of personal privacy. The other exception to disclosure that warrants discussion is the frustration of a legitimate government function.

B. Frustration of a Legitimate Government Function

The UIPA does not require agencies to disclose "[g]overnment records that, by their nature, must remain confidential in order for the government to avoid the frustration of a legitimate government function." Haw. Rev. Stat. § 92F-13(3) (1993). In particular, the UIPA's legislative history lists "examples of records which need not be disclosed if disclosure would frustrate a legitimate government function." S. Stand. Com. Rep. No. 2590, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1095 (1988). Of particular note, the UIPA "frustration" exception includes "[r]ecords or information compiled for law enforcement purposes." Id., see, e.g. OIP Op. Ltr. No. 90-18 (May 18, 1990) (videotaped confession before committing suicide found not disclosable because of an open police investigation). However, in the case of Mr. Lau's photograph, this exception does not warrant further examination because the Judiciary is not compiling or maintaining the photograph for law enforcement activities. See, e.g. OIP Op. Ltr. No. 95-21 (Aug. 28, 1995) (disclosure of police department's reports from a closed investigation would not result in the frustration of legitimate government function due to no reasonable possibility of interference with their law enforcement proceedings).

Furthermore, the Judiciary has not expressed to the OIP any particular circumstances within its administrative duties which would invoke the UIPA's "frustration of a legitimate government function" exception. Additionally, the OIP's evaluation of this exception reveals no circumstances where it would be applicable.

CONCLUSION

For the reasons set forth above, the OIP concludes that any privacy interests that Michael Lau may have had in his photograph were extinguished upon his death. Furthermore, the photograph does not depict or directly relate

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to Mr. Lau's death and, therefore, does not give Mr. Lau's surviving family members a privacy interest. Hence, the clearly unwarranted invasion of personal privacy exception to disclosure under section 92F-13(1), Hawaii Revised Statutes, is not applicable. Additionally, no facts have been presented to the OIP that would warrant the application of the frustration of a legitimate government function exception to disclosure under section 92F-13(3), Hawaii Revised Statutes. Finally, none of the other exceptions to disclosure under section 92F-13, Hawaii Revised Statutes, provide a statutory basis which could preclude public disclosure of the record. Therefore, under the UIPA, the photograph is a public record and must be provided by the Judiciary for public inspection and copying.

Very truly yours,

Randall J. Port
Staff Attorney

APPROVED:

Moya T. Davenport Gray
Director

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