

December 3, 1999

Mr. George Peabody  
Managing Editor  
The Molokai News  
HC Box 770  
Kaunakakai, Hawaii 96748

Re: Identities of Individuals Named in a Criminal Investigation

Dear Mr. Peabody:

This is in response to your letter to the Office of Information Practices ("OIP") requesting an opinion on the above-referenced matter.

#### **ISSUE PRESENTED**

Whether the identities of individuals named in an investigation of alleged illegal catching of lobsters out of season was properly withheld from disclosure by the Department of Land and Natural Resources Conservation and Resources Enforcement Division ("DOCARE").

#### **BRIEF ANSWER**

Yes. Individuals have significant privacy interests in the fact that they are named in a criminal investigation. These significant privacy interests must be balanced against the public interest in disclosure. The OIP believes that in this case, the privacy interests of individuals named in the investigation are not outweighed by the public interest in disclosure. Disclosure would therefore be a clearly unwarranted invasion of personal privacy under section 92F-13(1), Hawaii Revised Statutes. DOCARE also has discretion to withhold the identities of persons named in criminal investigations from disclosure when disclosure would cause the frustration of a legitimate government function.

#### **FACTS**

DOCARE is vested with criminal law enforcement powers to investigate alleged violations of seasonal fishing under chapter 199, Hawaii Revised Statutes. In 1997, you sought the OIP's assistance in obtaining a DOCARE report of a

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criminal investigation into whether Maui County Fire Department (“Fire Department”) employees had illegally caught lobsters while at sea in a Fire Department Rescue Boat in 1996. In 1998, DOCARE provided you with a copy of the investigation report with all information that would identify the individuals named in the report redacted.

Your letter stated you believed no one was terminated from the Fire Department as a result of this incident, but that the captain of the rescue shift allegedly involved was disciplined.<sup>1</sup> On October 22, 1996, you faxed a copy of a newspaper article to the OIP. The name of the newspaper was not provided, nor was the date of the article. The article stated that a Fire Department captain received a written reprimand after a four person crew he was in charge of supervising, used a county rescue boat to catch lobster out of season. The article stated that the captain was not on the training trip. The article also stated that the Fire Department did not release the captain’s name because it was a “personnel matter.”

A letter to the OIP from Gary Moniz, Acting Administrator for DOCARE dated August 10, 1998, stated that no one was ever charged with a crime nor implicated as a suspect in the report. No one has been criminally prosecuted in this case.

You believe that these same individuals were involved in a prior incident of alleged illegal catching of lobsters out of season, and that they may have received special treatment from the Fire Department regarding this incident. In your letter, you asked whether the “names of [Fire Department] employees who were on the rescue boat and actually doing the lobster diving” should be publicly disclosed.

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<sup>1</sup> Had there been evidence that any of the persons named in the DOCARE report had been suspended or discharged from government employment based on employment misconduct pursuant to this incident, the identities of those persons may be public under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes (“UIPA”). Section 92F-14(b)(4), Hawaii Revised Statutes, provides that government employees do not have significant privacy interests in certain information related to employment misconduct that results in a suspension or discharge. According to the UIPA’s legislative history, if a privacy interest is not ‘significant’, a scintilla of public interest in disclosure will preclude a funding of a clearly unwarranted invasion of personal privacy.” H. Conf. Comm. Rep. No. 112-88, 14<sup>th</sup> Leg., 1988 Reg. Sess., Haw. H.J. 817, 818 (1988); S. Conf. Comm. Rep. No. 235, 14<sup>th</sup> Leg., 1988 Reg. Sess., Haw. S.J. 689, 690 (1988).

In telephone conversations on October 25, 1999, and November 18, 1999, the OIP confirmed DOCARE's position with Gary Moniz. DOCARE asserts that the identities of the persons named in the investigation report should not be disclosed because they carry significant privacy interests that are not outweighed by the public interest in disclosure. Mr. Moniz stated that in this case, there was less than a mere suspicion, because although lobsters were found, there was insufficient evidence as to whether they were illegally caught out of season. DOCARE also fears that disclosure of identities of persons named in criminal investigations will interfere with future investigations because informants will not want to come forward with information in the future. DOCARE stated by example that sometimes informants are personally acquainted with, or work with individuals who become the subject of an investigation, and disclosure of the identities of persons named in an investigation could lead to retaliation.

## DISCUSSION

### **I. INTRODUCTION**

Records of all State and county agencies are public unless access is restricted or closed by law. Haw. Rev. Stat. §92F-11(a) (1993). There are five exceptions to the general rule of disclosure under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"). These are for: (1) information which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy; (2) information pertaining to the prosecution or defense of any judicial or quasi-judicial action to which the state or any county is or may be a party, but only to the extent such records would not be discoverable; (3) information which, if disclosed, would cause the frustration of a legitimate government function; (4) information that is protected by a state or federal law or court order; and (5) certain legislative papers. Haw. Rev. Stat. §92F-13 (1993).

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

Government records need not be disclosed when disclosure would constitute a clearly unwarranted invasion of personal privacy. Haw. Rev. Stat. §92F-13(1) (1993). To determine whether disclosure would constitute a clearly unwarranted

invasion of personal privacy, the UIPA's balancing test must be applied: if the public interest in disclosure outweighs any privacy interests in a government record, disclosure would not constitute a clearly unwarranted invasion of personal privacy. Haw. Rev. Stat. §92F-14(a) (Supp. 1998).

When balancing the privacy rights of an individual against the public interest in disclosure, the public interest to be considered is that which sheds light upon the workings of government. OIP Op. Ltr. No. 93-20 at 7 (Dec. 30, 1993). The OIP reached this conclusion by looking at:

[t]wo basic policies served by the UIPA, which are to “[p]romote the public interest in disclosure” and to “[e]nhance governmental accountability through a general policy of access to government records.” Haw. Rev. Stat. §92F-2 [1993]. Further, in enacting the UIPA, the Legislature declared that “it is the policy of this State that the formation and conduct of public policy--the discussions, deliberations, decisions, and action of government agencies-- shall be conducted as openly as possible.” Haw. Rev. Stat. §92F-2 [1993].

OIP Op. Ltr. No. 93-20 at 7 (Dec. 30, 1993).

#### **A. Criminal Investigations**

In a prior Opinion, the OIP discussed generally, the privacy rights of individuals named in closed criminal investigation reports generated by the Police Department for the City and County of Honolulu. In that opinion, we noted that the Legislature provided examples of government records in which an individual has 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.” OIP Op. Ltr. No. 95-21 at 16 (Aug. 28, 1995) (citing Haw. Rev. Stat. §92F-14(b)(2) (1993)).

##### **1. Privacy Interests of Suspects**

The OIP did not have to decide the issue of a particular suspect's privacy interest in his identity in the OIP Opinion Letter Number 95-21, because the investigation at issue discussed a suicide and there were no suspects. We did note that the Legislature provided that the OIP should look to federal case law under the

Freedom of Information Act (“FOIA”) for guidance in interpreting issues under the UIPA. OIP Op. Ltr. No. 95-21 at 16 (Aug. 28, 1995). We then discussed the federal view on privacy interests of persons named in criminal investigations.

Under the FOIA, federal courts 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 an investigation.

OIP Op. Ltr. No. 95-21 at 17 (Aug. 28, 1995).

Federal cases have also found that “disclosing the identity of targets of law enforcement investigations can subject those identified to embarrassment and potentially more serious reputational harm. OIP Op. Ltr. No. 95-21 at 17 (Aug. 28, 1995) (citing Senate of Puerto Rico v. Department of Justice, 823 F.2d 574 (D.C. Cir. 1987). See also OIP Op. Ltr. No. 98-5 at 21 (Nov. 24, 1998) (in general, public interests in the workings of government are not furthered by disclosure of names of government employees being investigated for misconduct).

## **2. Privacy Interests of Witnesses and Third Parties**

In the OIP Opinion Letter Number 95-21, the OIP followed the federal premise under FOIA that identities of witnesses and other individuals who supplied information or that are mentioned in criminal law enforcement records are generally protected from public disclosure. OIP Op. Ltr. No. 95-21 at 18-21 (Aug. 28, 1995). Further research shows that this is rule is still followed today. See Anderson v. U. S. Dep’t of Justice, 1999 U.S. Dist., LEXIS 4731 (D.D.C. March 31, 1999); Voinche v. FBI, 46 F. Supp. 2d 26 (D.D.C. 1999). Federal courts have stated that the significant privacy interests of informants can only be overcome in situations such as when there is compelling evidence of illegal activity by the agency. OIP Op. Ltr. No. 95-21 at 22 (Aug. 28, 1995); Voinche v. FBI, 46 F. Supp. 2d 26, 33 (D.D.C. 1999).

## **3. Application of the Balancing Test**

As stated above, to determine whether the public interest in disclosure would outweigh the privacy interests attached to requested information, one must look at whether disclosure would shed light on the workings of government. In a prior OIP Opinion, we discussed the disclosure of identities of individuals named in a criminal investigation, noting that:

[c]ourt decisions under the FOIA indicate that the names of individuals that appear in criminal investigation files would virtually never be “very probative of an agency’s behavior or performance.” . . . Indeed, . . . the disclosure of such information would serve a “significant” public interest only if “there is compelling evidence that the agency . . . is engaged in illegal activity.”

OIP Op. Ltr. No. 92-19 at 5-6 (Oct. 7, 1992) (citations omitted).

The OIP does not believe that disclosure of the identities of the persons named in the DOCARE report at issue here would shed light upon the workings of DOCARE, the government agency that conducted the criminal investigation. DOCARE’s investigation procedures and actions in this case are apparent from the unredacted portions of the report, and disclosing the names of those mentioned in the report would not further the public interest in disclosure because it would not shed any more light on the workings of government.

Further, there have been no allegations of illegal activity on the part of DOCARE. You indicated that you believed the Fire Department employees named in the report were receiving special treatment by the Fire Department. However, disclosure by DOCARE of individuals named in its report would not shed light on the workings of the Fire Department, which is a separate agency.

The OIP noted in the OIP Opinion Letter Number 95-21, that in some jurisdictions, records of closed law enforcement investigations may be available in their entirety. However, in balancing the public interest in disclosure of the identities of witnesses, third persons, suspects, or persons of investigatory interest against the privacy interests of those named individuals, the OIP believes disclosure would constitute a clearly unwarranted invasion of personal privacy. OIP Op. Ltr. No. 95-21 at 22 (Aug. 28, 1995). In the facts of this case, we believe the identities of the individuals named in DOCARE’s investigation report were properly withheld from the public as disclosure would constitute a clearly unwarranted invasion of personal privacy.

## **B. Privacy Interests After Arrest or Prosecution Initiated**

The OIP has also noted that: (1) once an agency has publicly confirmed the existence of a criminal investigation because disclosure of the suspect's identity is necessary to prosecute the violation or to continue the investigation, or (2) once an arrest has been made, or the suspect has been charged, there is little or no privacy interest implicated by disclosure of the suspect's identity. OIP Op. Ltr. No. 92-19 at 6 (Oct. 7, 1992); See also OIP Op. Ltr. No. 95-21 at 16 (Aug. 28, 1995). If either of these circumstances occurs in the future, it would be appropriate for DOCARE to disclose the names of the individuals in DOCARE's report.

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

Agencies need not disclose information, which, if disclosed, would cause the frustration of a legitimate government function. Haw. Rev. Stat. §92F-13(3) (1993). DOCARE has asserted that disclosure of the identities of persons named in criminal investigation reports will discourage individuals from coming forward in the future with information on possible violations of the law, and thus frustrate DOCARE's function of enforcing the law.

The OIP has discussed how the "frustration" exception may protect identities of subjects of complaints in a prior OIP opinion. The Ethics Commission for the City and County of Honolulu ("Commission") issues advisory opinions on alleged violations of standards of conduct in the Revised Charter of the City and County of Honolulu and the Revised Ordinances of the City and County of Honolulu. If a violation is found, the Commission recommends discipline. Commission advisory opinions are available to the public in redacted form, with all information that may identify individuals discussed in the advisory opinion, including requesters and subjects, redacted.

In the OIP Opinion Letter Number 98-1, a member of the public asked for a copy of an advisory opinion the Commission had issued about a specific person. The record requester named the person the advisory opinion was about. Because the subject was named by the requester, the requester would have known the identity of the subject of the complaint even if the advisory opinion was disclosed in redacted form. The Commission provided evidence on how disclosure would affect a requester's willingness to come forth with information. The Commission alleged that disclosure of advisory opinions about a specifically named individual, or merely

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confirming or denying the existence of an advisory opinion about a specific individual, would have a chilling effect on potential callers and complainants. Without information on possible violation or concerns, the Commission would be unable to perform its duties. OIP Op. Ltr. No. 98-1 at 3-4 (Jan. 16, 1998). We opined that it would frustrate the Commission's function of investigating alleged unethical behavior to make such a disclosure.

In this case, DOCARE has asserted that disclosure of identities of persons named in the report would frustrate its legitimate law enforcement functions because future informants will be less likely to come forward with information, due in part to fear of retribution. Therefore, consistent with our prior opinions, we opine that DOCARE has discretion to withhold the identities of persons named in a criminal investigation when disclosure would frustrate DOCARE's legitimate government function of law enforcement.

### CONCLUSION

DOCARE properly withheld identities of persons named in its criminal investigation into alleged illegal catching of lobsters because disclosure would be a clearly unwarranted invasion of personal privacy under section 92F-13(1), Hawaii Revised Statutes. In this case, no one was ever arrested nor publicly charged with a crime, and the privacy interests of the named individuals outweigh the public

interests therein. In addition, DOCAARE may withhold the identities of persons named in criminal investigations when disclosure would cause the frustration of a legitimate government function.

Very truly yours,

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