

May 28, 2002

Mr. Thomas A. Marzec
117 Aikapa Place
Kailua, Hawaii 96734

Re: Records Protected from Disclosure by Court Order

Dear Mr. Marzec:

You asked for a ruling from the Office of Information Practices ("OIP") concerning a denial by the Honolulu Police Department ("HPD") and the Department of Corporation Counsel, City and County of Honolulu, State of Hawaii ("Corporation Counsel") of access to police reports. The denial was made in connection with a civil lawsuit.

Specifically, your November 13, 2000 letter states:

[B]y this correspondence, I am appealing the improper HPD denial of my access to government records pursuant to UIPA 92F-15.5.

You provided the OIP with a copy of the transcript of a November 22, 2000 hearing before Judge Darryl Y.C. Choy and with a copy of Judge Choy's written order filed November 22, 2000, in the Family Court of the First Circuit, State of Hawaii.

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), a person can access a record maintained by a State or county agency when the record is sealed by a court order.

BRIEF ANSWER

No. The UIPA's statutory framework establishes a method for access to government records. Certain records are exempt from disclosure, including records

protected from disclosure by court order. Haw. Rev. Stat. § 92F-13(4) (1993); Haw. Rev. Stat. § 92F-22(5) (1993). In your case, Judge Choy's court order authorized the Corporation Counsel and the HPD to withhold access to the records at issue.

FACTS

On October 19, 2000, you presented a subpoena duces tecum to the Clerk of Court, First Circuit Court, State of Hawaii, who issued the subpoena duces tecum. The subpoena duces tecum required the HPD to testify and produce, *inter alia*, certain documents relating to police reports or complaints initiated by Eve Szeliga Morawski. Thereafter, the Corporation Counsel filed a motion to quash¹ the subpoena duces tecum, or in the alternative, for an *in-camera* inspection² of those records.³

Documents responsive to the subpoena duces tecum were delivered to Judge Choy by the Corporation Counsel. Those documents consisted of seven police reports. Judge Choy denied the motion to quash and granted the request for an *in camera* inspection of the police reports. Before reviewing the reports *in camera*, Judge Choy determined that you sought certain police reports and complaints made about you.⁴ After reviewing the reports *in-camera*, Judge Choy determined that some of the police reports referred to you, and that only one of the police reports was relevant⁵ to the issues in the court proceeding before him. That report related to a

¹ A motion to quash is defined as "[a] party's request that the court nullify process or an act instituted by the other party, as in seeking to nullify a subpoena." Black's Law Dictionary, 1034 (7th ed. 1999).

² *In camera* inspection is defined as "[a] trial judge's private consideration of evidence." Black's Law Dictionary, 763 (7th ed. 1999).

³ Honolulu Police Department's Motion to Quash Subpoena Duces Tecum, or, in the Alternative, for an *In-Camera* Inspection; Memorandum in Support of Motion; Notice of Hearing and Certificate of Service filed November 20, 2000, in *Morawski v. Marzec*, FC-D No. 98-1976, Family Court of the First Circuit, State of Hawaii.

⁴ Transcript of hearing of November 22, 2000, on Honolulu Police Department's Motion to Quash Subpoena Duces Tecum, or, in the Alternative, for an *In-Camera* Inspection filed in *Morawski v. Marzec*, FC-D No. 98-1976, Family Court of the First Circuit, State of Hawaii.

⁵ Evidence that is relevant is considered by a court (with certain exceptions); irrelevant evidence is not. Relevant evidence tends to prove or disprove a fact in issue. Article IV, Hawaii Rules of Evidence, chapter 626, Hawaii Revised Statutes (1993). Put another way, the evidence must be material, or have some logical connection to a fact in issue. Black's Law Dictionary, 578 (7th ed. 1999). A court can quash a subpoena if it seeks information that is not material to the case.

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complaint concerning a wiretap.⁶ Judge Choy determined that another report, concerning telephone harassment, could be relevant.

Judge Choy ordered that the police report concerning the wiretap be made available to you, with the conditions that you not distribute it without the consent of the Court, and that it be used only in connection with a particular financial transaction related to the matter before the Court. Judge Choy ordered that the complaint concerning telephone harassment be sealed,⁷ unless the matters relating to it were raised or referred to at trial.⁸ You indicated during a telephone conference with the OIP's Director, Ms. Moya Gray, on August 21, 2001, that, during the trial of the matter, you did not ask Judge Choy to unseal the complaint concerning the telephone harassment when the issue came up at trial. The other five documents produced by the HPD and the Corporation Counsel were found not to be relevant to the issues in the lawsuit, and Judge Choy ordered those documents sealed.⁹

Bank of Hawaii v. Shaw, 83 Haw. 50, 60, 924 P.2d 544, 554 (1996), *amended by* 80 Haw. 497, 911 P.2d 132 (1996), *cert. denied*, 83 Haw. 409, 927 P.2d 417 (1996).

⁶ Order Granting in Part and Denying in Part Honolulu Police Department's Motion to Quash Subpoena Duces Tecum, or, in the Alternative, for an *In-Camera* Inspection, filed November 22, 2000; transcript of hearing of November 22, 2000, on Honolulu Police Department's Motion to Quash Subpoena Duces Tecum, or, in the Alternative, for an *In-Camera* Inspection filed in *Morawski v. Marzec*, FC-D No. 98-1976, Family Court of the First Circuit, State of Hawaii ("*In Camera* Inspection Order").

⁷ To seal is defined as "to prevent access to (a document, record, etc.);" Black's Law Dictionary, 1350 (7th ed. 1999).

⁸ *In Camera* Inspection Order.

⁹ Id.

DISCUSSION

I. INTRODUCTION

The UIPA governs access to two distinct types of documents maintained by State and county agencies: 1) government records; and 2) personal records (a subset of government records). Whether access to a record is governed under the provisions applicable to government records or under the provisions applicable to personal records, the UIPA's underlying purposes and policies are to:

- 1) Promote the public interest in disclosure;
- 2) Provide for accurate, relevant, timely, and complete government records;
- 3) Enhance governmental accountability through a general policy of access to government records;
- 4) Make government accountable to individuals in the collection, use and dissemination of information relating to them; and
- 5) Balance the individual privacy interest and the public access interest, allowing access unless it would constitute a clearly unwarranted invasion of personal privacy.

Haw. Rev. Stat. § 92F-2 (1993).

Access to government records¹⁰ is governed by part II of the UIPA. Section 92F-11(a), Hawaii Revised Statutes, provides that all government records are open to public inspection unless access is restricted or closed by law. Section 92F-13(4), Hawaii Revised Statutes, excepts from this general rule, "[g]overnment records which, pursuant to State or federal law including an order of any State or federal court, are protected from disclosure."

¹⁰ Government record is defined as "information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. § 92F-3 (1993).

Access to personal records¹¹ is governed by part III of the UIPA. Section 92F-21, Hawaii Revised Statutes, provides that each agency that maintains a personal record shall make that record available to the individual to whom it pertains. Section 92F-22(5), Hawaii Revised Statutes, exempts from this general rule, personal records, or information in such records "[r]equired to be withheld from the individual to whom it pertains by statute or judicial decision or authorized to be so withheld by constitutional or statutory privilege."

To implement and administer the UIPA, the OIP was given certain powers and duties. Among those powers and duties, the OIP:

- (3) [u]pon request by any person, may provide advisory opinions or other information regarding that person's rights and the functions and responsibilities of agencies under this chapter.

Haw. Rev. Stat. § 92F-42(3) (Supp. 2001).

You have appealed the denial of your record request to the OIP, citing to section 92F-15.5, Hawaii Revised Statutes. At the present time, the OIP's administrative appeals structure has not yet been established, due to budgetary limitations. The OIP will therefore provide an advisory opinion, pursuant to its authority under section 92F-42(3), Hawaii Revised Statutes.

II. RECORDS SEALED BY COURT ORDER

A. Discovery of Records in a Lawsuit

The process of obtaining information in a lawsuit is referred to as discovery, and is defined as "[c]ompulsory disclosure, at a party's request, of information that relates to the litigation." Black's Law Dictionary, 478 (7th ed. 1999). Under Rule 26 of the Hawaii Family Court rules, a party to a lawsuit can obtain discovery so long

¹¹ Personal record is defined as "any item, collection, or grouping of information about an individual that is maintained by an agency. It includes, but is not limited to, the individual's education, financial, medical, or employment history, or items that contain or make reference to the individual's name, identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print, or a photograph." Haw. Rev. Stat. § 92F-3 (1993).

as the information sought relates directly to the issues in the lawsuit and so long as the information is not protected by a privilege,¹² or otherwise protected by law.

The UIPA and the discovery process are two distinct methods of obtaining access to documents. You sought to obtain access to documents by means of a subpoena duces tecum. The Corporation Counsel then sought an order denying access, or, alternatively, requiring *in camera* review by a judge. Those records were sealed, in part, by a court order. As will be discussed below, that court order now governs access to those documents.

The UIPA recognizes the judiciary's significant role in the evaluation of records for the preservation of confidentiality where warranted, and therefore does not require government records to be disclosed if a judge determines they are exempted. When the legislature considered the UIPA for adoption, it was guided by testimony submitted to and analyzed by the Governor's Committee on Public Records and Privacy ("Governor's Committee"). The legislative history of the UIPA recognizes the importance of the work done by the Governor's Committee.¹³ According to the Report of the Governor's Committee on Public Records and Privacy, Vol. I, 94-5, (1987), which received "substantial comment on the applicability of the records law to the judiciary . . . [d]isputes over access to . . . [sealed records] . . . should be raised within the context of the case."

The Hawaii Supreme Court has addressed the discovery of police records and found that there is no absolute privilege that would allow police records to be withheld. Tighe v. City and County of Honolulu, 55 Haw. 420, 429, 520 P.2d 1345, 1351 (1974). However, the Tighe Court also found that where there is a claim of privilege, that claim is subject to judicial evaluation. Id. at 422, 1347. See also Byrne v. City and County of Honolulu, 56 Haw. 227, 533 P.2d 871 (1975); Nakagawa v. Heen, 58 Haw. 316, 320, 568 P.2d 508, 511 (1977).

¹² Examples of privileges include the lawyer-client privilege, ("[a] client has the privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client . . ." Rule 503, Hawaii Rules of Evidence, chapter 626, Hawaii Revised Statutes (1993)), and the physician-patient privilege, ("[a] patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of the patient's physical, mental, or emotional condition." Rule 504, Hawaii Rules of Evidence, chapter 626, Hawaii Revised Statutes (1993)).

¹³ S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess. Haw. S.J. 1093, 1095 (1988).

B. Government Records Sealed by a Court Order

Part II of the UIPA governs an agency's disclosure of government records to the public generally. Under the UIPA, "[a]ll government records are open to public inspection unless access is restricted or closed by law." Haw. Rev. Stat. § 92F-11(a) (1993). Access to the records you sought by means of a subpoena duces tecum is restricted by a court order. The UIPA recognizes the court order as a legal restriction:

§ 92F-13. Government records; exceptions to general rule. This part shall not require disclosure of:

. . .

- (4) Government records which, pursuant to State or federal law including an order of any State or federal court, are protected from disclosure.

Haw. Rev. Stat. § 92F-13(4) (1993).

In the OIP Opinion Letter Number 93-9, the OIP was provided with a copy of a court order which governed the confidentiality of documents and other matters presented before a grand jury proceeding. The order stated that:

all testimony, documents and the contents contained therein, and any other matters presented before the Grand Jury . . . be secret and not subject to public disclosure, except upon further order of the Court, or as may be necessary to enable the Attorney General and any agents of the Attorney General to perform their official duties.

OIP Op. Ltr. No. 93-9 at 10 (Aug. 2, 1993).

In light of this court order, the OIP opined as follows:

[B]ased upon the language of the court order above quoted, we conclude that the court order protects the . . . [record] . . . from public disclosure under section 92F-13(4), Hawaii Revised Statutes, of the UIPA, until "further order of the Court."

OIP Op. Ltr. No. 93-9 at 10 (Aug. 2, 1993).

As was the case with the court order limiting access to documents submitted to the grand jury, the court order in your case limited access to the documents you sought. Only two of the seven documents were determined to be possibly relevant to the issues in your lawsuit. In other words, the court applied Rule 26 of the Hawaii Family Court Rules and determined that the records you sought did not relate directly to the issues in the lawsuit, as is required for discovery. One record was sealed unless the issue it concerned was raised at trial, and the other was made available to you, with the caveat that it not be distributed without the consent of the court and that the use of the record be restricted solely for the purposes of the divorce.¹⁴ That court order protects all seven records from public disclosure under section 92F-13(4), Hawaii Revised Statutes, until "further order of the Court."¹⁵ Where a court order protects a government record from disclosure, an agency is not required to disclose that record. Thus, the HPD is not required to disclose the requested police reports under part II of the UIPA.

C. Personal Records Sealed by Court Order

Your request is for copies of police records, which contain information about one or more complainants and one or more parties against whom complaints have been made. In the OIP Opinion Letter Number 95-19 at 9, the investigative record maintained by the Maui Police Commission was a personal record of both the complainant and the officer against whom the complaint was lodged. See also OIP Op. Ltrs. No. 01-04 at 6 (Oct. 29, 2001) (record containing information about a complainant, the subject of the complaint and witnesses is a "joint personal record"); No. 94-27 at 13 (Dec. 30, 1994) (an investigative fact-finding report is a personal record of both the complainant and respondent). Thus, because some of the reports contain references to you and to individuals other than yourself, some may be joint personal records.

Without opining as to whether some of the police reports can be categorized as personal records, the OIP notes that part III of the UIPA, entitled Disclosure of Personal Records, sets forth a limitation on access applicable to personal records where a judge has ordered that access be withheld:

¹⁴ *In Camera* Inspection Order.

¹⁵ Id.

§92F-22 Exemptions and limitations on individual access.

An agency is not required by this part to grant an individual access to personal records, or information in such records:

. . .

- (5) Required to be withheld from the individual to whom it pertains by statute or judicial decision or authorized to be so withheld by constitutional or statutory privilege.

Haw. Rev. Stat. § 92F-22(5) (1993).

The above-quoted provision permits an agency to withhold access to a personal record if there is a judicial decision prohibiting the release of the personal record.

In your case, Judge Choy's judicial decision restricted or limited your access to the records you requested, and therefore restricted or limited your access to those records under the UIPA as well.

III. APPLICATION OF THE UIPA IN THE PRETRIAL DISCOVERY CONTEXT

In your November 13, 2000 and August 3, 2001 letters, you reference the OIP Opinion Letter Number 95-16, which discusses disclosure of patient medical records in response to clerk-issued subpoenas. You reference the OIP Opinion Letter Number 95-16 as the basis for arguing that the Corporation Counsel inappropriately obtained an order preventing disclosure to you.

The excerpt you reference from the OIP Opinion Letter Number 95-16 states:

The exceptions in section 92F-13, Hawaii Revised Statutes, do not afford a basis to object to the discovery of records sought pursuant to a clerk-issued subpoena.

OIP Op. Ltr. No. 95-16 at 2 (Jul. 18, 1995).

The OIP Opinion Letter Number 95-16 addressed the issue of whether the Department of Health should routinely object to subpoenas duces tecum seeking medical records of patients of community hospital facilities. There, the narrow

holding is that the Department of Health did not have a **duty** to object to such subpoenas duces tecum, based solely on the UIPA.

In contrast, in the case before us, the Corporation Counsel ***used its discretion to*** move to quash your subpoena duces tecum and argued, *inter alia*, that under the UIPA, persons other than you, as the person requesting the record, had privacy rights.¹⁶ The Corporation Counsel also argued that these same persons had privacy rights under the Constitution of the State of Hawaii.¹⁷

The Court denied the motion to quash and granted an *in camera* review of the documents. Following such review, the Court determined that one of the documents was relevant and that another document could be relevant to the issues being litigated. The Court ordered one document sealed unless matters relating to it were raised or referred to at trial. The second document was made available to you with restrictions on dissemination outside of the lawsuit. The Court denied you access to five documents that were not relevant to the issues being litigated. The Court ruled without stating explicitly that it was ruling based on any particular ground contained in the Motion to Quash, or that it was ruling on a basis other than that argued by the Corporation Counsel. Thus, the Court's ruling could have been based on privacy rights under the UIPA, or be based on the Constitution of the State of Hawaii, or even be based on another law. That is because a court must take judicial notice of all laws and constitutions. Haw. R. Evid. 202(b), Haw. Rev. Stat. § 626-1 (1993).

Certainly, the Corporation Counsel had the right to argue that privacy rights under the Constitution of the State of Hawaii applied, even if its argument regarding rights under the UIPA may have been inappropriate, although the OIP does not opine at this time on the arguments made at Court.

Based upon the facts presented and the relevant law, the OIP concludes that the sealing of the records was solely within the jurisdiction of the Court.

Due to Judge Choy's ruling, if you were to seek access to the police reports under the UIPA, access would be restricted by law for as long as the order is in

¹⁶ Transcript of hearing of November 22, 2000, on Honolulu Police Department's Motion to Quash Subpoena Duces Tecum, or, in the Alternative, for an *In-Camera* Inspection filed in Morawski v. Marzec, FC-D No. 98-1976, Family Court of the First Circuit, State of Hawaii.

¹⁷ Id.

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effect. To access the records that are the subject of Judge Choy's order, you or your attorney must follow procedures as required by court rules.

CONCLUSION

The OIP concludes that the November 22, 2000 court order sealing the requested police records restricts or limits your access to those records. As there is a court order protecting the requested records, under both part II and part III of the UIPA, the records need not be disclosed by the agencies. Part II of the UIPA, at section 92F-13(4), Hawaii Revised Statutes, does not require disclosure of government records protected by a court order. Part III of the UIPA, at section 92F-22(5), Hawaii Revised Statutes, allows an agency to withhold personal records from an individual when a judicial decision requires them to be withheld from the individual to whom they pertain.

Very truly yours,

Susan R. Kern
Staff Attorney

APPROVED:

Moya T. Davenport Gray
Director

SRK: ankd