December 16, 2003

The Honorable Sol P. Kaho'ohalahala
House Representative District 13
State Capitol, Room 405
Honolulu, Hawaii 96813

The Honorable Lee D. Donohue
Chief of Police, City and County of Honolulu
801 South Beretania Street
Honolulu, Hawaii 96813

Mr. Daryl Huff
News Reporter, KITV 4 News
801 South King Street
Honolulu, Hawaii 96813

Re: Records of Deceased Persons

Dear Representative Kaho'ohalahala, Chief Donohue, and Mr. Huff:

The Honorable Sol P. Kaho'ohalahala wrote to the Office of Information Practices ("OIP") on September 12, 2003, to request an opinion on "whether living or deceased persons' names may be obtained from State records and put on public display" on a monument to the memory of victims of Hansen's disease to be erected in Kalaupapa.

On October 3, 2003, Mr. Daryl Huff of KITV 4 News wrote to OIP to ask for assistance in obtaining access to the records of deceased police officers, which he had requested from the Honolulu Police Department ("HPD") on September 22, 2003, with a clarification on September 25, 2003. The Honorable Lee D. Donohue, Chief of Police, wrote to OIP on October 6, 2003, to ask for an opinion on whether the records covered by Mr. Huff's request must be released.

All these requests raise the issue of how information about deceased persons should be treated when responding to requests under the Uniform

Information Practices Act ("Modified"), chapter 92F, Hawaii Revised Statutes ("UIPA"). Therefore, OIP will address these requests together.

OIP has addressed the treatment of information about deceased persons in many previous opinions: OIP Op. Ltr. Nos. 90-13, 90-18, 90-26, 91-32, 95-21, and 97-2. However, those opinions were all issued before the appearance of 45 C.F.R. Parts 160 and 164, the medical privacy rules promulgated under the Administrative Simplification subtitle of the Health Insurance Portability and Accountability Act of 1996, Public Law 104-191 ("HIPAA rules"). OIP must reconsider the treatment of deceased persons' information under the UIPA to take into account the HIPAA rules and other changes to the law with respect to the privacy interests of deceased persons.

ISSUES PRESENTED

I. Under the UIPA, may an agency withhold health information about either living or deceased persons, when the HIPAA rules bar disclosure of the information?

II. May an agency withhold records based on the UIPA's privacy exception, section 92F-13(1), Hawaii Revised Statutes, after the death of the individual concerned?

BRIEF ANSWERS

I. Yes. Section 92F-13(4), Hawaii Revised Statutes, allows an agency to withhold records that are protected from disclosure pursuant to federal law.

II. Yes, but to a lesser extent than with a living individual. The balance between the privacy interests of the individual and the public interest in disclosure will be affected by an individual's death and by the subsequent passage of time, but an individual's death does not automatically eliminate all privacy interests. Some privacy interests survive an individual's death. The privacy interests that do survive will diminish over time.

FACTS

I. HANSEN'S DISEASE VICTIMS' NAMES

The request for an opinion regarding the names of Hansen's disease victims is limited to health information[1], which might be in the hands of different government agencies, some covered by the HIPAA rules[2], and others not. The age and location of the records that contain victims' names vary in accordance with the age of the victims themselves. According to Ms. Louella Kurkjian of the State Archives' Historical Records Branch[3], the State Archives contain records of Kalaupapa and Hansen's disease victims dating from the 1880s. The most recent patient-specific records in the archives are from 1956[4], however, other state agencies likely hold more recent records of the more recently deceased or still-living victims.

II. POLICE DEPARTMENT RECORDS OF DECEASED OFFICERS

---

[1] The HIPAA rules state:

> *Health information* means any information, whether oral or recorded in any form or medium, that:
>
> (1) Is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse; and
>
> (2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual.

45 C.F.R. § 160.103 (2002).

[2] The HIPAA rules directly cover health plans, health care clearinghouses, or health care providers. See 45 C.F.R. § 160.103 (2002) (definition of "covered entity"). Certain state entities, such as the Department of Health and the Department of Human Services, are covered entities.

[3] The Historical Records Branch holds the permanent records of the state, those with long term value. The Archives' other branch, the State Records Center, takes only non-permanent records that are considered to be still maintained by the originating agency. See http://www.hawaii.gov/dags/archives/welcome.html (accessed Nov. 20, 2003). According to Ms. Kurkjian, the Historical Records Branch collection contains little non-medical information about individuals of a particularly sensitive nature. Records may contain home addresses, but in most cases, the addresses will be long outdated.

[4] The Historical Records Branch no longer receives patient records.

The request for an opinion regarding the records of deceased police officers involves "records regarding discipline or investigations into misconduct, counseling or treatment (mental health, substance abuse or alcoholism), or recommendations/referrals for counseling or treatment and the results of those referrals." According to Mr. Timothy Liu of HPD, the dates of death for the deceased officers are within the last five years, and the records held by HPD go back from then to the beginnings of their careers, which were of approximately 20 years' duration. Thus, the records date from approximately 25 years ago to within the last five years.

In his letter requesting an opinion, Chief Donohue quoted a provision of the State of Hawaii Organization of Police Officers ("SHOPO") collective bargaining agreement, stating that "all matters' relating to discipline, 'including investigations, shall be considered confidential.'" It is unclear whether the agreement specifically touches on confidentiality after death.

DISCUSSION

I. RECONSIDERATION OF OIP'S PAST OPINIONS

A. OIP's Past Opinions

OIP has addressed the privacy of deceased persons in six previous opinions, all decided prior to the first appearance of the proposed, and later final, HIPAA rules[5]. This opinion will briefly discuss each previous opinion, focusing specifically on the legal precedent OIP relied upon in formulating its opinion regarding the privacy interest of deceased persons.

In the first opinion, OIP Op. Ltr. No. 90-13 (Mar. 30, 1990), OIP assumed in dicta that deceased persons had no privacy interest, and noted that an opinion addressing the issue was forthcoming. OIP Op. Ltr. No. 90-13 at 6 (Mar. 30, 1990). In OIP Op. Ltr. No. 90-18 (May 18, 1990), which came out seven weeks later, OIP surveyed the then-current federal case law under the Freedom of Information Act,[6] 5 U.S.C. § 552 ("FOIA"), and

[5] The proposed rule was published on December 28, 2000, at 65 Fed. Reg. 82461. Supplementary information and a correction of dates was published on February 26, 2001, at 66 Fed. Reg. 12433. The final rule was published on August 14, 2002, at 67 Fed. Reg. 53182, and codified at 45 C.F.R. Parts 160 and 164. It was effective as of October 15, 2002, and enforceable as of April 14, 2003.

[6] The opinion pointed to the UIPA's legislative history, which states that federal "case law under the Freedom of Information Act should be consulted for additional guidance" in analyzing

determined that based on the majority of cases, "death extinguishes an individual's privacy rights." OIP Op. Ltr. No. 90-18 at 9 (May 18, 1990). Specifically, OIP relied on two opinions[7] from the Second Circuit of the United States Courts of Appeals for the majority view, and cited to a Sixth Circuit opinion[8] for the contrary view that the FOIA privacy exemption did not immediately lapse upon death. Id.

In OIP Op. Ltr. No. 90-26 (July 19, 1990), OIP reiterated its conclusion that the majority federal rule was that death extinguished privacy interests, although OIP ultimately relied on section 346-10, Hawaii Revised Statutes, as protecting the confidentiality of deceased individuals' welfare records.

OIP next took up the issue of deceased persons' privacy to decide that autopsy reports would not generally be protected from public disclosure in OIP Op. Ltr. No. 91-32 (Dec. 31, 1991). In addition to relying on its previous opinions, OIP cited to a Michigan case[9] holding that an autopsy report could be publicly released because the deceased subject's right to privacy had ended with his death and noted a Massachusetts case and Nevada Attorney General opinion[10] holding to the contrary.

In OIP Op. Ltr. No. 95-21 (Aug. 28, 1995), OIP again relied on its prior opinions regarding deceased persons' privacy and also cited to a 1993 opinion[11] from the Third Circuit of the United States Courts of Appeals as additional support for the same proposition. Finally, OIP most recently addressed this issue in OIP Op. Ltr. No. 97-2 (Mar. 11, 1997), relying on its prior opinions without further elaboration.

---

privacy interests and other provisions. OIP Op. Ltr. No. 90-18 at 9 (May 18, 1990), quoting S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1094 (1988).

[7] Diamond v. FBI, 707 F. 2d 75, 77 (2d. Cir. 1983) and Rabbitt v. Dep't of the Air Force, 383 F. Supp. 1065, 1070 (S.D.N.Y 1974), on motion for reconsideration, aff'd and rev'd on other grounds, 401 F. Supp. 1206, 1210.

[8] Kiraly v. FBI, 728 F.2d 273 (6th Cir. 1984).

[9] Joe Swickard v. Wayne County Medical Examiner, 475 N.W. 2d 304, 438 Mich. 536 (1991).

[10] Globe Newspaper v. Chief Medical Examiner, 533 N.E. 2d 1356, 1357 (Mass. 1989); Nev. Att'y Gen. Op. No. 82-12 (June 15, 1982).

[11] McDonnell v. U.S., 4 F. 3d 1227, 1257 (3d Cir. 1993).

In sum, OIP has maintained in the past that deceased persons no longer have a privacy interest under the UIPA, following the approach of the Second and Third Circuits and the Michigan Supreme Court. OIP has acknowledged but declined to follow the view that deceased persons retain some privacy rights, as expressed by the Sixth Circuit, the Massachusetts Supreme Court, and the Nevada Attorney General. OIP most recently looked at the general state of the law on this issue in 1995 (or possibly earlier).

B. Change In The Law And Reconsideration

Since OIP last surveyed the law regarding privacy rights of deceased persons, there has been further development in FOIA case law on this topic, which is discussed in detail below. In addition, there has been a significant addition to the state of privacy law generally in the form of the HIPAA medical privacy rules. These developments make it appropriate to reexamine the state of the law regarding privacy of deceased persons, in the context of medical records and in the context of government records generally, to determine whether the rule applied by OIP in past opinions is reflective of the current state of the law. See OIP Op. Ltr. No. 02-08 at 6 (Sept. 6, 2002) (OIP will reconsider a prior opinion based on a change in the law, a change in the facts, or other compelling circumstances).

II. DECEASED PERSONS' MEDICAL RECORDS

The medical privacy rules' most direct impact is on the privacy of deceased persons' medical records. The rules directly govern how medical records held by HIPAA-covered entities must be treated, and the rules are persuasive in determining the privacy interests of individuals in medical records held by other entities.

A. Health Records Held By Covered Entities

Medical records in the hands of HIPAA-covered entities are subject to the HIPAA medical privacy rules. See generally 45 C.F.R. §§ 160.102 and 164.500 (2002). The UIPA conforms to the HIPAA rules' restrictions on disclosure through its exception to public disclosure for records protected by federal law. See Haw. Rev. Stat. § 92F-13(4). For agencies that are HIPAA-covered entities, OIP has previously concluded that if the HIPAA rules restrict disclosure of requested records then they may be withheld under the UIPA also. OIP Op. Ltr. No. 03-05 (Apr. 11, 2003). The issue is thus whether the HIPAA rules restrict disclosure.

Under the HIPAA medical privacy rules, records of deceased persons are still protected for as long as the institution maintains the record, and a disclosure would require authorization from an executor, administrator, or other person with authority to act. 45 C.F.R. § 164.502(f) and (g)(4) (2002). According to the Department of Health and Human Services' commentary accompanying publication of the final rule, the HIPAA medical privacy rules originally were proposed to protect the privacy of a deceased person for two years after death, but the final version was amended to extend the protection for as long as a covered entity maintains the information. Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82461, 82499 (Dec. 28, 2000). The assumption[12] behind the rule is thus apparently that a HIPAA-covered entity – a health care provider or clearinghouse or a health plan – will not hold onto medical records for a significant number of years after a person's death, so the records should be protected for as long as the entity keeps them.[13]

In other words, the HIPAA medical privacy rules do restrict disclosure of deceased persons' health information (including their status as a Hansen's

---

[12] This assumption does not always hold true; institutions such as medical libraries and archives are sometimes part of a HIPAA-covered entity and in that situation are finding that materials relating to long-dead patients cannot be made available without first locating and obtaining consent from the heirs. See, e.g., Julie Bell, Privacy of Dead Perplexes Living, The Baltimore Sun, Nov. 13, 2003, available at http://www.sunspot.net/news/bal-te.archives13nov13,0,7472257.story?coll=bal-home-headlines.

[13] Hawaii law requires a health care provider to retain medical records for seven years, and to retain information from the records for 25 years (or 25 years after the patient reaches the age of majority). Haw. Rev. Stat. § 622-58 (1993).

disease victim) that is in the hands of a HIPAA-covered entity. The health information held by a HIPAA-covered entity may tend to date from within the last few decades, but no matter how old the health information is, its disclosure will be restricted by the HIPAA rules and thus will also fall within an exception to disclosure under the UIPA. See Haw. Rev. Stat. § 92F-13(4) (1993).

B. Health Records Held By Other Agencies

1. Recent Health Records

Health records held by government agencies that are not directly regulated by the HIPAA rules would not typically fall under the UIPA's exception for records protected by other laws.[14] However, the HIPAA rules are so significant to the treatment of health information that they are strongly persuasive as to the privacy interest in even health information that is outside the HIPAA rules' coverage. OIP is of the opinion that non-HIPAA covered agencies holding comparatively recent health records should treat those records similarly to what the HIPAA rules would require, based on the UIPA's privacy exception. The HIPAA rules set the new standard for determining privacy interests in medical records, and for records dating from within the last few decades, we do not see a reason to distinguish between privacy interests in medical records or other health information held by a government agency based on whether the agency is directly covered by HIPAA.

The HIPAA rules address the privacy of "health information." This includes information "created or received by a[n] . . . employer" that "relates to the past, present, or future physical or mental health or condition of an individual. . ." 45 C.F.R. § 160.103 (2002). Thus, HPD's records of officers' counseling or treatment for mental health, substance abuse, and alcoholism would be considered health information under HIPAA. (Indeed, mental health and substance abuse are subjects sensitive enough to have a separate confidentiality statute barring disclosure of records generated by the state's mental health and substance abuse treatment system. See Haw. Rev. Stat.

[14] In some cases a non-HIPAA-covered entity may be required to protect health information by other laws or by the terms of a contract with a HIPAA-covered entity that provided the information. See 45 C.F.R. § 164.502(e) (2002).

§ 334-5 (1993)). Again, although the records are held by an agency that is not directly regulated by HIPAA, we believe the standard of privacy for health information generally should be the same for records held by government agencies, regardless of whether they are directly covered by HIPAA.

2. Historical Health Records

With respect to health information held by non-HIPAA covered agencies, though, we must address the effect of time on the privacy interest in health information about deceased persons. As noted above, the HIPAA rules protect health information for as long as it is held by a HIPAA agency. Also as noted above, the HIPAA rules originally were proposed to protect health information for two years after a person's death, but the final version was amended to protect the information for as long as the covered entity held the record. Although it may typically be true that a health care provider or other HIPAA-covered entity will not keep records and information beyond the 25 years plus age of majority required by section 622-58, Hawaii Revised Statutes, non-HIPAA covered entities may be more likely to need to do so. In the case of Hawaii agencies, the State Archives is the obvious example of a non-HIPAA covered entity that as part of its function maintains health information dating back more than a hundred years. All historical records in the State Archives become public after 80 years, but prior to that time they may be subject to otherwise applicable restrictions on disclosure. Haw. Rev. Stat. § 94-7 (1993).[15]

The question thus arises whether, and to what extent, a deceased person's privacy interest in medical records is affected by time. The HIPAA rules' approach was created with relatively recent health records in mind and is obviously impracticable for older records, as it would often be impossible to determine who had the authority to act as personal representative for a long-deceased individual.[16]

---

[15] Section 94-7, Hawaii Revised Statutes, reads in part:

> All restrictions on access to government records which have been deposited in the state archives, whether confidential, classified, or private, shall be lifted and removed eighty years after the creation of the record.

[16] A HIPAA-covered entity would have to follow the HIPAA rules notwithstanding their impracticability as applied to historical materials.

For older health records held by non-HIPAA covered agencies – those old enough that a hospital or other HIPAA-covered entity would no longer be required to keep them, which is to say older than about 25 years[17] – it is OIP's opinion that the same approach to disclosure should be followed as for non-health records of deceased persons, which are discussed in detail below. Essentially, this entails balancing those privacy interests that survive death, e.g. reputational privacy interest or interest in protecting family, against the public interest. If the public interest is greater, then the records may not be withheld under the UIPA's privacy exception. See Haw. Rev. Stat. § 92F-14(a) (Supp. 2003). Those remaining privacy interests will diminish over the course of time as the person's contemporaries and immediate family themselves pass away. After a long enough period of time – about 80 years[18] – no significant privacy interests will survive, so the public interest will always prevail and it will no longer be necessary to balance the interests before disclosure.

III. DECEASED PERSONS' NON-MEDICAL RECORDS

The records requested from HPD include not only health information, but also "records regarding discipline or investigations into misconduct," which are likely to be non-medical in nature. As a preliminary matter, OIP notes that HPD cannot, through a collective bargaining agreement, bargain away the public's right to access under the UIPA. SHOPO v. Soc. of Professional Journalists, 83 Haw. 378, 404-06 (1996); OIP Op. Ltr. No. 98-5 at pages 14-15 (Nov. 24, 1998); OIP Op. Ltr. No. 90-39 (Dec. 31, 1990). If a record is publicly available under the UIPA then it must be provided notwithstanding a contrary collective bargaining agreement. The question is to what extent the UIPA's privacy exception continues to apply after a person's death.

---

[17] We note again that health care providers must keep information for 25 years. Haw. Rev. Stat. § 622-58 (1993).

[18] In the case of records held by the state archives, the legislature has already balanced the privacy interests against public interests, and has determined that all records are public eighty years or more after their creation. See Haw. Rev. Stat. § 94-7 (1993).

A. Recent Developments In Privacy Law

Recent developments in the law regarding the privacy interest of deceased persons tend to indicate a growing recognition that death does not extinguish all privacy interests. First, as discussed above, the HIPAA rules recognize that deceased persons do have some continuing privacy interests in sensitive information about them. Although the HIPAA rules apply only to health information, their recognition of deceased persons' privacy interests is persuasive as to the question of whether deceased persons have privacy interests in other types of information.

In 1998, the United States Supreme Court addressed the issue of the survival of the attorney client privilege after death. Faced with the question of whether an attorney's notes of a conversation with the late Vincent Foster remained privileged after Mr. Foster's suicide, the Court held that the privilege does survive death, noting that "[c]lients may be concerned about reputation, civil liability, or possible harm to friends or family. Posthumous disclosure of such communications may be as feared as disclosure during the client's lifetime." Swidler & Berlin v. U.S., 524 U.S. 399, 407, 141 L. Ed. 2d 379, 386, 118 S. Ct. 2081, 2086 (1998). As the Court of Appeals for the District of Columbia Circuit has observed, the Supreme Court's opinion that "reputational interests and family-related privacy interests survive death" is relevant to determining the privacy interest of a deceased person in the context of a records request. See Campbell v. D.O.J., 164 F. 3d 20, 33-34 (D.C. Cir. 1998) (Campbell I).

The Supreme Court's decision in a related case, Office of Independent Counsel v. Favish, No. 02-954 (regarding whether graphic photographs of the late Vincent Foster must be disclosed under FOIA), which was argued before the Court on December 3, 2003, is expected to address the survival of privacy interests after death. OIP expects to be able to take the Court's forthcoming decision into account when it next addresses this issue.

When OIP originally opined that deceased persons do not retain privacy interests, the opinion was based on a survey of FOIA case law. See OIP Op. Ltr. No. 90-18 at 9 (May 18, 1990). A survey of FOIA case law in the last ten years indicates that the circuits are still split on the issue, but the trend in recent cases is to recognize the survival of some privacy interest after death. Of the two federal circuits which OIP previously relied on to

conclude that the majority view was that privacy interests did not survive death, the Second Circuit has not addressed the issue in the last decade,[19] and the Third Circuit's most recent case was eight years ago and before the HIPAA rules or the Supreme Court's Swidler & Berlin decision[20]. Three federal circuits currently follow the view that some privacy interests survive death. The Sixth Circuit, which OIP had previously noted as supporting the view that privacy interests survive death, has continued to hold to that position[21]. The Ninth Circuit frames the privacy interest as belonging to a deceased person's family: "the personal privacy in the [FOIA] statutory exemption extends to the memory of the deceased held by those tied closely to the deceased by blood or love . . . ." Favish v. Office of Indep. Counsel, 217 F.3d 1168, 1173 (9th Cir. 2000), cert. granted, Office of Indep. Counsel v. Favish, 155 L. Ed. 2d 847, 123 S. Ct. 1928, 71 U.S.L.W. 3697, 2003 D.A.R. 4880 (2003). Finally, in the view of the D.C. Circuit, which hears many FOIA cases and seems to have dealt with this issue in the last five years more often than the other circuits all put together, death is relevant to the balance between privacy interests and the public interest, but does not extinguish all privacy rights of the deceased: reputation interests and family-related privacy interests survive. E.g. Schrecker v. U.S. Dept. of Justice, 254 F. 3d 162 (D.C. Cir. 2001) (Schrecker I); Accuracy in Media, Inc. v. Nat'l Park Service, 194 F. 3d 120 (D.C. Cir. 1999); Campbell I, supra.

B. Effect Of Death And Time Since Death On Privacy Interests

For non-medical records of deceased persons, the D.C. Circuit's view of the effect of death on privacy interests under FOIA appears to best express the current state of privacy law. A slim majority of federal circuits addressing the issue hold that at least some privacy interests survive death, a view which finds support in the HIPAA rules' approach and also in the

---

[19] The Second Circuit addressed this issue in Diamond v. FBI, 707 F. 2d 75, 77 (2d. Cir. 1983).

[20] The Third Circuit addressed this issue in McDonnell v. U.S., 4 F. 3d 1227, 1257 (3d Cir. 1993), and most recently in Davin v. F.B.I., 60 F. 3d 1043 (3d Cir. 1995).

[21] OIP previously cited to Kiraly v. FBI, 728 F.2d 273 (6th Cir. 1984) as representing the Sixth Circuit view. The United States District Court for the Southern District of Ohio, in the Sixth Circuit, expressed that view most recently in Dayton Newspapers v. Dept. of Veteran Affairs, 257 F. Supp. 2d 988 (2003).

Supreme Court's Swidler & Berlin decision regarding the attorney client privilege. The D.C. Circuit approach, which OIP now adopts, acknowledges that death is relevant to the balance between privacy interests and the public interest in government records, but does not eliminate all privacy interests relating to the deceased.

After the appellate opinions in Campbell I and Schrecker I, supra, the FBI (as the agency responding to the record requests at issue) sought to determine whether individuals mentioned in the records were deceased, the better to balance public and private interests. Schrecker v. U.S. Dept. of Justice, 217 F. Supp. 2d 29 (D.D.C. 2002) (Schrecker II), aff'd 2003 U.S. App. LEXIS 23425 (D.C. Cir. 2003) (Schrecker III); Campbell v. U.S. Dept. of Justice, 193 F. Supp. 2d 29 (D.D.C. 2001) (Campbell II). In both cases, if the FBI determined that individuals were deceased it released the requested information without further analysis (which the respective courts approved). Id. We note that the ongoing Campbell and Schrecker litigations both involved records dating back many decades – in Campbell, from the 1960s, and in Schrecker, from the 1930s through the 1950s. Id. In other words, the FBI apparently concluded that the passage of time had diminished the remaining privacy interests for deceased individuals to insignificance.

As with medical records held by non-HIPAA agencies, the passage of time since a record was created is an issue to consider in balancing privacy interests against the public interest. OIP agrees that the reputational and family related privacy expectations that survive death diminish with the passage of time. As the years pass by after a person's death, the person's family and other contemporaries may be expected to become less immediately concerned with events that were current news during the person's lifetime, and as decades pass, fewer and fewer family members and other contemporaries will remain alive themselves to be affected by the disclosure of information about a deceased individual.

We consider it inadvisable to create a bright line test for how much time must pass before reputational and family related privacy expectations may be considered diminished: this will best be determined case by case. However, we do see a distinction between records created in the 1960s and earlier (as in the FBI files), and records created within, for instance, the last decade. Notably, in the case of historical records held by the State Archives, the legislature has determined that 80 years after the record's creation, the

public interest in disclosure outweighs any remaining privacy interest. See Haw. Rev. Stat. § 94-7 (1993). We believe that for records of similar age held by other agencies, the same standard will generally apply even in the absence of a specific statute: records 80 years old or older would not be expected to carry a significant privacy interest.

OIP adopts the following approach for determining whether the privacy exception to disclosure applies for information about a deceased individual. First, for records less than 80 years old,[22] an agency must balance the passage of time against the sensitivity of the information involved[23] to determine how strong the remaining privacy interest is. Second, the agency must balance that privacy interest against the public interest in disclosure, as provided by section 92F-14, Hawaii Revised Statutes. If the public interest in disclosure outweighs the now-reduced privacy interests of the deceased individual, the record may not be withheld under the privacy exception. See Haw. Rev. Stat. § 92F-14(a) (1993).

CONCLUSION

Records that are covered by the HIPAA rules- generally, those containing health information and held by HIPAA-covered agencies – may be withheld if HIPAA so requires. Haw. Rev. Stat. § 92F-13(4) (1993). Thus, disclosure of health information about deceased persons in records held by HIPAA-covered entities will be governed by the HIPAA rules.

For health information about deceased persons in records held by non-HIPAA-covered agencies, HIPAA's approach generally represents the

---

[22] Once a record is eighty years old, the privacy interest is minimal. Cf. Haw. Rev. Stat. § 94-7 (1993).

[23] Many types of information that are considered private for living individuals could affect an individual's reputation, and thus they would potentially continue to carry privacy interests after an individual's death. See Haw. Rev. Stat. § 92F-14(b) (Supp. 2003) (examples of information carrying a privacy interest). However, some types of information that would fall under the privacy exception for a living individual would likely not do so for a deceased individual. For instance, a home address and phone number (assuming that the family was not still living there) are considered private because of an individual's physical privacy interest in not being disturbed at home, and would not tend to carry reputational or family-based privacy interests. A social security number, similarly, does not speak to an individual's reputation. It might arguably carry family-based privacy interests because of the possibility of identity theft that family members might then have to contend with; however, OIP will not decide whether social security numbers remain private after death until faced with an opinion request on that subject.

appropriate privacy standard. Thus, if HIPAA would bar release of similar information by a HIPAA-covered entity, the UIPA's privacy exception will typically apply. See Haw. Rev. Stat. § 92F-13(1) (1993). However, for historical records – records older than the period of retention required for HIPAA-covered entities – the HIPAA rules may not represent the appropriate privacy standard. Health information about deceased persons in older records held by non-HIPAA entities should be treated in the same way as non-health information.

For non-health records about deceased persons, an agency must balance the passage of time against the sensitivity of the information involved to determine how strong the remaining privacy interest is. Second, the agency must balance that privacy interest against the public interest in disclosure, as provided by section 92F-14, Hawaii Revised Statutes. If the public interest in disclosure outweighs the now-reduced privacy interests of the deceased individual, the record may not be withheld under the privacy exception. See Haw. Rev. Stat. § 92F-14(a) (1993).

Very truly yours,

Jennifer Z. Brooks
Staff Attorney

APPROVED:

Leslie H. Kondo
Director

JZB:ankd