

Op. Ltr. No. 01-03 Disclosure of inmate Information

OIP Op. Ltr. No. 03-19 partially overrules this opinion to the extent that the UIPA's privacy exception in section 92F-13(1), HRS, does, in fact, recognize a privacy interest for deceased persons.

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September 17, 2001

Ms. Lisa Itomura
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Regulatory Division
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Re: Disclosure of Directory and Other Information Regarding Inmates

Dear Ms. Itomura:

This letter is in response to your oral request that the Office of Information Practices ("OIP") provide you with written guidance regarding a government record request by Verifacts, Inc. ("Verifacts"), for a copy of inmate data that the Department of Public Safety ("PSD") maintains in its database ("Database"). This letter sets forth PSD's disclosure responsibilities in general and explains under what circumstances an agency may withhold government records from a requester.

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), directory and other information regarding inmates in the PSD's Database should be disclosed upon request.

BRIEF ANSWER

Yes. Directory information must be disclosed. Under the UIPA's mandatory disclosure provision, section 92F-12(a)(4), Hawaii Revised Statutes, government agencies are required to disclose "directory information concerning an individual's presence at any correctional facility."

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Other inmate information should be disclosed subject to the personal privacy and frustration exceptions of 92F-13, Hawaii Revised Statutes. Section 92F-12(a), Hawaii Revised Statutes, does not mandate that information in the Database other than directory information be disclosed to the public. Nevertheless, the information is presumed to be public unless PSD can establish that an exception to disclosure applies. Haw Rev. Stat. § 92F-11(b) (1993). Once this legal burden of proof has been met, PSD may withhold the information from public disclosure. Haw. Rev. Stat. § 92F-13(1) (1993). Based on the facts provided, the personal privacy and frustration exceptions to disclosure may apply to allow withholding of certain data. See Haw. Rev. Stat. § 92F-13(1) and (3) (1993).

The OIP has previously opined that disclosure of the following information is a clearly unwarranted invasion of personal privacy under section 92F-13(1), Hawaii Revised Statutes: social security number, birth date, complexion, gender, height, hair and eye color, age, and race. As in this instance, previous OIP Opinion Letters determined that individuals' significant privacy interests in that information outweighed the public interest in disclosure.

Another of the data fields sought by Verifacts is whether each offender has a "Legal Financial Obligation." The UIPA recognizes that individuals have a significant privacy interest in information that reveals their personal finances. Haw. Rev. Stat. § 92F-14(b)(5) (Supp. 2000). Therefore, an inmate's significant privacy interest in information relating to his or her legal financial obligations must be balanced against the public's interest in disclosure to determine whether disclosure would shed light on the operations of government or its officials. Note that this information may be publicly available in court records.

In addition, section 92F-13(3), Hawaii Revised Statutes, states that an agency is not required to disclose information that must be confidential in order to prevent the frustration of a legitimate government function. In the OIP Opinion Letter Number 94-19, the OIP opined that PSD did not have to disclose certain policies regarding inmate transportation procedures because: (1) these policies were primarily internal, and (2) their disclosure might risk the circumvention of PSD regulations or statutes. If the other information Verifacts requested meets a two-part "frustration test," then PSD would have the discretion to withhold this sensitive information from the public.

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After PSD determines which, if any, exceptions to disclosure apply, it should make the remaining information available to Verifacts in the form requested unless doing so might significantly risk damage, loss, or destruction of the original record.

FACTS

On July 17, 1996, Ms. Joan Schield, President of Verifacts, wrote to PSD to obtain information that PSD maintained on "all defenders from your PSD's Department of Corrections data base." Finally, Ms. Schield stated that "[t]his information will be used to serve the public in an easy to access information database." Ms. Schield added that "[t]his information is usually given to us by tape extraction."

Ms. Schield's letter included a list of twenty-five pieces of information that Verifacts is seeking. A list of the information sought is attached as Exhibit "A". You have orally advised the OIP that the Database contains all the information Verifacts requested.

DISCUSSION

I. INTRODUCTION

Government records are presumed to be open for public inspection and copying "unless access is restricted or closed by law." Haw. Rev. Stat. § 92F-11(a) (1993). Government records maintained by a State or county agency are subject to the disclosure requirements of the UIPA. The UIPA defines government record as "information maintained by an agency in written, auditory, visual, *electronic*, or other physical form." Haw. Rev. Stat. § 92F-3 (1993) (emphasis added). The OIP has previously opined that conviction data maintained in a computer database is a "government record" subject to the disclosure requirements of the UIPA. OIP Op. Ltr. No. 95-15 at 4 (May 8, 1995) ("conviction data must be made available for public inspection and copying regardless of whether this information is maintained in a paper or computerized format.")

II. MANDATORY DISCLOSURE OF CORRECTIONAL FACILITY DIRECTORY INFORMATION

Section 92F-12(a), Hawaii Revised Statutes, sets forth "a list of records (or categories of records) which the Legislature declares, as a matter of public policy, shall be disclosed." S. Conf. Comm. Rep. No. 235, 14th Leg., Reg. Sess., Haw. S.J. 689, 690 (1988). Under this "mandatory disclosure" provision, directory information from correctional facilities is required to be made available to the public notwithstanding any exceptions found in section 92F-13, Hawaii Revised Statutes, and despite any other contrary law. The provision states:

- (a) Any other law to the contrary notwithstanding, each agency shall make available for public inspection and duplication during regular business hours:
...
- (4) Pardons and commutations, as well as directory information concerning an individual's presence at any correctional facility;

Haw. Rev. Stat. § 92F-12(a)(4) (Supp. 2000).

The UIPA does not define what constitutes "directory information." However, in the OIP Opinion Letter Number 89-14, the OIP opined that the "directory information" that PSD must disclose includes the names and locations of inmates. Based on this opinion letter and section 92F-12(a)(4), Hawaii Revised Statutes, the OIP concludes that PSD is required to disclose the name and location of each person incarcerated under the jurisdiction of PSD.

III. EXCEPTIONS TO DISCLOSURE

The remaining information that Verifacts has requested is presumed by law to be public. Under the UIPA, government records are presumed open for public inspection and copying "unless access is restricted or closed by law." Haw. Rev. Stat. § 92F-11(a) (1993). The UIPA recognizes five categories of exceptions to this general rule of disclosure. An agency is not required to disclose the following government records: (1) records whose disclosure would constitute a clearly unwarranted invasion of personal privacy; (2) records pertaining to the prosecution

or defense of any judicial or quasi-judicial action to which the State or county is or may be a party, to the extent that such records would not be discoverable; (3) records that must be confidential in order to avoid the frustration of a legitimate government function; (4) records that are protected from disclosure by State or federal law or court order; and (5) personal files of legislative members, draft working papers of legislative committees, including unfiled committee reports and budget worksheets, and records of investigating committees of the Legislature that are closed pursuant to legislative rules. Haw. Rev. Stat. § 92F-13 (1993).

For the types of information requested by Verifacts, two exceptions to disclosure might apply: privacy, and frustration of a legitimate government function. See Haw. Rev. Stat. § 92F-13(1) & (3) (1993). We now turn to a discussion of these exceptions.

A. Clearly Unwarranted Invasion of Personal Privacy

Under the UIPA an agency is not required to disclose government records if doing so “would constitute a clearly unwarranted invasion of personal privacy.”¹ See Haw. Rev. Stat. § 92F-13(1) (1993); OIP Op. Ltr. No. 97-2 (Mar. 11, 1997). To determine whether disclosure of a government record constitutes a clearly unwarranted invasion of privacy, the individual’s privacy interest in the record is weighed against the public interest in disclosure of the record. Where the privacy interest is significant, the public interest in the information outweighs it only if disclosure would shed light on the agency’s performance of its statutory purpose or

¹ In a July 17, 1996 letter, Verifacts requested information regarding “all defenders” in the Database. The OIP assumes this request includes defenders who are deceased. Although a deceased individual’s privacy rights are extinguished at death, the surviving family members of the deceased may have a privacy interest in that information, especially where the record reveals graphic or personal details surrounding the deceased’s death, and disclosing this information would disrupt their peace of mind. OIP Op. Ltr. No. 97-2 (Mar. 11, 1997) (disclosing a deceased’s identification photograph would not violate surviving family’s privacy because the photograph was unrelated to the death and did not “depict or directly relate” to the deceased’s death). If the Database contains information about deceased inmates, information pertaining to them that normally would carry a significant privacy interest is open to the public unless the disclosure would violate the privacy interests of the deceased inmate’s family. It should be noted that the prior mentioned OIP opinion letter may be affected by the federal Standards for Privacy of Individually Identifiable Health Information Regulations that became effective April 14, 2001. See Standards for Privacy of Individually Identifiable Health Information, 66 Fed. Reg. 12,434 (2001). The potential effect of the federal standards arises from the fact that the federal standards provide privacy rights to deceased individuals, exercised through their representatives, as to their medical records. See Standards for Privacy of Individually Identifiable Health Information Regulations, 65 Fed. Reg. 82,462 (2000) (to be codified at 45 C.F.R. § 164.502).

upon the conduct of its government officials. OIP Op. Ltr. No. 93-20 at 7 (Oct. 21, 1993). However, where the privacy interest is not significant, a mere scintilla of public interest will outweigh it and hence preclude a finding of a clearly unwarranted invasion of personal privacy. S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., S.J. 689, 690 (1988); H. Conf. Comm. Rep. No. 112-88, 1988 Reg. Sess., Haw. H.J. 817, 818 (1988); Haw. Rev. Stat. § 92F-14(a) (Supp. 2000).

1. Social Security Numbers and Birth Dates

Section 92F-13(1), Hawaii Revised Statutes, partially implements Hawaii's constitutional right to privacy and is intended to protect from disclosure the personal and intimate details of an individual's life. OIP Op. Ltrs. No. 92-20 at 5 (Oct. 13, 1992) and No. 90-25 at 6 (Jul. 12, 1990). The OIP has previously opined that disclosure of inmates' social security numbers would be a clearly unwarranted invasion of their personal privacy. See OIP Op. Ltr. No. 89-14 at 5 (Dec. 15, 1989) (disclosing inmate social security numbers does not shed light on the conduct of PSD, therefore disclosure violates section 92F-13(1), Hawaii Revised Statutes). The OIP again confirms that individuals have a significant privacy interest in their social security numbers. Based on the facts submitted, the OIP can find no public interest in the disclosure of such information such that the public's interest would outweigh the significant privacy interests. Unless disclosure of the social security numbers would shed light on the performance of PSD or the actions of government officials in this instance, it is likely that the public's interests would not outweigh the privacy interests of the individual and PSD would have discretion to withhold this information.

The OIP has also previously concluded that an individual's birth date is protected from public disclosure under the UIPA's personal privacy exception. The OIP Op. Ltr. No. 92-22 (Nov. 18, 1992) (individual's birth date is protected from disclosure under section 92F-13(1), Hawaii Revised Statutes, as disclosure would not reveal anything about the conduct and actions of government agencies and their officials). The OIP again confirms that individuals have a significant privacy interest in their birth dates. Based on the facts submitted, the OIP can find no public interest in the disclosure of the information such that the public's interest would outweigh the inmates' significant privacy interest in their birth dates. Unless disclosure of inmates' birth dates would shed light on the performance of PSD's duties or the actions of government officials in this instance, it is likely that the public's interest would not outweigh the privacy interests of the individual in this information and PSD would have discretion to withhold this information.

However, the Hawaii Criminal Justice Data Center ("HCJDC") is mandated by statute to make public criminal history record information public, and in doing so, it must balance the public right to know with the privacy interests. Haw. Rev. Stat. § 846-2.5(a) (Supp. 2000). The OIP confirmed with the HCJDC, in a telephone conversation of August 31, 2001, that while it does not disclose birth dates of convicted persons, it will disclose their current age. As this information is already in the public domain, the OIP does not believe it would be a clearly unwarranted invasion of personal privacy to disclose only an inmate's age upon request.

2. Physical Characteristics and Ethnicity

Verifacts seeks information regarding the physical characteristics and ethnicity of inmates, including complexion, gender, height, age, hair and eye color, and Hispanic origin. In OIP Opinion Letter Number 90-25, the OIP concluded that the "physical descriptors of complexion, sex, height, weight, age, hair and eye color . . . qualify for protection from disclosure because of personal privacy." OIP Op. Ltr. No. 90-25 at 7 (July 12, 1990); see also Haw. Rev. Stat. § 92F-13(1) (1993). The OIP went on to state in OIP Opinion Letter Number 90-25 that based on "the facts presented, we can find no public interest in disclosure of such personal details . . . that outweighs an individuals privacy interests." Id. However, because the HCJDC makes public a convicted person's height and weight, the OIP believes there is no clearly unwarranted invasion of personal privacy in PSD's disclosure of this same information because it is already in the public domain.

In OIP Opinion Letter Number 92-8, the OIP stated that "individuals have significant privacy interest in information revealing their ethnicity. This significant privacy interest must be weighed against the public interest in disclosure to determine whether disclosure would constitute a clearly unwarranted invasion of personal privacy." OIP Op. Ltr. No. 92-8 at 6 (July 16, 1992) (citations omitted). The opinion went on to find that the individuals' significant privacy interest in their ethnicity outweighed the public interest in the disclosure of this information, and, therefore, the disclosure of that information would be a clearly unwarranted invasion of personal privacy under the UIPA.

Hispanic origin is generally considered a subcategory of ethnicity. The term more specifically refers to a person of Latin American, Puerto Rican, Cuban, or Mexican origin living in the United States. See Merriam Webster's Collegiate Dictionary 459 (10th ed. 1993). The OIP concludes that as a subcategory of ethnicity, Hispanic origin, like other ethnic information, carries significant privacy

interests. See Haw. Rev. Stat. § 92F-14 (Supp. 2000). Therefore, the privacy interest in this information must be balanced against the public interest in disclosure.

It is clear from section 92F-14, Hawaii Revised Statutes, and OIP's interpretation of that statute, in OIP Opinion Letter Numbers 90-25 and 92-8, that individuals have significant privacy interests in the information sought by Verifacts. When no overriding public interest in disclosure exists, disclosure is not justified. Therefore, in the present case, except for the information made public by the HCJDC, and unless disclosure of information regarding inmates' physical characteristics and ethnic information would shed light on government activities, disclosure would be considered a clearly unwarranted invasion of privacy.

3. Financial Information

Verifacts also asked for information regarding whether an inmate has a "legal financial obligation," and if so, the date that the PSD files show the inmate as having a legal financial obligation balance. The UIPA recognizes that individuals have significant privacy interests in their "finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or credit worthiness[.]" Haw. Rev. Stat. § 92F-14 (b)(6) (Supp. 2000). Therefore, the OIP concludes that if information related to an incarcerated inmate's "legal financial obligations" reveals the inmate's finances or financial status, then the inmate has a significant privacy interest in this information. When the balancing test is applied, unless disclosure of each inmate's outstanding financial obligations sheds light on how PSD is fulfilling its statutory obligations or on the actions of government officials, the public interest would not outweigh the privacy interest in the information. On the other hand, disclosure would not be a clearly unwarranted invasion of personal privacy if an inmate's legal financial obligations were part of a public record: for example, court ordered restitution. If such information were already public record, then disclosure by PSD would not constitute a clearly unwarranted invasion of personal privacy. Cf. OIP Op. Ltr. No. 91-22 (Nov. 25, 1991) (concluding that draft agency documents and staff memoranda discussed at a public meeting of a commission must be made available for public inspection and copying if the contents of such records were substantially discussed at the public meeting).

B. Frustration of a Legitimate Government Function

Under the UIPA, an agency is not required to disclose government records if disclosure would cause the frustration of the agency's legitimate government function. Haw. Rev. Stat. § 92F-13(3) (1993). The OIP has previously opined that inmates' tentative release dates did not fall within any exceptions to disclosure, and therefore, PSD was required to disclose this information to the public. OIP Op. Ltr. No. 89-14 at 6 (Dec. 15, 1989). However, the OIP has also opined that PSD was not required to disclose certain of its security policies and procedures for transporting inmates because: (1) the security measures were primarily internal; and (2) disclosure of these security measures would significantly jeopardize the enforcement of PSD's agency regulations or statutes. OIP Op. Ltr. No. 94-19 (Oct. 13, 1994).

It should be noted that PSD has not made any frustration arguments, and that the information sought by Verifacts only pertains to an inmates' crimes, sentences, and status in the correctional system and not to PSD's security policies and procedures. Therefore, in the present case, it does not appear that any of the information requested would qualify for protection under the two-part "frustration test" noted in OIP Opinion Letter Number 94-19.

IV. REQUESTED FORM OF DISCLOSURE OF RECORDS

As stated earlier, the UIPA defines "government record" to mean "information maintained by an agency in written, auditory, visual, *electronic*, or other physical form." Haw. Rev. Stat. § 92F-3 (1993) (emphasis added). Based on this definition, the OIP has previously concluded that where an agency maintains a record in the form requested:

the agency must generally provide a copy of that government record in the format requested by the public, unless doing so might significantly risk damage, loss, or destruction of the original record.

OIP Op. Ltr. No. 90-35 at 13 (Dec. 17, 1990).

Furthermore, according to OIP Opinion Letter 95-13 at 5 (May 8, 1995) "if a requested record contains both public information and information protected by one of the UIPA's exceptions, an agency must disclose any reasonably segregable

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portion of the record." Therefore, before PSD makes a copy of its Database available, and if the record is reasonable segregable, it should segregate any information from the record that it is legally allowed to withhold.

CONCLUSION

PSD is required to disclose directory information concerning an individual's presence at a correctional facility. Directory information is limited to names and locations of covered individuals. PSD may withhold information such as social security number, birth date, complexion, gender, hair and eye color, race, and personal financial information, in which individuals have a significant privacy interest, when the privacy interest of the individual outweighs the public interest in disclosure of that information. However, any information that is already in the public domain due to disclosure by HCJDC should be made public because disclosure would not be a clearly unwarranted invasion of personal privacy. PSD also has the discretion to withhold from disclosure information that must be confidential in order to prevent the frustration of a legitimate government function. Finally, after segregation of nonpublic information, PSD should disclose the remainder of the record in the form in which it was requested unless doing so might significantly risk damage, loss, or destruction of the original record.

Very truly yours,


for Georgia L. Fligg
Staff Attorney

APPROVED:


Moya T. Davenport Gray
Director

GLF: ran

cc: Joan Schield, President, Verifacts, Inc.

ATTACHMENT

Data fields requested are listed below:

1. Offender Name: First and Last name used by DOC for the current or last commitment.
2. DOC Number: The number assigned by Department of Corrections to identify and individual offender.
3. SID Number: The state identification number assigned by the State Patrol positively identifying an individual based on finger prints.
4. Date of Birth: Date when born, in YYYYMMDD format.
5. SS Number: Social Security number.
6. Offender Gender: Gender of the offender.
7. Offender Height: The height, in inches, of the offender.
8. Offender Weight: The weight, in pounds, of the offender.
9. Race: The race of the offender. This is a self-reported description.
10. Skin Complexion: The observers opinion of the Skin Complexion of the offender.
11. Eye Color: The color of the offender's eyes.
12. Hair: The color of the offender's hair.
13. Hispanic Origin: The offender's response when asked if they are Hispanic.
14. Current Location: If in Prison or Work-release, the facility where the offender is located or Field Office Name where the offender is supervised.
15. Current Offender Status:
 - The latest status of the offender according to the files of the DOC. Causes can be:
 - Closed The DOC files are closed and the offender is no longer under supervision.
 - Deceased The DOC files was closed due to the offender's death.
 - Convicted The offender has been convicted of a felony but not yet sentenced.
 - Escaped The offender has escaped from a correctional institution.
 - Field The offender is under the supervision of a community corrections field office.
 - Inmate The offender is in a correctional institution.
 - Other The person is listed with the Department of Corrections with one of the following statuses:
 - Absconded Prior to Sentencing
 - Failed to Appear
 - Out of state prior to this state admission
 - Federal Prisoner Prior to this state admission
 - No Supervision Ordered
 - From Other State
 - Denied
 - From Other State Investigation

- 16. Latest projected Release Date: If in Prison or Work-release, the latest projected release date for the offender, in the format YYYYMMDD.
- 17. LFO Owed: 'Y' indicates the offender has a Legal Financial Obligation. 'N' indicates the offender does not have a Legal Financial Obligation.
- 18. LFO As Of: The date of which the DOC files show the offender has an LFO balance, in format YYYYMMDD.

Data Elements 19 thru 25 recur depending on the number of causes for the offender.

- 19. County: The name of the County where the conviction occurred.
- 20. Cause Number: The county Cause number of the Most Serious Crime as described on the judgement and Sentence.
- 21. Date of Sentence: The date of conviction for the cause, in format YYYYMMDD.
- 22. Description of Most Serious Crime: A two-character code identifying the description of the most serious crime associated with the Cause Number.
- 23. Supervision Type: Where the offender served or is currently serving the sentence for the conviction: Incarceration, Community Supervision or Both Incarceration and Community Supervision.
- 24. Status of Cause: The current Status of cause: Closed, Deceased, Field, Inmate, Inactive, or Out Of State.
- 25. Length of Sentence: The number of years and/or months and/or days specified on the Judgement and Sentence for the particular Cause. This number does not consider consecutive or concurrent relationships with other sentences nor does it necessarily reflect the length of time the offender was incarcerated for the Cause. Separate values are provided for sentenced, maximum and mandatory Community Supervision and Prison time.