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March 23, 1994

Ms. Shannon Olson
Crime Reporter
Ke Kalahea
University of Hawaii at Hilo
UHH Campus Center, Room 215
Hilo, Hawaii 96720

Dear Ms. Olson:

Re: Access to "Daily Activity Reports" Maintained by the University of Hawaii at Hilo, Auxiliary Services

This is in reply to your letter to Attorney General Robert A. Marks, dated November 1, 1993, requesting assistance in obtaining access to the Daily Activity Reports ("incident reports") maintained by the University of Hawaii at Hilo ("UHH"), Auxiliary Services, after individually identifiable information concerning natural persons involved in the incidents has been segregated, or sanitized from the reports. In accordance with established protocol, your letter was forwarded to the Office of Information Practices ("OIP") for the issuance of an advisory opinion concerning your right to inspect and copy the incident reports.

In your letter to the Attorney General, you stated that you have the right to inspect and copy incident reports under the "Students Right to Know Act." However, the Student Right-to-Know and Campus Security Act, 20 U.S.C. § 1092 (1990), requires each eligible campus to collect and to publish statistical information about certain specified violent criminal offenses, arrests for liquor law violations, drug abuse violations, and weapon possessions. The Daily Activity Reports at issue are not covered by this federal law. Thus, we shall address whether you have the right to inspect and copy Daily Activity Reports under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA").

ISSUE PRESENTED

Whether, under the UIPA, Daily Activity (incident) Reports maintained by the UHH's Auxiliary Services must be made available for inspection and copying after individually identifiable information has been segregated, or deleted from the reports.

BRIEF ANSWER

Daily Activity Reports maintained by UHH's Auxiliary Services are "government records," as defined by section 92F-3, Hawaii Revised Statutes.

While the UHH has provided you with summaries of the incident reports in the past, under the UIPA, an agency does not satisfy its obligation to make government records available for inspection and copying by providing a requester with a summary or compilation of information contained in a requested government record. Rather, if an agency maintains a government record that has been requested, except as provided in section 92F-13, Hawaii Revised Statutes, the agency must make that government record (or a legible copy thereof) available for inspection and copying.

Since the UIPA's personal privacy exception (section 92F-13(1), Hawaii Revised Statutes) only applies to information that would identify specific individuals, we conclude that after the UHH segregates, or sanitizes, information identifying individuals mentioned in the reports, the disclosure of the reports would not constitute "a clearly unwarranted invasion of personal privacy." Haw. Rev. Stat. § 92F-13(1) (Supp. 1992).

A review by the OIP of a dozen Daily Activity Reports reveals that most of them contain information concerning observations made by campus security personnel while conducting routine campus patrols, information about individuals needing assistance, or about campus disturbances and accidents. In unusual cases, Daily Activity Reports may contain information relevant to possible civil or criminal violations that have occurred on the UHH campus. For the reasons explained below, we conclude that under these rare circumstances, when a Daily Activity Report is furnished to a law enforcement agency in connection with a pending law enforcement proceeding, or one that may fairly be regarded as prospective, under 92F-13(3), Hawaii Revised Statutes, the UHH and the law enforcement agency may withhold access to the report since the disclosure of the report "could reasonably be expected to interfere" with such a law

enforcement proceeding. However, in these rare circumstances, nothing would preclude the UHH from disclosing a general summary of incidents that involve possible civil or criminal violations that are subject to an ongoing law enforcement investigation.

FACTS

The UHH has contracted with Freeman Guards, Inc. ("Freeman") to provide security guard services on the UHH campus. When security guards respond to an incident or disturbance on campus, the guards complete a "Daily Activity Report," which sets forth a synopsis of the incident and actions taken. Security guards employed by Freeman also use the Daily Activity Report to record observations made when regularly patrolling the campus, for example, building doors, restrooms, and offices found to be unlocked, and about vehicles parked illegally. Incidents to which Freeman security guards respond may involve domestic disturbances, situations involving intoxicated individuals or injured persons, persons in need of assistance, reported suspicious activities, and acts of vandalism. Copies of the Daily Activity Reports are maintained by UHH's Auxiliary Services.

According to Mr. Kolin Kettleson of the UHH's Auxiliary Services, security guards employed by Freeman are not empowered to make arrests on the UHH campus or to take persons into custody (except for a citizen's arrest under section 803-3, Hawaii Revised Statutes). Freeman has apparently instructed its employees not to detain individuals on campus. If an incident or disturbance involves possible criminal violations, Hawaii County Police Department officers are summoned to the campus.

Ke Kalahea, the UHH student newspaper, has submitted several requests to inspect and copy "incident reports" maintained by the UHH's Auxiliary Services. As a result of receiving past requests for copies of incident reports, in 1993 the UHH's Auxiliary Services began providing Ke Kalahea with a bi-weekly summary of campus incidents, using information compiled from Daily Activity Reports. In a memorandum to UHH's Auxiliary Services dated October 4, 1993, Ke Kalahea stated:

> Thank you for the last bi-weekly summary of campus incidents. However, I still feel that it's not enough.
>
> In order to ensure accurate reporting of incidents to protect the safety of students

> and their property on this campus, Ke Kalahea needs copies of all campus incident reports, no matter how trivial, provided on a weekly basis without being summarized or abridged in any matter except to protect the innocent. In short, I want everything every week with only names of suspects and victims (and similar information from which a person's identity can be deduced) withheld . . . .
>
> Under Hawaii Revised Statutes, 92-1, 92-21, 92F-1 through 92F-42 (1985 and Supp. 1990), we have a right to the aforementioned information and consequently request access to and copies of security reports and other documents prepared or collected from your department.

Memorandum from Ms. Shannon Olson, former Editor of Ke Kalahea to Mr. Kolin Kettleson, Auxiliary Services (Oct. 4, 1993).

In a memorandum dated October 7, 1993 to Ke Kalahea from Kolin Kettleson, UHH Auxiliary Services, Mr. Kettleson stated:

> Our University community has a right to be well informed, and Ke Kalahea and Campus Security have a responsibility to give an accurate account of incidents. Campus Security also has a responsibility to maintain confidentiality and people's rights of privacy. Your previous requests for information has [sic] been fulfilled via the bi-weekly summary reports. The summaries accurately reflect information of what, when, and where of all incidents, yet still ensure everyones [sic] rights of privacy and confidentiality.
>
> . . . .
>
> I am encouraged by your request for information on all accident reports. By including all incidents, instead of just the sensational ones, an accurate representation of campus will be portrayed. The summaries eliminate possible selected editing of statements out of context, which even though

> is technically accurate, can give an inaccurate representation of the big picture. I stand by my original decision to make bi-weekly summaries available upon written request.

Letter from Mr. Kolin Kettleson to Ms. Shannon Olson, former Editor of Ke Kalahea (Oct. 7, 1993).

Attached to this opinion as Exhibit "A" is a copy of a bi-weekly summary of incident reports that was furnished to Ke Kalahea by UHH Auxiliary Services in a memorandum dated October 20, 1993.

In a letter to Attorney General Robert A. Marks dated November 1, 1993, you asserted that "Ke Kalahea has a right to [the Daily Activity Reports] under the First and Fourteenth Amendments to the US [sic] Constitution, the Freedom of Information Act, §92F-11 of the Hawaii Revised Statutes, and the Student's Right to Know Act." You requested the Attorney General to provide you with assistance in gaining access to UHH's "actual" Daily Activity Reports after individually identifiable information has been segregated, or sanitized from the reports. In accordance with established protocol, the Attorney General forwarded your letter to the OIP for a reply.

In connection with the preparation of this opinion letter, UHH's Auxiliary Services provided the OIP, for its examination, a representative sample of Daily Activity Reports submitted by Freeman security guards to UHH's Auxiliary Services.

DISCUSSION

I. INTRODUCTION

The UIPA, the State's public records law, states "[e]xcept as provided in section 92F-13, each agency shall make government records available for inspection and copying upon request by any person." Haw. Rev. Stat. § 92F-11(b) (Supp. 1992). In determining whether government records must be made available for inspection and copying under the UIPA, we observe at the outset that like the federal Freedom of Information Act, 5 U.S.C. § 552 (1988) ("FOIA"), and the open records laws of other states, the UIPA's disclosure provisions should be liberally construed, its

exceptions narrowly construed, and all doubts resolved in favor of disclosure.[1]

Under the UIPA, the term "government record," means "information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. § 92F-3 (Supp. 1992); Kaapu v. Aloha Tower Dev. Corp., 74 Haw. 365, 376 n.10 (1993).

Since the UHH's Auxiliary Services in an "agency" for purposes of the UIPA, see section 92F-3, Hawaii Revised Statutes,[2] Daily Activity Reports maintained by the Auxiliary Services are "government records," because they constitute information maintained by an agency in written or other physical form.

Before turning to an examination of whether Daily Activity Reports, when sanitized of individually identifiable information concerning individuals involved in campus incidents, are protected by any of the exceptions to required agency disclosure in section 92F-13, Hawaii Revised Statutes, we shall first examine whether the UHH's practice of providing summaries of the incident reports satisfies its obligation under the UIPA to make government records available for inspection and copying.

II. AGENCY'S DUTY TO PERMIT ACCESS TO ACTUAL GOVERNMENT RECORDS REQUESTED INSTEAD OF A SUMMARY OF INFORMATION CONTAINED IN THE RECORDS

Does an agency satisfy the UIPA's requirement to make government records available for inspection and copying when the

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[1]See, e.g., John Doe Corp. v. John Doe Agency, 493 U.S. 146 (1986); Department of the Air Force v. Rose, 425 U.S. 352, 361-63 (1976); Seminole County v. Wood, 512 So. 2d 1000 (Fla. Dist. Ct. App. 1987); City of Monmouth v. Galesburg Printing and Pub. Co., 494 N.E.2d 896 (Ill. App. 3 Dist. 1986); Title Research Corp. v. Rausch, 450 So. 2d 933 (La. 1984); Hechler v. Casey, 333 S.E.2d 799 (W.Va. 1985); Laborers Intern. Union of North America Local 374 v. City of Aberdeen, 642 P.2d 418 (Wash. 1982); Bowie v. Evanston Comm. Consul. School Dist., 538 N.E.2d 557 (Ill. 1989); Lucas v. Pastor, 498 N.Y.S.2d 461 (A.D. 2 Dept. 1986).

[2]See also OIP Op. Ltr. No. 89-9 (Nov. 20, 1989); OIP Op. Ltr. No. 90-11 (Feb. 26, 1990) and 90-16 (Apr. 24, 1990) (finding the University of Hawaii to be an "agency" under the UIPA).

agency provides a record requester with a summary of a requested government record in lieu of permitting the requester to inspect and copy the actual record, or a copy of the actual record requested? This question has been addressed in court decisions and attorney general opinions interpreting the provisions of other state open records laws that are similar in scope to the UIPA.

As with an agency's duty under the FOIA,[3] under the UIPA, an agency's duty is generally limited to providing access to existing government records. Section 92F-11(c), Hawaii Revised Statutes, provides that "[u]nless the information is readily retrievable by the agency in the form in which it is requested, an agency shall not be required to prepare a compilation or summary of its records." The commentary[4] to an identical provision in the Uniform Information Practices Code ("Model Code") drafted by the National Conference of Commissioners on Uniform State Laws, and upon which the UIPA was modeled by the Legislature explains:

> Subsection (b) specifies that an agency is not under a duty to compile or summarize information in its records unless readily retrievable in the form requested. <u>In brief, it makes plain that the agency's duty is to provide access to existing records</u>; the agency is not obligated to create "new" records for the convenience of the requester.

Model Code § 2-102 commentary at 11 (1980) (emphasis added).

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[3]<u>See</u> <u>NLRB v. Sears, Roebuck & Co.</u>, 421 U.S. 132, 161-62 (1975).

[4]The UIPA's legislative history states that:

> [I]t is the intent of your Committee that the commentary to the [Model Code] guide the interpretation of similar provisions found in the Uniform Act created by this bill where appropriate.

H. Stand. Comm. Rep. No. 342-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 969, 972 (1988); <u>see also</u>, Haw. Rev. Stat. §§ 1-16 and 1-24 (1985).

Thus, the commentary to parallel provisions of the Model Code strongly suggests that an agency is required to permit access to existing records, and not merely provide access to a summary or compilation of such records. Court decisions interpreting the open records laws of other states also provide significant guidance in resolving the question presented.

In AFSCME v. County of Cook, 555 N.E.2d 361 (Ill. 1990), the Illinois Supreme Court examined whether an agency satisfied its obligations under the Illinois Freedom of Information Act when it provided a record requester with a copy of a computer printout in lieu of a computer tape or diskette as had been requested. Since Illinois statutes included tapes and other records regardless of physical form within the definition of the term "public record,"[5] the court held that the agency had not provided the requester with the record that had been requested:

> Similarly, defendant now argues, and a majority of the appellate court specifically found, that a public body may choose the format in which it releases information so long as the requester is provided reasonable access to the information, regardless of the format that was requested. This is likewise incorrect. The Act states that public bodies must make public records available for inspection and copying, unless they can avoid doing so by invoking an exception that is provided in the Act. Computer tapes are public records and must, therefore, be made available to the public. The Act does not state that a public body may reply to information requests by supplying different public records than those for which the requester asked. Rather the public body must make the public record available, including computer tapes, unless it can properly invoke an exception.

AFSCME, 555 N.E.2d at 364-65 (emphasis added).

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[5]Under the UIPA, the term "government record" also includes information maintained by an agency in any physical form. Haw. Rev. Stat. § 92F-3 (Supp. 1992).

Similarly, in Davis v. Sarasota County Public Hosp., 480 So. 2d 203 (Fla. App. 2 Dist. 1985), the District Court of Appeal of Florida, Second District, held that a citizen who sought access to bills kept by a public hospital concerning the payment of legal fees was entitled, under the Florida Public Records Law, to inspect copies of the actual records, and not extracts from the records.

Likewise, in Texas Open Records Decision No. 606 (July 13, 1992), the Texas Attorney General[6] examined whether an agency satisfies its obligations under the Texas Open Records Act by providing a requester with a newly generated document on which only the disclosable information contained in other agency records has been consolidated and retyped. The facts giving rise to this open records decision involved an agency's decision to provide a requester with a retyped document, consolidating disclosable material contained in an actual record, and denoting omitted confidential or non-disclosable material with ellipses or asterisks. The Texas Attorney General concluded that under the Texas Open Records Act, an agency must provide access to the actual records:

> Your question compels us to determine whether the act requires a governmental body to release copies of the actual records to the requestor, or only the public information contained in these records.
>
> Upon reading the act in its entirety, we believe that the legislature intended to require governmental bodies to make available to the public copies of actual public records that the governmental bodies had collected, assembled, and maintained. In particular, we note that section 9(c) of the act requires all government bodies to "provide suitable **copies** of all public records." (Emphasis added). . . .

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[6]Like the OIP, the Texas Attorney General is charged with the responsibility of furnishing legal opinions concerning the provisions of the Texas Open Records Act. Under the Texas Open Records Act, an agency must seek an opinion from the Texas Attorney General if the agency believes that information that has been requested is protected from disclosure, and if there has been no previous determination that the information is protected from disclosure under the Act.

> We therefore conclude that the act requires a governmental body to release a copy of an actual requested record, with any confidential or nondisclosable information excised. The act does not permit a governmental body to provide a requestor with a new document on which only the disclosable requested information has been consolidated and retyped.

Tex. Open Records Decision No. 606 at 2-3 (emphasis in original).

As with the Texas, Florida, and Illinois public records laws, the UIPA requires each agency to make "government records" available for inspection and copying except as provided in section 92F-13, Hawaii Revised Statutes. The OIP concurs with the above-quoted authorities that an agency does not satisfy this requirement of the UIPA by providing an individual who has requested a copy of a government record with a summary or compilation of information contained in the requested records.[7] Indeed, as stated above, under the UIPA, an agency's duty is to permit the inspection of existing government records, and to assure reasonable access to duplication facilities for copying government records. Haw. Rev. Stat. § 92F-11(b),(c) (Supp. 1992).

Therefore, we conclude that when UHH's Auxiliary Services provided Ke Kalahea with bi-weekly summaries of Daily Activity Reports, the UHH disclosed a government record that was not responsive to Ke Kalahea's UIPA request for copies of the Daily Activity Reports, resulting in a de facto denial of such request.

We now turn to a consideration of whether Daily Activity Reports (or information contained therein) are protected by any of the exceptions in section 92F-13, Hawaii Revised Statutes, such that they may be withheld in response to a request to inspect and copy government records under the UIPA.

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[7]Under the FOIA, federal courts have permitted federal agencies to reproduce handwritten agency records in a typewritten form when disclosure of the handwritten record would permit the identification of the person who prepared the record, and when disclosure of the person's identity would constitute a clearly unwarranted invasion of personal privacy. See Church of Scientology v. IRS, 816 F.2d 1138, 1160 (W.D. Tex. 1993). We are not dealing, in this opinion, with similar circumstances.

III. UIPA'S EXCEPTIONS TO REQUIRED AGENCY DISCLOSURE

In reviewing the exceptions in section 92F-13, Hawaii Revised Statutes, we believe that only two of these exceptions would arguably permit the UHH to withhold access to information contained in Daily Activity Reports maintained by Auxiliary Services.[8]

A. Clearly Unwarranted Invasion of Personal Privacy

Under the UIPA, an agency is not required to disclose "[g]overnment records, which if disclosed, would constitute a clearly unwarranted invasion of personal privacy." Haw. Rev. Stat. § 92F-13(1) (Supp. 1992). Under the UIPA, the "[d]isclosure of a government record shall not constitute a clearly unwarranted invasion of personal privacy if the public interest in disclosure outweighs the privacy interests of the individual." Haw. Rev. Stat. § 92F-14(a) (Supp. 1992).

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

Campus security guards respond to a myriad of incidents, disturbances, and situations occurring on campus, and in many cases, information recorded in Daily Activity Reports may include

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[8]Section 1555 of the Higher Education Amendments of 1192, amended the federal Family Educational and Privacy Rights Act ("FEPRA") to exempt from the definition of "education records" (which as a condition of federal funding are subject to restrictions upon disclosure) records maintained by law enforcement units of an educational agency or institution. Because FEPRA does not restrict the disclosure of records maintained by campus law enforcement units, the provisions of section 92F-4, Hawaii Revised Statutes, would not permit the UHH to withhold access to Daily Activity Reports. See OIP Op. Ltr. No. 93-2 (May 26, 1993).

information in which an individual has a significant personal privacy interest.

For example, sample reports provided for the OIP's review included one incident involving a woman who was found to be disoriented by campus security guards. The report compiled as a result of this incident included the female's name, a description of medication she was taking for a medical condition, and the names and phone numbers of friends and relatives who were contacted to provide assistance to the woman. Another report included an entry about a woman who noticed an unidentified male looking through the window of a campus building. Another report described the pursuit of an individual described to be intoxicated who was acting in a violent manner, and who attempted to evade campus security personnel by fleeing on foot. In contrast, other Daily Activity Reports merely recount information reported by security guards on routine patrol and information in which an individual does not have a significant privacy interest.

Ke Kalahea has indicated that it is seeking copies of Daily Activity Reports after information identifying individuals mentioned therein has been segregated or sanitized from the reports. As we understand it, Ke Kalahea is not seeking information that would identify the individuals mentioned in the Daily Activity Reports.[9]

In previous OIP opinion letters, based upon court decisions applying the FOIA,[10] we have observed that the disclosure of government records does not constitute a clearly unwarranted

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[9]Although Ke Kalahea has indicated that it desires to obtain the names of individuals who have been arrested, Freeman guards do not have the power to effect an arrest; rather, arrests on campus are effectuated by officers of the Hawaii County Police Department. Thus, if Ke Kalahea is seeking information concerning individuals who have been arrested on campus, it should direct those requests to the Hawaii County Police Department. In OIP Opinion Letter No. 91-4 (March 25, 1991), we advised that under the UIPA, information contained in an arrest logs, or police blotters, must be made available for inspection and copying upon request. Thus, the names of individuals arrested by the Hawaii County Police Department, as contained in the arrest log or police blotter, would be public information.

[10]See Dep't of Air Force v. Rose, 425 U.S. 352 (1976); Arieff v. U.S. Dep't of Navy, 712 F.2d 1462 (D.C. Cir. 1983).

invasion of personal privacy when an agency segregates or deletes from the records individually identifiable information such as an individual's name, home address, social security number, or home telephone number, see OIP Opinion Letter No. 91-24 (Dec. 2, 1992), or information that would "result in the likelihood of actual identification." Dep't of Air Force v. Rose, 425 U.S. 352 (1976); Arieff v. U.S. Dep't of Navy, 712 F.2d 1462 (D.C. Cir. 1983). The likelihood of actual identification must be "more palpable than [a] mere possibility." Rose, 425 U.S. at 380 n.19.

Accordingly, we conclude that after individually identifiable information that would result in the likelihood of actual identification has been segregated from the Daily Activity Reports, the disclosure of the Daily Activity Reports would not constitute "a clearly unwarranted invasion of personal privacy."

Because Ke Kalahea has requested to receive copies of Daily Activity Reports after the UHH segregates, or deletes, from the reports information identifying specific individuals, we conclude that the disclosure of the segregated Daily Activity Reports would not constitute a clearly unwarranted invasion of personal privacy. Should Ke Kalahea, or other persons, seek access to a complete copy of an incident report for a particular incident, it will be necessary to examine the report and determine whether the report contains information, which if disclosed, would constitute a clearly unwarranted invasion of personal privacy.

B. Records That Must Be Confidential In Order for the Government to Avoid the Frustration of a Legitimate Government Function

The Daily Activity Reports provided for our review did not involve campus incidents or disturbances that involved suspected criminal activity, but involved persons requiring assistance, noise disturbances, accidents, and observations made by security guards during routine campus patrols. However, in some cases, it is possible that the Daily Activity Reports may provide information relevant to the enforcement of the civil or criminal laws, which at a later date, may be furnished by the UHH to civil or criminal law enforcement authorities. Under section 92F-13(3), Hawaii Revised Statutes, an agency is not required under part II of the UIPA, to disclose "[g]overnment records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function."

In Senate Standing Committee Report No. 2580, dated March 31, 1988, the Legislature set forth examples of information that may be withheld by an agency if its disclosure would result in the frustration of a legitimate government function. Among other examples, the Legislature listed "[r]ecords or information compiled for law enforcement purposes."

In determining whether the disclosure of records or information compiled for law enforcement purposes would result in the frustration of a legitimate government function, in previous opinion letters, we have consulted Exemption 7 of the FOIA for guidance.[11] Exemption 7 of the FOIA permits federal agencies to withhold:

> [R]ecords or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or

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[11]Our reliance upon FOIA's Exemption 7 for guidance in construing the UIPA's exception for law enforcement records is consistent with decisions by courts in other states when construing open records law exceptions for law enforcement records. See, e.g., Citizens for Better Care v. Dep't of Public Health, 215 N.W.2d 576 (Mich. 1974); Lodge v. Knowlton, 391 A.2d 893 (N.H. 1978) (in absence of legislative standards, FOIA's Exemption 7 adopted for guidance); see also, H. Stand. Comm. Rep. No. 342-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 969, 972 (1988) ("[w]ith regard to law enforcement records, your Committee considered the concerns from the police department and the press, and deleted this from the subparagraph in its entirety, adopting similar language from the federal [FOIA]"). We do not believe the Legislature intended to give categorical protection to all records or information compiled for law enforcement purposes. Had it meant to do so, it could have expressly provided an exemption for law enforcement records in section 92F-13, Hawaii Revised Statutes.

> authority . . . and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation . . . information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual.

5 U.S.C. § 552(b)(7) (1988) (emphases added).

Although Daily Activity Reports may not be compiled in the first instance for civil or criminal law enforcement purposes, but appear to be compiled in the ordinary course of business, the United States Supreme Court has held that Exemption 7(A) of FOIA may be invoked to prevent the disclosure of documents not originally created for, but later gathered for, law enforcement purposes. In John Doe Agency v. John Doe Corporation, 493 U.S. 146 (1989), the Court held that correspondence between a defense contractor and a federal agency relating to an audit, that were transferred to the FBI as part of an investigation of fraudulent practices, may be withheld under Exemption (7)(A) even though the correspondence was compiled seven years before the law enforcement investigation:

> We thus do not accept the distinction the Court of Appeals drew between documents that originally were assembled for law-enforcement purposes and those that were not so originally assembled but were gathered later for such purposes. The plain language of Exemption 7 does not permit such a distinction. Under the statute, documents need only to have been compiled when the response to the FOIA request must be made.

John Doe Corporation, 493 U.S. at 155 (emphasis added).

In OIP Opinion Letter No. 91-9 at 5 (July 18, 1991), we noted that FOIA's Exemption 7 applies to information compiled in connection with an agency's enforcement of both civil and criminal statutes, as well as those authorizing administrative

(regulatory) proceedings. A determination of whether Exemption 7(A) permits the agency to withhold a record requires a two-step analysis focusing on: (1) whether a law enforcement proceeding is pending or prospective, and (2) whether release of information about it could reasonably be expected to cause some articulable harm.

With regard to the first step of the Exemption 7(A) analysis, FOIA's legislative history as well as judicial interpretations of congressional intent make clear that Exemption 7(A) was not intended to "endlessly protect material simply because it [is] in an investigatory file." NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 232 (1978). Rather, Exemption 7(A) is temporal in nature and, as a general rule, may be invoked as long as the proceeding remains pending, or so long as the proceeding is fairly regarded as prospective or as preventative.[12] See Seegull Mfg. Co. v. NLRB, 741 F.2d 882, 886-87 (6th Cir. 1984); Barney v. IRS, 618 F.2d 1268, 1273-74 (8th Cir. 1980) (once enforcement proceedings are "either concluded or abandoned, exemption 7(A) will no longer apply"); Church of Scientology of Texas v. I.R.S., 816 F. Supp. 1138, 1157 (W.D. Tex. 1993) ("[o]nce the investigation has concluded and there is no reasonable possibility of future law enforcement proceedings relating to the requested documents, the documents lose Exemption 7(A) status").

With regard to the second step in the Exemption 7(A) analysis, the disclosure of records or information compiled for law enforcement purposes could reasonably be expected to interfere with enforcement proceedings:

> [I]f disclosure would inform the party being investigated of the scope or direction of the agency's investigation; potentially subject witnesses or others providing information to the agency to reprisal or harassment; permit

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[12]Exemption 7(A) of FOIA may also be invoked where: (1) an investigation, although in a dormant stage, "is nonetheless an 'active' one which will hopefully lead to a 'prospective law enforcement proceeding,'" see National Public Radio v. Bell, 412 F. Supp. 509, 514 (D.D.C. 1977), or (2) after an investigation is closed, the disclosure could be expected to interfere with a related, pending enforcement proceeding. New England Medical Ctr. Hosp. v. NLRB, 548 F.2d 377, 386 (1st Cir. 1976); Freedburg v. Dep't of the Navy, 581 F. Supp. 3, 4 (D.D.C. 1982).

> the target of the investigation to develop defenses that would enable the violations to go unremedied; permit the party being investigated to destroy or alter evidence; or chill the willingness of individuals providing information to the agency to do so.

See Robbins Tire & Rubber, 437 U.S. at 239-242; North v. Walsh, 881 F.2d 1088, 1097 (D.C. Cir. 1989); Alyeska Pipeline Co. v. U.S. E.P.A., 856 F.2d 309, 312-313 (D.C. Cir. 1988).

In OIP Opinion Letter No. 91-9 at 6, we observed that under FOIA's Exemption 7(A), the federal courts have sustained an agency's withholding of such information as:

> Details regarding initial allegations giving rise to an investigation; interviews with witnesses and subjects; an investigator's summary of findings; investigative reports furnished to the prosecuting attorneys; contacts with prosecuting attorneys regarding allegations; prosecutive opinions; and other materials that would permit a target of an investigation to discern the investigation's scope, direction, limits, and sources of information relied upon.

Given the foregoing authorities, we find that in the unusual event that a Daily Activity Report: (1) contains information relevant to potential civil or criminal violations, (2) is furnished to civil or criminal law enforcement agencies, and (3) a law enforcement proceeding arising out of an incident is pending or is a concrete possibility and not merely speculative, the public disclosure of the Daily Activity Report "could reasonably be expected to interfere with enforcement proceedings." Under these rare circumstances, we conclude that the UHH, as well as the law enforcement agency, may withhold access to the Daily Activity Report under section 92F-13(3), Hawaii Revised Statutes.

In the absence of a pending or prospective law enforcement proceeding, because we conclude that none of the other exceptions in section 92F-13, Hawaii Revised Statutes, would permit the UHH to withhold access to Daily Activity Reports after individually identifiable information has been segregated from the reports, we

conclude that they must be made available for inspection and copying "upon request[13] by any person." Haw. Rev. Stat. § 92F-11(b) (Supp. 1992).

CONCLUSION

For the reasons set forth above, we conclude that under the UIPA, copies of Daily Activity Reports maintained by the UHH's Auxiliary Services must be made available for inspection and copying after information identifying specific individuals mentioned in the reports has been segregated from the reports. However, in the rare circumstance that a Daily Activity Report is made part of a potential civil or criminal law enforcement investigation, and has been furnished to law enforcement authorities, we conclude that the Daily Activity Report may be withheld from the public under section 92F-13(3), Hawaii Revised Statutes, when a law enforcement proceeding is either pending, or is a concrete possibility.

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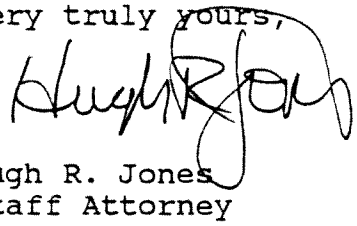
[13]Based upon court decisions applying the FOIA, we conclude that the UHH is not required to disclose Daily Activity Reports to Ke Kalahea in response to a "standing" UIPA request, or to disclose these reports as they are created. Under the UIPA, as under the FOIA, requesters cannot compel agencies to make automatic releases of records as they are created. Mandel Grunfeld & Herrick v. Customs Serv., 709 F.2d 41, 43 (11th Cir. 1986), aff'd 486 U.S. 1 (1988). Thus, if Ke Kalahea wishes to obtain copies of Daily Activity Reports on a bi-weekly basis, it will have to submit bi-weekly requests for these government records, unless the UHH is willing to accommodate its standing UIPA request.

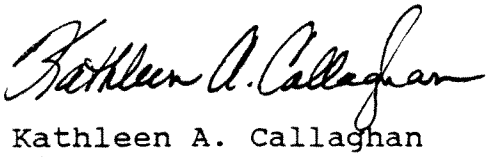
Please contact me at 586-1404 if you should have any questions regarding this opinion.

Very truly yours,



Hugh R. Jones
Staff Attorney

APPROVED:



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AUXILIARY SERVICES

October 20, 1993

MEMORANDUM

TO: Shannon Olson
Ke Kalahea

FROM: Kolin Kettleson
Auxiliary Services

SUBJECT: CAMPUS SECURITY INCIDENT SUMMARIES

10-04-93 2240 hour Police arrived at Kauanoe. 3 off campus runaways (juveniles) were thought to be in the dorm. Police checked building, found one. The other 2 apparently took off just as police arrived. Campus Security checked the area, but could not locate the 2 missing juveniles. Police left area at 2323 hour with lone juvenile in custody. All three juveniles are runaways from the detention home.

10-07-93 0310 hour Hale Aloha, a male resident ran out of dorm upset, and in the process was punching the pay phone and knocking over the trash can. Housing staff was informed, and the person was last seen heading in a west direction down Kawili St.

10-09-93 0315 hour Received a call from Hale Kauanoe about residents drinking in the parking lot. A group of males were spotted, but took off into the Mens wing of Kauanoe. Housing staff was informed.

10-09-93 2135 hour Security was called to Hale Kehau by Housing staff to escort an outsider off campus. Later, police was called in by the resident to make a report.

10-16-93 0040 hour Security received a call from Housing staff about a fight in progress at Hale Ikena. Two males were observed yelling and pushing each other. Security and Housing staff broke up the fight, which was apparently domestic in origin. 4 male outsiders left campus.

10-18-93 0150 hour Security observed 3 males running from a truck parked in the Hale Kehau parking lots. They apparently took something out of the cooler that was in the back of the truck, and ran with it under their shirts. Owner of the vehicle could not be reached.

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