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May 8, 1995

Ms. Liane Moriyama
Administrator
Hawaii Criminal Justice Data Center
Department of the Attorney General
465 King Street, Room 101
Honolulu, Hawaii 96813

Dear Ms. Moriyama:

Re: Disclosure of Conviction Data by Criminal Justice Agencies

This is in response to your letter to the Office of Information Practices ("OIP") requesting an advisory opinion regarding whether State and county criminal justice agencies are required to publicly disclose conviction data contained in the Offender-Based Transaction Statistics/Computerized Criminal History ("OBTS/CCH") system which is managed by the Hawaii Criminal Justice Data Center ("HCJDC").

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), State and county criminal justice agencies must disclose conviction data from the OBTS/CCH when such agencies have the unrestricted capability to inspect and copy such information.

BRIEF ANSWER

Because the OIP previously opined that conviction data in certain government records must be publicly disclosed, we conclude that conviction data contained in the OBTS/CCH must also be available for public inspection and copying under the UIPA.

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 Development Corp., 74 Haw. 365, 376 n.10 (1993). In order to determine whether conviction data contained in the OBTS/CCH constitute "government records" "maintained" by criminal justice agencies other than HCJDC, we refer to the definition of the term "maintain" in the Uniform Information Practices Code ("Model Code"), which was adopted by the National Conference of Commissioners on Uniform State Laws, for guidance. Under the Model Code, the term "maintain" means to "hold, possess, preserve, retain, store, or administratively control." Model Code § 1-105(6) (1980). The commentary to this Model Code definition explains that the term "maintain" is defined "to sweep as broadly as possible" and "includes information possessed or controlled in any way by an agency." Model Code § 1-105 commentary at 9 (1980). Furthermore, as we discussed in this opinion, an agency may "maintain" a record even though the record originates from outside the agency and the agency has no official authority to alter the record. See United States Dep't of Justice v. Tax Analyst, 492 U.S. 136 (1989).

Because State and county criminal justice agencies have the legal right and the unrestricted technical capability to directly retrieve, inspect, and copy computerized conviction data from the OBTS/CCH without intervention by the HCJDC, we believe that, for purposes of the UIPA, these agencies have "administrative control" over and, thus, "maintain" this information. Consequently, we find that, under the UIPA, these agencies are required by the UIPA to retrieve and publicly disclose this information upon request. We reach this conclusion notwithstanding the fact that the OBTS/CCH resides on a computer which is located at ICSD and managed by the HCJDC.

FACTS

Under chapter 846, Hawaii Revised Statutes, the HCJDC is responsible for collecting, storing, analyzing, and disseminating criminal justice information from all State and county criminal

justice agencies[1] and for preparing reports about criminal justice in Hawaii. See Haw. Rev. Stat. § 846-2.5 (1985). For these purposes, the HCJDC manages a computerized criminal history information system called the Offender-Based Transaction Statistics/Computerized Criminal History ("OBTS/CCH") system. The computer upon which the OBTS/CCH resides is located at the Information and Communication Services Division ("ICSD") of the State Department of Budget and Finance. By agreement with the HCJDC, via a telecommunication link to the OBTS/CCH, criminal justice agencies have the unrestricted capability to inspect and copy the criminal history information contained in the OBTS/CCH, as well as to enter and update criminal history information that they compile, without any intervention on the part of HCJDC.

In 1992, the HCJDC developed a component of the OBTS/CCH that would allow members of the public to make queries, inspect, and obtain printouts of electronically stored conviction data on a computer terminal available for public use at the HCJDC's office. This component is also available for criminal justice agencies so that they can, without restriction, retrieve, inspect, and copy conviction data only, segregated from any confidential criminal history information, about an individual.

Previously, State and county criminal justice agencies have referred requests from the public for criminal history record information to the HCJDC for a response. Since criminal justice agencies have the unrestricted capability to inspect and copy computerized conviction data contained in the OBTS/CCH, they can readily respond to requests from the public for conviction data about individuals, and the HCJDC has encouraged them to do so.

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[1]"Criminal justice agency" is defined as:

(1) Courts; or

(2) A government agency or any subunit thereof which performs the administration of criminal justice pursuant to a statute or executive order, and which allocates a substantial part of its annual budget to the administration of criminal justice.

Haw. Rev. Stat. § 846-1 (1985).

In a memorandum dated February 28, 1992, you requested an advisory opinion from the OIP on several issues concerning the disclosure of conviction data to the public, including the issue of whether criminal justice agencies must respond to requests for conviction data. In a memorandum dated March 12, 1992, to you, the OIP responded to the issues you raised in your request, and informed you that we will address in a separate opinion the remaining issue concerning the criminal justice agencies' obligation to disclose conviction data upon request. Hence, the OIP is providing this opinion letter as requested.

DISCUSSION

I. PUBLIC ACCESS TO CONVICTION DATA

Chapter 846, Hawaii Revised Statutes, sets forth restrictions upon the disclosure of conviction data, but the statutory restrictions upon the public disclosure of non-conviction data expressly do not apply to conviction data. See Haw. Rev. Stat. § 846-9 (1985). Consequently, in previous opinion letters, the OIP concluded that government agencies must disclose conviction data about individuals found in gubernatorial pardons, board and commission applications, and criminal history records obtained from the HCJDC for criminal checks. See OIP Op. Ltr. No. 89-7 (Nov. 20, 1989); OIP Op. Ltr. No. 91-8 (June 24, 1991); OIP Op. Ltr. No. 92-23 (Nov. 18, 1992); see also Thompson v. Weinstein, 542 N.Y.S.2d 33 (N.Y. App. Div. 1989) ("clearly unwarranted invasion of privacy" exception to disclosure does not apply to an individual's conviction record).

Furthermore, we believe that, under the UIPA, conviction data must be made available for public inspection and copying regardless of whether this information is maintained in a paper or computerized format. We reach this conclusion because the UIPA defines the term "government record" as "information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. § 92F-3 (Supp. 1992) (emphasis added); see also OIP Op. Ltr. No. 90-35 (Dec. 17, 1990) (copy of a computerized mailing list of water use declarants must be made available upon request). Accordingly, the HCJDC allows the public to inspect and make copies of computerized conviction data from the computer terminal that accesses the "conviction data only" component of the OBTS/CCH. Although the conviction data contained in the OBTS/CCH is public under the UIPA, we must determine whether the duty to disclose this public information

extends to those criminal justice agencies other than the HCJDC that have unrestricted capability to retrieve, inspect, and copy this information from the OBTS/CCH.

II. CRIMINAL JUSTICE AGENCIES' DUTY TO DISCLOSE CONVICTION DATA FROM THE OBTS/CCH

The HCJDC has informed the OIP that, to its knowledge, chapter 846, Hawaii Revised Statutes, does not restrict another criminal justice agency from releasing publicly disclosable conviction data from the OBTS/CCH, nor does this chapter specifically require that other criminal justice agencies disclose this information. After reviewing chapter 846, Hawaii Revised Statutes, we reached the same conclusion regarding this chapter's silence on this matter.[2] In the absence of a specific statute expressly restricting or requiring other criminal justice agencies' disclosure of conviction data from the OBTS/CCH, we look to the UIPA's provisions to determine these agencies' duties thereunder.

The UIPA sets forth the general rule that "[a]ll government records are open to public inspection unless access is restricted or closed by law." Haw. Rev. Stat. § 92F-11(a) (Supp. 1992). The UIPA instructs that "[e]xcept as provided in section 92F-13, each agency upon request by any person shall make government records available for inspection and copying during regular business hours." Haw. Rev. Stat. § 92F-11(b) (Supp. 1992). As previously stated, the term "government record," is defined by the UIPA as "information <u>maintained by an agency</u> in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. § 92F-3 (1992) (emphasis added); <u>Kaapu v. Aloha Tower Development Corp.</u>, 74 Haw. 365, 376 n.10 (1993).

In several previous advisory opinions, in order to determine whether an agency is required by the UIPA to disclose a

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[2]Section 846-4, Hawaii Revised Statutes, instructs criminal justice agencies to query the HCJDC for up-to-date criminal history information "prior to any dissemination" of the information. This statute seems to assume that criminal justice agencies can disseminate, or disclose, criminal history information from the OBTS/CCH so long as the information is up-to-date and the dissemination is authorized by chapter 846, Hawaii Revised Statutes.

government record, the OIP's first inquiry has been to verify that the record constitutes a "government record" that the agency "maintains." See, e.g., OIP Op. Ltr. No. 91-25 (Dec. 11, 1991); OIP Op. Ltr. No. 92-25 (Dec. 22, 1992). Because the UIPA does not define the term "maintain," we have previously referred to the definition of this term provided in the Uniform Information Practices Code ("Model Code"), which was drafted by the National Conference of Commissioners on Uniform State Laws, and which served as a model for the UIPA. See OIP Op. Ltr. No. 91-5 (April 15, 1991); OIP Op. Ltr. No. 91-25 (Dec. 11, 1991); OIP Op. Ltr. No. 92-25 (Dec. 22, 1992); OIP Op. Ltr. No. 95-8 (May 4, 1995). The Legislature had instructed that "the commentary to the Model Uniform Information Practices Code ("Model Act") guide the interpretation of similar provisions found in the [UIPA] where appropriate." H. Stand. Comm. Rep. No. 342-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 969, 972 (1988). The Model Code defines the term "maintain" as "hold, possess, preserve, retain, store or administratively control." Model Code § 1-105 (1980).

With respect to the Model Code's definition of the term "maintain," the commentary to the Model Code explains:

> "Maintain" is defined in Section 1-105(6) to sweep as broadly as possible. It includes information possessed or controlled in any way by an agency. The administrative control component of the definition is especially important since it prevents an agency that does not have physical custody of government records from evading its obligations under this Code.

Model Code § 1-105 commentary at 9 (1980) (emphases added).

Based upon the Model Code's definition of "maintain," the OIP previously concluded that a private accounting firm's working papers concerning an agency audit that the firm conducted under contract with the State Auditor were "government records" that were "maintained" by the State Auditor. OIP Op. Ltr. No. 92-25 (Dec. 22, 1992). Although the private firm retained physical custody of its working papers from the audit, we found that the State Auditor had "administrative control" over them because it had the contractual right to obtain these documents from the firm at any time.

Also, in OIP Opinion Letter No. 95-8 (May 4, 1995), the OIP concluded that the State Department of Transportation has "administrative control" and, therefore, "maintains" a contractor's records about the contractor's performance of work under two State contracts because, under these contracts, the State retains the right to inspect and copy the contractor's records before final payment and for a period of three years thereafter. Cf. OIP Op. Ltr. No. 91-5 (April 15, 1991) (information about jurors who graded an architect registration exam was not a "government record" because it was maintained by a private entity and the government agency had no legal right to obtain the information).

According to the facts before us, criminal justice agencies that have a telecommunication link to the OBTS/CCH possess both the legal right and the technical capability to directly retrieve, inspect, and copy computerized conviction data from this computer system without intervention by the HCJDC. We believe that because of these agencies' unrestricted capability to inspect and copy conviction data from the OBTS/CCH, this information constitutes "information possessed or controlled in any way" by these agencies. Model Code § 1-105 commentary at 9 (1980).

Consequently, we believe that, for purposes of the UIPA only, criminal justice agencies have "administrative control" over and, thus, "maintain" the conviction data. Accordingly, we find that these agencies are required by the UIPA to retrieve and disclose this information upon request. See also M.L.C. v. North American Philips Corp., 109 F.R.D. 134, 136 (S.D.N.Y. 1986) (for purposes of discovery, "control includes the legal right of the producing party to obtain documents from another source upon demand"). We also believe that our conclusion best abides by the UIPA's declaration that the UIPA "shall be applied and construed to promote its underlying purposes and policies," including policies to "[p]romote the public interest in disclosure" and to "[e]nhance governmental accountability through a general policy of access to government records." Haw. Rev. Stat. § 92F-3 (Supp. 1992).

Furthermore, we believe that an agency may "maintain" a record by having "administrative control" over a record even though the record originates from outside the agency and the agency has no official authority to alter the record. See OIP Op. Ltr. No. 91-25 (Dec. 11, 1991). In that OIP opinion letter,

we concluded that because the Department of Public Safety "maintained" a binder of newspaper articles in its recreational library, this binder was a "government record" under the UIPA even though the articles did not originate from any agency. In reaching this conclusion, for comparison, we referred to the United States Supreme Court's analysis in United States Dep't of Justice v. Tax Analyst, 492 U.S. 136 (1989) ("Tax Analyst") regarding what constitutes "agency records" under the federal public records law, the Freedom of Information Act, 5 U.S.C. § 552 (1988) ("FOIA"). In Tax Analyst, the United States Supreme Court held that records created by a non-agency, but possessed by an agency constitute "agency records" under the FOIA when the records: (1) have been either created or obtained by an agency; and (2) are within the "control" of the agency at the time of a FOIA request. 492 U.S. at 144-5.

Because the first prong in the Tax Analyst definition of the term "agency record" under FOIA requires that the agency has either created or obtained the record, we note that this definition appears to be narrower in scope than the UIPA's express definition of "government record." However, we find that the Supreme Court's explanation in Tax Analyst of an agency's "control" of a record, which is the second prong in its definition of "agency record," is instructive in the facts before us. The U.S. Department of Justice in Tax Analyst had argued that it did not "control" the copies of district court decisions that it received because only the district courts retain the authority to modify the decisions after they are released. In response, the Supreme Court stated:

> The control inquiry focuses on an agency's possession of the requested materials, not on its power to alter the content of the materials it receives. Agencies generally are not at liberty to alter the content of the materials that they receive from outside parties. An authorship-control requirement thus would sharply limit "agency records" essentially to documents generated by the agencies themselves. This result is incompatible with the FOIA's goal of giving the public access to all non-exempted information received by an agency as it carries out its mandate.

492 U.S. at 147 (1989) (emphasis added).

In the facts before us, conviction data contained in the OBTS/CCH is created from information input by many criminal justice agencies, and is compiled and stored in a computer system that is managed by the HCJDC and that physically resides at the ICSD. Yet, in view of the Supreme Court's explanation in Tax Analyst of the "control" component in its definition of "agency records" under FOIA, we believe that the HCJDC's management of the OBTS/CCH and the location of this computer system at the ICSD do not affect our conclusion that, under the UIPA, criminal justice agencies other than the HCJDC "maintain" this public information and must disclose it upon request.

CONCLUSION

Because criminal justice agencies have the unrestricted capability to retrieve, inspect, and copy computerized conviction data contained in the OBTS/CCH by agreement with the HCJDC, we believe that they have "administrative control" over this information and, thus, "maintain" this information for purposes of the UIPA. Consequently, under the UIPA, these agencies are required to retrieve and make computerized conviction data contained in the OBTS/CCH available for public inspection and copying upon request, because none of the exceptions in section 92F-13, Hawaii Revised Statutes, protects this information from public disclosure.

Very truly yours,

Lorna J. Loo
Staff Attorney

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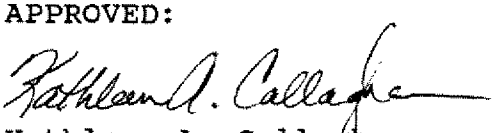

Kathleen A. Callaghan
Director

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