Op. Ltr. 98-05 RFO 98-04 – Honolulu Police Department Request for Opinion on *The Honolulu Advertiser* Request for Internal Affairs Reports

OIP Op. Ltr. No. 05-03 partially overrules this opinion to the extent that it states or implies that the UIPA's privacy exception in section 92F-13(1), HRS, either prohibits public disclosure or mandates confidentiality.

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November 24, 1998

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

Re: RFO 98-04 - Honolulu Police Department
Request for Opinion on *The Honolulu Advertiser*
Request for Internal Affairs Reports

Dear Chief Donohue:

This is in response to your February 13, 1998, letter to the Office of Information Practices ("OIP") requesting advice on whether or not Internal Affairs reports regarding several police shootings must be publicly disclosed. In that letter, you indicated that *The Honolulu Advertiser* asked to inspect and copy the administrative and criminal reports from Internal Affairs regarding several cases involving shootings by police officers. Two of the requests identified an officer, the other requests did not.

While the information from the closed criminal reports was disclosed by the Honolulu Police Department ("HPD") in a manner consistent with advice from the OIP, the HPD objects to disclosure of the Internal Affairs administrative investigation reports on the incidents.

In responding to your request for assistance, the OIP provides guidance for addressing the issues raised, but does not make a specific determination on each of the HPD's objections to disclosure at this time. The OIP determined that it would handle the request for assistance in this manner because of the voluminous nature of the IA Reports and the number of potential objections to disclosure which must be reviewed on a case-by-case basis.

This approach is further supported because of the approach taken by the HPD. In objecting to disclosure, the HPD primarily asserted that Internal Affairs administrative investigation reports ("administrative investigation reports"), as a category of information, must be exempt from disclosure in their entirety because disclosure would frustrate the HPD's legitimate government function of investigating and addressing employee misconduct. Thus, while the HPD has been responsive to the OIP's requests for clarification of its position and has provided additional information and two examples of the IA Reports requested, it has not specifically addressed every issue raised as to each particular IA Report, and further factual information is needed to assess the application of the disclosure exceptions to the specific IA Reports.

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), the HPD must make available for public inspection and copying the administrative investigation reports identified by *The Honolulu Advertiser* in the following manner and to be referred to collectively as "IA Reports":

- The August 1995 shooting that injured a 14-year-old boy at Meheula Parkway and Kamehameha Highway, near Mililani High School. Officer involved: Richard Wheeler;

- The December 1995 fatal shooting of Jabe La Corte at the Chateau Waikiki condominium;

- The February 7, 1996, fatal shooting of John Miranda at Sand Island;

- The June 7, 1996, fatal shooting of Jared Fe Benito and shooting that injured Chauncey Hata near Pearlridge Shopping Center. Officer involved: Daniel Scharf;

- The firing of wooden bullets to subdue George Parker, III, on January 29, 1997;

- The February 6, 1997, shooting that injured Robert Sua near Farrington Highway and Pupukai Street in Waipahu; and

- The New Year's Day fatal shooting of Benedict Manupule at Mayor Wright Housing.

BRIEF ANSWER

Yes, in redacted form. While the HPD has not established the need for withholding from disclosure the IA Reports in their entirety, the HPD has established that certain exceptions to disclosure under section 92F-13(1) and (3), Hawaii Revised Statutes, apply, warranting the redaction of the following information:

(1) information which identifies complainants and witnesses;
(2) the statement of the subject employee; and
(3) certain personnel information.

Thus, prior to any disclosure of the IA Reports, consistent with this opinion, the HPD should redact certain personnel information and individually identifiable information regarding complainants and witnesses. This information is not limited to the names of the individuals, but can encompass any information that would result in the likelihood of actual identification. See OIP Op. Ltrs. No. 94-8 at 10-11 (May 12, 1994); 95-7 at 11 (March 28, 1995); 95-21 at 23 n. 10 (Aug. 28, 1995); see also Dep't of Air Force v. Rose, 425 U.S. 352, 380-381, 96 S. Ct. 1592, 1608 (1976). What constitutes identifying information must be determined not only from the standpoint of the public, but also from that of persons familiar with the circumstances involved. See Dep't of Air Force v. Rose, 425 U.S. 352, 380-381, 96 S. Ct. 1592, 1608 (1976).

However, as the OIP lacks specific information as to other assertions made by the HPD, the OIP is constrained from finding that the following exceptions to disclosure apply, and therefore provides only guidance as to their application:

(1) The HPD's assertion that the IA Reports regarding the shootings of Jared Fe Benito and Robert Sua are excepted from disclosure as records, which if disclosed, could reasonably be expected to interfere with law enforcement proceedings (discussed at Section II.A);

(2) The HPD's assertion that disclosure of the IA Reports would deny a person a fair trial (discussed at Section II.C); and

(3) The HPD's assertion that procedures discussed in the IA Reports are excepted from disclosure (discussed at Section II.E).

In addition, with regard to the HPD's assertion of an exception to disclosure under section 92F-13(1), Hawaii Revised Statutes, the subject employees have a

significant privacy interest in the information regarding their identities. However, the OIP requires additional information in order to assess the public interest in disclosure, to be balanced against the employees' privacy interest (see Section III.B.1).

Where the request identifies the IA Reports by officer name and incident and the HPD asserts that the officer's identity is confidential, the OIP recommends that the HPD respond by neither confirming nor denying the accuracy of the statement that the officer named is the subject officer.

In disclosing the IA Report about the shooting of Benedict Manupule at Mayor Wright Housing, the HPD may not redact any information already disclosed, including the information identifying the subject officer Tenari Maafala, as the HPD waived its objection to disclosure by releasing such information to the news media. In addition, the HPD may not redact information revealed to the news media by Officer Maafala, himself.

FACTS

I. BACKGROUND

In telephone conversations with the OIP and letters dated April 21, 1998, and May 22, 1998, the HPD described its Internal Affairs process for the OIP.

The HPD's Internal Affairs conducts routine and unscheduled inspections of HPD employees, and investigates internal and external complaints of misconduct. It answers directly to the Chief of Police. Internal Affairs' primary function is to ensure that HPD employees perform their duties in accordance with federal, state and county laws, as well as the Honolulu Police Department Standards of Conduct. Internal Affairs also reviews compliance with the HPD's policies, procedures and directives.

Internal Affairs is divided into two separate sections, one handling administrative investigations, and the other handling criminal investigations. An Internal Affairs criminal investigation is handled like any other criminal investigation, as are the reports arising from an Internal Affairs criminal investigation. In disclosing criminal investigation reports, consistent with its treatment of all suspects, the HPD redacts the names of police officers who may be suspects. The names of other police officers are left in the disclosed reports.

Because of the serious consequences involved, an Internal Affairs administrative investigation is automatically opened where there is a police shooting. Therefore, the HPD has acknowledged the existence of Internal Affairs administrative investigations.[1]

An Internal Affairs administrative investigation is used for administrative disciplinary purposes only, to determine whether employee misconduct occurred and whether discipline should be imposed in personnel matters. It usually constitutes the only investigation as to whether discipline should be imposed for employee misconduct.

When investigating the same matters, the criminal investigation and administrative investigation sections operate independently from one another. While the information obtained through a criminal investigation may be shared with the administrative investigation, no part of the administrative investigation is shared with the criminal investigation. In addition, the investigations have different time frames. The administrative process can be and, in most cases, is completed before the criminal process.

The two types of Internal Affairs investigations are conducted independently because in an administrative investigation, an employee is required to provide a statement with regard to the incident or charge being investigated. Refusal to do so would subject the employee to discipline, and possible termination. In contrast, an employee may refuse to provide a statement in a criminal investigation.

The State of Hawaii Organization of Police Officers ("SHOPO") Collective Bargaining Agreement, Article 13 (Discipline and Dismissal) provides that all matters under that article, including investigations, shall be considered confidential. Article 12 (Police Officer's Protection - Administrative Investigations and Interrogations) of the SHOPO Collective Bargaining Agreement details the parameters for administrative investigations and the protections afforded an officer under investigation. It concludes with a statement of an officer's rights under Garrity v. New Jersey, 385 U.S. 493 (1967) that a statement made in the administrative investigation will be used for internal police department purposes only, and will not be used as part of an official criminal investigation.

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[1] In addition, with regard to the shooting at Mayor Wright Housing, the HPD publicly bestowed its highest honor upon the police officer involved and revealed that the internal police investigation found no wrongdoing in the officer's actions. Jean Christensen, Bravery Medal Goes to Officer Who Shot Mayor Wright Gunman, The Honolulu Advertiser, July 19, 1998.

The administrative investigation section of Internal Affairs acts only as an investigative body. While witness statements may be summarized in an administrative investigation report, statements are not weighed, and the Internal Affairs investigators make no findings or factual determinations.[2] After an administrative investigation is completed, the administrative investigation report is forwarded to a reviewing body, usually the Administrative Review Board, which is comprised of the deputy chiefs and the assistant chiefs of police. This body makes a recommendation to the Chief of Police, who determines whether discipline will be imposed. After a decision on discipline is made, an employee may go through the grievance process in accordance with the applicable collective bargaining agreement.

The HPD treats administrative investigation reports as confidential. Administrative investigation reports are secured within Internal Affairs in confidential repositories and kept separate and apart from other police reports. Access to the administrative investigation reports is restricted to persons involved in the investigative and disciplinary processes. Until the grievance process starts, the subject employee has access only to the written complaint and the employee's statement, and not the rest of the administrative investigation report. Once in the grievance process, however, the subject employee will have access to information regarding witnesses and their statements, and will be able to examine witnesses called by the HPD at the hearing on the grievance.

Administrative investigation reports may contain personnel information, including residential telephone numbers and addresses, personal emergency notification information, personal family information, and disciplinary history information. However, while an administrative investigation report is used in determining discipline in the personnel arena, only the disciplinary decision, and not the administrative investigation report, will become part of an employee's personnel file.

Through telephone conversations with Timothy Liu, Esq., counsel for the HPD, the OIP learned that none of the subject employees have been discharged as a result of the actions investigated here.

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[2] While the IA Reports are predecisional memoranda prepared for use by the reviewing body and the Chief of Police, because the IA Reports consist of factual material, the deliberative process privilege is not considered here. See e.g., OIP Op. Ltrs. No. 95-5 at n. 4 (March 9, 1995) (the deliberative process privilege does not protect purely factual information or the factual portions of otherwise deliberative memoranda); 90-11 (Feb. 26, 1990).

II. THE HPD'S OBJECTIONS TO DISCLOSURE

Through its February 13, 1998, letter, the HPD asserted several objections to disclosure of the IA Reports requested by *The Honolulu Advertiser*:

(1) The records, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function;

(2) The records should not be disclosed because they include information identifiable as part of an investigation into a possible violation of criminal law; and

(3) The records should not be disclosed because the reports also represent personnel files which contain investigations into possible employee disciplinary matters.

In letters dated April 21, 1998, and May 22, 1998, and in conversations with the OIP, the HPD further explained and developed its objections to disclosure of the IA Reports. In objecting to disclosure of the IA Reports in their entirety, the HPD asserts that disclosure will frustrate its legitimate government function of effectively investigating and addressing any improper conduct by its employees. The HPD states that a complete investigation requires the full cooperation of witnesses, complainants, and the police officers, themselves. If witnesses and complainants know that administrative investigation reports are subject to public disclosure, the HPD fears that the witnesses and complainants will be less likely to come forward to lodge complaints against HPD employees, or to provide full and accurate accounts of the facts involved.

In its May 22, 1998, letter to the OIP, the HPD states that the event triggering a complaint is often traumatic, sometimes involving sensitive personal or family issues, and close friends and relations. Thus, victims and witnesses have expressed their unwillingness to pursue complaints if the events are made public. Internal Affairs investigators contend that if administrative investigation reports are deemed public, they would be hard pressed to convince victims to lodge and pursue complaints and to convince witnesses to give true and complete statements.

The HPD states that it is not uncommon for people to make complaints in person to the Internal Affairs Office. There, the complainant is asked to provide his name and other identifying information, and have his statement notarized. The complainant is informed that officers who are the subject of the complaint are provided a copy of the written complaint in order that they may respond to the

allegations. Where questions as to confidentiality arise, the complainant is assured that the investigation will be used for internal administrative proceedings only, and that only authorized persons in the administrative process will have access to the Internal Affairs report.

Upon learning that their names will be released to the subject officers, some complainants have changed their minds about filing or pursuing complaints. In doing so, complainants have cited fear of retaliation by the officers or others involved in a case and fear of others finding out about their involvement in the events.

With regard to witnesses, who have less of a personal stake in a complaint, even with access to information now restricted to those within the administrative process, many witnesses presently decline to be interviewed or, at best, give sketchy accounts of an incident or their involvement. Witnesses may not wish to get involved because of fear of retaliation, embarrassment, or apathy.

The HPD asserts that public release of administrative investigation reports and the further erosion of any assurances of confidentiality will make it more difficult to obtain witness statements. Further, even where a witness is willing to give a statement, the HPD expresses concern that the statement may be an inaccurate or incomplete account of an incident. In the instances where a witness has been promised confidentiality or anonymity, witnesses will be reluctant to cooperate with investigators should administrative investigation reports be subject to disclosure.

In addition, the HPD asserts several other objections to disclosure. Because the administrative investigations deal with compliance with department procedures, the HPD states that disclosure of the administrative investigation reports would result in the disclosure of those procedures, which would jeopardize the safety of police officers and the public.

Noting that the criminal cases involving Robert Sua and Jared Fe Benito were still open, and that administrative and criminal investigations often involve the same witnesses, the HPD also asserts that the untimely release of an administrative investigation report while a criminal investigation is ongoing could jeopardize the criminal investigation.[3] The HPD also states that disclosure of an administrative investigation report before the completion of a criminal

[3] The HPD asserts this objection regarding the file involving Robert Sua until the period for appeal has passed.

investigation or prosecution could deny a person of a fair hearing because of the media publicity. In addition, the HPD asserts that disclosure of an employee's statement in an administrative investigation will compromise the employee's rights under Garrity v. New Jersey, 385 U.S. 493 (1967), as set forth in the SHOPO contract.

Finally, because administrative investigation reports contain personnel information and because the administrative investigation often constitutes the HPD's only investigation of the alleged employee misconduct, the HPD asserts that the IA Reports must be deemed confidential as information, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

DISCUSSION

I. INTRODUCTION

As information maintained by the HPD, the IA Reports are government records subject to the UIPA. See Haw. Rev. Stat. § 92F-3 (1993) (definition of "government record"). Under the UIPA, all government records are open to the public unless an exception under section 92F-13, Hawaii Revised Statutes, applies. Haw. Rev. Stat. § 92F-11 (1993).

In its communications with the OIP, the HPD raises several objections to disclosure which fall under section 92F-13(3), Hawaii Revised Statutes, for government records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function, and section 92F-13(1), Hawaii Revised Statutes, for government records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy.

II. FRUSTRATION OF A LEGITIMATE GOVERNMENT FUNCTION

A. Interference With Ongoing Criminal Proceedings

The OIP will first consider the HPD's assertion that, under section 92F-13(3), Hawaii Revised Statutes, the IA Reports must be confidential in order to avoid jeopardizing ongoing criminal proceedings and frustrating the government's legitimate government function of enforcing the law. If applicable, such an exception from disclosure, at least temporally, will likely foreclose access to the entire record. Unlike the other objections to disclosure raised by the HPD, which apply at any time, that exception applies only when a file is "open," i.e., when there is a pending or prospective law enforcement proceeding.

The OIP previously recognized, under section 92F-13(3), Hawaii Revised Statutes, the exception from disclosure for law enforcement records, which if disclosed, could reasonably be expected to interfere with law enforcement proceedings. See OIP Op. Ltr. No. 95-21 (Aug. 28, 1995). In applying this exception, the OIP referred to the 7(A) exemption of the federal Freedom of Information Act, 5 U.S.C. § 552(b)(7)(A) (1988) ("FOIA"), and applicable case law for guidance. See OIP Op. Ltr. No. 95-21 (Aug. 28, 1995).

Here, as records which are used only for internal disciplinary purposes, the IA Reports do not constitute law enforcement records. See Kimberlin v. Dep't of Justice, 139 F.3d 944 (D.C. Cir. 1998), cert. denied, 67 U.S.L.W. 3236 (1998); Stern v. F.B.I., 737 F.2d 84 (D.C. Cir. 1984). However, the same rationale for recognizing an exception to disclosure applies under section 92F-13(3), Hawaii Revised Statutes, as under FOIA. The Internal Affairs administrative process is often completed before the criminal process, and administrative investigation reports often track the criminal investigation reports, covering the same witnesses. In addition, administrative investigation reports sometimes contain material received from the criminal investigations. Thus, premature release of an administrative investigation report could reasonably be expected to interfere with law enforcement proceedings, just as the premature release of a criminal investigation report might. Therefore, the exception to disclosure under section 92F-13(3), Hawaii Revised Statutes, for government records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function, could apply to the IA Reports.[4]

In order to establish that the exception does apply, the HPD must provide specific facts demonstrating: (1) that a related criminal case is under investigation or is being prosecuted in the courts, and (2) that disclosure of the IA Reports would in some particular way disrupt or harm that investigation or prosecution. See OIP Op. Ltr. No. 95-21 at 10-12 (Aug. 28, 1995) (to establish that a law enforcement record should be exempt from disclosure because disclosure could reasonably be expected to interfere with enforcement proceedings, courts require an agency to

[4] By its terms, the UIPA exception from disclosure at section 92F-13(3), Hawaii Revised Statutes (for government records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function), is broader than the FOIA exception at 5 U.S.C. § 552(b)(7)(A) (1988), which provides an exemption for "records 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...."

establish that a law enforcement proceeding is pending or prospective; and that disclosure would, in some particular, discernable way, disrupt, impede, or otherwise harm the enforcement proceeding) (citing North v. Walsh, 881 F.2d 1088, 1097 (D.C. Cir. 1989)). Courts have held information exempt from disclosure where disclosure would tip off a target to an investigation, subject witnesses to reprisal or harassment, or chill the willingness of individuals to provide information to the agency. See OIP Op. Ltr. No. 95-21 at 11-12 (Aug. 28, 1995).

While the HPD has asserted the exception with regard to the IA Reports on the shootings of Robert Sua and Jared Fe Benito,[5] the HPD needs to provide further information to the OIP which establishes that a related criminal case is under investigation or is being prosecuted, and that disclosure of the IA Reports would harm the criminal investigation or prosecution. Without that information, the OIP is constrained from finding that those IA Reports are exempt from disclosure under section 92F-13(3), Hawaii Revised Statutes, on the grounds that disclosure could reasonably be expected to interfere with law enforcement proceedings.

B. HPD's Contention That Disclosure Will Impair its Ability to Investigate and Address Allegations of Employee Misconduct

The HPD has asserted that all administrative investigation reports are exempt from disclosure in their entirety, because disclosure would frustrate its legitimate government function of investigating and addressing employee misconduct. The HPD has stated that under the present system, while complainants and witnesses are not assured of complete confidentiality, they are assured that disclosure of the information provided is limited to those involved in the investigative and disciplinary processes within the HPD. If administrative investigation reports are deemed public, the HPD's Internal Affairs investigators assert that it will be difficult to convince victims to file complaints and to convince witnesses to give true and complete statements. The HPD states that, fearing retaliation by the subject employee or others and fearing that others will learn of their involvement in the surrounding events, complainants already sometimes change their minds about filing or pursuing a complaint. Furthermore, out of fear of retaliation or embarrassment, witnesses decline to be interviewed or give only

[5] The OIP has a request for an opinion on the disclosure of the criminal reports involving the events surrounding the shooting of Jared Fe Benito. As the issues regarding the disclosure of these criminal reports overlap with the issue discussed here, some of the information in the OIP's file regarding the disclosure of the criminal reports can be applied to this analysis; however, specific determination of the issue requires further factual clarification.

sketchy accounts. Investigators fear that this will worsen with public disclosure of administrative investigation reports.

The HPD's argument that disclosure of administrative investigation reports will frustrate its ability to effectively investigate and address employee misconduct is based on the proposition that complainants and witnesses, fearing that their identities will be publicly disclosed, will no longer be willing to provide necessary information to investigators. The OIP previously has held that the identities of complainants are exempt from disclosure under section 92F-13(3), Hawaii Revised Statutes. See OIP Op. Ltr. No. 89-12 (Dec. 12, 1989) (identity of complainant who reported alleged zoning violations exempt from public disclosure under Haw. Rev. Stat. § 92F-13(3)); cf. OIP Op. Ltr. No. 98-1 (Jan. 16, 1998) (OIP recognized the effect that disclosure would have on individuals' willingness to make complaints or inquiries upon the City Ethics Commission's ability to investigate unethical behavior and advise on ethical conduct).

Thus, given the need for public cooperation in identifying misconduct of HPD employees and the need for complete and accurate information in conducting an investigation, the HPD makes a cogent argument for an exception from disclosure for information which identifies complainants and witnesses. However, the HPD has not established the need for nondisclosure of the IA Reports in their entirety.

The UIPA starts with the presumption that all records are public, and provides that the agency carries the burden of establishing an exception from disclosure. See Haw. Rev. Stat. §§ 92F-11, 92F-15(c) (1993); see also OIP Op. Ltrs. No. 98-4 (June 17, 1998); 95-21 at 8 n. 1 (Aug. 28, 1995); 95-5 at 3 n. 1 (March 9, 1995); 94-18 at 10 (Sept. 20, 1994); 94-11 at 5 n.1 (June 24, 1994); 91-15 at 8 (Sept. 10, 1991). Thus, for example, where identifying information can reasonably be segregated in order to protect an individual's privacy right, the UIPA supports the segregation of such material and disclosure of the remaining material. See OIP Op. Ltrs. No. 95-7 at 11 (March 28, 1995); 94-8 at 10-11 (May 12, 1994); see also Dep't of Air Force v. Rose, 425 U.S. 352, 380-381, 96 S. Ct. 1592, 1608 (1976).

Recently, in OIP Opinion Letter Number 98-1 (Jan. 16, 1998), the OIP upheld a claim by the City Ethics Commission for the City and County of Honolulu ("Ethics Commission") that disclosure of an advisory opinion would discourage complaints and inquiries into possible ethical violations, and therefore impair the Ethics Commission's legitimate government function to investigate, advise and make recommendations on possible ethical violations. However, the form of the request in that case differed from the form of the request here. In OIP Opinion Letter Number 98-1, the advisory opinion sought from the Ethics Commission was

identified by the name of the individual who was the subject of the opinion, thereby making it impossible to redact information to protect the individual's identity and to address the concerns raised by the Ethics Commission.

Here, the IA Reports were requested and can be referenced by incident.[6] Thus, in contrast with the circumstances of OIP Opinion Letter Number 98-1 (Jan. 16, 1998), the HPD's concerns about disclosure of the identity of complainants and witnesses, and the subsequent effect on their willingness to provide information to investigators, can be addressed by redacting and segregating individually identifiable information about a complainant or witness.[7] Therefore, while the HPD has demonstrated that information which identifies the complainants and witnesses within the IA Reports must be confidential in order to avoid the frustration of its legitimate government function of investigating and addressing employee misconduct,[8] it has not established that the IA Reports, in their entirety, are exempt from disclosure.

As is discussed later in this opinion, the OIP advises that, prior to disclosure, the HPD segregate any information within the IA Reports that would result in the likelihood of actual identification, considering the viewpoint both of the general public and those persons familiar with the events involved. See OIP Op. Ltrs. No. 94-8 at 10-11 (May 12, 1994); 95-7 at 11 (March 28, 1995); 95-21 at 23 n. 10 (Aug. 28, 1995); Dep't of the Air Force v. Rose, 425 U.S. 352, 380-381, 96 S. Ct. 1592, 1608 (1976).

C. Right to Fair Trial

The HPD also asserts that disclosure of the IA Reports before completion of the criminal investigation or prosecution could result in media publicity which would deny a person of a fair trial. To successfully assert this exception from

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[6] While two of the IA Reports also listed the name of an officer, those IA Reports, too, were identified by the incident involved.

[7] The OIP acknowledges that the HPD may have concerns that, although identifying information is redacted, certain individuals may still be fearful and will not provide investigators with necessary information. However, as the removal of information identifying individuals addresses the concerns raised by the HPD, the OIP cannot base its determination upon such fears or speculation. Cf. OIP Op. Ltr. No. 93-5 at 14 (June 14, 1993) (application of the UIPA's exceptions should not rest upon tenuous, conclusory, or speculative arguments).

[8] The information which identifies the complainants and witnesses also is excepted from disclosure as information, which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy (discussed at Section III.B). See Haw. Rev. Stat. § 92F-13(1) (1993).

disclosure under section 92F-13(3), Hawaii Revised Statutes, the HPD must establish that disclosure would result in the impairment of a legitimate government function, here, the government's interest in assuring that an individual has a fair trial.

To establish that the exception from disclosure applies, the HPD must provide further information demonstrating that there is a pending or imminent law enforcement proceeding, and that it is more probable than not that disclosure of the IA Report will seriously interfere with the fairness of that law enforcement proceeding. See Washington Post Co. v. U.S. Dep't of Justice, 863 F.2d 96, 102 (D.C. Cir. 1988). Without such information, the OIP cannot find that the IA Reports, or any portion of them, are exempt from disclosure because disclosure would deprive a person of a fair trial.

D. Employee's Statement

The HPD asserts that administrative investigation reports must not be disclosed because disclosure will violate the subject employee's rights under Garrity v. New Jersey, 385 U.S. 493 (1967). In Garrity, police officers were questioned during a state investigation regarding traffic ticket "fixing." The officers were warned that statements provided might be used against them in a state criminal proceeding, and that they had the right not to answer if disclosure would tend to incriminate them. However, if they chose not to answer, they would be subject to removal from office. The officers gave statements. Over the officers' objections, the officers' statements were used against them in a subsequent prosecution for conspiracy to obstruct the administration of the traffic laws, and they were convicted. The Supreme Court held that protection under the Fourteenth Amendment against coerced statements prohibits the use in subsequent criminal proceedings of statements obtained under threat of removal from office. Garrity, 385 U.S. 493, 500 (1967).

Similar to the police officers in Garrity, the HPD officers must provide information to the Internal Affairs administrative investigators or face discipline for insubordination, with punishment up to and including termination. Thus, in order to protect the officers' constitutional rights, Internal Affairs administrative investigative reports are not shared with the criminal investigators, and the officers' statements are used for administrative investigative purposes only.

This practice and understanding is set forth in the SHOPO Collective Bargaining Agreement. However, as state law, and not contractual language, governs whether a record must be publicly disclosed, the SHOPO agreement, itself,

is not enough to establish an exception from public disclosure under the UIPA. See SHOPO v. Society of Professional Journalists, 83 Haw. 378, 413-414 (1996); OIP Op. Ltr. No. 90-39 (Dec. 31, 1990).

Garrity v. New Jersey, 385 U.S. 493 (1967) provides that the officers' statements are inadmissible in a criminal trial, and does not address public disclosure of such statements. However, Garrity does raise the question about the impact of public disclosure upon a subject employee's constitutional right not to give a statement which may incriminate him. Given an individual's right not to incriminate himself, public disclosure of an officer's statement would provide the criminal investigation with information to which they would not have been entitled and which they may not otherwise have been able to obtain. Furthermore, public disclosure of the statement also may have the same effect on a subsequent trial as the admission of the statement into evidence at trial. Once a prospective juror has heard or read the officer's statement, it is impossible to "un-ring the bell," and in a relatively small state like Hawaii, it would be hard to eliminate the prejudice to the officer.

In addition, as with witnesses, if the officers' statements in Internal Affairs administrative investigations are subject to public disclosure, the subject officers may not be willing to provide full and accurate accounts of the events involved. This would impair the HPD's ability to properly investigate allegations of misconduct.

Thus, because disclosure of the subject officer's statement could impair his constitutional right against self-incrimination, and further, impair the HPD's ability to conduct a full and accurate investigation, the OIP finds that the statement constitutes a government record that, by its nature, must be confidential in order for the government to avoid the frustration of a legitimate government function, as set forth in section 92F-13(3), Hawaii Revised Statutes.

The OIP advises that the HPD segregate the officer's statement, as well as references to the statement, from the IA Reports prior to disclosure.

E. Internal Procedures

The HPD states that, as administrative investigation reports discuss compliance with departmental procedures, disclosure of the IA Reports would reveal departmental procedures, which if disclosed, would jeopardize the safety of police officers and the public. In asserting this objection, the HPD is not referring to the Standards of Conduct of the Honolulu Police Department, which the OIP previously

determined to be public in OIP Op. Ltr. Number 91-3 (March 22, 1991), but to other procedures that address the conduct of the HPD officers.[9]

The OIP previously found specific agency internal or personnel policies to be exempt from disclosure where (1) they were predominately internal and (2) disclosure of the policy would significantly risk the circumvention of agency statutes or regulations that the agency is charged with enforcing, or significantly impede the agency's enforcement process. See OIP Op. Ltrs. No. 90-34 (Dec. 17, 1990); 94-19 (Oct. 13, 1994); see also OIP Op. Ltrs. No. 94-25 (Dec. 14, 1994); 91-3 (March 22, 1991); 92-1 (Feb. 21, 1992). In establishing that a procedure is predominately internal, the OIP has found subject to protection information that:

> does not purport to regulate activities among members of the public...[and] does [not]...set standards to be followed by agency personnel in deciding whether to proceed against or take action affecting members of the public. Differently stated, the unreleased information is not "secret law" the primary target of [the FOIA's] disclosure provisions.

OIP Op. Ltr. No. 94-19 at 4-5 (Oct. 13, 1994) (citing Cox v. Dep't of Justice, 601 F.2d 1, 5 (D.C. Cir. 1979)).

To determine whether disclosure would significantly risk circumvention of agency statutes or regulations, the OIP referred to federal law. Under that authority, agencies may withhold information when disclosure would cause the procedure to lose the utility it was intended to provide or render the procedure operationally useless. OIP Op. Ltr. No. 94-19 at 7 (Oct. 13, 1994) (citing Dirksen v. HHS, 803 F.2d 1456, 1458 (9th Cir. 1986); National Treasury Employees Union v. Customs Serv., 802 F.2d 525, 530-531 (D. C. Cir. 1986)).

While the IA Reports may contain procedures which may be exempt from disclosure, whether an exception from disclosure is warranted must be determined

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[9] Note, however, that with its disclosure to the news media of its policy on the use of force and its guidelines for handling suspects, see The HPD Policy on the Use of Force, Honolulu Star-Bulletin, July 30, 1998 at A-10, HPD's Guidelines for Handling Suspects, Honolulu Star-Bulletin, July 30, 1998 at A-12, the HPD has waived any exceptions to disclosure of that information which the HPD disclosed. See e.g., OIP Op. Ltr. No. 90-8 at 6-7 (Feb. 8, 1990) (agency may waive exception for frustration of a legitimate government function, there, the deliberative process privilege); cf. OIP Op. Ltr. No. 94-21 (Nov. 15, 1994) (individual waived her privacy interest in information that she disclosed to the media).

on a case-by-case basis. Thus, where the HPD wishes to assert the exception to disclosure, it must provide the OIP with facts justifying its application.

III. PRIVACY

The facts provided and arguments asserted by the HPD also raise the issue of the privacy interest of the individuals mentioned in the IA Reports, particularly, the privacy interest of the witnesses, complainants, and the subject employees. Information is exempt from disclosure under section 92F-13(1), Hawaii Revised Statutes, where disclosure would constitute a clearly unwarranted invasion of personal privacy. Haw. Rev. Stat. § 92F-13(1) (1993). A determination of whether disclosure would constitute a clearly unwarranted invasion of personal privacy requires a balancing of the public interest in disclosure against the privacy interest of the individual mentioned in the record. The record is not exempt from disclosure if the public interest in disclosure outweighs the privacy interest of the individual. Haw. Rev. Stat. § 92F-14(a) (Supp. 1997).

A. Witnesses and Complainants

As stated earlier, information which identifies witnesses and complainants is exempt from disclosure under section 92F-13(3), Hawaii Revised Statutes, as information that must be confidential in order for the HPD to avoid the frustration of its legitimate government function of investigating and addressing employee misconduct. The individually identifying information is also exempt from disclosure under section 92F-13(1), Hawaii Revised Statutes, as information which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy.

1. Significant Privacy Interest

The OIP has previously determined that individuals have a significant privacy interest in not being publicly associated with law enforcement investigations. See OIP Op. Ltrs. No. 89-12 at 4-5 (Dec. 12, 1989) (a complainant has a significant privacy interest in disclosure of his identity under the UIPA); 95-21 at 18-21 (Aug. 28, 1995). Further, because disclosure of an individual's cooperation in a government investigation could subject that individual to unnecessary questioning or harassment, or to litigation, courts in other jurisdictions have recognized the substantial privacy interest of a source in a government investigation. See Cappabianca v. Commissioner, U.S. Customs Service, 847 F. Supp. 1558, 1564 (M.D. Fla. 1994) (witnesses and co-workers have legitimate privacy interests in the nondisclosure of their identities and in keeping their participation in an investigation regarding employee misconduct confidential);

Houseley v. U.S. Dep't of Treasury, I.R.S., 697 F. Supp. 3, 5 (D.D.C. 1988) (co-workers and supervisors who voiced opinions concerning an employee's conduct had a substantial interest in seeing that their participation in the investigation was not disclosed); see also Nadler v. U.S. Dep't of Justice, 955 F.2d 1479, 1489 (11th Cir. 1992) (source in a government investigation has a substantial privacy interest in keeping his participation in the investigation private); L & C Marine Transport, Ltd. v. United States, 740 F.2d 919 (11th Cir. 1984); McCutchen v. U.S. Dep't of Health and Human Serv., 30 F.3d 183, 189 (D.C. Cir. 1994) (complainants have a strong privacy interest in remaining anonymous because they might face retaliation if their identities are revealed).

The HPD states that witnesses and complainants sometimes refuse to come forward because of embarrassment and fear of retaliation. In addition, the HPD states that the subject matter of a complaint is often a traumatic event, involving sensitive personal or family issues. Thus, consistent with prior opinion and case law, the OIP finds that the witnesses and complainants have a significant privacy interest in information about their identity within the IA Reports.

2. Public Interest and Balancing

In balancing the privacy right of an individual against the public interest in disclosure under the UIPA, the public interest to be considered is that which sheds light upon the workings of government. See OIP Op. Ltrs. No. 97-10 (Dec. 30, 1997); 95-24 at 11-13 (Oct. 6, 1995); 95-14 at 11 (May 8, 1995); 95-10 at 7-8 (May 4, 1995).

Here, the public interest in disclosure of the IA Reports lies in confirming that the HPD is properly investigating and addressing questions regarding its officers' handling of those incidents resulting in the shooting of a member of the public. Disclosure of the identities of the witnesses and complainants in the IA Reports would not further the public interest in determining whether the HPD conducted a proper review of the police shootings. Thus, the OIP finds that there is little or no public interest in the disclosure of the information which identifies witnesses and complainants. Cf. U.S. Dep't of Justice v. Reporters Comm., 489 U.S. 749, 773-774, 109 S. Ct. 1468, 1482 (1989) (commenting on Dep't of Air Force v. Rose, 425 U.S. 352, 96 S. Ct. 1592 (1976), the Supreme Court noted that it had been appropriate to delete from disciplinary hearing summaries information that would identify the subject candidates, because that information was irrelevant to the inquiry into how the Air Force Academy administered its Honor Code); Albuquerque Pub. Co. v. U.S. Dep't of Justice, 726 F. Supp. 851, 855-856 (D.D.C. 1989) (information identifying persons involved in an investigation was irrelevant

to the inquiry into the Drug Enforcement Agency's conduct in an investigation and was appropriately redacted).

As the witnesses' and complainants' significant privacy interest in the information outweighs the public interest in the disclosure, the information regarding the identities of the witnesses and complainants in the IA Reports is exempt from disclosure as information, which, if disclosed, would constitute a clearly unwarranted invasion of privacy, under section 92F-13(1), Hawaii Revised Statutes.

B. Subject Employee

1. Significant Privacy Interest

While an administrative investigation report is not kept within an HPD employee's personnel file, the OIP believes that it is akin to the information maintained in a personnel file. An administrative investigation report often is the only investigation with regard to personnel action and discipline, and it provides the basis for any personnel action taken. In addition, an administrative investigation report also may contain personnel information, including, but not limited to, residential addresses and telephone numbers, personal emergency notification information, personal family information, and disciplinary history information.

The OIP previously has determined that an employee has a significant privacy interest in personnel-related information within a report not contained in the employee's personnel file. OIP Op. Ltr. No. 95-7 (March 28, 1995); see also Dep't of State v. Washington Post, 456 U.S. 595, 102 S. Ct. 1957 (1982) (protection of an individual's privacy should not turn upon the label of the file in which information is kept); Dep't of Air Force v. Rose, 425 U.S. 352, 96 S. Ct. 1592 (1976); Newark v. Saginaw Sheriff, 514 N.W. 2d 213 (Mich. App. 1994). Therefore, as the IA Reports, in essence, consist of personnel information, the OIP believes that the IA Reports should be evaluated in the same light as information contained in a personnel file.

Section 92F-14(b)(4), Hawaii Revised Statutes, provides that an individual has a significant privacy interest in:

> Information in an agency's personnel file, or applications, nominations, recommendations, or proposals for public employment or appointment to a governmental position, except:

(A) Information disclosed under section 92F-12(a)(14); and

(B) The following information related to employment misconduct that results in an employee's suspension or discharge:

(i) The name of the employee;
(ii) The nature of the employment related misconduct;
(iii) The agency's summary of the allegations of misconduct;
(iv) Findings of fact and conclusions of law; and
(v) The disciplinary action taken by the agency;

when the following has occurred: the highest non-judicial grievance adjustment procedure timely invoked by the employee or the employee's representative has concluded; a written decision sustaining the suspension or discharge has been issued after this procedure; and thirty calendar days have elapsed following the issuance of the decision; provided that this subparagraph shall not apply to a county police department officer except in a case which results in the discharge of the officer...

Haw. Rev. Stat. § 92F-14(b)(4) (1997 Supp.) (emphasis added).

Thus, when the subject officer is discharged as a result of employee misconduct, he lacks a significant privacy interest in the information identified in section 92F-14(b)(4)(B)(i)-(v), Hawaii Revised Statutes, which information must be disclosed in accordance with the terms of that provision. See OIP Op. Ltr. No. 95-6 (March 16, 1995).

When there is no discharge resulting from employee misconduct,[10] the subject employee has a significant privacy interest in the information contained in the IA

[10] In OIP Opinion Letter Number 97-1 (Feb. 21, 1997), the OIP found that while the disclosure of information regarding employment misconduct resulting in the suspension of county police department officers is not mandated by section 92F-14(b)(4)(B), Hawaii Revised Statutes, in light of the Hawaii Supreme Court's ruling in State of Hawaii Organization of Police Officers v. Society of Professional Journalists—University of Hawaii Chapter, 83 Haw. 378, 927 P. 2d 386 (1996), disclosure of employment misconduct information regarding a suspension does not constitute a clearly unwarranted invasion of personal privacy. OIP Op. Ltr. No. 97-1 (Feb. 21, 1997). Subsequently, SHOPO brought an action against the HPD to prevent disclosure of employment misconduct information, and that matter is currently in litigation. State of Hawaii Organization of Police Officers v. City and County of Honolulu, No. 97-1514-04, Complaint for Declaratory Judgment and Injunctive Relief (1st Cir. April 15, 1997).

Report. Haw. Rev. Stat. § 92F-14(b)(4); see also Hunt v. F.B.I., 972 F.2d 286, 288 (9th Cir. 1992) (a government employee generally has a privacy interest in any file that reports on an investigation that could lead to the employee's discipline or censure); Stern v. F.B.I., 737 F.2d 84, 91-92 (D. C. Cir. 1984) (individuals have a strong interest in not being associated with alleged criminal activity). Cf. OIP Op. Ltr. No. 92-19 (Oct. 7, 1992) (under the UIPA, an individual has a significant privacy interest when an allegation of misconduct also implicates a violation of criminal law and there has been no arrest, charge, or indictment); Haw. Rev. Stat. § 92F-14(b)(2) (Supp. 1997). Here, as there has been no discharge resulting from the actions under investigation, the subject employees have a significant privacy interest in the personal information contained in the IA Reports.[11]

2. Public Interest in Disclosure and Balancing

a. Subject Employees' Identities

As stated earlier, the public interest recognized by the UIPA lies in shedding light upon the workings of government. See, e.g., OIP Op. Ltr. No. 97-10 (Dec. 30, 1997). The public interest in disclosure of the IA Reports generally lies in confirming that the HPD is properly investigating and addressing questions regarding its officers' handling of the incidents which resulted in the shooting of a member of the public. In general, this interest is not furthered by disclosure of the subject employees' identities. See Stern v. F.B.I., 737 F.2d 84, 92 (D.C. Cir. 1984).

The public interest in disclosure of the subject employee's identities is a distinct one. Courts have identified the public interest in disclosure of the identities of employees as one which lies in holding those public officials accountable for their conduct. See Stern v. F.B.I., 737 F.2d 84, 92 (D.C. Cir. 1984); Baez v. U.S. Dep't of Justice, 647 F.2d 1328, 1339 (D.C. Cir. 1980).

In determining the weight of the public interest in the disclosure of the identity of an employee who is the subject of allegations of wrongdoing, courts have looked at several factors, including: the rank and level of responsibility of the employee, see Stern v. F.B.I., 737 F.2d 84, 92 (D.C. Cir. 1984); the activity in

[11] The only exception to this lies with regard to the subject employee discussed in the IA Report involving the shooting of Benedict Manupule. As is discussed later, in Section IV, by disclosing information to the news media, the subject employee waived his privacy interest as to the information disclosed.

question, see Stern v. F.B.I., 737 F.2d 84, 92 (D.C. Cir. 1984); whether there is evidence of wrongdoing on the part of a government employee, see Hunt v. F.B.I., 972 F.2d 286, 289 (9th Cir. 1992); and whether there is any evidence that the government has failed to investigate adequately, see Hunt v. F.B.I., 972 F.2d 286, 289 (9th Cir. 1992). Where lower level employees are involved, it will "tilt the balance against disclosure of the names of the...employees." Stern at 92. Where there is no evidence of employee wrongdoing or that the government has failed to adequately investigate, the public interest in disclosure is diminished. Hunt at 289.

Notably, the factors set forth above come from cases in which employee misconduct either has been found or has been alleged. Stern, 737 F.2d 84 (D.C. Cir. 1984) (F.B.I. agents had been censured); Hunt, 972 F.2d 286 (9th Cir. 1992) (information sought regarding investigation into conduct of F.B.I. agent accused of improper conduct). Given that the public interest in disclosure of the subject employees' identities lies in holding them accountable for their conduct, in determining the weight of the public interest in disclosure, consideration also should be given to whether or not there exists any finding, or even any allegation, of misconduct.

Because one needs to consider different factors in assessing the weight of public interest in disclosure, a determination of the need to disclose the subject employees' identities must be made on a case-by-case basis. This approach is underscored by the facts here. An Internal Affairs administrative investigation may be opened because a complaint is lodged about an employee's conduct; however, under other circumstances, such as with a police shooting, because of the serious consequences involved, the HPD will begin an Internal Affairs administrative investigation in the absence of any allegation of wrongdoing. In addition, the Internal Affairs administrative investigation process addresses allegations of wrongdoing by employees at all levels, up to and including the Chief of Police. Finally, the specific action investigated, the surrounding circumstances, and thus, the outcome of the investigation all will differ from case to case.

Here, certain factors diminish the public interest in disclosure of the employees' names. The OIP has been informed that no discharge arose from the subject employees' actions investigated in the IA Reports. In addition, because of the HPD's practice of automatically starting an administrative investigation when a police shooting occurs, there may not even be allegations of wrongdoing in each of the IA Reports requested. Finally, the OIP is aware of no evidence that the government has failed to investigate adequately.

However, as to other factors, the OIP needs further specific factual information. In discussing the IA Reports with the HPD, the OIP learned that because the administrative investigation reports focus on the events rather than the individuals, the actions of several individuals might be reviewed through one report, and the rank of the individuals can vary, from those who receive orders to those who give them. Thus, specific information as to the individuals involved and their particular rank is needed. In addition, because of the need to consider the activity involved, it would be helpful to review each of the IA Reports.

Because the OIP lacks this specific information, necessary to fully assess the public interest in disclosure of the IA Reports and to conduct the balancing test under section 92F-14, Hawaii Revised Statutes, at this time, the OIP cannot determine whether the exception from disclosure under section 92F-13(1), Hawaii Revised Statutes, applies to the identities of the subject officers. Haw. Rev. Stat. §§ 92F-14(a) (Supp. 1997); 92F-13(1) (1993).

b. Other 'Personnel' Information

Information such as residential telephone numbers and addresses, personal emergency notification information, and personal family information provide no insight into agency action. Thus, in light of the subject employee's significant privacy interest and the lack of public interest in disclosure, this personnel information is exempt from disclosure under section 92F-13(1), Hawaii Revised Statutes. See e.g., OIP Op. Ltrs. No. 95-2 at 4 (Jan. 19, 1995) (home addresses and telephone numbers exempt from disclosure under section 92F-13(1), Hawaii Revised Statutes); 91-15 at 17-18 (Sept. 10, 1991) (home address and telephone numbers, birthdates, and marital and familial status of law school faculty exempt from disclosure under section 92F-13(1), Hawaii Revised Statutes); 92-4 at 10-11 (June 10, 1992) (name change petition and fact sheet containing information regarding family history, marriages and divorces, names and dates of birth of all living children and current residential address exempt from disclosure under section 92F-13(1), Hawaii Revised Statutes).

Regarding disciplinary history, where information of a subject employee's identity has been redacted, the employee will not be identified with the disciplinary history in the IA Report, and therefore, disclosure of the disciplinary history will not constitute a clearly unwarranted invasion of personal privacy. See OIP Op. Ltrs. No. 94-8 at 10 (May 12, 1994); 90-14 at 8 (March 30, 1990).

Where a subject employee's identity has not been redacted, the issue of the employee's privacy interest remains. In those circumstances, information regarding employee misconduct resulting in discharge must be disclosed pursuant to section 92F-14(b)(4)(B), in accordance with the earlier discussion herein. Determination of disclosure of information regarding employee misconduct resulting in discipline less than termination must be made on a case-by-case basis, after weighing the employee's significant privacy interest in the information against the public interest in disclosure. See Haw. Rev. Stat. § 92F-14(a), (b)(4) (Supp. 1997).

IV. DISCLOSURE OF THE REMAINDER OF THE IA REPORTS

The public interest in disclosure of the remainder of the IA Reports lies in confirming that the HPD is properly investigating and reviewing allegations of misconduct by its employees. Review of the IA Reports on cases in which police shootings occurred over a time period allows for a review of the effectiveness of the HPD internal oversight. See Hunt v. F.B.I., 972 F.2d 286, 289 (9th Cir. 1992) (contrasting the circumstances before it where the investigative file regarding a single individual was requested, with the request in Dep't of Air Force v. Rose, 425 U.S. 352, 96 S. Ct. 1592 (1976), which asked for numerous disciplinary files, the court noted that Rose involved a significant public interest in disclosure because conclusions could be drawn concerning the efficacy and fairness of the Air Force disciplinary procedures).

In light of the OIP's determination that the HPD may redact particular exempt information, there should be little or no concern that disclosure of the remaining portions of the IA Reports would constitute a clearly unwarranted invasion of personal privacy or would result in the frustration of a legitimate government function. See e.g. OIP Op. Ltrs. No. 94-8 at 10-11 (May 12, 1994); 90-14 at 8 (March 30, 1990). Thus, the IA Reports, in redacted form, must be disclosed.

V. WAIVER OF OBJECTIONS TO DISCLOSURE

Where an agency or an individual intentionally publicly discloses information, the agency or individual waives the objections to disclosure of that information. See, e.g., OIP Op. Ltrs. No. 94-21 (Nov. 15, 1994) (by revealing personal information to news reporter, individual waived privacy interest in that information); 90-8 at 6-7 (Feb. 8, 1990) (agency may voluntarily disclose

intra-agency memoranda not required to be disclosed under the UIPA exception based on the deliberative process privilege and the frustration of the legitimate government function, but in doing so, waives application of the exception for the record).

Where it is asserting an objection to disclosure under the UIPA, it is generally the HPD's practice not to publicly disclose the information to which the objection applies. Thus, as with the identities of complainants and witnesses, and as with other suspects, the HPD attempts to redact the subject employees' names from publicly released material prior to disclosure.

However, on or about July 19, 1998, the HPD publicly identified and bestowed its highest honor upon the police officer who fatally shot Benedict Manupule, who allegedly was firing a gun at Mayor Wright Housing. At that time, the HPD provided information to various news organizations regarding the shooting and disclosed the outcome of its Internal Affairs administrative investigation. In doing so, the HPD waived its objections to disclosure of that information.

Likewise, the officer identified by the HPD, Tenari Maafala, spoke with the news media. Thus, to the extent that Officer Maafala, himself, disclosed information about his actions, he waived his privacy interest in that information. See OIP Op. Ltr. No. 94-21 (Nov. 15, 1994).

Given that Officer Maafala has publicly received the HPD's highest honor, the public's interest in disclosure of the information revealed by Officer Maafala is more than slight, and therefore outweighs his waived privacy interest in the information. Thus, any information in the IA Report that already was revealed by Officer Maafala to the news media must be disclosed by the HPD. See OIP Op. Ltr. No. 94-21 at 5 (Nov. 15, 1994) (if the privacy interest is not significant, a scintilla of public interest in disclosure will preclude a finding of a clearly unwarranted invasion of personal privacy) (citing S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 690 (1988); H. Conf. Rep. No. 112-88, Haw. H.J. 817, 818 (1988)).

With regard to the IA Report involving the shooting of Benedict Manupule, the HPD must provide the IA Report, without redacting any information which it and Officer Maafala already has publicly disclosed, including the police officer's name, the findings of the Internal Affairs administrative investigation, and any

facts regarding the incident discussed with the media. The HPD may segregate, in a manner consistent with this opinion, any other information which has not been publicly disclosed and which is otherwise exempt from disclosure, e.g., personnel information not disclosed by Officer Maafala, information regarding the identities of complainants and witnesses, and the officer's statement.[12]

VI. REQUESTS MADE WHERE OFFICER IS NAMED

Two of *The Honolulu Advertiser's* requests identified the record requested both by the incident involved and the name of an officer. At first blush, where the identities of the subject employees have been deemed confidential,[13] the requests which are worded in such a manner seem to implicate the kind of concerns raised in OIP Opinion Letter Number 98-01 (Jan. 16, 1998), involving a request for a City Ethics Commission advisory opinion about an identified individual. In that opinion, the OIP determined that the Ethics Commission was not required to disclose the particular advisory opinion responsive to the request because disclosure would discourage complainants and individuals from inquiring as to ethical behavior or from seeking advice, and therefore would frustrate the Ethics Commission's legitimate government function of investigating allegations of unethical behavior and answering inquiries about ethical behavior. OIP Op. Ltr. No. 98-1 (Jan. 16, 1998).

However, in OIP Opinion Letter Number 98-1, the agency's response to the record request would have directly confirmed the subject individual's identity, and it was impossible to segregate the requested document in a manner that would keep confidential the individual's identity. In contrast, a response to *The Honolulu Advertiser's* requests would not necessarily confirm the subject individual's identity, because *The Honolulu Advertiser's* requests identify the records not only by name, but by incident, as well. In addition, it is significant that the Ethics Commission

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[12] It is not clear from the facts specifically what information was provided to the news media. In particular, if the officer's statement in the IA Report was not disclosed, consistent with this opinion, Officer Maafala's statement in the IA Report should be segregated prior to disclosure of the IA Report.

[13] This discussion only involves circumstances where the HPD asserts that the subject employee's identity is excepted from disclosure under section 92F-13(1), Hawaii Revised Statutes. Where the HPD asserts that the identity of the subject employee is public, the fact that the request identifies the employee does not raise concerns that disclosure of the IA Report will reveal confidential information regarding the identity of the subject employee.

publishes its reports in redacted form, allowing the public to review the Ethics Commission's work. In the facts here, the administrative investigation reports are not published.

If the HPD asserts that the subject employee's identity is confidential, in order to protect the identity of the subject employee, the OIP recommends that the HPD provide the IA Report, after redacting identifying information in a manner consistent with this opinion, but respond by neither confirming nor denying that the officer named by the newspaper is the subject officer.

VII. SEGREGATION

Except as stated otherwise, prior to any disclosure of the IA Reports, the HPD should segregate the subject employee's statement and references thereto, the personnel information discussed herein and the information which identifies the complainants, witnesses, and if applicable, subject employee.

With regard to individually identifiable information, the HPD may redact any information that results in the likelihood of actual identification. See OIP Op. Ltrs. No. 94-8 at 10-11 (May 12, 1994); 95-7 at 11 (March 28, 1995); 95-21 at 23 n. 10 (Aug. 28, 1995); see also Dep't of Air Force v. Rose, 425 U.S. 352, 380-381, 96 S. Ct. 1592, 1608 (1976). Among other things, this may include the individual's name, occupation (for witnesses and complainants), home address and telephone number, social security number, date of birth, marital status, or any statement or description that could only be attributed to a particular individual. What constitutes identifying information must be determined not only from the standpoint of the public, but also from that of persons familiar with the circumstances involved. See Dep't of Air Force v. Rose, 425 U.S. 352, 380-381, 96 S. Ct. 1592, 1608 (1976); Cappabianca v. Commissioner, U.S. Customs Service, 847 F. Supp. 1558, 1565 (M.D. Fla. 1994) (based on requester's knowledge of the individuals and events involved, additional caution in redaction was required to prevent release of information which would further identify witnesses and their specific statements; withholding of names only would be insufficient).

Should the HPD find that it cannot segregate individually identifiable information to prevent a likelihood of actual identification, then it may request OIP assistance with that particular case. If, upon review of the circumstances involved, the deletion of personal references and other identifying information would not be

sufficient to safeguard an individual's privacy, the OIP may find that the particular IA Report, in its entirety, should not be disclosed. See Dep't of Air Force v. Rose, 425 U.S. 352, 381, 96 S. Ct. 1592, 1608 (1976); Hunt v. F.B.I., 972 F.2d 286 (9th Cir. 1992) (where request targeted a single lower-level FBI agent, whose privacy interest outweighed the public interest in disclosure, file was exempt from disclosure as information the disclosure of which could reasonably be expected to constitute an unwarranted invasion of personal privacy under FOIA exemption 7(C)); see also OIP Op. Ltr. No. 98-1 (Jan. 16, 1998).

CONCLUSION

The HPD has not established that the IA Reports are exempt from disclosure in their entirety under section 92F-13(3), Hawaii Revised Statutes. However, the HPD has demonstrated that information identifying the complainants and witnesses; the statement of the subject employee; and certain personnel information are exempt from disclosure under section 92F-13(1) and (3), Hawaii Revised Statutes.

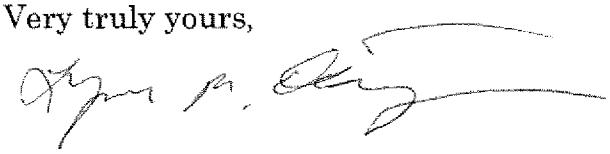
Prior to disclosing the IA Reports, consistent with this opinion, the HPD should redact the subject employee's statement and references thereto, the personnel information as discussed herein and the information that identifies the complainants, witnesses, and if applicable, the subject employee. Identifying information includes any factual information that would likely identify the individual, and should be determined from the standpoint of a person familiar with the circumstances involved, as well as from that of the general public.

By providing to the news media information regarding the police officer who fatally shot Benedict Manupule at Mayor Wright Housing and the outcome of its Internal Affairs administrative investigation, the HPD waived its objections to disclosure of that information. In speaking to the news media, the identified officer, Tenari Maafala, waived his privacy interest in the information he provided. Therefore, in disclosing the IA Report involving the shooting of Benedict Manupule at Mayor Wright Housing, the HPD may not redact the information already disclosed by the HPD or by Officer Maafala to the news media.

Where the HPD asserts that the identity of the subject officer is confidential, the OIP recommends that in responding to requests that identify the IA Report by incident, as well as the name of an officer, the HPD neither confirm nor deny that the officer named in the request is the subject officer.

Because of the voluminous nature of the request, the time constraints involved, and the lack of sufficient information, the OIP has provided guidance but no determination as to the HPD's other objections to disclosure. Should the HPD require further assistance, it is invited to contact the OIP.

Very truly yours,



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