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February 23, 2004

Mr. Albert Del Rio

Re: Honolulu Police Commission Records

Dear Mr. Del Rio:

This is in response to your request to the Office of Information Practices ("OIP") for an opinion on the above-referenced matter.

ISSUE PRESENTED

Whether records pertaining to investigations of complaints against police officers convicted of police brutality maintained by the Police Commission, City and County of Honolulu ("Honolulu Police Commission" or "Commission") are public under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("HRS") ("UIPA").

BRIEF ANSWER

Although the Honolulu Police Commission has adopted a rule that makes its investigative reports confidential, the rule is not a "state law" for purposes of the UIPA and cannot be used to avoid disclosure of records that are otherwise public under the UIPA. Accordingly, the UIPA, not the Commission's rules, dictates whether its records of the investigations of police brutality may be withheld.

Assuming the Honolulu Police Commission maintains records pertaining to a criminal conviction of a police officer, these records are presumed public under the UIPA subject to the exceptions set forth at section 92F-13, HRS. For instance, information about individuals mentioned in Honolulu Police Commission investigations may be withheld from public disclosure to the extent that disclosure would constitute "a clearly unwarranted invasion of personal privacy" under section 92F-13(1), HRS.

In addition, agencies are not required to disclose government records that must be confidential for the government to avoid the frustration of a legitimate government function. Haw. Rev. Stat. § 92F-13(3) (1993). This exception applies to certain records or information compiled for law enforcement and other purposes. Public information which is reasonably segregable from nonpublic information, however, should be made available.

Because of the diverse types of issues involved, the decision of whether to deny access to investigative records must be made on a case-by-case basis. This opinion is intended to provide the Honolulu Police Commission with general guidance for use in determining whether access to specific records is appropriate. The Honolulu Police Commission should consult with the OIP or its own attorney if it has any questions.

FACTS

Section 52D-1, HRS, creates a police commission for each of Hawaii's four counties and delegates organization of these commissions to the counties. The Honolulu Police Commission's powers and duties include receiving, considering, and investigating charges of physical or verbal abuse brought by the public against police officers or civilian employees of the Police Department, City and County of Honolulu ("Honolulu Police Department"). Rules of the Honolulu Police Commission ("RHPC") Rule 3-1(d) (Apr. 5, 2000). According to a pamphlet provided by the Commission, its investigative files may include witness statements, arrest reports, citations and other documents, sketches, photographs, and an investigator's "open end" report.

The Honolulu Police Commission provided the OIP with a document entitled "History and Duties" which states that an investigator's "open end" reports are considered personal records[1] and are confidential. The document further notes that the reports may be made available to other government agencies that require the information for their functions, such as the Honolulu Police Department's Internal Affairs office, the Department of the Prosecuting Attorney, and the Department of the Corporation Counsel. See also RHPC 4-4. The Commission Chair also advised the OIP that rulings and records of complaints against police officers are confidential and can be released only through court subpoena or order.

The Honolulu Police Commission deliberates in closed session in accordance with the "Sunshine Law" at part I of chapter 92, HRS. RHPC 9-2. No information is made available to a complainant in a Commission case except for the findings.[2] The Commission forwards its decision to the Chief of Police, who has final authority to impose discipline.[3] Information on how many complaints were received and the amounts and types of allegations that the Commission sustained, did not sustain, exonerated, or determined to be unfounded are announced at public Commission meetings.[4] Summaries of the charges filed and their disposition are included in the Commission's annual report.[5] All records, including investigative reports, are destroyed 30 months after the date of the incident.[6]

You advised that you requested the Honolulu Police Commission's files relating to four former Honolulu Police Department officers, identified by name, who were convicted[7] of police brutality and were denied access[8] to

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1 History and Duties page 5.

2 History and Duties pages 4-5.

3 History and Duties page 4.

4 History and Duties page 5.

5 Id.

6 Id.

7 As reported by the *Honolulu Star Bulletin* in 1996, at least two of the officers you named had been sentenced in federal court following "illegal force" indictments and one was awaiting sentencing.

8 As it has been more than thirty months since you were denied access to the records you requested, the Honolulu Police Commission Chair advised the OIP that the records have been

those records. You further informed the OIP that, according to the Honolulu Police Department, the officers all resigned and had not been fired or otherwise discharged. It is not clear from the information you provided to the OIP whether you requested information specifically pertaining to the officers' convictions, or whether you simply sought access to all Commission files on those four individuals, including those files unrelated to the misconduct for which the officers were convicted.

DISCUSSION

The UIPA provides that the records[9] of all State and county agencies[10] are public unless such access is restricted or closed by law. Haw. Rev. Stat. § 92F-11(a) (1993). There is no dispute that the Honolulu Police Commission is a government agency subject to the UIPA and that the investigative records it maintains are government records for UIPA purposes.

There are five exceptions to the UIPA's general rule of disclosure. Those relevant to this opinion are as follows:

> **§92F-13 Government records; exceptions to general rule.** This part shall not require disclosure of:
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> (1) Government records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy;
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> . . .

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destroyed. This Opinion therefore provides general advice as to whether the Commission may withhold its investigative records in the future.

9 "Government record" means "information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. § 92F-3 (1993).

10 "Agency" means "any unit of government in this State, any county, or any combination of counties; department; institution; board; commission; district; council; bureau; office; governing authority; other instrumentality of state or county government; or corporation or other establishment owned, operated, or managed by or on behalf of this State or any county, but does not include the nonadministrative functions of the courts of this State." Haw. Rev. Stat. § 92F-3 (1993).

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

(4) Government records which, pursuant to state or federal law including an order of any state or federal court, are protected from disclosure[.]

Haw. Rev. Stat. § 92F-13 (1993).

I. HONOLULU POLICE COMMISSION RULE 4-4 IS NOT "STATE LAW" PROTECTING RECORDS FROM DISCLOSURE

The UIPA allows agencies to withhold government records which "pursuant to state or federal law including an order of any state or federal court, are protected from disclosure." Haw. Rev. Stat. § 92F-13(4) (1993). The OIP discusses this exception to disclosure first because, if it applied in this case, no further discussion would be necessary.

The Honolulu Police Commission has adopted a rule which purports to make its investigative records confidential:

4-4. Release of confidential investigative reports. All complaint investigative reports shall be considered confidential and may only be released under the following circumstances:

(a) To the chief of police when a decision has been made by the Commission;

(b) By order of a court of competent jurisdiction pursuant to a lawfully issued subpoena; or

(c) To other agencies or to the individual involved within the provisions, limitations, and protection of the Hawaii Revised Statutes, Chapter 92F, the Uniform Information Practices Act.

RHPC 4-4.

The OIP, however, has opined that an administrative rule adopted by an agency is not a "state law" within the meaning of section 92F-13(4), HRS. OIP Op. Ltr. No. 92-4 (June 10, 1992). In that Opinion, the OIP looked to the Uniform Information Practices Code ("Model Code")[11], drafted by the National Conference of Commissioners on Uniform State Laws upon which the UIPA was based, for guidance. OIP Op. Ltr. No. 92-4 at 8 (June 10, 1992).

Section 2-103 of the Model Code sets forth the Code's exceptions to public access and, like section 92F-13(4), HRS, protects information made non-disclosable "by federal or state law." See Model Code § 2-103(a)(11). The Model Code commentary on this provision states:

> Subsection (a)(11) is a catch-all provision which assimilates into this Article any federal law, state statute or rule of evidence that expressly requires the withholding of information from the general public. The purpose of requiring an express withholding policy is to put a burden on the legislative and judicial branches to make an affirmative judgment.

Model Code § 2-103 commentary at 18 (1980).

Based on the Model Code and its Commentary, the OIP found that section 92F-13(4), HRS, which is substantively identical to the Model Code, was intended to permit an agency to deny access to government records made confidential by state legislative, as opposed to administrative, enactments. OIP Op. Ltr. No. 92-4 at 8 (June 10, 1992). By limiting the Model Code disclosure exception to legislative enactments, the OIP reasoned that the Model Code drafters apparently intended to prevent an agency from avoiding its affirmative disclosure responsibilities through administrative rulemaking. Id.

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[11] The Legislature directed those interpreting the UIPA to consult the Model Code's commentary to guide the interpretation of similar provisions of the UIPA. See H.R. Stand. Comm. Rep. No. 342-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 969, 972 (1988). See also, section 1-24, HRS, concerning the interpretation of uniform acts.

In addition, based again on the Model Code, in the OIP Opinion Letter No. 92-3, we stated:

> It is our opinion that an agency rule prohibiting the disclosure of government records which is adopted pursuant to a general legislative delegation of rulemaking power is not a state law that protects a government record from disclosure under section 92F-13(4), Hawaii Revised Statutes. A contrary conclusion would permit agencies to readily defeat the comprehensive legislative scheme established by the UIPA. [citations omitted.]

OIP Op. Ltr. No. 92-3 at 12 fn.2 (Mar. 19, 1992) (emphasis added)[12].

Consistent with the above authorities and our previous Opinions, we conclude that RHPC 4-4, adopted under chapter 91, HRS, is not a "state law" that permits the non-disclosure of a government record under section 92F-13(4), HRS. Further, as the OIP is unaware of any state or federal statute or court order making Honolulu Police Commission investigative records confidential, section 92F-13(4), HRS, cannot be invoked to avoid disclosure of the investigative records that are otherwise public under the UIPA.[13]

II. CLEARLY UNWARRANTED INVASION OF PERSONAL PRIVACY

The UIPA does not require an agency to disclose "[g]overnment records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy." Haw. Rev. Stat. § 92F-13(1) (1993). The legislative history of the UIPA's privacy exception indicates it only applies if an individual's privacy interest in a government record is "significant." H. Conf. Comm. Rep. No. 112-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 817, 818 (1988); S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J.

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12 This Opinion was overruled by Pray v. Judicial Selection Commission, 75 Haw. 333 (1993) on other grounds.

13 The Honolulu Police Commission has not presented an argument to the OIP that RHPC 4-4 takes precedent over or otherwise supercedes the requirements of the UIPA. The OIP would reject such an argument as it is axiomatic that a county cannot, by rule or ordinance, supercede a State law.

689, 670 (1988). Further, the UIPA notes that "[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 interest of the individual." Haw. Rev. Stat. § 92F-14(a) (1993). Thus, for records implicating significant privacy interests, a balancing of privacy versus public interests must be had to determine whether public disclosure is proper.

A. Police Commission Records Used in Criminal Prosecution

Although there are no records responsive to your record request, to provide the Commission with guidance in responding to future record requests, the OIP next discusses four categories of investigative records or information the Police Commission may maintain on current or former police officers. The first type consists of records actually used in a criminal prosecution. For the records you requested, because the officers were apparently convicted criminally, information maintained by the Honolulu Police Commission *pertaining to those convictions*, if any, carries little or no privacy interests because the officers have been through the criminal court system which is generally open to the public. Thus, had the Commission not already destroyed records on the officers at issue, it would have been required under the UIPA to disclose conviction data, which includes all of the records relating to the action for which the officers were convicted, and possibly other information relevant to the conviction after segregating information protected by section 92F-13, HRS.

In addition, for convicted individuals, the Legislature has already employed a balancing test, and found that disclosure of "conviction data"[14] is required. See Haw. Rev. Stat. § 846-9 (Supp. 2003). Based on chapter 846, HRS, the OIP has opined that conviction data maintained by agencies is public. See OIP Op. Ltrs. No. 89-7 (Nov. 20, 1989) (gubernatorial pardons); No. 91-8 (June 24, 1991) (board and commission applications); No. 92-23 (Nov. 18, 1992) (criminal history records obtained from the Hawaii Criminal Justice Data Center for criminal checks); No. 95-15 (May 8, 1995) (State and

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[14] "Conviction data" is not defined by chapter 846, HRS, but "nonconviction data" is defined as "arrest information without a disposition if an interval of one year has elapsed from the date of arrest and no active prosecution of the charge is pending; or information disclosing that the police have elected not to refer a matter to a prosecutor, or that a prosecutor has elected not to commence criminal proceedings, or that proceedings have been indefinitely postponed, as well as all acquittals and all dismissals." Haw. Rev. Stat. § 846-1 (1993).

county criminal justice agencies). In keeping with its prior Opinions, the OIP advises here that, in addition to disclosure being required under the UIPA, the Commission must disclose conviction data about individuals in accordance with chapter 846, HRS.[15]

B. Police Commission Records Related to Allegations of Misconduct that Resulted in Conviction, but that Were Not Used in Prosecution

The second type of records that may be maintained by the Police Commission pertain to instances when an officer was found by the Police Commission to have committed misconduct, and was later convicted criminally for the same misconduct, but the Commission's records were not part of the prosecution (and therefore may not be considered to be "conviction data.") In such cases, any information that is in the public domain, such as information akin to conviction data or records public at the courts, would likewise be public as maintained by the Commission. Accordingly, information contained in the Commission's records falling into this category is presumed public unless an exception to disclosure at section 92F-13, HRS, applies.

For future guidance on disclosure of closed investigation files, the OIP recommends the Honolulu Police Commission consult the OIP Opinion Letter Number 95-21, which discusses the privacy exception in the context of a request for disclosure of a closed police investigation file. The Opinion covers disclosure of information on deceased individuals[16], suspects, witnesses, and third parties mentioned in closed investigation reports. In addition, the Commission may consult with the OIP or its own attorney on future issues of disclosure.

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[15] Section 846-9, HRS, also does not limit disclosure of data pertaining to cases in which the defendant is acquitted, or charges are dismissed by reason of physical or mental disease, disorder, or defect under chapter 704, HRS.

[16] Federal laws' treatment of medical records has been changed by 45 C.F.R. Parts 160 and 164, the medical privacy rules promulgated by the federal Department of Health and Human Services as required by the Health Insurance Portability and Accountability Act of 1996, Public Law 104-191 ("HIPAA"). HIPAA may dictate disclosure of information on deceased individuals in certain circumstances, which must be reviewed on a case by case inquiry. In addition, the OIP recently opined that records of deceased individuals likely continue to carry some privacy interests which diminish as time passes, although again, this must be decided on a case-by-case inquiry. See OIP Op. Ltr. No. 03-19 (Dec. 16, 2003).

C. Police Commission Records Unrelated to Conviction

Closed Police Commission investigative records unrelated to criminal convictions are also presumed public unless an exception to disclosure at section 92F-13, HRS, applies. For purposes of the privacy exception, the Legislature provided examples in the UIPA of records in which an individual possesses a significant privacy interest. Those relevant to this discussion include:

> (4) Information in an agency's personnel file, or applications, nominations, recommendations, or proposals for public employment or appointment to a governmental position, except:
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> > (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)(Supp. 2003). Based on this section, current or former police officers who have not been discharged from duty will, in ordinary circumstances, have a significant privacy interest in the Honolulu Police Commission's closed investigative records that are about them.[17] The fact that the Commission may not maintain official "personnel" type files does not make section 92F-14(b), HRS, inapplicable, as the OIP has opined that "personnel" type information maintained by agencies falls under section 92F-14(b), HRS, even if it is not maintained in an official personnel file. See OIP Op. Ltr. No. 03-18 at 5 (Nov 12, 2003).[18]

When balancing the privacy right of an individual against the public interest in disclosure, the public interest to be considered is that which sheds light upon the workings of government. OIP Op. Ltr. No. 93-20 at 7 (Dec. 30, 1993). The OIP reached this conclusion by looking at:

> [t]wo basic policies served by the UIPA, which are to "[p]romote the public interest in disclosure" and to "[e]nhance governmental accountability through a general policy of access to government records." Further, in enacting the UIPA, the Legislature declared that "it is the policy of this State that the formation and

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[17] The OIP has opined that the Honolulu Police Department must disclose information about suspended police officers listed in section 92F-14(b)(4)(B), HRS, because disclosure would not be a clearly unwarranted invasion of personal privacy. OIP Op. Ltr. No. 97-1 at 1-2 (Feb. 21, 1997).

[18] In this case, at least two of the officers whose files you requested were convicted of crimes. The OIP was not provided with any information as to why the officers resigned. In cases where the Commission maintains records pertaining to disciplinary action taken against current or former officers suspended or discharged based on employment related misconduct, the Legislature has determined, via section 92F-14(b)(4)(B), HRS, that such information does not carry significant privacy interests. Therefore, such records should be disclosed. In this case, we do not have copies of the records requested, and so cannot make any determinations as to disclosability.

> conduct of public policy--the discussions, deliberations, decisions, and action of government agencies--shall be conducted as openly as possible."

OIP Op. Ltr. No. 93-20 at 7 (Dec. 30, 1993) (citations omitted). The public interest in knowing the actions or decisions of agencies or their officials generally "is not fostered by disclosure of information about private citizens accumulated in various governmental files but that reveals little or nothing about an agency's own conduct." OIP Op. Ltr. No. 95-10 at 7 (May 4, 1995). Again, the OIP recommends the Commission consult the OIP Opinion Letter Number 95-21 or the OIP for guidance should it receive a request for a closed investigative file.

D. Nonconviction Data

Section 846-9, HRS, limits dissemination of "nonconviction data" as listed in footnote 14 of this Opinion by criminal justice agencies[19], whether directly or through an intermediary, only to six types of individuals or agencies. If records of the Police Commission contain "nonconviction data" obtained from a criminal justice agency for which there has been no disposition, such data is protected from public disclosure by section 846-9, HRS.

Other nonconviction data carries a significant privacy interest under section 92F-14(b)(2), HRS[20], which must be balanced against the public interest in disclosure under section 92F-14(a), HRS. Should the Police Commission maintain any information falling into this category, it must balance the significant privacy interests against the public interest in disclosure. Haw. Rev. Stat. §92F-14(a) (Supp.2003). In ordinary circumstances, the privacy interests of the officers will prevail, allowing the Commission to withhold the records from public disclosure.

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19 "Criminal justice agency" means the courts, or 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 (1993).

20 The UIPA attaches a significant privacy interest to "[i]nformation identifiable as part of an investigation into a possible violation of criminal law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation[.]" Haw. Rev. Stat. § 92F-14(b)(2) (Supp. 2003).

III. FRUSTRATION OF A LEGITIMATE GOVERNMENT FUNCTION

Agencies need not disclose records which, if disclosed, would result in the frustration of a legitimate government function. Haw. Rev. Stat. § 92F-13(3) (1993). The Honolulu Police Commission was given the opportunity to advise the OIP as to any bases for denying a request for its closed investigation records[21], and the Commission did not raise the "frustration" exception. By copy of this letter, the OIP reminds the Commission that it is required to cite the specific legal authority should it withhold records in response to a record request under the UIPA. See Haw. Admin. R. § 2-71-14 (1999).

The OIP again recommends that, in responding to future records requests, the Honolulu Police Commission consult the OIP Opinion Letter Number 95-21 for guidance on the "frustration" exception's application to closed investigation files. This Opinion covers law enforcement proceedings, right to a fair trial, law enforcement techniques, confidential sources, and "glomarization[22]."

Finally, the OIP reminds the Honolulu Police Commission that "[f]inal opinions, including concurring and dissenting opinions, as well as orders made in the adjudication of cases" are required to be public by section 92F-12(a)(2), HRS.

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[21] Unlike records of closed investigations, records of pending or ongoing law enforcement investigations are clearly protected under the UIPA's "frustration" exception.

[22] Sometimes in order to protect privacy or other interests, there must be a "glomarization" of information; in other words, law enforcement agencies must generally refuse to confirm or deny whether such records exist, such as when a person requests records about another named individual from a law enforcement agency, or the investigation was not officially acknowledged. OIP Op. Ltr. No 95-21 at 18 (Aug. 28, 1993).

Similarly, the OIP has held that the Ethics Commission for the City and County of Honolulu need not respond to requests for advisory opinions by the name of the subject of the complaint because disclosure would frustrate the Ethics Commission's ability to investigate future allegations because potential complainants would be discouraged by the possibility that their identities would be made public. OIP. Op. Ltr. No. 98-1 at 1-2 (Jan. 16, 1998). Thus, the Ethics Commission was advised that it could refrain from confirming or denying that a specific individual had been investigated, and may instead refer record requesters to a compilation of redacted opinions so that the requester may search for a responsive opinion. Id.

IV. PERSONAL RECORD REQUESTS

The UIPA also governs access to "personal records," which include: any item, collection, or grouping of information about an individual that is maintained by an agency. Haw. Rev. Stat. § 92F-3 (1993). Agencies must permit an individual access to his own personal record within ten working days following the date of receipt of the request unless the personal record requested is exempt from disclosure under section 92F-22, HRS, and subject to additional time limits for "unusual circumstances." Haw. Rev. Stat. § 92F-23 (Supp. 2003). This general rule of disclosure is subject to five exemptions at section 92F-22, HRS. Should the Honolulu Police Commission receive a personal record request, i.e.: a request by the officer who is the subject of a complaint or by the complaining party, it must respond in accordance with part III of the UIPA.

V. SEGREGATION

In instances when the Honolulu Police Commission may respond to a record request by making public portions available while segregating nonpublic information, the OIP's administrative rules note how to properly segregate records:

> § 2-71-17 Segregation of information in records. (a) When information in a requested record is not required to be disclosed under section 92F-13, HRS, or any other law, an agency shall assess whether the information is reasonably segregable from the requested record. If the record is reasonably segregable, the agency shall:
>
> (1) Provide access to the portions of the record that are required to be disclosed under chapter 92F, HRS; and
>
> (2) Provide a notice to the requester in accordance with section 2-71-14(b) regarding information that is not disclosed.

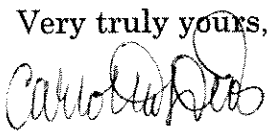
> (b) An agency shall segregate information from a requested record in such a way so that it is reasonably apparent that information has been removed from the record. An agency shall not replace information that has been segregated with information or text that did not appear in the original record.

Haw. Admin. R. § 2-71-17 (1999).

CONCLUSION

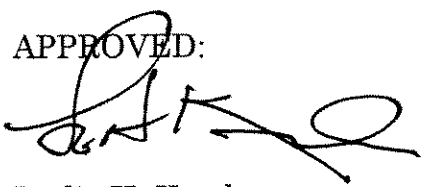
The Honolulu Police Commission's records of investigations are subject to the UIPA. Upon receipt of a request for records, the Commission should disclose in accordance with this Opinion and the OIP Opinion Letter Number 95-21, and may consult with the OIP or its own attorney for guidance on what information may be withheld under section 92F-13, HRS.

Very truly yours,



Carlotta Dias
Staff Attorney

APPROVED:



Leslie H. Kondo
Director

CMD:ankd

cc: Ronald I. Taketa, Chair, Honolulu Police Commission
George Clemente, Executive Officer, Honolulu Police Commission