LINDA LINGLE
GOVERNOR

JAMES R. AIONA, JR.
LIEUTENANT GOVERNOR

STATE OF HAWAII
OFFICE OF THE LIEUTENANT GOVERNOR
OFFICE OF INFORMATION PRACTICES
NO. 1 CAPITOL DISTRICT BUILDING
250 SOUTH HOTEL STREET, SUITE 107
HONOLULU, HAWAI'I 96813
Telephone: (808) 586-1400 FAX: (808) 586-1412
E-MAIL: oip@hawaii.gov
www.hawaii.gov/oip

LESLIE H. KONDO
DIRECTOR

March 22, 2005

VIA FACSIMILE: 587-2167

The Honorable Rodney K. Haraga
Director of Transportation
Department of Transportation
869 Punchbowl Street
Honolulu, Hawaii 96813-5097

VIA FACSIMILE: 525-8037

Mr. Mike Leidemann
The Honolulu Advertiser
605 Kapiolani Boulevard
Honolulu, Hawaii 96813

RE: Disclosure of Traffic Accident Reports and Data
(RFO-P 05-005) (RFA-P 05-008)

Dear Messrs. Haraga and Leidemann:

This letter responds to both your requests to the Office of Information Practices ("OIP") for an opinion regarding the request by The Honolulu Advertiser ("Advertiser") to the Department of Transportation ("DOT") for "an electronic copy of all statistical data on major vehicle traffic accidents reported to the Department of Transportation for the calendar years 2002 and 2003" ("Accident Data").[1]

[1] DOT has represented to OIP that it discussed alternatives to providing the requested records in electronic form with Mr. Mike Leidemann, but that those alternatives were not acceptable to Mr. Leidemann.

BACKGROUND

DOT maintains a traffic accident database on its computer system which is derived from the State of Hawaii's Motor Vehicle Accident Report Forms. There are 67 fields of information related to traffic accidents in the database.

On or about September 17, 2004, the Advertiser made a records request for an electronic copy of the Accident Data pursuant to the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes (1993) ("HRS") ("UIPA"). DOT denied the Advertiser's record request, citing 23 U.S.C. § 152[2], chapter (sic) 291C-20, HRS, and section 15-5.3, Revised Ordinances of Honolulu as the basis for the denial,[3] and efforts were made by the parties to resolve their dispute. On February 4, 2005, OIP received requests from both the Advertiser and DOT to render an opinion regarding whether the Accident Data must be disclosed under the UIPA.

DOT has represented to OIP that DOT's software allows it to display all 67 fields of the traffic accident database but that it does not allow DOT to segregate the information fields and display selected fields within the traffic accident database. This is relevant as the Accident Data includes fields of information pertaining to drivers' personal information that the Advertiser indicated that it did not want.[4] DOT further represented that it contacted the license holder of its software to determine the cost of obtaining the software that would allow it to display only selected fields from its traffic accident database and was quoted a cost of approximately $20,000.

ISSUES PRESENTED

1. Whether 23 U.S.C. § 409 makes the Accident Data confidential and, therefore, subject to an exception to public disclosure under the UIPA.

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[2] 23 USC 152 refers to the federal highway Hazard Elimination Program which requires that certain information be kept, including, presumably, the Accident Data. The Code section, however, that DOT believed rendered the Accident Data confidential and, therefore, exempt from disclosure under the UIPA is 23 U.S.C. § 409. DOT should have cited that Code section, along with section 92F-13(4), HRS, in its response to the Advertiser. See Haw. Admin. R. § 2-71-14(b) (1999).

[3] OIP reminds DOT that the exceptions that allow it to withhold records from public disclosure are found in section 92F-13, HRS. If DOT denies access to a requested record, it is required to cite the specific statutory authority in section 92F-13, HRS, that supports its denial. See Haw. Admin. R. §2-71-14(b) (1999).

[4] The Advertiser's request to the DOT specifically states that the request does not include relevant details about the drivers and vehicles involved in crashes that would violate the privacy of those involved.

2. Whether the DOT is required to provide the Accident Data in electronic form.

BRIEF ANSWERS

1. No. OIP believes that 23 U.S.C. § 409 does not make the Accident Data confidential or otherwise protected from disclosure under the UIPA. While the privacy exception, section 92F-13(1), HRS, may allow DOT to withhold certain information or fields of information contained in the Accident Data[5], the Accident Data, in its entirety, cannot be withheld from disclosure.

2. No. Based upon DOT's representation, DOT does not have the ability to segregate the personal information (that it is likely entitled to withhold from disclosure) from the other parts of the Accident Data without purchasing additional software at the cost of approximately $20,000. In other words, given DOT's present software, the information which if disclosed would constitute a clearly unwarranted invasion of personal privacy is not reasonably segregable from the public portion of the requested record. Accordingly, DOT is not required to make the Accident Data available in the requested electronic form or to incur the cost to purchase the software that would allow it to segregate the requested record. However, in the event that the Advertiser is willing to pay the software cost, DOT would be required to make the segregated Accident Data available.

DISCUSSION

I. Federal Law Does Not Require Withholding of the Accident Data Under the UIPA

The UIPA provides that "[a]ll government records are open to public inspection unless access is restricted or closed by law." Haw. Rev. Stat. § 92F-11 (1993). One of the exceptions to disclosure is where the requested record is "protected from disclosure" by a state or federal law. Haw. Rev. Stat. § 92F-13(4) (1993). OIP interprets this exception to allow an agency to withhold a record from disclosure only where that record is made confidential by another statute.

In this case, DOT asserted several statutory bases as justification for withholding the Accident Data from disclosure, the most relevant of which is 23 U.S.C. § 409 ("section 409"). Specifically, section 409 provides in pertinent part:

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[5] OIP has not reviewed the Accident Data and, therefore, has no ability to comment on the specific information contained therein that may be withheld under section 92F-13(1), HRS, as disclosure would constitute a clearly unwarranted invasion of personal privacy. If DOT or the Advertiser require further guidance on the specific information that can be withheld from disclosure, OIP will review the Accident Data and provide such guidance at that time.

> reports, surveys, schedules, lists, or data complied or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, [or] hazardous roadway conditions . . . shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

At least one other jurisdiction has considered whether section 409 precludes access under a state freedom of information law to the traffic records referenced therein. In Newsday v. State Department of Transportation, 780 N.Y.S.2d 402 (2004), the Supreme Court of New York, based upon the plain language of the statute, concluded that section 409 was not a confidentiality provision and did not preclude access under New York's version of the UIPA to certain intersection and highway location data, where the requestor was not engaged in a court proceeding involving an accident at a location mentioned in the data. Id. at 404. The court noted that, if Congress had intended to make the traffic accident data confidential and not subject to disclosure in response to freedom of information requests, Congress could have explicitly done so as it had in other types of statutes. Id.

OIP likewise believes that that section 409 is not a confidentiality statute. In other words, OIP does not construe section 409 as prohibiting disclosure outside of a lawsuit. As the Newsday court reasoned, section 409, by its express and unambiguous terms, is limited to court actions, i.e., the information is not discoverable or admissible. Moreover, given the purpose of the UIPA and the statute's presumption that all records maintained by a government agency are public, OIP is inclined to narrowly construe the exceptions to disclosure, including those purporting to make records confidential. Based upon the determination that section 409 does not render the Accident Data confidential, OIP is of the opinion that the UIPA's exceptions to disclosure do not support the DOT's withholding of the records requested by the Advertiser.

OIP previously conveyed its opinion that section 409 does not support withholding the Accident Data to DOT and the Advertiser. Subsequently, DOT revised its position that the Accident Data was not a government record subject to disclosure pursuant to the UIPA and, as OIP understands, DOT is making the Accident Data available to the Advertiser and will continue to do so in response to any other requests for the record.[6] Accordingly, it is OIP's understanding that the

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[6] This comment is not meant imply or otherwise opine that the entire Accident Data must be disclosed in response to a request under the UIPA. As noted above, for instance, certain field containing personal identifiable information of individuals involved in the traffic accidents likely can be withheld from disclosure under section 92F-13(1), HRS. Because OIP has not been

remaining issue is whether the Accident Data must be provided to the Advertiser in the electronic form as the Advertiser requested.

II. The DOT is Not Required to Provide the Accident Data in Electronic Form Where It Does Not Possess the Ability to Redact Protected Information From the Accident Data

As noted above, OIP understands that the Accident Data includes certain fields of information that may be exempt from disclosure under the UIPA's privacy exception, section 92F-13(1), HRS.[7] More specifically, for instance, the names and other personal information, such as home address, telephone number and driver's license number, of those involved in a particular accident that may be included in the Accident Data may, generally, be withheld from disclosure.[8]

Where a record contains both public information and information that may be withheld, such as is the case with the Accident Data, DOT is required to segregate the portion of the record that it may withhold and make the rest of the record available, to the extent that the information is "reasonably segregable" from the Accident Data. Specifically, the Hawaii Administrative Rules provides in relevant part:

> (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. <u>If the record is reasonably segregable, the agency shall</u>:
>
> (1) Provide access to the portions of the record that are required to be disclosed under chapter 92F, HRS . . . .

Haw. Admin. R. §2-71-17 (a)(1) (1999) (emphasis added). The rule implies, and OIP has previously ruled, that, where the record is not reasonably segregable, the

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provided and has not reviewed the Accident Data, OIP cannot comment on the specific fields that are public and reserves the right to so should the issue arise in the future.

[7] The Advertiser's request specifically states that it is limited to information that "does not violate the privacy of those involved." Furthermore, the Advertiser's Request for Assistance to OIP states that "we did not seek any information that violates privacy provisions."

[8] For purposes of this analysis, it is not necessary to specify the information fields that may be withheld from disclosure, rather it is of key importance to note that such fields exist within the Accident Data.

agency may withhold the entire record. OIP Op. Ltr. Nos. 90-11 (Feb. 26, 1990) and 95-13 (May 8, 1995).

In this case, DOT represents that the personal information fields are not reasonably segregable from the Accident Data due to limitations in their computer software which does not allow for individual fields to be segregated from the Accident Data. Furthermore, DOT indicates that it has been advised that it will cost approximately $20,000 to obtain the software that will allow for the Accident Data to be displayed, with selected fields redacted. Under these circumstances, OIP agrees that the personal information is not reasonably segregable from the Accident Data. It would be unreasonable and beyond the UIPA's purpose to require DOT to incur the high cost of the software required to allow DOT to segregate the information from the Accident Data. Accordingly, it is OIP's position that the UIPA does not require DOT to make the Accident Data available to the Advertiser in the electronic form that was requested.

However, should the Advertiser provide DOT with the necessary software or provide DOT with the cost of the software, OIP believes that, in that case, the information would be reasonably segregable under section 2-71-17, HAR, and that DOT would then be required to provide the Accident Data, with the personal information segregated, to the Advertiser in the requested electronic form.

Lastly, because the Advertiser's request specifically sought access to the Accident Data in electronic form, this opinion is focused on DOT's obligation to provide the Accident Data in that form. OIP, however, notes that, should the Advertiser revise its request and seek access to the Accident Data in paper form and assuming that the personal information (and any other information that can be withheld under section 92F-13, HRS) can be segregated from the Accident Data in the paper form, DOT is required to provide the segregated record to the Advertiser. If the requested Accident Data is voluminous and DOT requires additional time to make the record available to avoid an unreasonable interference with its other statutory duties, DOT can disclose the segregated Accident Data in increments in accordance with section 2-71-15(b), HAR. In addition, DOT may charge the Advertiser certain fees that are incurred in reviewing and segregating the Accident Data. See Haw. Admin. R. § 2-71-31 (1999).

CONCLUSION

OIP finds that section 409 does not make the Accident Data confidential and, therefore, section 92F-13(4), HRS, does not support withholding the Accident Data from disclosure. Based upon representations by DOT, OIP understands that there are several fields of information included within the Accident Data that would constitute personal information which may be withheld from disclosure; however,

DOT has also represented that it lacks the computer software to enable it to provide the segregated version of the Accident Data. OIP opines that DOT is not obligated to purchase the additional software which would enable it to provide the redacted Accident Data. Accordingly, unless the software is purchased by the Advertiser or the Advertiser provides DOT with the funds to purchase the software, it is OIP's opinion that the Accident Data is not reasonably segregable and, therefore, does not need to be provided to the Advertiser in the requested electronic form.

Very truly yours,

Wintehn K. T. Park
Staff Attorney

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APPROVED:

Leslie H. Kondo
Director