August 2, 1993

Ms. Tina Shelton
KITV-4
1290 Ala Moana Boulevard
Honolulu, Hawaii 96814

Dear Ms. Shelton:

Re: Invoice Submitted to the Governor's Office by Hawaii State Communications

This is in reply to your letter to the Office of Information Practices ("OIP") dated July 20, 1993, which was telefaxed to the OIP on July 20, 1993. In your letter, you requested an advisory opinion regarding whether an invoice submitted by Hawaii State Communications ("HSC") and/or Ms. Nora Feuerstein to the Office of the Governor, State of Hawaii ("Governor's Office"), must be made available for public inspection and copying.

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), an invoice submitted by HSC and/or Ms. Nora Feuerstein to the Governor's Office ("HSC Invoice"), which invoice has been presented to an investigatory grand jury, must be made available for public inspection and copying.

BRIEF ANSWER

No. Under the UIPA, each State and county agency subject to the UIPA must disclose "[g]overnment purchasing information, including all bid results, <u>except to the extent prohibited by section 92F-13</u>." Haw. Rev. Stat. § 92F-12(a)(3) (Supp. 1992) (emphasis added). We believe that the HSC Invoice constitutes "government purchasing information" within the meaning of this UIPA provision.

One of the UIPA exceptions contained in section 92F-13, Hawaii Revised Statutes, protects from required disclosure

"[g]overnment 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) (Supp. 1992).

The Department of the Attorney General ("ATG") relied on Rule 6(e) of the Hawaii Rules of Penal Procedure as the basis for non-disclosure of the HSC Invoice. Rule 6(e), which has the force and effect of law, restricts the disclosure of matters occurring before a grand jury. Court decisions interpreting and applying Exemption 3 of the federal Freedom of Information Act, which shields records specifically exempted from disclosure by statute (including Rule 6(e) of the Federal Rules of Criminal Procedure), provide substantial guidance in resolving the issue presented. Based on the federal court decisions, we believe that the mere fact that a record is before a grand jury does not, in and of itself, automatically protect it from disclosure under Rule 6(e) of the Hawaii Rules of Penal Procedure. Rather, there must be some showing of a nexus between the disclosure of the record and the revelation of a secret aspect of a grand jury proceeding.

Although the ATG initially relied on Rule 6(e) of the Hawaii Rules of Penal Procedure as the basis for not disclosing the HSC Invoice, we are not required to determine whether its disclosure would reveal a protected aspect of a grand jury proceeding. The OIP has been provided with a copy of an order issued by the Circuit Court of the First Circuit, State of Hawaii, on June 18, 1993, which restricts the disclosure of documents and other matters presented before the grand jury in this particular proceeding. Based on our examination of the order, which the ATG stated was confidential in nature, we conclude that it protects the HSC Invoice from public disclosure under the UIPA's exception for government records that are protected from disclosure by court order. Thus, the Governor's Office and the ATG may not make the HSC Invoice available for public inspection and copying, except as provided in the order or as provided by further order of the court.

FACTS

On July 20, 1993, the OIP received your telefaxed request for "an opinion on whether an invoice to the Governor's Office from Hawaii State Communications and/or Nora Feuerstein is `public record', and therefore, can and should be released to the news media." In a telephone conversation on July 26, 1993, you informed the OIP that you contacted Deputy Attorney General Lawrence A. Goya of the ATG's Criminal Justice Division and an employee of the Governor's Office, and requested a copy of the HSC Invoice. In reliance on advice from the ATG, the Governor's Office declined to disclose the HSC Invoice and referred you to Deputy Attorney General Goya. Deputy Attorney General Goya informed you that the HSC Invoice could not be disclosed under

Rule 6(e) of the Hawaii Rules of Penal Procedure, which restricts the disclosure of matters occurring before a grand jury. We are informed that the HSC Invoice has been presented to the grand jury in proceedings involving the alleged discovery of listening devices in State government offices.

On July 21, 1993, the OIP became aware of the existence of a court order, which, OIP was informed, prohibited disclosure of all documents presented to the grand jury in this proceeding. The ATG informed the OIP that the court order was confidential in nature, and thereupon filed a motion for limited disclosure to the OIP of matters related to the grand jury proceedings, which was approved by the Circuit Court of the First Circuit, State of Hawaii ("Court") on July 22, 1993. The order permits limited disclosure to the OIP to enable it to render an opinion in this matter:

> The limited disclosure is necessary to enable the Office of Information Practices to determine whether certain documents presented to the grand jury are subject to production upon request by the news media, or other members of the public. The limited disclosure will not only entail disclosure to the Office of Information Practices to enable it to render an opinion on the public nature of the documents in question, but may also entail references to the documents in any opinions in which the Office of Information Practices may issue and will make public.

Motion for Limited Disclosure in the Special Secret (Investigation) Grand Jury Sessions and Order at 1-2, In the Matter of the Proceedings of the Grand Jury of the First Circuit Court of the State of Hawaii for the 1993 Term, as to Panel "F" (S.P. No. 93-7).

DISCUSSION

I. INTRODUCTION

Under the UIPA, "[a]ll government records are open to public inspection unless access is restricted or closed by law." Haw. Rev. Stat. . 92F-11(a) (Supp. 1992). Thus, unless one of the five exceptions contained in section 92F-13, Hawaii Revised Statutes, authorizes an agency to withhold access to government records, an agency must make its records available for inspection and copying upon request by any person. Haw. Rev. Stat. . 92F-11(b) (Supp 1992); Kaapu v. Aloha Tower Development Corp., ___ Haw. ___, No. 15775 (Feb. 25, 1993).

Pursuant to the Court's order for limited disclosure to the

OIP, the OIP did examine the HSC Invoice. Although the terms of the Court order do not permit us to disclose the contents of the HSC Invoice, our review leads us to conclude that it constitutes a "government record"[1] for purposes of the UIPA.

In addition to the UIPA's general rule that all government records are public unless access is closed or restricted by law, in section 92F-12(a), Hawaii Revised Statutes, the Legislature set forth a list of government records that must be made available for inspection and copying "[a]ny provision to the contrary notwithstanding." Subsection (a) of section 92F-12, Hawaii Revised Statutes, provides in pertinent part:

> . **92F-12 Disclosure required.** (a) Any provision to the contrary notwithstanding, each agency shall make available for public inspection and copying during regular business hours:
>
> . . . .
>
> (3) Government purchasing information including all bid results, <u>except to the extent prohibited by section 92F-13</u>; . . . .

Haw. Rev. Stat. . 92F-12(a)(3) (Supp. 1992) (emphasis added).

In our opinion, an invoice or bill for the cost of goods sold or services provided to an agency constitutes "government purchasing information" within the meaning of section 92F-12(a)(3), Hawaii Revised Statutes. <u>See, e.g.</u>, OIP Op. Ltr. No. 90-15 (Apr. 9, 1990) (lump sum bid price components constitute government purchasing information); OIP Op. Ltr. No. 91-14 (Aug. 28, 1991) (purchase of service proposal rating sheets); OIP Op. Ltr. No. 91-21 (Nov. 12, 1991) (proposals to provide title insurance); OIP Op. Ltr. No. 93-5 (June 7, 1993) (list of prospective emergency medical technicians submitted in response to an invitation for bids).

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[1]"Government record" means "information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. ' 92F-3 (Supp. 1992).

Because the HSC Invoice must be made public "except to the extent prohibited by section 92F-13," we now must consider whether any of the five UIPA exceptions to mandatory disclosure contained in section 92F-13, Hawaii Revised Statutes, apply to the inspection of the HSC Invoice.[2] Based on the facts before us, we find that only one of the five UIPA exceptions, section 92F-13(4), Hawaii Revised Statutes, merits consideration in determining whether the HSC Invoice is protected from disclosure under the UIPA.

Under section 92F-13(4), Hawaii Revised Statutes, an agency is not required to disclose "[g]overnment records which, pursuant to state or federal law including an order of any state or federal court, are protected from disclosure." For this exception to apply to the facts presented, we must determine whether a State or federal law or court order authorizes or compels the Governor's Office and the ATG to withhold access to the HSC Invoice.

II. RULE 6(e) OF THE HAWAII RULES OF PENAL PROCEDURE

First, we consider whether Rule 6(e) of the Hawaii Rules of Penal Procedure protects the HSC Invoice from disclosure. Rule 6(e) is the law upon which the ATG relied in declining to publicly disclose the HSC Invoice. Rule 6(e) of the Hawaii Rules of Penal Procedure provides:

> **(e) Secrecy of Proceedings and Disclosure.**
>
> (1) Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the prosecutor for use in the

[2]In previous OIP opinion letters, we concluded that the phrase "except to the extent prohibited by section 92F-13," set forth in section 92F-12(a)(3), Hawaii Revised Statutes, was intended by the Legislature to permit agencies to withhold government purchasing information protected by the UIPA's "frustration of a legitimate government function" exception contained in section 92F-13(3), Hawaii Revised Statutes. See OIP Op. Ltr. No. 92-17 at 10 (Sept. 2, 1992); OIP Op. Ltr. No. 91-14 at 6 (Aug. 28, 1991); OIP Op. Ltr. No. 90-15 at 8 (Apr. 9, 1990) ("[w]e have serious doubts concerning whether section 92F-12(a)(3), Hawaii Revised Statutes, was intended to allow the non-disclosure of government contract bid information under the UIPA's privacy exception"). However, we have also recognized that government purchasing information "may be protected by specific state or federal laws under section 92F-13(4), Hawaii Revised Statutes." OIP Op. Ltr. No. 90-15 at 8 (Apr. 9, 1990).

> performance of his duties. Otherwise, a juror, prosecutor, interpreter, reporter or operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury, subject, however, to the provisions of subsection (e)(2) of this rule. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.
>
> (2) After indictment is returned against a defendant, the defendant shall, on motion to the court and subject to payment therefor, have the right to a transcript of that portion of the grand jury proceedings which relates to the offense charged in the indictment; subject, however, to regulation by the court under Rule 16(e)(4).

Section 7 of article VI of the Constitution of the State of Hawaii provides that "[t]he supreme court shall have power to promulgate rules and regulations in all civil and criminal cases for all courts relating to process, practice, procedure and appeals, which shall have the force and effect of law." [Emphasis added.] See also Haw. Rev. Stat. . 602-11 (Supp. 1992). The Hawaii Supreme Court's rules governing grand jury proceedings are contained in the Hawaii Rules of Penal Procedure. These rules have the "force and effect of law," and, therefore, they constitute "state law" for purposes of section 92F-13(4), Hawaii Revised Statutes.

Like section 92F-13(4), Hawaii Revised Statutes, Exemption 3 of the federal Freedom of Information Act, 5 U.S.C. . 552(b)(3) (1988) ("FOIA") exempts from disclosure all federal agency records that are "specifically exempted from disclosure by statute" other than the FOIA. Additionally, Rule 6(e) of the

Federal Rules of Criminal Procedure,[3] like Rule 6(e) of the Hawaii Rules of Penal Procedure, regulates disclosure of matters occurring before a grand jury.[4] Consequently, court decisions interpreting Exemption 3 of the FOIA in which Rule 6(e) protection has been asserted provide relevant and substantial guidance.

Case law under Exemption 3 of the FOIA establishes that "Rule 6(e) [of the Federal Rules of Criminal Procedure] embodies a broad sweeping policy of preserving the secrecy of grand jury material regardless of the substance in which the material is contained." Iglesias v. CIA, 525 F. Supp. 547, 556 (D.D.C. 1981). However, neither the fact that information was obtained pursuant to a grand jury subpoena nor the fact that the information was submitted to the grand jury is sufficient, in and of itself, to warrant the conclusion that disclosure is necessarily prohibited by Rule 6(e). See Washington Post Co. v. U.S. Dept. of Justice, 863 F.2d 96, 100 (D.C. Cir. 1988); Senate of Puerto Rico v. United States Dep't of Justice, 823 F.2d 574, 582 (D.C. Cir. 1987) ("[a]utomatically sealing all that a grand jury sees or hears would enable the government to shield any information from public view indefinitely by the simple expedient of presenting it to the grand jury"); see also John Doe Corp. v. John Doe Agency, 850 F.2d 105, 109 (2d Cir. 1988) ("[a] document that is otherwise available to the public does not become confidential simply because it is before a grand jury"), rev'd on other grounds, 493 U.S. 146 (1989).

Rather, an agency must establish a nexus or connection

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[3]Rule 6(e)(2) of the Federal Rules of Criminal Procedure provides:

> A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court. [Emphasis added.]

[4]Rule 6(e) of the Federal Rules of Criminal Procedure has been held to satisfy the "statute" requirement of Exemption 3 of the FOIA. See Fund for Constitutional Government v. National Archives and Records Service, 656 F.2d 856, 867 (D.C. Cir. 1981).

between the release of that information and "revelation of a protected aspect of the grand jury's investigation." Senate of Puerto Rico, 823 F.2d at 584. As stated in Washington Post:

> This court has consistently held that Rule 6(e) does not draw a "veil of secrecy" over all documents about activity investigated by the grand jury or even all documents revealed to the grand jury. The relevant inquiry is whether the document would reveal the inner workings of the grand jury, such as witness names, or the substance of testimony or the direction and strategy of the investigation. Moreover, the document itself must reveal the inner workings; the government cannot immunize a document by publicizing the link.

Washington Post, 863 F.2d at 100 (emphasis added) (citations omitted).

The record involved in Washington Post was in existence almost five months before the grand jury was impanelled, was not yet before the grand jury at the time it was requested under the FOIA, and had a purpose wholly separate from grand jury deliberations. The court noted that the record would not "have revealed anything whatsoever about the grand jury's deliberations had the government not disclosed the report's role in those deliberations." Id. The court found that "a showing [that disclosure would reveal the grand jury's inner workings] could not be made on these facts." Id.

Additionally, the Hawaii Supreme Court In re Moe, 62 Haw. 613, 617 P.2d 1222 (1980), identified the interests that are protected by maintaining the confidentiality of grand jury proceedings.

> Maintaining the confidentiality of grand jury proceedings protects several important interests of the government and of private citizens: (1) First, if preindictment proceedings were conducted publicly, individuals who learned of their possible indictment might flee the jurisdiction or attempt to tamper with the grand jurors or witnesses appearing before them. (2) Persons with information about crimes would be less willing to appear voluntarily and to speak fully and frankly, knowing that the individuals about whom they testify would be aware of that testimony. (3) The rule of secrecy avoids injury to the reputation of those persons accused of crimes whom the

> grand jury does not indict. (4) Finally, it encourages the grand jurors to investigate suspected crimes without inhibition and to engage in unrestricted deliberations.

Id. at 617; 617 P.2d at 1225 (citations omitted).

To the extent that withholding an otherwise public record does not serve one of the interests to be protected by secret grand jury proceedings as identified by the Hawaii Supreme Court, then it would appear that the record should not be withheld under Rule 6(e) of the Hawaii Rules of Penal Procedure, notwithstanding the record's presence before a grand jury. This is further supported by the federal cases above cited, which generally found that the record in question must itself disclose "the inner workings" of a grand jury.

One might reasonably argue that the HSC Invoice is protected from disclosure by Rule 6(e) of the Hawaii Rules of Penal Procedure. However, based upon the foregoing federal cases, we believe that Rule 6(e) of the Hawaii Rules of Penal Procedure does not provide automatic protection from disclosure for all records before a grand jury. Rather, there must be some showing of a nexus between disclosure of the record and revelation of a secret aspect of a grand jury proceeding.

Despite the fact that the ATG was initially relying on Rule 6(e) of the Hawaii Rules of Penal Procedure as the basis for not publicly disclosing the HSC Invoice, it may not be necessary for the OIP to determine whether its disclosure would reveal a protected aspect of a grand jury proceeding, as the Court has issued an order that restricts the disclosure of matters presented before the grand jury in this particular proceeding. Consequently, we turn to an examination of the effect of this order on disclosure of the HSC Invoice under the UIPA.

III. COURT ORDER

The UIPA does not require an agency to disclose government records that are protected from disclosure by a court order. Haw. Rev. Stat. . 92F-13(4) (Supp. 1992). The OIP has been provided with a copy of a Court order issued on June 18, 1993, which governs the confidentiality of documents and other matters presented before the grand jury in this proceeding, for the sole and limited purpose of enabling the OIP to render an advisory opinion concerning whether the HSC Invoice must be made available for public inspection and copying under the UIPA.

The order states that "all testimony, documents and the contents contained therein, and any other matters presented before the Grand Jury . . . be secret and not subject to public disclosure, except upon further order of the Court, or as may be

necessary to enable the Attorney General and any agents of the Attorney General to perform their official duties." We are informed that the HSC Invoice has been "presented before the grand jury." Consequently, based upon the language of the court order above quoted, we conclude that the court order protects the HSC Invoice from public disclosure under section 92F-13(4), Hawaii Revised Statutes, of the UIPA, until "further order of the Court."

CONCLUSION

In our opinion, the HSC Invoice is protected from disclosure under the UIPA's exception for government records which are protected from disclosure by court order. Thus, we conclude that the HSC Invoice may not be made available for public inspection and copying under the UIPA, until further order of the Court.

Very truly yours,

Mimi K. Horiuchi
Staff Attorney

APPROVED:

Kathleen A. Callaghan
Director

MKH:sc
c: Governor John Waihee
Lawrence A. Goya, Deputy Attorney General