April 5, 1999

Ms. Estelle Furuike
Police Records Supervisor
Police Department, County of Kauai
3060 Umi Street
Lihue, Hawaii 96766

Dear Ms. Furuike:

Re: Release of Police Reports

This is in response to your April 8, 1998 letter to the Office of Information Practices ("OIP") requesting an advisory opinion on whether police reports regarding a closed criminal investigation must be made available for public inspection and copying.

When you first wrote to the OIP, *The Garden Island* newspaper had requested the reports with the names of the victim redacted. Subsequently, Roger Myers, Esq., representing *The Garden Island*, clarified that his client does not seek the names or other information identifying the victims and witnesses and is willing to have such information redacted.

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), police reports regarding a closed criminal

investigation which resulted in a deferred acceptance of nolo contendere ("DANC") plea, after the segregation of information identifying the victim and witnesses, must be made available for public inspection and copying.

BRIEF ANSWER

Yes. However, prior to disclosure, in addition to information identifying the victim and witnesses, the Defendant's social security number and home address and phone number must be redacted as information excepted from disclosure as government records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy.

FACTS

On April 8, 1998, Ms. Estelle C. Furuike, Police Records Supervisor of the County of Kauai Police Department ("KPD"), wrote to the OIP requesting a written opinion on whether the KPD could disclose closed criminal police reports in which the victim was a minor and there was no booking or arrest of the Defendant ("Police Reports"). In the letter, Ms. Furuike stated that the reports involve the sexual assault of a minor by an adult, and that in court, a motion for DANC was granted for a period of six months. While Ms. Furuike characterized the sentence as nonconviction data which could be expunged, she stated that the Defendant had not asked for expungement. Ms. Furuike asserted that the KPD had questions about disclosure of the Police Reports because they relate to a juvenile and because no arrest was made.

On May 1, 1998, Inspector Morris of the KPD stated to the OIP that the KPD was concerned about the juvenile victim's privacy. He noted that even if the juvenile's name were deleted, because the community is so small, the victim could be identified. On May 15, 1998, Ms. Furuike also confirmed that redacting the victim's name may not be sufficient to protect the victim's identity and that people could identify the victim by the facts. Subsequently, the OIP learned from the attorney for *The Garden Island* newspaper, Roger Myers, Esq., that *The Garden Island* has no objection to redacting other information identifying the victims and witnesses from the Police Reports.

DISCUSSION

I. INTRODUCTION

As information maintained by an agency in written form, the Police Reports are government records subject to the UIPA. See Haw. Rev. Stat. § 92F-3 (1993). Under the UIPA, all government records are open to the public unless an exception exists under section 92F-13, Hawaii Revised Statutes. See Haw. Rev. Stat. § 92F-11 (1993).

Here, as the investigation is closed and the court proceedings are complete, the KPD does not raise any objection based on an interference with the police investigation or prosecution of the Defendant. However, because the underlying case involves a DANC and the possibility of the expungement of records, and because the victim was a juvenile, the KPD raised issues implicating the exception to disclosure at section 92F-13(4), Hawaii Revised Statutes, for government records that are protected from disclosure under state or federal law. In addition, as the Police Reports contain personal information about the Defendant, application of the exception at section 92F-13(1), Hawaii Revised Statutes, for records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, must also be considered.

II. PROTECTION FROM DISCLOSURE UNDER STATE LAW

A. STATE LAW GOVERNING THE DEFERRED ACCEPTANCE OF NOLO CONTENDERE PLEA

Section 92F-13(4), Hawaii Revised Statutes, provides an exception to disclosure under the UIPA for those government records which are protected from disclosure under state or federal law. As Defendant was granted a DANC, a question arises as to the effect of the DANC statute upon disclosure of the Police Reports under the UIPA.

Under section 853-1, Hawaii Revised Statutes, where, prior to the commencement of a trial, a defendant voluntarily pleads nolo contendere to a misdemeanor, and it appears to the court that the defendant is not likely again to engage in a criminal course of conduct and the ends of justice and welfare of society

do not require that the defendant suffer the penalty imposed by law, the court may defer further proceedings for a set period of time without accepting the plea. Haw. Rev. Stat. § 853-1(a) (1993). At the end of that period of time, if the defendant has complied with the terms and conditions set by the court, the court must discharge the defendant and dismiss the charge against the defendant. Haw. Rev. Stat. § 853-1(c) (1993). This discharge and dismissal is not a conviction, and after one year following the discharge, the defendant can apply for expungement of certain records concerning the charge against him.[1] Haw. Rev. Stat. § 853-1(d), (e) (1993).

Thus, section 853-1, Hawaii Revised Statutes, itself, does not make the Police Reports confidential or limit access to them. Therefore, section 853-1, Hawaii Revised Statutes, does not constitute a state law which protects the Police Reports from disclosure under section 92F-13(4) Hawaii Revised Statutes. However, because a defendant subject to a DANC can apply for expungement and because the DANC constitutes non-conviction data, it is necessary to consider the effect of other statutes, as well.

B. EXPUNGEMENT STATUTE

A review of the statute regarding the expungement of arrest records indicates that provision does not affect disclosure of the Police Reports at issue here. Ms. Furuike has stated that the defendant has not requested that his records be expunged. However, even if an order of expungement had been issued, such an order would not affect disclosure of the Police Reports.

---

[1] Specifically, section 853-1(d) and (e), Hawaii Revised Statutes, states:

> (d) Discharge of the defendant and dismissal of the charge against the defendant under this section shall be without adjudication of guilt, shall eliminate any civil admission of guilt, and is not a conviction.
>
> (e) Upon discharge of the defendant and dismissal of the charge against the defendant under this section, the defendant may apply for expungement not less than one year following discharge, pursuant to section 831-3.2.

Haw. Rev. Stat. § 853-1(d), (e) (1993).

Section 831-3.2(c), Hawaii Revised Statutes provides that upon issuance of an order of expungement, all arrest records pertaining to the arrest which are in the custody or control of a county law enforcement agency and which are capable of being forwarded to the attorney general without affecting other records not pertaining to the arrest, shall be forwarded for placement of the arrest records in a confidential file. Haw. Rev. Stat. § 831-3.2(c) (1993). Disclosure of those records placed in a confidential file is limited by section 831-3.2(d), Hawaii Revised Statutes to:

(1) A court of law or an agency thereof which is preparing a presentence investigation for the court;

(2) An agency of the federal or state government which is considering the subject person for a position immediately and directly affecting the national or state security; or

(3) A law enforcement agency acting within the scope of their duties.

Haw. Rev. Stat. § 831-3.2(d) (1993).

However, the term "arrest record" for purposes of section 831-3.2, Hawaii Revised Statutes, is specifically limited by statute to only "any existing photographic and fingerprint cards relating to the arrest." Haw Rev. Stat. § 831-3.2(f)(2) (1993). As investigative reports, the Police Reports are not included in the records affected and are not protected from disclosure by the expungement provisions at section 831-3.2, Hawaii Revised Statutes.[2] Therefore, section 831-3.2, Hawaii Revised Statutes, is not a state statute that protects the Police Reports from disclosure under section 92F-13(4), Hawaii Revised Statutes.

---

[2] In enacting the law governing the expungement of arrest records, the Legislature intended to minimize or abolish the extrajudicial penalties, which might confront a person with a record of arrest, which did not lead to conviction. However, the Legislature acknowledged that the law would result in only the partial expungement of information regarding the incident involved. See section 1, Act 92, 1974 Haw. Sess. Laws 165. While the definition of "arrest record" affected by expungement was subsequently broadened in 1975 to mean "the document, magnetic tape or computer memory bank, produced under authority of law, which contains the data of legal proceedings against a person beginning with his arrest for the alleged commission of a crime and ending with final disposition of the charges against the person by nonconviction," in 1987, the definition was amended to "the

C. "CRIMINAL HISTORY RECORD INFORMATION" STATUTE

Because of the effect of section 853-1(d), Hawaii Revised Statutes, chapter 846, Hawaii Revised Statutes, regarding criminal history record information, must also be reviewed. Section 853-1(d), Hawaii Revised Statutes, pertaining to DANCs, provides that a dismissal of a charge under that section is not a conviction. Haw. Rev. Stat. § 853-1(d) (1993). As the dismissal falls within the definition of "nonconviction data" in section 846-1, Hawaii Revised Statutes, disclosure of the dismissal information is limited by sections 846-9 and 846-10, Hawaii Revised Statutes. Haw. Rev. Stat. § 846-1 (1993) (definition of "nonconviction data"); §§ 846-9, 846-10 (1993 & Supp. 1998); OIP Op. Ltr. No. 97-5 at 4-7 (June 10, 1997).

However, while it may limit disclosure of the dismissal information, chapter 846, Hawaii Revised Statutes, does not limit disclosure of the Police Reports. Chapter 846, Hawaii Revised Statutes, provides for the collection, storage, dissemination and analysis of *criminal history record information* from criminal justice agencies, in a manner that balances the public's right to be informed, the privacy of individual citizens, and the need for law enforcement agencies to utilize crime prevention and detection tools by establishing the Hawaii Criminal Justice Data Center to carry out these functions. See Haw. Rev. Stat. § 846-2 (1993); § 846-2.5 (1998 Supp.). Section 846-1, Hawaii Revised Statutes, specifically excludes investigative reports, such as the Police Reports, from the definition of "criminal history record information" as follows:

> Information collected by criminal justice agencies on individuals consisting of identifiable descriptions and notations of arrests, detentions, indictments, and other formal criminal charges, and any disposition arising therefrom, sentencing formal correctional supervisory action, and release; but does not include intelligence or investigative information, identification information to the extent that such information does not indicate involvement of the

---

photographic and fingerprint cards relating to the arrest," and in 1993, it was amended to "any existing photographic and fingerprint cards relating to the arrest." See Act 103, 1975 Haw. Sess. Laws 180; Act 322, 1987 Haw. Sess. Laws 995; Act 7, 1993 Haw. Sess. Laws 20.

> individual in the criminal justice system, and information derived from offender-based transaction statistics systems, which do not reveal the identity of individuals.

Haw. Rev. Stat. § 846-1 (1993).[3]

As investigative reports are not covered by chapter 846, Hawaii Revised Statutes, the provisions of chapter 846, Hawaii Revised Statutes, do not protect the Police Reports from disclosure. Therefore, the exception from disclosure at section 92F-13(4), Hawaii Revised Statutes does not apply.

D. STATE STATUTE CONCERNING FAMILY COURT PROCEEDINGS

In responding to the request for information, the KPD raised the question of whether the victim's juvenile status creates an exception to disclosure. Where the Family Court has jurisdiction over a case, section 571-84, Hawaii Revised Statutes, provides for the confidentiality of the records of the proceedings, including reports filed with the court. In addition, the records of any police department relating to any proceedings authorized under section 571-11, Hawaii Revised Statutes, which sets forth the Family Court jurisdiction, are confidential and are open to inspection only by specified persons, or as ordered by the court. Haw. Rev. Stat. § 571-84(e) (1993).

However, the information requested here does not relate to a Family Court proceeding. Therefore, the protection from disclosure under section 571-84, Hawaii Revised Statutes, does not apply.

III. CLEARLY UNWARRANTED INVASION OF PERSONAL PRIVACY

Section 92F-13(1), Hawaii Revised Statutes, provides an exception to disclosure for government records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. Disclosure shall not constitute a clearly

---

[3] As a subset of criminal history record information, nonconviction data also does not include investigative reports.

unwarranted invasion of personal privacy if the public interest in disclosure outweighs the privacy interest of the individual. Haw. Rev. Stat. § 92F-14(a) (Supp. 1998).

In addition, where disclosure would result in a clearly unwarranted invasion of personal privacy, information about an individual contained in law enforcement records also is protected under section 92F-13(3), Hawaii Revised Statutes, as a government record that, by its nature, must be confidential in order for the government to avoid the frustration of a legitimate government function. See OIP Op. Ltr. No. 95-21 at 13, 15-23 (Aug. 28, 1995).

A. DEFENDANT'S IDENTITY

A suspect who has neither been arrested nor charged has a significant privacy interest in information about his identity. See OIP Op. Ltr. No. 95-21 at 16-18 (Aug. 28, 1995). Under section 92F-14(b)(2), Hawaii Revised Statutes, an individual has a significant privacy interest in "information 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) (1998 Supp.). However, once an agency has publicly disclosed the suspect's identity because it was necessary to prosecute the violation or continue the investigation, or once the suspect has been arrested or charged, there is little or no privacy interest implicated by the disclosure of the suspect's identity. See OIP Op. Ltr. No. 92-19 at 6 (Oct. 7, 1992); OIP Op. Ltr. No. 91-4 (March 25, 1991); see also Detroit Free Press, Inc. v. Dep't of Justice, 73 F. 3d 93 (6th Cir. 1996) (privacy rights of defendants in an ongoing criminal proceeding, in which their names have already been divulged and in which they have appeared in open court, are not implicated in the disclosure of the defendants' mug shots) .

Here, while there has been no arrest, the Defendant has already been prosecuted. He was summoned to and did appear in open court, where he entered his plea, and his motion for DANC was granted. In addition, the court docket, a public record, identifies Defendant by name. Therefore, consistent with prior OIP opinion, Defendant maintains little or no privacy interest in disclosure of his identity as a target of the investigation. Thus, information regarding the

Defendant's identity is not protected from disclosure under the exception for information, which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy.

B. DEFENDANT'S SOCIAL SECURITY NUMBER, HOME ADDRESS AND TELEPHONE NUMBER

Because an individual has a significant privacy interest in his social security number, and home address and telephone number, and because this information generally fails to shed light upon the workings of government, the OIP has previously found an individual's social security number, and home address and telephone number to be excepted 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 excepted from disclosure under section 92F-13(1), Hawaii Revised Statutes); 89-14 at 5 (Dec. 15, 1989) (inmates' social security numbers excepted from disclosure under section 92F-13(1), Hawaii Revised Statutes). Consistent with prior opinion, the OIP finds that Defendant's social security number, and home address and telephone number should be redacted prior to the Police Reports' disclosure.

IV. SEGREGATION

As *The Garden Island* does not request information which would identify the victim and witnesses, the KPD should segregate such information prior to disclosure of the Police Reports. When doing so, the KPD may redact any information that would result in the likelihood of actual identification. See OIP Op. Ltrs. No. 98-5 at 27-28 (Nov. 24, 1998); 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 the 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 also Dep't of the Air Force v. Rose, 425 U.S. 352, 380-381, 96 S.Ct. 1592, 1608 (1976). Thus, it may be appropriate to redact, among other things, an individual's name, occupation, workplace, home address and telephone number, social security number, date of birth, marital status, any statement that could only be attributed to a particular individual, or even the location of the activity, if disclosure would identify the individual.

In addition, the KPD should segregate the Defendant's social security number, home address and home phone number.

CONCLUSION

After segregation of the information identifying the victim and witnesses, and the Defendant's social security number, home address and home telephone number, the Police Reports must be made available for public inspection and copying.

Very truly yours,

Lynn M. Otaguro
Staff Attorney

APPROVED:

Moya T. Davenport Gray
Director

LMO/ran

cc: Anthony Sommer
Roger R. Myers, Esq.