November 23, 1999

Maurice Tamura
Environmental Health Program Manager
Department of Health
P. O. Box 3378
Honolulu, Hawaii 96801

Re: Identities of Complainants to Department of Health Alleging Violations of Hawaii Labeling Laws

Dear Mr. Tamura:

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

ISSUE PRESENTED

Whether the Department of Health ("DOH") must disclose the identity of a complainant, and other information which, if disclosed, could lead to the actual identity of the complainant in a civil law enforcement investigation report after the investigation has been completed and closed.

BRIEF ANSWER

No. Disclosure of the identities of complainants would likely chill the DOH's ability to perform its function of investigating possible violations in the future because individuals will be less likely to come forward with information if they know their identities will be revealed to the alleged violators. Agencies are not required to disclose information which, if disclosed, would cause the frustration of a legitimate government function.

FACTS

In a June 29, 1994, letter to the OIP, the DOH advised that it sometimes receives complaints from individuals alleging violations of Hawaii laws under the jurisdiction of the DOH. The DOH may conduct a civil law enforcement investigation based on these allegations. For example, a food distribution business had recently reported its belief that another business violated Hawaii's food labeling laws. A representative of the business that was the subject of the investigation ("Subject") then requested a copy of the DOH complaint investigation report. The DOH noted that the Subject believed it knew the identity of the complainant and was considering legal action against the complainant.

Allan Izen, Supervisor of the DOH Environmental Health Services Division Food and Drug Branch, informed the OIP in an August 10, 1998, telephone conversation, that the DOH has encountered many cases where a complainant, due to fear of retaliation or repercussion against him or his business, does not want his identity, nor his business position, nor company name to be disclosed to the subject of the complaint. The importance of protecting the identities of complainants in order to ensure a person's willingness to report alleged violations was also noted by the DOH in its June 29, 1994, letter. The DOH stated that "if we divulge complainant's names, people will be discouraged from complaining and thus reduce our effectiveness. Complaints from consumers and people in industry often bring problems to our attention that we could learn about in no other way."

Mr. Izen also informed the OIP on September 3, 1998, that in cases where the complainant, on behalf of a business, has made a complaint, disclosing the identity of the business may reveal the individual identity of the complainant. The complainant's individual identity is likely to be discovered in cases where the business is a small business and the owner or president is likely to be the complainant.

On September 3, 1998, Mr. Izen also informed the OIP that the DOH frequently receives anonymous telephone calls or letters from people who observed actions they believe are in violation of DOH laws or regulations. These are sometimes termed "industrial complaints" in which the complainant is identified only by company. These complainants, both individuals and businesses, often fear retaliation or repercussion and therefore will not provide their telephone numbers, return addresses, or even provide the DOH with their names. In addition, callers sometimes refuse to provide sufficient information for the DOH to contact them for more information.

When processing these complaints, the DOH's Consumer Complaint form is filled out. This form includes a check-off box to instruct the DOH whether or not the complainant consents to his or her name being disclosed to the Subject. The DOH provided the OIP with: (1) a blank copy of a Consumer Complaint form, which is filled out by the DOH employee who received the complaint, and (2) a follow-up narrative report written by the DOH investigator who investigated the complaint. In general, this narrative report describes who the investigator spoke to, what was said or done between the DOH and the Subject, whether the complaint was substantiated, and whether a citation was issued, or other actions were taken.

On October 27, 1998, the OIP was advised by Mr. Izen that the records of the original complaint for the incident described in the first paragraph above are no longer maintained by the DOH. However, whether to disclose a complainant's identity remains a concern for the DOH, so we provide this opinion as general guidance for future reference.

DISCUSSION

I. INTRODUCTION

Records of all State and county agencies are public unless access is restricted or closed by law. Haw. Rev. Stat. §92F-11(a) (1993). There are five exceptions to the general rule of disclosure under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"). These are for: 1) information which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy; (2) information pertaining to the prosecution or defense of any judicial or quasi-judicial action to which the state or any county is or may be a party, but only to the extent such records would not be discoverable; (3) information which, if disclosed, would cause the frustration of a legitimate government function; (4) information that is protected by a state or federal law or court order; and (5) certain legislative papers. Haw. Rev. Stat. §92F-13 (1993).

II. FRUSTRATION OF A LEGITIMATE GOVERNMENT FUNCTION

The OIP believes that the UIPA exception to disclosure of records which, if disclosed, would cause the frustration of a legitimate government function, applies here, based on the facts provided.

The DOH has authority to regulate food-labeling laws under chapter 328, Hawaii Revised Statutes. The OIP believes that the DOH's civil law enforcement operations pertaining to food labeling laws are legitimate government functions.

The DOH asserts that if it must disclose the names of informants, or other information that could lead to the actual identification of an informant, its legitimate government functions will be frustrated because individuals will be discouraged from coming forward with information in the future. When applying the "frustration" exception to informants' identities in the past, the OIP found that:

> [b]y taking appropriate actions against violations, a government agency performs a legitimate government function of enforcing the laws it administers. To perform this function, an agency may rely to a large extent on the complaints of private citizens to notify the agency of possible violations.
>
> A policy of keeping complainants' identities confidential encourages the flow of information that is necessary for agencies' enforcement of laws. . .

OIP Op. Ltr. No. 89-12 at 3 (Dec 12, 1989) (identities of persons reporting alleged zoning violations may be withheld from disclosure under "frustration" exception). The OIP Opinion Letter Number 89-12 went on to state that:

> [m]andatory public access to information about complainants' identities would frustrate agencies' legitimate enforcement function because agencies would be less likely to receive incriminating information at the initiative of private citizens. The identities of complainants would, therefore, be exempt from public access under the UIPA exception contained in section 92F-13(3), Hawaii Revised Statutes, based on the frustration of a legitimate government function. OIP Op. Ltr. No. 89-12 at 3 (Dec 12, 1989).

In another OIP Opinion, the issue was raised as to whether the Honolulu City Council should require the Ethics Commission of the City and County of Honolulu ("Commission") to disclose identities of persons requesting advisory

opinions from the Commission. The Commission issues advisory opinions on alleged violations of standards of conduct in the Revised Charter of the City and County of Honolulu and the Revised Ordinances of the City and County of Honolulu. Requesters of advisory opinions from the Commission are like informants or complainants in other situations because, by requesting advisory opinions from the Commission, they are informing the Commission of possible violations. If a violation is found, the Commission recommends discipline. Commission advisory opinions are available to the public in redacted form, with all information that may identify individuals discussed in the advisory opinion, including requesters and subjects, redacted. The Commission provided evidence to the OIP that disclosure of the requesters' identities would discourage future requesters from requesting advisory opinions and providing information. The OIP opined that, because the Commission relies on requesters to inform it of possible violations, disclosure of their identities would frustrate the Commission's ability to investigate alleged violations. OIP Op. Ltr. No. 96-2 (July 16, 1996).

In this case, DOH asserts that as part of its function of enforcing laws, it relies on informants for information on suspected illegal activities, and that the disclosure of informants' identities by the DOH is likely to have a chilling effect on the reporting by private citizens of possible violations. The DOH believes that "if we divulge complainant's names, people will be discouraged from complaining and thus reduce our effectiveness." The DOH has further evidenced its concerns by noting the frequent anonymous phone calls, and the necessity to have on the DOH's Consumer Complaint form, a check off box to instruct the DOH whether or not the complainant's name may be released to the business that is the subject of the complaint. The DOH also asserts that it often has no other way of obtaining information about possible violations. Therefore, consistent with our prior opinions, we opine here that the DOH has discretion to withhold from disclosure complainants' identities under section 92F-13, Hawaii Revised Statutes, because disclosure would likely frustrate the DOH's legitimate government function of investigating alleged violations.

III. SCOPE OF REDACTION

In previous opinions, the OIP noted that in cases where a person's identity may be withheld from disclosure under the "frustration" exception, identifying information in addition to the person's name may be redacted, if disclosure would result in the "likelihood of actual identification" of the person. See, e.g., OIP Op. Ltr. No. 94-8 at 11 (May 12, 1994). This identifying information is particular to the facts of a case, and what may be redacted must be determined on a case-by-case inquiry. Therefore, if a person's identity is so closely linked to the company he works for that disclosing the name of the company would lead to the actual identity of the individual, there may be instances when it is appropriate to redact the name of the company the person works for.

IV. DESTRUCTION OF RECORDS

When an agency has a pending request for government records, it would be improper to destroy those requested records, even when the records would otherwise be allowed by law to be destroyed, or even if there is eventually a ruling that those requested records are not public. The OIP has issued a formal opinion letter stating:

> [t]he disposal of government records is generally governed by Chapter 94, Hawaii Revised Statutes, entitled "Public Archives; Disposal of Records." Because the retention and destruction of government records are outside the scope of the UIPA, questions on these matters should be directed to the Archives Division, Department of Accounting and General Services.
> For purposes of complying with the UIPA, we believe that when a government agency receives a request for the disclosure of a record that is required to be made available for public inspection, it would be improper for the agency to avoid its disclosure obligations by intentionally or knowingly destroying the requested record.

OIP Op. Ltr. No. 92-13 at 6 fn 1 (Aug. 13, 1992). We advise that for all future record requests, if there is a genuine issue of disclosability that requires consultation with the OIP, or with your Deputy Attorney General, you develop safeguards to ensure that the record is not destroyed while the request is still pending.

CONCLUSION

The DOH relies on information from complainants to perform its legitimate government function of investigating alleged law violations. If identities of these informants were made public, it would likely chill the DOH's ability to obtain such information in the future, thus frustrating its ability to investigate alleged violations. Therefore, the DOH may withhold disclosure of informant's identities under section 92F-13(3), Hawaii Revised Statutes.

Very truly yours,

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Staff Attorney

APPROVED:

Moya T. Davenport Gray
Director

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