

# HONOLULU POLICE DEPARTMENT

## POLICY SUPPORT OPERATIONS

August 6, 2018

Policy Number 5.09

### RELEASE OF PHOTOGRAPHS OF ARRESTED PERSONS

#### POLICY

- I. In accordance with an Office of Information Practices (OIP) ruling, photographs of arrested persons (mug photos) are public records and therefore are available for public access.
- II. All requests for mug photos shall be referred to the Records and Identification Division who is responsible for making available/issuing mug photos to requestors.

#### PROCEDURE

##### I. DEFINITION

Section 846-1, Hawaii Revised Statutes, defines "nonconviction data" 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."

##### II. RULES GOVERNING THE RELEASE OF MUG PHOTOS

A. Generally, mug photos may be released as follows:

1. A mug photo may be released for a period of one year from the date of arrest as long as the arrest does not have a disposition as set out in the definition of "nonconviction data" and there is no expungement order in place.

2. After one year from the date of arrest, the mug photo for that arrest may be released if the subject was convicted in court for that offense or the case is actively under prosecution.
- B. Other circumstances may require case-by-case decisions for release/nonrelease; some situations may require review and decision by the OIP. See OIP opinion letters No. 03-09 (Attachment 1) and No. 94-12 (Attachment 2) for further information.

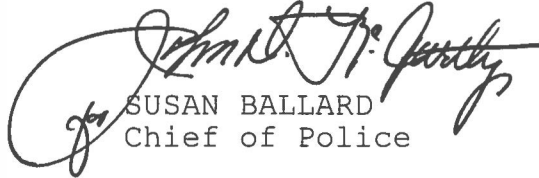
### III. PROCEDURES

- A. All requests for mug photos should be made by submitting the Request for Mug Photographs, HPD-434 form, to the Records and Identification Division. Forms are available from the Records and Identification Division and on the intranet under "HPD FORMS."
- B. Prior to fulfilling the mug photo request, the Records and Identification Division shall make the preliminary verification of the identification of the subject of the photograph.
- C. Investigators who wish to delay the release of a mug photo (see section II B above) must contact the Records and Identification Division as soon as possible to request and explain the delay. Whenever possible, they should also state the anticipated date that the photograph may be released.

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- D. Commanders of investigative elements may release mug photos to facilitate the search for persons sought in connection with crimes (e.g., escapes from correctional facilities). The release of mug photos shall be in accordance with section II above.



SUSAN BALLARD  
Chief of Police

Attachments

Post on bulletin  
board for one week

Policy first issued  
May 15, 1996



LINDA LINGLE  
GOVERNOR

JAMES H. AIOA, JR.  
LIEUTENANT GOVERNOR

LESLIE H. KONDO  
DIRECTOR

**STATE OF HAWAII**  
**OFFICE OF THE LIEUTENANT GOVERNOR**  
**OFFICE OF INFORMATION PRACTICES**  
NO. 1 CAPITOL DISTRICT BUILDING  
250 SOUTH HOTEL STREET, SUITE 107  
HONOLULU, HAWAII 96813  
TELEPHONE 808-580-1400 FAX 808-593-1412  
E-MAIL: [info@oip.hawaii.gov](mailto:info@oip.hawaii.gov)  
WEBSITE: [www.oip.hawaii.gov](http://www.oip.hawaii.gov)  
June 26, 2003

The Honorable Lee D. Donohue  
Chief of Police  
City and County of Honolulu  
801 South Beretania Street  
Honolulu, Hawaii 96813

Re: Ancillary Issues Not Addressed by OIP Opinion Letter  
No. 94-12 on Police Department Mug Shots

Dear Chief Donohue:

This letter is in reply to former Chief Michael Nakamura's letter to the Office of Information Practices ("OIP") of July 12, 1994 and your letter of May 5, 1999, requesting clarification of the above-referenced opinion letter.

**ISSUES PRESENTED**

I. Whether police departments are authorized, by the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), to withhold access to mug shots<sup>1</sup> when an arrest record which includes the mug shots is expunged or where there is a possibility that an arrest record may be expunged under section 831-3.2, Hawaii Revised Statutes.

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<sup>1</sup> The term "mug shot" is defined as "a photograph of a person's face taken after the person has been arrested and booked." Black's Law Dictionary 1035 (7<sup>th</sup> ed. 1999).

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II. Whether chapter 846, Hawaii Revised Statutes, which covers disclosure of criminal history record information and nonconviction data, authorizes police departments to withhold access to mug shots.

III. Whether police departments are authorized, under the UIPA, to withhold access to identifying numbers and arrest dates contained on mug shots.

IV. Whether police departments may temporarily withhold access to a mug shot of an arrested person due to concerns that release could place an individual in personal danger or reveal parts of confidential investigations, or when such photographs are expected to be used as part of a photo or other pretrial identification procedure.

#### BRIEF ANSWERS

I. Yes. When an individual obtains an expungement order, photographs retained by county police departments in connection with the particular arrest for which the expungement order was granted must remain confidential, except for the limited exceptions for law enforcement purposes contained in section 831-3.2(d), Hawaii Revised Statutes.

However, the possibility that an expungement order may be obtained is insufficient to authorize non-disclosure of mug shots, and withholding access on the basis that an arrest may later be expunged is not authorized under the UIPA.

II. In certain circumstances. Chapter 846, Hawaii Revised Statutes, does not restrict the disclosure of an individual's mug shot connected with an arrest without a recorded disposition which took place less than one year from disclosure.

After one year from the date of a person's arrest, the mug shot is protected from disclosure unless: (1) an active prosecution of the charge is pending, or (2) the arrest results in a conviction.

III. No. The UIPA does not authorize withholding of access to identifying numbers and arrest dates contained on mug shots.

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IV. No. As the fact of an arrest is public record, disclosure of a mug shot is not reasonably likely to place an individual in physical danger. The public nature of an arrest record also makes it unlikely that disclosure of a mug shot would reveal parts of confidential investigations. Even where mug shots have been widely disseminated in the media, subsequent pretrial identifications are admissible into evidence.

#### FACTS

In the OIP Opinion Letter Number 94-12, the OIP opined that a Hawaii County Police Department mug shot must be made available for public inspection and copying under the UIPA. In that case, a criminal conviction resulted from the arrest for which the mug shot was taken. The OIP concluded that disclosure of the mug shot would not constitute "a clearly unwarranted invasion of personal privacy" and, therefore, section 92F-13(1), Hawaii Revised Statutes, did not supply a basis to withhold the mug shot in the circumstances of that case.

The Honolulu Police Department ("HPD") thereafter requested that the OIP address the ancillary issues noted above.

#### DISCUSSION

##### I. EFFECT OF HAWAII'S EXPUNGEMENT STATUTE ON THE DISCLOSURE OF POLICE DEPARTMENT MUG SHOTS

Section 831-3.2(a), Hawaii Revised Statutes, requires the Attorney General or an authorized representative to issue an expungement order annulling, canceling, or rescinding an arrest record<sup>2</sup> upon written application by the person arrested for or charged with, but not convicted of, a crime ("Expungement Applicant"), except in certain circumstances listed therein. The expungement applicant is then issued an expungement certificate "stating that the order has been issued and that its effect is to annul the record of a specific arrest." Haw. Rev. Stat. § 831-3.2(e) (1993). The outcome of an expungement certificate is spelled out in the statute:

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<sup>2</sup> "Arrest record" is defined as "any existing photographic and fingerprint cards relating to the arrest." Haw. Rev. Stat. § 831-3.2(f)(2) (1993)

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Upon the issuance of the expungement certificate, the person applying for the order shall be treated as not having been arrested in all respects not otherwise provided for in this section.

Haw. Rev. Stat. § 831-3.2(b) (1993) (emphasis added).

When an expungement order is issued, all arrest records maintained by the county police departments are forwarded to the Attorney General for placement in a confidential file. Haw. Rev. Stat. § 831-3.2(c) (1993). Access is thereafter granted only in limited circumstances to courts and law enforcement personnel, and requests for access to those records by others are treated as though the Expungement Applicant has no arrest record. See Haw. Rev. Stat. § 831-3.2(d) (1993).

The Expungement Applicant can also request return of all photographs and fingerprints taken in connection with that person's arrest, and the Attorney General, within 120 days thereafter, is required to deliver or cause to be delivered all fingerprints or photographs of the person "unless the person has a record of conviction or is a fugitive from justice, in which case the photographs or fingerprints may be retained by the agencies holding such records." Haw. Rev. Stat. § 831-3.2(a) (1993).

The Hawaii Criminal Justice Data Center ("HCJDC") is the State's central repository of criminal history record information and is a division of the Department of the Attorney General.<sup>3</sup> To determine the HCJDC's practice, the OIP contacted the Director of the HCJDC, Liane Moriyama, who informed the OIP that (1) records of expunged arrests are placed within confidential files located in a secured location at the HCJDC; and (2) if a person who obtains an expungement order has a record of conviction, the photographs and fingerprints associated with the expunged arrest are retained by county police departments and are not returned to the person

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<sup>3</sup> The HCJDC is "responsible for the collection, storage, dissemination, and analysis of all pertinent criminal justice data from all criminal justice agencies, including, the collection, storage, and dissemination of criminal history record information by criminal justice agencies in such a manner as to balance the right of the public and press to be informed, the right of privacy of individual citizens, and the necessity for law enforcement agencies to utilize the tools needed to prevent crimes and detect criminals in support of the right of the public to be free from crime and the fear of crime." Haw. Rev. Stat. § 846-2.5(a) (Supp. 2002).

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whose arrest is expunged, as permitted by section 831-3.2(a), Hawaii Revised Statutes. This practice was also confirmed with Major Carl Godsey of the HPD Records and Identification Division.

The question addressed here is whether those records permitted to be retained by the police departments must be made publicly available. The OIP has previously determined that mug shots maintained by the Hawaii County Police Department are government records for the purposes of the UIPA. OIP Op. Ltr. No. 94-12 at 2 (June 28, 1994).

**A. Disclosure of a Mug Shot When an Expungement Order Has Been Obtained Would Frustrate a Legitimate Government Function**

Under the UIPA, an agency is not required to disclose "[g]overnment records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function." Haw. Rev. Stat. § 92F-13(3). (1993) ("Frustration Exception"). In this case, the statute sets out the legitimate government function that would be frustrated if the mug shot is disclosed to the public after an expungement order is issued: the expungement applicant must be treated in all respects as though the arrest never happened, and responses to requests for expunged arrest records are to be the same as if no record existed, i.e., the records are not to be divulged. Haw. Rev. Stat. § 831-3.2 (1993). Moreover, section 831-3.2(d), Hawaii Revised Statutes, explicitly limits the parties to whom records of an expunged arrest are permitted to be released and should be consulted in connection with all requests for disclosure of records of an expunged arrest. If mug shots taken in connection with such an arrest were publicly available despite the issuance of an expungement order,<sup>4</sup> the statute's requirement that an arrest be treated as if it had never occurred would be nullified, and the statute's purpose, i.e., the legitimate government function, would be defeated.

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<sup>4</sup> The OIP recognizes that, under section 831-3.2(b), Hawaii Revised Statutes, the triggering mechanism is the issuance by the Attorney General of the expungement certificate. However, given that the expungement certificate may be issued subsequent to the expungement order, the OIP believes that any public disclosure of an arrest record after the expungement order has been issued would defeat the Legislature's intent. The OIP, therefore, concludes that, for UIPA purposes, the date of the expungement order is the date after which disclosure should be withheld.

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Accordingly, the OIP opines that under section 92F-13(3), Hawaii Revised Statutes, police departments and the HCJDC should withhold from public disclosure those mug shots related to arrests for which expungement orders have been issued by the Attorney General.

**B. Disclosure of Mug Shot Where There is a Possibility that an Expungement Order May Be Obtained**

HPD personnel have also expressed concern as to disclosure of the mug shot of an arrested person when there is a possibility that a person may later apply for and receive an expungement order. The OIP notes that the only UIPA exception that could preclude disclosure in such situations is the exception for the disclosure of government records which would constitute a clearly unwarranted invasion of personal privacy set forth at section 92F-13(1), Hawaii Revised Statutes.<sup>5</sup>

Under the UIPA, records are not authorized to be withheld from public inspection when the public interest in disclosure outweighs the privacy interest of the person about whom the record pertains. Haw. Rev. Stat. §§ 92F-13(1), 92F-14(a) (1993). The weight to be given to the public interest in disclosure is set forth in the UIPA's legislative history:

If the privacy interest is not "significant," a scintilla of public interest in disclosure will preclude a finding of a clearly unwarranted invasion of personal privacy.

S. Conf. Comm. Rep. No. 235, S.J. 689, 690 (1988). Here, the Legislature has stated that there is no privacy interest in information necessary to prosecute a violation or to continue an investigation. Haw. Rev. Stat. 92F-14(b)(2) (Supp. 2002). Based on this statutory language, the OIP has opined that, once an arrest occurs, the suspect's privacy interest in the fact of the arrest is diminished or nonexistent. See OIP Op. Ltrs. No. 99-2 at 8 (Apr. 5, 1999); No. 95-21 at 16-18 (Aug. 28, 1995); No. 92-19 at 6 (Oct. 7, 1992); No. 91-4 at 10 (Mar. 25, 1991). Mug shots are a record of an event, i.e., the arrest, that carries no significant privacy interest. Given that there is no significant

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<sup>5</sup> In this case, the Frustration Exception is not applicable as, absent an expungement order, there is no frustration of the legitimate government function of treating the arrest as it had never occurred.

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privacy interest, the public interest in disclosure must prevail.<sup>5</sup> Therefore, the OIP finds that section 92F-13(1), Hawaii Revised Statutes, does not authorize the withholding of access to mug shots due to the possibility that an expungement order may be obtained in the future.

## II. EFFECT OF CHAPTER 846, HAWAII REVISED STATUTES, ON THE DISCLOSURE OF MUG SHOTS

When government records are protected from disclosure by a specific federal or State law, agencies are not required to make those records available for public inspection and copying. Haw. Rev. Stat. 92F-13(4) (1993). The HPD has requested that the OIP advise whether mug shots may be withheld from disclosure pursuant to chapter 846, Hawaii Revised Statutes, which establishes the HCJDC and governs the disclosure of criminal history record information and nonconviction data.

Chapter 846, Hawaii Revised Statutes, limits the dissemination of "nonconviction data" to criminal justice agencies and other enumerated individuals and agencies. Haw. Rev. Stat. § 846-9 (Supp. 2002). The statute defines "nonconviction data" 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).

Thus, applying the definition of nonconviction data to the disclosure of mug shots, chapter 846, Hawaii Revised Statutes, authorizes police departments to withhold access to information, including mug shots,

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<sup>5</sup> Although an arrestee may apply for an expungement order, the possibility that an expungement order may be issued is insufficient to authorize the withholding of access to a mug shot. It is the issuance of the expungement order that supplies the basis for the authority to withhold access to records of an expunged arrest.

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concerning arrests more than one year old where "no active prosecution of the charge is pending." Haw. Rev. Stat. § 846-1 (1993). Also authorized to be withheld is information, including mug shots, concerning arrests where (1) the police department has decided to not refer the matter to a prosecutor, (2) the prosecutor has decided to not file a criminal proceeding, (3) a proceeding has been indefinitely postponed, (4) the person charged has been acquitted, or (5) the charge has been dismissed. Id.

"Nonconviction data" does not include an arrested person's mug shot if the arrest is less than one year old or if active prosecution of the charge remains pending.

Under the provisions of section 846-9, Hawaii Revised Statutes, there is no limitation on dissemination of conviction data. Thus, an arrest which has resulted in a conviction is considered a public record.<sup>7</sup> The OIP therefore concludes, as mug shots are taken at the time of arrest,<sup>8</sup> mug shots taken in connection with an arrest where a conviction results are public records.

Based on chapter 846, Hawaii Revised Statutes, the OIP concludes that its provisions affect only the release of nonconviction data, as defined in section 846-1, Hawaii Revised Statutes, and do not preclude the release of mug shots of persons arrested less than one year prior or against whom active prosecution of a charge remains pending. Nonetheless, juvenile records can only be disclosed as authorized by section 846-12, Hawaii Revised Statutes.

Thus, where a department receives a request for an individual's mug shot within one year of the person's date of arrest, it may release the mug shot so long as the arrest does not have a disposition as set out in the definition of "nonconviction data" and so long as there is no expungement order in place. However, if more than one year has elapsed since the person's

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<sup>7</sup> <http://www.state.hi.us/rcide/crimhistary.htm>, accessed June 5, 2003.

<sup>8</sup> You have advised the OIP in a letter dated May 5, 1999, that mug shots are taken at the time of the arrest.

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arrest, the department may not release the mug shot unless the case is actively under prosecution or there has been a conviction.<sup>9</sup>

### III. STATE IDENTIFICATION NUMBERS AND ARREST DATES ON MUG SHOTS

#### A. State Identification Numbers

The HPD has also asked that the OIP advise whether the State Identification Number ("SID") assigned to the person depicted in the mug shot and noted on the mug shot may be withheld from disclosure, requesting the OIP's opinion concerning the effect of chapter 846, Hawaii Revised Statutes, on public disclosure of SIDs.

The HCJDC advised the OIP that, when a person is arrested for the first time, a SID is assigned to that person and is contained on their booking photographs or mug shots. The HCJDC explained:

The . . . system uses the SID number as a unique identifier for each and every offender that is arrested, fingerprinted and processed through the criminal justice system. An offender should have only one SID number regardless of the number of times an offender is arrested.

The OIP believes, if it were possible for a member of the public to use a SID to access nonconviction data, the HCJDC's legitimate government function may be frustrated because it would prevent it from maintaining the confidentiality of nonconviction data, as required by chapter 846, Hawaii Revised Statutes. Therefore, the OIP requested that the HCJDC advise it whether public access to the SIDs would jeopardize the security of the HCJDC's criminal history record database or permit unauthorized users to obtain access to name indexed criminal history record information. The HCJDC advised that public access to SIDs contained on police department mug shots would only jeopardize the security of the HCJDC's database if a

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<sup>9</sup> Additionally, dissemination of data concerning cases in which the defendant was acquitted, or charges are dismissed, by reason of physical or mental disease, disorder or defect under chapter 704 is not limited by chapter 846. Haw. Rev. Stat. § 846-9 (Supp. 2002). However, disclosure of juvenile records is governed by the express provisions of section 846-12, Hawaii Revised Statutes.

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person with knowledge of a SID has access to a terminal connected to the database and has a code to log on to the system. The HCJDC also advised that the public access terminal does not allow such use based on a SID. The OIP therefore concludes that the public disclosure of this number in and of itself will not jeopardize the security of the HCJDC's record-keeping system. Rather, any threat to security would only be present where an unauthorized user has obtained both access to a valid code to log on to the system and has access to a terminal connected to the database. Based upon the HCJDC's statements, the OIP finds such a scenario where a member of the public is able to access the database to be extremely remote and highly speculative. Therefore it is the OIP's opinion that SIDs are not exempt from public disclosure by the Frustration Exemption.

#### B. Arrest Dates

The HCJDC asked that the OIP address the issue of whether the arrest dates contained on mug shots may be withheld from disclosure. The HCJDC states that disclosure of arrest dates may permit a charge-by-charge comparison with conviction information publicly disclosable pursuant to chapter 846, Hawaii Revised Statutes, which may impart nonconviction data.<sup>10</sup> Conceivably, compilation of this information involves privacy concerns. The OIP notes that, since police blotters are maintained chronologically, arrest dates are already available to the public. The OIP Opinion Letter Number 91-4 discusses the privacy interest in police blotter information and notes that "authorities are nearly unanimous in concluding that individuals do not have a significant, or constitutional privacy interest, in police blotter information. Under both the American and the English

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<sup>10</sup> Chapter 846, Hawaii Revised Statutes, does not limit public access to dates of arrest, as that information is contained in:

[o]riginal records of entry such as police blotters maintained by criminal justice agencies, compiled chronologically and required by law or long-standing custom to be made public if such records are organized on a chronological basis[.]

Haw. Rev. Stat. 846-8(2) (1993). Arrest records, maintained by police departments according to date and time of arrest, have traditionally been publicly accessible. See OIP Op. Ltr. No. 91-4 (Mar. 25, 1991). These records are referred to as "police blotters." *Id.*

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judicial system, secret arrests are unlawful, indeed repugnant." (quoting Newspapers, Inc. v. Breir, 279 N.W.2d 179, 189 (Wis. 1979)). OIP Op. Ltr. No. 91-4 at 8 (Mar. 25, 1991).

The OIP believes that, since there is no significant privacy interest in information concerning the fact of an arrest and the information regarding the arrest data is available to the public via other sources, there is no significant privacy interest in arrest dates. Therefore, the UIPA's balancing test requires that the public interest in disclosure prevail; hence, redaction of arrest dates on mug shots is not authorized under the UIPA. So long as the police departments do not disclose the mug shot of an individual in a manner inconsistent to that described herein, the fact that an individual may uncover nonconviction data by making data comparison is not a sufficient cause to withhold the date of the arrest from the public.

#### **IV. MUG SHOTS AND THE FRUSTRATION EXCEPTION**

##### **A. Temporarily Withholding Mug Shots Because of Concerns that Release Could Place an Individual in Personal Danger**

The HPD has requested that the OIP advise it as to whether the Frustration Exception would authorize the withholding of access to mug shots when the HPD is concerned that release could place an individual in personal danger.

The federal Freedom of Information Act, 5 U.S.C. § 552(b) ("FOIA") (2002), contains a provision which provides guidance. Under the federal FOIA, a document compiled for law enforcement purposes can be withheld from disclosure "only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to endanger the life or physical safety of an individual." 5 U.S.C. § 552(b)(7)(F) (2002). The OIP's research based on this exemption did not locate any federal court decisions exempting arrest records. The fact that courts have not exempted arrest records under the FOIA leads the OIP to believe that the exemption cannot be categorically invoked to apply to the disclosure of mug shots.

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As stated above, the OIP has previously held, in the OIP Opinion Letter Number 91-4, that public disclosure of police blotter information (the official record of an arrest, which typically includes a description of the arrest and the arrestee) would not cause the frustration of a legitimate government function and must be made available for inspection and copying upon request. In the OIP Opinion Letter Number 91-4, the HPD did not raise, and the OIP did not address, a concern that release of the police blotter information would jeopardize the safety of the arrestee. Given that the fact of an arrest is already public record, the OIP believes that the disclosure of a photograph of an arrestee will not result in placing an individual in physical danger. Therefore, generally, the remote and unsubstantiated possibility that a person's safety will be jeopardized by the release of the person's mug shot is insufficient to justify withholding the mug shot from public disclosure.

Nonetheless, the OIP believes that there may conceivably be a situation when a police department would have compelling information indicating that disclosure of a mug shot would reasonably be expected to endanger the life or physical safety of an individual. Under these circumstances, withholding disclosure of the mug shots may be justified. The OIP believes that, based upon the information provided by the HPD, such a situation will arise very infrequently and the OIP therefore recommends police departments address those situations only on a case-by-case basis after consultation with counsel or the OIP.

**B. Temporarily Withholding of Mug Shots Because Release Would Reveal Parts of Confidential Investigations or Be Used in Photographic Lineups to Protect the Admissibility of Pretrial Identification Procedures**

The HPD also maintains that there may be instances when disclosure of the mug shots would reveal parts of confidential investigations and cause the frustration of a legitimate government function. The OIP has previously held that ongoing investigation material is exempt from public disclosure, so long as the agency withholding access provides specific facts that establish (1) that a related criminal case is under investigation or is being prosecuted in the courts, and (2) that disclosure of the information would in some particular way disrupt or harm that investigation or prosecution. See OIP Op. Ltr. No. 95-21 at 10-12 (Aug. 28, 1995). However, the fact of an arrest does not constitute such exempt information, as an arrest is a public event.

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See United States Dep't of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 109 S. Ct. 1468, 103 L. Ed. 2d 774 (1989). And, as mug shots are taken at the time of the arrest, disclosure of the mug shot itself should not reveal any part of a confidential investigation. Therefore, based upon the information provided by the HPD, the OIP finds that the UIPA's Frustration Exception does not authorize police departments to withhold access to mug shots on the basis that disclosure would reveal information about a confidential investigation.

The HPD has advised that police departments frequently use an arrested person's mug shot in connection with a photographic or other pretrial identification procedure. Witnesses to a crime or victims of a crime are asked to identify the perpetrator of the crime based on a photographic lineup.<sup>11</sup> The HPD has expressed a concern as to the possibility of a photographic lineup being ruled inadmissible where a mug shot has been made publicly available. This concern was not present in the facts involved in the OIP Opinion Letter No. 94-12, as the mug shot involved in that case was connected with an arrest that had already led to a conviction. The UIPA's legislative history indicates that nondisclosure of mug shots would be authorized as "[r]ecords or information compiled for law enforcement purposes" if disclosure would result in the frustration of a legitimate government function. See S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1095 (1988).

Again, looking to the federal FOIA for guidance, under the FOIA's Exemption 7(A), a federal law enforcement agency may withhold access to records or information compiled for law enforcement purposes but only to the extent that disclosure of the record "could reasonably be expected to interfere with enforcement proceedings."

If the prior publication of an arrested person's mug shot could lead to the inadmissibility of the results of a photographic or other lineup

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<sup>11</sup> The term "lineup" is defined as "a police identification procedure in which a criminal suspect and other physically similar persons are shown to the victim or witness to determine whether the suspect can be identified as the perpetrator of the crime." Black's Law Dictionary 941 (7<sup>th</sup> ed. 1999)



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identification, then the disclosure of the mug shot, before such time as the line up has been conducted, "could reasonably be expected to interfere with enforcement proceedings."

Pretrial photographic identifications are admissible in the State of Hawaii provided that the photographic display is not "so impermissibly suggestive as to give rise a very substantial likelihood of irreparable misidentification." State v. Naeole, 62 Haw. 563 570 (1980) (quoting State v. Malani, 59 Haw. 167, 170 (1978)).

Although no Hawaii court has considered whether the prior publication or public dissemination of a photograph of an arrested individual would result in a finding that a lineup is impermissibly suggestive, the United States Court of Appeals for the Seventh Circuit has specifically considered this issue.

In United States v. Johnson, 859 F.2d 1289 (7th Cir. 1989), the defendant alleged that the prior public dissemination of his photograph on a Milwaukee television news broadcast resulted in an impermissibly suggestive photograph lineup. The same photograph was also posted in another bank located ten miles from where the tellers who made a pretrial identification of the defendant worked.

In rejecting the defendant's argument, the court reasoned:

Johnson argues that it is somehow unconstitutional for the police to use in an identification procedure a photograph that they themselves had earlier distributed publicly. We disagree, and are not surprised that Johnson cites no authority for this proposition. Merely to create a risk that a witness may see a publicly distributed photo does not automatically create a substantial likelihood of subsequent irreparable misidentification.

Id. at 1296; see also United States v. Hunter, 982 F. Supp. 541, 545-46 (N. Dist. Ill. 1997) ([P]hotograph of suspect publicly aired on television cannot establish suggestiveness. "[R]eliability of witnesses' identifications was a matter appropriately left to the jury.")

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The OIP has no reason to believe that the Hawaii appellate courts would reach a conclusion any different from the Johnson court's opinion. Accordingly, given that prior publication of a photograph of an arrested subject would not lead to a finding that a subsequent photographic or lineup identification would be so impermissibly suggestive as to create a substantial likelihood of misidentification, such a disclosure could not reasonably be expected to interfere with enforcement proceedings. Thus, it is the OIP's opinion that a mug shot of an arrested subject may not be withheld under the UIPA's frustration of legitimate government function exception on the basis that the prior public disclosure of the mug shot may taint the admissibility of subsequent pretrial identification procedures.

#### CONCLUSION

The OIP concludes that photographs retained by county police departments associated with arrests that have been expunged pursuant to chapter 831, Hawaii Revised Statutes, are protected from public inspection and copying under section 92F-13(4), Hawaii Revised Statutes, as the purpose of an expungement order is to treat the arrest as if it had never occurred.

The OIP further concludes that chapter 846, Hawaii Revised Statutes, does not restrict the public dissemination of police department mug shots associated with arrests less than one year old that have no recorded disposition. In contrast, the OIP concludes that chapter 846, Hawaii Revised Statutes, would prohibit the dissemination of mug shots taken in connection with arrests that are over one year old unless an active prosecution of a charge is pending, or unless the arrest leads to a conviction.

Also, the OIP does not believe that the disclosure of the State Identification Number or the arrest date contained in each arrested person's mug shot would jeopardize the security of a record-keeping system, and, therefore, result in the frustration of a legitimate government function.

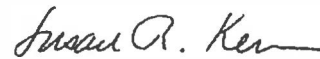
Nor does the UIPA's Frustration Exception authorize categorical denial of access to mug shots based on considerations that release would place an individual in physical danger, or reveal a part of a confidential investigation. And, as disclosure of an arrested person's mug shot before pretrial identification procedures have been performed would not lead to the

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inadmissibility of the result of the identification procedure, the disclosure of an arrested person's mug shot would not result in the frustration of the legitimate function of law enforcement.

Very truly yours,



Susan R. Kern  
Staff Attorney

APPROVED:



Leslie H. Kondo  
Director

SRK: ankd

cc: The Honorable Lawrence Mahuna, Chief of Police  
County of Hawaii

The Honorable George Freitas, Jr., Chief of Police  
County of Kauai

The Honorable Thomas Phillips, Chief of Police  
County of Maui

Ms. Liane Moriyama, Administrator  
Hawaii Criminal Justice Data Center

The Honorable Mark J. Bennett, Attorney General

Mr. Timothy Liu, Legal Advisor  
Honolulu Police Department

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JOHN WAIHEE  
GOVERNOR  
ROBERT A. MARRAS  
WARREN P. RICE  
ATTORNEY GENERAL



KATHLEEN A. CALLAGHAN  
DIRECTOR  
PH. (808) 586-1400  
FAX (808) 586-1412

STATE OF HAWAII  
DEPARTMENT OF THE ATTORNEY GENERAL  
OFFICE OF INFORMATION PRACTICES  
426 QUEEN STREET, ROOM 201  
HONOLULU, HAWAII 96813-2904

June 29, 1994

Honorable Victor V. Vierra  
Chief of Police  
Hawaii County Police Department  
349 Kapiolani Street  
Hilo, Hawaii 96720

Dear Chief Vierra:

Re: Police Department Mug Shots

This is to confirm the oral opinion provided to Major Cheryl Reis of the Hawaii County Police Department by the Office of Information Practices ("OIP") on June 27, 1994, concerning the public's right to inspect and copy booking photographs or "mug shots" of arrested individuals.

Major Reis contacted the OIP for advice in responding to requests that the Hawaii County Police Department received from several mainland and Hawaii media organizations for a copy of the mug shot of Mr. Samuel Reeves, who was recently convicted of a criminal offense in the County of Hawaii. Mr. Reeves is apparently the father of actor Keanu Reeves.

In our telephone conversation, the OIP informed Major Reis that mug shots maintained by the Hawaii County Police Department would not be protected from disclosure under any of the exceptions in section 92F-13, Hawaii Revised Statutes.

**ISSUE PRESENTED**

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), mug shots or booking photographs maintained by the county police departments must be made available for inspection and copying upon request.

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**BRIEF ANSWER**

Yes. Mug shots are government records for purposes of the UIPA. It is our opinion that only the UIPA's "clearly unwarranted invasion of personal privacy" exception would arguably permit the county police departments to withhold access to booking photographs or mug shots of individuals who have been arrested.

Based upon the principles set forth in OIP Opinion Letter No. 91-4 (Mar. 25, 1991), and in U.S. Supreme Court and state court decisions concerning mug shots and arrest records, it is our opinion that the disclosure of a mug shot would not constitute a clearly unwarranted invasion of personal privacy under the UIPA.

Accordingly, we find that the Hawaii County Police Department must make a copy of Mr. Samuel Reeves' mug shot available for public inspection and copying upon request.

**DISCUSSION**

The UIPA provides that "[e]xcept as provided in section 92F-13, each agency upon request by any person shall make government records available for inspection and copying during regular business hours." Haw. Rev. Stat. § 92F-11(b) (Supp. 1992). Under the UIPA, the term "government record" means "information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. § 92F-3 (Supp. 1992) (emphases added). Mug shots kept by the Hawaii County Police Department are government records for purposes of the UIPA.

In the opinion of the OIP, only the UIPA's "clearly unwarranted invasion of personal privacy" exception, section 92F-13(1), Hawaii Revised Statutes, would arguably permit the Department to withhold a copy of Mr. Reeves' mug shot.

In OIP Opinion Letter No. 91-4 (Mar. 25, 1991), we concluded that the disclosure of chronologically compiled arrest or police blotters maintained by the county police departments would not constitute a clearly unwarranted invasion of personal privacy under the UIPA. This conclusion was based upon state court decisions holding that an arrest is a public, not a private event and that secret arrests are a "concept odious to a democratic

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society." OIP Op. Ltr. No. 91-4 at 9, quoting, Morrow v. District of Columbia, 417 F.2d 728, 741-42 (D.C. Cir. 1969).

Further research we have conducted reveals that the disclosure of an arrested person's mug shot would not constitute a clearly unwarranted invasion of personal privacy. For example, in Paul v. Davis, 424 U.S. 693 (1976), the U.S. Supreme Court held that a police department's circulation to merchants of a mug shot of a person thought to be an active shoplifter would not implicate any constitutionally protected right to privacy:

Davis claims constitutional protection against the disclosure of the fact of his arrest on a shoplifting charge. His claim is based, not upon any challenge to the State's ability to restrict his freedom of action in a sphere contended to be "private" but instead on a claim that the State may not publicize a record of an official act such as an arrest. None of our substantive decisions hold this or anything like this, and we decline to enlarge them in this matter.

Davis, 424 U.S. at 713.

Similarly, in Detroit Free Press, Inc. v. Oakland County Sheriff, 418 N.W.2d 124 (Mich. Ct. App. 1987), the court held that booking photographs of suspects charged with felonies awaiting trial were not protected from disclosure under an exception to the Michigan Freedom of Information Act for records of a personal nature, the disclosure of which would be a clearly unwarranted invasion of privacy. Noting that comment (c) to § 652D of the Restatement (Second) of Torts (1977) states that publicity concerning arrests are matters of legitimate public concern, the court stated:

We conclude that the disclosure sought by plaintiff in this case would violate neither common law nor constitutional principles of privacy and that, using the approach outlined in Justice Cavanagh's opinion in *State Employees Ass'n*, nondisclosure is not justified under [the Michigan Freedom of Information Act] . . . .

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Based upon the principles set forth in OIP Opinion Letter No. 91-4 and the above-cited authorities, it is the opinion of the OIP that disclosure of Mr. Reeves' mug shot would not constitute a clearly unwarranted invasion of personal privacy under section 92F-13(1), Hawaii Revised Statutes.

Additionally, because we do not believe that any of the other exceptions in section 92F-13, Hawaii Revised Statutes, would permit the Hawaii County Police Department to withhold access to this mug shot, we conclude that it must be made available for inspection and copying during regular business hours.

Please contact me at 586-1404 if you or your staff should have any questions regarding the advice set forth above.

Very truly yours,



Hugh R. Jones  
Staff Attorney

APPROVED:



Kathleen A. Callaghan  
Director

HRJ:sc

c: Jeffrey S. Portnoy, Esq.

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