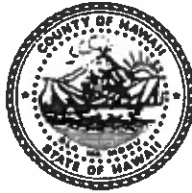


William P. Kenoi
Mayor



Molly A. Stebbins
Corporation Counsel

William V. Brilhante, Jr.
Assistant Corporation
Counsel

COUNTY OF HAWAII
OFFICE OF THE CORPORATION COUNSEL

101 Aupuni Street, Suite 325 • Hilo, Hawaii 96720-4262 • (808) 961-8251 • Fax (808) 961-8622

January 12, 2016

Ms. Liza R.H. Onuma
Staff Attorney

E-mail only

[REDACTED]
Office of Information Practices
No. 1 Capitol district Building
250 South Hotel Street, Suite 107
Honolulu, HI 96813

Dear Ms. Onuma:

RE: Notice of Appeal from Denial of Access to General Records (U APPEAL 16-17)

Pursuant to Hawai'i Administrative Rules §§ 2-73-14 and -15, this is a response to the above referenced Notice of Appeal, which was received by the Hawai'i Police Department ("HPD") on December 28, 2015.

Factual Background

Appellant's November 19, 2015 request for "any police narratives prepared for police report no. C15009958" was denied by HPD by letter dated November 25, 2015. As the basis for denial, the letter cited sections 92F-13(3) and 92F-22(1)(A) and (B), Hawai'i Revised Statutes.

Records Withheld

Narratives of Officer Joshua Pa and Officer Tyler Jelsma prepared for police report no. C15009958.

Justification for Denying Access

Under section 92F-13(3), HRS, an agency is not required to disclose records that, by their nature, must be confidential in order to avoid the frustration of a legitimate government function. The OIP has long recognized the applicability of this section to certain law enforcement records and in determining whether the "frustration exemption" applies to a particular law enforcement record, the OIP has relied upon the standards set forth in Exemption 7 of the Freedom of Information Act ("FOIA"), 5 U.S.C. §552(b)(7), for guidance. (See OIP Op. Ltrs. Nos. 94-01 and 95-21).

Ms. Liza R.H. Onuma
January 12, 2016
Page 2

Exemption 7(A) of the FOIA permits the withholding of law enforcement records when disclosure “could reasonably be expected to interfere with enforcement proceedings.” As noted in OIP Op. Ltr. No. 95-21, application of this exemption requires the agency to establish that 1) a law enforcement proceedings is pending or prospective, and 2) disclosure of the documents would disrupt, impede, or otherwise harm the enforcement proceeding. (Op. Ltr. No. 95-21, citing *North v. Walsh*, 881 F.2d 1088, 1097 (D.C. Cir. 1989).

As to the first prong of Exemption 7(A), the records requested by the appellant in this case relate to a prospective criminal prosecution. The police investigation is currently suspended pending location of the suspect, for whom there is an active BOLO/APB (“Be On the Lookout/All Points Bulletin”). Upon location of the suspect it is anticipated that the case will be routed to the Prosecutor’s Office for their review and determination on charging. As to the second prong, withholding the records at this point in time is warranted in order to avoid the risk that disclosure could interfere with the prospective criminal proceedings by informing the suspect of the scope or direction of HPD’s investigation, potentially subjecting witnesses or other providing information to HPD to harassment or reprisal, permitting the target of the investigation to develop defenses that would enable the violations to go unremedied, permitting the party being investigated to destroy or alter evidence, or chilling the willingness of individuals providing information to the agency to do so. (OIP Op. Ltr. No. 95-21, citing *Robbins Tire & Rubber*, 437 U.S. 214, 239-242 (1978); *North v. Walsh*, 881 F.2d 1088, 1097 (D.C.Cir. 1989); *Alyeska Pipeline Co. v. U.S. E.P.A.*, 856 F.2d 309, 312-313 (D.C. Cir. 1988).

The denial of appellant’s request was further justified based on HRS 92F-22(A)(1). The OIP has held that this section allows police departments to deny personal record requests for evidence contained in pending investigation files, stating that “it is apparent that the exemption set forth in 92F-22(a), Hawai’i Revised Statutes is intended to protect the police’s ability to conduct its investigation without public interference.” (OIP Op. Ltr. No. 03-11).

A criminal prosecution remains a concrete and reasonable possibility in this case and release of the officers’ narratives could compromise the prospective proceedings. Therefore, HPD’s denial of access to requested records was justified and appropriate.

As requested, unredacted copies of the records to which access was denied are attached hereto for OIP’s *in camera* review. Should OIP determine that the records must be provided, HPD requests that appropriate redactions be made for protected personal information.

Please contact the undersigned if any additional information is required.

Sincerely,

Molly Stebbins
Corporation Counsel

Attach.