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OPINION

Requester: Kauai Police Department
Agency: Kauai Police Department
Date: March 22, 2007
Subject: Police Blotter Information (U RFO-G 07-44)

REQUEST FOR OPINION

The Kauai Police Department ("KPD") seeks an opinion on whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("HRS") ("UIPA"), it may redact from its Daily Arrest Log, commonly referred to as the police blotter, the names of individuals who have been arrested and either released without charges being filed or released pending further investigation.

Unless otherwise indicated, this advisory opinion is based solely upon the facts presented in Requester's letter dated October 23, 2006.

QUESTION PRESENTED

Whether police blotter information concerning an adult arrestee must be made publicly available upon request when the arrestee was either released without charges being filed or released pending further investigation.

BRIEF ANSWER

Police blotter information concerning adult offenders must be made publicly available upon request. OIP Op. Ltr. No. 91-4. The UIPA does not permit an agency to redact or to otherwise withhold the names of arrested individuals, even where the arrestee was released without charges being filed or released pending further investigation.

FACTS

KPD keeps a daily register of arrests called a Daily Arrest Log, also referred to as the police blotter. Although OIP addressed police blotter information in OIP Opinion Letter Number 91-4 ("Opinion 91-4"), concluding that police blotter data concerning adult offenders does not fall under any exception to the UIPA and thus must be disclosed, KPD argues for withholding the names of arrested individuals where the arrestee is released without charges being filed or released pending further investigation. KPD represents that, after a suspect is arrested and questioned, it may determine that the suspect is innocent or that there is insufficient evidence and the suspect is released without being charged and without having been fingerprinted or photographed. KPD also represents that suspects who are released pending further investigation sometimes become police informants, who could be endangered or at least discouraged from informing if they were known to have been arrested.

DISCUSSION

Opinion 91-4 addressed the question of whether police blotter information concerning adult arrestees must be made publicly available upon request. In that opinion, OIP considered whether chapter 846, HRS (barring dissemination of nonconviction criminal history but making an exception for original records of entry such as police blotters), or any other law, precluded such disclosure and concluded that it did not. OIP Op. Ltr. No. 91-4 at 6-8. OIP then considered the privacy interests of arrestees and concluded that legal authority almost unanimously supported the conclusion that individuals do not have a significant or constitutional privacy interest in police blotter information. Id. at 8-11. That conclusion was based upon the well-established principle that "[u]nder both the American and the English judicial system, secret arrests are unlawful, indeed repugnant." Id. at 9 (citations omitted). Finally, OIP examined the possibility that disclosure of the information could interfere with law enforcement proceedings and concluded that, given the weight of legal authority for the public nature of police blotter information, disclosure of such information could not reasonably impede or interfere with law enforcement proceedings. Id. at 11-12.

Notwithstanding Opinion 91-4, KPD argues that the disclosure of the names of arrestees who were released without charges being filed should be withheld, apparently on the theory that disclosure would be an unwarranted invasion of the arrestees' personal privacy. KPD also argues that the disclosure of the names of arrestees who were released pending further investigation could put such arrestees at risk of being identified as informants, and would thus discourage arrestees from becoming informants or, alternatively, place them in danger because they would be believed to be informants.

As a preliminary matter, OIP notes the importance of the governmental power to arrest and the public interest in how the government exercises that power:

> An arrest represents the exercise of the power of the state to deprive a person of his liberty. Under the fourth and fourteenth amendments an arrest may be made only upon probable cause. [Citations omitted.]
>
> An arrest is a completed official act. . . . We cannot view the arrest . . . as merely a tentative and incomplete jural act. Whether an arrest is subsequently ratified by the issuance of a charge of the same or greater magnitude at a later time, it is, nevertheless, at the time it is made, a completed official act of the executive branch of government.
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> The power to arrest is one of the most awesome weapons in the arsenal of the state. . . . In every case, the fact of an arrest and the charge upon which the arrest is made is a matter of legitimate public interest. The power of arrest may be abused by taking persons into custody on trivial charges when charges of greater magnitude would be appropriate. The power of arrest may be abused by overcharging for the purpose of harassing individuals and with the expectation and intent that the initial charge will be dismissed or substantially reduced.

Newspapers v. Brier, 279 N.W. 2d 179, 188-89 (Wis. 1979).

Because of the significance of the government's power to arrest, an arrest has historically and legally been considered a public event, and "'secret arrests' [are] a concept odious to a democratic society." OIP Op. Ltr. No. 91-4 at 9 (quoting Morrow v. D.C., 417 F. 2d 728, 741-42 (D.C. Cir. 1969)). "It is fundamental to a free society that the fact of arrest and the reason for arrest be available to the public." Brier, 279 N.W.2d at 190. In addition to being legally a public event, an arrest is often public as a practical matter: the fact of an individual's arrest is known not just to the arrested individual but, often, to the individual's friends or family, to persons who observed the arrest itself or saw the individual brought in to the station, or to those who noted the individual's absence from expected activities while under arrest.

KPD does not explain why it believes it may be able to withhold information about the arrest of an individual who was determined to be innocent after arrest and thus released with no charge. However, based on the circumstances described OIP assumes KPD's concern to be the individual's privacy interest.[1] As discussed in Opinion 91-4, an individual does not have a significant privacy interest in police blotter information because an arrest is a public, not a private, event. OIP Op. Ltr. No. 91-4 at 8-11. Moreover, an individual's privacy interest in records of arrest not followed by conviction is protected by statute after a year has passed. Id. at 6-8; see also Haw. Rev. Stat. §§ 84-1 and -9 (1993); OIP Op. Ltr. No. 03-09 at 7-8. However, that statutory protection does not extend to "original records of entry such as police blotters. . . ." Haw. Rev. Stat. § 846-8(2) (quoted in OIP Op. Ltr. No. 91-4 at 6-7). In other words, although arrest records that are organized and maintained under an individual's name (rap sheets) are protected as nonconviction data when no conviction resulted, arrest records in the form of chronologically compiled police blotter information are not so protected and must be disclosed upon request. See OIP Op. Ltr. Nos. 91-4 and 97-5.

KPD's argument for withholding the names of arrestees who are released pending further investigation appears to be that releasing those names would frustrate KPD's ability obtain an arrestee's cooperation as an informant. KPD has not asserted a particular set of facts that it believes would justify withholding an individual arrestee's identity under the frustration exception; rather, it asserts that it may generally withhold the identities of arrested individuals who are released pending further investigation.[2]

In Opinion 91-4, OIP looked at the question of whether disclosure of police blotter information "could reasonably impede or interfere with a prospective law enforcement proceeding against an arrested individual" and answered it in the negative. OIP Op. Ltr. No. 91-4 at 11. KPD argues, however, that Opinion 91-4 did not address the effect of disclosure of police blotter information on law enforcement's ability to use an arrestee as an informant. If an arrestee's associates learn of his arrest, KPD asserts, they may suspect him of being an informant, which could either deter an arrestee from becoming an informant or limit his effectiveness in the role. KPD correctly notes that OIP's discussion of the frustration issue in

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[1] OIP notes that an agency has the burden under the UIPA to establish that an exception allows it to withhold specific records; broad, general assertions are generally insufficient to meet this burden. See Haw. Rev. Stat. § 92F-15(c) (1993); see also OIP Op. Ltr. No. 05-16 at 7.

[2] See footnote 1, infra.

Opinion 91-4 focused on the possibility that disclosure would impede investigation and prosecution of the arrested individual.[3] However, OIP's primary reason for rejecting application of the frustration exception was that "[t]he willingness of courts, federal administrative agencies, and state legislatures to view police blotter information as 'public' obviates any finding that the disclosure of the same could reasonably impede or interfere with a prospective law enforcement proceeding against an arrested individual."[4] OIP Op. Ltr. No. 91-4 at 11. This reasoning applies with equal force whether the prospective law enforcement proceeding would be against the arrested individual or another party.

In summary, an arrest is a significant and completed official act, and the public's knowledge of who is arrested and for what reason has historically been considered essential to a free society. E.g., Brier, 279 N.W.2d 179. In other words, it is the overwhelming public interest in how the executive branch of

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[3] In the course of the frustration discussion, OIP noted that "[m]ost, if not all, the information set forth in a police blotter is already within the possession and knowledge of the arrested person." OIP Op. Ltr. No. 91-14 at 11. In the situation KPD proposes, an arrestee's associates might not be aware of the arrest, although as noted above, as a practical matter, an arrest is most often public. Even if an arrestee's associates had no way of learning about the arrest except through the Daily Arrest Log, that would not alter OIP's conclusion given the historical and legal weight of authority rejecting secret arrests and favoring public disclosure of arrests.

[4] Since OIP released its Opinion 91-4, several federal cases stemming from the federal governments' terrorism investigations and deportation activities after September 11, 2001, have created uncertainty as to whether and to what extent governmental claims of necessity – frustration claims, in essence – may temper the availability of several longstanding civil rights, notably including the prohibition of secret arrests or other detentions. See Ctr. for Nat'l Security Studies v. U.S. Dept. of Justice, 331 F. 3d 918 (D.C. Cir. 2003) (Government could withhold names of individuals detained for violations of immigration laws with no criminal charges based on Freedom of Information Act's exception for law enforcement records whose disclosure would interfere with enforcement proceedings), cert. den. 540 U.S. 110; but see Hamdi v. Rumsfeld, 542 U.S. 507, 124 S. Ct. 2633 (2004) (Citizen held as 'enemy combatant' retained due process right to hearing before a neutral decisionmaker at which he could contest the factual basis for his detention) and Rasul v. Bush, 542 U.S. 466, 124 S. Ct. 2686 (2004) (Habeas corpus statute applied to non-citizens captured abroad and held at Guantanamo Bay); compare also North Jersey Media Group v. Ashcroft, 308 F. 3d 198 (3rd Cir. 2002) (Deportation hearings could properly be closed to media), cert. den. 538 U.S. 1056, with Detroit Free Press v. Ashcroft, 303 F. 3d 681 (6th Cir. 2002) (Deportation hearings could not properly be closed to media). Given the uncertainty as to whether Ctr. For Nat'l Security Studies represents a change in the law or merely reflects the anxieties of the times, and given that KPD has not argued a frustration that is of the type considered in that case, OIP concludes that the weight of legal and other authority still favors public knowledge of arrests such that the disclosure of an arrestee's name cannot reasonably be said to interfere with or impede law enforcement proceedings.

government exercises the arrest power that compels OIP's conclusion herein, not the particular circumstances of whether an arrestee is subsequently determined to be innocent or whether law enforcement might find it useful to conceal a potential informant's arrest. OIP therefore concludes that the fact that an arrestee was released without charges being filed or released pending investigation does not alter the conclusion reached in Opinion 91-4 that police blotter information concerning adult offenders must be made publicly available upon request.

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