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The Honorable Douglas S. Chin
Lieutenant Governor
State of Hawaii
State Capitol, Executive Chambers
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Lieutenant Governor Chin:

Re: Availability of Unconcealed-Carry Licenses

This letter responds to your request for a formal legal opinion clarifying the authority of chiefs of police to issue licenses permitting the unconcealed carry of firearms.

Your inquiry arises from ongoing litigation challenging the constitutionality of a portion of section 134-9, Hawaii Revised Statutes (HRS), which provides that "[w]here the urgency or the need has been sufficiently indicated, the respective chief of police" may issue a license authorizing an otherwise-qualified applicant who "is engaged in the protection of life and property" to carry an unconcealed firearm within the county. In *Young v. Hawaii*, a divided panel of the Ninth Circuit construed this provision as "[r]estricting open carry to those whose job entails protecting life or property," such as "security guard[s]." 896 F.3d 1044, 1071 (9th Cir. 2018). The panel held that, so construed, the unconcealed-carry provision violates the Second Amendment. *Id.* Both the County of Hawaii and the State of Hawaii have announced that they intend to seek panel rehearing or rehearing en banc of that decision.

For the reasons set forth below, we advise that the *Young* panel's construction of section 134-9, HRS, is overly restrictive. By its plain text, section 134-9 does not limit unconcealed-carry

licenses to persons whose job entails the protection of life and property, but authorizes the issuance of such licenses to anyone "engaged in the protection of life and property" who demonstrates a sufficient "urgency" or "need" to carry a weapon. Furthermore, without attempting to set forth a comprehensive list of eligible recipients, we advise that a private individual would likely satisfy the statutory criteria for an unconcealed-carry license where he or she identifies a need for protection that significantly exceeds that held by an ordinary law-abiding citizen, and otherwise satisfies the statutory requirements for possessing and carrying a firearm.

I. QUESTIONS PRESENTED AND SHORT ANSWERS.

1. Does section 134-9, HRS, limit the issuance of unconcealed-carry licenses to private security officers and other individuals whose jobs entail protecting life and property?

SHORT ANSWER: No. Section 134-9, HRS, authorizes the issuance of unconcealed-carry licenses to any qualified individual who demonstrates a sufficient "urgency" or "need" to carry a firearm and is "engaged in the protection of life and property."

2. What standards should chiefs of police apply in adjudicating applications for unconcealed-carry licenses?

SHORT ANSWER: An applicant must satisfy four criteria to obtain an unconcealed-carry license: He or she must (1) meet the objective qualifications for possessing and carrying a firearm; (2) demonstrate a sufficient need to carry a firearm for the purpose of protecting life and property; (3) be of good moral character; and (4) present no other reason justifying the discretionary denial of a license. To satisfy these requirements, an applicant must demonstrate, among other things, that he or she has a need for protection that substantially exceeds that held by ordinary law-abiding citizens.

II. BACKGROUND.

Hawai'i has imposed limits on the public carry of firearms for over 150 years. In 1852, the Legislative Council enacted a statute making it a criminal offense for "[a]ny person not authorized by law" to "carry, or be found armed with, any . . . pistol . . . or other deadly weapon . . . unless good cause be shown for having such dangerous weapons." 1852 Haw. Sess. Laws Act of May 25, 1852, § 1 at 19; see *Republic of Hawaii v. Clark*, 10 Haw. 585, 587-88 (1897). In 1927, the territorial legislature enacted a statute, modeled on the Uniform Firearms Act, that required individuals to obtain a license in order to "carry a

pistol or revolver," and provided that individuals could obtain such a license upon showing "good reason to fear an injury to his person or property" or "other proper reason for carrying" a firearm. 1927 Haw. Sess. Laws Act 206, §§ 5, 7 at 209; see S. Stand. Comm. Rep. No. 322, in 1927 Senate Journal, at 1023. In 1934 and 1961, the Legislature amended the statute to substantially its present form. See 1933 (Special Sess.) Haw. Sess. Laws Act 26, § 8 at 39 (Jan. 9, 1934); 1961 Haw. Sess. Laws Act 163, § 1 at 215 (July 8, 1961).

Today, Hawai'i law provides that, subject to a number of exceptions, "[a]ll firearms shall be confined to the possessor's place of business, residence, or sojourn." HRS §§ 134-23, 134-24, 134-25. It is generally unlawful "for any person on any public highway to carry on the person, or to have in the person's possession, or to carry in a vehicle any firearm loaded with ammunition." HRS § 134-26; see HRS § 134-9(c). Members of the armed forces, mail carriers, and persons employed by the State or its subdivisions are exempt from this limit "while in the performance of their respective duties." HRS § 134-11(a). Individuals may also carry lawfully acquired firearms "while actually engaged in hunting or target shooting." HRS § 134-5(a); see HRS § 134-5(c).

In addition, individuals may lawfully carry a pistol or revolver within a county if they obtain a license from the county's chief of police. HRS § 134-9. Section 134-9, HRS, authorizes police chiefs to issue two types of carry licenses. A chief of police may issue a *concealed*-carry license "[i]n an exceptional case, when an applicant shows reason to fear injury to the applicant's person or property" and satisfies certain age, citizenship, and other statutory requirements. HRS § 134-9(a)-(b). A chief of police may also grant a *unconcealed*-carry license to a qualified applicant "[w]here the urgency or the need has been sufficiently indicated," the applicant "is engaged in the protection of life and property," and the applicant is "of good moral character." HRS § 134-9(a).

III. ANALYSIS.

A. Section 134-9, HRS, Does Not Limit Unconcealed-Carry Licenses To Private Security Officers.

We advise that section 134-9, HRS, does not limit the issuance of unconcealed-carry licenses to individuals whose jobs entail protecting life and property. The plain text of the statute, the legislative history, and the applicable case law all support this conclusion.

Our analysis begins with the statute's text. See *Del Monte Fresh Produce (Hawaii), Inc. v. Int'l Longshore & Warehouse Union, Local 142, AFL-CIO*, 112 Hawai'i 489, 499, 146 P.3d 1066, 1076 (2006). As relevant, section 134-9, HRS, imposes two requirements that an otherwise qualified applicant must satisfy in order to obtain an unconcealed-carry license: the applicant must (1) "sufficiently indicate[]" "the urgency or the need" to carry an unconcealed firearm, and (2) be "engaged in the protection of life and property." HRS § 134-9(a).

It is plain that the first of these requirements does not limit unconcealed-carry licenses to private security officers. A private individual, no less than a security guard, may identify an "urgen[t]" or compelling "need" to carry an unconcealed firearm. Indeed, the statute's use of the disjunctive phrase "the urgency or the need" indicates that the Legislature intended to permit the issuance of unconcealed-carry licenses for multiple reasons. Construing the statute to authorize such licenses for one reason only -- that the applicant's job duties require a firearm -- would contravene that textual choice.

Nor does the requirement that an applicant be "engaged in the protection of life and property" limit unconcealed-carry licenses to private security officers. The words "engage in" mean simply "to do or take part in something." Merriam Webster's Dictionary (2018). In ordinary usage, an individual may "take part in" an activity even though his job duties do not require it. See *Sierra Club v. Castle & Cooke Homes Hawai'i, Inc.*, 132 Hawai'i 184, 191-92, 320 P.3d 849, 856-57 (2013) ("Under general principles of statutory construction, courts give words their ordinary meaning unless something in the statute requires a different interpretation." (citation omitted)). And other provisions of the statute use the words "engaged in" to refer to non-professional activities in this way. Section 134-5(c), HRS, authorizes a person to "carry unconcealed and use a lawfully acquired pistol or revolver while actually engaged in hunting game mammals." HRS § 134-5(c) (emphasis added). Likewise, sections 134-3 and 134-5(a), HRS, authorize the use or carrying of firearms while "engage[d] in" hunting or target shooting. HRS §§ 134-3(a)(3), 134-5(a).

Furthermore, when the Legislature wished to limit firearms to individuals engaged in the performance of their professional duties, it expressly said so. Section 134-11(a), HRS, authorizes a variety of officers to carry firearms "while in the performance of their respective duties." HRS § 134-11(a)(2), (4)-(5). Similarly, section 134-31, HRS, requires individuals to obtain a license in order to "engage in the business to sell and manufacture firearms." HRS § 134-31 (emphasis added). The

Legislature notably did not include similar language in section 134-9, HRS, and it would be improper in our view to read such limits implicitly into the statute's text.

The legislative history of section 134-9, HRS, reinforces this interpretation. For several decades prior to 1961, section 134-9 only authorized chiefs of police to issue *concealed*-carry licenses. See 1933 (Special Sess.) Haw. Sess. Laws Act 26, §8 at 39. In 1961, the Legislature amended the statute to authorize the issuance of *unconcealed*-carry licenses, as well. 1961 Haw. Sess. Laws Act 163, § 1 at 215. In the committee report accompanying that amendment, the Senate Judiciary Committee explained that this change was "designed to extend the permit provisions to those employed as guards or watchman *and/or to persons engaged in the protection of life and property* and to further authorize such licensees to carry the described firearms unconcealed on their persons." S. Stand. Comm. Rep. No. 558, in 1961 Senate Journal, at 874 (emphasis added). This report thus makes clear that the drafters intended to reach not only "those employed as guards or watchman" but, more broadly, any "persons engaged in the protection of life and property." Although "guards" and "watchm[e]n" may have been the principal persons the Legislature had in mind, legislation is not limited to the principal mischief it is designed to address, and that is particularly so where the drafters expressly contemplated it would extend more broadly.

The limited case law discussing section 134-9, HRS, and analogous statutes is also consistent with our understanding. To our knowledge, prior to the Ninth Circuit panel decision in *Young*, no court suggested that section 134-9 limits open-carry licenses to private security officers. To the contrary, in *Baker v. Kealoha*, the District Court for the District of Hawai'i observed that section 134-9 "provides for exceptions in cases where an individual demonstrates an urgency or need for protection in public places." 2012 WL 12886818, at *18 (D. Haw. Apr. 30, 2012), *vacated and remanded on other grounds*, 679 F. App'x 625 (9th Cir. 2017). Moreover, courts and agencies in other states have construed comparable statutes -- which likewise permit issuance of carry licenses upon a showing of adequate "need" or "cause" -- to authorize licenses for private individuals, and not just professional security guards and the like. See, e.g., *Woollard v. Gallagher*, 712 F.3d 865, 870 (4th Cir. 2013) (Maryland); *Drake v. Filko*, 724 F.3d 426, 428 (3d Cir. 2013) (New Jersey); *Kachalsky v. County of Westchester*, 701 F.3d 81, 86-87 (2d Cir. 2012) (New York).

Nor does past practice justify a different conclusion. The *Young* panel placed substantial weight on the premise that, to its knowledge, "no one other than a security guard -- or someone

similarly employed -- ha[s] ever been issued an open carry license." 896 F.3d at 1070. But even if that premise were correct, a practice of that kind would not justify adopting a reading that the statute's text cannot bear. Moreover, there is little evidence in the court record to back up the panel's assertion. Although the Department of the Attorney General has published statistics on firearm license applications, those reports date back only to the year 2000 -- 39 years after the statute was enacted, and nearly 150 years after the first restriction on public carry was imposed. See Dep't of Attorney Gen., Crime Prevention & Justice Assistance Div., *Research & Statistics Branch*, <http://ag.hawaii.gov/cpja/rs/> (last visited Sept. 10, 2018) (collecting reports). And those reports, starting in 2004, state only the number of private individuals who applied for (and were granted or denied) a *concealed*-carry license; they do not state the number of private individuals who applied for (and were granted or denied) an *unconcealed*-carry license. What is more, out of the handful of instances before 2004 in which the reports state simply that private individuals applied for "carry license[s]," without specifying that the license was for *concealed*- or *unconcealed*-carry, individuals were *granted* such licenses in two cases. See Dep't of Attorney Gen., *Firearm Registrations in Hawaii, 2001*, at 7, <http://ag.hawaii.gov/cpja/files/2013/01/Firearms-Registration-2001.pdf> (last visited Sept. 10, 2018).

In short, the plain text of the statute does not limit *unconcealed*-carry licenses to individuals employed as private security officers. And other indicia of statutory meaning support that straightforward reading. Accordingly, we advise that private individuals as well as security officers are eligible to obtain licenses to carry *unconcealed* firearms under section 134-9, HRS.

B. Standards For Adjudicating Unconcealed-Carry Applications.

You have also asked us to clarify the standards that police chiefs should apply in adjudicating applications for *unconcealed*-carry licenses. By its text, section 134-9, HRS, establishes four basic criteria that an applicant must satisfy to obtain an *unconcealed*-carry license: An applicant must (1) meet the objective qualifications for possessing and carrying a firearm; (2) demonstrate a sufficient need to carry a firearm in order to protect life and property; (3) be of good moral character; and

(4) present no other reason that justifies the exercise of discretion to deny a license. We consider each of these criteria in turn below.

1. Objective Qualifications.

As an initial matter, section 134-9, HRS, requires every applicant for an unconcealed-carry license to meet three objective qualifications. Every applicant must (1) be "a citizen of the United States," (2) be "of the age of twenty-one years or more," and (3) not be "prohibited under section 134-7 from the ownership or possession of a firearm." HRS § 134-9(a). Section 134-7, HRS, further provides that an individual may not own, possess, or control a firearm if he is barred from possessing a firearm by federal law, is a fugitive from justice, or fails to satisfy the statute's other prerequisites. HRS § 134-7; see 18 U.S.C. § 922(g)(1)-(9), (n) (listing federal requirements).

An application for an unconcealed-carry license must therefore be denied if the applicant fails to satisfy any of these objective criteria. And the statute specifies, in part, the procedures a police chief or his designated representative must follow prior to making that determination. It states that such officials "shall perform an inquiry on [the] applicant by using the National Instant Criminal Background Check System, to include a check of the Immigration and Customs Enforcement databases where the applicant is not a citizen of the United States, before any determination to grant a license is made." HRS § 134-9(a).

2. Sufficient Need To Carry A Firearm.

Section 134-9, HRS, further requires that each applicant must "sufficiently indicate[]" that he or she has an "urgency" or "need" to carry a firearm and is "engaged in the protection of life and property." *Id.* As we have explained, this language does not limit carry licenses to private security officers. See *supra* section III.A. Case law from other states is instructive, however, in discerning what it does require. Courts interpreting virtually identical laws have held that "a simple desire to carry a weapon is not enough" to satisfy their substantive requirements. *Kachalsky*, 701 F.3d at 86-87. "Nor is living or being employed in a 'high crime area[.]'" *Id.* at 87. Rather, an applicant typically must demonstrate that he or she has a need to carry a firearm for protection that substantially exceeds the need possessed by ordinary law-abiding citizens. See *Drake*, 724 F.3d at 428 & n.2; *Woollard*, 712 F.3d at 870; *Kachalsky*, 701 F.3d at 86-87.

In our view, a similar standard is appropriate in interpreting section 134-9, HRS. Section 134-9 requires that an applicant "sufficiently" demonstrate an "urgency" or "need" to carry a firearm -- all words that connote an immediate, pressing, and heightened interest in carrying a firearm. Furthermore, the applicant must be "engaged in the protection of life and property," language that requires that the individual be actively "tak[ing] part in" such protection, not merely exhibit a generalized concern for safety. Particularly given that Hawaii's modern firearm laws were designed to mirror the uniform firearm laws adopted by many other states, see S. Stand. Comm. Rep. No. 322, in 1927 Senate Journal, at 1023, we therefore believe that much the same standard adopted by those states is appropriate in interpreting section 134-9. This provision, we conclude, requires applicants for an unconcealed-carry license to demonstrate that they have a need to carry a firearm for protection that substantially exceeds the need possessed by ordinary law-abiding citizens.

Without attempting to offer an exhaustive list of applicants who could satisfy this standard, we believe that the following illustrative examples could present a sufficient urgency or need for protection under the statute:

- (a) A person who has suffered serious domestic abuse from a former partner who has violated previous protective orders;
- (b) A victim of stalking who has received credible threats of death or serious bodily harm from his or her stalker;
- (c) A political activist who has received credible threats of death or serious bodily harm due to his or her political activity;
- (d) A witness to a crime who has received credible threats, or is testifying against an organization known to use violence to intimidate witnesses;
- (e) A person who faces heightened risk of attack or violence due to his or her profession, such as a private security officer, a psychiatrist or physician with an obsessive or threatening patient, an attorney with a former client or opposing party who has made credible threats of death or serious bodily harm, a business owner with a violent former employee who has made credible threats of death or serious bodily harm,

an entertainer with an obsessive fan who has made credible threats of death or serious bodily harm and engaged in stalking; or a person who faces a high risk of armed robbery because his or her job requires stocking ATMs or otherwise transporting large quantities of cash.

3. Good Moral Character.

An applicant for an unconcealed-carry license must also be a person "of good moral character." HRS § 134-9. As courts in other jurisdictions have concluded, we think it plain that a person does not demonstrate "good moral character" where there is reliable and credible evidence that, if issued a license, the applicant may create a risk to public safety. See *Caputo v. Kelly*, 117 A.D.3d 644, 644 (N.Y. App. Div. 2014); *Hider v. Chief of Police, City of Portland*, 628 A.2d 158, 161 (Maine 1993). That is, we advise that a chief of police should deny an application when the applicant exhibits specific and articulable indicia that the applicant poses a heightened risk to public safety. Such indicia could include, but are not limited to:

- (a) Recent incidents of alleged domestic violence, even if not leading to charges or the issuance of a protective order;
- (b) Recent incidents of careless handling or storage of a firearm, especially if involving children;
- (c) Recent incidents of alcohol or drug abuse, especially involving violence, even when not leading to criminal charges or mental health treatment;
- (d) Other recent violent conduct, even if not resulting in criminal charges or serious injury.

4. No Other Reasons That Justify The Exercise Of Discretion To Deny A License.

Finally, section 134-9, HRS, provides that where an applicant satisfies the statute's express requirements, "the respective chief of police may grant" an unconcealed-carry license. HRS § 134-9(a) (emphasis added). Accordingly, we advise that chiefs of police may exercise reasonable discretion to deny licenses to otherwise-qualified applicants, but that discretion may not be exercised in an arbitrary or capricious manner. Chiefs of police should exercise their discretion to

deny unconcealed-carry licenses to qualified applicants only where an applicant's characteristics or circumstances render the applicant unsuitable to carry an unconcealed firearm for reasons not captured by the express statutory requirements. Discretion may not be used to effectively nullify the authorization for unconcealed-carry licenses contained in section 134-9. Nor may discretion be used to impose categorical restrictions on unconcealed-carry licenses -- such as limiting them to private security officers -- that the Legislature did not enact. When a chief of police denies a firearm for discretionary reasons, he or she should document the reasons and report them to the Attorney General as provided in section 134-14, HRS.

IV. CONCLUSION.

We advise that section 134-9, HRS, does not limit unconcealed-carry licenses to private security officers. Furthermore, we advise police chiefs to administer the statute's requirements in accordance with the standards set forth in this Opinion.

Very truly yours,



Russell A. Suzuki
Attorney General