Op. Ltr. 90-09 Disclosure of Home Telephone Numbers of Board of Water Supply Customers

OIP Op. Ltr. No. 05-03 partially overrules this opinion to the extent that it states or implies that the UIPA's privacy exception in section 92F-13(1), HRS, either prohibits public disclosure or mandates confidentiality.

February 26, 1990

MEMORANDUM

TO: The Honorable Kazu Hayashida
Manager and Chief Engineer
Board of Water Supply
City and County of Honolulu

FROM: Hugh R. Jones, Staff Attorney

SUBJECT: Disclosure of Home Telephone Numbers of Board of Water Supply Customers

This is in response to your letter dated August 21, 1989, requesting an advisory opinion regarding whether under the Uniform Information Practices Act (Modified) ("UIPA"), chapter 92F, Hawaii Revised Statutes, the Board of Water Supply ("BWS") may disclose the home telephone numbers of BWS customers to particular persons.

ISSUE PRESENTED

Whether under the UIPA, the BWS may disclose the home telephone numbers of BWS customers to: (1) other customers and/or organizations, (2) federal law enforcement agencies, (3) the Department of the Prosecuting Attorney ("Prosecuting Attorney"), and (4) the U.S. Attorney's Office.

BRIEF ANSWER

The BWS generally may not disclose to BWS customers, or other requesters, the home telephone numbers of its "individual" customers, as such disclosure would constitute a "clearly unwarranted invasion of personal privacy" under the UIPA. On the contrary, pursuant to the UIPA, the BWS may disclose the home telephone numbers of its "individual" customers to federal agencies for the purpose of a criminal or civil law enforcement

investigation. Additionally, the BWS may disclose the home telephone numbers of its "individual" customers to the Prosecuting Attorney, to the extent that such information reasonably appears to directly further the performance of the Prosecuting Attorney's express or implied statutory or constitutional duties and functions. However, the BWS is not permitted to disclose the home telephone numbers of its customers to the U.S. Attorney's Office for the purpose of locating individuals who have defaulted on student loans. Finally, the telephone numbers of customers who are not "individuals" may be disclosed, since "persons" do not have a privacy interest in this information.

FACTS

The BWS requests, but does not require its customers to provide the BWS with their telephone numbers at locations where water service is provided to BWS customers. Some BWS customers have unlisted residential telephone numbers which are provided to the BWS with the express or implied understanding that their number will not be disclosed to others.

The BWS occasionally receives requests for these residential telephone numbers from federal law enforcement agencies, the Prosecuting Attorney, the U.S. Attorney's Office, and other persons or organizations. The federal agencies' and Prosecuting Attorney's stated purpose for seeking this information is to locate potential suspects or witnesses in civil or criminal law enforcement investigations. Requests for this information by the U.S. Attorney's Office is often for the purpose of locating persons who have defaulted upon federally guaranteed student loans. Requests for this information by other persons or organizations is generally motivated by the desire to use such information for commercial purposes, such as telephone solicitation, or to aid in private debt collections.

DISCUSSION

A. Introduction

The UIPA became effective on July 1, 1989. Among the purposes sought to be achieved by the passage of this new public records law are to:

> (1) Promote the public interest in disclosure;
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> . . . .
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> (3) Enhance governmental accountability through a general policy of access to governmental records;
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> . . . .
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> (4) Make government accountable to individuals in the collection, use, and dissemination of information relating to them; and
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> (5) Balance the individual privacy interest and the public access interest, allowing access unless it would constitute a clearly unwarranted invasion of personal privacy.

Haw. Rev. Stat. § 92F-2 (Supp. 1989).

The provisions and restrictions set forth in chapter 92F, Hawaii Revised Statutes, apply only to "agencies." Under the UIPA, "agency" means:

> Any unit of government in this State, any county, or any combination of counties; department; institution; board; commission; district; council; bureau; office; governing authority; other instrumentality of state or county government; or corporation or other establishment owned, operated, or managed by or on behalf of this State or any county, but does not include the nonadministrative functions of the courts of this State.

Haw. Rev. Stat. § 92F-3 (Supp. 1989) (emphasis added).

The BWS is a "board," "unit of government," or "instrumentality" of county government. See Haw. Rev. Stat. ch. 54 (1985); article VII, section 7-102, Revised Charter of the City and County of Honolulu (rev. ed. 1984). Therefore, the BWS is within the ambit of the definition of "agency" set forth at section 92F-3, Hawaii Revised Statutes, and as such, the BWS is subject to the provisions of the UIPA.

Part II of the UIPA states that "[a]ll government records are open to public inspection unless access is restricted or closed by law." Haw. Rev. Stat. § 92F-11(a) (Supp. 1989). Several exceptions to this clear mandate of public accessibility to government records are set forth in the UIPA. Additionally, part II of the UIPA places restrictions upon an agency's disclosure of government records (which are not otherwise public) to other agencies. See Haw. Rev. Stat. § 92F-19 (Supp. 1989).

B. Disclosure of Government Records to Nongovernmental Individuals or "Persons"

The term "government record" is defined under the UIPA as "information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. § 92F-3 (Supp. 1989). Thus, the home telephone numbers of BWS customers, if contained within the BWS' files, are subject to mandatory public inspection, unless access to these government records is "closed or restricted by law." Haw. Rev. Stat. § 92F-11(a) (Supp. 1989).

Since we are aware of no state or federal law which expressly closes, or restricts the disclosure of the home telephone numbers of BWS customers, it is necessary to consider whether any exception to the general rule of mandatory disclosure under the UIPA applies. Section 92F-13, Hawaii Revised Statutes, provides in relevant part:

> This chapter shall not require disclosure of:
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> (1) Government records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy; . . . .

Additionally, section 92F-14, Hawaii Revised Statutes, states that "disclosure of a government record shall not constitute a clearly unwarranted invasion of personal privacy if the public interest in disclosure outweighs the privacy interests of the individual."[1] Thus, if an individual has a personal privacy

[1]"Individual" is defined under the UIPA as "a natural person." See Haw. Rev. Stat. §92F-3 (Supp. 1989). Thus, corporations or unincorporated associations have no privacy interest in government records maintained by agencies.

interest in a government record, a clearly unwarranted invasion of that interest would require an agency, such as the BWS, to withhold disclosure of that record.

In making a determination whether disclosure of a government record would be a "clearly unwarranted invasion of personal privacy," the legislative history of the UIPA suggests that "case law under the Freedom of Information Act should be consulted for additional guidance." S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1094 (1988).

Even in absence of this legislative directive concerning the construction and application of the UIPA, resort to case law under the Freedom of Information Act ("FOIA") would be instructive,[2] as 5 U.S.C. § 552(b)(6) of FOIA provides an exemption from disclosure of matters that are:

> Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. [Emphasis added.]

In construing Exemption 6 of the FOIA, the United States Supreme Court in U.S. Department of State v. Washington Post Co., 456 U.S. 595, 102 S. Ct. 1957, 72 L. Ed. 2d 358 (1982), held that the protection of an individual's right to privacy which Congress sought to achieve by preventing the disclosure of information which might harm the individual, does not turn on the label of the file which contains the damaging information, reasoning:

> In sum, we do not think that Congress meant to limit Exemption 6 to a narrow class of files containing only a discrete kind of personal information. Rather, `[t]he exemption [was] intended to cover detailed Government records on an individual which can be identified as applying to that individual.

[2]See also 2A Sands Sutherland Statutory Construction § 51.06, at 510 (4th ed. rev. 1984) ("state and federal statutes may be in pari materia, and if so, should be construed together, for it may be presumed the Legislature had existing federal statutes relating to the same subject matter in mind when enacting the statute being construed").

Id. at 602, 102 S. Ct. at 1961, quoting, H.R. Rep. No. 1497, 89th Cong., 2nd Sess. 11 (1966).

In OIP Opinion Letter Nos. 89-4 (Nov. 9, 1989) and 89-16 (Dec. 27, 1989), we previously considered whether the disclosure of an individual's home address or telephone number would constitute "a clearly unwarranted invasion of personal privacy" under section 92F-13(1), Hawaii Revised Statutes. In those opinions, we discussed the significant impact of recent federal court decisions which address the "public interest" to be considered in applying Exemption 6's balancing test. Briefly, after the U.S. Supreme Court's decision in United States Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. ___, 109 S. Ct. 1468, 103 L. Ed. 2d 774 (1989), the United States Court of Appeals for the District of Columbia, in two cases, held that the "public interest" in disclosure under FOIA is one that is measured in relation to the Act's central purpose--to open agency conduct to the light of public scrutiny and to reveal "what the government is up to." See National Association of Retired Federal Employees v. Horner, 879 F.2d 873 (D.C. Cir. 1989); Federal Labor Relations Authority v. U.S. Department of the Treasury, 884 F.2d 1446 (D.C. Cir. 1989).

Furthermore, in balancing the public interest in disclosure against an individual's privacy interest under the UIPA, the access interest of a particular requester is not a determining factor. The UIPA was modeled on the Uniform Information Practices Code, drafted by the Uniform Conference of Commissioners on Uniform State Laws ("Model Code"). Indeed, the UIPA's legislative history encourages those construing its provisions to consult the Model Code's commentary to guide interpretation of similar provisions in the UIPA. See H.R. Stand. Comm. Rep. No. 342-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 969, 972 (1988). The commentary to section 3-102 of the Model Code clarifies that the access needs of a particular requester are irrelevant:

> The "clearly unwarranted invasion of personal privacy" standard is a widely accepted starting point for analyzing and reconciling the often conflicting interests of public access and individual privacy. (citation omitted) It differs from an earlier standard . . . which balanced the privacy interest of the record subject against the access interest of

> the requester. This approach, while perhaps easier to apply, was deficient because it did not impose any redisclosure limitations. Thus, information properly disclosed to the initial requester could be redisclosed to a third party who would have been unable to justify disclosure if he had sought access in his own behalf. Under the standard adopted here, the subordination of an individual's privacy interest depends upon an assessment of the public need for the information rather than the interest of a particular requester. [Emphasis added.]

This mandate of the Model Code and the UIPA is consistent with the U.S. Supreme Court's analysis in Reporters Committee regarding the irrelevancy of the requester's purpose for access to records:

> Our previous decisions establish that whether an invasion of privacy is warranted cannot turn on the purposes for which the request for information is made. Except for cases in which the objection to disclosure is based on a claim of privilege and the person requesting disclosure is the party protected by the privilege, the identity of the requesting party has no bearing on the merits of his or her FOIA request . . . . As we have repeatedly stated, Congress "clearly intended" the FOIA "to give any member of the public as much right to disclosure as one with a special interest [in a particular document]." (citations omitted) . . . .
>
> Thus whether disclosure of a private document under Exemption 7(C) is warranted must turn on the nature of the requested document and its relationship to "the basic purpose of the Freedom of Information Act `to open agency action to the light of public scrutiny.'" Department of the Air Force v. Rose, 425 U.S., at 372, 96 S. Ct., at 1604, rather than on the particular purpose for which the document is being requested.

Reporters Committee, 109 S. Ct. at 1480-1481.

Consistent with the foregoing authorities, we conclude that whether you describe an individual's privacy interest in their home telephone number as substantial or modest, the disclosure of such information, in most cases, will not advance the statutory purpose of the UIPA that "the formation and conduct of public policy--the discussions, deliberations, decisions, and action of government agencies--shall be conducted as openly as possible." Haw. Rev. Stat. § 92F-2 (Supp. 1989). The disclosure of the home telephone numbers of BWS customers, some of which are unlisted, "would not shed any light on the conduct of any government agency or official," nor would disclosure promote the understanding of "the formation and conduct of public policy." Reporters Committee, 109 S. Ct. at 1481; Haw. Rev. Stat. § 92F-2 (Supp. 1989).

Thus, in absence of the applicability of the provisions of section 92F-12(b), Hawaii Revised Statutes (which could mandate disclosure under certain circumstances), the BWS should not disclose the home telephone numbers of its customers who are individuals, the public interest in disclosure of such data being outweighed by BWS' customers' privacy interest in such information.

C. Requests for Telephone Numbers by Federal Investigative and/or Law Enforcement Agencies

In furtherance of the UIPA's purpose to make government accountable to individuals in the collection, use, and dissemination of information relating to them, the Legislature carefully circumscribed the authority of government agencies to disclose, or authorize the disclosure of, government records to any other agency. Section 92F-19, Hawaii Revised Statutes, sets forth the limited conditions under which an agency may disclose government records which are not otherwise "public" under the UIPA[3] to another agency, and provides in pertinent part:

> **§ 92F-19 Limitations on disclosure of government records to other agencies.** (a) No agency may disclose or authorize disclosure of government records to any other agency unless the disclosure is:

[3]Thus, section 92F-9, Hawaii Revised Statutes, only applies if an agency would not be entitled to access to a government record under Part II of the UIPA. See Haw. Rev. Stat. § 92F-19(a)(10).

> (5) To an agency or instrumentality of any governmental jurisdiction within or under the control of the United States . . . for a civil or criminal law enforcement investigation; . . . .

Section 92F-19(a)(5), Hawaii Revised Statutes, is identical to the provisions of section 92E-5(5), Hawaii Revised Statutes, which was repealed by the enactment of the UIPA. See Act 262, 1988 Haw. Sess. Laws 473. Section 92F-19(a)(5), Hawaii Revised Statutes (as with its predecessor, section 92E-5(5), Hawaii Revised Statutes), is similar to 5 U.S.C. Þ 552a(b)(7), the Privacy Act of 1974, which also allows disclosure of a record "to another agency or to an instrumentality of any government jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity."[4]

Accordingly, the BWS may disclose to federal law enforcement agencies the home telephone numbers of its customers "for a civil or criminal law enforcement investigation." Although not required by section 92F-19(a)(5), Hawaii Revised Statutes, it would be prudent to disclose such information in writing to the requesting agency to avoid an improper disclosure to imposters or non-bonafide law enforcement officials.

D. Requests for Government Records by the Department of the Prosecuting Attorney

In OIP Opinion Letter No. 90-1 (Jan. 8, 1990), we concluded that section 92F-19(a)(5), Hawaii Revised Statutes, does not permit the disclosure of confidential government records to state agencies. However, section 92F-19(a)(3), Hawaii Revised Statutes, authorizes an agency to disclose a government record which "reasonably appears to be proper for the performance of the requesting agency's duties and functions." Parallel provisions of the Model Code referred to above prohibit the disclosure of government records, if made to another agency, unless the record is:

[4]Unlike the Privacy Act of 1974, however, section 92F-19 (a)(5), Hawaii Revised Statutes, does not require the head of the requesting agency to submit a written request to the agency which maintains the record, setting forth the law enforcement activity for which the record is sought.

(i) certified by the requesting agency as being necessary to the performance of its duties and functions, and

(ii) compatible with the purpose for which the information was originally collected or obtained; . . . .

Model Code § 3-103(a)(1)(i) and (ii) (emphasis added).

Thus, the above Model Code section is written in the conjunctive, unlike paragraphs (1) and (3) of subsection 92F-19(a), Hawaii Revised Statutes, which are written in the disjunctive. Accordingly, under the UIPA, an agency may disclose a government record which "reasonably appears proper for the performance of the requesting agency's duties and functions," even though such a disclosure would be totally incompatible "with the purpose for which the information was collected or obtained."[5]

In our opinion, section 92F-19(a)(3), Hawaii Revised Statutes, must be narrowly construed in order to effectuate the clear legislative intention that the UIPA "[m]ake government accountable to individuals in the collection, use, and dissemination of information relating to them." Haw. Rev. Stat. § 92F-2 (Supp. 1989). A liberal construction of section 92F-19(a)(5), Hawaii Revised Statutes, would result in "a hole one can drive a truck through." John Doe Agency v. John Doe Corporation, 58 U.S.L.W. 4067, 4072 (U.S. Dec. 11, 1989) (Scalia, J., dissenting). Therefore, we believe that in order for disclosure to be "proper" under section 92F-19(a)(3), Hawaii Revised Statutes, such disclosure must reasonably appear to directly further an agency's performance of its expressed constitutional or statutory purposes and duties, or those that may be fairly implied.

[5]We have reservations regarding whether the Legislature intended this result, given the legislative purposes set forth at Haw. Rev. Stat. § 92F-2 (Supp. 1989). However, we are nevertheless constrained to apply the unambiguous provisions of section 92F-19(a), Hawaii Revised Statutes, which are clearly set forth in the disjunctive.

In applying this principle to the prosecuting Attorney's request to the BWS, the location of suspected violators of the law, or witnesses to said violations, reasonably appears to be proper for the performance of the Prosecuting Attorney's expressed duties, which include prosecuting offenses against the laws of the State and instituting proceedings for the arrest of persons suspected of public offenses. See article VIII, section 8-104, Revised Charter of the City and County of Honolulu (rev. ed. 1984).

E. Requests by U.S. Attorney's Office for Home Telephone Numbers to Assist in the Collection of Defaulted Student Loans

The U.S. Attorney's Office represents the United States government in all cases where the United States is a plaintiff, under 28 U.S.C. Þ 1345 (1989). In this capacity, it collects defaulted student loans which have been assigned to the Secretary of Education under the provisions of 20 U.S.C. § 1080 (1989).

As discussed above, section 92F-19, Hawaii Revised Statutes, sets forth the conditions under which an "agency" of this State may disclose records to any other agency. Section 92F-3, Hawaii Revised Statutes, does not include federal agencies within the definition of "agency." Thus, for disclosure to be permitted, it must be authorized by either of two provisions of section 92F-19, Hawaii Revised Statutes, which specifically authorizes disclosure of government records to federal agencies. Section 92F-19(a), Hawaii Revised Statutes, provides in pertinent part:

> (a),No agency may disclose or authorize disclosure of government records to any other agency unless the disclosure is:
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> . . . .
>
> (5) To an agency or instrumentality of any governmental jurisdiction within or under the control of the United States, or to a foreign government if specifically authorized by treaty or statute, for a civil or criminal law enforcement investigation;
>
> . . . .

> (8) To authorized officials of a department or agency of the federal government for the purpose of auditing or monitoring an agency program that received federal monies; . . . .

In applying the exemption set forth in subsection (a)(5) above to the facts presented here, we are aware of no federal statute making it a civil or criminal offense to default upon a federally guaranteed student loan under 20 U.S.C. §§ 1071 through 1080. Rather, a student who defaults upon a federally guaranteed student loan has breached his or her contract with a participating lender in the guaranteed student loan program. Therefore, section 92F-19(a)(5), Hawaii Revised Statutes, does not permit disclosure of BWS' customers' home phone numbers to the U.S. Attorney under these facts.

The provisions set forth by subsection (a)(8) present a more difficult question for determination. Assuming, for the sake of argument, that the guaranteed student loan program is an "agency program" which "receives federal monies, it is necessary to decide whether the disclosure of the home telephone numbers of BWS customers to the U.S. Attorney's Office is made "for the purpose of auditing or monitoring" a federally funded "program." It is a cardinal rule of statutory construction that where a statute does not define the term sought to be construed and the words are ones in common usage, they are to be given their common meaning. 2A N. Singer, Sutherland Statutory Construction § 48.28 (Sands 4th ed. rev. 1984). Webster's Ninth New Collegiate Dictionary 115 (1988), defines "audit" as follows:

> 1: a: a formal examination of an organization's or individual's accounts or financial situation
>
> b:,the final report of an audit.
>
> 2: a methodical examination and review.

Similarly, "monitoring" is defined as:

> 1: to watch, observe or check esp. for a purpose
>
> . . . .

> 4: to keep track of, regulate, or control the operation of (as a machine or process).

Webster's Ninth New Collegiate Dictionary 767 (1988).

In our opinion, furnishing the home telephone numbers of BWS customers to the U.S. Attorney for the purpose of collecting defaulted student loans, would not be for the purpose of either "auditing" or "monitoring." Additionally, such information, while useful in locating individuals who are in default, would not constitute the act of auditing or monitoring an "agency program." Rather, the best that can be said is that such information would only monitor individuals, not programs. A narrow reading of this exemption is further supported by the legislative history of the UIPA:

> The bill will continue the current prohibitions on the sharing of records and information between agencies except in specific circumstances or where the record on information is otherwise public.

S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 691 (1988) (emphasis added). See also Vol. I Report of the Governor's Committee on Public Records and Privacy 65 (1987) ("The creation of large data banks on citizens is a fundamental threat to our freedom"). Like the Federal Privacy Act of 1974, the UIPA's limitations on inter-agency disclosure "may well be one of the most important, if not the most important provisions of the bill." H.R. Rep. No. 1416, 93d Cong., 2d Sess. (1974).

Thus, interpreting section 92F-19(a)(8), Hawaii Revised Statutes, according to the commonly accepted meaning of the words chosen, and consistent with the legislative purposes and history of the UIPA, we conclude that in the absence of the conditions set forth at section 92F-12(b), Hawaii Revised Statutes, the BWS may not disclose the telephone numbers of individual customers to the U.S. Attorney's Office for the purpose of assisting that office in the collection of federally guaranteed student loans which are in default.

CONCLUSION

For the foregoing reasons, we conclude that the BWS may disclose the home telephone numbers of its customers: (1) to

federal law enforcement agencies for a civil or criminal law enforcement activity; and (2) to the Department of the Prosecuting Attorney when such disclosure reasonably appears to directly further the performance of its express constitutional or statutory duties and functions.

On the contrary, we conclude that disclosure of such information to the U.S. Attorney's Office for the purposes of locating persons who have defaulted upon federally guaranteed student loans is not permitted by the UIPA. Similarly, we have determined that disclosure of such information to other customers or persons would constitute "a clearly unwarranted invasion of personal privacy." Haw. Rev. Stat. Þ 92F-13(1) (Supp. 1989). Individuals have a significant privacy interest in avoiding the unlimited disclosure of their home telephone number, one that is not outweighed by the public interest in disclosure, where as here, it would reveal little or nothing concerning an agency's conduct or performance of its duties or the formation of public policy.

Hugh R. Jones
Staff Attorney

HRJ:sc

APPROVED:

Kathleen A. Callaghan
Director