

March 30, 1990

MEMORANDUM

TO: The Honorable David K. Luke, Jr.
Director of Personnel, County of Hawaii

FROM: Lorna J. Loo, Staff Attorney

SUBJECT: Disclosure of Certified List of Eligibles and Civil
Service Examination Scores

This is in response to your letters, dated July 20, 1989 and February 1, 1990, requesting an advisory opinion from the Office of Information Practices ("OIP") regarding the disclosure of a certified list of eligibles and the civil service examination scores ("examination scores") of the individuals named on the list ("certified eligibles").

ISSUES PRESENTED

- I. Whether the Uniform Information Practices Act, chapter 92F, Hawaii Revised Statutes ("UIPA"), requires public disclosure of a certified list of eligibles.
- II. Whether the UIPA requires public disclosure of the examination scores of the certified eligibles.
- III. Whether a certified list of eligibles and the certified eligibles' examination scores should be disclosed to an exclusive representative pursuant to section 89-16.5, Hawaii Revised Statutes.

BRIEF ANSWER

A certified list of eligibles is confidential except for the name of the individual appointed from it. Individuals not selected have a significant privacy interest in information revealing that they were considered and not selected, and there is minimal public interest in this disclosure because it sheds

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little light on the agency's actual selection. Because the privacy interest outweighs the public interest in disclosure about the individuals not selected, disclosure would constitute a clearly unwarranted invasion of these individuals' personal privacy and is not permitted under section 92F-13(1), Hawaii Revised Statutes. The exception in section 92F-13(3), Hawaii Revised Statutes, also applies since disclosure of all certified eligibles' identities before the selection and the identities of those eventually not selected would frustrate the legitimate government function of hiring personnel. Home addresses, home telephone numbers, and the comments contained in the certified list of eligibles about the certified eligibles are also confidential.

The UIPA exception based on personal privacy also makes confidential the examination scores of all the certified eligibles since the individuals have a significant privacy interest in their examination scores and disclosure would not further the public interest in learning about the agency's selection. The exception based on frustration of a legitimate government function also applies since disclosure of an individual's examination scores would frustrate government hiring by discouraging individuals from applying for civil service positions. The examination scores, however, shall be made public if they are maintained by an agency in a readily retrievable form and information identifying the individuals is reasonably segregable and deleted from the disclosed record.

Where a state or federal law expressly authorizes disclosure of a government record, the UIPA requires disclosure in accordance with that law. Section 89-16.5, Hawaii Revised Statutes, requires disclosure of an employee's personal records to an exclusive representative if they are "relevant to the investigation or processing of a grievance." Since the issue of "relevancy" involves an analysis of the facts in each particular case, the County Corporation Counsel, or where appropriate, the State Attorney General, should be consulted regarding the determination of the "relevancy" of an employee's personal records to the investigation or processing of a grievance.

FACTS

When a government agency of the County of Hawaii has a vacant civil service position, the Department of Civil Service,

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County of Hawaii ("Department"), provides to the agency a certified list of eligibles which names and certifies five individuals determined to be qualified, based on the individuals' civil service examination scores, for the particular civil service class or position. The certified list of eligibles also contains the home or mailing addresses and the home telephone numbers of the certified eligibles. The agency that is hiring ("hiring agency") selects and appoints one of the certified eligibles to the position. After the hiring agency's selection, the certified list of eligibles maintained by the Department identifies the appointed individual and may contain comments describing the hiring agency's reasons for rejecting the other certified eligibles.

An exclusive representative has requested, as part of a grievance investigation, a copy of the certified list of eligibles used to fill an Assistant County Real Property Tax Administrator position and the examination scores of the certified eligibles.

For this Real Property Tax Administrator position, each candidate had received two different types of civil service examination scores, an unassembled examination score derived from the Department's rating of the candidate's relevant training and experience ("training and experience score") and the other examination score indicating the candidate's performance on the written supervisory judgment test administered by the Department ("written test"). The certified eligibles were the five candidates that received the five highest training and experience scores, as well as passing scores on the written test. Although the certified eligibles were ranked on the certified list of eligibles according to their respective training and experience scores, neither these scores nor the scores from the written test were submitted to the hiring agency. The Department maintains the certified eligibles' examination scores in other records and currently keeps the scores, as well as the certified list of eligibles, confidential.

DISCUSSION

I. Public Disclosure of the Certified List of Eligibles

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The UIPA states that "[a]ll government records are open to public inspection unless access is restricted or closed by law."¹ Haw. Rev. Stat. § 92F-11(a) (Supp. 1989). The UIPA, in section 92F-13, Hawaii Revised Statutes, sets forth exceptions to this general rule of access, two of which are relevant to the issues presented. This section provides in pertinent part:

§92F-13 Government records; exceptions to general rule. This chapter shall not require disclosure of:

- (1) Government records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy;
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- (3) Government 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(1), (3) (Supp. 1989).

The UIPA exception based on a "clearly unwarranted invasion of personal privacy" involves a "balancing" of the privacy and public interests in disclosure. According to the UIPA, "[d]isclosure 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." Haw. Rev. Stat. § 92F-14(a) (Supp. 1989). The UIPA's legislative history instructs that "[i]f 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, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 690 (1988); H. Conf. Comm. Rep. No. 112-88, Haw. H.J. 817, 818 (1988).

The State Legislature has determined that an individual does have a significant privacy interest in "applications,

¹Disclosure of a personal record to the individual to whom it pertains is governed by Part III of the UIPA. The discussion herein does not address this situation since it is not presented in the facts provided.

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nominations, recommendations, or proposals for public employment or appointment to a governmental position." Haw. Rev. Stat. § 92F-14(b)(4) (Supp. 1989). The OIP has previously opined that this significant privacy interest includes an individual's identity as an applicant or candidate for a government position, but that this interest is outweighed by the public interest where the individual is the candidate selected. See OIP Op. Ltr. No. 89-2 (Oct. 27, 1989).

In OIP Opinion Letter No. 89-2, we concluded that there was a greater counterveiling public interest in the disclosure of the identity, training, and experience of the candidate selected for the position of special master for the state corrections system. As was recognized in OIP Opinion Letter No. 89-2, disclosure of this information about a successful employment candidate promotes the public interest in the competence of people employed by government agencies and the agencies' adherence to the laws and rules governing hiring practices.

On the other hand, disclosure about individuals not selected "is unnecessary for the public to evaluate the competence of people who were appointed," whereas it "may embarrass or harm [these] applicants who failed to get a job."² *Core v. U.S. Postal Service*, 730 F.2d 946, 949 (4th Cir. 1984). Consequently, we concluded that the significant privacy interest outweighed the minimal public interest with respect to the information about unsuccessful candidates. See OIP Op. Ltr. No. 89-2 (Oct. 27, 1989).

Furthermore, OIP Opinion Letter No. 89-2 also concluded that disclosure of information about unsuccessful applicants or any applicant before the final selection, would frustrate the legitimate government function of hiring personnel. This disclosure will have such an effect because the potential embarrassment or harm resulting from disclosure may discourage qualified individuals from applying to government positions. Consequently, the UIPA exception to disclosure set forth in section 92F-13(3), Hawaii Revised Statutes, based on frustration of a legitimate government function, is also applicable.

²As suggested by the UIPA's legislative history, "[t]he case law under the Freedom of Information Act ["FOIA"] should be consulted for additional guidance" regarding an individual's privacy interest. S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1094 (1988).

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There does not appear to be any state or federal case law specifically deciding whether a certified list of eligibles should be made public. Yet, by applying the analysis in OIP Opinion Letter No. 89-2 to the case at hand, we believe that the identity of the certified eligible actually appointed to the position is publicly disclosable under the UIPA. The great public interest in this information, since it reveals government hiring practices, exceeds this individual's privacy interest. On the other hand, under the rationale discussed in OIP Opinion Letter No. 89-2, information identifying those certified eligibles not selected is confidential because disclosure would constitute a clearly unwarranted invasion of personal privacy and would also frustrate the legitimate government function of hiring government personnel.

In addition, the certified eligibles' home addresses and home telephone numbers contained in the certified list of eligibles are confidential. The OIP has previously opined that there is a significant privacy interest in home addresses and home telephone numbers, for example, of seminar attendees, see OIP Op. Ltr. No. 89-16 (Dec. 27, 1989), and the home addresses listed on an agency waiting list for the award of homestead leases, see OIP Op. Ltr. No. 89-4 (Nov. 9, 1989). These opinions point out that, by analogy to prevailing FOIA case law, the relevant public interest in disclosure of a government record is measured by the extent to which the record sheds light upon government conduct. Accordingly, there is little public interest in the disclosure of certified eligibles' home addresses and home telephone numbers, since disclosure will not shed light upon the Department's conduct, its duties, or "what the agency is up to." Id.; see, e.g., National Association of Retired Federal Employees v. Horner, 879 F.2d 873 (D.C. Cir. 1989); Federal Labor Relations Authority v. U.S. Dep't. of Treasury, 884 F.2d 1446 (D.C. Cir. 1989).

We believe that comments provided on the certified list of eligibles about the certified eligibles not selected are also confidential. In OIP Opinion Letter No. 89-2, we concluded that subjective narrative comments made by a search firm about employment candidates, successful or unsuccessful, should be deleted to avoid a clearly unwarranted invasion of personal privacy. See also Ripskis v. Dep't. of Housing and Urban Development, 746 F.2d 1 (D.C. Cir. 1984); Clemins v. U.S. Dep't.

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of Treasury, Etc., 457 F. Supp. 13 (D.D.C. 1977) (approving the deletion of identifying material in narrative comments, favorable or unfavorable, in promotion evaluations). Similarly, certified eligibles not selected have a great privacy interest in the comments describing why they were not selected, and this significant privacy interest outweighs any countervailing public interest. Since the comments describe the individuals not selected, disclosure identifying these individuals would discourage applicants and, therefore, also frustrate the legitimate government function of hiring personnel.

II. Public Disclosure of the Certified Eligibles' Examination Scores

We believe that under the UIPA individuals have a significant privacy interest in their civil service examination scores. For the Assistant County Real Property Tax Administrator position, the examination scores reflect the Department's rating of the respective individuals' training and experience and also these individuals' performance on the written test. Individuals may be embarrassed by the disclosure of their scores whether they are high or low. See Ripskis, 746 F.2d at 3 (employee evaluation ratings). Certified eligibles not selected especially have a significant privacy interest in their examination scores because like other identifying information, disclosure would reveal that these individuals were eligible, but nevertheless not selected for the position. Civil service appointees also have a significant privacy interest in their own examination scores, and disclosure of their scores "will be likely to spur unhealthy comparisons among . . . employees" in civil service. See

We find that there is no countervailing public interest in disclosure of the examination scores of any of the certified eligibles. Since the hiring agency did not receive the certified eligibles' examination scores, the scores themselves were not a consideration in the hiring process. The certified eligibles' ranking order according to their undisclosed scores is but only one factor that the hiring agency may have considered in its actual selection from the certified list of eligibles. Disclosure of the examination scores would shed little light upon the hiring agency's selection and if anything, may be misleading since undue emphasis would be given to the examination scores. On the other hand, disclosure of the appointed certified eligible's education, training background, and work experience

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required for the position does serve the public interest in learning about the agency's selection, and the UIPA expressly makes this information public. Haw. Rev. Stat. § 92F-12(a)(14) (Supp. 1989).

Because the certified eligibles' privacy interest outweighs the public interest in disclosure of their examination scores, disclosure would constitute a clearly unwarranted invasion of privacy and is, therefore, not permitted under section 92F-13(1), Hawaii Revised Statutes. Furthermore, the exception in section 92F-13(3), Hawaii Revised Statutes, also applies to this information since disclosure would frustrate the legitimate government function of hiring personnel by discouraging other applicants for civil service positions.

The described exceptions to disclosure do not apply to the examination scores when all individual identifying information is removed. See, e.g., Bowie v. Evanston Community Consol. School Dist. No. 65, 538 N.E.2d 557 (Ill. 1989) (no clearly unwarranted invasion of privacy by disclosing students' standardized test scores where information identifying the students is deleted). By this disclosure, the public can ensure that the Department complies with its own standards in certifying individuals for a civil service position. If the examination scores are maintained by the Department in a readily retrievable form and can reasonably be segregated from information identifying the individuals, the examination scores of the certified eligibles shall be disclosed after information revealing the individuals' identities is deleted. See Ripskis, 746 F.2d 1; Clemins, 457 F. Supp. 13 (approving the deletion of individual identifying material in employee evaluation records). Yet, where an examination score can be identified with the respective certified eligible even after segregation, then disclosure to the public will not be permitted in order to protect that individual's right to privacy. See, e.g., Clemins, 457 F. Supp. at 17 (it would be obvious which application and evaluation, if disclosed, belonged to the only applicant that applied to a position).

III. Disclosure to an Exclusive Representative

The third issue raised is whether the certified list of eligibles and the certified eligibles' examination scores should be disclosed to an exclusive representative during the investigation or processing of a grievance. This information,

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except for the name of the appointed certified eligible, is confidential under the applicable UIPA exceptions and not disclosable to the general public. However, where a federal or state law expressly authorizes disclosure of a government record to an individual, the UIPA requires disclosure in accordance with that statute notwithstanding any provision to the contrary. Haw. Rev. Stat. § 92F-12(b)(2) (Supp. 1989).

Section 89-16.5, Hawaii Revised Statutes, which was adopted in 1988, provides as follows:

§89-16.5 Access to personal records by an employee organization. Exclusive representatives shall be allowed access to an employee's personal records which are relevant to the investigation or processing of a grievance. The exclusive representative shall not share or disclose the specific information contained in the personal records and shall notify the employee that access has been obtained.

Haw. Rev. Stat. § 89-16.5 (Supp. 1989).

The names, home addresses, home telephone numbers, and comments on the certified list of eligibles and the examination scores constitute information maintained by an agency about individuals, namely the certified eligibles, and, therefore, are "personal records" as defined in section 92F-3, Hawaii Revised Statutes. Section 89-16.5, Hawaii Revised Statutes, specifically governs disclosure of an employee's personal record. Hence, this statute does not apply to disclosure of records about individuals who are not employees.

In applying section 89-16.5, Hawaii Revised Statutes, the determination of whether a particular personal record of an employee is "relevant" rests upon an analysis of the facts of the particular grievance and related investigation. The performance of this analysis should be conducted by the government attorney assigned to the case, not the OIP. Therefore, the County's Corporation Counsel, or where appropriate, the State Attorney General, should be consulted regarding whether the particular personal records are "relevant" to the exclusive representative's investigation or processing of a grievance. If the employee's personal records are determined to be "relevant," then the agency

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shall allow access by the exclusive representative pursuant to section 89-16.5, Hawaii Revised Statutes. However, the exclusive representative shall not share or disclose this information and shall notify the employee that access has been obtained. Haw. Rev. Stat. § 89-16.5 (Supp. 1989).

CONCLUSION

The identity of the individual appointed from the certified list of eligibles shall be made public, but the identities of the certified eligibles not selected shall be kept confidential under the applicable UIPA exceptions in section 92F-13(1) and (3), Hawaii Revised Statutes. Disclosure is not permitted because it would constitute a clearly unwarranted invasion of the personal privacy of the certified eligibles not selected. Furthermore, disclosure of the certified eligibles' identities before the selection and the identities of those not selected would frustrate a legitimate government function, namely the hiring of personnel. Home addresses, home telephone numbers, and the comments contained in the certified list of eligibles are also confidential under the exception based on personal privacy.

The certified eligibles' examination scores are also confidential because disclosure would constitute a clearly unwarranted invasion of these individuals' privacy and frustrate the legitimate government function of hiring personnel. The examination scores, however, shall be disclosed if they are maintained by the Department in a readily retrievable form and information revealing the individuals' identities is reasonably segregable and not disclosed with the examination scores.

The UIPA requires disclosure to an individual where a state or federal law expressly requires disclosure to that individual. Section 89-16.5, Hawaii Revised Statutes, requires that an exclusive representative be granted access to an employee's personal records relevant to the investigation or processing of a grievance. The County Corporation Counsel, or where appropriate, the State Attorney General, should be consulted regarding the issue of whether an employee's personal record is "relevant" to the grievance.

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Staff Attorney

LJL:bl

APPROVED:

Kathleen A. Callaghan
Director