April 24, 1990

Ms. Kelli K. Abe
KGMB-TV
1534 Kapiolani Boulevard
Honolulu, Hawaii 96814

Dear Ms. Abe:

Re: Disclosure of Information Relating to the Vacation and Sick Leave of Agency Officers and Employees

This is in reply to your letter dated January 5, 1990, requesting an advisory opinion concerning public access to government records relating to the use of paid vacation leave by Deputy Courts Administrator Thomas Okuda.

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), the disclosure of vacation leave and sick leave credits used by or granted to present or former agency officers or employees would constitute a "clearly unwarranted invasion of personal privacy," under section 92F-13(1), Hawaii Revised Statutes.

BRIEF ANSWER

Under the UIPA, present or former agency officers or employees ("employees") have a significant privacy interest in "[i]nformation contained in an agency's personnel file." Haw. Rev. Stat. § 92F-14(b)(4) (Supp. 1989). Based upon case law interpreting privacy exceptions to the open records laws of other states which are similar to section 92F-13(1), Hawaii Revised Statutes, we conclude that the disclosure of government records which reflect the vacation leave and sick leave granted to or used by agency employees would not "constitute a clearly

unwarranted invasion of personal privacy." These records, severed of any medical information, do not disclose any "highly personal" or "intimate" information. Further, an agency employee's use of sick leave or vacation leave goes to the heart of the expenditure of tax moneys by the government and the public's right to know how its taxes are spent. Thus, we conclude that after the segregation of any medical information from such records, an agency employee's privacy interest is outweighed by the public interest in disclosure under the UIPA's balancing test set forth at section 92F-14(a), Hawaii Revised Statutes. However, before making such records available for public inspection, an agency must delete from such records any information relating to the medical condition, treatment, or diagnosis of an agency employee, since in the usual case, no significant public interest will be furthered by the disclosure of such information.

FACTS

Commencing on April 3, 1989, and continuing through the middle of June 1989, the Deputy Administrative Director of the Courts, Thomas Okuda ("Okuda"), stood trial upon criminal misdemeanor charges relating to the performance of his official duties. As a result of that trial, Okuda was convicted of, among other things, ticket fixing, tampering with public records, and unsworn falsification to authorities. At Okuda's sentencing, the trial court ordered that he be "summarily discharged" from his office as required by Hawaii's ticket-fixing law, section 286-138, Hawaii Revised Statutes. The trial court, however, stayed this sentence pending an appeal by Okuda.

Both before and during his trial, Okuda submitted requests to use his accumulated vacation time as a Judiciary employee, in order to assist in his defense and to attend his trial. These requests were made by Okuda's completion of State of Hawaii forms entitled "Application for Leave of Absence," a copy of which is attached as Exhibit "A." An employee's use of sick leave is also recorded and approved by the completion of this same form.

In general, agency employees, including those of the Judiciary, earn 21 days of paid vacation leave and 21 days of paid sick leave each year, both of which accrue at 1.75 days for

each full month of service.[1] Generally, in the absence of emergency situations, agency employees must obtain approval for the use of their vacation leave in advance of using their accumulated paid vacation leave. Each agency also maintains for each of its employees, an "Attendance and Leave Record" (State DPS Form 7) which documents each employee's use of leave on a day-by-day basis. A copy of this "Attendance and Leave Record" form is attached as Exhibit "B."

On June 29, 1989, one day after Okuda's sentencing hearing, the Hawaii Government Employees Association ("HGEA"), on Okuda's behalf, requested that the Judiciary credit back to Okuda portions of the vacation leave he used during the trial. The apparent basis for the request was that on many occasions, Okuda did not spend all day attending trial, and in fact, returned to the performance of his administrative duties. In essence, it was asserted that Okuda did not in fact use all the vacation leave reflected in the "Application for Leave of Absence" forms previously submitted, and approved by the Judiciary. Eventually, Okuda was credited back with approximately 132 hours of vacation time, or the equivalent of 16-1/2 days of vacation time. These credits were approved after Okuda filed amended Applications for Leave of Absence dated November 29, 1989.

In response to inquiries by your office, the Judiciary's Public Information Office disclosed, in general, that Okuda was credited back with portions of the accumulated vacation leave he used during his trial. Your news organization then requested to inspect government records maintained by the Judiciary relating to the granting of vacation leave to Okuda. Specifically, you requested information concerning how much paid vacation time was credited back to Okuda by the Judiciary, including the number of hours credited and the dates to which those credits correspond. The Judiciary denied this request. By letter dated January 5, 1989, you requested an advisory opinion concerning the public's right to inspect Okuda's leave records.

DISCUSSION

Because of the similarity of paid vacation and sick leave, and because such matters are requested, approved, and recorded on

[1]An agency employee's unused vacation leave may accumulate up to a maximum of 90 working days.

the same government records, we shall consider in this opinion the public's right to inspect and copy both agency employee sick leave and vacation leave records.

First, section 92F-11, Hawaii Revised Statutes, sets forth general rules concerning the disclosure of government records, and provides in pertinent part:

> **§92F-11 Affirmative agency disclosure responsibilities.** (a) All government records are open to public inspection unless access is restricted or closed by law.
>
> (b) Except as provided in section 92F-13, each agency upon request by any person shall make government records available for inspection and copying during regular business hours. [Emphasis added.]

In addition to the general rules of agency disclosure set forth above, section 92F-12, Hawaii Revised Statutes, sets forth government records, or information contained therein, that must be disclosed as a matter of law. With respect to information concerning present or former officers or employees of an agency, section 92F-12(a)(14), Hawaii Revised Statutes, states:

> **§92F-12 Disclosure required.** (a) Any provision to the contrary notwithstanding each agency shall make available for public inspection and duplication during regular business hours:
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> . . . .
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> (14) The name, compensation (but only the salary range for employees covered by chapters 76, 77, 297 or 304), job title, business address, business telephone number, job description, education and training background, previous work experience, dates of first and last employment, position number, type of appointment, service computation date, occupational group or class code, bargaining unit code, employing

> agency name and code, department, division, branch, office, section, unit and island of employment, of present or former officers or employees of the agency, provided that this provision shall not require the creation of a roster of employees; except that this provision shall not apply to information regarding present or former employees involved in an undercover capacity in a law enforcement agency; . . . .

A review of this section reveals that data concerning such matters as paid sick leave or paid vacation leave accumulated, used, or granted to present or former agency employees is not expressly mentioned as data that must be disclosed under the UIPA, "[a]ny provision to the contrary notwithstanding." However, this does not end the inquiry, for as noted above, under the UIPA, an agency must disclose government records in the absence of any applicable exception to access enumerated in section 92F-13, Hawaii Revised Statutes. Thus, we now turn to a consideration of whether government records which record or reflect an agency employee's use of vacation or sick leave are protected from disclosure under one or more of these UIPA exceptions.

In our opinion, the only potentially applicable UIPA exception to access, is that which protects from disclosure "[g]overnment records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy." Haw. Rev. Stat. § 92F-13(1) (Supp. 1989). The UIPA declares that this exception does not apply "if the public interest in disclosure outweighs the privacy interests of the individual." Haw. Rev. Stat. § 92F-14(a) (Supp. 1989). Further, the UIPA's legislative history instructs those applying this balancing test that government records are not protected from disclosure under the UIPA's privacy exception unless the individual's privacy interest in those records is "significant."[2] In determining whether an individual has a significant privacy interest in a government record, guidance has been supplied by the Legislature in section

[2]See S. Conf. Comm. Rep. No. 235, 14th Leg., Reg. Sess., Haw. S.J. 689, 690 (1988); H. Conf. Comm. Rep. No. 112-88, 14th Leg., Reg. Sess., Haw. H.J. 817, 818 (1988) ("Once a significant privacy interest is found, the privacy interest will be balanced against the public interest in disclosure.")

92F-14(b), Hawaii Revised Statutes, which enumerates examples of the types of information in which an individual is deemed to have such a significant privacy interest:

> (b) The following are examples of information in which the individual has a significant privacy interest:
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> (1) Information relating to medical, psychiatric, or psychological history, diagnosis, condition, treatment, or evaluation, other than directory information while an individual is present at such facility;
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> . . . .
>
> (4) Information in an agency's personnel file, or applications, nominations, recommendations, or proposals for public employment or appointment to a governmental position, except information relating to the status of any formal charges against the employee and disciplinary action taken or information disclosed under section 92F-12(a)(14); . . . .

Haw. Rev. Stat. § 92F-14(b)(1), (4) (Supp. 1989) (emphasis added).

Both the "Application for Leave of Absence" and "Attendance and Leave Record" forms are generally a type of information found in an agency's personnel file.[3] Additionally, occasionally employees will set forth on the "Application for Leave" form the medical reason why sick leave is being claimed, such as "influenza." Further, if sick leave is being requested for any period in excess of five days, the application must be supported

[3]We do not mean to suggest that the mere presence of a government record in an agency personnel file establishes a significant privacy interest in that record. Entirely "public" data may be found within a personnel file. Conversely, the protection of an individual's privacy "surely was not intended to turn upon the label of the file which contains the damaging information." Department of State v. Washington Post Co., 456 U.S. 595, 601, 102 S. Ct. 1957, 72 L. Ed.2d 358 (1982). Thus, we conclude that section 92F-14(b)(4), Hawaii Revised Statutes, was meant to recognize an individual's significant privacy interest in personnel related information, that may, or may not, be contained in a "personnel file."

by a physician's certificate that excuses that employee for medical reasons. Often, these certificates disclose information relating to an agency employee's medical condition, treatment, or diagnosis. Therefore, whether the "Application for Leave" form is used for vacation leave or sick leave, an agency employee has a significant privacy interest in the information contained on the form under section 92F-14(b)(1) or (4), Hawaii Revised Statutes. Thus, we must now balance an employee's significant privacy interest in the information contained in the "Application for Leave of Absence" and "Attendance and Leave Record" forms against the public interest in disclosure, to determine whether the disclosure of these government records would be "clearly unwarranted" under section 92F-13(1), Hawaii Revised Statutes.

Two of the basic policies served by the UIPA are to "[p]romote the public interest in disclosure" and to "[e]nhance governmental accountability through a general policy of access to government records." Haw. Rev. Stat. § 92F-2 (Supp. 1989). Like the federal Freedom of Information Act, 5 U.S.C. § 552 (1989) ("FOIA"), one of the UIPA's core purposes "focuses on the citizen's right to be informed about what their government is up to and about the conduct of government officials." U.S. Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. ___, 109 S. Ct. 1468, 1481, 103 L. Ed.2d 774 (1989). With these principles in mind, we turn to an examination of case law which considers whether the disclosure of agency employee attendance records would constitute an unwarranted invasion of privacy under the public records laws of other jurisdictions, in accordance with the Legislature's directive that the developing common law "is ideally suited to the task of balancing competing interests in the grey and unanticipated cases." S. Stand. Comm. Rep. No. 2580, 14th Leg., Reg. Sess., Haw. S.J. 1093, 1094 (1988).

The issue of public access to agency employee attendance records has not received extensive judicial consideration. In Bahlman v. Brier, 462 N.Y.S.2d 381 (N.Y. Sup. 1983), a New York state trial court held that the disclosure of the names of city employees, the departments for which they worked, and number of sick time hours accumulated by each employee would result in an "unwarranted invasion of privacy." The court, while noting the existence of a vital public interest in "knowing whether or not it is getting good value in terms of taxpayer dollars spent, for services performed by public employees," nevertheless held that

disclosure of sick time records after deletion of identifying particulars, would equally serve this public interest. The court reasoned:

> No public interest is advanced by publishing a laundry list of names so that the newspaper can "ask the guy what was his problem." A mass indictment of all city personnel by publication of a list of names and sick leave hours utilized, without any attempt to delineate justifiable sick leave from an abuse is abhorrent to all notions of fair play and serves no legitimate purpose other than to subject an employee's reputation to conjecture and innuendo.

Bahlman, 462 N.Y.S.2d at 382.

On the contrary, three years after the Bahlman decision, a New York Appeals Court, interpreting the same statute before the court in Bahlman, held that the disclosure of a "Lost Time Report" kept as a record of sick time taken by a particular police officer would not constitute an "unwarranted invasion of privacy" under New York's Freedom of Information Law. Capital Newspapers Div. v. Burns, 505 N.Y.S.2d 576 (Ct. App. 1986). In Capital Newspapers, a news reporter was investigating allegations that members of the City of Albany police force were abusing sick leave privileges accorded under a collective bargaining agreement. The City refused to disclose the sick time records of one police officer who was also president of the police officers' union. In holding that the sick time records were not exempt from disclosure under an "unwarranted invasion of privacy" exception, the court reasoned that New York's Freedom of Information Law was enacted in furtherance of "the public's vested and inherent `right to know' [and] affords all citizens the means to obtain information concerning the day-to-day functioning of state and local government thus providing the electorate with sufficient information to make intelligent, informed choices with respect to both the direction and scope of governmental activities." Capital Newspapers, 505 N.Y.S.2d at 578.

Similarly, in Brogan v. School Committee of Westport, 516 N.E.2d 159 (Mass. 1987), the Massachusetts Supreme Court held that a school committee's employee attendance and absentee

records were public records subject to disclosure. In Brogan, a requester had sought access to the individual absentee records of a school committee and was provided summaries of such records, sanitized of any identifying details. Under the Massachusetts public records law, "medical and personnel files or information" are exempt from disclosure "where the files or information are of a personal nature and relate to a particular individual." In sustaining a trial court ruling that the records were not "of a personal nature" the court reasoned:

> The selectmen seek information only as to the names of the school committee's employees, and the dates and generic classifications, e.g., "sick day," "personal day," etc., of their absences. These are not "`intimate details' of a `highly personal' nature," the "kind of private facts that the Legislature intended to exempt from mandatory disclosure" [citations omitted]. The selectmen have not requested any information of a personal nature, such as the medical reason for a given absence or the details of family emergencies, nor does the record indicate that any of the absentee records involved such information.
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> . . . .
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> Here we deal only with records of absenteeism among teachers, information which has potential to embarrass its subjects only in so far as evidence of excessive absenteeism may lead to further inquiry and discovery of abuses. The records sought are not themselves "of a personal nature." `Not every bit of information which might be found in a personnel or medical file is necessarily personal so as to fall within the exemption's protection . . . . [T]he scope of the exemption turn[s] on the character of the information sought . . . .'

Brogan, 516 N.E.2d at 160-161.

Likewise, in Kanzelmeyer v. Eger, 329 A.2d 307 (Pa. Commw. 1974), the Pennsylvania Commonwealth Court held that the attendance record cards of school district employees were not exempt from disclosure under an exemption to the Pennsylvania

"Right to Know Law" which protected from disclosure matters "which would operate to the prejudice or impairment of a person's reputation or personal security." Although the Kanzelmeyer decision involves the application of statutory language different from the UIPA exception under consideration herein, the court's decision does set forth the significant public interest that would be served by disclosure of employee attendance records:

> Public employment has attractions, including the satisfaction of performing public service and, in the case of professional employees of public schools, protection from dismissal for whimsical reasons or no reason at all. One of the disadvantages of public employment is the requirement of public accountability by both employer and employee. The instant record clearly establishes that the appellant would be unable to ascertain whether the district had paid its employees for unauthorized absences without access to the attendance record cards. The cards are, therefore, plainly the kind of record intended to be made available to public examination by the "Right to Know Law." Considerations of privacy and confidentiality, as distinguished from regard for reputation and personal security, must yield to the public's right to know about and examine into its servants' performance of duty.

Kanzelmeyer, 329 A.2d at 310 (emphasis added). Attached hereto as Exhibit "C" is a copy of the attendance card that was before the court in Kanzelmeyer, which the court decided was subject to public inspection. A review of Exhibit "C" reveals that it is strikingly similar to the "Attendance and Leave Record" form attached hereto as Exhibit "B", which records the use of leave by State of Hawaii employees.

The issue of public inspection of public employee attendance records has also been addressed in at least one state attorney general opinion. The State of Michigan, Department of the Attorney General, in an opinion dated July 28, 1982, concluded that under Michigan's Freedom of Information Act, agency records which disclose the number of days that a public employee is absent from work are subject to disclosure. In Op. Att'y Gen. Mich. No. 6087 (July 18, 1982), the Michigan Attorney General opined that the attendance records of public employees were not

exempt from disclosure under a statutory exemption for "[i]nformation of a personal nature, the disclosure of which would constitute a clearly unwarranted invasion of an individual's privacy." The Michigan Attorney General relied heavily upon the decision of the Michigan Court of Appeals in Penokie v. Michigan Technology University, 287 N.W.2d 304 (1979), in which the court concluded that the disclosure of the names and wages of University employees would not result in a "clearly unwarranted" invasion of privacy. In support of it's conclusion, the Michigan Attorney General stated that:

> The reasoning of Penokie v. Michigan Technological University, . . . is persuasive and supports the conclusion that the attendance record of a public employee is a public matter since it is a prerequisite to the receipt of wages and a vital incident to the expenditure of public funds. The performance or non-performance of public duties is not a "highly personal" or "private" matter, the disclosure of which would constitute an unwarranted invasion of privacy. On the contrary, it goes to the heart of the expenditure of tax moneys paid by the public and the public's right to know how its taxes are spent.
>
> It is my opinion, therefore, that records of a public body showing the number !□of days a public employee is absent from work are not exempt from disclosure under the Freedom of Information Act; . . . .

Op. Att'y Gen. Mich. No. 6087 (July 28, 1982) (emphasis added).

Moreover, in Nakano v. Matayoshi, 68 Haw. 140, 406 P.2d 814 (1985), the Hawaii Supreme Court noted that public employees have a reduced expectation of privacy concerning their financial affairs, reasoning "we cannot say that an employee of the State or any of its political subdivisions may reasonably expect that his financial affairs is protected to the same extent as that of other citizens." Nakano, 68 Haw. at 148. Further, the court noted that section 6 of article I of the Constitution of the State of Hawaii was intended to curb "abuses in the use of highly personal and intimate information," not "deter government from the legitimate compilation and dissemination of data." Id. at 147.

The foregoing legal authority convincingly points out that an agency employee's use of paid sick or vacation leave "goes to the heart" of the expenditure of state tax revenue and the public's right to know how its taxes are being spent. These authorities also underscore that public employees are ultimately accountable to the public in the performance of their public duties and that considerations of privacy, significant as they may be, "must yield to the public's right to know about and examine into its servants' performance of duty." Kanzelmeyer, 329 A.2d at 310. Similarly, these authorities concur that the performance or nonperformance of public duties is not a "highly personal" or "private" or "intimate" matter, the disclosure of which would constitute a "clearly unwarranted" invasion of personal privacy.

The foregoing authorities convince us that the disclosure of agency employee sick leave and vacation leave records would directly further the UIPA's core purpose, which like the FOIA, is to "ensure that the government's activities be opened to the sharp light of public scrutiny." Federal Labor Relations Authority v. U.S. Department of the Treasury, 884 F.2d 1446, 1451 (D.C. Cir. 1989). See also Haw. Rev. Stat. § 92F-2 (Supp. 1989) (UIPA policy to "[e]nhance governmental accountability through a general policy of access to government records"). We do not ignore the significant privacy interest that agency employees $□have in their leave records. We merely conclude that on balance, the public interest in the disclosure of these records outweighs any significant privacy interest an agency employee may have in such records, after the deletion of any medical information.

Interestingly, in response to inquiries from the public and other agencies, agency employees routinely disclose that their co-workers are unavailable because they are, for example, "out sick," "on vacation," or on "administrative leave." Indeed, the Judiciary did so itself in the case of Okuda. The fact that such disclosures so commonly and repeatedly occur further indicates that the information is not of a "highly personal," "private" or "intimate" nature.

However, in the usual case, no significant public interest would be served by the disclosure of government records which disclose details relating to an agency employee's medical condition, diagnosis, or treatment. Thus, we conclude that

except in the most unusual circumstances, an employee's doctor's certificate should not be made available for public inspection. Similarly, any medical information contained in an agency employee's "Application for Leave of Absence" form should be deleted before making the record available for public inspection.

With the above noted qualifications, we conclude that "Applications for Leave of Absence" and "Attendance and Leave Records"[4] of present or former agency officers or employees are subject to public inspection and copying under the UIPA. The public interest in disclosure outweighs an agency employee's privacy interest in these records under section 92F-14(a), Hawaii Revised Statutes.

CONCLUSION

After information relating to the medical condition, diagnosis, or treatment of present or former agency employees has been segregated from the government records attached to this opinion as Exhibits "A" and "B", we conclude that the public may inspect and copy such records under the UIPA. Although agency employees have a significant privacy interest in "[i]nformation in an agency's personnel file" under section 92F-14(b)(4), Hawaii Revised Statutes, we conclude that under the UIPA, an agency employee's privacy interest in "Applications for Leave of Absence" and "Attendance and Leave Records" reflecting their use of sick leave and vacation leave is outweighed by the public interest in disclosure.

Very truly yours,

Hugh R. Jones
Staff Attorney

HRJ:sc
Attachments
cc: Honorable Herman T.F. Lum
Chief Justice, Supreme Court of Hawaii

[4]For the reasons set forth in this opinion, we conclude that information concerning other types of employee leave as documented in the "Attendance and Leave Record" attached hereto as Exhibit "B," may also be inspected and copied by the public under the UIPA.

APPROVED:

Kathleen A. Callaghan
Director