

Op. Ltr. 92-03 List of Nominees for Judicial Vacancy

This opinion was partially overruled by OIP Op. Ltr. 03-03 in light of Pray v. Judicial Selection Commission of the State of Hawaii, 75 Haw. 333 (1993).

March 19, 1992

Ms. Barbara Marshall
KHON-TV
1170 Auahi Street
Honolulu Hawaii 96813

Dear Ms. Marshall:

Re:Judicial Selection Commission's List of Nominees to
Fill Judicial Vacancy

This is in reply to your letter dated March 10, 1992, which was telefaxed to the Office of Information Practices ("OIP") on March 11, 1992, regarding the above-referenced matter.

ISSUES PRESENTED

I. Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), the Judicial Selection Commission of the State of Hawaii ("Commission") is an "agency."

II. Whether, under the UIPA, the following information maintained by the Commission must be made available for public inspection and copying:

- 1.The list(s) of individuals who have applied or who have been recruited to apply for the vacancies in the Hawaii Supreme Court, Intermediate Court of Appeals, or Circuit Courts;
- 2.The number of individuals applying for each current judicial vacancy;
- 3.The list of nominees to fill a judicial vacancy that is delivered to the Governor by the Commission;

4. The number of lists of nominees for appointment to judicial office delivered to the Governor by the Commission;
5. The number of individuals on each list of nominees delivered to the Governor by the Commission;
6. The number of female nominees on each list delivered to the Governor by the Commission;
7. The Commission's voting tabulations concerning the nominees appearing on any list delivered to the Governor; and
8. The names of commissioners who did not vote on any applicant and the reason they did not vote.

BRIEF ANSWERS

I. Yes. The UIPA requires the disclosure of "government records" unless access to the same is closed or restricted by law. Under the UIPA, the term "government record" means "information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. \square 92F-3 (Supp. 1991) (emphasis added). The term "agency" is defined by the UIPA to include any unit of government in this State, including a "commission." Haw. Rev. Stat. \square 92F-3 (Supp. 1991).

The UIPA does not apply to the nonadministrative functions of the courts of this State. See Haw. Rev. Stat. \square 92F-3 (Supp. 1991); OIP Op. Ltr. No. 90-4 (Jan. 29, 1990). Although under article VI, section 4 of the Constitution of the State of Hawaii ("State Constitution"), the Commission is attached to the Judiciary "for purposes of administration," based upon a decision by the U.S. Court of Appeals, Ninth Circuit, it is our opinion that the Commission exercises an executive or administrative function, as opposed to a judicial function. Richardson v. Koshiba, 693 F.2d 911 (9th Cir. 1982). Accordingly, we conclude that information maintained by the Commission in any physical form constitutes a "government record," and that the Commission is subject to the provisions of the UIPA.

II. Under the UIPA, agencies are not required to disclose "[g]overnment records which, pursuant to state or federal law

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including an order of any state or federal court, are protected from disclosure." Haw. Rev. Stat. §92F-13(4) (Supp. 1991).

Article VI, section 4 of the State Constitution expressly provides that the "deliberations of the Commission shall be confidential." Additionally, article VI, section 4 of the State Constitution authorizes the Commission "to promulgate rules which shall have the force and effect of law." The record of proceedings of the Constitutional Convention of 1978 reflects that the delegates considered it essential that the Commission's deliberations be confidential. It further reflects that the delegates intended that the Commission establish the boundaries and limits of the confidentiality of the Commission's proceedings and actions under its constitutionally delegated rulemaking powers.

Rule 7 of the Judicial Selection Commission of Hawaii Rules ("Commission Rules") provides that "all commission records, proceedings and business, including the names of all proposed nominees and the names of nominees forwarded to the appointing authority, shall be confidential." Where, as here, the power to adopt rules has been delegated to an agency by the State Constitution itself, that delegation is absolute, except as limited by the State Constitution, the Constitution of the United States, or by the Legislature pursuant to a power expressly granted by the State Constitution. As such, it is our opinion that rules adopted pursuant to an express constitutional grant of rulemaking power that have the force and effect of law qualify as a State law that protects government records from disclosure within the meaning of section 92F-13(4), Hawaii Revised Statutes.

While Rule 7 of the Commission Rules purports to protect "all commission records" from disclosure, in our opinion, this rule should be interpreted to protect from disclosure only those Commission records, proceedings and business that would reveal the Commission's deliberative process. For example, we do not believe that Rule 7 of the Commission Rules should be read to encompass the personnel, purchasing, or other administrative records of the Commission since the disclosure of this information would not reveal the Commission's constitutionally protected deliberations.

However, because Rule 7 of the Commission Rules expressly provides that "the names of all proposed nominees and the names of nominees forwarded to the appointing authority, shall be confidential," and because Commission Rules have the force and

effect of law, we must conclude that under section 92F-13(4), Hawaii Revised Statutes, the Commission is not required to make such lists available for public inspection and copying. It is important to recognize that the OIP does not have the authority to opine on any question regarding the constitutionality of Rule 7 of the Commission Rules. This issue is more appropriately within the jurisdiction of the State Attorney General and the courts.

Further, because the Commission's written receipts evidencing delivery of each list of nominees to the appointing authority would not reveal the Commission's deliberations, and because these receipts are not expressly protected from disclosure by the Commission's confidentiality rule, we conclude that these written receipts should be made available for public inspection and copying under the UIPA. The disclosure of these receipts will serve to verify the delivery date of each list, which will in turn disclose the date triggering appointment action under the Constitution. Additionally, because Rule 5(B) of the Commission Rules specifically authorizes the Commission to disclose whether a commissioner did not vote on the consideration of an applicant, it is our opinion that this information should also be publicly announced.

Lastly, in our opinion, because Rule 7 of the Commission Rules expressly provides that the names of all nominees forwarded to the appointing authority are confidential, once delivered to the governor in accordance with Rule 14 of the Commission Rules, the Commission's lists of judicial nominees continue to be confidential under State law. Thus, it is our opinion that once delivered to the governor, each list of Commission nominees is protected from required disclosure by section 92F-13(4), Hawaii Revised Statutes.

FACTS

The Judicial Selection Commission of the State of Hawaii ("Commission") was established in 1979 after voters ratified an amendment proposed by the State's Constitutional Convention of 1978. As ratified by the voters, article VI, section 3 of the Constitution of the State of Hawaii ("State Constitution") sets forth the process by which persons are appointed to fill vacancies in the office of the chief justice, or in the Supreme Court, the Intermediate Court of Appeals, or the Circuit Courts. This constitutional provision provides in pertinent part:

Section 3. The governor shall, with the consent of the senate, fill a vacancy in the office of the chief justice, supreme court, intermediate appellate court and circuit courts, by appointing a person from a list of not less than six nominees for the vacancy, presented to the governor by the judicial selection commission.

If the governor fails to make any appointment within thirty days of presentation, or within ten days of the senate's rejection of any previous appointment, the appointment shall be made by the judicial selection commission from the list with the consent of the senate. If the senate fails to reject any appointment within thirty days thereof, it shall be deemed to have given its consent to such appointment.

If the senate shall reject any appointment, the governor shall make another appointment from the list within ten days thereof. The same appointment and consent procedure shall be followed until a valid appointment has been made, or failing this, the commission shall make the appointment from the list, without senate consent

. . . .

Haw. Const. art. IV, §3 (emphasis added).

The Commission is created by article VI, section 4 of the State Constitution. Under article VI, section 4 of the State Constitution, the Commission "is attached to the judiciary branch of the state government for purposes of administration." This constitutional provision also provides in pertinent part:

The judicial selection commission shall select one of its members to serve as chairperson. The commission shall promulgate rules which shall have the force and effect of law. The deliberations of the _____ commission shall be confidential.

Haw. Const. art. VI, §4 (emphasis added).

When a judicial vacancy occurs, the Commission publishes a "Notice of Vacancy" in newspapers having a statewide circulation. The Notice of Vacancy announces that the Commission is accepting names of applicants for a particular judicial vacancy,

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and routinely states that "[a] ll names submitted to the Commission will be kept confidential."

Applicants to fill a judicial vacancy and individuals whose names have been furnished to the Commission by others must complete a written "questionnaire," which we understand to be similar to an application form. The form transmittal letter used by the Commission to send this questionnaire to an applicant is stamped "PERSONAL AND CONFIDENTIAL." After receiving this questionnaire, the Commission interviews each applicant and conducts an investigation of each applicant's background, experience, and character, among other things. See Rules 9, 10 and 11 of the Commission Rules.

Rule 5(C) of the Commission's Rules provides that all communications between commissioners, between a commissioner and an applicant, or between any other person or organization with respect to the judicial qualifications of an applicant shall be kept confidential. Indeed, the OIP's review of the Commission's standard form letters to applicants and third persons reveals that the Commission consistently reminds the recipients of this Commission policy.

After voting by secret ballot, the Commission approves a list of not less than six nominees to fill each judicial vacancy. See Rule 12(C) of the Commission Rules. Under Rule 14 of the Commission Rules, this list of nominees must be in alphabetical order and hand delivered to the appointing authority, which in this case was the Governor. The OIP is informed by the Commission that the list of nominees is provided to the governor in the form of a letter, and the Commission obtains a written receipt that confirms the date of the governor's receipt of each list of nominees submitted to the governor. The Commission also informed the OIP that it does not notify the individuals whose names appear on each list of nominees that they have been nominated to fill a judicial vacancy.

On or about March 7, 1992, Governor John Waihee announced that subject to the consent of the Senate, he was appointing Judges Robert G. Klein and Steven H. Levinson of the First Circuit Court to fill two vacancies in the Supreme Court of the State of Hawaii. The Governor also announced that he was appointing First Deputy Attorney General Corinne K. A. Watanabe to fill a vacancy in the Intermediate Court of Appeals, and Acting Ombudsman Karen N. Blondin to fill a judicial vacancy in the First Circuit Court.

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By letter telefaxed to the OIP dated March 10, 1992, you requested an opinion concerning KHON-TV's right to inspect the lists of nominees delivered to the Governor by the Commission, along with other information. In particular, your letter to the OIP stated:

We would like to have the list of all applicants for each vacancy in the Judiciary, or, if not those names, at least the number applying for each vacancy. We are seeking the names on the list sent to the Governor for each vacancy, which would inherently supply us with the number of lists actually sent to the Governor. At the very least, we would request the number of names on each list, the number of women on each list, and the number of lists each individual applicant appeared on.

We also feel it should be public knowledge as to the numerical vote on each name which made the final list, and the names of and [sic] commissioners who did not vote (and the reason) on any name.

Letter from Barbara Marshall to Kathleen A. Callaghan, Director of the Office of Information Practices (March 10, 1992).

DISCUSSION

I. WHETHER THE COMMISSION IS AN AGENCY

The UIPA, the State's open records law, applies only to the public inspection and copying of "government records." Under the UIPA, the term "[g] overnment record means information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. § 92F-3 (Supp. 1991) (emphasis added). The term "agency" is defined by the UIPA as follows:

'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. 1991) (emphases added).

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While the UIPA's definition of the term "agency" expressly includes "commission[s]," it does not include "the nonadministrative functions of the courts of this State." Haw. Rev. Stat. § 92F-3 (Supp. 1991). The UIPA's legislative history indicates that the judicial functions of the State courts were excluded from the UIPA's coverage "to preserve the current practice of granting broad access to the records of court proceedings," and that it was the intention of the Legislature that the UIPA apply only to the "administrative records" of the Judiciary. See S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 690 (1988); H.R. Conf. Comm. Rep. No. 112-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 817, 818 (1988).

Because under the State Constitution the Commission is attached to the Judiciary, we must determine whether the Commission exercises a judicial function. If so, it is excepted from the UIPA's coverage. See generally, OIP Op. Ltr. No. 90-4 (Jan. 29, 1990).

In Richardson v. Koshiba, 693 F.2d 911 (9th Cir. 1982), the Commission contended that its functions were judicial in nature and, therefore, it should enjoy absolute immunity from a civil claim brought by a former district court judge. In rejecting the Commission's contention, the U.S. Court of Appeals, Ninth Circuit reasoned:

Although the Commission describes its responsibilities in "judicial" terms, these functions bear little resemblance to the characteristic of the judicial process that gave rise to the recognition of absolute immunity for judicial officers: the adjudication of controversies between adversaries. [Citation omitted.] Rather, these responsibilities indicate that the Commission's functions are executive in nature.

Richardson, 693 F.2d at 914 (emphasis added).

Based upon the decision of the U.S. Court of Appeals, Ninth Circuit in the Richardson case, we conclude: (1) that the Commission does not exercise a judicial function and, therefore, it is an "agency" within the meaning of section 92F-3, Hawaii Revised Statutes, and (2) that the information it maintains in any physical form constitutes a government record which is subject to the provisions of the UIPA.

II. ACCESS TO COMMISSION RECORDS

Under the UIPA, "[e] xcept 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." Haw. Rev. Stat. □ 92F-11(b) (Supp. 1991). Thus, unless protected from required disclosure by one of the exceptions set forth by section 92F-13, Hawaii Revised Statutes, all Commission records must be made available for public inspection and copying upon request by any person.

Under section 92F-13(4), Hawaii Revised Statutes, agencies are not required by the UIPA to disclose "[g] overnment records which, pursuant to state or federal law including an order of any state or federal court, are protected from disclosure." As previously stated, article VI, section 4 of the State Constitution, provides that the Commission's deliberations shall be confidential. Additionally, article VI, section 4 of the State Constitution provides that the Commission's Rules shall have "the force and effect of law." This leads us to Rule 7 of the Judicial Section Commission of Hawaii Rules ("Commission Rules"), which provides:

Rule 7. CONFIDENTIALITY.

Under the Constitution of the State of Hawaii, the commission's proceeding [sic] must be confidential. Therefore, all commission records, proceedings and business, including the names of all proposed nominees and the names of nominees forwarded to the appointing authority, shall be confidential and may not be discussed outside commission meetings, except among commission members, or as made necessary by Rule 10, or Rule 13, or pursuant to Rule 14. [Emphases added.]

With respect to the selection of nominees to be sent to the appointing authority, Rule 12(C) of the Commission Rules, provides that "[t] he commission members shall vote by secret ballot," and that each member of the Commission shall vote to select six qualified nominees for any given judicial office vacancy unless otherwise provided by the Commission. Additionally, Rule 5(B) of the Commission Rules provides:

B. If a commissioner knows of any personal, business, or litigious relationship as a party or attorney which the commissioner or another

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commissioner had with applicant or petitioner (which refers to a judge who petitions for another term), the commissioner must report this fact to the commission. The commission shall then decide the extent to which the involved commissioner shall participate in the proceedings concerning said applicant or petitioner. In the event that a commissioner does not vote, the fact that a commissioner did not vote may be announced publicly.¹ [Emphasis added.]

The record of the proceedings of the 1978 Constitutional Convention provides guidance concerning the intended scope and effect of the confidentiality provision of article VI, section 4 of the State Constitution, as well as the intended scope of the rulemaking power conferred upon the Commission by this constitutional provision. The Constitutional Convention's Committee on Judiciary recommended that the State Constitution be amended to create a judicial selection commission, and that its deliberations be kept confidential. In Standing Committee Report No. 52, the Committee on Judiciary explained:

One important concern your Committee addressed was in regard to the actions of the judicial selection commission in the confidentiality of their deliberations. Confidentiality is necessary to encourage and protect those prospective candidates

¹The Commission Rules were revised effective February 14, 1992. However, even under Rule 5(B) of the Commission rules as revised, the Commission is authorized to disclose whether a commissioner took part in voting upon a nominee. Revised Rule 5(B) of the Commission Rules provides:

B. A commissioner must report any personal professional, business, or legal relationship as a party or attorney which the commissioner or another commissioner has or had with an applicant or petitioner to the commission. The commission shall then decide the extent to which the involved commissioner shall participate in the proceedings concerning such applicant or petitioner. The commission may disclose its decision on this issue.

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who otherwise would not be willing to be considered if the deliberation process of the commission were to be made public.

1 Proceedings of the Constitutional Convention of Hawaii of 1978 at 626 (1980) (emphasis added).

Likewise, Committee of the Whole Report No. 10 indicates that it was the intention of the Convention's Committee of the Whole that the judicial selection commission's rules establish the boundaries of the confidentiality provision proposed by the Convention:

There were several amendments to the proposed language in this section which were either withdrawn or failed to obtain the necessary votes for passage. One of the amendments proposed related to the confidentiality of the actions of the judicial selection commission. After considerable debate the amendment was withdrawn, with the understanding that the judicial selection commission would have power by way of its own rules to determine its boundaries and limits on the confidentiality of its actions.

2 Proceedings of the Constitutional Convention of Hawaii of 1978 at 1015 (1980) (emphasis added).

Our research indicates that constitutional provisions that delegate rulemaking authority to a state agency are unique. Rather, in the usual case, an administrative agency's rulemaking authority derives from the Legislature, not from the constitution. In Guthrie v. Taylor, 185 S.E.2d 193 (N.C. 1971), the court examined whether regulations adopted by a department of education pursuant to a state constitutional provision were valid. The Guthrie court noted that as a general rule the legislature may not delegate rulemaking power to an agency without establishing standards to guide the agency's rulemaking, but the court also noted:

This principle has no application to a direct delegation by the people, themselves, in the Constitution of the State, of any portion of their power, legislative or other. In such case, we look only to the Constitution to determine what power has been delegated. Where, as here, the power to make rules and regulations has been delegated to an administrative board or agency by the Constitution,

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itself, the delegation is absolute, except insofar as it is limited by the Constitution of the State, by the Constitution of the United States or by the Legislature or some other agency, pursuant to power expressly conferred upon it by the Constitution.

Guthrie, 185 S.E.2d at 200 (emphasis added).

The OIP believes that it should refrain from second guessing the public policy choices of the people's delegates to the 1978 Constitutional Convention of the State of Hawaii. The people's delegates to the 1978 Constitutional Convention balanced the public interest in the disclosure of the Commission's deliberations against the Commission's need for secrecy and, after doing so, recommended that the deliberations of the Commission be confidential.

The people's delegates also recommended that the Commission have the power to promulgate rules that have the force and effect of law. These recommendations were ratified by the voters of the State of Hawaii. Because the State Constitution, as ratified by the people, provides that the Commission's deliberations must be confidential, and invests the Commission with the power to enact rules that have the force and effect of law, the OIP is constrained to conclude that Rule 7 of the Commission Rules is a State law that protects government records from disclosure within the meaning of section 92F-13(4), Hawaii Revised Statutes.² It is important to recognize that the OIP does not have the authority

²It is our opinion that an agency rule prohibiting the disclosure of government records which is adopted pursuant to a general legislative delegation of rulemaking power is not a state law that protects a government record from disclosure under section 92F-13(4), Hawaii Revised Statutes. A contrary conclusion would permit agencies to readily defeat the comprehensive legislative scheme established by the UIPA. See generally, Washington Post Co. v. HHS, 690 F.2d 252, 273 (D.C. Cir. 1982); Society of Professional Journalists v. Sexton, 324 S.E.2d 313 (S.C. 1984) (department of health regulation repugnant to state FOIA law and, therefore, invalid); Cashel v. Smith, 324 N.W.2d 336 (Mich. App. 1982) . In this opinion, we merely conclude that a valid and enforceable rule adopted by an agency pursuant to an express constitutional delegation of to

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opine on any question regarding the constitutionality of Rule 7 of the Commission Rules. Thus, whether the scope of Rule 7 is overly broad is an issue more appropriately within the jurisdiction of the State Attorney General and the courts.

However, because the Commission's confidentiality rule was adopted to implement the constitutional protection afforded to the Commission's deliberations, in our opinion, Rule 7 of the Commission Rules is most sensibly interpreted to protect from disclosure only those Commission records that would expose the Commission's deliberations.³

There is no basis to believe that the people's delegates to the 1978 Constitutional Convention intended the State Constitution to cast a shroud of secrecy over Commission records that reveal nothing about the Commission's deliberative process.

This conclusion is supported by the text of Rule 7 of the Commission Rules, which states that "[u] nder the Constitution of the State of Hawaii, the commission's proceeding[s] must be confidential." [Emphasis added.]

In truth, the State Constitution provides that the Commission's "deliberations shall be confidential." Haw. Const. art. IV,

□4 (emphasis added). See also, OIP Op. Ltr. No. 91-22 (Nov. 25, 1991) (State statute establishing the confidentiality of "all records" of the Civil Rights Commission only applies to records

rulemaking power qualifies as a state law that protects government records from disclosure under section 92F-13(4), Hawaii Revised Statutes.

³It is a fundamental rule of statutory construction that departure from the literal construction of a statute or regulation is justified when such construction would produce an absurd or unreasonable result and would clearly be inconsistent with the purposes and policies of the act in question. 2A N. Singer, Sutherland Statutory Construction □45.13 (4th ed. rev. 1984); see also State v. Torres, 66 Haw. 281, 286, 660 P.2d 522 (1984). In our opinion, interpreting Rule 7 of the Commission Rules to protect all Commission records from disclosure would produce an unreasonable result, insofar as the rule would protect records that have no connection whatsoever to the Commission's deliberations, such as administrative records of the Commission.

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associated with its investigatory and adjudicative functions, not its administrative records).

Accordingly, in our opinion, not all Commission records are deliberative in character and, thus, not all of its records are protected from disclosure by Rule 7 of the Commission Rules. For example, in our opinion, the disclosure of the Commission's personnel, purchasing, or other administrative records would not result in the exposure of the Commission's deliberative process and, therefore, these records should not fall within the protections afforded by the Commission's confidentiality rule. Rather, the disclosure of these Commission records would be determined in accordance with the UIPA's provisions.

However, it is the Commission's position that the lists of not less than six nominees that are hand delivered to the Governor under article VI, section 3 of the State Constitution are deliberative in character. For this reason, Rule 7 of the Commission Rules expressly provides that "the names of nominees forwarded to the appointing authority, shall be confidential." Because the Commission Rules have the force and effect of law, and because Rule 7 of the Commission Rules unambiguously establishes the confidentiality of the names of nominees forwarded to the appointing authority, we believe that Commission lists delivered to the governor under article VI, section 3 of the State Constitution are protected from disclosure by section 92F-13(4), Hawaii Revised Statutes.

On the contrary, however, disclosure of the Commission's written receipts for delivery of the Commission's lists of nominees would not reveal the names of the Commission's nominees, nor otherwise result in the exposure of the Commission's deliberations. Because these receipts are not expressly within the coverage of Rule 7 of the Commission Rules, and because we believe that these written receipts do not fall within the intended protection of Rule 7 of the Commission Rules, we believe the Commission must make these written delivery receipts available for public inspection and copying under the UIPA.

Further, because Rule 12(C) of the Commission Rules provides that all votes shall be by "secret ballot," under the UIPA, the Commission is not required to disclose the votes of each commissioner. However, because Commission Rules also expressly permit the Commission to disclose whether a commissioner did not vote in proceedings concerning an

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applicant, it is our opinion that under the UIPA, this information should be disclosed to the public upon request.

Because Commission Rules have the force and effect of law and expressly provide that the names of nominees forwarded to the appointing authority shall be confidential, and because we conclude that rules adopted by the Commission constitute a state law that protects records from disclosure under section 92F-13(4), Hawaii Revised Statutes, we conclude that when received by the Governor, the Commission's list of not less than six nominees continues to be protected from disclosure under section 92F-13(4), Hawaii Revised Statutes.

CONCLUSION

We conclude that the Commission is an "agency" under the UIPA, and that any information it maintains in a physical form constitutes a government record. Under the UIPA, agencies are not required to disclose "[g]overnment records which are protected from disclosure by state or federal law." Haw. Rev. Stat. §92F-13(4) (Supp. 1991). It is our opinion that Rule 7 of the Commission Rules, which has the force and effect of law, and which was promulgated pursuant to an express constitutional delegation of rulemaking authority, is a State law that protects records from disclosure under the UIPA. Consequently, we conclude that under the UIPA, the Commission is not required to permit public inspection of lists of individuals nominated to fill judicial vacancies under article VI, section 3 of the State Constitution.

While Rule 7 of the Commission Rules provides that "all commission records" are confidential, we believe that this Rule is most reasonably construed to protect only those Commission records that are deliberative in character. In the Commission's view, lists of nominees it delivers to the Governor are deliberative in nature and, therefore, the Commission's confidentiality rule expressly makes confidential the names of nominees forwarded to the appointing authority. Because Rule 7 of the Commission Rules has the force and effect of law, and because under Commission Rules the names forwarded to the appointing authority are confidential, we conclude that under section 92F-13(4), Hawaii Revised Statutes, the Commission's list of not less than six nominees to fill judicial vacancies are government records protected from disclosure by State law.

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On the contrary, we conclude that the Commission may publicly disclose whether a commissioner did not vote in proceedings concerning an applicant, because Commission rules authorize such a disclosure. Similarly, we conclude that the Commission's written receipts for delivery of its lists to the governor should be made available for public inspection and copying, because such receipts would not reveal the Commission's deliberative process, nor are they protected from disclosure by any other UIPA exception to required public disclosure.

Finally, because we find that Rule 7 of the Commission Rules is a State law that protects government records from required disclosure, we conclude that lists of nominees delivered to the governor by the Commission continue to be confidential even after they have been delivered to the governor. Accordingly, we conclude that under the UIPA the governor should not make available for public inspection and copying lists of nominees delivered to the governor by the Commission under article VI, section 3 of the State Constitution.

In closing, we suggest that the Commission carefully reexamine Rule 7 of the Commission Rules and the extent to which it comports with the State constitutional provision protecting Commission deliberations.

Very truly yours,

Hugh R. Jones Staff Attorney

Kathleen A. Callaghan Director

KAC/HRJ: sc
c: Honorable John Waihee
Governor, State of Hawaii

Honorable Warren Price, III Attorney
General

C. Michael Hare, Esquire
Chairperson, Judicial Selection Commission