

June 22, 1992

The Honorable William W. Paty, Jr.
Chairperson, Board of Land and Natural Resources
Kalanimoku Building
1151 Punchbowl Street
Honolulu, Hawaii 96813

Dear Mr. Paty:

Re: Unpublished Portion of Statewide Trail and Access
System's Inventory of Trails and Accesses

Your memorandum to the Honorable Warren Price, III, concerning the above-referenced matter has been forwarded to the Office of Information Practices ("OIP") for a reply, pursuant to established protocol. In your memorandum to the Attorney General, you requested advice concerning whether the Department of Land and Natural Resources ("DLNR") must publicly disclose the unpublished portions of the Statewide Trail and Access System's inventory of trails and accesses ("Inventory").

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), the unpublished portions of the DLNR's Inventory must be made available for public inspection and duplication upon request.

BRIEF ANSWER

Under the UIPA, agencies are not required 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." Haw. Rev. Stat. 92F-13(4) (Supp. 1991).

We believe that under this UIPA exception, authority to

withhold a government record must generally be found in the language of the statute itself and not merely in the statute's legislative history. We reach this conclusion after examining provisions in the federal Freedom of Information Act and the Uniform Information Practices Code that are nearly identical to this UIPA exception.

In the situation before us, section 198D-3(b), Hawaii Revised Statutes, does not contain express withholding language. Rather, it is the legislative history of section 198D-3(b), Hawaii Revised Statutes, as amended in 1990, that speaks of the governmental need to keep the unpublished portions of the Inventory confidential.

While section 198D-3(b), Hawaii Revised Statutes, does not expressly authorize the nondisclosure of the unpublished portions of the DLNR's Inventory, we believe that this is a very unusual situation which merits special consideration. First, the statute, as enacted in 1988, originally required the DLNR to publish the entire Inventory. However, in 1990, the Legislature amended section 198D-3(b), Hawaii Revised Statutes, and specifically sought to alter the DLNR's publication requirements. In essence, the Legislature acted to repeal the previous requirements of section 198D-3(b), Hawaii Revised Statutes.

We also note that both the Senate and House Standing Committee Reports clearly and convincingly express the Legislature's intent to withhold public access to the unpublished portions of the Inventory. The failure of the Legislature to include specific withholding language in the body of the statute can be explained by the fact that the Legislature was under the impression that, by repealing the former language of the statute, the unpublished portions of the Inventory would be protected from disclosure under the UIPA. Hence, the Legislature may have believed that language expressly authorizing the withholding of this government record was unnecessary.

Taking into consideration the unique and peculiar facts in this situation, we believe that section 198D-3(b), Hawaii Revised Statutes, constitutes a withholding statute within the meaning of section 92F-13(4), Hawaii Revised Statutes. Consequently, under this UIPA exception, which protects government records protected from disclosure by State or federal law, the DLNR may withhold public access to the unpublished portions of the Inventory.

FACTS

Chapter 198D, Hawaii Revised Statutes, is entitled "Hawaii Statewide Trail and Access System." Section 198D-2, Hawaii Revised Statutes, provides:

198D-2 . Establishment of Hawaii statewide trail and access system. There is established the Hawaii statewide trail and access system, to be known as Na Ala Hele. The Hawaii statewide trail and access system shall consist of all trails and accesses in the State. The department of land and natural resources shall plan, develop, acquire land or rights for public use of land, construct, and engage in coordination activities to implement the system, in accordance with this chapter.

Haw. Rev. Stat. □ 198D-2 (Supp. 1991).

As part of its duties, the DLNR is required to compile an inventory of all the trails and accesses in the State. Section 198D-3, Hawaii Revised Statutes, itemizes the DLNR's responsibilities in compiling this inventory:

□ **198D-3 Inventory.** (a) The department shall establish, maintain, and amend, as required, an inventory of all trails and accesses in the State, whether wholly or partly on public or private lands and whether or not under the jurisdiction of the department, and a separate inventory of all trails and accesses to public hunting areas in the State. The inventories shall include:

- (1) Maps and lists of all trails and accesses;
- (2) Name and length of each trail or access;
- (3) The person or agency having management responsibility for each trail or access;
- (4) The predominant transportation mode for each trail or access;
- (5) The development standard, condition, and grade of each trail and access;
- (6) The description of amenities or other features on or in close proximity to each trail or access;
- (7) The status of availability to the general public of each trail or access; and

(8) Other information for each trail or access deemed necessary or desirable by the department. (b) The department shall publish and periodically update documents, which shall be available to the general public. The documents shall contain that portion of the inventories which include trails and accesses available for the use of the general public. The department may charge an appropriate fee for the documents and any updates.

Haw. Rev. Stat. § 198D-3 (Supp. 1991) (emphasis added).

To collect all the information required in section 198D-3, Hawaii Revised Statutes, the DLNR has developed an electronic database which contains specific information about each trail and access in the Inventory. The DLNR's Inventory database contains the following information concerning each trail and access in the State:

1. Island
2. Quad
3. Popular Name
4. Traditional Name
5. Year Created
6. District
7. Owner
8. Manager
9. Tax Map Key at start
10. Tax Map Key at end
11. Network
12. Length
13. Elevation Range
14. Access to Start
15. Starting Point
16. Ending Point
17. Standard
18. Condition
19. Climate
20. Transport Type
21. Features
22. Amenities
23. Restrictions
24. Hazards
25. Comments
26. Public Access
27. Memo

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Although most of these categories are self-explanatory, certain categories require further elaboration. For example, the "Quad" category indicates the number of the United States Geological Survey ("USGS") 1:24,000 scale quadrangle map(s) that the trail or access traverses. The "District" category contains the name(s) of the island land use district(s) traversed by the trail or access. The district name can be determined from the USGS 1:24,000 quadrangle maps.

The "Owner" category does not reflect the name of the owner. Rather, the type of owner, such as State, Federal, Hawaiian Homes, County, Individual, or Corporate, is indicated on the inventory under this category.

The "Manager" category names the person, agency, or organization that has primary jurisdiction over the trail/access.

The "Network" category shows whether the trail or access is connected to, or is a part of, a larger network of trails or accesses.

The "Access to Start" category shows the means by which a person may get to the start of the trail/access. Entries found in this category are: Foot, Bus, 2-Wheel Drive, Boat, or 4-Wheel Drive.

The "Standard" category shows whether a foot trail or access is easy, moderate, difficult, or whether the trail accommodates motor vehicles. Whether a trail is maintained or not is indicated in the "Condition" category.

The "Comments" and "Memo" categories indicate additional information not already covered by the other categories.

As originally enacted in 1988, section 198D-3, Hawaii Revised Statutes, required the DLNR to publish the entire Inventory. However, in 1990, the Legislature amended section 198D-3, Hawaii Revised Statutes, to require the DLNR to publish only "that portion of inventories which include trails or accesses available for the use of the general public." Haw. Rev. Stat. §198D-3(b) (Supp. 1991).

You have requested the Attorney General for an advisory opinion concerning the effect of the UIPA and section 198D-3(b), Hawaii Revised Statutes, on the public's right to inspect and

copy the unpublished portion of the Inventory. In accordance with established protocol, the Attorney General forwarded your memorandum to the OIP for a reply.

DISCUSSION

I. INTRODUCTION

Under the UIPA, "[a] ll government records are open to public inspection unless access is restricted or closed by law." Haw. Rev. Stat. § 92F-11(a) (Supp. 1991). In addition, "[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).

Section 92F-13, Hawaii Revised Statutes, sets forth five exceptions to the UIPA's general rule of required agency disclosure. As a preliminary matter, we find that sections 92F-13(1), (2), and (5), Hawaii Revised Statutes, do not apply to the facts presented here. However, sections 92F-13(3) and (4) merit examination in determining whether the unpublished portions of the DLNR's Inventory are protected from required disclosure under the UIPA.

II. RECORDS PROTECTED FROM DISCLOSURE BY STATE OR FEDERAL LAW

Section 92F-13(4), Hawaii Revised Statutes, provides an exception to required agency disclosure for "[g] overnment records which, pursuant to state or federal law including an order of any state or federal court, are protected from disclosure." In order for this UIPA exception to apply to the facts presented, we must find the existence of a State or federal law that authorizes the DLNR to withhold access to the unpublished portions of the Inventory.

Section 198D-3(b), Hawaii Revised Statutes, as enacted in 1988, originally required the DLNR to "publish and update periodically the [I] nventory in a document, which shall be available to the general public." Thus, as originally codified, the statute directed the DLNR to publish the entire Inventory. However, in 1990, the Legislature amended this section to read as follows:

(b) The department shall publish and periodically update documents, which shall be available to the general public. The documents shall contain that

portion of the inventories which include trails and accesses available for the use of the general public. The department may charge an appropriate fee for the documents and any updates.

Haw. Rev. Stat. §198D-3(b) (Supp. 1991) (emphasis added).

The legislative history of the 1990 amendments to section 198D-3(b), Hawaii Revised Statutes, explains that:

The purpose of this bill is to prevent any misuse or misunderstanding of public information about hiking trails and accesses by clarifying the type of information that must be included in the hiking trail inventory that is made available to the public.

. . . .

Your committee finds that, as presently worded, the law requires the Department to publish a complete inventory of all trails and accesses in the State, including those on public or private lands. The problem is that some of the information may not be appropriate for general public use due to: (1) liability concerns and hazardous conditions; (2) private agreements that allow limited access only to certain organized groups; and (3) the unknown status of the public's right to use a trail or access due to pending litigation or unresolved claims.

This bill would remedy this potential problem by requiring the Department to publish only that portion of the statewide inventory that identifies trails and accesses that are available for general public use.
Your Committee finds that such an amendment would help to ensure against any misinterpretations or misunderstanding about trail conditions and access.

H. Stand. Comm. Rep. No. 441-90, 15th Leg., 1990 Reg. Sess., Haw. S.J. 1011 (1990) (emphases added).

Additionally, Senate Standing Committee Report No. 2955 also provides further background information on the purpose of the amendment to section 198D-3(b), Hawaii Revised Statutes:

[F]ull public disclosure of the trails and accesses inventory maintained by the Department of Land and Natural Resources is inappropriate. Your Committee finds that information disseminated to the public should be limited to the trails and accesses that are legally open to the general public and not overly hazardous. Full disclosure could result in a failure of the general public to understand: (1) the true condition of hazardous trails and the precautions necessary; (2) that certain trails are on private lands or on state-owned lands leased to private entities and are not open to the general public; and (3) that, in some cases, access to trails is limited to only specific groups or for only specific uses. Your Committee is also concerned about state liability in the event that full disclosure leads to trespassing on private lands or injuries on hazardous trails. Finally, your Committee understands that the full inventory maintained by the Department of Land and Natural Resources would be exempt from public disclosure under chapter 92F, Hawaii Revised Statutes, and specifically intends that the bill be construed in this manner.

S. Stand. Comm. Rep. No. 2955, 15th Leg., 1990 Reg. Sess., Haw. S.J. 1209-1210 (1990) (emphases added).

In determining whether section 198D-3(b), Hawaii Revised Statutes, is a State law which protects government records from disclosure, we turn first to the parallel provisions of the Uniform Information Practices Code, drafted by the National Conference of Commissioners on Uniform State Laws ("Model Code"), and upon which the UIPA was modeled. Section 2-103 (a) (11) of the Model Code provides that an agency is not required to disclose "information that is expressly made non-disclosable under federal or state law or protected by the rules of evidence." The Commentary¹ to section 2-103 (a) (11) further explains that:

¹The UIPA's legislative history provides that the Model Code Commentary should be consulted to "guide the interpretation of similar provisions found in the [UIPA]." H. Stand. Comm. Rep. No. 342-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 969, 972 (1988); see also Haw. Rev. Stat. 1-24 (1985).

Subsection (a) (11) is a catch-all provision which assimilates into this Article any federal law, state statute or rule of evidence that expressly requires the withholding of information from the general public. The purpose of requiring an express withholding policy is to put a burden on the legislative and judicial branches to make an affirmative judgment respecting the need for confidentiality.

Model Code Commentary □2-103 at 18 (emphasis added).

In past OIP advisory opinions, this office has also turned to the provisions of the federal Freedom of Information Act, 5 U.S.C. □552 (1988) ("FOIA"), for guidance in interpreting similar provisions of the UIPA. Exemption 3 of the FOIA provides that federal agencies are not required to disclose records that are:

[S] pecifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

5 U.S.C. □552(b) (3) (1988) (emphasis added).

The Court of Appeals for the District of Columbia addressed FOIA's Exemption 3 in Reporters Committee v. U.S. Dep't of Justice, 816 F.2d 730 (D.C. Cir. 1987), modified on other grounds, 831 F.2d 1124 (D.C. Cir. 1987), rev'd on other grounds, 489 U.S. 749 (1989) . In Reporters Committee, the court examined a statute which purported to be a withholding statute, but, in fact, did not expressly authorize the Department of Justice to withhold the requested information.

Quoting Irons & Sears v. Dann, 606 F.2d 1220 (D.C. Cir. 1979), the court in Reporters Committee held that "[o] nly explicit nondisclosure statutes that evidence a congressional determination that certain materials ought to be kept in confidence will be sufficient to qualify under the exemption." Reporters Committee at 735 (emphasis in original). The Court also stated that there must be "a congressional purpose to exempt matter from disclosure in the actual words of the statute [sic] not in the legislative history of the statute." Id.

(emphasis added). Thus, in Reporters Committee, the court found that a statute's legislative history alone was not sufficient to bring it within the scope of FOIA's Exemption 3.

In applying the above authorities, we note that on its face, section 198D-3(b), Hawaii Revised Statutes, is entirely silent regarding the public's right to inspect, or inability to inspect, the unpublished portions of the DLNR's Inventory.

While we believe that under section 92F-13(4), Hawaii Revised Statutes, the authority for an agency to withhold access to a government record must generally be found in the language of the statute itself, in our opinion, several unique and very peculiar factors in this case lead us to conclude that the DLNR may withhold access to the unpublished portions of the Inventory.

First, it is important to note that as originally codified, section 198D-3(b), Hawaii Revised Statutes, expressly required the public availability of the entire Inventory, not just the public portions of the same. In 1990, however, the Legislature essentially "repealed" this requirement, and replaced it with one requiring the DLNR to publish only that portion of the Inventory containing trails and accesses available for the use of the general public.

Additionally, the legislative history of the 1990 amendments to section 198D-3(b), Hawaii Revised Statutes, reveals clear and convincing evidence that the Legislature believed, correctly or incorrectly, that repealing the publication requirement, as it existed in 1988, would lead to protection of the unpublished portions of the Inventory under the UIPA. Senate Standing Committee Report No. 2955 specifically states "your Committee understands that the full inventory maintained by the Department of Land and Natural Resources would be exempt [sic] from disclosure under chapter 92F, Hawaii Revised Statutes, and specifically intends that the bill be construed in this manner." S. Stand. Comm. Rep. No. 2955, 15th Leg., 1990 Reg. Sess., Haw. S.J. 1210 (1990).

We reiterate our belief that under section 92F-13(4), Hawaii Revised Statutes, authority to withhold a government record must be found in the express wording of the statute itself, and that resort to the statute's legislative history to find such authority is generally inappropriate. However, the confluence of several unique and peculiar factors in this case

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lead us to conclude that the unpublished portions of the DLNR Inventory are protected from required public disclosure under section 92F-13(4), Hawaii Revised Statutes.

III. FRUSTRATION OF LEGITIMATE GOVERNMENT FUNCTION

Because we have already found that section 92F-13(4), Hawaii Revised Statutes, permits the DLNR to withhold public access to the unpublished portions of the Inventory, we need not address the issue concerning whether this information would be protected under the UIPA's exception for records which, if disclosed, would result in a "frustration of a legitimate government function."

CONCLUSION

Although section 198D-3(b), Hawaii Revised Statutes, requires the publication of the public portions of the Inventory, this provision does not expressly require or authorize the DLNR to withhold the unpublished portions of the Inventory from public access. However, because of the clear and convincing evidence of the legislative intent underlying the 1990 amendments to this statute, and also because the Legislature was acting to essentially repeal the requirement to publish the entire Inventory, we are of the opinion that section 198D-3(b), Hawaii Revised Statutes, is a statute which permits the DLNR to withhold public access to the unpublished portions of the Inventory under section 92F-13(4), Hawaii Revised Statutes.

Very truly yours,

Stella M. Lee
Staff Attorney

APPROVED:

Kathleen A. Callaghan
Director

SML: s c

c: Dawn Chang, Deputy Attorney General
Christina Meller, Na Ala Hele Program Manager