November 18, 1992

The Honorable Winona E. Rubin
Director of Human Services 1390
Miller Street, Room 209
Honolulu, Hawaii 96813

Re: Register of Blind Persons

This is in response to your letter requesting an opinion from the Office of Information Practices ("OIP") regarding whether the State of Hawaii Departments of Taxation ("DOTAX"), Health ("DOH"), and Education ("DOE") may disclose records that they maintain about blind individuals to the Department of Human Services ("DHS") for its compilation of a register of blind individuals in the State.

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), the DOTAX, DOH, and DOE are permitted to disclose records that they maintain about blind individuals to the DHS for its register of blind individuals ("register").

BRIEF ANSWER

Information about a blind individual's visual impairment, and the individual's birthdate and ethnicity, are not available for public inspection because this information falls under the UIPA exception for "[g] overnment records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy." Haw. Rev. Stat. □92F-13(1) (Supp. 1991). Specifically, under the UIPA, an individual has a significant privacy interest in "information relating to [the individual's] medical . . . history, diagnosis, condition, treatment, or evaluation," which we believe would include information about the individual's visual impairment. Haw. Rev. Stat.

□92F-14 (b) (1) (Supp. 1991) . In contrast, the disclosure of information about a blind individual's visual impairment would not further the public interest in the disclosure of information that reveals "what government is up to." In previous opinion letters, we reached the same conclusion when balancing an individual's significant privacy interest and the public interest in the disclosure of information about the individual's birthdate and ethnicity.

Further, certain government records that the DHS seeks for its register from the DOTAX and the DOH also constitute "[g] overnment records which, pursuant to state or federal law . . . are protected from disclosure." Haw. Rev. Stat. □92F-13(4) (Supp. 1991). Specifically, the DOTAX is prohibited by State statute from disclosing income tax "return information," which includes information verifying an individual's blindness that is submitted to the DOTAX for an income tax exemption. Haw. Rev. Stat. □235-116 (1985). Similarly, the DOH is restricted by several State statutes from disclosing specific categories of individually identifiable records, some of which may contain information about blind individuals.

The UIPA permits, but does not require, an agency to disclose confidential information to another agency under certain conditions, including when disclosure of the information "[r] easonably appears to be proper for the performance of the requesting agency's duties and functions." Haw. Rev. Stat. □92F-19 (a) (3) (Supp. 1991) . For the reasons discussed below, we find that section 92F-19, Hawaii Revised Statutes, does not authorize the inter-agency disclosure of records that are protected from disclosure by specific State or federal statutes. Therefore, under the applicable confidentiality statutes, the DOTAX is prohibited from disclosing income tax return records and the DOH cannot disclose certain categories of individually identifiable health records to the DHS for its register, notwithstanding the provisions of section 92F-19, Hawaii Revised Statutes, permitting inter-agency disclosure. However, under section 92F-19(a) (3), Hawaii Revised Statutes, an agency may disclose information about blind individuals to the DHS for its register where the information requested is contained in government records that are <u>not</u> explicitly made confidential by a specific statute.

Finally, to our knowledge, the DOE is not prohibited by specific State statutes from disclosing student records.

However, federal law provides that no federal funding shall be provided to any institution that discloses personally identifiable information from students' education records except as authorized by statute. 20 U.S.C. □1232g(b) (1) (1988). Thus, the DOE would likely jeopardize its federal funding if it disclosed information about blind students to the DHS under section 92F-19, Hawaii Revised Statutes.

FACTS

Section 347-6, Hawaii Revised Statutes, requires the DHS to compile a register of blind individuals in the State as follows:

> □**347-6 Registration of blind.** The department of human services shall cause to be maintained a complete register of the blind in the State which shall describe the condition, causes of blindness, capacity for education and industrial training, and such other facts as may seem to it to be of value regarding each blind person, together with recommendations for rehabilitation and relief.

Haw. Rev. Stat. □347-6 (1985).

In order to comply with its statutory duty to compile this register, the DHS seeks to obtain the following information concerning blind individuals in this State:

1) Name;

2) Visual acuity measured and certified by a licensed ophthalmologist or optometrist;

3) Birthdate; and

4) Ethnicity.

The DHS believes that this information, or a portion thereof, may be found in the following government records: the DOTAX's records concerning individuals who claimed a personal exemption for blindness on their income tax returns, DOH records that may identify blind individuals, and the DOE's student educational records.

When the DHS requested the DOTAX, DOH, and DOE to disclose information about blind individuals from the above-described

records, the DHS was denied access because these agencies asserted that they are required by law to keep the requested records confidential. You have requested an advisory opinion from the OIP regarding whether the UIPA permits these agencies to disclose their records about blind individuals to the DHS for the compilation of its register.

DISCUSSION

I. DISCLOSURE TO THE PUBLIC

The UIPA sets forth the general rule that "[a] ll government records are open to public inspection unless access is restricted or closed by law." Haw. Rev. Stat. □92F-11(a) (Supp. 1991) . Section 92F-13, Hawaii Revised Statutes, sets forth exceptions to this general rule, two of which are relevant to the information at hand:

> **□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;
>
> . . . .
>
> (4)Government 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(1), (4) (Supp. 1991). We shall discuss each of these exceptions separately below.

A.Clearly Unwarranted Invasion of Privacy

In order for the disclosure of a government record to constitute a clearly unwarranted invasion of privacy, an individual's privacy interest must outweigh the public interest in disclosure. Haw. Rev. Stat. □ 92F-14(a) (Supp. 1991). As the UIPA expressly recognizes, an individual has a significant privacy interest in "[i] nformation relating to medical psychiatric, or psychological history, diagnosis, condition, treatment, or evaluation." Haw. Rev. Stat. □ 92F-14(b) (1) (Supp. 1991) (emphases added). We believe that a blind

individual has a significant privacy interest in information about the individual's disability of visual impairment because this information relates to the individual's "medical . . . history, diagnosis, condition." Id.; see Hanig v. State Dep't of Motor Vehicles, 564 N.Y.S.2d 805 (A.D.3d 1990), aff'd, 580 N.Y.S.2d 715 (Ct. App. 1992).

In Hanig,[1] the New York court held that a clearly unwarranted invasion of privacy would result from the public disclosure of information on a driver's license application describing previous or current treatment received by the individual for any medical disabilities. The court stated:

> [W] e have no difficult in concluding that an applicant's existing medical condition, particularly the presence or absence of a disability, constitutes a relevant and material part of the applicant's medical history. . . . The relevant inquiry is not, in our view, whether the information was compiled by medically qualified personnel or whether the information in and of itself constitutes a complete and precise technical appraisal of a person's medical past. Rather, the information constitutes medical history, the disclosure of which would be an unwarranted invasion of personal privacy pursuant to Public Officers Law □89(2) (b).

564 N.Y.S.2d at 806; see also Plain Dealer Publishing Co. v. United States Dep't of Labor, 471 F. Supp. 1023 (D.D.C. 1979) (significant privacy interest in individually identifiable workers' compensation files revealing work-related injury or disability and other medical history).

We have previously concluded that the "public interest" to be considered under the UIPA's balancing test is the interest in the disclosure of "[o] fficial information that sheds light on an agency's performance of its statutory duties," see OIP Op. Ltr. No. 90-7 (Feb. 9, 1990), and information which sheds

---

[1]In determining whether the disclosure of information would constitute a clearly unwarranted invasion of personal privacy under the UIPA, the OIP has frequently consulted state court decisions and federal court decisions applying privacy exceptions similar to that provided in the UIPA.

light upon the conduct of government officials, see OIP Op. Ltr. No. 90-17 (April 24, 1990).

In balancing the competing public interest in disclosure against a blind individual's significant privacy in information about the individual's visual impairment, we find that the disclosure of this information does not, in any meaningful way, serve the public interest underlying the UIPA because the disclosure of this information would shed no light on government conduct. See Nat'l Ass'n of Retired Federal Employees v. Horner, 879 F.2d 873 (D.C. Cir. 1989) (names and addresses of retired and disabled federal employees say nothing of significance about "what government is up to") . In the absence of a countervailing public interest, the names of individuals who are blind, and information describing their visual impairment, must be kept confidential under the UIPA's exception for records which, if disclosed, would result in a clearly unwarranted invasion of privacy.

The OIP previously opined that an individual's birthdate and ethnicity must also be kept confidential under the UIPA's personal privacy exception. See, e.g., OIP Op. Ltr. No. 90-28 (Aug. 23, 1990) (birthdates of individuals licensed by the State); OIP Op. Ltr. No. 92-8 (July 16, 1992) (ethnicities of veterans); cf. OIP Op. Ltr. 91-19 (Oct. 18, 1991) (ethnicity information in Hawaiian Home Lands Lessee Data file). Applying the same analysis in these opinions to the facts present here, we find that blind individuals have a significant privacy interest in information revealing their birthdates and ethnicities, while the disclosure of this information does not reveal anything about the conduct and actions of government agencies or their officials. See, e.g., Hemenway v. Hughes, 601 F. Supp. 1002 (D.D.C. 1985); CBS, Inc. v. Partee, 556 N.E.2d 648 (Ill. App. Ct. 1990).

B.Records Protected from Disclosure by State or Federal Law

There are specific statutes that prohibit or restrict the disclosure of certain records maintained by the DOTAX, DOH, and DOE, including those containing information about blind individuals. For instance, the DOTAX is prohibited from disclosing "[a] ll tax returns and return information required to be filed under" chapter 235, Hawaii Revised Statutes. Haw. Rev. Stat. □235-116 (1985) (making disclosure an offense punishable by a fine not exceeding $500, or by imprisonment not exceeding

one year, or both); see OIP Op. Ltr. No. 89-3 (Nov. 3, 1989); OIP Op. Ltr. No. 92-10 (Aug. 1, 1992).

Under chapter 235, Hawaii Revised Statutes, an individual claiming a personal exemption for blindness on the individual's State income tax return must file with the DOTAX a report by a qualified ophthalmologist or qualified optometrist certifying the impairment of sight. Haw. Rev. Stat. □235-1 (Supp. 1991) (definition of the term "blind"). In view of this statutory requirement, we believe that the information contained in reports received by the DOTAX certifying the visual impairment of blind individuals constitute "return information required to be filed under" chapter 235, Hawaii Revised Statutes, that the DOTAX is prohibited from disclosing. See Haw. Rev. Stat. □235-116 (1985); OIP Op. Ltr. No. 92-10 (Aug. 1, 1992) ("return information" includes information concerning a taxpayer's exemptions).

Similarly, the DOH also must comply with several statutes that restrict the disclosure of certain categories of individually identifiable records, some of which may contain information about blind individuals that may be helpful to the DHS' compilation of a register. For example, the DOH is prohibited from disclosing records identifying individuals with developmental disabilities, individuals receiving mental health services, medical research study subjects, individuals afflicted by or tested for certain infectious diseases, and individuals who may have been exposed to chemical defoliants or herbicides. Haw. Rev. Stat. □□333E-6, 334-5, 324-2, 324-12, 324-22, 324-31, 325-4, 325-54, 325-73, 325-101, 321-265 (1985 & Supp. 1991).

In comparison to the DOTAX and the DOH, the DOE is not specifically prohibited by State statutes from disclosing its students' education records. See Univ. of Connecticut v. FOI Comm'n, 217 Conn. 322 (1991) (identities of students employed as campus police). Instead, under the federal Family Educational Rights and Privacy Act of 1974, 20 U.S.C. □1232g ("FERPA"), the DOE might lose federal funding for its educational programs if it discloses personally identifiable information from a student's education records, except as authorized by the FERPA's provisions or regulations adopted thereunder. In pertinent part, the FERPA provides:

> (1) No funds shall be made available under any applicable program to any educational agency or

> institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section) of students without the written consent of their parents to any individual, agency, or organization, ...

20 U.S.C. □1232g(b) (1) (1988).

We reviewed the FERPA's provisions, and we could find no provision of this federal law that would allow the DOE to disclose personally identifiable information about blind students for the DHS' compilation of a register. In our review, we noted that although the FERPA does not restrict disclosure of "directory information" about a student, the term "directory information," as defined by FERPA, does not include information identifying those students with visual impairment and other information about them sought by the DHS in this case.

II. INTER-AGENCY DISCLOSURE OF CONFIDENTIAL INFORMATION

Section 92F-19(a), Hawaii Revised Statutes, sets forth the limitations on the disclosure of confidential government records by one government agency to another. In pertinent part, this section provides:

> **□92F-19 Limitations on disclosure of government records to other agencies.** (a) No agency may disclose or authorize disclosure of government records to any other agency unless the disclosure is:
>
> . . . .
>
> (3)Reasonably appears to be proper for the performance of the requesting agency's duties and functions; . . . .

Haw. Rev. Stat. □92F-19(a) (3) (Supp. 1991).

The disclosure of information about blind persons to the DHS may be one that "[r] easonably appears to be proper for the performance of" the DHS' duty of compiling a register of blind persons under section 347-6, Hawaii Revised Statutes. However, from our review of the legislative history of section 92F-19, Hawaii Revised Statutes, we believe that the Legislature did not

intend for this section to authorize the inter-agency disclosure of records that are specifically protected from disclosure by State or federal law, such as section 235-116, Hawaii Revised Statutes, which prohibits the DOTAX's disclosure of income tax returns and return information.

In explaining the purpose behind section 92F-19, Hawaii Revised Statutes, the Legislature stated that it intended to "continue the current prohibitions on the sharing of records and information between agencies," presumably including the "current prohibitions" set forth in other statutes. See 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); see also OIP Op. Ltr. No. 90-24 (July 9, 1990).

Furthermore, the structure of the UIPA itself reflects that the Legislature intended the general disclosure provisions of the UIPA to yield to specific State statutes that either expressly restrict or authorize the disclosure of government records. See Haw. Rev. Stat. □92F-12(b) (2) (Supp. 1991) (requiring the disclosure of government records that are expressly authorized to be disclosed pursuant to "federal law or a statute of this State"); Haw. Rev. Stat. □92F-22(5) (Supp. 1991) (protecting from disclosure any personal record that is "[r] equired to be withheld from the individual to whom it pertains by statute"); see also OIP Op. Ltr. No. 92-10 (Aug. 1, 1992) (UIPA does not require the disclosure of DOTAX rulings which constitute tax "return information" made confidential by a specific statute).

In addition, we note that the UIPA provides:

> □**92F-17 Criminal penalties.** (a) An officer or employee of an agency who intentionally discloses or provides a copy of a government record, or any confidential information explicitly described by specific confidentiality statutes, to any person or agency with actual knowledge that disclosure is prohibited, shall be guilty of a misdemeanor, unless a greater penalty is otherwise provided for by law.

Haw. Rev. Stat. □92F-17 (Supp. 1991) (emphasis added). Thus, although section 92F-19, Hawaii Revised Statutes, may initially appear to authorize an agency official or employee to disclose to another agency a record protected from disclosure by State or federal law, the disclosing employee or official would be criminally liable under section 92F-17, Hawaii Revised Statutes,

for an improper disclosure if the individual had "actual knowledge that disclosure is prohibited" by a specific statute.

In reaching our conclusion that section 92F-19(a), Hawaii Revised Statutes, does not permit the inter-agency disclosure of a record required to be kept confidential by a specific State or federal statute, we find further support in the Uniform Information Practices Code ("Model Code"), drafted by the National Conference of Commissioners on Uniform State Laws, which served as a model for the UIPA.[2] In OIP Opinion Letter No. 90-24, we observed that section 92F-19, Hawaii Revised Statutes, is substantially identical in substance to section 3-103 of the Model Code concerning the inter-agency disclosure of government records. See OIP Op. Ltr. No. 90-24 (July 9, 1990). Section 3-103 of the Model Code is followed by section 3-104, which provides:

> □3-104. [Prohibitions on Disclosures Not Affected.] Nothing in sections 3-101 through 3-103 authorizes the disclosure of an individually identifiable record if disclosure is otherwise prohibited by law.

Model Code □3-104 (1980).

Section 3-104 of the Model Code makes clear that the Model Code's provision permitting inter-agency disclosure of government records does not operate to authorize the disclosure of a record if this disclosure is otherwise prohibited by law. Although the UIPA does not contain an explicit provision similar to section 3-104 of the Model Code, for all of the foregoing reasons, we believe that the Legislature intended the same result with respect to section 92F-19, Hawaii Revised Statutes.

Thus, we conclude that section 92F-19(a), Hawaii Revised Statutes, which sets forth the conditions under which the

---

[2]Section 1-24, Hawaii Revised Statutes, provides that "[a] ll provisions of uniform acts adopted by the State shall be so interpreted and construed as to effectuate their general purpose to make uniform the laws of the states and territories which enact them."

inter-agency disclosure of otherwise confidential records is generally permitted, does not supersede the specific prohibitions against the disclosure of income tax "return information" and certain health records under the State statutes previously cited. Our finding is consistent with the cardinal rule of statutory construction that where a "general" statute and a "specific" statute cannot operate coincidentally, the specific statute will supersede or exist as an exception to the general statute's terms. See, e.g., State v. Spencer, 68 Haw. 622 (1986) (conflicting criminal penalty provisions); In re Smart, 54 Haw. 250 (1973) (conflicting time limit provisions for filing an appeal of a real property tax assessment); see generally 2B N. Singer, Sutherland Statutory Construction § 51.05 (Sands 5th ed. rev. 1992).

Consequently, the DHS will not be able to obtain information about blind individuals from the DOTAX's income tax return records, and from those categories of confidential DOH records previously described since the disclosure of these records is prohibited by law. However, if the DOH maintains information about blind individuals in other categories of health records that are not made confidential by specific statutes, the DOH would be permitted to disclose such information to the DHS under section 92F-19(a) (3), Hawaii Revised Statutes, because this disclosure "reasonably appears to be proper for" the DHS' compilation of a register under section 347-6, Hawaii Revised Statutes.

Further, as previously discussed, the FERPA makes federal funding to educational institutions and agencies, such as the DOE, conditional upon their compliance with the FERPA's requirements regarding the disclosure of students' education records, or personally identifiable information contained therein. Although the FERPA does not specifically prohibit the disclosure of these records, the availability of federal funding is jeopardized unless the educational institution's policy or practice of permitting the release of students' education records is premised upon the written consent of the students' parents. Therefore, although section 92F-19, Hawaii Revised Statutes, may permit the DOE to disclose students' education records to the DHS for its register, the DOE would not be inclined to do so since such disclosure, if done without the written permission of the students' parents, would likely jeopardize the DOE's receipt of substantial federal funding. See OIP Op. Ltr. No. 90-24 (July 9, 1990) (concluding that

section 92F-19, Hawaii Revised Statutes, only permits, and does not require, inter-agency disclosure of records protected by a UIPA exception). In addition, we wish to point out that the UIPA was recently amended by the addition of section 92F-4, Hawaii Revised Statutes, which provides that an agency is not required to comply with a UIPA provision when the agency's compliance with the UIPA provision would cause the agency to lose or be denied federal funding, services, or other assistance from the federal government. Act 118, 1992 Haw. Sess. Laws 197.

CONCLUSION

Information contained in government records about a blind individual's visual impairment, birthdate, and ethnic background is not available for public inspection and copying because this information falls under the UIPA exception for "[g] overnment records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy." Haw. Rev. Stat. □92F-13(1) (Supp. 1991).

In addition, the DOTAX is prohibited by a specific State statute from disclosing income tax returns and "return information," which would include information about an individual's blindness that is filed to claim an exemption from income taxation. Haw. Rev. Stat. □235-116 (1985) . Similarly, the DOH is restricted by several statutes from disclosing certain categories of individually identifiable records, some of which may identify blind individuals. Thus, information about an individual's blindness contained in income tax return records and those DOH records made confidential by statute would also fall within the UIPA's exception to required disclosure for "[g] overnment records which, pursuant to state or federal law . . . are protected from disclosure." Haw. Rev. Stat. □92F-13(4) (Supp. 1991).

Section 92F-19, Hawaii Revised Statutes, permits, but does not require, the disclosure of confidential government records from one agency to another under certain conditions, but, for the reasons discussed, we believe that this UIPA section is superseded by the specific State statutes prohibiting the disclosure of tax "return information" and certain categories of DOH records. Furthermore, since, under federal law, no federal funding shall be provided to the DOE unless the DOE complies with federal restrictions regarding the disclosure of students' education records or personally identifiable information

contained therein, the DOE would likely jeopardize its federal funding by disclosing these records to the DHS under section 92F-19, Hawaii Revised Statutes.

Very truly yours,

Lorna J. Loo
Staff Attorney

APPROVED:

Kathleen A. Callaghan
Director

LJL: sc