December 2, 1992

The Honorable Robert A. Alm
Director of Commerce and Consumer Affairs
State of Hawaii
Kamamalu Building, Second Floor
1010 Richards Street
Honolulu, Hawaii 96813

Attention: Ms. Constance Cabral, Executive Secretary
Board of Professional Engineers,Architects,
Surveyors, and Landscape Architects

Dear Mr. Alm:

Re: Disclosure of Certificate[s] of Experience to License Applicants to Whom They Pertain

This is in reply to a memorandum from Lynn Otaguro, Deputy Attorney General, requesting an advisory opinion from the Office of Information Practices ("OIP") in order to advise the Board of Professional Engineers, Architects, Surveyors, and Landscape Architects ("Board") regarding the above-referenced matter.

ISSUE PRESENTED

Whether, under part III of the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), an applicant for an engineering, architecture, land surveying, or landscape architect's license, must be permitted to inspect and copy Certificate[s] of Experience submitted to the Board which evaluate the applicant's experience, character, and professional competence.

BRIEF ANSWER

Under part III of the UIPA, entitled "Disclosure of Personal Records," an agency must permit individuals to inspect and copy the individuals' personal records within ten working days, unless the individuals' personal records are exempt from disclosure under section 92F-22, Hawaii Revised Statutes.

Based upon our examination of the information reported in the Board's Certificate of Experience form, we believe that each certificate constitutes a "personal record" of the license applicant to which they pertain, as this term is defined by section 92F-3, Hawaii Revised Statutes, and federal court decisions construing the definition of the term "record" set forth in the federal Privacy Act of 1974, 5 U.S.C. § 552a(a)(4) (1988) ("Privacy Act").

Turning to an examination of the exemptions set forth in section 92F-22, Hawaii Revised Statutes, the only exemption that would arguably apply is that which does not require an agency to disclose personal records "[t]he disclosure of which would reveal the identity of a source who furnished information to the agency under an express or implied promise of confidentiality." Haw. Rev. Stat. § 92F-22(4) (Supp. 1991).

The Certificate of Experience form used by the Board does not contain an express promise that the identity of the person furnishing information on the form will not be disclosed. As such, we must determine whether persons who furnish information to the Board in this Board form do so under an implied promise of confidentiality.

Federal court decisions under a similar exemption in the Privacy Act of 1974, Exemption (k)(5), indicate that merely because a source's comments are of a personal nature, set forth comments about a person's character, shortcomings, or other personal assets, or were supplied by an acquaintance or business associate, does not dictate that they were provided under an implied promise of confidentiality.

These court decisions also indicate that the agency's past practices are a factor to be considered in making a determination on such a question. In our opinion, a determination of whether information has been furnished to an agency under an implied promise of confidentiality must usually be determined on a case-by-case basis because "from one set [of circumstances] to another the result indicated expectably may differ." However, in the case of Certificate[s] of Experience furnished to the Board, we believe that as a categorical matter, the information furnished therein is generally not furnished under an implied promise of confidentiality.

As its past practice, the Board has routinely disclosed this personal record to the individual to whom it pertains. Additionally, individuals who complete and submit the Certificate[s] of Experience are selected and named by the

license applicant, they are not sought out by the Board without the applicant's knowledge. In some cases, the certificates are returned to the Board by the license applicant.

Accordingly, absent any statement in a particular Certificate of Experience that reveals an expectation of confidentiality, or other clear indicia that the information has been furnished under an implied promise of confidentiality, we believe that under section 92F-23, Hawaii Revised Statutes, Certificate[s] of Experience must generally be made available for inspection and copying by the individual to whom they pertain.

FACTS

The Board of Professional Engineers, Architects, Surveyors, and Landscape Architects ("Board") administratively attached to the Department of Commerce and Consumer Affairs, licenses individuals to practice in the fields of engineering, architecture, land surveying, and landscape architecture.

To qualify for a license in any of the above professions, an applicant must demonstrate that the applicant possesses the required number of years of work experience "of a character satisfactory to the board." Haw. Rev. Stat. § 464-8 (Supp. 1991). Additionally, each license applicant must also "possess a history of honesty, truthfulness, financial integrity, and fair dealing." Haw. Rev. Stat. § 464-8(b)(4) (Supp. 1991).

To help the Board evaluate each license applicant's work experience and qualifications, it requires each applicant to provide "Certificate[s] of Experience" completed by three individuals each of whom are selected by the license applicant. Individuals who complete and submit the Certificate[s] of Experience are requested to provide an opinion concerning the applicant's personal integrity and character, professional/technical abilities, and professional competence. The instructions to the applicant state that the applicant may either attach the certificates to the license application or have the persons completing them return them directly to the Board. A copy of the Board's Certificate of Experience form is attached as Exhibit "A."

Deputy Attorney General Otaguro's memorandum to the OIP states that, based upon its understanding of the UIPA, "the Board previously has made the experience certificates it received from evaluators available to applicants evaluated." However, because the Board would like to receive candid and truthful evaluations of license applicants, the Board requests an opinion from the OIP

concerning the propriety of its past practice of making its Certificate[s] of Experience available for inspection by the applicants to whom they relate.

DISCUSSION

The question presented by the Board must be resolved with reference to part III of the UIPA, entitled "Disclosure of Personal Records," sections 92F-21 through 92F-27.5, Hawaii Revised Statutes, which govern an individual's right to inspect and copy the individual's accessible "personal records."

Under the UIPA, the term "personal record" means:

> [A]ny item, collection, or grouping of information about an individual that is maintained by an agency. It includes, but is not limited to, the individual's education, financial, medical, or employment history, or items that contain or make reference to the individual's name, identifying number, symbol, or other identifying particular assigned to the individual, such as an finger or voice print or a photograph.

Haw. Rev. Stat. § 92F-3 (Supp. 1991) (emphases added).

The definition of the term "personal record" is nearly identical to the definition of the term "record" set forth in the federal Privacy Act of 1974, 5 U.S.C. § 552a(a)(4) (Act").[1] Federal courts examining this definition have found that to be a "record" under the Privacy Act, the record "must reflect

[1]Under section 552a(a)(4) of the Privacy Act, the term "record" means:

> any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph.

some quality or characteristic of the individual involved." Boyd v. Secretary of the Navy, 709 F.2d 684, 686 (11th Cir. 1983); see also, Topurdize v. U.S. Information Agency, 772 F. Supp. 662, 664 (D.D.C. 1991); Unt v. Aerospace Corp., 765 F.2d 1440, 1448-49 (9th Cir. 1985). Contra Quinn v. Secretary of the Army, ___ F.2d ___ 1992 WL 315737 (3rd Cir. Nov. 4, 1992) (rejecting a quality or characteristic test). We believe that Certificate[s] of Experience meet either of the tests applied by the federal courts to Privacy Act "record[s]."

With regard to the disclosure of personal records to the individuals to whom they pertain, section 92F-23, Hawaii Revised Statutes, describes an agency's affirmative disclosure duties, as follows:

> §92F-23 **Access to personal record; initial procedure.** Upon the request of an individual to gain access to the individual's personal record, an agency shall permit the individual to review the record and have a copy made within ten working days following the date of the request unless the personal record requested is exempted under section 92F-22. The ten-day period may be extended for an additional twenty working days if the agency provides to the individual, within the initial ten working days, a written explanation of unusual circumstances causing the delay.

Haw. Rev. Stat. § 92F-23 (Supp. 1991) (emphasis added).

Accordingly, unless an individual's personal record is exempt from the individual's inspection under one the exemptions set forth by section 92F-22, Hawaii Revised Statutes, an agency must permit the individual to whom the record pertains to inspect and copy the same within ten working days of the date of the individual's request.

Based upon our review of the Board's Certificate of Experience form, in our opinion, only paragraph (2) of section 92F-22, Hawaii Revised Statutes, would arguably permit the Board to deny an license applicant access to a Certificate of Experience which pertains to them. This provision provides:

> §92F-22 **Exemptions and limitations on individual access.** An agency is not

> required by this chapter to grant an individual access to personal records, or information in such records:
>
> . . . .
>
> (2) The disclosure of which would reveal the identity of a source who furnished information to the agency under an express or implied promise of confidentiality; . . . .

Haw. Rev. Stat. §92F-22(2) (Supp. 1991) (emphasis added).

The UIPA, including part III governing an individual's access to the individual's personal records, was modeled upon the Uniform Information Practices Code ("Model Code") drafted by the National Conference of Commissioners on Uniform State Laws. Significantly, however, the Legislature departed from the Model Code's provisions concerning personal records which are exempt from disclosure under article III of the Model Code. Of particular note is the fact that unlike section 92F-22, Hawaii Revised Statutes, section 3-106(a)(2) of the Model Code provides that an agency is not required to disclose personal records which contain:

> (2) information collected and used solely to evaluate the character and fitness of persons, but only to the extent that disclosure would identify the source of the information; . . . .[2]

Model Code §3-106(a)(2) (1980). Thus, under the Model Code, the identity of a source providing information concerning the character and fitness of persons is exempt from disclosure to the individual to whom the information relates, irrespective of

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2The commentary to this Model Code provision provides:

> Subsection (a)(2) protects the anonymity of individuals who write letters of recommendation or provide character and fitness evaluations. A record requester is entitled to access, however, provided that the identity of the source of the evaluation is not revealed.

whether the source was expressly or impliedly promised that their identity would remain confidential.

Had the Legislature included section 3-106(a)(2) of the Model Code as one of the part III exemptions to disclosure of personal records, in our opinion, the Board would clearly be authorized to withhold or excise the identity of persons who complete and submit Certificate[s] of Experience before disclosing them to the license applicants to whom they pertain. However, because the Legislature did not include this provision from article III of the Model Code in part III of the UIPA, a person providing a fitness or character evaluation must be the recipient of an express or implied promise of confidentiality, before the source's identity may be withheld by a state or county agency.

Turning to the Certificate[s] of Experience Form maintained by the Board, on their face, they do not contain an express promise to the submitter thereof that the submitter's identity will remain confidential. Thus, a person who submits a Certificate of Experience must be the recipient of an implied promise of confidentiality in order for the submitter's identity to be exempt from disclosure to the license applicant under part III of the UIPA.

In determining whether a promise of confidentiality may be reasonably implied for individuals who complete a Certificate of Experience on behalf of a license applicant, court decisions under the Privacy Act provide useful guidance in resolving the question presented. The policies and purposes underlying part III of the UIPA nearly are identical to those underlying the Privacy Act's provisions which, among other things, require federal agencies to disclose, to individuals, records which relate to them, and allows individuals to request correction or amendment of incorrect or misleading factual information in such records. Indeed, the commentary to article III of the Model Code, expressly notes that it "establishes a statutory framework similar to the Federal Privacy Act." See Model Code § 3-101 commentary at 21 (1980).

Thus it is not surprising that like part III of the UIPA, the Privacy Act contains provisions protecting the disclosure of the identities of agency sources who supply information under an express or implied promise of confidentiality. Specifically, under section 552a(k)(5) of the Privacy Act, federal agencies are not required to disclose to an individual:

> (5) investigatory material compiled solely

> for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence; . . . .

5 U.S.C. § 552a(k)(5) (Supp. 1990) (emphasis added).

Therefore, it follows that the UIPA's part III exemptions should be construed in pari materia with parallel provisions of the Privacy Act. See 2B N. Singer, Sutherland Statutory Construction § 52.02 (5th ed. rev. 1992) (judicial interpretations of federal statutes useful in construing state statutes copied from federal acts).

However, before turning to an examination of significant court decisions interpreting the Privacy Act's provisions concerning implied promises of confidentiality, we observe from the outset that federal courts have held that the Privacy Act's exemptions to an individual's statutory right of access "must be narrowly construed and their requirements must be strictly met." See, e.g., Hernandez v. Alexander, 671 F.2d 402, 407 (10th Cir. 1982); Nemetz v. Dept. of Treasury, 446 F. Supp. 102, 105 (N.D. Ill. 1978). As stated by the court in the Topuridze case, "when the individual to whom the information pertains is also the individual requesting the information, the Privacy Act presumes that disclosure to the individual will occur." Id. at 662, quoting Wren v. Harris, 675 F.2d 1144, 1146 (10th Cir. 1982).

In Londrigan v. FBI, 670 F.2d 1164 (D.C. Cir. 1984), the court examined whether Federal Bureau of Investigation ("FBI") sources provided information to the FBI under an implied promise of confidentiality when they were consulted in a background investigation of an individual's suitability for a position with the Peace Corps. The court held that neither conclusory assertions, the fact that the information was solicited by and given to a government agency, nor the fact that the information was of a personal nature and obtained from acquaintances of the job applicant would suffice to validate a finding of an implied

promise of confidentiality,[3] and stated:

> Verification of the fact of such a[n] [implied] promise may vary in extent depending on the type of information, the circumstances under which it was gathered, and other factors, but some effort beyond mere observations that the documents contain comments on a prospective employee's character and other personal assets or shortcomings, and that they were supplied by acquaintances and business associates, must be made to enable a determination of exactly what kinds of assurances, if any, were given to providers of the information. An implied promise of confidentiality is established only as a logical deduction from the circumstances shown, and from one set to another the result indicated expectably may differ . . . .

Londrigan, 670 F.2d at 1173 (emphasis added).

In remanding the case for additional factual findings, the court provided guidance to the lower court in determining whether an assurance of confidentiality may reasonably be inferred:

> [T]here are several steps that the District Court appropriately may take. First, a careful review of each document should be undertaken to determine the nature of the source--for example, record custodian, personal acquaintance or the like--and whether any statement contained in the document indicates an expectation of confidentiality. Second, while the FBI cannot realistically be expected to contact [the sources] at least some of the available investigating agents might be consulted to determine whether any promises of assurances where expressly given or impliedly arose in [this] instance. Third, FBI policies prevalent in 1961 may be considered, but

[3]In a footnote to its opinion the court in Londrigan rejected a contention that Exemption (k)(5) protects only those sources who furnish derogatory information to an agency, stating, "one may be complimented by comments from a stranger, yet insulted by the same remarks from a close friend." Id. at 1174 n.46.

> great care should be taken to avoid confusion of internal agency rules with specific practices actually pursued with persons interviewed.
>
> The District court may find other indicia of the presence or absence of promises of confidentiality, and the court should feel free to weigh them, but we hasten to point out that the mere fact that the FBI conducted the investigation or that the comments were of a personal nature does not dictate the result.

Londrigan, at 1173-74.

After remanding the case to the District Court, the Court of Appeals for the District of Columbia revisited the Londrigan case in Londrigan v. FBI, 722 F.2d 840 (D.C. Cir. 1983) ("Londrigan II"). In Londrigan II, the court held that the FBI had satisfied its burden of demonstrating that sources who furnished background information concerning the plaintiff did so under an implied assurance of confidentiality, reasoning:

> We do not depart from Londrigan I and adopt an automatic exemption for background interviews conducted by the FBI prior to the effective date of the Privacy Act. We do add to what was said in that opinion, based upon the augmented record we now have. We hold that where, as shown here, the FBI has pursued a policy of confidentiality, and demonstrates that the agents involved were alert to that policy,conformed their conduct to it, and routinely assured confidentiality to interviewees who exhibited any doubt, then, absent contrary indicators (footnote omitted), the inference should be drawn that the interviewees were impliedly promised confidentiality.
>
> As to interviews conducted today,Congress has established a rule that agencies can and must follow--sources are not shielded unless they are expressly promised that their identities will not be divulged. During the 1960's period in question, however, Congress had set no such rule. We conclude that, through the [Privacy Act]

> implied promise exception, Congress sought to accommodate once prevailing, lawful agency practices.

Londrigan II, at 844-45 (emphasis added).

Before reaching a conclusion on the question of whether individuals who complete Certificate[s] of Experience do so under an implied promise of confidentiality, an additional court decision under Exemption (k)(5) of the Privacy Act bears examination. While Exemption (k)(5) of the Privacy Act only applies to information that would reveal the identity of a confidential source, and generally does not apply to information furnished by such a source, see Nemetz v. Dep't of Treasury, 446 F. Supp. 102 (N.D. Ill. 1978); Vymetalik v. FBI, 785 F.2d 1090 (D.C. Cir. 1986), there does appear to be a judicially created exception to this rule.

In Volz v. United States Dep't of Justice, 619 F.2d 49 (10th Cir. 1980), the court held that Exemption (k)(5) exempts those portions of a document containing information under a promise of confidentiality when the source of the information is known but the specific confidential information itself is not known to the party seeking access, stating:

> The trial court fails to recognize the inextricable connection between the source and the substance of a confidential disclosure. [The source] obtained a lawful promise of confidentiality for the fact that he was the source of certain substantive information. That the information contained in the two confidential paragraphs was part of a broader body of information that was released does not alter the result. Subsection (k)(5) protects the confidentiality of any substantive information provided by [the source] insofar as disclosure would reveal that he was the agency's source for that information.

Volz, 619 F.2d at 50.

In reaching a conclusion on what is admittedly a complex question, that being whether individuals who submit Certificate[s] of Experience do so under an implied promise of confidentiality, we believe that the following factors are relevant and must dictate our legal conclusion:

1. Unlike the FBI in Londrigan II, the Board has no uniform past policy of routinely assuring those individuals submitting Certificate[s] of Experience that their identities will remain confidential. Indeed, the Board's past practice has been to disclose the Certificate[s] of Experience to the license applicant to whom they pertain upon request.

2. Those individuals who complete and submit the Certificate[s] of Experience are selected by the license applicant, and are not independently sought out by the Board without the applicant's knowledge or involvement. In some cases, they are returned to the Board by the applicant, as attachments to the applicant's application.

3. Given the opinion in Londrigan I, and the fact that the Legislature did not adopt the Model Code provision making confidential the identity of any source providing information to an agency regarding an individual's reputation or character, the fact that a Certificate of Experience contains information of a personal character, while relevant, cannot in and of itself be considered determinative of the question presented.

While a determination concerning whether a person furnished information to an agency under an implied promise of confidentiality is one that must ordinarily be made on a case-by-case basis because "from one set [of circumstances] to another the result indicated expectably may differ," Londrigan at 1173, we conclude that absent an indication within the Certificate of Experience form demonstrating that the source furnished the information contained therein based upon an assurance of confidentiality,[4] or absent other persuasive indicia that the source supplied information under an implied promise of confidentiality, the identities of such sources are generally not

[4]For example, comments set forth by a person in section 7 of the Certificate of Experience form entitled "Additional Comments" or in other sections of the form that indicate that the person expects the information not to be revealed to the particular license applicant.

protected from disclosure to the license applicants to whom the Certificate[s] of Experience pertain under part III of the UIPA.

CONCLUSION

Based upon the provisions of part III of the UIPA, and case law under the Privacy Act, it is our opinion that absent an express promise of confidentiality, and in absence of other indicia that a person who has completed a Certificate of Experience was impliedly promised that their identity would remain confidential, we find that a license applicant must be permitted to inspect and copy Certificate[s] of Experience that pertain to them under section 92F-23, Hawaii Revised Statutes.

Very truly yours,

Hugh R. Jones
Staff Attorney

APPROVED:

Kathleen A. Callaghan
Director

HRJ:sc\OL92-24sc
Attachment
c: John Anderson
Deputy Attorney General