

June 14, 1993

Mr. Don L. Whitney
P. O. Box 98
Honolulu, Hawaii 96810

Dear Mr. Whitney:

Re: Answers to Architect's License Examination Questions

This is in reply to your letter to the Office of Information Practices ("OIP") dated May 15, 1993, concerning the above-referenced matter.

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), the Department of Commerce and Consumer Affairs ("DCCA") must permit you to inspect and copy your answer, or the answers of other applicants for an architect's license, submitted in connection with the Architect's License Examination ("Examination").

BRIEF ANSWER

Under the UIPA, State and county 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. 1992).

Section 436B-8.5, Hawaii Revised Statutes, provides that "under no circumstances shall the licensing authority or the DCCA allow an examination to be copied." We believe that this statute is ambiguous, in that the term "examination" can reasonably be construed to include only the examination questions themselves, or include both the test questions and the answers selected or submitted by those taking the examination.

Based upon: (1) a careful examination of section 436B-8.5, Hawaii Revised Statutes, as a whole, (2) related sections of

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chapter 436B, Hawaii Revised Statutes, and (3) giving effect to the most plausible legislative intention underlying this statute, it is our opinion that the term "examination" should be interpreted to include both the licensing examination as well as a license applicant's answers thereto.

Accordingly, it is our opinion that under sections 92F-13(4) and 436B-8.5, Hawaii Revised Statutes, the DCCA is prohibited from allowing you to copy your answers on the most recent Examination.

Additionally, because section 436B-8.5, Hawaii Revised Statutes, provides that "under no circumstances shall the licensing authority or the [DCCA] allow an examination to be copied," it is our opinion that the DCCA is precluded from allowing you to copy the answers submitted by other license applicants in response to questions on the Examination.

FACTS

In OIP Opinion Letter No. 91-5, (Apr. 15, 1991), we found that under the UIPA, the DCCA was not required to disclose to you the names, addresses, and telephone numbers of individuals who graded Division C of the Examination administered by the National Council of Architectural Registration Boards ("NCARB") because the DCCA did not "maintain" the information you requested. Rather, this information was maintained by NCARB, which is not an "agency" subject to the UIPA's disclosure provisions.

As a result of discussions between the OIP, NCARB, and the DCCA that preceded the issuance of OIP Opinion Letter No. 91-5, the DCCA permitted you to inspect your solution and the solutions of others to a graphic design question on the Examination, along with the pass/fail grades assigned to each drawing after segregating the identity of each individual who submitted the answers. This information was disclosed because NCARB, the DCCA, and the OIP all agreed that the disclosure of these government records would not "compromise the validity, fairness or objectivity of the examination," and thereby "result in the frustration of a legitimate government function" under section 92F-13(3), Hawaii Revised Statutes.

In 1991, after the issuance of OIP Opinion Letter No. 91-5, the Legislature adopted the Professional and Vocational Licensing Act, chapter 436B, Hawaii Revised Statutes ("PVLA"). The PVLA applies only to the professions and vocations required by law to be regulated by a board or commission, and only when the

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licensing laws for the respective profession or vocation are silent. See Haw. Rev. Stat. ~~§ 436B~~ (Supp. 1992).

A year after the passage of the PVLA, the Legislature amended it to, among other things, create a new section of the Act applicable to the disclosure of licensing examinations:

~~§ 436B~~**8.5 Review of examinations.** The department, in its discretion, may allow an applicant to review the most recent examination failed by the applicant, provided that under no circumstances, shall the licensing authority or the department allow an examination to be copied.

Haw. Rev. Stat. ~~§ 436B~~ (Supp. 1992) (emphasis added).

Recently, you requested to inspect and copy your answer to the building design question on the most recent Examination, and a DCCA employee provided you with a copy of the same, believing that section 436B-8.5, Hawaii Revised Statutes, only applies to the Examination questions, not the answers. Subsequently, you requested to inspect and copy the building design solutions of other applicants, and DCCA personnel denied your request after receiving an informal opinion over the telephone from the OIP. Based upon limited research and facts supplied over the telephone, the OIP concluded that the term "examination" in section 436B-8.5, Hawaii Revised Statutes, should be construed to include both the Examination questions, as well as the answers.

You requested the OIP to provide you with a formal advisory opinion concerning whether, under the UIPA, the DCCA must permit you to copy your own answers to the Examination, and to inspect and copy the answers of other license applicants who also took the Examination.

DISCUSSION

The UIPA states that "[e]xcept as provided in section 92F-13, each agency shall make government records available for inspection and copying upon request by any person." Haw. Rev. Stat. ~~§ 192F~~ (Supp. 1992). The term "government record" means "information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. ~~§ 92F-3~~ (Supp. 1993) (emphasis added); Kaapu v. Aloha Tower Development Corp., ___ Haw. ___, No. 15775 (Feb. 25, 1993).

Under section 92F-13(4), Hawaii Revised Statutes, an agency

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is 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." Section 436B-8.5, Hawaii Revised Statutes, provides in pertinent part, "under no circumstances shall the licensing authority or the [DCCA] allow an examination to be copied." This statute protects, in a limited fashion, licensing examinations maintained by the DCCA.

Where statutory language is plain and unambiguous, the language chosen by the Legislature must ordinarily be regarded as conclusive unless a literal application would produce an absurd or unreasonable result, or an unjust result clearly inconsistent with the purposes and policies of the statute. State v. Medina, ___ Haw. ___ (1992). When there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists. State v. Avilla, 69 Haw. 509 (1988). When a statute is ambiguous:

- (1) The meaning of the ambiguous words may be sought by examining the content, with which the ambiguous words, phrases, and sentences may be compared in order to ascertain their true meaning.
- (2) The reason and spirit of the law, and the cause which induced the legislature to enact it, may be considered to discover its true meaning.
- (3) Every construction which leads to an absurdity shall be rejected.

Haw. Rev. Stat. 1-15 (1985).

We believe that section 436B-8.5, Hawaii Revised Statutes, is ambiguous. The term "examination," as used in this statute, is reasonably subject to two different interpretations. On one hand, the term "examination" could be construed to include only the examination questions. On the other hand, this term could reasonably be construed to include both the questions and the answers to an examination.

We believe that the Legislature intended the term "examination" to encompass not only the examination questions, but also the license applicant's answers thereto. While legislative committee reports concerning the 1992 amendments to chapter 436B, Hawaii Revised Statutes, provide no guidance in

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resolving the question presented¹, the written testimony of the DCCA on Senate Bill No. 2922, and a careful examination of this statute as a whole supports our conclusion.

Specifically, section 436B-8.5, Hawaii Revised Statutes, begins by stating, "[t]he department, in its discretion, may allow an applicant to review the most recent examination failed by the applicant." We believe that the most plausible reason for permitting applicants to review their most recent failed examination would be to permit license applicants to explore where or how their examination answers were either deficient or incorrect and, thereby, learn from their mistakes. Thus, a construction of the term "examination" that would subject it only to licensing test questions, would not be consistent with the most plausible rationale for permitting license applicants to inspect an examination that they failed to pass.

Further, as you pointed out in your letter to the OIP dated May 3, 1993, in section 436B-7(7), Hawaii Revised Statutes, the Legislature authorized the DCCA "to prepare, administer, and grade examinations." In grading an examination, one grades examination answers, not the questions themselves.

Additionally, section 436B-8.5, Hawaii Revised Statutes, was apparently included in 1992 Senate Bill No. 2292 in response to discussions between the OIP, NCARB, and the DCCA that preceded the issuance of OIP Opinion Letter No. 91-5. In those discussions, the OIP pointed out that under section 92F-13(3), Hawaii Revised Statutes, an agency is not required to disclose "[m]aterials used to administer an examination which, if disclosed, would compromise the validity, fairness or objectivity of the examination." S. Stand. Comm. Rep. No. 2580, dated March 31, 1988.

In discussions that preceded the issuance of OIP Opinion Letter No. 91-5,² we pointed out that a similar exemption exists

¹See H.R. Stand. Comm. Rep. No. 904-92, 16th Leg., 1992 Reg. Sess., Haw. H.J. 1235 (1992); H.R. Stand. Comm. Rep. No. 1204-92, Haw. H.J., 1356 (1992); S. Stand. Comm. Rep. No. 1802, Haw. S.J. 895 (1992); S. Stand. Comm. Rep. No. 2103, Haw. S.J. 992 (1992); S. Conf. Comm. Rep. No. 68, Haw. S.J. 761 (1992).

²You were permitted to copy your own answer to the building design questions because, at that time, this question was not re-used from examination to examination, and because based upon the UIPA's legislative history and similar exemptions in laws similar to the UIPA, the OIP advised the DCCA that it would be

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in the federal Privacy Act, 5 U.S.C. § 552a, and in section 2-103 of the Uniform Information Practices Code ("Model Code") drafted by the National Conference of Commissioners on Uniform State Laws, upon which the UIPA was styled by the Legislature. This Model Code section provides in pertinent part:

2-103 Information Not Subject to Duty of Disclosure. (a) This article does not require disclosure of:

. . . .

(4) material used to administer a licensing, employment, or academic examination if disclosure would compromise the fairness or objectivity of the examination process;

The commentary to this section of the Model Code provides:

Subsection (a)(4) protects the integrity of agency administered licensing, employment or academic examinations. A number of states have this exemption in one form or another. Some appear to permit an agency to withhold this information indefinitely [Citations omitted.] Others allow public access after the examination; [citations omitted] a few do so only if the examination is not going to be used again, [citations omitted] or where the public interest is paramount [Citations omitted.] Subsection (a)(4) requires the disclosure of examination material only if the fairness or objectivity of the examination process would not be compromised.

For example, essay questions of a type not ordinarily used in future testing probably

difficult for the OIP to conclude that your answer "must be confidential in order to avoid the frustration of a legitimate government function," under section 92F-13(3), Hawaii Revised Statutes. See Exhibit "A," attached. Presumably, the provisions now codified in section 436B-8.5, Hawaii Revised Statutes, were included in 1992 Senate Bill No. 2992 to authorize the DCCA to restrict the duplication of even those examinations that are not re-used from year-to-year.

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would be available after the examination is administered. On the other hand, disclosure of multiple choice or other objective questions would be unlikely since they are commonly used again. The right of the individual to examine but not copy his own test questions and answers is made effective through a limited form of access authorized by [article III] of this Code.

Model Code 2-103 commentary at 16 (1980) (emphasis added).

Similarly, the federal Privacy Act of 1974, 5 U.S.C. (1988) ("Privacy Act") also contains a similar exemption for testing or examination material.³ Privacy Act guidelines issued by the Office of Management and Budget also provide guidance in resolving the issue presented:

552a

This provision permits an agency to exempt testing or examination material used to assess the qualifications of an individual for appointment or promotion in the military or civilian service only if disclosure of the record to the individual would reveal information about the testing process which would potentially give an individual an unfair competitive advantage. For example, the Civil Service Commission and the military departments give written examinations which cannot be revised each time they are offered. Access to the examination questions and answers could give an individual an unfair advantage. This language also covers certain materials used in rating individual qualifications. This subsection permits the agency to withhold a record only to the extent that its disclosure would reveal test questions or answers or testing procedures.

OMB Privacy Act Guidelines Circular No. A-108 (July 9, 1975)

³Exemption (k)(6) of the Privacy Act contains an exemption for "testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service the disclosure of which would compromise the objectivity or fairness of the testing or examination process." 5 U.S.C. \S 552a(k)(6) (1988).

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(emphasis added).

Finally, in written testimony before the Senate Committee on Consumer Protection and Business Regulation dated February 3, 1992, and the House Committee on Consumer Protection and Commerce dated March 9, 1992, the DCCA stated that one of the purposes of the Senate Bill No. 2992 was to "[a]dd a new section to allow the DCCA to continue its practice of providing exam candidates with an opportunity to review their failed exams, but to withhold copying to protect the security of the exam."⁴

Thus, in construing section 436B-8.5, Hawaii Revised Statutes, with relation to laws which are upon the same subject matter, see section 1-14, Hawaii Revised Statutes, and also considering the DCCA's testimony on Senate Bill No. 2292, we believe that the Legislature intended the term "examination" to include both the questions on a licensing examination as well as a license applicant's answers thereto.

Accordingly, it is our opinion that under section 92F-13(4), Hawaii Revised Statutes, the DCCA is prohibited from allowing you to duplicate both the questions and the answers to your recent Examination.

However, the OIP wishes to point out in this opinion that the provisions of section 436B-8.5, Hawaii Revised Statutes: (1) are largely unnecessary in light of the fact that under section 92F-13(3) and 92F-22(4), Hawaii Revised Statutes, agencies are not required to disclose materials used to administer an examination, which if disclosed would compromise the validity, fairness, or objectivity of the examination; and (2) represent yet another in a growing number of legislatively established information loopholes or "pukas" which threaten the uniform application of the UIPA, which after all, was intended "to provide a new framework for the resolution of the often competing public and privacy interests involved in terms of access to government records." See S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689 (1988); H. Conf. Comm. Rep. No. 112-88, H.J. 871 (1988). When the Legislature adopted

⁴We recognize that written testimony presented to legislative committees is usually of little persuasive value. See 2A N. Singer, Sutherland Statutory Construction § 48.11 (rev. 1992). However, since the DCCA was one of the chief sponsors of the bill, we believe that its written testimony has some value as an aide, at least in the absence of evidence in the legislative committee reports.

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the UIPA, it intended it to end "the current confusion and conflict" which surrounded the patchwork quilt of then existing records laws. Id.⁵

The use and disclosure of examination and testing materials, whether for licensing, academic, or public employment purposes, present questions of statewide application, and should be addressed by the Legislature as part of a uniform law, not in a series of separate provisions scattered throughout the Hawaii Revised Statutes. As such, we would encourage the Legislature to seriously consider repealing section 436B-8.5, Hawaii Revised Statutes.

Finally, it is also our opinion that section 436B-8.5, Hawaii Revised Statutes, prevents the DCCA from permitting you to copy or duplicate the answers submitted by other license applicants. Specifically, section 436B-8.5, Hawaii Revised

⁵As pointed out in the Prefatory Note to the Uniform Information Practices Code, upon which the UIPA was modeled, the establishment of uniform practices concerning government records serves important purposes:

Uniformity has special meaning in that state and local government records now cross state lines with ease. The individual inevitably is the subject--and sometimes target--of expanding dossiers of vital statistics, medical, educational, tax, social services, and criminal justice records, among others. At the same time, access to public records and other information that should be public must be assured in law and fact.

Uniformity has other advantages including (1) greater consistency and efficiency in record handling, (2) increased awareness and respect by private citizens and government personnel for the law, (3) assurance of consistent rights relating to the existence, protection, correction, and disclosure of government records, and (4) harmony and balance in records, principles, standards, and goals.

Uniform Information Practices Code Prefatory Note at 4-5 (Nat'l Conf. of Commissioners on Uniform State Laws 1980).

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Statutes, unambiguously provides that "under no circumstances shall the licensing authority or the department allow an examination to be copied." [Emphases added.] In our opinion, this prohibition extends not only to your Examination (including your answers) but to the Examinations completed by other license applicants as well.

CONCLUSION

We believe that under sections 92F-13(4) and 436B-8.5, Hawaii Revised Statutes, the DCCA is not required to permit you to copy your answers to the most recent Examination. Similarly, we conclude that under the UIPA, the DCCA is not required to permit you to copy the answers of other applicants on the Examination.

If you should have any questions regarding this opinion letter, please contact me at 586-1400.

Very truly yours,

Hugh R. Jones
Staff Attorney

APPROVED:

Kathleen A. Callaghan
Director

HRJ:sc
Attachment

c: Honorable Clifford K. Higa
Director of Commerce and Consumer Affairs

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Licensing Administrator