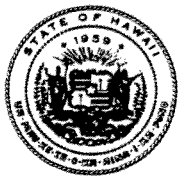
JOHN WAIHEE
GOVERNOR

WARREN PRICE, III
ATTORNEY GENERAL



KATHLEEN A. CALLAGHAN
DIRECTOR

PH. (808) 586-1400
FAX (808) 586-1412

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
OFFICE OF INFORMATION PRACTICES
426 QUEEN STREET, ROOM 201
HONOLULU, HAWAII 96813-2904

September 2, 1993

Honorable Ronald Mun
Corporation Counsel
City and County of Honolulu
Honolulu Hale, First Floor
530 South King Street
Honolulu, Hawaii 96813

Attention: Donna Woo
Deputy Corporation Counsel

Dear Mr. Mun:

Re: Salaries of Exempt Employees within the Office of the Mayor

This is in reply to a telephone conversation with Deputy Corporation Counsel Donna Woo on August 26, 1993, in which she requested an advisory opinion from the Office of Information Practices ("OIP") concerning the above-referenced matter.

FACTS

The OIP understands that Mr. David Waite, a reporter with the Honolulu Advertiser, has requested the City and County of Honolulu ("City") to provide him with the exact salaries of individuals employed within the Office of the Mayor. Mr. Waite's request was prompted by findings made by the City Ethics Commission, that the City's Deputy Managing Director obtained access to confidential salary information concerning exempt employees within the Office of the Mayor, and used this information in soliciting campaign contributions from those employees.

Pursuant to the Charter of the City and County of Honolulu, positions within the Office of the Mayor are exempt from the civil service, "but such positions shall be included in the position classification plan." Rev. Charter of the City and County of Honolulu, art. VI, § 6-303(b) (rev. ed. 1984); see also, Haw. Rev. Stat. § 76-77(1) (1985). Based upon this

provision, it is the City Department of Personnel's belief that under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), the exact salaries of employees within the Office of the Mayor are confidential.

ISSUE PRESENTED

Whether, under the UIPA, the salaries paid to exempt employees within the Office of the Mayor must be made available to the public upon request.

DISCUSSION

In determining whether government records must be made available for public inspection and copying under the UIPA, we observe at the outset that like the federal Freedom of Information Act, 5 U.S.C. § 552 (1988), and the open records laws of other states, the UIPA's affirmative disclosure provisions should be liberally construed, its exceptions narrowly construed, and all doubts resolved in favor of disclosure.[1] It is the agency's burden to establish that requested records (or information contained therein) is protected from disclosure by one of the UIPA's exceptions. Haw. Rev. Stat. § 92F-15(c) (Supp. 1992).

The UIPA provides "[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. 1992). In addition to this general rule, in section 92F-12, Hawaii Revised Statutes, the Legislature set forth a list of government records that each agency must disclose "[a]ny provision to the contrary notwithstanding." The Legislature stated that "[a]s to these records, the exceptions such as for personal privacy and for frustration of legitimate government purpose are inapplicable . . . [t]his list merely addresses some particular cases by unambiguously requiring disclosure." S. Conf. Comm. Rep. No.

---

[1]See, e.g., John Doe Corp. v. John Doe Agency, 493 U.S. 146 (1986); Department of the Air Force v. Rose, 425 U.S. 352, 361-63 (1976); Seminole County v. Wood, 512 So.2d 1000 (Fla. Dist. Ct. App. 1987); City of Monmouth v. Galesburg Printing and Pub. Co., 494 N.E.2d 896 (Ill. App. 3 Dist. 1986); Title Research Corp. v. Rausch, 450 So.2d 933 (La. 1984); Hechler v. Casey, 333 S.E.2d 799 (W. Va. 1985); Laborers Intern. Union of North America Local 374 v. City of Aberdeen, 642 P.2d 418 (Wash. 1982); Bowie v. Evanston Comm. Consul. School Dist., 538 N.E.2d 557 (Ill. 1989); Lucas v. Pastor, 498 N.Y.S.2d 461 (N.Y. A.D. 2 Dept. 1986).

235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 690 (1988); H.R. Conf. Comm. Rep. No. 112-88, Haw. H.J. 817, 818 (1988).

With regard to information concerning present or former agency employees, section 92F-12(a)(14), Hawaii Revised Statutes, requires each agency to make available for public inspection and copying during regular business hours, among other things, "[t]he name, compensation (but only the salary range for employees covered by or included in chapters 76, 77, 297, or bargaining unit (8)) . . . ."

When the UIPA was adopted in 1988, section 92F-12(a)(14), Hawaii Revised Statutes, provided that the compensation of present or former agency employees shall be disclosed, "(or salary range for employees covered by chapters 76 and 77). See Act 262, 1988 Haw. Sess. Laws 474, 475 (1988) (emphasis added). The parallel provision of the Uniform Information Practices Code ("Model Code") drafted by the National Conference of Commissioners on Uniform State Laws, and upon which the UIPA was styled, simply provided that "the compensation" of present or former officers or employees of an agency shall be disclosed.[2]

As we have previously noted in several OIP advisory opinions, many of the government records described in section 92F-12, Hawaii Revised Statutes, were included by the Legislature in response to recommendations set forth in the Report of the Governor's Committee on Public Records and Privacy (1987) ("Governor's Committee Report").[3] The Governor's Committee Report contains a detailed discussion of how the issue of compensation paid to public employees should be treated as part of a new public records law:

> The Committee heard a good deal of testimony on the subject of records relating to government employees. As was often stated, these are public officials being compensated with public dollars. There is,

---

[2]See Model Code § 3-101(1) (1980).

[3]The UIPA's Legislative history acknowledges the "Herculean efforts" of the Governor's Committee on Public Records and Privacy, and the important role that this committee performed in the drafting of the UIPA. See S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093 (1988); see also, OIP Op. Ltr. No. 89-11 (Dec. 12, 1989); OIP Op. Ltr. No. 90-20 (June 12, 1990); OIP Op. Ltr. No. 90-29 (Oct. 5, 1990); OIP Op. Ltr. No. 92-17 (Sept. 2, 1992).

> therefore, a strong interest in ensuring that this money is well spent. There is also a need to reduce any potential for corruption and most importantly to allow for meaningful review of actions and policies . . . .
>
> . . . .
>
> The information which attracted the most attention was the **salaries and compensation of public employees.** There was strong sentiment that more information in this area should be available expressed by Representative Rod Tam (II at 7 and I(H) at 53-54), John Simonds (II at 224 and I(H) at 56-57), Beverly Keever (II at 355; III at 338; and I(H) at 44-46), Marcia Reynolds (II at 148), Desmond Byrne (II at 317 and I(H) at 57-59), Jahan Byrne (II at 332 and I(H) at 47), Ah Jook Ku (II at 221 and I(H) at 39), and James Setliff (I(H) at 32). As was expressed by a Committee member, the public has a right to know what public employees are making, at least in part, to judge whether it is worth the expense.
>
> One way to handle this would simply be to provide that the salary or compensation paid to an employee is public. There are, however, alternatives. If the focus is the salaries of appointed or high level positions, and that appeared to be the case from much of the testimony and comment, then perhaps the formula should allow the specific salaries of most employees to be confidential while providing the information which is more important. <u>For example, providing the actual salaries of all "exempt and/or excluded employees" would mean that the salaries of all appointed positions and all managerial positions would be public</u>. That could be supplemented by providing the "salary range" for all other employees.

Vol. I <u>Governor's Committee Report</u>, 106, 109 (1987) (boldface in original) (emphasis added).

In adopting the UIPA, the Legislature chose to modify the parallel provisions of the Model Code concerning the availability of the compensation paid to agency officers or employees. Since

the legislative committee reports concerning Act 262, 1988 Haw. Sess. Laws 474 are silent about the issue of the disclosure of salaries of agency employees, we believe that it is reasonable to assume that the Legislature intended to adopt the recommendation set forth in the Governor's Committee Report, namely, that the exact salaries of employees exempt from the civil service be publicly available during an agency's regular business hours.

In 1989, the Legislature amended section 92F-12(a)(14), Hawaii Revised Statutes, to provide in pertinent part, "(but only the salary range for employees covered by chapters 76, 77, 297 or 304) . . . ." The legislative history of Act 160, 1989 Haw. Sess. Laws 297, indicates that this change was made in response to concerns expressed by the University of Hawaii in its written testimony on 1989 H.B. No. 1799:

> In addition, we would like this committee to consider clarification of section 92F-12, Disclosure Required, as follows:
>
> . . . .
>
> (14) The name, compensation (or salary range for employees covered by chapters 76, [and] 77 and 304-11), job title
> . . . .
>
> This change is required in order to afford those employees appointed pursuant to section 304-11, HRS, the same protection of the right of privacy as those employees covered by sections 76, and 77, HRS.

Written Testimony of the University of Hawaii on H.B. No. 1799 at 1 (February 21, 1989).

We recognize that employees within the Office of the Mayor are included within the position classification plan established under chapter 77, Hawaii Revised Statutes.[4] However, one of the principal purposes of chapter 77, Hawaii Revised Statutes, is that "in [so] compensating employees in the civil service, due consideration shall be given to a decent standard of living and

---

[4]Under section 77-31, Hawaii Revised Statutes, the provisions of chapter 77, Hawaii Revised Statutes, apply to all positions included in the position classification plan for the City and County of Honolulu.

to the ability of the people to pay for such service." Haw. Rev. Stat. § 77-2 (1985) (emphasis added). We believe that the Legislature included the reference to chapter 77, Hawaii Revised Statutes, in the UIPA to recognize the coverage of this chapter to employees in the civil service. In other words, in attempting to implement the recommendations of the Governor's Committee, the Legislature used the reference to "chapters 76 and 77," Hawaii Revised Statutes, as a shorthand, or concise method to distinguish civil service employees from "exempt and/or excluded employees."

While the most desirable construction of a statute is that which is consistent with the spirit and letter of the statute, "both of which should be considered, frequently the purpose of an Act justifies the departure from a literal construction of the wording." G.J. Hawaii, Ltd. v. Waipouli Dev. Co., 57 Haw. 557, 562 (1977). We believe that given the UIPA's legislative history, a departure from the literal wording of this provision is justified. For example, if section 92F-12(a)(14), Hawaii Revised Statutes, were literally applied, even the exact salaries of exempt employees would remain confidential since section 76-16, Hawaii Revised Statutes, establishes the exemptions from the civil service, and one could therefore argue that even exempt employees may be said to be "covered by or included in" chapter 76, Hawaii Revised Statutes.

In 1992, the Legislature amended section 92F-12(a)(14), Hawaii Revised Statutes, to delete the reference, within the parentheses, to University of Hawaii employees covered by chapter 304, Hawaii Revised Statutes.[5] It narrowed this proviso by requiring the public availability of the exact salaries of employees of the University of Hawaii, except for those employees "included in" bargaining unit (8), the administrative, professional, and technical employees of the University. See H.R. Conf. Comm. Rep. No. 44, 16th Leg., 1992 Reg. Sess, Haw. H.J. 809 (1992).[6] The term "included" in section 92F-12(a)(14),

---

[5]Before the 1992 amendments to section 92F-12(a)(14), Hawaii Revised Statutes, provided in pertinent part, "(but only the salary range of employees covered by chapters 76, 77, 297, or 304) . . . ."

[6]The conference committee report states:

> The intent of this bill, as currently drafted, is to exclude members of bargaining unit (8), or certain employees of the University of Hawaii, as well as its

(continued...)

Hawaii Revised Statutes, was added to except those employees included within bargaining unit (8) from provisions requiring exact salary information to be disclosed.

The committee report of the Senate Committee on Employment and Public Institutions, which was responsible for adding the exclusionary language concerning bargaining unit (8) to 1992 H.B. No. 3424, further strengthens our conclusion that the reference to chapters 76 and 77, Hawaii Revised Statutes, was intended solely to identify those employees who are included in the civil service:

> The purpose of this bill is to include as public information the specific salaries of employees of the Department of Education and the University of Hawaii.
>
> Current law protects the exact salaries but provides for public disclosure of the salary ranges paid to civil servants, including the Department and University personnel.

S. Stand. Comm. Rep. No. 2595, 16th Leg., 1992 Reg. Sess., Haw. S. J. 1158 (1992) (emphasis added). Thus, a legislative committee

---

[6](...continued)

> community college system, from reporting their specific salaries as public information. Your Committee, however notes that the amended language manifesting this intent currently reads:
>
> > " . . . compensation (but only the salary range for employees . . . **or included in** chapters 76,77, [297 or 304] 297 **and bargaining unit (8)** . . ."
>
> This language, as previously drafted, may be interpreted to mean that salary ranges shall be reported as public information for the employee that is subject to the mandate of all chapters listed, as well as require that the employee be a member of bargaining unit (8). To clarify its legislative intent, your Committee has amended the bill by replacing the word "and" with the word "or." [Emphasis added, boldface in original.]

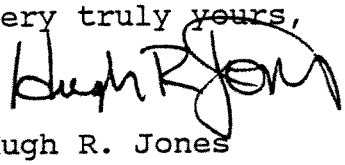
report on the 1992 amendments to section 92F-12(a)(14), Hawaii Revised Statutes, reveal that the Legislature understood that the purpose and effect of the pre-existing language was to protect the exact salaries of civil service employees from disclosure.

CONCLUSION

For the foregoing reasons, it is the opinion of the OIP that the specific salaries of present or former employees within the Office of the Mayor, who are exempt from the civil service, must be made available for public inspection and copying during regular business hours.

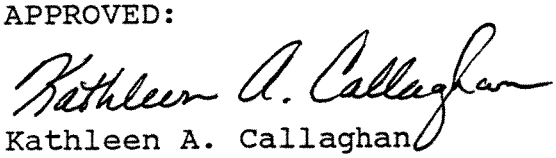
Please contact me at 586-1404, if you should have any questions regarding this opinion.

Very truly yours,



Hugh R. Jones
Staff Attorney

APPROVED:



Kathleen A. Callaghan
Director

HRJ:sc
c: David Waite
Honolulu Advertiser

Honorable Frank M. Fasi
Mayor of Honolulu