



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 14, 1993

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

Dear Mr. Whitney:

Re: Restrictions on Access to Circuit Court File Room

This in reply to your telefax to the Office of Information Practices ("OIP") dated August 9, 1993.

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), an individual's access to the file room of the Circuit Court for the First Circuit, State of Hawaii, may be conditioned upon the individual's presentation of some form of photo identification.

FACTS

The Circuit Court for the First Circuit, State of Hawaii, maintains a file room that is accessible to the public on the first floor of the Kaahumanu Hale building, 777 Punchbowl Street, Honolulu, Hawaii. The file room is open from 8:00 a.m. to noon, and from 1:00 p.m. to 4:15 p.m., Monday through Friday, except on State holidays.

The Circuit Court file room contains duplicate copies of all pleadings and documents that are filed with the Clerk of the First Circuit Court in pending or closed civil, criminal, probate, divorce, and other cases and proceedings.

The duplicate copies of these pleadings and records are contained in thousands of files located on a number of shelves that are accessible only to file room personnel. Each file is indexed by case number and by the names of the parties.

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An individual who wishes to retrieve information or records from the case files must first check-in at the file room's front desk and present some form of photo identification. File room personnel also request the individual to supply the requester's firm name, if applicable, and a telephone number. An individual's photo identification is kept by file room personnel until the individual checks out at the file room's front desk.

Individuals wishing to retrieve particular case files must complete the request form that is attached hereto as Exhibit "A," and supply their name, firm (if applicable), the case number, and plaintiff's name. This information can be retrieved by using public access computer terminals to perform searches for the names of parties and corresponding case numbers.

Once a requester completes the form attached as Exhibit "A," the individual must take a number and wait for file room personnel to call their number, at which time the file room personnel retrieve the file or files that the individual wishes to review. When the individual has completed reviewing the files the individual requested: (1) the files are returned to a cart for refiling, and (2) the individual reports to the front desk to check out, at which time file room personnel return the individual's photo identification.

The above-described policies of the Circuit Court's file room are set forth in a memorandum dated January 18, 1991 a copy of which is attached as Exhibit "B."

DISCUSSION

Under the UIPA each agency must make government records available for inspection and copying upon request of any person, except as provided by section 92F-13, Hawaii Revised Statutes. Haw. Rev. Stat. § 92F-11(b) (Supp. 1992). The UIPA defines the term "government record" to mean "information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. § 92F-3 (Supp. 1992) (emphasis added).

The Legislature defined the term "agency," for purposes of the UIPA, as follows:

"Agency" means any unit of government in this State, any county, or any combination of counties, department, institution, board, commission, district, council, bureau; office; governing authority; other instrumentality of state or county government; or corporation or other

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establishment owned, operated, or managed by or on behalf of this State or any county; but does not include the nonadministrative functions of the courts of this State.

Haw. Rev. Stat. § 92F-3 (Supp. 1992) (emphasis added).

We have examined the applicability of the UIPA to records maintained by the State Judiciary in several OIP advisory opinion letters. A recent opinion letter, OIP Opinion Letter No. 93-8 (Aug. 2, 1993), a copy of which is attached as Exhibit "C," contains a summary and discussion of these opinions.

As we noted in OIP Opinion Letter No. 93-8, the UIPA's legislative history suggests that the nonadministrative records of the Judiciary were excluded from the UIPA "to preserve the current practice of granting broad access to the records of court proceedings." S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 690 (1988); H. R. Conf. Comm. Rep. No. 112-88, Haw. H.J. 1017, 1018 (1988). Additionally, in OIP Opinion Letter No. 90-4 (Jan. 29, 1990), we stated that:

[N]onadministrative records of the courts, generally speaking, are those records which are provided to the court incident to the adjudication of a legal matter before the tribunal. Such a construction means that records including, but not limited to, charging documents, complaints, motions, pleadings, clerk's minutes, legal memoranda, exhibits, orders, and decisions are not subject to the provisions of the UIPA.

OIP Op. Ltr. No. 90-4 at 5-6 (Jan. 29, 1990) (emphasis in original).¹

For the reasons explained in previous OIP opinion letters, we believe that court files connected with pending or closed Circuit Court cases and proceedings are nonadministrative records of the Judiciary, and that your right to inspect and copy these records is not governed by the provisions of the UIPA.

¹See also Fromer v. Freedom of Information Commission, 1993 WL 293970 (Conn. Super. Ct. 1993) (sustaining finding by Connecticut Freedom of Information Commission that tape recording of a trial was a non-administrative record of the court).

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However, in Honolulu Advertiser, Inc. v. Takao, 59 Haw. 236, 238 (1978), the Hawaii Supreme Court recognized the existence of a common law right to inspect and copy judicial records:

Every court has supervisory power over its own records and files. And while the public does generally have the right, established by the common law, to inspect and copy public records and documents, including judicial records, State v. O'Connell, supra; Craemer v. Superior Court, supra, this right of access is not absolute, and the determination of whether and to what extent access is to be permitted is "is one best left to the sound discretion of the trial court."

Because the UIPA does not apply to the nonadministrative functions of the courts of this State, the OIP does not have the authority to advise you whether, under the UIPA, the court may condition your access to the file room upon the presentation of identification.

However, with respect to agency records that are subject to the provisions of the UIPA, we have previously addressed agency policies requiring UIPA requesters to provide identification. In OIP Opinion Letter No. 90-29 (Oct. 5, 1990), we noted that because the UIPA uses an "any person" access principle, a requester's identity is generally irrelevant to the merits of the person's request. We did, however, acknowledge that under certain narrowly defined circumstances, it would be appropriate for an agency to require UIPA requesters to provide some form of identification.

For example, we concluded that under part II of the UIPA, an agency may properly request identification when an individual requests to inspect an original government record, to prevent damage, loss, or destruction of such original record. Model rules to be adopted by the OIP under section 92F-11(e), Hawaii Revised Statutes, which State and county agencies may adopt, will set forth the circumstances under which an agency subject to the UIPA may require a requester to provide identification to prevent damage, loss, or destruction of government records, or to prevent manifestly excessive interference with the agency's duties and functions.

Similarly, we also noted that an agency may properly require a requester to provide identification when the requester asks to receive a waiver of fees for searching, reviewing, or segregating government records, under rules to be adopted by the OIP under

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section 92F-42(13), Hawaii Revised Statutes. We also opined that when requesters desire an agency to mail them a copy of a government record, the agency must necessarily be provided with the requester's, or someone else's, name and mailing address. Again, rules to be adopted by the OIP after public hearings will set forth the circumstances under which an agency may properly request an individual to provide the agency with identification.

CONCLUSION

The public access provisions of the UIPA do not apply to the "nonadministrative" records of the courts of this State. Haw. Rev. Stat. § 92F-3 (Supp. 1992). Based upon principles set forth in previous OIP advisory opinion letters, we conclude that duplicate case files maintained in the Circuit Court's file room are non-administrative records of the court. Therefore, the UIPA does not prohibit the Circuit Court from imposing restrictions upon the access to files maintained in the file room.

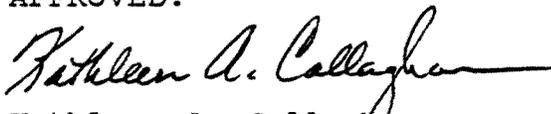
Please contact me at 586-1404 if you should have any questions regarding this matter.

Very truly yours,



Hugh R. Jones
Staff Attorney

APPROVED:



Kathleen A. Callaghan
Director

HRJ:sc

c: Honorable Nathaniel H.C. Kim

Ms. Lovina Cruz
Clerk, Legal Documents Section

Jodary

Legal Documents Branch

NAME (PRINT) _____

FIRM _____

CASE TYPE & NUMBER PL. NAME

NOTE: LIMIT 3 FILES PER REQUEST

CLERK'S INT. DATE: _____

EXHIBIT

A



Office of the Clerk of Court - Circuit Court of the First Circuit
The Judiciary - State of Hawaii

Post Office Box 619 Honolulu, Hawaii 96809

Riley S. Yamada
Court Administrator

RECEIVED
OFC INFORM PRACTICES

January 18, 1991

'93 AUG 23 P2 09

TO: ALL ATTORNEYS AND STAFF

THRU: NATHANIEL H. C. KIM *NHK*
Interim Chief Court Administrator

FROM: RILEY S. YAMADA *Ryamada*
Court Administrator

SUBJECT: FILE ROOM POLICIES AND PROCEDURES

We are always striving to improve service to the legal community and the public. We are, at the same time, responsible for the protection of the integrity of our case files. With these goals in mind, we are implementing the following rules EFFECTIVE IMMEDIATELY.

1. Upon entering the file room, please submit a photo Identification (such as State Driver's License, State ID card, etc) to the clerk on duty. Your name, firm name, case number you are researching and time of entry will be recorded by the clerk. Upon leaving, your Identification will be returned and you will be logged out.

2. Please leave all tote bags, brief cases, packages, etc. at the information counter. We have a numbered box system set up for your convenience. The clerk on duty will bring you a box for YOU to place your articles into. They will then give you a claim number. When leaving, present your claim number to the clerk and the box will be brought to you containing the articles that you left. ONLY WRITING AND/OR RECORDING MATERIALS WILL BE ALLOWED BEYOND THE INFORMATION COUNTER !!

3. Microfilm users may pull out their own reels of film from the cabinets. Due to the limited number of viewers, users are asked to retrieve no more than two (2) reels. A time limit of 30 minutes has been set and will be enforced! When finished with the film, please return to the information counter for the clerks to file away.

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B



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4. If you wish to make your own copies on the coin operated xerox machine, please take the file to the clerks on duty at the information counter. They will remove the document(s) from the case file for you. When you are finished, return the original document(s) to the clerks so that they may reassemble the case file. NO ONE OTHER THAN LEGAL DOCUMENTS STAFF IS TO TAKE CASE FILES APART !!

5. There are signs posted in the file room stating "Absolutely No Researching or sitting in the Aisles. Please use the tables and desks for your work". This policy will be strictly enforced!

Thank you, in advance, for your cooperation in implementing these policies.



JOHN WAIHEE
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STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
OFFICE OF INFORMATION PRACTICES

426 QUEEN STREET, ROOM 201
HONOLULU, HAWAII 96813-2904

August 2, 1993

David Kimo Frankel, Esq.
(Home address withheld.)

Dear Mr. Frankel:

Re: Disclosure of Bar Examination Scores and Answers

This is in reply to your letter to the Office of Information Practices ("OIP") requesting an advisory opinion concerning the above-referenced matter.

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), an applicant for admission to the Hawaii State Bar ("Bar") may inspect and copy the applicant's scores and answers, and the correct answers, on the Hawaii State Bar Examination ("Bar Examination"), which are maintained by the Board of Examiners ("Board") of the Hawaii Supreme Court ("Court").

BRIEF ANSWER

The UIPA applies only to government records that are maintained by an "agency." The UIPA's definition of the term "agency" excludes records relating to the "nonadministrative functions" of the State courts. Haw. Rev. Stat. § 92F-3 (Supp. 1992). Consequently, only records relating to the administrative functions of the Judiciary are subject to the UIPA's disclosure provisions.

Based upon court decisions construing a parallel provision of the Connecticut Freedom of Information Act, Hawaii statutes describing the administrative duties of the chief justice and the administrative director, and decisions relating to the Court's exercise of its power over attorney admission, we believe that

OIP Op. Ltr. No. 93-8

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C

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records containing a Bar examinee's scores, graded answers, and the correct answers, are records relating to the nonadministrative functions of the Hawaii Supreme Court. Accordingly, we conclude that a bar applicant's right to inspect that applicant's scores and graded answers on the Bar Examination, and the correct answers to the Bar Examination, is governed by laws other than the UIPA.

FACTS

By letter dated August 17, 1992, you requested an advisory opinion from the OIP concerning your right under the UIPA to inspect your Bar Examination scores and answers. You noted in your letter to the OIP that you recently took the Bar Examination and regardless of whether you pass or fail, you want to inspect your Bar Examination scores and "what [you] did wrong." We are informed that you also wish to see the correct answers.

The Hawaii Supreme Court examines and admits as practitioners in the State courts those persons it finds qualified for that purpose. Haw. Rev. Stat. § 605-1 (1985). The process of admission to the Bar is administered by the Board; however the Hawaii Supreme Court maintains the "ultimate authority . . . to oversee and control the privilege of the practice of law in this State." Haw. S. Ct. R. 1(a).

The Board consists of persons appointed by the Court from nominations submitted by the Board of Directors of the Hawaii State Bar. Haw. S. Ct. R. 1(f). The Board is directed to "examine into the legal and educational qualifications of each applicant, and his or her knowledge of legal ethics, and . . . give a written examination." Haw. S. Ct. R. 1(f). The Board is also required to report its recommendations to the Court and file the record of the examination with the clerk. Id.

Rule 1(g) of the Rules of Supreme Court of the State of Hawaii governs the Bar Examination. It provides, in part, as follows:

No applicant shall be admitted to practice until he or she has passed an examination which satisfies the court that

the applicant has the necessary legal and educational qualifications¹

Within thirty (30) days after the results of the examination are filed by the court any unsuccessful applicant may request the board to allow him or her to review his or her scores. The review shall be made personally by the applicant at a date, time and place and under such conditions established by the chairperson of the board.

Unless otherwise ordered by the court, the files, records and proceedings of the Board of Examiners are confidential and may not be disclosed except in furtherance of the board's duties under this rule; provided that the board may without a court order release files and records to an attorney admission or disciplinary authority or judicial selection authority of any jurisdiction in which the applicant is admitted to practice or seeks to practice.

Haw. Sup. Ct. R. 1(g) (emphases added).

As indicated above, unsuccessful applicants may request the Board to allow them to inspect their scores on the examination. However, successful applicants are not permitted to inspect their examination scores on either the essay or the MBE components.²

¹The bar examination consists of two parts, the essay component and the Multistate Bar Examination ("MBE"). The MBE was developed by the National Conference of Bar Examiners ("NCBE") and consists of 200 multiple choice questions. The essay component consists of sixteen essay questions and a legal ethics section that comprises 40 multiple choice questions.

²A successful applicant may apply to the NCBE to verify if that applicant's MBE scaled score meets the minimum score needed for reciprocity in another jurisdiction. However, the NCBE will not disclose the actual MBE scaled score to a Hawaii applicant. The MBE information booklet states that "[e]xcept where authorized by a State board of bar examiners, the NCBE does not release MBE scores to any applicant." National Conference of Bar Examiners, 1993 MBE Information Booklet 3 (1992).

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Further, neither the unsuccessful nor the successful applicants are permitted to inspect their essay examination answers or the correct answers. We are informed by Carolyn Nicol, the Staff Attorney of the Board, that the MBE examination booklets and answer sheets are returned by the Board to the NCBE the day after the examination.

DISCUSSION

I. INTRODUCTION

The UIPA generally provides 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. 1992). Under the UIPA, 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. 1992) (emphasis added); Kaapu v. Aloha Tower Dev. Corp., ___ Haw. ___ No. 15775 (Feb. 25, 1993). The UIPA further provides that unless one of the exceptions set forth in section 92F-13, Hawaii Revised Statutes, authorizes an agency to withhold access to government records, they must be made available for inspection and copying upon request by any person. See Haw. Rev. Stat. § 92F-11(b) (Supp. 1992).

Part III of the UIPA, entitled "Disclosure of Personal Records," governs an individual's access to government records pertaining to that individual. Under part III of the UIPA, "[e]ach agency that maintains any accessible personal record shall make that record available to the individual to whom it pertains, in a reasonably prompt manner and in a reasonably intelligible form." Haw. Rev. Stat. § 92F-21 (Supp. 1992). There are, however, exemptions to and limitations on an individual's right to inspect that individual's personal records. Haw. Rev. Stat. § 92F-22 (Supp. 1992). The term "personal record" means "any item, collection, or grouping of information about an individual that is maintained by an agency. It includes, but is not limited to . . . items that contain or make reference to the individual's name, identifying number, symbol, or other identifying particular assigned to the individual." Haw. Rev. Stat. § 92F-3 (Supp. 1992) (emphasis added).³

³Because an individual's Bar Examination scores and answers "contain or make reference to" an "identifying number" assigned to that individual, we believe that those records are "personal
(continued...)

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Thus, the UIPA applies only to information "maintained by an agency." Accordingly, we must determine whether the requested records contain information "maintained by an agency."

The UIPA defines the term "agency" as:

[A]ny unit of government in this State, any county, or combination of counties; department; institution; board; commission; district; council; bureau; office; governing authority; other instrumentality of state or county government; or corporation or other establishment owned, operated, or managed by or on behalf of this State or any county, but does not include the nonadministrative functions of the courts of this State.

Haw. Rev. Stat. § 92F-3 (Supp. 1992) (emphases added).

Although the UIPA's definition of the term "agency" expressly includes "board[s]," it does not include "the nonadministrative functions of the courts of this State." Haw. Rev. Stat. § 92F-3 (Supp. 1992).

The UIPA's legislative history indicates that the nonadministrative records of the Judiciary were excluded from the UIPA "to preserve the current practice of granting broad access to the records of court proceedings," and that "the records of the Judiciary which will be affected by this bill are the administrative records." 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. 1017, 1018 (1988); see generally, OIP Op. Ltr. No. 90-4 (Jan. 29, 1990) ("certified drivers' abstracts are 'administrative' records of the district courts and therefore, are 'government records' subject to the UIPA").

³(...continued)
records," assuming, however, those records are maintained by an "agency." Therefore, your request for access to your Bar Examination scores and answers is properly analyzed under part III of the UIPA. In contrast, your request for the correct answers is properly analyzed under part II of the UIPA, entitled "Freedom of Information," assuming, again, that those records are maintained by an "agency."

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In OIP Opinion Letter No. 90-4 at 5 (Jan. 29, 1990), we concluded that "the legislative history reflects that in excluding the 'nonadministrative' records of state courts from the scope of the UIPA, the Legislature intended that only the administrative records of the state courts be subject to the UIPA." Accordingly, as a threshold matter, we must determine whether records containing Bar Examination scores and answers constitute records relating to the administrative functions or the nonadministrative functions of the Judiciary. If they relate to the nonadministrative functions, then access to those records is not controlled by the provisions of the UIPA, and, as a result, our inquiry is at an end.

II. ATTORNEY ADMISSION: ADMINISTRATIVE OR NONADMINISTRATIVE FUNCTION?

Like the UIPA, Connecticut's Freedom of Information Act also applies only to the "administrative functions" of the Judiciary. See Conn. Gen. Stat. § 1-18a(a) (1993). The Connecticut Supreme Court has examined this provision on two separate occasions. Because no Hawaii state court has addressed what constitutes a record associated with the administrative functions of the Judiciary, substantial guidance may be drawn from Connecticut Supreme Court decisions construing parallel provisions of the Connecticut Freedom of Information Act. See 2B N. Singer, Sutherland Statutory Construction § 51.06 at 186 (Sands 5th ed. rev. 1992).

In Rules Committee of the Superior Court of Connecticut v. Freedom of Information Commission, 472 A.2d 9 (Conn. 1984), the court considered whether a rules committee of the Connecticut Superior Court was subject to the open meetings provisions of Connecticut's Freedom of Information Act. In the Rules Committee case, the court noted that the term "administrative" "is commonly used to refer to a wide range of activities extending from the day to day management of an organization or an estate's internal housekeeping functions to the conduct of the entire official business of the government." Rules Committee, 472 A.2d at 12.

The Rules Committee court concluded that "administrative functions" exclude matters involved in the adjudication of cases or the adoption of rules of court "that directly control the conduct of litigation," or that "set[] the parameters of the adjudicative process that regulates the interactions between individual litigants and the courts." Id. at 15. The court also stated that the term "administrative functions" applies only to "matters relating to the internal management of the internal

institutional machinery of the court system." Id. at 13. Further, the court indicated that such matters as accounting, budgeting, personnel, payroll, scheduling, purchasing, judicial assignments, data processing, and record keeping were examples of "administrative tasks." Id. at 14-15.

Similarly, Hawaii statutes that describe the duties of the chief justice as administrative head of the Judiciary and the duties of the administrative director of the courts provide similar examples of a court's administrative tasks. See Haw. Rev. Stat. §§ 601-2, 601-3 (Supp. 1992).⁴ These two statutes

⁴Section 601-2, Hawaii Revised Statutes, provides as follows:

§601-2 Administration. (a) The chief justice shall be the administrative head of the judiciary. The chief justice shall make a report to the legislature, at each regular session thereof, of the business of the judiciary and of the administration of justice throughout the State. The chief justice shall present to the legislature a unified budget, six-year program and financial plan, and variance report for all of the programs of the judiciary. The chief justice shall direct the administration of the judiciary, with responsibility for the efficient operation of all of the courts and for the expeditious dispatch of all judicial business.

(b) The chief justice shall possess the following powers, subject to such rule as may be adopted by the supreme court:

(1) To assign circuit judges from one circuit to another;

(2) In a circuit court with more than one judge, (A) to make assignments of calendars among the circuit judges for such period as the chief justice may determine and, as deemed advisable from time to time, to change assignments of calendars or portions thereof (but not individual cases) from one judge to another, and (B) to appoint one of the judges, for such period as the chief

(continued...)

⁴(...continued)

justice may determine, as the administrative judge to manage the business of the court, subject to the rules of the supreme court and the direction of the chief justice;

- (3) To prescribe for all of the courts a uniform system of keeping and periodically reporting statistics of their business;
- (4) To procure from all of the courts estimates for their appropriations; with the cooperation of the representatives of the court concerned to review and revise them as the chief justice deems necessary for equitable provisions for the various courts according to their needs and to present the estimates, as reviewed and revised by the chief justice, to the legislature as collectively constituting a unified budget for all of the courts;
- (5) To exercise exclusive authority over the preparation, explanation, and administration of the judiciary budget, programs, plans, and expenditures, including without limitation policies and practices of financial administration and the establishment of guidelines as to permissible expenditures, provided that all expenditures of the judiciary shall be in conformance with program appropriations and provisions of the legislature, and all powers of administration over judiciary personnel that are specified in title 7; and

(continued...)

⁴(...continued)

- (6) To do all other acts which may be necessary or appropriate for the administration of the judiciary.

Haw. Rev. Stat. § 601-2(a) and (b) (Supp. 1992).

Section 601-3, Hawaii Revised Statutes, provides as follows:

§601-3 Administrative director. The chief justice, with the approval of the supreme court, shall appoint an administrative director of the courts to assist the chief justice in directing the administration of the judiciary. The administrative director shall be a resident of the State for a continuous period of three years prior to the administrative director's appointment, and shall be appointed without regard to chapters 76 and 77 and shall serve at the pleasure of the chief justice. The administrative director shall hold no other office or employment. Effective January 1, 1989, the administrative director shall receive a salary of \$81,629 a year. Effective January 1, 1990, the administrative director shall receive a salary of \$85,302 a year. The administrative director shall, subject to the direction of the chief justice, perform the following functions:

- (1) Examine the administrative methods of the courts and make recommendations to the chief justice for their improvement;
- (2) Examine the state of the dockets of the courts, secure information as to their needs of assistance, if any, prepare statistical data and reports of the business of the courts and advise the chief justice to the end that proper action may be taken;
- (3) Examines the estimates of the courts for appropriations and
(continued...)

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primarily describe the scheduling, financial, record keeping, planning, reporting, and personnel activities of the Judiciary.

More recently, in Connecticut Bar Examining Committee v. Freedom of Information Commission, 550 A.2d 633 (Conn. 1988), the Connecticut Supreme Court considered whether information relating to the examination of candidates for admission to the bar constituted information relating to the Judiciary's "administrative functions." Reversing a decision of the Connecticut Freedom of Information Commission,⁵ the court

⁴(...continued)

present to the chief justice the administrative director's recommendations concerning them;

- (4) Examine the statistical systems of the courts and make recommendations to the chief justice for a uniform system of judicial statistics;
- (5) Collect, analyze, and report to the chief justice statistical and other data concerning the business of the courts;
- (6) Assist the chief justice in the preparation of the budget, the six-year program and financial plan, the variance report and any other reports requested by the legislature;
- (7) Carry out all duties and responsibilities that are specified in title 7 as it pertains to employees of the judiciary; and
- (8) Attend to such other matters as may be assigned by the chief justice.

Haw. Rev. Stat. § 601-3 (Supp. 1992).

⁵Connecticut's Freedom of Information Commission is that state's equivalent of the Office of Information Practices

(continued...)

concluded that, with certain exceptions,⁶ records associated with the examination of candidates for admission to the bar were records associated with the court's judicial, as opposed to administrative, functions:

We agree with the [bar examining] committee that its principal function of determining whether an applicant is qualified for admission to the bar is quite analogous to adjudication.⁷ This function involves the exercise of considered judgment in establishing the criteria to be used for that determination, in selecting the questions for the examination and deciding upon its scope, in grading the examinations, and in establishing procedures designed to reduce the effect of subjectivity on the part of the examiners.

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The application of the standards for admission to a particular candidate, however, like the application of the law to the facts of a case, is a function of the committee that must be regarded as essentially judicial. Some aspects of the adjudicative

⁵(...continued)
("OIP"). As with the OIP, it is charged with the statutory duty to review and rule upon an agency's denial of access to government records.

⁶The court conceded that some records associated with the admission of bar candidates were administrative in nature. For example, the court said that the duty of the bar examining committee to certify to the clerk of court the names of successful applicants "can hardly be described as adjudicative." Bar Examining Committee, 550 A.2d at 636.

⁷The United States Supreme Court has held that a state supreme court's decision on a particular individual's application for bar admission is "judicial in nature," rather than "legislative, ministerial, or administrative." District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 479 (1983). See also Tofano v. Supreme Court of Nevada, 718 F.2d 313 (1983).

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process, however, such as the compilation of scores on the examinations in a manner similar to the preservation of records of judicial proceedings in the clerk's office, may properly be classified as administrative.

We have construed the limitation to "administrative functions" of the public disclosure provisions of the FOIA as applied to the judicial department to be designed to accommodate, rather than infringe upon, the independence of a constitutional court in performing its historic functions. [citation omitted.] We have concluded that the bar examining committee, as an "arm of the court," is performing an essentially judicial function in deciding upon the qualifications of candidates for admission to the bar.

Connecticut Bar Examining Committee, 550 A.2d at 635-636 (emphases added).

Additionally, a New York court has found that the State Board of Law Examiners exercised a "judicial function" in the discharge of its duties and, therefore, was part of the "judiciary" exempt from the disclosure requirements of New York's Freedom of Information Law ("FOIL").⁸ Pasik v. State Bd. of Law Examiners, 478 N.Y.S.2d 270 (A.D. 1 Dept. 1984). In reaching its decision, the court first described the process which leads to admission to the bar and the Board's relationship to that process. The court then concluded that "[e]ach component part [of the admission process] is a delegated part of the judicial process acting pursuant to the authority of the Court of Appeals in accordance with Section 53 of the Judiciary Law, and each performs a judicial function." Id. at 273.

The Pasik court distinguished a case in which an individual sought information from the Office of Court Administration ("OCA"), which was found not to be exempt from FOIL:

⁸Under New York law, only "agency" and legislative records are subject to the access requirements of that state's Freedom of Information law. The term "agency" expressly excludes the judiciary. Pasik, at 272.

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The Constitution . . . created the office of Chief Administrator of the Courts. Section 212 of the Judiciary Law makes it plain that his duties, and the duties of his office, are ministerial and administrative. His discretionary power, in contradistinction to that of the State Board of Law Examiners, is limited to functional matters and it is exercised in accordance with standards and policies formulated by the Chief Judge of the Court of Appeals and approved by the members of that Court.

The State Board of Law Examiners, on the other hand, has substantial discretionary power within the ambit in which it operates. . . . In sum, it formulates and grades one of the elements--the Bar examination--which is part of the process which leads to admission.

. . . the process of admission from its inception to its culmination is a judicial function. We do not think that the legislature, by its enactment of [the freedom of information law], intended to interfere with the historic relationship between the courts and the Bar by making available to anyone who might seek the information one of the essential bases on which admission is bottomed.

Id.

In determining whether a governmental body is part of the judiciary, the Pasik court appears to make a distinction between the ministerial and administrative functions of the judiciary, such as those performed by the OCA, and the "judicial functions," of the judiciary, such as those exercised by the State Board of Law Examiners. Thus, under New York law the OCA is not considered to be a part of the judiciary for purposes of FOIL, despite its obvious connection to the judiciary, because its duties are not a part of the "judicial process."

Recently, Florida voters approved an amendment to the state constitution, which sets forth a right of access to the public records of all three branches of government. Fla. Const. art. 1,

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§ 24. Before the adoption of this amendment, Florida's public records law was determined to be inapplicable to the judiciary. See Florida Office of the Attorney General, Government-in-the-Sunshine Manual 133 (1993). Under the amended constitution, the public has a right of access to records in the judicial branch of government, with certain exceptions, including an exception for those records exempted pursuant to court rules in effect on November 3, 1992.

In October 1992, the Florida Supreme Court adopted amendments to the Florida Rules of Judicial Administration. See In re Amendments to the Florida Rules of Judicial Administration -- Public Access to Judicial Records; In re Amendments to the Rules Regulating The Florida Bar, 608 So. 2d 472 (Fla. 1992).

In its opinion, the Florida Supreme Court observed:

The amendments to the Florida Rules of Judicial Administration are intended to reflect the judiciary's responsibility to perform both an administrative function and an adjudicatory function. In its administrative role, the judiciary is a governmental entity expending public funds and employing government personnel. Thus, records generated while courts are acting in an administrative capacity should be subject to the same standards that govern similar records of other branches of government. The judiciary's adjudicatory responsibilities, however, require a modified policy toward public inspection. We find that the exceptions to the public access rule, listed in rule 2.051(a), of the Florida Rules of Judicial Administration, are reasonable and necessary.

Id. at 472-473.

Rule 2.051(a) of the amended Florida Rules of Judicial Administration lists those records of the judicial branch and its agencies that shall be confidential, including "all court records presently deemed to be confidential by court rule, including the Rules for Admission to the Bar." [Emphasis added.] Article I, section 14 of the Florida Rules of the Supreme Court Relating to Admissions to the Bar provide that "[a]ll information maintained by the Board [of bar examiners] in the discharge of those

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responsibilities delegated to it by the Supreme Court of Florida shall be confidential except as provided by these Rules or otherwise authorized by the Court. All matters including, but not limited to, registrant and applicant files, investigative reports, examination materials, and interoffice memoranda shall be the property of the Supreme Court of Florida and the Board shall serve as custodian of all such records." The rules further state that "[n]o information regarding applicants' scores shall be released except as directed by the Supreme Court of Florida." Fla. R. Relating to Admissions to the Bar, Art. VI, Sec. 13.

Thus, the Florida Supreme Court appears to conclude that those records maintained by the board of bar examiners in the discharge of its delegated responsibilities relate to the courts' adjudicatory functions and, therefore, a "modified policy toward public inspection" for those records is warranted.

The OIP previously examined the meanings of the words "administrative" and "judicial" as they related to the functions of the courts of this State and the definition of "agency" under the UIPA. See OIP Op. Ltr. No. 90-4 (Jan. 29, 1990); OIP Op. Ltr. No. 92-3 (Mar. 19, 1992).

In OIP Opinion Letter No. 90-4 at 5 (Jan. 29, 1990), we opined that "nonadministrative records of the courts, generally speaking, are those records which are provided to the court incident to the adjudication of a legal matter before the tribunal." [Emphasis added.] In that opinion, the OIP concluded that drivers' abstracts were "administrative" in nature, even though they may report the dispositions of legal proceedings, "as they are a compilation of data that does not involve the exercise of judgment or discretion by the court. Rather, the preparation of a driver's abstract involves ministerial action by the preparer of these records." Id. at 5-6.

In OIP Opinion Letter No. 92-3 (Mar. 19, 1992), we determined that the Judicial Selection Commission ("Commission"), which is administratively attached to the Judiciary, does not exercise a judicial function and, therefore, it is an "agency" whose records are subject to the UIPA. In that opinion, we relied on a decision by the U.S. Court of Appeals for the Ninth Circuit, which concluded that the Commission's functions of recommending candidates for judicial office to the appointing officials and of reviewing appointment petitions are "executive in nature" and "bear little resemblance to the characteristic of the judicial process that gave rise to the recognition of absolute immunity for judicial officers: the adjudication of

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controversies between adversaries." Richardson v. Koshiba, 693 F.2d 911, 914 (9th Cir. 1982).

Thus, it appears that the records that were the subject of the two OIP opinion letters above discussed were found to be "administrative" in nature, because those records did not relate to the "adjudication of a legal matter before the tribunal" or the "adjudication of controversies between adversaries." In this matter, however, we agree with the decision of the Connecticut Supreme Court in the Connecticut Bar Examining Committee case, that the Board's principal function of determining whether an applicant is qualified for admission to the bar is "analogous to adjudication."

We believe that the Bar Examination records maintained by the Board pursuant to its duties under Supreme Court Rule 1(g) do not relate to the Judiciary's "administrative" functions, as that term is described in the foregoing Connecticut, New York, and Florida cases and the Hawaii statutes. We agree with the Connecticut Supreme Court in the Connecticut Bar Examining Committee case that the matters associated with the admission of attorneys primarily involve the exercise of a judicial, as opposed to an administrative, function. However, we do not believe that all records of the Board are unaffected by the UIPA. We merely conclude that Supreme Court Rule 1(g) governing the Bar Examination concerns matters involving the "nonadministrative functions of the Courts of this State." Haw. Rev. Stat. § 92F-2 (Supp. 1992).

In further support of this conclusion, we observe that the United States Supreme Court and the Hawaii Supreme Court have held that the power to admit applicants to the practice of law is judicial in nature. See Ex parte Garland, 71 U.S. (4 Wall.) 333, 378-379 (1866) ("[t]heir admission or their exclusion is not the exercise of a mere ministerial power [but] the exercise of a judicial power"); In re Trask, 46 Haw. 404, 415, 380 P.2d 751, 758 (1963) ("[t]he power to regulate the admission to practice . . . is judicial in nature and is inherent in the courts").

Accordingly, we conclude that records containing an applicant's Bar Examination scores and graded answers, and records containing the correct Bar Examination answers, are records relating to the "nonadministrative functions of the courts of this State" and, therefore, access to those records is governed by disclosure provisions other than those set forth in the UIPA. Haw. Rev. Stat. §§ 92F-3 and 92F-21 (Supp. 1992).

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CONCLUSION

For the reasons stated above, we believe that records containing an applicant's Bar Examination scores and graded answers, and records containing the correct Bar Examination answers, are records relating to the "nonadministrative functions" of the Court. Consequently, because the UIPA's definition of the term "agency" does not include the nonadministrative functions of the Court, we conclude that an applicant's access to those records is governed by laws other than the UIPA.

Very truly yours,


Mimi K. Horiuchi
Staff Attorney

APPROVED:


Kathleen A. Callaghan
Director

MKH:sc

c: The Honorable Ronald T. Y. Moon, Chief Justice

The Honorable Daniel G. Heely
Chairperson, Board of Examiners

Ann Burns, Deputy Attorney General

Sherry S. Broder, President
Hawaii State Bar Association

