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September 17, 1993

VIA FAX AND MAIL

Mr. Desmond J. Byrne  
Chairperson  
Common Cause Hawaii  
1109 Bethel Street, Suite 419  
Honolulu, Hawaii 96813

Dear Mr. Byrne:

Re: Judicial Council Nominees for State Ethics Commission

This is in response to your letter to Governor John Waihee dated June 16, 1993, a copy of which you sent to the Office of Information Practices ("OIP") by telefax. In your letter, among other things, you requested the OIP to render an advisory opinion concerning the disclosure of the identities of the two individuals nominated by the Judicial Council of the State of Hawaii ("Judicial Council") to fill vacancies on the State Ethics Commission ("Commission"). The Governor must, when appointing an individual to a vacancy on the Ethics Commission, choose one of the two nominees nominated by the Judicial Council.<sup>1</sup>

ISSUES PRESENTED

I. Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), the Judicial Council is an "agency."

II. Whether, under the UIPA, the names of two individuals nominated by the Judicial Council, one of which is appointed by the Governor, to fill vacancies on the Commission must be made available for public inspection and copying, upon request, before the Governor's final appointment of one of the nominees to the Commission.

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<sup>1</sup>The issue of holdover members of the Ethics Commission is outside the scope of the OIP's jurisdiction and, thus, we do not address that issue in this opinion. See letter from Charleen M. Aina, Deputy Attorney General, to Governor John Waihee (June 13, 1990) (holdover members of Ethics Commission).

BRIEF ANSWERS

I. Yes. The Judicial Council performs in an advisory capacity to the Judiciary. Consequently, the Judicial Council does not function in an adjudicatory role and, instead, performs an executive or administrative function of the courts. Because the UIPA's definition of the term "agency" only excludes the "nonadministrative functions of the courts of this State," see Haw. Rev. Stat. § 92F-3 (Supp. 1992), we conclude that the Judicial Council is an "agency," and that its records are subject to the provisions of the UIPA.

II. Yes. Our examination of the UIPA exceptions to required agency disclosure does not reveal any applicable exceptions which would permit the Judicial Council to withhold public access to the list of nominees to fill Commission vacancies. Specifically, although an individual has a significant privacy interest in nominations for appointment to a government position under section 92F-14(b)(4), Hawaii Revised Statutes, we believe that the disclosure of the nominees' identities would shed significant light upon the end product of an advisory agency's deliberations and, thus, would open up the "decisions and action[s] of government agencies" in accordance with the general principles of the UIPA. See Haw. Rev. Stat. § 92F-2 (Supp. 1992). Also, the disclosure of the nominees' identities before the Governor's final appointment would permit members of the public to evaluate the two individuals nominated by the Judicial Council.

Further, because the Hawaii Constitution states that members of the Commission are to be selected "in a manner which assures their independence and impartiality," see Haw. Const. art. XIV, we believe that the disclosure of the nominees' identities would shed light upon the actions of the judicial and executive branches of government and the entire selection process, and would ensure that the nominees have been selected and appointed in accordance with the mandate of article XIV of the Hawaii Constitution. Therefore, in our opinion, the public interest in disclosure outweighs the privacy interests of the nominees, and the disclosure of the nominees' identities would not result in a clearly unwarranted invasion of personal privacy under section 92F-13(1), Hawaii Revised Statutes. Haw. Rev. Stat. § 92F-14(a) (Supp. 1992).

Turning to the UIPA's "frustration of a legitimate government function" exception which applies to certain inter-agency and intra-agency memoranda protected under the common law "deliberative process privilege," we note that the deliberative

process privilege "must be construed as narrowly as is consistent with efficient government operation." Army Times Publishing Co. v. Dep't of Air Force, --- F.2d --- (1993 WL 291449) (D.C. Cir. Aug. 6, 1993). Further, federal courts have emphasized that "[d]isclosure, not secrecy, is the dominant objective" in applying public records laws. Dep't of Air Force v. Rose, 425 U.S. 352, 361, 96 S.Ct. 1592, 1599 (1976).

Applying the deliberative process privilege's two-part test to the present situation, we note that the list of nominees may be "predecisional" because it was received by the Governor before his selection of an individual to fill the Commission's vacancy. However, we doubt that the list can be considered "deliberative." The list merely identifies the two individuals nominated by the Judicial Council, and does not contain any other information which would reveal the "give and take" of an agency's consultative process.

Further, because this selection process was designed to promote the balance of power between the judicial, executive, and legislative branches of government, we believe it is important to note that the list represents the final decision, and not the opinion or recommendation, of the Judicial Council. We also find it significant that the Governor is statutorily required to select one of the nominees from this list when filling a Commission vacancy. Thus, in our opinion, one of the primary purposes of the deliberative process privilege, protecting the opinions and recommendations of subordinates to superiors in the decision-making process, would not be served by using the privilege as the basis for nondisclosure of the list.

Finally, we do not believe that the disclosure of the list would impede or chill the candid and free exchange of ideas and opinions of the Judicial Council members. Thus, in our opinion, the policies underlying the deliberative process privilege would not be promoted by withholding access to the list. Consequently, based upon the reasons expressed, we are of the opinion that the UIPA's "frustration of a legitimate government function" exception does not protect the list from public inspection and copying upon request.

#### FACTS

Article XIV of the Constitution of the State of Hawaii requires the establishment of a code of ethics applicable to legislators and executive branch employees, and provides that the code of ethics shall be administered by the Commission. The Commission, placed within the Office of the Legislative Auditor

for administrative purposes, administers and enforces this code of ethics. Issues concerning possible violations of the State Ethics Code are resolved by the Commission through advisory opinions and hearings. In addition, the Commission administers the financial and gift disclosure requirements applicable to public officers and employees, and also oversees the State's lobbyists law, chapter 97, Hawaii Revised Statutes.

In accordance with section 84-21, Hawaii Revised Statutes, the five original members of the Commission were appointed by the Governor from a list of ten individuals nominated by the Judicial Council. Under section 84-21, Hawaii Revised Statutes, "the term of each member shall be four years, provided that of the five members initially appointed two members shall hold office for two years, two members shall hold office for three years and one member shall hold office for four years." As for vacancies occurring on the Commission, "the judicial council shall nominate for gubernatorial appointment two persons for any vacancy." Haw. Rev. Stat. § 84-21 (1985).<sup>2</sup> The Hawaii Constitution prohibits Commission members from taking an active part in political management or in political campaigns. In addition, "[e]thics commissioners shall be selected in a manner which assures their independence and impartiality." Haw. Const. art. XIV.

Section 601-4, Hawaii Revised Statutes, explains the functions and responsibilities of the Judicial Council<sup>3</sup>:

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<sup>2</sup>Legislative approval of the Governor's appointee to the Commission is not required.

<sup>3</sup>Rule 4 of the Hawaii Rules of Supreme Court which also provides for the appointment to and the functions of the Judicial Council, contains information similar to that found in section 601-4, Hawaii Revised Statutes:

**Rule 4. JUDICIAL COUNCIL.**

(a) **Appointment.** There shall be a judicial council consisting of the chief justice and not more than 15 other members appointed by this court, each of whom shall serve for a term of 3 years. Any vacancy shall be filled by the court for the unexpired term. The membership shall be fairly representative, including laymen as well as judges and lawyers.

(continued...)

§601-4 Judicial council. The supreme court shall provide for the appointment of a judicial council which shall serve in an advisory capacity only. The judicial council shall give continuing consideration to the administration of justice in the courts of the State. It shall make reports and recommendations biennially to the supreme court and also whenever deemed advisable by the court. The chief justice shall be a member and chairman of the judicial council. The supreme court shall appoint, from time to time, such number of other members as it deems necessary to be fairly representative, but not to exceed fifteen, whose terms shall be in accordance with the rules of the supreme court. The members of the judicial council shall include laymen as well as judges and lawyers. The members of the judicial council shall receive no compensation for their service but they shall be reimbursed for their traveling and other expenses incidental to attending meetings.

Haw. Rev. Stat. § 601-4 (1985).

The OIP has been informed by the Judiciary that when a vacancy on the Commission occurs, the Judicial Council will prepare a news release informing the public that the Commission has a vacancy for which the Judicial Council will be accepting applications. When the applications are received by the Judicial Council, they are photocopied and provided to all members of the Judicial Council. If there is a large number of applicants, the Judicial Council may conduct an initial vote to narrow the list of applicants. From this initial voting, a list of finalists is

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<sup>3</sup>(...continued)

(b) **Functions.** The council shall serve in an advisory capacity only, shall give continuing consideration to the administration of justice in the courts of the state, and shall make reports and recommendations biennially to this court and also whenever deemed advisable by this court.

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compiled and a subcommittee of Judicial Council members interviews each of the finalists. After the subcommittee completes all of the interviews, the Judicial Council will vote on the list of finalists. On occasion, the subcommittee will send its recommendations along with the ballot to the Judicial Council members. The two individuals receiving the highest number of votes will be placed on the Judicial Council's list of nominees, which is transmitted to the Governor, along with their resumes.

The term of one of the members of the Commission, Laurie A. Loomis, ended on June 30, 1993. Common Cause Hawaii believes that the names of the two individuals nominated to fill this vacancy by the Judicial Council should be made public "as soon as they are transmitted to the Governor so that the public has an opportunity to make comments before the vacancy is filled by the Governor." Letter from Desmond J. Byrne, Common Cause Hawaii, to Governor John Waihee (June 16, 1993). As part of its letter to Governor John Waihee, Common Cause Hawaii has requested an advisory opinion from the OIP concerning the public's right to inspect and copy the list containing the names of the two individuals nominated by the Judicial Council to fill the vacancy on the Commission.

#### DISCUSSION

##### I. WHETHER THE JUDICIAL COUNCIL IS AN "AGENCY"

The provisions of the UIPA govern the inspection and copying of government records. The UIPA defines a "government record" as "information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. § 92F-3 (Supp. 1992). Under the UIPA, the term "agency" is defined as:

[A]ny 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 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 definition of "agency" clearly applies to "council[s]," we must also determine that the Judicial Council performs some administrative functions rather than solely nonadministrative functions of the Judiciary before we can apply the provisions of the UIPA to the records of the Judiciary Council.

In previous advisory opinions, we have addressed the issue of administrative and nonadministrative records of the Judiciary. Specifically, in OIP Opinion Letter No. 92-3 (March 19, 1992), the OIP found that the Judicial Selection Commission ("JSC") performed executive and administrative duties for the Judiciary rather than adjudicatory duties. Consequently, we found the JSC to be an "agency" as that term is defined under section 92F-3, Hawaii Revised Statutes, and we opined that its records are subject to the provisions of the UIPA. In that opinion, however, we found that the disclosure of the JSC's list of judicial nominees submitted to the Governor was governed by rules adopted by the JSC pursuant to an express provision in the Hawaii Constitution delegating rule-making authority to the JSC.<sup>4</sup>

The Council, like the JSC, does not perform adjudicatory functions, but instead, "serve[s] in an advisory capacity" to the courts of the State. Haw. Rev. Stat. § 601-4 (1985). Thus, in our opinion, the Council performs essentially an administrative function and, therefore, it is an "agency" within the meaning of section 92F-3, Hawaii Revised Statutes.

The UIPA generally states that records maintained by an agency are presumed public unless excepted from disclosure by one of the five UIPA exceptions provided in section 92F-13, Hawaii Revised Statutes. See Haw. Rev. Stat. § 92F-11(b) (Supp. 1992).

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<sup>4</sup>Article VI, section 4 of the State Constitution expressly provides that the "deliberations of the [JSC] shall be confidential" and that the JSC has the authority "to promulgate rules which shall have the force and effect of law." Rule 7 of the Judicial Selection Commission of Hawaii Rules provides that "all [JSC] records, proceedings and business, including the names of all proposed nominees and the names of nominees forwarded to the appointing authority, shall be confidential." Thus, Rule 7 is a rule "adopted pursuant to an express constitutional grant of rulemaking power that ha[s] the force and effect of law," see OIP Op. Ltr. No. 92-3 at 3 (March 19, 1992), (emphasis in original), and under section 92F-13(4), Hawaii Revised Statutes, the JSC's list of nominees for judicial vacancies are government records protected from disclosure by State law.

In examining these five UIPA exceptions, we note that only two of the exceptions arguably apply to the facts presented and thus, require closer examination.

## II. CLEARLY UNWARRANTED INVASION OF PERSONAL PRIVACY

Section 92F-13(1), Hawaii Revised Statutes, permits an agency to withhold information that would, if disclosed, "constitute a clearly unwarranted invasion of personal privacy." This provision is further clarified in section 92F-14(a), Hawaii Revised Statutes, which provides that "[d]isclosure of a government record shall not constitute a clearly unwarranted invasion of personal privacy if the public interest in disclosure outweighs the privacy interests of the individual."<sup>5</sup> See also Haw. Rev. Stat. § 92F-2 (Supp. 1992). Unless an individual's privacy interest is "significant," "a scintilla of public interest in disclosure will preclude a finding of a clearly unwarranted invasion of personal privacy." S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 690 (1988); H. Conf. Comm. Rep. No. 112-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 817, 818 (1988). Examples of information in which an individual has a significant privacy interest are provided in section 92F-14(b), Hawaii Revised Statutes. Among the examples given are "[i]nformation in an agency's personnel file, or application, nominations, recommendations, or proposals for public employment or appointment to a governmental position." Haw. Rev. Stat. § 92F-14(b)(4) (Supp. 1992) (emphases added). However, this privacy interest must still be balanced against the public interest in the disclosure of this information.

In OIP Opinion Letter No. 91-8 (June 24, 1991), we found that, under the UIPA, the privacy interests of unsuccessful applicants for appointment to various State boards and commissions outweighed the public interest in disclosure. In appointing individuals to boards and commissions, the Governor reviews all applications submitted by members of the public, nominates an individual to fill a vacancy, and with the consent of the Senate, appoints one individual to the vacancy. We found

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<sup>5</sup>In several previous advisory opinions, we have stated that the "public interest" to be considered is the "disclosure of official information that sheds light on an agency's performance of its statutory purpose" and "information which sheds light upon the conduct of government officials." OIP Op. Ltr. No. 93-1 (April 8, 1993) at 8. See also OIP Op. Ltr. No. 92-17 (Sept. 2, 1992); OIP Op. Ltr. No. 91-19 (Oct. 18, 1991); and OIP Op. Ltr. No. 93-5 (June 7, 1993).

that applicants not nominated to fill a vacancy have a significant privacy interest in their application for a position on a board or commission, and that the disclosure of these unsuccessful applicants' identities would not shed significant light upon the actions of the Governor in selecting the appointee. Thus, we could find no public interest in the disclosure of this information and concluded that such a disclosure would constitute a "clearly unwarranted invasion of privacy" under section 92F-13(1), Hawaii Revised Statutes.

However, in OIP Opinion Letter No. 91-8, we found that the identity and certain other information about the successful applicant, the Governor's nominee, "would shed light upon the operations of government boards and commissions, and also upon the Governor's and the Senate's role in selecting board and commission members on the public's behalf." OIP Op. Ltr. No 91-8 at 5. Further, we stated that "the public has an interest in the application and nomination records concerning a nominee that would reveal the composition, conduct, and potential conflicts of interest of board and commission members whom the Governor appoints with the Senate's approval." Id. We concluded under the UIPA's balancing test that the public interest in disclosure of the nominee's identity and qualifications outweighed the nominee's privacy interest and, therefore, disclosure would not constitute a clearly unwarranted invasion of privacy.

We believe that the present situation concerning the identities of the Judicial Council's nominees for the Commission is analogous to the situation involving the successful applicants who are nominated to boards and commissions by the Governor in OIP Opinion Letter No. 91-8. Like the Governor, who must review all of the applications for boards and commissions, the Judicial Council reviews all applications and resumes submitted by the public for a Commission vacancy. Further, the Judicial Council's selection of two nominees, like the Governor's selection of a nominee in OIP Opinion Letter No. 91-8, represents the Judicial Council's final decision in nominating individuals to be selected by the Governor. Thus, there is a strong public interest in the disclosure of the names of the nominees because it would shed significant light upon the "decisions and actions of government agencies" and thereby promote one of the core policies underlying the UIPA. Haw. Rev. Stat. § 92F-2 (Supp. 1992).

In addition, there are other important public interests that will be served by disclosing the Judicial Council's list of nominees for the Commission. Although we recognize that of the two nominees selected by the Judicial Council, the Governor will only appoint one individual to fill the vacancy on the Commission

and thus, one of the two individuals must be an unsuccessful nominee, we believe that disclosure of the identities of both nominees would shed light upon the Judicial Council's and the Governor's selection of individuals to fill vacancies on the Commission. We also note that, under section 601-4, Hawaii Revised Statutes, the Judicial Council is an advisory agency and that disclosure of the nominees' identities would shed substantial light on the end product of the Judicial Council's deliberative process in selecting the nominees.<sup>6</sup> Moreover, disclosure of the nominees' identities before the Governor's final appointment would permit members of the public to evaluate the two individuals nominated by the Judicial Council.

In addition, article XIV of the Hawaii Constitution requires the members of the Commission to be selected "in a manner which assures their independence and impartiality." Haw. Const. art. XIV. The Commission, placed under the legislative branch of government, is composed of individuals who are nominated by the judicial branch and ultimately appointed by the executive branch. Accordingly, in our opinion, the disclosure of the identities of the individuals nominated by the Judicial Council would shed light upon the actions of two co-equal branches of government and the entire selection process, and would ensure that this selection process is conducted in a manner which assures that the Commission members are independent and impartial.

Considering all of the public interests that would be furthered by disclosure of the list, we believe that these important public interests outweigh the nominees' significant privacy interests. Thus, we conclude that the disclosure of the nominees' identities would not constitute a clearly unwarranted invasion of privacy under the UIPA.

Before we can conclude that the nominees' identities should be made available for public inspection and copying under the UIPA, we now turn to examine the UIPA's "frustration of a legitimate government function" exception to determine whether

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<sup>6</sup>Section 92F-2, Hawaii Revised Statutes, states that "it is the policy of this State that the formation and conduct of public policy--the discussions, deliberations, decisions, and action of government agencies--shall be conducted as openly as possible." Haw. Rev. Stat. § 92F-2 (Supp. 1992) (emphases added). Additionally, section 92F-12(a)(1), Hawaii Revised Statutes, evidences the strong public interest in the disclosure of final agency decisions.

this exception will permit the Judicial Council to withhold the list of nominees from disclosure.

### III. FRUSTRATION OF A LEGITIMATE GOVERNMENT FUNCTION

Under section 92F-13(3), Hawaii Revised Statutes, agencies are not required to disclose "[g]overnment records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function." In previous advisory opinions, based upon compelling policy reasons, the OIP has found that this "frustration" exception can be extended to certain inter-agency and intra-agency memoranda protected by the common law "deliberative process privilege." See OIP Opinion Letter No. 90-8 (Feb. 12, 1990) (drafts and staff notes); OIP Op. Ltr. No. 90-21 (June 20, 1990) (consultant's report); OIP Op. Ltr. No. 91-16 (Sept. 199, 1991) (draft master plan); OIP Op. Ltr. 92-27 (Dec. 30, 1992) (draft meeting minutes).

To qualify for protection under the deliberative process privilege, an inter-agency or intra-agency memorandum must be both "predecisional" and "deliberative." To be "predecisional," the memorandum must be "received by the decision maker on the subject of the decision prior to the time the decision is made." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1984). To be "deliberative," the memorandum must "reflect the give and take of the consultative process" within or among agencies. Schell v. United States Dep't of Health & Human Services, 843 F.2d 933, 940 (6th Cir. 1988).

We have found, in our previous advisory opinions, that there are various policy reasons underlying the "deliberative process privilege." Specifically, in OIP Op. Ltr. No. 90-8 (Feb. 12, 1990), we found that the disclosure of predecisional and deliberative records "would frustrate agency decision-making functions, such as the resolution of issues and the formulation of policies." Moreover, the "candid and free exchange of ideas and opinions within and among the agencies is essential to agency decision-making and is less likely to occur when all memoranda for this purpose are subject to public disclosure." Id. at 5. In addition, we note that the Freedom of Information Act Guide & Privacy Act Overview published by the Office of Information and Privacy, U.S. Department of Justice, lists three policy purposes which have been consistently held to constitute the bases for the deliberative process privilege:

- (1) [T]o encourage open, frank discussions on matters of policy between subordinates and superiors; (2) to

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protect against premature disclosure of proposed policies before they are finally adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action.

Office of Information and Privacy, U.S. Dep't of Justice, Freedom of Information Act Guide & Privacy Act Overview 109 (1992).

The federal Freedom of Information Act, 5 U.S.C. §552 (1988) ("FOIA"), also contains an exemption for records protected by the deliberative process privilege. See 5 U.S.C. §552(b)(5). The federal courts have emphasized that the deliberative process privilege "must be construed as narrowly as is consistent with efficient government operation" because "[d]isclosure, not secrecy, is the dominant objective' of FOIA's statutory scheme." Army Times Publishing Co. v. Dep't of the Air Force, --- F.2d ---, (1993 WL 291449) (D.C. Cir. Aug. 6, 1993), quoting, Dep't of Air Force v. Rose, 425 U.S. 352, 361, 96 S.Ct. 1592, 1599 (1976).

Courts applying the deliberative process privilege have also stressed that the central inquiry is whether the document is so candid or personal in nature that public disclosure would stifle future honest and frank communication. See Burke Energy Corp. v. Department of Energy, 583 F. Supp. 507 (D.C. Kan. 1984); Concrete Const. Co. Inc. v. U.S. Department of Labor, 748 F. Supp. 562 (S.D. Ohio 1990). The U.S. Supreme Court has stated that examples of documents protected by the deliberative process privilege are predecisional drafts, opinions, recommendations, or reports prepared in conjunction with an agency's decision-making process. N.L.R.B. v. Sears, Roebuck & Co., 421 U.S. 132, 150, 95 S. Ct. 1504, 1516 (1975). In addition, the deliberative process privilege has been found to protect predecisional records containing "views submitted by one agency to a second agency that has final decisional authority." Bureau of National Affairs v. U.S. Department of Justice, 742 F.2d 1484, 1497 (D.C. Cir. 1984) (emphasis added).

Applying the two-part test for the deliberative process privilege to the facts before us, we find that the list of the two individuals nominated by the Judicial Council is "predecisional" because it is received by the Governor before his selection of an individual to fill the Commission's vacancy. However, we doubt that the list can be characterized as "deliberative" because the list merely contains the names of the two nominees, and the Judicial Council does not express any opinions, recommendations, or evaluations of the nominees. Thus,

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the list is primarily factual in nature and does not contain information that would reveal the "give and take" of the consultative process.

Further, we note that the public policy reasons underlying the deliberative process privilege would not be served by protecting the list of nominees. In order to assure the "independence and impartiality" of ethics commissioners in accordance with article XIV of the Hawaii Constitution, the selection process involves a balance of power between the three separate but co-equal branches of government: the judicial branch (Judicial Council), the executive branch (Governor), and the legislative branch (Ethics Commission). The list constitutes the Judicial Council's final decision in the selection process, and the Governor is required by law to select one of these two nominees when filling a vacancy on the Commission. Accordingly, we believe that the important policy reason of protecting the opinions or recommendations of a subordinate to a superior in the decision-making process would not be served by the nondisclosure of the list based upon the deliberative process privilege.

In addition, there is no evidence to indicate that the disclosure of the list would impede or chill the candid and free exchange of ideas and opinions of the Judicial Council members. The list merely contains the names of the two individuals nominated, and not the reasons for the nomination nor the give and take which may have occurred during the Judicial Council's selection process. Further, because the list merely contains the names of two individuals and not the reasons for the selection of these two individuals by the Judicial Council, we do not believe that the disclosure of the list would reveal the thoughts and reasons of the Governor in his selection of one of the two nominees.

We also note that there is no evidence to suggest that revealing the identities of the two nominees would deter qualified individuals from applying for vacancies on the Commission. Rather, a strong argument can be made that the fact that an individual has been selected as one of two nominees to the Commission would be construed by most individuals and the general community as an honor, and would not operate as a deterrent to qualified applicants. Thus, disclosure of the nominees' identities before the Governor makes his appointment would not frustrate the legitimate government function of obtaining impartial and qualified applicants for Commission vacancies.

In addition, we recognize that the disclosure of the nominees' identities before the Governor selects an appointee may subject the Governor to lobbying efforts by the public, media, and special interest groups. In OIP Opinion Letter No. 89-9 (Nov. 20, 1989), we found that the disclosure of the identities of law school admissions committee members "may cause some persons connected with the Committee to attempt to exert influence." OIP Op. Ltr. No. 89-9 at 11. However, we noted that "Law School admissions professionals 'should not pursue any activity that might compromise or seem to compromise their integrity or that of the admissions process.'" OIP Op. Ltr. No. 89-9 at 11, quoting Law School Admissions Council, Statement of Good Admission Practices 3 (1989). Further, we found that disclosure of the committee members' identities would serve the UIPA's underlying purpose by "[o]pening up the government processes to public scrutiny and participation . . . the only viable and reasonable method of protecting the public's interest." Haw. Rev. Stat. § 92F-2 (Supp. 1992).

Although the present situation is different factually from that presented in OIP Opinion Letter No. 89-9, we believe that the issue of undue pressure or influence upon the decision-making authority can be analogized to our situation. We note that the Hawaii Constitution requires members of the Commission to be selected "in a manner which assures their independence and impartiality." Haw. Const. art. XIV. Thus, we believe that the Governor must and will select the individual he believes is best qualified to fill the Commission vacancy, notwithstanding possible pressure from outside forces, thereby ensuring the integrity of the selection process. Consequently, we believe that there is insufficient evidence to suggest that the disclosure of the Judicial Council's nominees for the Commission would result in the frustration of a legitimate government function by causing injury to the integrity of the decision-making process of the State's chief executive, the Governor.

In our opinion, the deliberative process privilege does not operate to protect the Judicial Council's final list of nominees to the Commission from disclosure and, therefore, the list is not a government record that, by its nature, must be confidential in order to avoid the "frustration of a legitimate function."

#### CONCLUSION

The Judicial Council's list of two nominees for each Commission vacancy is not protected by any of the UIPA exceptions to required agency disclosure. Specifically, the UIPA's privacy exception and the exception for records which would, if

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disclosed, result in a frustration of a legitimate government function do not apply to permit the Judicial Council to withhold public access to the list. Consequently, we conclude that, under the UIPA, the list of final nominees to a Commission vacancy must be made available for public inspection and copying upon request, before the Governor appoints one of the nominees to the Commission.

Very truly yours,



Stella M. Lee  
Staff Attorney

APPROVED:



Kathleen A. Callaghan  
Director

SML:si

c: The Honorable John Waihee  
Governor, State of Hawaii

Chief Justice Ronald Moon  
Supreme Court of Hawaii

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