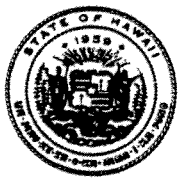
JOHN WAIHEE
GOVERNOR
BERT A. MARKS
[redacted]
ATTORNEY GENERAL



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

October 8, 1993

Honorable Russell Blair
Senator
The Seventeenth Legislature
State Office Tower, Room 301
235 South Beretania Street
Honolulu, Hawaii 96813

Dear Senator Blair:

Re: Records Relating to the Expenditure of Each Hawaii State Legislator's $5,000 Annual Allowance

This is in reply to your request for an advisory opinion from the Office of Information Practices ("OIP"). In your letter, you requested an opinion from the OIP concerning whether the "paper trail" connected with a State legislator's expenditure of the $5,000 annual allowance provided for by section 24-1, Hawaii Revised Statutes, would be considered a public "government record" under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA").

Additionally, you inquired whether such records would be available for public inspection and copying if the annual allowance is commingled with a legislator's personal funds. Your letter also raises the question of whether these records would be considered "personal files of members of the legislature," that under section 92F-13(5), Hawaii Revised Statutes, are authorized (but not required) to be withheld from the public under the UIPA.

ISSUES PRESENTED

I. Whether, under the UIPA, records relating to each State of Hawaii legislator's expenditure of the annual $5,000 allowance provided in section 24-1, Hawaii Revised Statutes, are "government records."

II. If records relating to each legislator's expenditure of the $5,000 annual allowance are "government records," whether such

records must be made available for inspection and copying under the UIPA upon request by any person.

BRIEF ANSWERS

I. 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). Based upon the definition of the term "maintain," set forth in the uniform law upon which the UIPA was modeled by the Legislature, the OIP believes that the UIPA applies to information possessed or controlled in any way by an agency. Based upon principles set forth in advisory opinions previously issued by the OIP, an agency does "maintain" information even if it does not have physical custody of the same, provided that it retains administrative control over the information. See OIP Op. Ltr. No. 91-5 (Apr. 15, 1991); OIP Op. Ltr. No. 92-25 (Dec. 22, 1992).

Each legislator's annual allowance is paid in a $5,000 lump sum. In accordance with regulations adopted by the U.S. Internal Revenue Service, the annual allowance is: (1) included in each legislator's "gross income," (2) reported on each legislator's Form W-2, and (3) subject to income taxation and employment tax withholding. Also, under current administrative policies of the State House and Senate the annual allowance is not subject to any reporting or accounting requirements and may be spent in any manner deemed appropriate by the legislator.

While the Legislature intended the term "government record" to be comprehensive and to sweep as broadly as possible, we do not believe that the term "government record" can be extended so far as to encompass records that are possessed solely by agency employees and that relate to how they expend their personal income, any more than it can be extended to include records relating to how agency employees disburse their public salary, or income derived from other sources. Given the very unique circumstances surrounding the payment of each legislator's annual allowance, and the present administrative policies of the State House and Senate relating to the allowance, we do not believe that records relating to the expenditure of each legislator's annual allowance constitute "information maintained by an agency," since at present, the annual allowance is treated as part of each legislator's personal income.

Accordingly, we conclude that such records are not "government records" subject to the affirmative disclosure requirements of the UIPA. However, both the Senate and the House retain the authority under article III, section 9 of the

40-2, Hawaii Revised Statutes, to establish accounting, reporting and substantiation requirements concerning the expenditure of the $5,000 annual allowance. Should the House or the Senate establish such requirements, we believe that records submitted or compiled by a legislator pursuant to such requirements would constitute information possessed, retained, or administratively controlled by an agency and, therefore, be "government records" subject to the disclosure provisions of the UIPA.

In the absence of such policies and restrictions, the OIP is constrained to find that the "paper trail" concerning the expenditure of the annual allowance paid to each legislator are not "government records." Accordingly, we find that legislators may disclose records concerning their expenditure of their annual allowance, but that the disclosure of such records is not subject to the freedom of information provisions of the UIPA, at this time.

II. Because we find that, at present, records concerning how each legislator expends the legislator's annual allowance are not government records subject to the disclosure requirements of the UIPA, we find it unnecessary to express an opinion concerning the second issue presented.

FACTS

Article III, section 9 of the Constitution of the State of Hawaii provides in relevant part:

> The members of the legislature shall receive allowances reasonably related to expenses as provided by law, and a salary prescribed by the commission on legislative salaries pursuant to this section . . . .

Haw. Const. art. III, § 9.

The phrase "reasonably related to expenses as [prescribed] by law" was made a part of article III, section 10 of the Constitution of the State of Hawaii by the Constitutional Convention of the State of Hawaii of 1968. Standing Committee Report No. 46 (majority) highlights why this phrase was included in the State Constitution:

> An amendment has also been made to this section to relate the allowances to reasonable expenses. While your Committee has no reason to believe that there is any abuse under the present provision, the

> amendment would clearly restrict allowances from taking any forms of subsidy. With the term "allowances" restricted to relate to reasonable expenses, it was believed that the legislature should have the flexibility to, and could fairly, effect changes in allowances to apply immediately to reflect current needs and expenses.

Vol. I Proceedings of the Constitutional Convention of Hawaii 211, 214 (1968). As a result of the next Constitutional Convention in 1978, the term "prescribed" was changed to "provided," and section 10 renumbered as section 9.

Section 24-1, Hawaii Revised Statutes, provides:

> **§24-1 Allowance for incidental expenses.** Each member of the legislature shall receive an annual allowance of $5,000, which amount is to cover incidental expenses connected with legislative duties and the amount shall be payable in a manner prescribed by the respective rules of each house.

Haw. Rev. Stat. § 24-1 (Supp. 1992) (emphasis added).

In a letter to the OIP dated May 3, 1993, you indicated that:

> (1) No State procedures or restrictions exist with respect to the payment of expenditure [of the annual allowance]. A W-2 form is issued and the sums are reported, via that form, to the Federal Government. Legislators may then deduct expenses under applicable federal tax code provisions.
>
> . . . .
>
> (2) Legislators are free to deposit the allowance into their personal financial accounts, as far as the Senate is concerned.
>
> (3) There are no record keeping or accounting practices or standards.

Letter from Senator Russell Blair to OIP Staff Attorney Hugh R. Jones at 1 (May 3, 1993).

Both the Senate and the House have adopted internal administrative policies concerning the annual allowance paid to legislators. Section 1.3 of The Administrative and Financial Manual of Guides of the Senate of Hawaii provides:

> **Sec. 1.3 Legislators' annual allowance.** Each legislator is allowed such amount as provided by statute to be used for any purposes he considers in his discretion to be appropriate in his duties as a legislator.
>
> The allowance is not subject to reporting or accounting, and that amount of the allowance is not subject to reduction or adjustment by reason of the receipt of any other allowance provided by statute or under any other section of this manual or by reason of the legislator serving for less than a full year. The allowance is paid in lump sum no later than ten calendar days after the effective date of the legislation appropriating funds for the operation of the Senate.

Section 1.3 of the House Administrative and Financial Manual provides:

> **Sec. 1.3 Legislator's annual allowance.** Each legislator is allowed such amount as provided by statute to be used for any purpose he considers in his discretion to be appropriate in the discharge of his function as a legislator. The use of the allowance is not subject to reporting or accounting, and the amount of the allowance is not subject to reduction or adjustment by reason of the receipt of any other allowance provided by statute or under any other section of this manual or by reason of the legislator serving for less than a full term. The allowance is payable in lump sum no later than ten calendar days after the effective date of legislation appropriating funds for the operation of the House . . . .

The legislative history of section 24-1, Hawaii Revised Statutes, indicates that the annual allowance was intended to reimburse each legislator for such things as meals; automobile mileage; telephone bills; the expenses of social, political and

charitable functions; postage for newsletters or other mailings; and secretarial assistance.[1] However, according to your letter, it appears that the annual allowance provided to each legislator is treated for federal income tax purposes as part of the legislator's "gross income," i.e., wages, tips, and other compensation.

DISCUSSION

I. INTRODUCTION

The UIPA states that "[e]xcept as provided in section 92F-13, each agency shall make government records available for inspection and copying upon request by any person." Haw. Rev. Stat. § 92F-11(b) (Supp. 1992). The term "government record" means "information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. § 92F-3 (Supp. 1992) (emphasis added); Kaapu v. Aloha Tower Development Corp., ___ Haw. ___, No. 15775 (Feb. 25, 1993).

II. WHETHER THE LEGISLATURE IS AN 'AGENCY'

Under the UIPA, the term "agency" includes:

> [A]ny unit of government in this State, any county, or any combination of counties; department, institution; board; commission;

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[1]The legislative history of section 24-1, Hawaii Revised Statutes, states:

> Your Committee has provided each legislator with an annual allowance of $750 to cover the expenses associated with legislative work, such as meals required by meetings held early or late in the day, auto mileage (beyond travel to and from work) and depreciation, increased home telephone bills, expenditures connected with social, political and charitable functions which legislator is expected to attend, postage for newsletters and other mailings to constituents.

S. Stand. Comm. Rep. No. 4, 5th Leg., 1969 Reg. Sess., Haw. S.J. 860 (1969); see also, S. Conf. Comm. Rep. No. 2, 5th Leg., 1969 Reg. Sess., Haw. S.J. 823 (1969) (allowance to take care of incidental expenses such as meals, telephone bills, postage, automobile mileage "and also secretarial help").

> 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).

In our opinion, the UIPA's definition of the term "agency" includes the Legislature as a unit of government in this State or governing authority.[2]

Additionally, because the term "agency" includes within its coverage the units, offices, and subdivisions of each agency, we believe that the UIPA also applies to subunits of the Legislature (such as the Senate, the House, research offices, and committees), as well as the offices of each legislator.

III. WHETHER RECORDS ASSOCIATED WITH EXPENDITURE OF ANNUAL ALLOWANCE ARE GOVERNMENT RECORDS

The definition of the term "government record" was adopted verbatim by the Legislature from that set forth in the Uniform Information Practice Code drafted by the National Conference of Commissioners on Uniform State Laws (1980) ("Model Code"). With

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[2]The UIPA's definition of the term "agency" was taken almost verbatim from the definition of the term "agency" set forth in section 1-105(2) of the Uniform Information Practices Code (Nat'l Conf. of Commissioners on Uniform State Laws 1980) ("Model Code"). The Model Code definition of the term "agency," however, expressly excludes legislative bodies from its scope. Significantly, when the Legislature modified the Model Code for adoption in Hawaii, it deleted the express exclusion of legislative bodies from the definition of the term agency. Also, the UIPA's legislative history clearly indicates the Legislature intended the definition of the term "agency" to include the Legislature. 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. 969, 970 (1988) (the definition of "agency" "includes both the Legislature and the Judiciary"). Also, there would be no need for the exception in section 92F-13(5), Hawaii Revised Statutes, for certain legislative records, if the UIPA did not apply to legislative offices.

respect to the definition of the term "government record," the Model Code commentary[3] states:

> 'Government record' is the key operative definition in Article 2 of this Code. It includes all information maintained by an 'agency' as long as the information exists in some physical form. For example, the personal recollection of an agency employee would not be a 'government record' but his handwritten notes summarizing an event or conversation would.

Model Code § 1-105 Commentary at 7 (1980).

As we have noted in OIP Opinion Letter No. 91-5 (Apr. 15, 1991) and OIP Opinion Letter No. 92-25 (Dec. 22, 1992), when the Legislature adopted the UIPA, it did not define the meaning of the word "maintain." As such, we have turned for guidance to the definition of the term "maintain" as set forth in the Model Code in construing the meaning of this term which appears within the UIPA's definition of "government record," as well as elsewhere in the UIPA. See OIP Op. Ltr. No. 91-5 (Apr. 15, 1991); OIP Op. Ltr. No. 91-25 (Dec. 11, 1991); OIP Op. Ltr. No. 91-29 (Dec. 23, 1991); OIP Op. Ltr. No. 92-13 (Aug. 13, 1992); OIP Op. Ltr. No. 92-15 (Aug. 14, 1992); OIP Op. Ltr. No. 92-17 (Sept. 2, 1992); and OIP Op. Ltr. No. 92-25 (Dec. 22, 1992). Section 1-105(6) of the Model Code provides that "[m]aintain means to hold, possess, preserve, retain, store, or administratively control." The Model Code commentary notes:

> 'Maintain' is defined in section 1-105(6) to sweep as broadly as possible. It includes information possessed or controlled in any way by an agency. The administrative control component of the definition is especially important because it prevents an agency that does not have

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[3]The UIPA's legislative history instructs those interpreting its provisions to consult the Model Code commentary for guidance in interpreting similar provisions of the UIPA. See H. Stand. Comm. Rep. No. 342-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 969, 972 (1988); see also, Haw. Rev. Stat. §§ 1-16 and 1-24 (1985) (regarding the interpretation of laws in pari materia and uniform acts).

> physical custody of government records from evading its obligations under this Code.

Model Code § 1-105 Commentary at 9 (1980).

Also, it is a cardinal rule of statutory construction that the words used in a statute are to be understood in their "general or popular use or meaning." Haw. Rev. Stat. § 1-14 (1985). The American Heritage Dictionary of the English Language 787 (7th ed. 1971) defines the term "maintenance" as the "action of continuing, carrying on, preserving, or retaining something," and defines the term "maintain" as "[t]o preserve or retain." Webster's Third New International Dictionary 1362 (Unabr. 1967) defines the term "maintain" as "to keep in a state of repair, efficiency or validity; preserve from failure or decline," and "to persevere in; carry on; keep up."

In some cases, it is difficult to determine whether records created by or in the possession of an agency employee constitute information possessed or controlled by an agency. See, e.g., Kissinger v. Reporters Committee, 445 U.S. 136 (1980); Bureau of National Affairs, Inc. v. U.S. Dep't of Justice, 742 F.2d 1484 (D.C. Cir. 1984); Kurtis A. Kemper, What are "Records" of Agency Which Must Be Made Available Under the Freedom of Information Act, 50 A.L.R. Fed. 336 (1980).

For example, in determining whether documents created within an agency, by an agency employee, are "agency records," the decision of the U.S. Court of Appeals for the District of Columbia in Bureau of National Affairs, Inc. v. U.S. Dep't of Justice, 742 F.2d 1484 (D.C. Cir. 1984) ("BNA") represents the leading, and most often cited case. In BNA, the Court of Appeals for the District of Columbia considered whether the appointment calendar, telephone message slips, and daily agenda of William Baxter, the Assistant Attorney General for Antitrust, were agency records of the Department of Justice under the federal Freedom of Information Act, 5 U.S.C. § 552 (1988) ("FOIA").

The BNA court noted that in Kissinger, the Supreme Court focused on four factors: "whether the documents were (1) in the agency's control; (2) generated within the agency; (3) placed into the agency's files; and (4) used by the agency 'for any purpose.'" BNA 742 F.2d 1489. BNA interpreted the prior case law to mean that the inquiry should focus on the "totality of circumstances surrounding the creation, maintenance, and use of the document." Id. at 1492-93 (emphasis added). Also, the court noted that reliance solely upon a "possession and control" test could be an overly restrictive approach:

> An "agency" may choose not to assert any control over a particular document, but an employee who created that document for the express purpose of enabling him to perform his duties certainly retains possession and control over the document. The issue is not simply whether the agency as an institution has taken steps to "obtain" the document. Rather the question presented by these cases is whether, when an agency employee creates a document, that creation can be attributed to the agency under the FOIA.

BNA, 742 F.2d at 1492 (emphasis added).

Under current administrative policies of the House and the Senate, the annual allowance is paid to each legislator in a lump sum. Additionally, the annual allowance is reported to the U.S. Internal Revenue Service as part of each legislator's "gross income," and is subject to income taxation, and employment tax withholding.[4] Further, current administrative policies of both

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[4]According to research performed by the OIP, business expenses reimbursed by an employer under an "accountable plan," are excluded from an employee's income, are not required to be reported on the employees Form W-2, and are exempt from income and employment tax withholding. Treas. Reg. § 1.62-2(c)(4)(ii) (1992). Business expenses reimbursed under a "nonaccountable" plan are included in the employee's gross income, must be reported as wages or other compensation on the employee's Form W-2, and are subject to withholding and payment of employment taxes. Treas. Reg. § 1.62-2(c)(5) (1992). An arrangement that reimburses business expenses, travel, entertainment or the use of a passenger automobile is an "accountable plan," if it meets one of the "substantiation" requirements of section 274(d) of the Internal Revenue Code:

> Under section 274(d), information sufficient to substantiate the requisite elements of each expenditure or use must be submitted to the payor. For example, with respect to travel away from home § 1.274-5T(b)(2) requires that information sufficient to substantiate the amount, time, place and business purpose of the expense must be submitted to the payor . . . .

(continued...)

the House and the Senate provide that the annual allowance "is not subject to reporting or accounting," and may be "used for any purpose he considers in his discretion to be appropriate in his duties as a legislator." Section 1.3 of The Administrative and Financial Guides of the Senate of Hawaii and Section 1.3 of the House Administrative and Financial Manual.

Thus, legislators are presently free to deposit their annual allowances into their personal financial accounts and permitted to spend the allowance in any manner they deem appropriate.[5] While the Legislature intended the UIPA's definition of the term

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[4](...continued)

> (3) **Expenses not governed by section 274(d).** An arrangement that reimburses business expenses not governed by section 274(d) meets the requirements of this paragraph (e)(3) if information is submitted to the payor sufficient to enable the payor to identify the specific nature of each expense and to conclude that the expense is attributable to the payor's business activities. Therefore, each of the elements of an expenditure or use must be substantiated to the payor. It is not sufficient if an employee merely aggregates expenses into broad categories (such as "travel") or reports individual expenses through the use of vague, nondescriptive terms (such as "miscellaneous business expenses").

Treas. Reg. 1.62-2(e) (1992).

Further, if a payor of a business expense "provides a nonaccountable plan, an employee who receives payments under the plan cannot compel the payor to treat the payments as paid under an accountable plan by voluntarily substantiating the expenses and returning any excess to the employer." Treas. Reg. 1.62-2(c)(3)(i) (1992).

[5]It is not within the OIP's jurisdiction to determine whether current House and Senate policies relating to the expenditure of the annual allowance provided to each legislator is consistent either the letter or the spirit of article III, section 9 of the Constitution of the State of Hawaii, or section 1-24, Hawaii Revised Statutes. Such a determination rests with authorities other than the OIP.

"government record" to be comprehensive in scope, we do not believe that this term can be extended so far as to encompass records possessed solely by the official that relate to how the official expends a payment that is included in the official's "gross income," any more than it can extended to encompass records possessed solely by the official concerning how the official spends such person's salary, deferred compensation, or retirement benefits.

In contrast, however, under article III, section 9 of the Constitution of the State of Hawaii, and sections 1-24, and 40-2 Hawaii Revised Statutes, each House of the Legislature retains the authority to adopt rules concerning the payment of the annual allowance, including presumably, rules establishing accounting, substantiation, and reporting requirements. See, e.g., 2 U.S.C. § 58 (Supp. 1991) (payments from the contingency fund of the United States Senate must be supported by documentary evidence, including detailed itemized vouchers for travel, entertainment or meals).

To the extent that the Senate and the House establish accounting, reporting, and substantiation requirements related to the annual allowance, we believe that records compiled and submitted by a legislator in connection with such requirements would constitute "government records" for purposes of the UIPA. Under such circumstances, the records would be possessed, or retained by an agency, or be subject to the agency's administrative control. However, such accounting and reporting requirements do not presently exist. Given the unique totality of circumstances surrounding the payment of the annual allowance, and the Legislature's current administrative policies related thereto, we do not believe that an agency holds, possesses, preserves, retains, stores, or administratively controls the paper trail connected with the expenditure of the allowance. In fact, because these expenses are reimbursed under a "nonaccountable plan" for income tax purposes, the Legislature does not currently possess any control over records evidencing how the annual allowance is spent by each legislator.

Therefore, for the reasons set forth above, it is the OIP's opinion that despite the comprehensive definition of the term "government record," records possessed solely by legislators relating to how they spend their annual allowance (which is paid in lump sum and reported to the IRS as part of their gross incomes) are not "maintained" by an agency. Therefore, we find that such records are not government records subject to the freedom of information provisions of the UIPA.

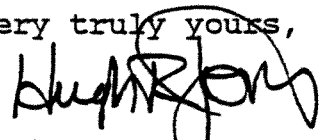
Finally, despite the absence of any legislative rules establishing accounting or reporting requirements, some legislators may nevertheless maintain receipts or ledgers that substantiate how they have spent their annual allowance. Nothing in the UIPA would prohibit or restrict any legislator from making such records available for public inspection and copying upon request.

CONCLUSION

For the reasons set forth above, it is the opinion of the OIP that records possessed solely by individual legislators concerning the expenditure of their annual allowance (which amounts are included in their gross incomes) do not constitute "information maintained by an agency." Therefore, in the absence of rules or policies prescribing accounting, reporting, or substantiation requirements, we do not believe that these records are "government records" subject to the affirmative disclosure requirements of the UIPA.

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

Very truly yours,



Hugh R. Jones
Staff Attorney

APPROVED:

Kathleen A. Callaghan
Director

HRJ:sc
c: Honorable James Aki
President of the Senate

Honorable Joseph M Souki
Speaker of the House of Representataives

Honorable Robert A. Marks
Attorney General