

Op. Ltr. 93-18 Akaku Not An Agency

This opinion was overruled by OIP Op. Ltr. 02-08

JOHN WAIHEE
GOVERNOR
ROBERT A. MARKS
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
428 QUEEN STREET, ROOM 201
HONOLULU, HAWAII 96813-2904

October 20, 1993

Mr. John Anthony
P. O. Box 1
Kihei, Maui, Hawaii 96753

Dear Mr. Anthony:

Re: Akaku - Maui Community Television, Inc.

This is in response to your letter to the Office of Information Practices ("OIP") dated October 1, 1993. In your letter, you requested the OIP to render an advisory opinion concerning whether Akaku - Maui Community Television, Inc. ("Akaku"), is an "agency" for purposes of the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA").

ISSUE PRESENTED

Whether, under the UIPA, Akaku is an "agency," the records of which are subject to public inspection and copying upon request.

BRIEF ANSWER

No. The UIPA only applies to government records or information maintained by an "agency." The UIPA's definition of the term "agency" includes "any corporation or other establishment owned, operated, or managed by or on behalf of this State or any county." See Haw. Rev. Stat. § 92F-3 (Supp. 1992).

Although the DCCA was initially involved with assisting Akaku set up its operations, the DCCA no longer plays any part in Akaku's activities. Akaku is a private non-profit corporation and is not "owned, operated, or managed" by the DCCA or any State or county agency.

In addition, although providing "public" broadcasting can be considered a governmental function under section 314-8(1), Hawaii Revised Statutes, providing "community" broadcasting is not a required function of any government agency. Further, community

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broadcasting is not supported by taxpayers' funds. For all of the above reasons, we are of the opinion that Akaku is not an "agency" within the meaning of the definition provided in section 92F-3, Hawaii Revised Statutes. Accordingly, Akaku's records are not subject to the disclosure provisions of the UIPA.

FACTS

In a telephone call to the OIP on September 19, 1993, you informed the OIP that you believe Akaku is a part of the State of Hawaii Department of Commerce and Consumer Affairs ("DCCA"). I contacted both Ms. Sally Ho, Staff Attorney, at the DCCA's Cable TV Division, as well as Ms. Darla Palmer, General Manager, at Akaku. I was informed by both Ms. Ho and Ms. Palmer that Akaku is a community television broadcasting company, and they do not believe Akaku is owned, operated, or managed by or on behalf of any government agency. In a letter to you dated September 21, 1993, a copy of which you provided to the OIP, Ms. Palmer stated that Akaku is an independent non-profit corporation.

According to Ms. Ho and Ms. Palmer, cable television companies that are franchised by the DCCA must provide channels for community television broadcasting.¹ In addition, the franchise agreement requires the cable television companies to remit a small percentage of their gross revenues to the Director of the DCCA for certain designees. These designees are the non-profit community television broadcasting companies on Oahu, Maui, Kauai, and, in the near future, the Big Island.

The DCCA enters into contracts with each community broadcasting company to ensure that the company is properly utilizing the funds from the cable companies to facilitate community access to the cable television channels designated for community broadcasting. When the contract is signed, the DCCA will direct the cable companies to remit the designated amount directly to the community broadcasting company. However, because Akaku has not yet entered into a contract with the DCCA, Olelo, a community television broadcasting company on Oahu, is currently acting as Akaku's temporary fiscal manager and is receiving the

¹Ms. Ho has informed the OIP that "community" television broadcasting is essentially a community's use of a cable channel. The government has no editorial control over what programs are broadcast on a community television station. In contrast, "public" broadcasting is administered by the Hawaii Public Broadcasting Authority under chapter 314, Hawaii Revised Statutes, and public broadcasting stations are required to air a certain amount of national public broadcasting programs.

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funds from the cable companies on behalf of Akaku. Thus, Akaku currently receives its funds from Olelo. Again, we note that the amounts provided to the community broadcasting companies such as Akaku derive from payments made by cable television subscribers, rather than from taxpayer dollars.

According to Ms. Ho, the DCCA initially assisted Akaku in establishing its operations, and was also involved in appointing a percentage of Akaku's first board of directors.² However, now that Akaku is operational, the DCCA's involvement with Akaku has ended, and the DCCA does not assist Akaku with any of its activities or operations.

DISCUSSION

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). Section 92F-3, Hawaii Revised Statutes, which is the UIPA's definitions section, states that the term "[g]overnment record" means information maintained by an agency in written auditory, visual, electronic, or other physical form." "Agency" is defined in section 92F-3, Hawaii Revised Statutes, as "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 establishment owned, operated or managed by or on behalf of this State or any county." Haw. Rev. Stat. § 92F-3 (Supp. 1992) (emphasis added).

In OIP Opinion Letter No. 90-31 (Oct. 25, 1990), we addressed the issue of whether the Hawaiian Humane Society ("HHS") is an "agency" for purposes of the UIPA. After researching both federal and state case law interpreting the definition of the term "agency" for purposes of public records laws, we found that:

[W]hether an entity is an "agency" for purposes of the UIPA must be made on a case-by-case basis, based on the totality of circumstances. Each new arrangement must be separately considered in its own context given the myriad of organizational arrangements for getting the business of

²To fill the eleven seats on the board, the DCCA appointed eight members, Chronicle Cablevision appointed two members, and Hawaiian Cablevision appointed one member. None of the board members are DCCA officers or employees.

government done. Further, it is clear that an entity is not "operated on behalf of" the State or any county, and therefore, an agency under the UIPA, merely by contracting with a governmental agency However, at a minimum, under the UIPA, we believe that an entity must perform what may reasonably be considered a governmental function before it may be included within the coverage of the Act.

OIP Op. Ltr. No. 90-31 (Oct. 25, 1990) at 14 (emphasis added).

After examining the functions and responsibilities of the HHS, we concluded that the HHS performs a traditional governmental function by enforcing laws "enacted by the State and the county for the health, safety, and welfare of the public." See OIP Op. Ltr. No. 90-31 at 2. In addition, we noted that the HHS operations were subsidized primarily through taxpayers' funds, and all of the fees and charges received by the HHS in the course of its operation of a dog pound were remitted to the City and County of Honolulu ("City"). Finally, we found it significant that the records maintained by the HHS were subject to inspection by the City at any time and without prior notice. Given the totality of the circumstances, we concluded that the HHS is an "agency" for purposes of the UIPA.

Although we believe that Akaku, by providing community broadcasting on Maui, is performing a service that benefits the public interest, we do not believe that it is performing a governmental function. We note that "public" broadcasting may be considered a governmental function under chapter 314, Hawaii Revised Statutes;³ however, our research has not revealed any section of the Hawaii Revised Statutes that requires a government agency to provide "community" broadcasting. Nor are we aware of any legal authority that has found community broadcasting to constitute a governmental function.

Moreover, the State is not involved with the operations of Akaku, nor does it manage Akaku. Funds paid to Akaku directly derive from cable television companies' gross revenues, and Akaku is not supported by taxpayer funds. Given the totality of the circumstances surrounding Akaku's operations, we believe that Akaku is not "owned, operated, or managed by or on behalf of this State or any county" within the meaning of section 92F-3, Hawaii

³Under section 314-8(1), Hawaii Revised Statutes, the Board of Public Broadcasting may "[e]stablish[] public broadcasting facilities and govern[], control[] and operat[e] each facility."

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Revised Statutes. Accordingly, we conclude that Akaku is not an "agency" the records of which are subject to the UIPA.

CONCLUSION

Akaku is not "owned, operated, or managed by or on behalf of this State or any county," within the meaning of the definition of "agency" provided in section 92F-3, Hawaii Revised Statutes. Further, although the provision of community broadcasting on cable television channels may be considered a service in the public interest, no government agency is required to either provide or oversee provisions for community broadcasting. Thus, we do not believe that providing community broadcasting can be considered a governmental function.

In addition, we find it significant that Akaku derives its funding from cable television companies' gross revenues, and does not receive any taxpayer funds. For all of these reasons, we believe that Akaku is not an "agency" within the meaning of the definition provided in section 92F-3, Hawaii Revised Statutes. Consequently, the records maintained by Akaku are not subject to the provisions of the UIPA.

Very truly yours,



Stella M. Lee
Staff Attorney

APPROVED:



Kathleen A. Callaghan
Director

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Attachment

c: Sally Ho, Staff Attorney
DCCA - Cable Television Division

Darla Palmer, General Manager
Akaku - Maui Community Television, Inc.

John Anderson
Deputy Attorney General