May 8, 1995

Mr. Gene T. Okita
[home address deleted]

Dear Mr. Okita:

Re: Names and Qualifications of Unpaid DHRD Consultants

This is in response to your letter to the Office of Information Practices ("OIP") dated December 1, 1992. In your letter to the OIP, you requested an advisory opinion regarding your right to inspect and copy government records that contain the name and qualifications of an unpaid consultant who assisted the Department of Human Resources Development ("DHRD") in reviewing your application for employment with the State.

## ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), government records that reveal the names and qualifications of unpaid consultants ("consultants") who assist DHRD in reviewing applications for State civil service positions must be made available for public inspection and copying.

## BRIEF ANSWER

Yes. Based upon our review of the UIPA's exceptions to required agency disclosure in section 92F-13, Hawaii Revised Statutes, we do not believe that any of these exceptions would permit DHRD to withhold public access to the identities and qualifications of consultants who assist DHRD in reviewing job applications for civil service positions.

In determining whether the UIPA's exception for information which, if disclosed, would result in a "clearly unwarranted invasion of personal privacy," we note that under section 92F-12(a)(14), Hawaii Revised Statutes, the name, educational background, all previous employment, and present government employment information of present or former agency officers or employees is specifically made public under the UIPA. See OIP Op. Ltr. No. 94-9 (May 16, 1994) (nongovernmental work experience of agency officers and employees is also public under section 92F-12(a)(14), Hawaii Revised Statutes). In addition, section 92F-12(a)(10), Hawaii Revised Statutes, specifically requires

that an agency make publicly available the following information concerning contract hires and consultants employed by a government agency: the contract, the amount of compensation, the duration of the contract, and the objectives of the contract.

We realize that DHRD consultants in question are unpaid and, therefore, do not have a contract with DHRD. Moreover, as for nongovernmental DHRD consultants, section 92F-14(b)(5), Hawaii Revised Statutes, provides that individuals have a significant privacy interest in "[i]nformation relating to an individual's nongovernmental employment history except as necessary to demonstrate compliance with requirements for a particular government position." In our opinion, public disclosure of the consultants' employment history, including their nongovernmental employment history which is relevant to their consultant work, is necessary to demonstrate that the consultants are qualified to provide government agencies with specialized information in the agency's decisionmaking process. Thus, in the absence of a significant privacy interest, we believe that the public interest in the disclosure of this information outweighs any privacy interests of the DHRD consultants, and the disclosure of their identities and their nongovernmental employment history would not result in a "clearly unwarranted invasion of personal privacy." Haw. Rev. Stat. ə 92F-13(1) (Supp. 1992).

In addition, we find that information concerning the unpaid DHRD consultants' identities and qualifications is not protected by the common law "deliberative process privilege." This privilege usually applies to protect the predecisional opinions and recommendations that are a part of an agency's decision-making process in order to promote candid and frank communications within or between agencies. Because the requested information involves only the names and qualifications of the consultants, and would not disclose any predecisional or deliberative communications between the unpaid consultants and DHRD, we believe that the "deliberative process privilege" does not apply to protect the information you have sought. Specifically, we believe that information concerning the name, educational background, previous employment, as well as any certifications or awards the consultant has received is not information which "must be confidential in order for the government to avoid the frustration of a legitimate government function" under section 92F-13(3), Hawaii Revised Statutes.

Accordingly, we believe that, under the UIPA, the names and

qualifications of DHRD consultants, paid or unpaid, both government employees as well as private sector employees, must be publicly disclosed upon request.

## FACTS

DHRD frequently utilizes consultants when reviewing civil service applications submitted to DHRD. These consultants are specialists in their particular fields, and they assist DHRD by performing various specialized functions such as drafting test questions and answers, grading tests, explaining to DHRD personnel any specialized terminology used by applicants, and evaluating whether an applicant's work experience can be substituted for educational requirements for the position. However, the role of the consultants in DHRD's application review process is limited to the above activities. Consultants do not provide DHRD with opinions or recommendations concerning whether to hire a particular applicant.

The consultants used by DHRD provide their knowledge and expertise to DHRD as a professional courtesy. Thus, the consultants from the private sector, as well as the consultants who are State employees, are not paid for their services and there are no contracts between DHRD and consultants who perform these functions. However, DHRD has informed the OIP that information about the consultant's name, educational background, employment background, and any certifications that the consultant may possess is maintained by DHRD in its files.

When a consultant's expertise is required, DHRD will contact State department personnel officers to request the names of State employees who have expertise or knowledge in the particular field. If there are no State employees who have this specialized knowledge, DHRD will seek individuals from the private sector.

In certain circumstances, the State employee with the best knowledge in the particular field is currently employed in the same office as the position which is being filled. In such a case, to avoid the appearance of favoritism, DHRD generally will not ask the knowledgeable employee for assistance. Instead, DHRD will attempt to find another individual who has comparable qualifications and who is further removed from the position being filled.

The consultants do not decide whether an applicant is

accepted or rejected because such decisions are made solely by DHRD employees. Nonetheless, DHRD believes that rejected applicants may attempt to contact the consultants for information about the application review process or to harass the consultants in the mistaken belief that the information received by DHRD from the consultants resulted in the rejection of the applicant. Consequently, it is DHRD's policy not to disclose the names of the consultants. Further, DHRD will not disclose the consultant's qualifications even without the consultant's name because it believes that the disclosure of this information might enable an applicant to discover the consultant's identity.

In your civil service application for a position with the State, you provided DHRD with information concerning your work experience, which experience was to be substituted for the minimum educational requirements for the position. The DHRD contacted a consultant for assistance in assessing the information provided in the applications received during the recruitment to fill this position. The consultant also provided assistance in evaluating work experience substitutions for the minimum educational requirements for the position. Following DHRD's review of your application for the position, you contacted DHRD and requested the name and qualifications of the consultant who assisted DHRD in reviewing the applications that DHRD received. The DHRD denied your request. Although you have, through independent means, discovered the identity of the consultant used in the recruitment for the position, you have requested the OIP to provide you with an advisory opinion concerning the public's right to inspect and copy government records that reveal the names and qualifications of consultants used by DHRD.

## 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. ə 92F-11(a) (Supp. 1992). Further, "[e]xcept as provided in section 92F-13, each agency upon request by any person shall make government records available for inspection and copying during regular business hours." Haw. Rev. Stat. ə 92F-11(b) (Supp. 1992).

Preliminarily, we find that only two of the UIPA exceptions

contained in section 92F-13, Hawaii Revised Statutes, are applicable to the facts in this situation:

> **[ə92F-13] Government records; exceptions to general rule.** This chapter shall not require disclosure of:
>
> (1) Government records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy;
>
> . . . .
>
> (3) Government records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function; . . . .

Haw. Rev. Stat. ə 92F-13(1) and (3) (Supp. 1992).

We will address each of the above-referenced UIPA exceptions separately.

## II. CLEARLY UNWARRANTED INVASION OF PERSONAL PRIVACY

To determine whether the disclosure of information contained in a government record would "constitute a clearly unwarranted invasion of personal privacy" under section 92F-13(1), Hawaii Revised Statutes, it is necessary to apply the UIPA's public interest "balancing test." Section 92F-14(a), Hawaii Revised Statutes, states 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."[1]

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[1]The legislative history states that "[o]nce a significant privacy interest is found, the privacy interest will be balanced against the public interest in disclosure. If the privacy interest is not '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., S.J. 689, 690 (1988); H. Conf. Comm. Rep. No. 112-88, 1988 Reg. Sess., Haw. H.J. 817, 818 (1988).

In section 92F-14(b), Hawaii Revised Statutes, the Legislature provided examples of information in which an individual possesses a significant privacy interest. None of the examples listed in section 92F-14(b), Hawaii Revised Statutes, provides that unpaid agency consultants have a significant privacy interest in their identities as such. While section 92F-14(b), Hawaii Revised Statutes, does not purport to be an exhaustive list, we do not believe that individuals who assist government agency decisionmaking have a "significant" privacy interest in this fact. Thus, in our opinion, the disclosure of the names of the consultants would not constitute a "clearly unwarranted invasion of personal privacy" under section 92F-13(1), Hawaii Revised Statutes.

Further, we do not believe that DHRD consultants who are government employees have a significant privacy interest in their qualifications. Under section 92F-12(a)(14), Hawaii Revised Statutes, information about government employees, including their "education and training background" and their "previous work experience" are specifically made public.[2] See OIP Op. Ltr. No. 94-9 (May 16, 1994) (previous work experience, including nongovernmental employment, of agency employees and officers is public under UIPA).

As for DHRD consultants who are not government employees, we believe that under section 92F-14(b)(5), Hawaii Revised Statutes, these DHRD consultants also do not have a significant privacy interest in their qualifications. Section 92F-14(b)(5), Hawaii Revised Statutes, provides that individuals have a significant privacy interest in "[i]nformation relating to an individual's nongovernmental employment history except as necessary to demonstrate compliance with requirements for a particular government position." [Emphasis added]. Given the factual situation, we believe that the disclosure of the nongovernmental employment history of DHRD consultants is necessary in order to

[2]The legislative history of the UIPA specifically states that the exceptions for "personal privacy and for frustration of legitimate government purpose" are inapplicable to the list of records made public in section 92F-12(a), Hawaii Revised Statutes. 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. 817, 818 (1988).

demonstrate that they are qualified to provide DHRD with information upon which DHRD bases its decisions.

Further, we note that under section 92F-12(a)(10), Hawaii Revised Statutes, each agency must, upon request, disclose information about contract hires and consultants employed by the agency, including "the contract itself, the amount of compensation, the duration of the contract, and the objectives of the contract." Haw. Rev. Stat. ə 92F-12(a)(10) (Supp. 1992). We believe that this section was intended to apply to paid agency consultants[3] and we realize that DHRD consultants do not receive compensation for their services and are not under a contract with DHRD. However, we believe that the affirmative disclosure requirement for information concerning contract hires and consultants indicates that there is substantial public interest in the disclosure of information concerning persons who provide professional services to an agency or who assist the agency in performing its functions. This public interest is no less substantial merely because DHRD consultants are not under any formal contractual relationship and do not receive any compensation for their services.

In our opinion, there is a strong public interest in the disclosure of information revealing the professional qualifications of individuals who provide DHRD with technical assistance and who, as volunteers, assist DHRD in the performance of its duties. Although the non-governmental consultants may have a privacy interest in their professional qualifications, we do not believe that this is a significant privacy interest because this information "demonstrate[s] compliance with requirements for a particular government position." Further, we believe that this privacy interest is outweighed by the strong public interest in disclosure, and the disclosure of this information would not constitute a "clearly unwarranted invasion of personal privacy" under section 92F-13(1), Hawaii Revised Statutes.

Next, we turn to examine the UIPA's "frustration of a legitimate government function" exception.

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[3]See Vol. I, Report of the Governor's Committee on Public Records and Privacy 110, 116 (1987), which played a significant role in the Legislature's inclusion of section 92F-12(a)(10), Hawaii Revised Statutes.

## 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." The UIPA's legislative history provides examples of information which must be confidential in order to avoid the frustration of a legitimate government function. We have reviewed this list, and we find that none of these examples applies to protect the names and qualifications of the consultants. See S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S. J. 1093, 1095 (1988). Further, because the UIPA exceptions should be narrowly construed with all doubts resolved in favor of disclosure, we decline to extend the UIPA's "frustration of a legitimate government function" exception in the absence of compelling public policy reasons to do so. See OIP Op. Ltr. No. 93-5 at 13-14 (June 7, 1993).

In previous OIP advisory opinions, we found that certain inter-agency and intra-agency memoranda may be protected under the UIPA's "frustration of a legitimate government function" exception. Specifically, we found that the common law "deliberative process privilege" protects records containing the opinions, evaluations, and recommendations of agency employees and that are used by agency supervisors for decisionmaking purposes.[4]

In order to qualify for protection under the "deliberative process privilege," the information must be both "deliberative" and "predecisional." To be "deliberative," the government record must reflect the "give and take" of the agency's consultative process. See OIP Op. Ltr. No. 91-24 at 7 (Nov. 26, 1991). To be "predecisional," a government record must be "received by the decisionmaker 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).

In previous OIP advisory opinions, the OIP has described the

[4]See OIP Op. Ltr. No. 92-27 (Dec. 30, 1992); OIP Op. Ltr. No. 91-24 (Nov. 26, 1991); OIP Op. Ltr. No. 91-16 (Sept. 19, 1991); OIP Op. Ltr. No. 90-8 (Feb. 12, 1990).

various policy reasons that underlie the "deliberative process privilege." In OIP Opinion Letter No. 90-8 (Feb. 12, 1990), this office 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." OIP Op. Ltr. No. 90-8 at 5. Additionally, federal courts interpreting the "deliberative process privilege" have found that if "agencies [are] forced to 'operate in a fishbowl', the frank exchange of ideas and opinions would cease and the quality of administrative decisions would consequently suffer." Dudman Communications v. Dep't of the Air Force, 815 F.2d 1565, 1567 (D.C. Cir. 1987), quoting S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965).

The requested information in this case consists of the names and qualifications of the consultants, and not the information that they have provided to DHRD, or any other communications that they may have had with DHRD. Consequently, we do not believe that the "deliberative process privilege" applies to the requested information. However, even if we apply the elements of the "deliberative process privilege" to the records containing the names and qualifications of the consultants, this privilege still does not protect the requested information because the names and qualifications of the consultants are neither predecisional or deliberative.

DHRD believes that its policy of nondisclosure protects the consultants from applicants who believe, incorrectly, that the information provided by the consultants to DHRD resulted in the rejection of their application. However, the speculative concern that an applicant may harass a consultant is not a legitimate reason for withholding the identity and qualifications of the consultant under section 92F-13(3), Hawaii Revised Statutes.

In OIP Opinion Letter No. 89-9 (Nov. 20, 1989), we addressed the similar issue of whether the identities of law school admissions committee members must be publicly available under the UIPA. We concluded that the identities of the law school admissions committee members should be disclosed because (1) the identities of the committee members who are law school students are made public through elections held by the student body, and (2) disclosure would not chill the candor among the committee members, nor would it result in the premature disclosure of the recommended outcome of the deliberative process.

In another advisory opinion, the OIP examined whether the identities of University of Hawaii employees serving on a search committee of the college should be disclosed under the UIPA. In OIP Opinion Letter No. 90-16 (April 24, 1990), we determined that such disclosure "may subject committee members to occasional unwanted overtures on behalf of an applicant, but this possible effect should not hamper any discussion and deliberation among committee members about the applicants." OIP Op. Ltr. No. 90-16 at 5. Consequently, we found that disclosure of the search committee members' identities would not result in the "frustration of a legitimate government function" under the UIPA.

We believe that the issue concerning the disclosure of the consultants' identities and qualifications is analogous to the facts presented in OIP Opinion Letter No. 89-9 and OIP Opinion Letter No. 90-16. As with those opinion letters, in this case, we are concerned with the disclosure of the identities and qualifications of the consultants rather than the disclosure of the actual information that they provide to DHRD in the application review process. We believe that disclosure of only the identities and qualifications of the consultants will not prevent these persons from communicating candidly with DHRD and, thus, DHRD cannot withhold this information from disclosure under the UIPA's "frustration of a legitimate government function" exception.

We also note that, unlike the committee members in OIP Opinion Letter No. 89-9 and OIP Opinion Letter No. 90-16, the consultants do not make final decisions regarding the acceptance or hiring of the applicant. Rather, the consultants merely provide technical information to DHRD employees and, thus, do not play any role in the actual decisionmaking. However, even if the consultants did participate in the decisionmaking process, their names and qualifications would still be publicly accessible because none of the UIPA exceptions to required agency disclosure operate to protect this information.

## CONCLUSION

We conclude that the UIPA's exceptions for a clearly unwarranted invasion of personal privacy exception and for information which, if disclosed, would result in a frustration of a legitimate government function do not permit DHRD to withhold the names and qualifications of the consultants it uses in reviewing applications for State civil service positions. In

addition, none of the other UIPA exceptions in section 92F-13, Hawaii Revised Statutes, apply to the facts present here. Further, based upon the analogy between the contract consultant information required to be made public under section 92F-12(a)(10), Hawaii Revised Statutes, and also because the names and qualifications of State employees are considered public information under section 92F-12(a)(14), Hawaii Revised Statutes, we believe that the names and qualifications of DHRD consultants, paid or unpaid, both government employees as well as private sector employees, must be publicly disclosed, upon request, under the UIPA.

Very truly yours,

Stella M. Lee
Staff Attorney

APPROVED:

Kathleen A. Callaghan
Director

SML:sc
c: Honorable James Takushi
Department of Human Resources Development