July 16, 1996

Honorable Jon Yoshimura
Chair
Committee on Policy
City and County of Honolulu
Honolulu Hale, 2nd Floor
530 S. King Street
Honolulu, Hawaii 96813

Dear Chairperson Yoshimura:

Re: Public Access to City Ethics Commission Advisory Opinions

This is in reply to your letter to the Office of Information Practices ("OIP") dated July 5, 1996, requesting an advisory opinion concerning the above-referenced matter. In particular, you requested the OIP to advise you whether, under the State's public records law, the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), the City and County of Honolulu ("City") may implement a charter or ordinance provision requiring the public disclosure of certain information in opinions issued by the Ethics Commission of the City and County of Honolulu ("Commission").

ISSUES PRESENTED

I. Whether, under the UIPA, the City may implement a charter or ordinance provision requiring that the identities of the persons who are subjects of, or other persons referred to in, the Commission's opinions ("Subjects") be made available for public inspection or copying.

II. Whether, under the UIPA, the City may implement a charter or ordinance provision requiring that the identities of individuals who requested opinions from the Commission ("Requesters") be available for public inspection or copying.

BRIEF ANSWER

I. No. The OIP finds that, in most cases, the identities

of the Subjects would fall within the scope of the UIPA's exception to required disclosure that is based upon "a clearly unwarranted invasion of personal privacy." Haw. Rev. Stat. § 92F-13(1) (1993). Thus, the UIPA would generally make these persons' identities confidential.

Under section 92F-12(b)(2), Hawaii Revised Statutes, an agency may publicly disclose a government record "pursuant to federal law or a statute of this State" even when the UIPA exception based upon a clearly unwarranted invasion of personal privacy would otherwise apply to the record. A charter or ordinance provision requiring disclosure does not constitute a "statute of this State" for purposes of this UIPA provision.

II. No. The OIP finds that, in most cases, the identities of the Requesters would fall within the scope of the UIPA's exception to required disclosure that is based upon "a clearly unwarranted invasion of personal privacy, as well as the UIPA exception based upon "the frustration of a legitimate government function." Haw. Rev. Stat. § 92F-13(1), (3) (1993). Thus, the UIPA would generally make these persons' identities confidential.

Under section 92F-12(b)(2), Hawaii Revised Statutes, an agency may publicly disclose a government record "pursuant to federal law or a statute of this State" even when either the UIPA exception based upon a clearly unwarranted invasion of personal privacy or the exception for frustration of a legitimate government function would otherwise apply to the record. A charter or ordinance provision requiring disclosure does not constitute a "statute of this State" for purposes of this UIPA provision.

FACTS

The Commission issues advisory opinions regarding possible conflicts of interest and unethical conduct in violation of the standards of conduct established by the Revised Charter of the City and County of Honolulu ("Charter") and the Revised Ordinances of the City and County of Honolulu ("ordinance"). Rev. Ordinances of the City and County of Honolulu 1990 § 3-6.5 (1995 Ed.). After the Commission issues an opinion, the Commission notifies the Subject's appointing authority of its decision and, where the Commission has found a violation of the City's standards of conduct, recommends appropriate disciplinary action against the officer or employee who is in violation. Rev. Charter of the City and County of Honolulu, art. XI, § 11-107 (rev. ed. 1984); Rev. Ordinances of the City and County of Honolulu 1990 § 3-6.5,(1995 Ed.). Upon the Commission's recommendation, as discipline, the appointing

authority may then reprimand, put on probation, demote, suspend, or discharge the employee found to have violated the City's standards of conduct. Rev. Charter of the City and County of Honolulu, art. XI, § 11-106 (rev. ed. 1984).

With regard to the disclosure of the Commission's opinions, the Charter provides that "the commission shall publish its advisory opinions with such deletions as may be necessary to prevent disclosure of the identity of the persons involved." Rev. Charter of the City and County of Honolulu, art. XI, § 11-107 (rev. ed. 1984). Ordinance § 3-6.5(d) similarly provides that the Commission shall publish its advisory opinions in a form and with such deletions as may be necessary to prevent the disclosure of the identity of the persons involved.

On July 2, 1996, the Honolulu City Council's Committee on Policy ("Committee") considered Resolution 96-137 ("Resolution") that proposed an amendment to the Charter requiring the Commission to "publish its advisory opinions, including the disclosure of the identities of persons involved in the advisory opinions, in accordance with terms and conditions established by ordinance." In effect, the Resolution will replace the current restrictive Charter provision regarding the disclosure of identities of persons involved in the Commission's opinions with an express Charter requirement that this information be disclosed in accordance with any applicable ordinance. The Council will hold a public hearing on this Resolution and consider it for passage on Second Reading at its meeting on July 17, 1996. Consequently, the Committee requested the OIP's opinion regarding the operation of the UIPA in relation to the Resolution under consideration.

DISCUSSION

I. SUBJECTS' IDENTITIES IN COMMISSION OPINIONS

A. Disclosure under the UIPA

An advisory opinion issued by the Commission is a "government record" as this term is defined by the UIPA. Haw. Rev. Stat. § 92F-3 (Supp. 1993) (term "government record" means "information maintained by an agency" in any physical form). Under the UIPA, an agency must make government records available for public inspection and copying upon request by any person, unless the records are protected from disclosure by one of the exceptions in section 92F-13, Hawaii Revised Statutes. Haw. Rev. Stat. § 92F-11(b) (1993).

1. Does a Government Employee Have a Personal Privacy Interest in a Commission Opinion? Under section 92F-13(1), Hawaii Revised Statutes, an agency is not required to disclose government records "which if disclosed, would constitute a clearly unwarranted invasion of personal privacy." Disclosure of a record does not constitute a clearly unwarranted invasion of personal privacy if the public interest in disclosure outweighs the privacy interest of the individual.[1] Haw. Rev. Stat. § 92F-14(a) (1993). If an individual's privacy interest in the information in question is not "significant," "a scintilla of public interest in disclosure will preclude a finding of a clearly unwarranted invasion of personal privacy." H. Conf. Comm. Rep. No. 112-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 817, 818 (1988); S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 690 (1988). Yet, "[o]nce a significant privacy interest is found, the privacy interest will be balanced against the public interest in disclosure." Id.

Section 92F-14(b), Hawaii Revised Statutes, gives examples of records in which the UIPA expressly recognizes that an individual has a significant privacy interest. In particular, a government employee is deemed to have a significant privacy interest in "information in an agency's personnel file," except for general employment information listed in section 92F-12(a)(14), Hawaii Revised Statutes, and except for certain information related to employment misconduct when the misconduct results in the employee's suspension or discharge."[2]

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[1]The UIPA recognizes only the privacy interest of an "individual," which term is defined by the UIPA as "a natural person." Haw. Rev. Stat. § 92F-3 (1993). Thus, the UIPA's "clearly unwarranted invasion of personal privacy" exception would not apply to a Subject's identity in a Commission's opinion where the Subject is not an individual.

[2]Section 92F-14(b)(4), Hawaii Revised Statutes, states:

> (b) The following are examples of information in which the individual has a significant privacy interest:
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> . . . .
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> Information in an agency's personnel file, or applications, nominations, recommendations, or proposals for public employment or appointment to a government position, except: (A) Information disclosed under section 92F-12(a)(14); and Haw. Rev. Stat. § 92F-14(b)(4) (Supp. 1995).

> The following information related to employment misconduct that results in an employee's suspension or discharge: The name of the employee; The nature of the employment-related misconduct; The agency's summary of

The OIP notes that where a Commission's opinion concludes that a conflict of interest or unethical conduct occurred, the Commission may recommend, and the Subject's employing agency may impose, appropriate discipline, including suspension or discharge, as would be imposed for any other type of employment-related misconduct. See Rev. Charter of the City and County of Honolulu, art. XI, § 11-106 (rev. ed. 1984). Although the issue addressed in this opinion specifically concerns the Commission's opinions and not "information in an agency's personnel file," the OIP believes that a government employee has as much of a significant privacy interest in a Commission's opinion as in a record contained in the agency's personnel file about the employee's alleged employment-related misconduct because both records reveal the same type of personal information about the employee.

Thus, the UIPA recognizes that an agency employee has a significant privacy interest in government records which contain information relating to the employee's alleged misconduct, including the employee's identity, except when the employee was suspended or discharged as part of the discipline for the misconduct under section 92F-14(b)(4), Hawaii Revised Statutes. In 1993, the Legislature clarified this provision about the disclosure of employee misconduct and explained:

> Your Committee notes that this measure appropriately distinguishes between minor and more serious misconduct by focusing on the disciplinary consequences, and protects the employee from the disclosure of information while formal grievance

(..continued)

> the allegations of misconduct; Findings of fact and conclusions of law; and The disciplinary action taken by the agency; when the following has occurred: the highest non-judicial grievance adjustment procedure timely invoked by the employee or the employee's representative has concluded; a written decision sustaining the suspension or discharge has been issued after this procedure; and thirty calendar days have elapsed following the issuance of the decision; provided that this subparagraph shall not apply to a county policy department officer except in a case which results in the discharge of the officer.
>
> Haw. Rev. Stat. § 92F-14(b)(4) (Supp. 1995).

> procedures are still in progress. Yet the bill also serves the public at large by refusing to provide further protection from disclosure of misconduct when the employee has exhausted non-judicial grievance procedures, and has been suspended or discharged.

Conf. Comm. Rep. No. 61, 17th Leg., 1993 Reg. Sess., Haw. S.J. 764, Haw. H.J. 900 (1993).

As the legislative history behind section 92F-14(b)(4), Hawaii Revised Statutes, explains, it is appropriate to gauge an employee's privacy interest based upon the distinction between minor and more serious misconduct as reflected in the discipline imposed. Thus, the OIP concludes that a Subject has a significant privacy interest in the Commission's opinion that reveals the Subject's identity, except when the employee was suspended or discharged as discipline imposed by the employing agency as a result of the Commission's conclusion that the employee violated the City's standards of conduct.

2. Is There a Public Interest Which Outweighs the Individual's Privacy Interest? In applying the UIPA's balancing test, one must show a public interest in the disclosure of the Subject's identity in the Commission's opinion that outweighs the individual's significant privacy interest. Otherwise, disclosure of the ethics opinion would constitute a clearly unwarranted invasion of personal privacy. In previous opinions, the OIP has opined that the public interest to be considered is the public interest in the disclosure of "official information that sheds light on an agency's performance of its statutory purpose" and in "information that sheds light upon the conduct of government officials." See, e.g., OIP Op. Ltr. No. 92-17 (Sept. 2, 1992); OIP Op. Ltr. No. 93-1 (April 1993).

Generally, a determination of whether the public interest in disclosure of a government record outweighs an individual's privacy interest must be made on a case-by-case basis. In comparison, however, we note that, as for identities of persons involved in the opinions issued by the State Ethics Commission, the Legislature apparently has already performed the balancing test and has determined that State employees' significant privacy interest in this information generally outweighs the public interest in the disclosure of this information. Specifically, in the State Ethics Code, chapter 84, Hawaii Revised Statutes, the Legislature directed the State Ethics Commission to publish yearly summaries of its advisory opinions

and to make sufficient deletions in the summaries to prevent disclosing the identity of persons involved in the decisions or opinions. Haw. Rev. Stat. § 84-31(f) (1993).

While section 84-31(f), Hawaii Revised Statutes, does not directly apply to the facts presented by this opinion, the OIP finds it to be indicative of a legislative recognition that, in the general case, an individual's significant privacy interest outweighs the public interest in the disclosure of the individual's identity as a subject of an opinion regarding a possible ethical violation in government employment. Hence, the OIP believes that, unless particular circumstances or set of facts bolster the public interest in the disclosure of Subjects' identities, this information would be protected from required public disclosure under the UIPA's "clearly unwarranted invasion of personal privacy" exception.

B. Effect of Proposed Charter or Ordinance Provision

The UIPA states:

> (b) Any provision to the contrary notwithstanding, each agency shall also disclose:
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> . . . .
>
> (2) Government records which, pursuant to federal law or a statute of this State, are expressly authorized to be disclosed to the person requesting access; . . . .

Haw. Rev. Stat. § 92F-12(b)(2) (1993). As the UIPA's legislative history explains, section 92F-12 sets forth "a list of records (or categories of records) which the Legislature declares, as a matter of public policy, shall be disclosed." Specifically, [a]s to these records listed in this section, "the exceptions such as for personal privacy and for frustration of legitimate government purpose are inapplicable." 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).

Section 92F-12(b)(2), Hawaii Revised Statutes, specifically recognizes only "federal law or a statute of this State" as legal authorities that would supersede any UIPA provision to the contrary. State laws have statewide application and are adopted by the State Legislature. In

contrast, county charter and ordinance provisions do not have statewide application.[3]

Additionally, the UIPA was intended by the Legislature to establish uniform information practices throughout the State and the counties. See, e.g., S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689 (1988); H. Conf. Comm. Rep. No. 112-88, Haw. H.J. 817 (1988) ("the current confusion and conflict which surround existing records laws are plainly unacceptable"). Permitting county governments to create exemptions through the enactment of county charter or ordinance provisions would: (1) permit county governments to avoid the UIPA's freedom of information provisions, and (2) create a substantial possibility that the access policies of the various counties would become a patch-work quilt of conflicting provisions such that the same government records might be accessible in one county and inaccessible in another.

Thus, the OIP believes that extending section 92F-12(b)(2), Hawaii Revised Statutes, to recognize individual county charter or ordinance provisions would be contrary to the legislative intent underlying the UIPA to create uniform information practices.[4] See also OIP Op. Ltr. No. 93-6 (June 22, 1993); OIP Op. Ltr. No. 95-14 (May 8, 1995) (ordinance is not State law for purposes of UIPA exception for records protected from disclosure pursuant to state or federal law). Therefore, the UIPA would not recognize a City charter or ordinance provision requiring the disclosure of the Subjects' identities which, as discussed, are generally confidential under the UIPA.

II. REQUESTERS' IDENTITIES IN COMMISSION OPINIONS

A. Disclosure under the UIPA

By submitting requests for Commission opinions, Requesters inform the Commission about possible conflicts of

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[3] See, e.g., Newspapers, Inc. v. Metropolitan Police Dep't, 546 A.2d 990 (D.C. Cir. 1988) (ordinance adopted by District of Columbia Board of Supervisors is not a "statute" for purposes of Freedom of Information Act exemption that shields records specifically exempted from disclosure by statute).

[4] For similar reasons, the OIP has previously opined that administrative rules adopted by an agency, despite having the force and effect of law, are not a "state law" for purposes of section 92F-13(4), Hawaii Revised Statutes. See, OIP Op. Ltr. No. 91-15 at 9 (Sept. 10, 1991); OIP Op. Ltr. No. 92-4 (June 10, 1992); and OIP Op. Ltr. No. 94-6 (April 28, 1994).

interest and unethical conduct. The request for an opinion begins the process by which the Commission investigates and determines whether a violation of the standards of conduct occurred and, if so, whether disciplinary action should be recommended. Thus, in the OIP's opinion, the Requesters serve a very similar role to that of complainants who bring alleged violations to the attention of the appropriate agencies having the power to investigate and require correction of the violations. See, e.g., OIP Op. Ltr. No. 89-12 (Dec. 12, 1989) (complainants of alleged zoning violations).

1. Requester's Privacy Interests. The OIP has previously opined that individual complainants have a significant privacy interest in their identities. See, e.g., OIP Op. Ltr. No. 89-12 (Dec. 12, 1989) (complainants of alleged zoning violations); OIP Op. Ltr. No. 90-12 (Feb. 26, 1990) (individuals who file complaints of sexual harassment). The OIP found that complainants have a significant privacy interest in the disclosure of their identity because disclosure makes the complainants identifiable targets for retribution and harassment. OIP Op. Ltr. No. 89-12 (Dec. 12, 1989). Further, the OIP found that the disclosure of the complainants' identities sheds little, if any, light upon the decisions or actions of the agency. In the absence of a countervailing public interest, public disclosure of a complainant's identity would constitute a clearly unwarranted invasion of personal privacy. Id.

Similarly, in this instance, the OIP finds that Requesters also have a significant privacy in their identities. The Commission has informed the OIP of its concerns regarding the disclosure of Requesters' identities and emphasized the Requesters' vulnerability to retribution or harassment if their identities were publicly disclosed. A copy of the letter from the Commission's staff attorney is attached as Exhibit "A" as reference.

As for the public interest in the Requesters' identities, the OIP believes that the disclosure of this information reveals no information about the policies, actions, or decisions of the Commission or any other agency. Rather, information that does shed light upon the Commission's activities and decisions is already made public in the body of the Commission's opinions in which the identities of the Requesters and the Subjects are not revealed. Thus, the OIP finds that the public's interest in the disclosure of this information in the Commission's

opinions does not outweigh the Requesters' significant privacy interest in their identities. Consequently, the OIP concludes that Requesters' identities are confidential under the UIPA's "clearly unwarranted invasion of personal privacy" exception.

2. Confidentiality Necessary for a Legitimate Government Function. The OIP further concludes that Requesters' identities are also not required to be disclosed under the UIPA exception for "[g]overnment 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. § 92F-13(3) (1993). Previously, the OIP has recognized that an agency often relies to a large extent on the complaints of private citizens to notify the agency of possible violations. A policy of keeping complainants' identities confidential encourages this flow of information that is necessary for agencies' enforcement of laws. OIP Op. Ltr. No. 89-12 (Dec. 12, 1989).

Similarly, the Commission relies upon Requesters to inform it of possible conflicts of interest and unethical conduct. Requests for opinions often come from City employees who wish to be informed of whether actions that they are considering would violate the City's standards of conduct. Other requests for opinions concern actions by City employees that have occurred and that the Requester wishes to inquire as to whether the actions constituted a conflict of interest or unethical conduct. The disclosure of Requesters' identities would discourage Requesters from requesting the opinions and providing information so that the Commission can provide guidance regarding the prevention or correction of the alleged violation of the City's standards of conduct. The letter to the OIP from the Commission's staff attorney, attached as Exhibit "A", describes how the disclosure of the Requesters' identities would interfere with the Commission's functions set forth in the City's Charter and ordinances.

B. Effect of Proposed Charter or Ordinance Provision

Even when the UIPA's exceptions to disclosure based upon a clearly unwarranted invasion of personal privacy or frustration of a legitimate government function would otherwise apply to exempt the record from public disclosure, an agency must publicly disclose a government record "pursuant to federal law or a statute of this State" under 92F-12(b)(2), Hawaii Revised Statutes. See 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). However, as previously discussed in this Opinion, a charter or ordinance provision requiring disclosure does not constitute a "statute of this State" for purposes of this UIPA provision.

CONCLUSION

The OIP finds that, in most cases, the identities of the Subjects and Requesters in Commission's opinions would fall within the scope of the UIPA's exception to disclosure based upon "a clearly unwarranted invasion of personal privacy." Haw. Rev. Stat. § 92F-13(1) (1993). In addition, the UIPA's exception to disclosure based upon "the frustration of a legitimate government function" applies to the Requesters' identities as well. Thus, the UIPA would generally make these persons' identities confidential.

Under section 92F-12(b)(2), Hawaii Revised Statutes, an agency must publicly disclose a government record "pursuant to federal law or a statute of this State" even if the UIPA exceptions to required disclosure, based upon a clearly unwarranted invasion of personal privacy or the frustration of a legitimate government function, would otherwise apply to the record. As discussed herein, a charter or ordinance provision requiring disclosure does not constitute a "statute of this State" for purposes of this UIPA provision and would not overcome the exceptions to disclosure discussed in this Opinion.

Very truly yours,

Lorna J. Loo
Staff Attorney

APPROVED:

Moya T. Davenport Gray
Director

MTDG/LJL:dtl
c: Carolyn Stapleton, Esq.
Daniel Mollway, Esq.