

June 23, 1997

Marilyn A. Matsunaga  
Administrator  
State Health Planning and Development Agency  
Department of Health  
P.O. Box 3378  
Honolulu, Hawaii 96801

Attention: Mr. John McCarthy

Dear Ms. Matsunaga:

Re: Disclosure of Audio Cassette Tape Recordings of Public Meetings

This is in response to your January 17, 1997 request to the Office of Information Practices ("OIP") for an advisory opinion regarding disclosure of audio cassette tape recordings held by the Department of Health ("DOH").

### **ISSUE PRESENTED**

Whether, under the Uniform Information Practices Act (Modified) , chapter 92F, Hawaii Revised Statutes ("UIPA"), as amended, the DOH must disclose audio cassette tape recordings of meetings open to the public.

### **BRIEF ANSWER**

Yes. The DOH makes audio recordings of its public meetings and maintains the recordings. The DOH's recordings contain information in some physical form and, therefore, they are government records which are subject to the UIPA. Because no exception to the general rule of disclosure applies to these records, the DOH must allow the public to inspect and copy the recordings. The DOH must provide another audio cassette copy rather than a written transcript of the recordings upon receiving such a request. Additionally, as the UIPA does not apply to records which are not maintained by a government agency, the agency does not have a duty to provide copies of a record which has not yet been created. Therefore, the DOH may require that a request to inspect or copy be made for each recording, and need not respond to a running request.

### **FACTS**

You and Mr. John McCarthy, a DOH staff member, have advised the OIP that the DOH makes a recording of certain of its public meetings on audio cassette tapes ("Recordings"). Because the meetings are not closed to the public, the DOH considers the meetings to be public and, therefore, it also considers the Recordings to be a public government record.

The DOH has requested the OIP to advise whether, for the purposes of the UIPA, (1) it must permit the public to inspect and copy the Recordings, (2) the DOH must provide written transcripts of the Recordings to the public, and (3) whether the DOH may require a specific request for the Recording of each public meeting.

## DISCUSSION

### **I. INTRODUCTION**

The advice provided in this opinion letter is limited to the DOH's disclosure responsibilities under chapter 92F, Hawaii Revised Statutes. You may wish to consult with the Department of the Attorney General as to the DOH's other statutory duties and responsibilities for public meetings.

The UIPA requires each agency to make government records available for public inspection and copying unless those records are protected from disclosure by one of the exceptions in section 92F-13, Hawaii Revised Statutes. See Haw. Rev. Stat. §92F-11(b) (1993). The term "government records" means "information maintained by an agency in written, auditory, visual, electronic or other physical form." Haw. Rev. Stat. § 92F-3 (1993); Kaapu v. Aloha Tower Dev. Corp., 74 Haw. 365, 376 n.10 (1993). See also OIP Op. Ltr. No. 93-17 at 8 (Oct. 8, 1993) ("maintain" is defined to sweep as broadly as possible and means "to hold, possess, preserve, retain, store, or administratively control").

### **II. DOH RECORDINGS ARE GOVERNMENT RECORDS SUBJECT TO THE UIPA**

Audio tape recordings, maintained by a government agency, of government agency meetings are government records subject to the UIPA. See OIP Op. Ltr. No. 92-13 at 3 (Aug. 13, 1992) (audio tape recording of the meeting of the State Commission on Memorials for Veterans of the Korean and Vietnam Conflicts is a government record subject to the UIPA). The Recordings made by

the DOH are held by the DOH, therefore, the OIP concludes that the Recordings are government records for purposes of the UIPA because they contain information “maintained” by an agency in some physical form. Id. at 4.

### III. RECORDINGS OF PUBLIC MEETINGS MUST BE MADE PUBLIC

In addition to the general rule that government records must be disclosed unless an exception applies, the Legislature enumerated a list of specific records or information therein which must be made available for public inspection despite any contrary law. Haw. Rev. Stat. § 92F-12(a) (Supp. 1996).

Under section 92F-12(a)(16), Hawaii Revised Statutes, information found in or compiled from a transcript, minutes, report, or summary of a proceeding which is open to the public must be made available for public inspection and duplication during the agency’s regular business hours. Haw. Rev. Stat. § 92F-12(a)(16) (Supp. 1996). The UIPA does not indicate whether the term “report” as used in section 92F-12(a)(16), Hawaii Revised Statutes, encompasses audio cassette tape recordings of a public meeting. Section 1-14, Hawaii Revised Statutes, provides that “words of a law are generally to be understood in their most known and usual signification, without attending so much to the literal and strictly grammatical construction of the words as to their general or popular use of meaning.” Haw. Rev. Stat. § 1-14 (1993).

The term “report” is defined in Webster’s Ninth New Collegiate Dictionary, as, among other things, a “formal record of the proceedings of a meeting or session.” Webster’s Ninth New Collegiate Dictionary 984 (1988). The OIP is of the opinion that, because the DOH’s Recordings are a verbatim record of the public meetings, they are themselves reports of a proceeding open to the public under section 92F-12(a)(16), Hawaii Revised Statutes. Furthermore, the OIP has opined that, under section 92F-12(a)(16), Hawaii Revised Statutes, a tape recording of an agency’s public meeting should not be

treated differently from a “transcript” of such a meeting. See OIP Op. Ltr. No. 92-13 at 4 (Aug. 13, 1992) (the Legislature did not intend section 92F-12(a)(16), Hawaii Revised Statutes, to only apply to written or paper records).

In the facts presented to the OIP, the DOH considers the record to be public. Furthermore, while there are five exceptions to disclosure of government records under section 92F-13, Hawaii Revised Statutes,<sup>1</sup> the OIP’s review of the five exceptions reveal no circumstances where they would apply to the facts herein. Therefore, further consideration of the exceptions is unwarranted and the Recordings of the public meetings must be made available for public inspection and copying under section 92F-12(a)(16), Hawaii Revised Statutes. See also OIP Op. Ltr. No. 92-13 at 4 (Aug. 13, 1992) (audio tape recording is a public record under section 92F-12(a)(16), Hawaii Revised Statutes).

#### **IV. THE DOH’S RESPONSIBILITIES UNDER THE UIPA**

##### **A. No Duty to Create Records**

Government agencies have affirmative disclosure responsibilities as set forth in section 92F-11, Hawaii Revised Statutes. Government agencies must “make government records available for inspection and copying during regular business hours,” (Haw. Rev. Stat. § 92F-11(b) (1993)), and “shall assure reasonable access to facilities for duplicating records and for making memoranda or abstracts,” (Haw. Rev. Stat. § 92F-11(d) (1993)). However, unless the agency can readily retrieve the information in the form in which it is requested, the agency is not required to compile or summarize information found in its records. Haw. Rev. Stat. § 92F-11(c) (1993).

Section 92F-11(c), Hawaii Revised Statutes, was reviewed in OIP’s Opinion Letter No. 90-35 (Dec. 17, 1990). The OIP opined that:

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<sup>1</sup>These exceptions are provided in section 92F-13, Hawaii Revised Statutes, as follows: (1) government records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy; (2) government records that would not be discoverable in a judicial or quasi-judicial action to which the State or county is or may be a party; (3) government records which, by their nature, must be kept confidential to avoid the frustration of a legitimate government function; (4) government records that are protected from disclosure by State or federal law, including State or federal court order; and (5) inchoate and draft working papers of legislative committees.

Section 92F-11(c), Hawaii Revised Statutes, is identical to section 2-102(b) of the Uniform Information Practices Code ("Model Code") drafted by the National Conference of Commissioners on Uniform State Laws. The commentary [ . . . ] to this provision is instructive, and states that this provision "makes plain that the agency's duty is to provide access to existing records; the agency is not obligated to create 'new' records for the convenience of the requester." Id. . . . .

OIP Op. Ltr. No. 90-35 at 9 (Dec. 17, 1990) (emphasis added; footnote in original omitted). On the other hand, if an agency maintains the information in the form requested by a UIPA requester, the agency must generally provide a copy of that government record in the requested format unless doing so might significantly risk damage, loss, or destruction of the original government record. Id. at 13.

In the case at hand, when the DOH has not transcribed the Recordings, there is no duty under the UIPA to create a new record or compile information in a form different than the form the agency maintains. A requester cannot require the DOH to provide written transcripts of the Recordings when such do not exist at the time of a request.

**B. Standing (Perpetual) Requests for Records as They are Created**

Based upon court decisions applying the Federal Freedom of Information act, 5 U.S.C. § 552 (1988) ("FOIA"), the OIP has concluded in prior opinion letters that requesters cannot compel an agency to make automatic disclosures of government records as they are created. OIP Op. Ltr. No. 94-3, n.13 at 18 (March 23, 1994), (citing Mandel Grunfeld & Herrick v. U.S. Customs Service, 709 F.2d 41 (11<sup>th</sup> Cir. 1986), aff'd 486 U.S. 1 (1988)). Therefore, the DOH may require a requester to submit a new request for each Recording as it is created.

**CONCLUSION**

The DOH's Recordings are government records subject to the UIPA. Because the Recordings are a formal verbatim record of a public proceeding, section 92F-12(a)(16), Hawaii Revised Statutes, requires that the Recordings be

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available for public inspection and copying during the DOH's regular business hours. Furthermore, because the UIPA does not require an agency to create records, the DOH is not required to create written transcripts of the Recordings. Finally, a requester cannot compel the DOH to disclose the Recordings on a "standing" basis; the DOH may require a requester to submit a new request for each Recording.

Very truly yours,

Randall J. Port  
Staff Attorney

APPROVED:

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Director

RJP:sc  
*opltrs/matsunaga*