

March 30, 1990

MEMORANDUM

TO: The Honorable Yukio Takemoto
Director of Finance

ATTN: Stanley Fukuhara, Funds Custody Manager
Finance Division

FROM: Martha L. Young, Staff Attorney

SUBJECT: Accessibility of Unclaimed Property Valuation
Information

This is in response to your June 5, 1989, verbal request for an advisory opinion regarding whether under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), certain information contained in the "Annual Report of Property Presumed Abandoned" forms, filed with the Department of Budget & Finance ("B & F") by holders of such property, may be disclosed to the public.

ISSUE PRESENTED

Whether the amount or value of unclaimed property "presumed abandoned" under chapter 523A, Hawaii Revised Statutes, may be disclosed to the public under the UIPA.

BRIEF ANSWER

The amount or value of unclaimed property "presumed abandoned" under chapter 523A, Hawaii Revised Statutes, which is information maintained by B & F in accordance with chapter 523A, Hawaii Revised Statutes, is public information under the UIPA. Property owners who are individuals may initially have a significant privacy interest in the value or amount of the

The Honorable Yukio Takemoto
March 30, 1990
Page 2

unclaimed property. The public interest in (1) providing information necessary to comply with section 523A-35, Hawaii Revised Statutes, (2) disbursing the property to its rightful owners, and (3) opening agency action to public scrutiny outweighs any privacy interest in the amount or value of the property. In addition, disclosure of the information will not result in the frustration of any legitimate government function. Therefore, such information is public and should be made available for public inspection and copying.

FACTS

Each year holders of property "presumed abandoned and subject to custody as unclaimed property" under Hawaii's Uniform Unclaimed Property Act¹ must submit to the Director of Finance an "Annual Report of Property Presumed Abandoned," listing the owner's name, last known address, description of the property and its value, and the date of the last transaction regarding the property. Haw. Rev. Stat. § 523A-17 (1985 and Supp. 1989).

Chapter 523A, Hawaii Revised Statutes, applies to intangible property such as travelers checks and money orders, checks and drafts, bank deposits and funds in financial organizations, life insurance policy funds, utility deposits, refunds, stocks and interests in business associations, property held by agents and fiduciaries, property held by courts and public agencies, gift certificates and credit memos, and wages. Chapter 523A also applies to both tangible and intangible contents of safe deposit boxes or other safekeeping repositories. Such property is "presumed abandoned" if unclaimed by the owner for a specific period of time as prescribed by chapter 523A, which is usually five years, except for travelers checks (15 years); money orders, stocks, and interests in business associations (seven years); and utility deposits, refunds, property held by courts and public agencies, and wages (one year).

B & F is required to annually publish "Notices of Names of Persons Appearing to be Owners of Abandoned Property" containing the owner's name, last known address, a "statement that information concerning the property and the name and last known address of the holder may be obtained by any person possessing an interest in the property by addressing an inquiry to the

¹Haw. Rev. Stat. chapter 523A (1985 and Supp. 1989).

The Honorable Yukio Takemoto
March 30, 1990
Page 3

director," and a statement that if the property's owner is not identified within a certain time, the Director will take custody of the property. Haw. Rev. Stat. § 523A-18 (1985). The State then "assumes custody and responsibility for the safekeeping of the property,"² which is held in trust in perpetuity (valid claims will always be honored),³ as part of the State's general fund. The State thus has use of the funds until returned to their rightful owners.

The State has received the abandoned property of over 160,000 persons since 1974, with approximately 5,000 more names added each year. In this fashion, the State's general fund is being increased by approximately \$1-2 million per year. As of December 31, 1989, the total amount thus transferred to the State is \$15,846,464.78. The State attempts to locate the owners of the unclaimed property, and approximately ten percent of the funds are returned to their owners each year. As the property claims grow older, the owners are progressively harder to locate.

Section 523A-35 of Hawaii's Uniform Unclaimed Property Act provides as follows:

Agreement to locate reported property. No agreement entered into within two years after the report is filed under section 523A-17 shall be valid if any person thereby undertakes to locate property included in that report for a fee or other compensation. Thereafter, any agreement entered into for the recovery or for assistance in the recovery of such property shall be valid if the fee or other compensation under such agreement does not exceed twenty per cent of the value of the property claimed. Such an agreement shall be valid only if it is in writing, signed by the owner, and clearly sets forth the nature and value of the property and

²Haw. Rev. Stat. § 523A-20(a) (1985).

³"The Uniform Act is custodial in nature--that is to say, it does not result in the loss of the owner's property rights. The state takes custody and remains the custodian in perpetuity. Although the actual possibility of his presenting a claim in the distant future is not great, the owner retains his right of presenting his claim at any time, no matter how remote." Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings of the Annual Conference Meeting in its Seventy-Fifth Year at 279 (1966).

The Honorable Yukio Takemoto
March 30, 1990
Page 4

the value of the owner's share after the fee or compensation has been deducted. Nothing in this section shall be construed to prevent any owner from asserting, at any time, that any agreement to locate property is based upon excessive or unjust consideration.

Haw. Rev. Stat. § 523A-35 (Supp. 1989) (emphasis added).

An attorney representing an individual who proposes to enter into agreements pursuant to section 523A-35, Hawaii Revised Statutes, to assist persons in their recovery of unclaimed property, has requested that B & F disclose the value or amount of each person's unclaimed property included in the holders' annual reports to the Director. The stated basis for this request is that the information is needed to comply with the requirement of section 523A-35 that such agreements must clearly set forth the nature and value of the property. The individual has taken the position that B & F's refusal to provide the information has made it impossible for him to comply with the statute and thus, effectively limits his right to do business.

B & F does not disclose the amount or value of the unclaimed property to the general public, but it does provide this information to property owners or their agents, or anyone who produces a signed agreement with the property owner. B & F does not require that the agreement contain the property's value or amount. The individual requester asserts through his attorney that he should be entitled to this information before entering any agreement with a property owner in order to enter into valid agreements under the statute. This information would also assist a professional searcher or finder in determining which property owners to attempt to locate.

We note that although some of the property's "owners" may have lost track of their property through neglect or conscious abandonment, others have acquired interests in the property through their status as heirs, successors-in-interest, or assignees, and thus, have no knowledge of the property's existence, much less its value or amount.

DISCUSSION

The UIPA provides that "[a]ll government records are open to public inspection unless access is restricted or closed by law."

OIP Op. Ltr. No. 90-13

Haw. Rev. Stat. § 92F-11(a) (Supp. 1989). Section 92F-13 lists several exceptions to the general rule of disclosure, including the following:

§92F-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. § 92F-13 (Supp. 1989) (emphasis added).

Under the UIPA, "[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."⁴ Haw. Rev. Stat. § 92F-14(a) (Supp. 1989). Section 92F-14, Hawaii Revised Statutes, includes as an example of information in which the individual has a significant privacy interest, "[i]nformation describing an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or credit worthiness." Haw. Rev. Stat. § 92F-14 (b)(6) (Supp. 1989).

Some of the property presumed abandoned by chapter 523A describes the "finances," "income," "assets," and "bank balances" of individuals. In addition, some of the "financial history or activities" of individuals could also be learned by examining the information maintained by B & F pursuant to chapter 523A. The original property owners may have "abandoned" their property through conscious choice, negligence, mistake, or being deceased. A deceased person generally has no privacy interests,⁵ but

⁴Under the UIPA, only individuals, defined as "natural persons" in section 92F-3, Hawaii Revised Statutes, have protectable privacy interests.

⁵The privacy interests of deceased persons will be addressed in a future OIP opinion letter.

The Honorable Yukio Takemoto
March 30, 1990
Page 6

B & F's unclaimed property records do not indicate whether an original owner is deceased. Assuming then that neither the original owners nor those persons who have unknowingly acquired interests in the unclaimed property are aware of its existence, for whatever reason, we must next address whether an individual must be aware of a particular government record or the information contained therein to have a privacy interest in the information.

The basic concept of part III of the UIPA is that an individual has the right of access to his own personal record (except for information exempt under section 92F-22). Haw. Rev. Stat. § 92F-21 (Supp. 1989). Indeed, making "government accountable to individuals in the collection, use, and dissemination of information relating to them" is one of the UIPA's underlying purposes and policies. Haw. Rev. Stat. § 92F-2 (Supp. 1989). Nowhere in the UIPA's legislative history, or in that of the federal Privacy Act or Freedom of Information Act,⁶ could we find a requirement that individuals must be aware of, or have knowledge of, the existence of government information about themselves for a privacy right to exist in that information. In fact, the individual access rights granted in part III of the UIPA exist in large extent to counter "the concern about 'big brother,' that the creation of large data banks on citizens is a fundamental threat to our freedom." Vol. I Report of the Governor's Committee on Public Records and Privacy 65 (December 1987).

Thus, we conclude that it is not necessary for individuals to be aware of government records or of government information about themselves in order to have a privacy interest in such information. We must then also conclude that the privacy interest of owners who are individuals in the financial information maintained by B & F under chapter 523A is a "significant" privacy interest, pursuant to the UIPA. Haw. Rev. Stat. § 92F-14(b)(6) (Supp. 1989).

The next step in determining if the amount or value of the unclaimed property is public is to balance the privacy interest

⁶The legislative history of the UIPA suggests that federal "case law under the Freedom of Information Act should be consulted for additional guidance." S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1094 (1988).

The Honorable Yukio Takemoto
March 30, 1990
Page 7

against the public interest in disclosure, to determine if disclosure falls within the "clearly unwarranted invasion of personal privacy" exception. Haw. Rev. Stat § 92F-14(a) (Supp. 1989). "Once 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." Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 690 (1988); Conf. Comm. Rep. No. 112-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 817, 818 (1988). Thus, "any public interest in disclosure must be given due consideration." S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1094 (1988) (emphasis added).

In the present fact situation, disclosure of the amount or value of the property presumed abandoned would make it possible for professional searchers or finders to comply with section 523A-35 of the Unclaimed Property Act, which provides that an agreement to locate such property shall be valid only if it "clearly sets forth the nature and value of the property." Since many of those who have acquired interests in the property presumably are not even aware of its existence, they certainly would not be able to describe its value or amount. Therefore, for most professional searchers, the only practical means of compliance with the requirement of section 523A-35 is for B & F to provide the information. Although B & F's statistics do not reveal what percentage of the property is returned by the State's efforts versus the efforts of private search firms, it is clear that the firms do assist in returning some of the property to owners, heirs, and successors who otherwise would never receive it. Disclosure of the information would thus enable professional searchers to comply with section 523A-35, Hawaii Revised Statutes, and would result in the return or disbursement of more property to its rightful owners.

Another beneficial result of disclosure would be the opening up of agency activities to public scrutiny. In the recent Supreme Court decision of United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. ____, 109 S. Ct. 1468, 57 U.S.L.W. 4373, 103 L. Ed. 2d 774 (1989), the Court stated that opening up "agency action to the light of public scrutiny" is "the basic purpose of the Freedom of Information Act." Id. at 1481, citing Dep't of the Air Force v. Rose, 425 U.S. 352, 96

The Honorable Yukio Takemoto
March 30, 1990
Page 8

Ct. 1592, 48 L. Ed. 2d 11 (1976). The present fact situation involves the public purposes of returning property to citizens that they would otherwise most likely never receive and making public a process that should be open to public scrutiny.

In sum, the public interest in disclosure of the amount of unclaimed property entrusted to government consists of (1) providing information to professional searchers necessary to comply with section 523A-35, Hawaii Revised Statutes, (2) increasing the likelihood that the property owners will actually be located, and (3) opening government conduct up to public scrutiny. After weighing these public interests in disclosure against the privacy interest of property owners who are individuals, notwithstanding the "significant" nature assigned to such privacy interest by the UIPA, we find that, given these facts, the privacy interest is outweighed by the public interest in disclosure.

In addition, we could find nothing in the UIPA's legislative history concerning the exception for "frustration of a legitimate government function" to indicate that the disclosure of the amount or value of unclaimed property maintained by B & F would "frustrate" government's efforts to return the property to its rightful owners.

CONCLUSION

Individuals initially have a significant privacy interest in the value or amount of unclaimed property "presumed abandoned" under chapter 523A, Hawaii Revised Statutes. But the public interest in (1) providing the information necessary to comply with section 523A-35, Hawaii Revised Statutes, (2) returning the unclaimed property to its rightful owners, and (3) opening up agency activities to public scrutiny cause the balance to tip in favor of disclosure. In addition, disclosure of the information will not result in the frustration of any legitimate government function. It will in fact help carry out the UIPA's policy and purposes. The amount or value of unclaimed property, information maintained by B & F pursuant to chapter 523A, Hawaii Revised Statutes, is public information and should be made available to the public for inspection and copying.

The Honorable Yukio Takemoto
March 30, 1990
Page 9

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cc: James W. Geiger, Esq.

APPROVED:

Kathleen A. Callaghan
Director