

July 19, 1990

Clinton R. Ashford, Esq.
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Title Guaranty Building
235 Queen Street
Honolulu, Hawaii 96813

Dear Mr. Ashford:

Re: Welfare Records of Deceased Individuals

This is in response to your request for an advisory opinion regarding the confidentiality of welfare records of deceased individuals.

ISSUE PRESENTED

Whether the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), requires public disclosure of the welfare records of deceased individuals.

BRIEF ANSWER

Section 92F-13(4), Hawaii Revised Statutes, does not require public disclosure of a record that is protected from disclosure by law. Section 346-10, Hawaii Revised Statutes, prohibits disclosure of records concerning welfare recipients except to particular persons for the specific purposes described in the statute. There is no provision in section 346-10, Hawaii Revised Statutes, indicating that an individual's death extinguishes the confidentiality of an individual's welfare records. Thus, an individual's death is not considered in determining whether public access to the individual's welfare records is permitted, and the welfare records of a deceased individual are, therefore, not publicly disclosable.

FACTS

OIP Op. Ltr. No. 90-26

Your firm represents the Hawaii beneficiaries of a trust and is seeking to increase the trust distribution on behalf of its clients. Apparently, there have been reports that some former trust beneficiaries have been on welfare. Therefore, your firm desires to verify whether any of the former trust beneficiaries, now deceased, had ever received welfare benefits. You requested that verification be accomplished by having the State Department of Human Services, Public Welfare Division ("DHS"), compare a list of the deceased trust beneficiaries' names with State welfare records. The DHS denied the request, stating that public disclosure of this information is prohibited. You then requested an advisory opinion from the Office of Information Practices ("OIP") about the confidentiality of this information.

DISCUSSION

The UIPA sets forth the general rule 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. 1989). The UIPA, in section 92F-13, Hawaii Revised Statutes, also sets forth exceptions to this general rule of public access. One of the exceptions addresses records made confidential by other statutes. In pertinent part, section 92F-13, Hawaii Revised Statutes, provides:

§92F-13 Government records; exceptions to general rule. This chapter shall not require disclosure of:

. . . .

- (4) Government records which, pursuant to state or federal law including an order of any state or federal court, are protected from disclosure;

Haw. Rev. Stat. § 92F-13(4) (Supp. 1989).

Section 346-10, Hawaii Revised Statutes, makes confidential "[a]ll applications and records concerning any applicant or recipient" of public assistance, including welfare benefits. An individual may be eligible and, upon application to DHS, receive welfare benefits when the individual is "determined to be without sufficient means of support to maintain a standard [of living] consistent with this chapter [346]." Haw. Rev. Stat. § 346-1 (1985).

The names of welfare recipients are made confidential by the statute's explicit prohibition of the "publication of lists or

names of applicants and recipients." Haw. Rev. Stat. § 346-10(b) (1985). Under section 346-10, Hawaii Revised Statutes, records about recipients of welfare benefits may only be disclosed to particular persons for the specific purposes described in the statute.¹ A person is deemed to be guilty of a violation of law when the person intentionally discloses DHS records known to be confidential in circumstances "other than as authorized by law." Haw. Rev. Stat. § 346-11 (1985).

The OIP previously opined that a deceased individual is generally not recognized to have a privacy interest for purposes of applying the privacy exception to disclosure contained in section 92F-13(1), Hawaii Revised Statutes. See OIP Op. Ltr. No. 90-18 (May 18, 1990). Accordingly, under the UIPA, unlike living individuals, deceased individuals would not have a significant privacy interest in records revealing welfare status.²

However, this analysis regarding a deceased individual's privacy interest under the UIPA does not apply when a specific statute governs disclosure as in this case. See Haw. Rev. Stat. § 92F-13(4) (Supp. 1989); see also Haw. Rev. Stat. § 92F-12(b)(2) (Supp. 1989); see generally 1A Singer, Sutherland Statutory Construction § 24.04 (Sands 4th ed. rev. 1985). Since section 346-10, Hawaii Revised Statutes, governs the disclosure of records about welfare recipients, its provisions shall determine whether disclosure of welfare records about an individual is permitted after the individual's death. In fact, section 346-10, Hawaii Revised Statutes, explicitly provides that information made confidential by its provisions "shall not be subject to any other law permitting inspection of public records." Haw. Rev. Stat. § 346-10(c) (1985).

Section 346-10, Hawaii Revised Statutes, has no provision permitting disclosure of an individual's welfare records because

¹The text of section 346-10, Hawaii Revised Statutes, is set forth, in pertinent part, in Exhibit A.

²With regard to an individual's welfare records, the UIPA expressly recognizes that an individual has a significant privacy interest in "[i]nformation relating to eligibility for social services or welfare benefits or to the determination of benefit levels." Haw. Rev. Stat. § 92F-14 (b)(3) (Supp. 1989). In our opinion, "information relating to [welfare] eligibility" would include information identifying an individual as a welfare recipient. Therefore, an individual, while living, would have a significant privacy interest in records identifying the individual as a welfare recipient. In order to determine public accessibility, this privacy interest must be balanced against the public interest in disclosure. Haw. Rev. Stat. § 92F-14(a) (Supp. 1989).

the individual is deceased. Furthermore, the legislative history behind section 346-10, Hawaii Revised Statutes, does not indicate a clear intention by the Legislature to permit disclosure of welfare records after the death of the individual to whom the records pertain.³

An argument can be made that the Legislature may have intended a deceased individual's welfare records to be protected only to the extent that they would be protected by the federal government. The legislative history of section 346-10, Hawaii Revised Statutes, refers to federal laws and regulations requiring states to restrict disclosure of records concerning applicants and recipients in certain state public assistance programs that receive federal funds. See H. Stand. Comm. Rep. No. 699, 26th Leg., 1951 Reg. Sess., Haw. H.J. 575. Apparently, these federal requirements do not provide specific guidance about whether a state should continue to keep confidential an individual's public assistance records after the individual's death. See, e.g., 45 C.F.R. § 205.50 (1989) (Aid/Services to Families with Dependent Children); 42 C.F.R. § 431.306 (1989) (Medicaid). Yet, under the federal Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, that generally governs federal agencies' records disclosure,⁴ the majority rule is that an individual's death extinguishes the individual's privacy interest in a government record. Office of Information and Privacy, U.S. Dep't. of Justice, Freedom of Information Case List 433 (1989).

Since the federal government would not find a protectible privacy interest in a deceased individual's welfare records under FOIA, it is possible to imply that the Legislature may have intended a similar result when it strived to comply with federal requirements. However, in the absence of clear legislative intent, we are unable to conclude that an individual's death extinguishes the confidentiality of the individual's welfare records under section 346-10, Hawaii Revised Statutes. Cf. New York News Inc. v. Grinker, 537 N.Y.S.2d 770 (N.Y. Sup. Ct. 1989) (disclosure of child abuse records about deceased child abuse victim violates statutorily-imposed confidentiality); State v. Miami Herald Publishing Company, 479 So. 2d 158 (Fla. Dist. Ct. App. 1985) (child abuse records are confidential by statute although child victim is deceased); Yeste v. Miami Herald Publishing Company, 451 So. 2d 491 (Fla. Dist. Ct. App. 1984) (cause of death in death certificate is made confidential by statute).

³For a general discussion about the legislative history behind section 346-10, Hawaii Revised Statutes, see Haw. Att'y Gen. Op. No. 77-5.

⁴For example, the federal Health Care Financing Administration, Department of Health and Human Services, administers the federal grants to states for medicaid programs and its records are governed by the FOIA. See 42 C.F.R. § 401.105 (1989).

Notably, the legislature amended section 346-10, Hawaii Revised Statutes, several times to add provisions permitting disclosure of individuals' welfare records to particular persons for certain purposes. The Legislature presumably performed the "balancing" of the privacy and public interests and specified in this statute those circumstances in which it found a greater public interest in disclosure. In the absence of similar legislative direction regarding the circumstance of an individual's death, section 346-10, Hawaii Revised Statutes, does not permit the DHS to publicly disclose the names welfare recipients that correspond to the names on a list of former trust beneficiaries who are deceased.⁵⁵

CONCLUSION

The UIPA does not require disclosure of government records that "are protected from disclosure" by law. Haw. Rev. Stat. § 92F-13(4) (Supp. 1989). Section 346-10, Hawaii Revised Statutes, prohibits disclosure of all records concerning welfare recipients except to particular persons for specific purposes as set forth in the statute. Section 346-10, Hawaii Revised Statutes, does not include an individual's death as a circumstance under which it permits disclosure of an individual's welfare records. An individual's death, therefore, cannot be considered in determining public access to the individual's welfare records. Consequently, the DHS cannot publicly disclose the names of welfare recipients that correspond to listed names of former trust beneficiaries who are deceased.

Very truly yours,

Lorna J. Loo
Staff Attorney

LJL:sc
Attachment

APPROVED:

Kathleen A. Callaghan
Director

⁵⁵However, section 94-7, Hawaii Revised Statutes, provides that "[a]ll restrictions on access to public records which have been deposited in the state archives, whether confidential, classified, or private, shall be lifted and removed eighty years after the creation of the record." Haw. Rev. Stat. § 94-7 (Supp. 1989).

EXHIBIT A

§346-10 Protection of records; divulging confidential information prohibited. (a) The department of human services and its agents shall keep such records as may be necessary or proper in accordance with this chapter. All applications and records concerning any applicant or recipient shall be confidential. The use or disclosure of information concerning applicants and recipients shall be limited to:

- (1) Persons duly authorized by the State or the United States in connection with their official duties, when the official duties are directly connected with the administration of any form of public assistance, medical assistance, food stamps, or social services;
- (2) Purposes directly connected with any investigation, prosecution, or criminal or civil proceeding conducted in connection with the administration of any and all forms of public assistance, food stamps, medical assistance, or social services, including but not limited to disclosure by the department of information and documents to police departments, prosecutors' offices, the attorney general's office, or any other state, county, or federal agency engaged in the detection, investigation, or prosecution of violations of applicable state, county, and federal laws or regulations regarding any and all aspects of theft, fraud, deception, or overpayment in connection with any aspect of public assistance, food stamps, medical assistance, or social services; provided that disclosure by recipient agencies and personnel is permitted under this section to the extent reasonably necessary to carry out the functions for which the information was provided;
- (3) Disclosure to the extent necessary to provide services for applicants and recipients, to determine eligibility, or to determine the amount of public assistance, such determination to include but not be limited to verification of information provided by the recipient of public assistance, medical assistance, or food stamps, or to determine the type, kind, frequency, and amount of social services, including health and mental health related services needed;
- (4) Disclosure to banks, financial institutions, or any other payor of a public assistance warrant or check of any and all information indicating that a public assistance warrant or check honored by the bank, institution, or payor has been forged or otherwise wrongfully presented for payment;

- (5) Federal agencies responsible for the administration of federally assisted programs, which provide assistance, in cash or in kind, for services, directly to individuals on the basis of need; and certification of receipt of aid to families with dependent children to an employer for purposes of claiming tax credit under Public Law 94-12, the Tax Reduction Act of 1975, shall be permitted;
- (6) Employees acting within the scope and course of their employment of such recognized social welfare organizations as may be approved by the department;
- (7) Purposes directly connected with any investigation, prosecution, or criminal proceeding conducted in connection with the licensure or operation of an adult day care center, including but not limited to disclosure by the department of information and documents to police departments, prosecutors' offices, the attorney general's office, or any other state, county, or federal agency engaged in the detection, investigation, or prosecution of violations of applicable state, county, and federal laws or regulations;
- (8) Disclosure to the child support enforcement agency for obtaining or enforcing a child support order under chapter 576D; and
- (9) Purposes directly connected to and necessary for the career planning, job training, education, job placement, or employment of participants in the workfare program under part IX.
 - (b) Disclosure to any committee or legislative body (federal, state, or local) of any information that identifies by name and address any such applicant or recipient; and publication of lists or names of applicants and recipients shall be prohibited.
 - (c) The department shall promulgate and enforce such rules as may be necessary to prevent improper acquisition or use of confidential information. Any information secured pursuant to this section by the officials or employees may be used in connection with their official duties or within the scope and course of their employment but not otherwise, and shall be kept in confidential records or files, which shall not be subject to any other law permitting inspection of public records. The department and its agents shall determine whether or not such inspection is in connection with such official duties or within the scope and course of such employment.
 - (d) The use of the records, and other communications of the department or its agents by any other agency or department of government to which they may be furnished,

shall be limited to the purposes for which they are furnished.

(e) Confidential information shall be released if requested by specific written waiver of the applicant or recipient concerned. . . .

Haw. Rev. Stat. § 346-10 (1985 and Supp. 1989) (emphases added).

END OF EXHIBIT A