

April 15, 1991

Mr. Don L. Whitney
P.O. Box 98
Honolulu, Hawaii 96810

Dear Mr. Whitney:

Re: Access to Names, Addresses, and Telephone Numbers of
Architectural Registration Examination Jurors

This is in reply to your letter dated December 3, 1990, requesting an advisory opinion from the Office of Information Practices ("OIP") concerning your right to inspect and copy records which disclose the names, addresses, and telephone numbers of jurors who graded Division C of your Architect Registration Examination, produced by the National Council of Architectural Registration Boards ("NCARB").

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), you have the right to inspect and copy government records which disclose the names, addresses, and telephone numbers of those jurors who reviewed and graded your Architect Registration Examination.

BRIEF ANSWER

Under the UIPA, all agencies must make "government records" available for inspection and copying, unless protected from disclosure under section 92F-13, Hawaii Revised Statutes. See Haw. Rev. Stat. § 92F-11(b) (Supp. 1990). Under the UIPA, the term "government record" means "information maintained by an agency" in some physical form. Haw. Rev. Stat. § 92F-3 (Supp. 1990).

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While the UIPA's definition of the term "agency" is quite broad, in our opinion, the NCARB is not an "agency" subject to the provisions of the UIPA. In previous OIP opinion letters, we opined that a decision regarding whether an entity or nonprofit corporation is an agency for purposes of the UIPA must be made on a case-by-case basis, while considering the totality of circumstances. In examining the totality of circumstances surrounding the NCARB's organization, activities, and authority, we conclude that it is not an "agency" under the UIPA.

In addition, we conclude that the Board does not "maintain" government records concerning the names, addresses, and telephone numbers of jurors who graded Division C of the Architect Registration Examination, within the meaning of sections 92F-3 and 92F-11(b), Hawaii Revised Statutes. Based upon the legislative history of the UIPA, we conclude that an agency "maintains" government records, or information set forth therein, when it holds, possesses, preserves, retains, stores, or administratively controls the information in question. While under this definition an agency need not have actual physical custody of the records sought, in examining the relationship between the NCARB and the Board, we conclude that the Board does not "maintain" the requested information within the meaning of sections 92F-3 and 92F-11(b), Hawaii Revised Statutes.

Accordingly, your right to inspect records which disclose the names, addresses, and telephone numbers of jurors who graded Division C of the Architects Registration Examination is not governed by the provisions of the UIPA.

FACTS

Section 464-8(3), Hawaii Revised Statutes, provides, among other things, that no person shall be licensed as a professional architect unless the person has successfully passed a professional written examination prescribed by the Board of Professional Engineers, Architects, Surveyors and Landscape Architects ("Board") administratively attached to the Department of Commerce and Consumer Affairs. The examination is designed to test the person's knowledge, skill, and competency in the profession of architecture.

Pursuant to rules adopted by the Board, the written architectural examination required by section 464-8, Hawaii

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Revised Statutes, consists of a national examination prepared by the NCARB. See §§ 16-82-46 and 16-82-46, Hawaii Administrative Rules.

By contract dated June 6, 1990, between the Board and the NCARB, the NCARB agreed to prepare and deliver to the Board blank copies of an Architect Registration Examination ("Examination"), or divisions thereof, together with answer sheets, and other Examination administration materials. This contract provides that all materials furnished by the NCARB "remain the property of NCARB." Additionally, under this contract, scoring of the Examination is the responsibility of the NCARB, which also sets the criteria used for determining a passing grade. A copy of the Board's contract with the NCARB is attached as Exhibit "A."

Division C of the Examination administered by the NCARB requires each examinee to complete a "building design solution," or in other words, perform an architectural design drawing. Division C of the Examination is graded by jurors selected by the NCARB. These jurors are usually appointed members of state architectural registration boards, and the NCARB informs each jurisdiction of the number of local board members needed as jurors for a given Examination. Because the completed Examinations are randomly distributed for grading, Board members who act as jurors may, and probably do, grade the Examination answers of persons seeking registration in jurisdictions other than the State of Hawaii.

Generally, three NCARB-selected jurors review each examinee's building design solution, and separately assign it either a passing or failing grade. A final grade assigned to each examinee's answer must be unanimous, and if the jurors do not agree, a "master juror" selected by the NCARB makes the final grading determination.

In June 1990, you took Division C of the Examination produced by the NCARB. Following the receipt of the result of your Examination, by letter dated October 22, 1990, you requested the Board to permit you to inspect the graphic design answers and pass/fail grades of each June 1990 examinee, severed of any information which would identify each examinee's identity.

Although the Board acknowledged that it possessed the information your requested, it initially refused this request,

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relying upon the UIPA exception to access set forth at section 92F-13(3), Hawaii Revised Statutes. However, after discussions between the OIP, the Board, and the NCARB's legal counsel, the Board concluded that the disclosure of the information you requested would not result in the disclosure of "materials used to administer an examination which, if disclosed, would compromise the validity, fairness or objectivity of the examination,"¹ and therefore, result in the frustration of a legitimate government function under section 92F-13(3), Hawaii Revised Statutes. Accordingly, the Board granted your October 22, 1990 UIPA request.

After you had inspected the examination answers of other examinees, and their pass/fail grades, you then requested the Board to disclose the names, addresses, and telephone numbers of the three NCARB jurors who graded Division C of your Examination, and certain statistical information. In response to this request, the Board's Executive Secretary notified you that the Board did not maintain government records which disclose the names, addresses, and telephone numbers of the jurors who graded your Examination, and that this information was instead maintained by the NCARB. However, the Board did make available for your inspection national statistical information concerning the Examination. Additionally, citing privacy concerns, the Board's Executive Secretary notified you that it would not, on your behalf, request the NCARB to disclose the information you requested.

By letter dated December 3, 1990, you requested an advisory opinion from the OIP concerning whether the NCARB is an "agency" as that term is defined by the UIPA, and if so, whether it must disclose the names, addresses, and telephone numbers of the jurors who graded Division C of your Examination.

DISCUSSION

Section 92F-11(b), Hawaii Revised Statutes, states, "[e]xcept as provided by section 92F-13, each agency upon request by any person shall make government records available

¹Senate Standing Committee Report No. 2580, dated March 31, 1988, provides the quoted language as an example of information which must remain confidential in order to avoid the frustration of a legitimate government function under section 92F-13(3), Hawaii Revised Statutes.

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for inspection and copying during regular business hours." Haw. Rev. Stat. § 92F-11(b) (Supp. 1990) (emphasis added). The term "government record" is defined by the UIPA as "information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. § 92F-3 (Supp. 1990) (emphasis added). Thus, the UIPA's provisions only apply to information "maintained by an agency." Accordingly, as a threshold matter, we must determine whether the information you have requested to inspect and copy is "information maintained by an agency."

Under the UIPA, the term "agency" means:

[A]ny unit of government in this State, any county, or any combination of counties; department; institution; board; commission; district; council; bureau; office; governing authority; other instrumentality of state or county government; or corporation or other establishment owned, operated, or managed by or on behalf of this State or any county, but does not include the nonadministrative functions of the courts of this State.

Haw. Rev. Stat. § 92F-3 (Supp. 1990) (emphases added).

In OIP Opinion Letter No. 90-31 (Oct. 25, 1990), we noted that the Legislature intended that the UIPA definition of the term "agency" be comprehensive, and concluded that for limited purposes, records maintained by the Hawaiian Humane Society, a non-profit corporation, were subject to the UIPA's disclosure provisions. Specifically, in this opinion letter, we concluded that the Hawaiian Humane Society was a "corporation or other establishment . . . operated . . . by or on behalf of this State or any county." Haw. Rev. Stat. § 92F-3 (Supp. 1990).

Additionally, we concluded that a decision whether a quasi-governmental entity is an "agency" under the UIPA, "must be made on a case-by-case basis, based on the totality of circumstances," and that each new arrangement must be separately considered on its own "given the myriad of organizational arrangements for getting the business of the government done." Id. at 14. Significantly, we concluded that an entity is not an "agency" under the UIPA, merely because it has contracted with an executive branch agency. Id.

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Our conclusion that the Hawaiian Humane Society was an "agency" under the UIPA was based on the fact that 1) the Society's operations were primarily subsidized by public funds; 2) the Society performed what is a traditional government function, the enforcement of laws enacted for the health, safety, and welfare of the public; 3) the Society's records, personnel, and property were subject to City inspection without notice; and 4) all fees charged and collected by the Society were remitted to the City.

While we believe that the act of granting an individual a privilege or license to engage in a trade or occupation is a traditional government function, it does not necessarily follow that the NCARB performs a traditional government function. Rather, this organization has developed a standardized examination, based upon nation-wide criteria, used to test the qualifications of potential licensees, and assists licensing authorities in the administration and scoring of the examination. The Board merely utilizes this national examination in the performance of its licensing functions. The Board, in its discretion, remains free to refuse to issue a license to an applicant even if such applicant achieves a passing grade on the NCARB examination. Thus, the decision to grant, or not to grant a license, remains vested at all times with the Board, not the NCARB.

Further, the NCARB is not primarily subsidized by State or county revenue and based upon our review of its contract with the NCARB, the Board retains extremely limited, if any, control over the NCARB's operations. Based on these facts, we are constrained to conclude that the NCARB is not an "agency" as that term is defined by section 92F-3, Hawaii Revised Statutes.

Our conclusion that NCARB is not an agency does not end the required analysis. Specifically, the UIPA defines "government record" as information "maintained by an agency." Haw. Rev. Stat. § 92F-3 (Supp. 1990). If we were to conclude that the Board "maintains" the subject information, we must also conclude that public access to the information is governed by the provisions of the UIPA.

Nowhere does the UIPA define the meaning of the term "maintain" as used in the UIPA definition of "government record."

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However, the Uniform Information Practices Code drafted by the National Conference of Commissioner's on Uniform State Laws ("Model Code), and upon which the Legislature modeled the UIPA, does contain a definition of this term. Accordingly, resort to the Model Code definition of the term "maintain" provides significant guidance and would be consistent with the legislative purposes underlying the UIPA.

Section 1-105(6) of the Model Code defines the term "maintain" as "hold, possess, preserve, retain, store or administratively control." The commentary to this Model Code provision discloses that:

Maintain is defined in Section 1-105(6) to sweep as broadly as possible. It includes information possessed or controlled in any way by an agency. The administrative control component of the definition is especially important since it prevents an agency that does not have physical custody of government records from evading its obligations under this Code.
[Emphasis added.]

Like the drafters of the Model Code, we believe that under the UIPA, an agency may "maintain" a government record without having physical custody of the information, provided that it has administrative control over the same. A contrary conclusion would permit an agency to evade its UIPA disclosure obligations merely by surrendering physical custody of government records, while at the same time retaining power over their storage and retrieval, or access to the records. However, based upon our review of the contract between the Board and the NCARB, we conclude that the subject information is neither held, possessed, retained, or administratively controlled by the Board.

Specifically, according to the Board, the NCARB retains the physical custody of all records which disclose the names, addresses, and telephone numbers of jurors grading Division C of the Examination, in addition to the jurors' written comments and observations. Additionally, based upon our review of the Board's contract with the NCARB, we could find no provision giving the Board the right or power to compel the NCARB's disclosure of the requested information.

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While the word "control" has different meanings depending on its context, most authorities agree that in its ordinary sense, it refers "to the power or authority to manage, direct, or oversee," or "to exercise restraining or directing influence over," and also relates to "authority over what is not in one's physical possession." Hardware Mut. Cas. Co. v. Crafton, 350 S.W.2d 507, 507 (Ak. 1961); Bryant v. State, 185 A.2d 190, 193 (Md. 1962); See also Biben v. Card, 119 F.R.D. 421, 425 (D.C.W.D. Mo. 1987) ("it includes the legal right of a producing party to obtain documents from other sources upon demand").

Indeed, Exhibit "A" to the Board's contract reflects that the Board has no legal power to obtain the requested information from NCARB upon demand. It states that NCARB:

[R]etains copyright and proprietary interest in all examination materials it prepares including and not limited to examination booklets, supervisor's manuals, juror's manuals, examinee information manuals . . . grading sheets, answer sheets, scoring templates and other supplies.

Further, as mentioned above, the contract also provides that all materials remain the property of the NCARB, not the Board.

Based upon the foregoing, we conclude that the names, addressees, and telephone numbers of jurors grading Division C of the Examination do not constitute "information maintained by an agency," and therefore, a "government record" under the UIPA. Having also concluded that NCARB is not an agency under the UIPA, our inquiry is at an end, because the UIPA only regulates, or requires the disclosure of, information "maintained by an agency." Therefore, we conclude that under the UIPA, you do not have the right to inspect and copy records of NCARB which disclose the names, addressees, and telephone numbers of those jurors who grade Division C of your Examination. Whether you have the right to access this information under some other law, is a question that exceeds the scope of the OIP's authority.

CONCLUSION

The UIPA only governs the public's right to inspect and copy "information maintained by an agency." Haw. Rev. Stat. § 92F-3 (Supp. 1990). While the UIPA definition of the terms "agency"

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and "maintain" are admittedly broad, we conclude that the NCARB is not an agency for purposes of the UIPA, and that the Board does not hold, possess, retain, or administratively control the information you have requested to inspect and copy. Accordingly, your right to inspect and copy the names, addresses, and telephone numbers of the jurors grading your Examination, is not governed by the UIPA.

Hugh R. Jones
Staff Attorney

HRJ:sc
Attachment
cc: Constance Cabral, Executive Secretary
Board of Professional Engineers, Architects
Surveyors and Landscape Architects

APPROVED:

Kathleen A. Callaghan
Director