

Op. Ltr. 91-08 Applications for Appointment to Boards and Commissions

OIP Op. Ltr. No. 05-03 partially overrules this opinion to the extent that it states or implies that the UIPA's privacy exception in section 92F-13(1), HRS, either prohibits public disclosure or mandates confidentiality.

June 24, 1991

TO: The Honorable John Waihee
Governor of Hawaii

FROM: Lorna J. Loo, Staff Attorney

SUBJECT: Applications for Appointment to Boards and Commissions

This is in response to a letter dated September 18, 1990, from Celia C. U. Suzuki, to the Honorable Warren Price, III, requesting an opinion regarding the submission of information by individuals applying for appointment to State boards or commissions ("applicants"). Among other things, the letter raised several issues regarding public access to the applicant information received by the Office of the Governor. These particular issues have been referred to the Office of Information Practices ("OIP") for a response in accordance with established protocol.

ISSUES PRESENTED

I. Whether the applications for appointment to boards and commissions submitted to the Governor ("applications") constitute government records under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA").

II. Whether, under the UIPA, the Governor must make information contained in the applications available for public inspection and copying either during or after the Governor's selection process.

III. Whether, under the UIPA, the Governor is permitted to disclose to the Legislature confidential information about an applicant whom the Governor has nominated, subject to the Senate's consent, to a board or commission ("nominee").

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IV. Whether under the UIPA, confidential information about a nominee becomes available for public inspection when the Governor discloses the information to the Legislature.

BRIEF ANSWERS

I. The applications constitute government records under the UIPA because they constitute written information and are maintained by the Office of the Governor, a government agency. See Haw. Rev. Stat. § 92F-3 (Supp. 1990).

II. Information about unsuccessful board or commission applicants, and about any applicant before the Governor's nomination, cannot be disclosed to the public because disclosure of this information would constitute a clearly unwarranted invasion of privacy. See Haw. Rev. Stat. § 92F-13(1) (Supp. 1990). This information also falls under the UIPA exception for government records that "must be confidential in order to avoid the frustration of a legitimate government function." Haw. Rev. Stat. § 92F-13(3) (Supp. 1990). However, the identity of the successful applicant nominated by the Governor, and information about this individual's current occupation, business address, business telephone number, education, work experience required for appointment to the board or commission, and convictions must be made available for public inspection under the UIPA. Other information on the nominee's application, including the nominee's home address, home telephone number, birthdate, and financial information, must be kept confidential in order to avoid a clearly unwarranted invasion of privacy.

III. Under section 92F-19, Hawaii Revised Statutes, an agency is permitted to disclose confidential information to another agency under certain circumstances, including "[t]o the legislature or any committee or subcommittee thereof." Haw. Rev. Stat. § 92F-19(a)(6) (Supp. 1990). In accordance with this provision, the Governor may disclose information, including confidential information, about a nominee to the Senate committee that will review and recommend whether the Senate should consent to the Governor's nomination.

IV. When the appropriate Senate committee receives confidential information about a nominee from the Governor, the committee must observe the applicable restrictions on disclosure. See Haw. Rev. Stat. § 92F-19(b) (Supp. 1990). However, when the public

interest in disclosure of certain nominee information under the committee's review outweighs the nominee's privacy interest, disclosure of the information will not constitute a clearly unwarranted invasion of privacy. See Haw. Rev. Stat. § 92F-14(a) (Supp. 1990). When no exception to disclosure applies, the Senate committee must make the information available to the public.

FACTS

Section 26-34, Hawaii Revised Statutes, provides that "[t]he members of each board and commission established by law shall be nominated and, by and with the advice and consent of the senate, appointed by the governor." Haw. Rev. Stat. § 26-34 (1985); see also Haw. Const. art. V, § 6. In accordance with this statute, the Governor receives and reviews applications for vacant positions on boards and commissions and nominates qualified individuals to fill these positions. A copy of the application form is attached hereto as "Exhibit A." Thereafter, the Governor submits the nominees' names and information about their qualifications to the appropriate Senate committee that will review the nominations. After its review, the Senate committee will recommend to the Senate whether the Senate should consent to the Governor's nominations.

The Office of the Governor has requested the Attorney General to issue an advisory opinion regarding the collection and disclosure of information concerning applicants. In accordance with established protocol, the Attorney General has requested the Office of Information Practices ("OIP") to respond to the issues that fall within the scope of the UIPA.

DISCUSSION

I. GOVERNMENT RECORDS

The UIPA defines a "government record" as "information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. § 92F-3 (Supp. 1990) (emphasis added). The applications for board and commission appointments are "government records" because they contain information in a written form and are maintained by the Office of the Governor, a government agency. Accordingly, the

UIPA's principles govern the disclosure of information contained in the applications.

II. DISCLOSURE TO THE PUBLIC

A. Unsuccessful Applicants

In previous opinion letters, we concluded that individually identifiable information about unsuccessful applicants for government employment must be kept confidential because such information falls under the UIPA exception for "[g]overnment records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy." Haw. Rev. Stat. § 92F-13(1) (Supp. 1990); see OIP Op. Ltr. No. 89-2 (Oct. 27, 1989) (executive search report); OIP Op. Ltr. No. 90-14 (March 30, 1990) (certified list of eligibles). We came to this conclusion after balancing the competing privacy and public interests in disclosure. See Haw. Rev. Stat. § 92F-14(a) (Supp. 1990).

Applying the same analysis to applicants for appointment to governmental boards and commissions, we find that unsuccessful applicants have a significant privacy interest in individually identifiable application information. The UIPA expressly recognizes an individual's significant privacy interest in "applications, nominations, recommendations, or proposals for public employment or appointment to a governmental position." Haw. Rev. Stat. § 92F-14(b)(4) (Supp. 1990) (emphases added). Further, we find that there is no countervailing public interest in such information about those individuals not selected to serve on boards and commissions because disclosure of this information "is unnecessary for the public to evaluate the competence of people who were appointed." Core v. U.S. Postal Service, 730 F.2d 946, 949 (4th Cir. 1984).

Because the unsuccessful applicants' privacy interest outweighs the public interest in the disclosure of individually identifiable application information, we conclude that information about unsuccessful applicants must be kept confidential because its disclosure would constitute a clearly unwarranted invasion of their privacy. Haw. Rev. Stat. § 92F-13(1) (Supp. 1990). Similarly, before the Governor's nomination, individually identifiable information about any applicant must be kept confidential in order to avoid a clearly

unwarranted invasion of privacy under section 92F-13(1), Hawaii Revised Statutes. See Haw. Rev. Stat. § 92F-14(b)(4) (Supp. 1990).

In addition, information about unsuccessful applicants, or about any applicant before the Governor's nomination, also falls 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) (Supp. 1990); see OIP Op. Ltr. Nos. 89-2 and 90-14. Disclosure of this information will frustrate the appointment process because it may embarrass or cause harm to the personal or business life of applicants who were not selected and, therefore, may discourage other qualified individuals from applying to government boards and commissions. See id.

B. Successful Applicants

1. Public Information about a Nominee.

As previously discussed, an individual has a significant privacy interest in "applications" and "nominations" for "appointment to a governmental position." Haw. Rev. Stat. § 92F-14(b)(4) (Supp. 1990). However, unlike information about unsuccessful applicants, we find that certain information about a Governor's nomination would shed light upon the operations of government boards and commissions, and also upon the Governor's and the Senate's role in selecting board and commission members on the public's behalf. In our opinion, the public has an interest in the application and nomination records concerning a nominee that would reveal the composition, conduct, and potential conflicts of interest of board and commission members whom the Governor appoints with the Senate's approval. We believe that this public interest would be furthered by the disclosure of a nominee's identity and the other nominee information discussed below.

In OIP Opinion Letter Nos. 89-2 and 90-14, we found that the public's interest in a successful employment applicant's identity and competence outweighed the individual's privacy interest in this information. See OIP Op. Ltr. Nos. 89-2 and 90-14; cf. Nakano v. Matayoshi, 68 Haw. 140 (1985) (government officials have a diminished privacy interest in disclosure of their financial affairs as compared to other citizens). Applying the

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same analysis to the identity of a board or commission nominee, we find that the public interest in the disclosure of this information outweighs the nominee's privacy interest. Therefore, disclosure of the nominee's identity would not constitute a clearly unwarranted invasion of privacy.

The nominee's work experience required for appointment to the particular board and commission must also be disclosed to the public upon request. Under the UIPA, an individual has a significant privacy interest in the individual's "nongovernmental employment history except as necessary to demonstrate compliance with requirements for a particular government position," in this case, as a board or commission member. Haw. Rev. Stat. § 92F-14(b)(5) (Supp. 1990) (emphasis added). We find that more than a "scintilla of public interest" in a nominee's qualifying work experience exists "to preclude a finding of a clearly unwarranted invasion of privacy." See Haw. Rev. Stat. § 92F-14(a) (Supp. 1990); 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).

Further, we find that the UIPA requires public disclosure of a nominee's current occupation, business address, business telephone number, and education. If the nominee is also employed in another government position, this information is expressly made public under the UIPA, "[a]ny provision to the contrary notwithstanding." Haw. Rev. Stat. § 92F-12(a)(14) (Supp. 1990). Commission or board members employed in the private sector may have a privacy interest in information about their current employment and educational background. Yet, we believe that the public has an interest in this information because it directly sheds light upon the composition, conduct, and potential conflicts of interest of government board and commission members. In finding this public interest, we note that the application form itself expressly states the Governor's "goal" of selecting board or commission members "who bring a variety of skills and life experiences to these agencies."

With regard to disclosure of conviction data, the OIP previously opined that this information is subject to public inspection. See OIP Op. Ltr. Nos. 89-7 (Nov. 20, 1989) (gubernatorial pardons) and 91-1 (Feb. 15, 1991) (massage therapist license applications). In these opinions, we noted that unlike most criminal history record information, conviction

data is not subject to statutory restrictions upon its dissemination by the Hawaii Criminal Justice Data Center. See Haw. Rev. Stat. § 846-9 (1985).

2. Confidential Information about a Nominee.

The Governor cannot disclose to the public other personal information that the nominee provides on the application when the disclosure of such information would constitute a clearly unwarranted invasion of the individual's privacy. For example, the nominee's home address, home telephone number, and birthdate must be kept confidential pursuant to section 92F-13(1), Hawaii Revised Statutes. See, e.g., OIP Op. Ltr. Nos. 90-7 (Feb. 9, 1990) and 90-14 (March 30, 1990).

With regard to information concerning a nominee's finances that the Governor may receive with the application, section 92F-14(b), Hawaii Revised Statutes, expressly recognizes that an individual has a significant privacy interest in:

- (6) Information 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. 1990).

The Governor may review information about an applicant's finances when considering the applicant's qualifications and, as described below, may provide this information to the Legislature for its review as well. However, we believe that disclosure of a nominee's finances to the public generally would not further the public interest in knowing "what government is up to." In reaching this conclusion, we point out that by law, the State Ethics Commission must keep confidential the financial disclosure statements of board and commission members, but must make available for public inspection the financial disclosure statements of other specified officials. Haw. Rev. Stat. § 84-17 (1985). However, there may be special circumstances in which the public would have an interest in limited information about a nominee's financial activities, for example, where there is a potential conflict of interest. In the absence of a countervailing public interest in disclosure, the Governor should not publicly disclose information about a nominee's finances in

order to avoid a clearly unwarranted invasion of privacy. Haw. Rev. Stat. §§ 92F-13(1), 92F-14(a) (Supp. 1990).

III. DISCLOSURE TO THE LEGISLATURE

Section 92F-19(a), Hawaii Revised Statutes, sets forth the limitations on the disclosure of confidential government records by one government agency to another. With regard to an agency's disclosure of government records to the Legislature, this section provides in pertinent part:

§92F-19 Limitations on disclosure of government records to other agencies. (a) No agency may disclose or authorize disclosure of government records to any other agency unless the disclosure is:

. . . .

(6) To the legislature or any committee or subcommittee thereof;

Haw. Rev. Stat. § 92F-19(a)(6) (Supp. 1990).

The Governor shall appoint a member of a board or commission "with the advice and consent of the senate." Haw. Rev. Stat. § 26-34 (1985); see also Haw. Const. art. V, § 6. Accordingly, the Governor submits information about a nominee to the Senate, or its appropriate committee or subcommittee, in order to obtain the Senate's consent. Since the Governor's disclosure of information about a nominee is "[t]o the Legislature or any committee or subcommittee thereof," this disclosure, including disclosure of confidential information about the nominee, is expressly permitted by the UIPA. Haw. Rev. Stat. § 92F-19(a)(6) (Supp. 1990).

IV. DISCLOSURE BY THE LEGISLATURE

Generally, an agency that receives confidential information disclosed by another agency under section 92F-19(a), Hawaii Revised Statutes, "shall be subject to the same restrictions on disclosure of the records as the originating agency." Haw. Rev. Stat. § 92F-19(b) (Supp. 1990) (emphasis added). Therefore, when the appropriate Senate committee receives confidential information about a nominee from the Governor, the committee must

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observe the applicable restrictions on disclosure, except where public disclosure is required as described below.

In addition, section 84-12, Hawaii Revised Statutes, also forbids disclosure of confidential information by legislators as follows:

§84-12 Confidential information. No legislator or employee shall disclose information which by law or practice is not available to the public and which the legislator or employee acquires in the course of the legislator's or employee's official duties, or use the information for the legislator's or employee's personal gain or for the benefit of anyone.

Haw. Rev. Stat. § 84-12 (1985).

In OIP Opinion Letter No. 89-2, we explained that otherwise confidential information about an employment applicant would be made available to the public in the following circumstance:

Of course, certain high level positions in government require legislative scrutiny and evaluation of the final candidate during public hearings as a part of the approval process. If there is a federal or state law requiring the disclosure of certain personal information during this process, then the information would indeed be public.

OIP Op. Ltr. No. 89-2 (October 27, 1989). Because the Senate's consent is required for the Governor's appointment of an individual to a board or commission, information about the nominee may be subject to public disclosure during the Senate committee's evaluation of the nominee. See Haw. Rev. Stat. §§ 92F-12(b)(2) and 92F-13(1) (Supp. 1990).

According to section 92-10, Hawaii Revised Statutes, the open meeting requirements set forth in the Senate's rules and procedures take precedence over the related statutory requirements in chapter 92, Hawaii Revised Statutes. Haw. Rev. Stat. § 92-10 (1985). Specifically, Rule 19 of the Senate provides:

Rule 19. Meetings of Committees

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Meetings, including decision-making sessions, of Standing Committees shall be public provided that meetings in executive session may be allowed in such exceptional circumstances when committee discussion could unfairly damage the reputation of individuals or where there is a legal question concerning a bill.

Rule 19, Rules of the Senate, Supplement to Hawaii Legislators' Handbook, p. 13 (July, 1987). In accordance with this rule, the Senate committee reviewing the Governor's nomination generally must meet in public to conduct its review.

The Senate committee's review of the Governor's nomination in a public meeting apparently serves to promote the public's interest in learning about the composition and conduct of government board and commission members. Like the Governor, the Senate committee would be required to publicly disclose information about a nominee, including information that is usually kept confidential under the privacy exception, when the public interest in disclosure of the information outweighs the nominee's privacy interest. For example, we believe that the public has a strong interest in ensuring that a nominee has no financial interests that would cause the nominee's decision-making to be biased or result in the appearance of impropriety, should the nominee be appointed. Therefore, in furtherance of this public interest, the Legislature may be required to disclose limited information about a nominee's financial interests that present a possible conflict of interest. See Haw. Rev. Stat. § 92F-14(a) (Supp. 1990).

Where disclosure of nomination information would not constitute a clearly unwarranted invasion of privacy, the Senate committee may disclose the information at the committee's public meeting as well as make it available for public inspection under the UIPA. See Walloon Lake Water System v. Melrose Township, 415 N.W.2d 292 (Mich. App. Ct. 1987) (a letter, concerning the water system provided by the person requesting disclosure of the letter, that was read aloud to the township board of trustees at a public meeting constitutes a record subject to public disclosure). In addition, the UIPA expressly requires an agency to make available for public inspection and duplication "[i]nformation contained in or compiled from a transcript, minutes, report, or summary of a proceeding open to the public."

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Haw. Rev. Stat. § 92F-12(a)(16) (Supp. 1990). However, with regard to information about the nominee where the public interest in disclosure does not outweigh the nominee's privacy interest, the Senate committee must observe the same restrictions on disclosure that apply to the Governor. Haw. Rev. Stat. § 92F-19(b) (Supp. 1990).

CONCLUSION

The identity of the Governor's nominee and this individual's current occupation, business address, business telephone number, education, related work experience, and convictions must be disclosed to the public upon request. The nominee's home address, home telephone number, birthdate, financial information, and other information contained in the application must be kept confidential under the UIPA exception for a clearly unwarranted invasion of privacy. This exception based on privacy, and the exception based on the frustration of a government function, protect from disclosure information about unsuccessful applicants and about any applicant before the Governor's nomination. See Haw. Rev. Stat. § 92F-13(1), (3)f(Supp. 1990).

Under section 92F-19(a)(6), Hawaii Revised Statutes, the Governor may disclose information, including confidential information, about a nominee to the Senate committee that will review the nomination. When the Senate committee receives confidential information about a nominee from the Governor, the committee must observe the applicable restrictions on disclosure. However, the Senate committee will be required to publicly disclose certain nominee information under its review when the public interest in disclosure of the information outweighs the nominee's privacy interest. See Haw. Rev. Stat. § 92F-14(a) (Supp. 1990).

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Attachments

c: Warren Price, III, Attorney General
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