

October 28, 1991

The Honorable Ronald B. Mun
Corporation Counsel
City and County of Honolulu
Honolulu Hale, First Floor
Honolulu, Hawaii 96813

Attention: Mr. Gregory J. Swartz
Deputy Corporation Counsel

Dear Mr. Mun:

Re: Scope of the UIPA's Immunity Provision
(Section 92F-16, Hawaii Revised Statutes)

This is in reply to your letter to the Office of Information Practices ("OIP") dated October 22, 1991, requesting an advisory opinion regarding the above-referenced matter.

ISSUE PRESENTED

Whether, under the immunity provision of the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), government agencies, agency officers or employees, or both are immunized from any liability, civil or criminal, for participating in the good faith disclosure or nondisclosure of a government record.

BRIEF ANSWER

Based upon the legislative committee reports concerning section 92F-16, Hawaii Revised Statutes, we conclude that the UIPA's immunity provision, section 92F-16, Hawaii Revised Statutes, only applies to agency officers or employees in their individual capacities, not to government agencies as entities.

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FACTS

The Honolulu Advertiser has submitted a request to the OIP for an advisory opinion concerning its right to inspect and copy the complete documents involved in the City and County of Honolulu's ("City") selection of the winning bidder to construct the proposed rail transit system.

In connection with the City's response to The Honolulu Advertiser's UIPA request, you have requested an advisory opinion from the OIP pursuant to section 92F-42(2), Hawaii Revised Statutes. The issue you have raised is whether the UIPA's immunity provision, section 92F-16, Hawaii Revised Statutes, immunizes agencies, agency officers or employees, or both when participating in the good faith disclosure or nondisclosure of a government record.

DISCUSSION

As part of the UIPA, the Legislature included an immunity provision, which is set forth at section 92F-16, Hawaii Revised Statutes, and that provides:

§92F-16 Immunity from liability. Anyone participating in good faith in the disclosure or nondisclosure of a government record shall be immune from any liability, civil or criminal, that might otherwise be incurred, imposed or result from such acts or omissions.

Haw. Rev. Stat. § 92F-16 (Supp. 1990) (emphasis added).

In the UIPA's legislative history, it is apparent that the Legislature recognized the "Herculean efforts" of the Governor's Committee on Public Records and Privacy ("Governor's Committee"), and the important role that its report played in shaping the provisions of the UIPA. See S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1095 (1988). An immunity provision was included in the UIPA by the
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Legislature largely as a result of issues explored by the Governor's Committee in its report to the Governor and the Legislature. Among other things, the Governor's Committee observed that the penalty provisions of former chapter 92E, Hawaii Revised Statutes, "led to a restrictive, but safe interpretation that in any doubtful case the record should be

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kept confidential." Vol. I Report of the Governor's Committee on Public Records and Privacy 87 (1987). In discussing issues pertaining to possible penalties of a civil, criminal, or administrative nature that could be included in a new public records law, the Governor's Committee Report raised the issue of who should be subject to such penalties:

Who should be subject to the penalty? Is it to be the employees themselves or should the agencies instead be subject to some form of sanction. If for example, the employees themselves were not subject but instead the State could be sued for damages, the situation would be more akin to other types of laws where the State itself assumes liability for the acts of its employees.

Vol I. Report of the Governor's Committee on Public Records and Privacy 88 (1987).

The Governor's Committee also reported that it received testimony which raised the issue of including an immunity provision as part of a new State open records law:

And finally, it was suggested that there should be **immunity to the State when material is released**. This was raised by Mayor Tony Kunimura (II at 144) in the form of a desire for a good faith defense or immunity in Chapter 92E cases. Clearly if the goal is to have information available to the public, the current fears generated by Chapter 92E's penalties need to be alleviated to some degree. Immunity or at least a defense based upon good faith is one way to go.

Vol. I Report of the Governor's Committee on Public Records and Privacy 89 (1987) (emphasis and boldface in original).

As codified, section 92F-16, Hawaii Revised Statutes, provides immunity to "anyone" participating in a good faith disclosure or nondisclosure of a government record. In determining whether the term "anyone" should include "agencies" as well as agency officers or employees, we are guided by the principle that the fundamental objective in the construction of a statute is to ascertain and give effect to the intention of

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the Legislature. Hawaii Public Employment Relations Board v. United Public Workers, 66 Haw. 461, 667 P.2d 783 (1983); Educators Ventures Inc. v. Bundy, 3 Haw. App 435, 652 P.2d 1044 (1982). Accordingly, in determining the meaning of the word "anyone" as used in section 92F-16, Hawaii Revised Statutes, it would be appropriate to consult the pertinent provisions of the UIPA's legislative committee reports.

With respect to the UIPA's immunity provisions, the UIPA's legislative history states:

8. Immunity. The bill will provide in Section -16 that the good faith actions of employees in handling records distribution shall not subject them to liability. In this way, public employees will be free to act according to the intent of the law without the defensive posture which was perhaps a consequence of the existing penalty provisions [of chapter 92E, Hawaii Revised Statutes]. This bill provides that actions will proceed against agencies and not individual employees. Employees [sic] misconduct can, of course, be handled under normal personnel provisions.

H.R. Conf. Comm. Rep. No. 112-88, 14th Leg., 1988 Reg. Sess., Haw. H. J. 817, 818 (1988); S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 690 (1988) (emphases added).

Thus, despite the fact that the Governor's Committee raised the possibility that immunity could be given to "the State" as part of a new public records law, the UIPA's legislative history indicates an unmistakable legislative intention that the UIPA's immunity provision protect agency officers or employees, not agencies as entities.

Moreover, this construction of section 89-16, Hawaii Revised Statutes, is buttressed by the fact that the Legislature expressly granted any person aggrieved by a denial of access to government record the statutory right to bring an action against "an agency" in the circuit courts to compel the disclosure of a government record. See Haw. Rev. Stat. § 92F-15 (Supp. 1990).

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Accordingly, we conclude that section 92F-16, Hawaii Revised Statutes, only provides immunity to agency officers or employees who participate in the good faith disclosure or nondisclosure of a government record. On the contrary, we conclude that section 92F-16, Hawaii Revised Statutes, does not provide immunity to government agencies. Finally, we express no opinion concerning whether the provisions of the Constitution of the State of Hawaii or other statutes, provide immunity to a government agency for the disclosure or nondisclosure of a government record under the UIPA.

CONCLUSION

Based upon the UIPA's legislative history, we conclude that it was the intention of the Legislature that section 92F-16, Hawaii Revised Statutes, provide immunity, both civil and criminal, to agency officers or employees participating in the good faith disclosure or nondisclosure of a government record. It is also our opinion that section 92F-16, Hawaii Revised Statutes, does not grant immunity to government agencies.

If you should have any questions regarding this matter, I may be contacted at 586-1400.

Very truly yours,

Hugh R. Jones
Staff Attorney

APPROVED:

Kathleen A. Callaghan
Director

c: Jeffrey S. Portnoy, Esq.
Gerry Keir, Editor, The Honolulu Advertiser