

August 14, 1992

Mr. Dwight H. Kondo
President
The Hawaiian Hemp Company
P. O. Box 2056
Pahoa, Hawaii 96778

Dear Mr. Kondo:

Re: Article in The Ag Rag Entitled "High on Alternatives"

This is in reply to your letter requesting an advisory opinion from the Office of Information Practices ("OIP") concerning the above-referenced matter.

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), an article entitled "High on Alternatives" ("Article") printed in the April 1, 1992 edition of the Department of the Attorney General's in-house newsletter, The Ag Rag, must be made available for public inspection and duplication.

BRIEF ANSWER

Yes. The Ag Rag, in its entirety, including the Article, is a "government record" as this term is defined by the UIPA. See Haw. Rev. Stat. § 92F-2 (Supp. 1991). The UIPA provides that all government records must be made available for public inspection and copying, unless one of the statutory exceptions set forth in section 92F-13, Hawaii Revised Statutes, authorizes an agency to deny a request for access to its records. See Haw. Rev. Stat. § 92F-11(b) (Supp. 1991).

In our opinion, the Article is not protected from required disclosure by any exception listed in section 92F-13, Hawaii Revised Statutes. Specifically, we find that the disclosure of

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the Article would not "constitute a clearly unwarranted invasion of personal privacy." Haw. Rev. Stat. § 92F-13(1) (Supp. 1991).

In our opinion, the disclosure of the Article also would not result in the "frustration of a legitimate government function."

Haw. Rev. Stat. § 92F-13(3) (Supp. 1991). Therefore, we believe that the Department of the Attorney General must make the Article available for public inspection and copying upon request.

FACTS

The Ag Rag is a monthly newsletter prepared by the staff of the Department of the Attorney General ("Department"). The newsletter is comprised, in part, of articles written and contributed by Department employees. In addition to feature articles, The Ag Rag also contains news items concerning employees who have joined or left the Department, along with other personal information about employees of the Department. The Ag Rag is widely distributed throughout the Department's many divisions.

An article, entitled "High on Alternatives" ("Article"), was written by a deputy attorney general, and published in the April 1, 1992 edition of The Ag Rag. The Article generally discussed the use of biomass as an alternative form of energy, and included references to hemp as a possible source of biomass.

You have requested an opinion from the OIP regarding whether, under the UIPA, The Ag Rag is a "public document." Because of your particular interest in the Article, our discussion shall focus upon this Article, rather than all articles that were contained in the April 1, 1992 edition of The Ag Rag.

DISCUSSION

I. INTRODUCTION

The UIPA defines the term "government record" as "information maintained by an agency in written . . . or other physical form." Haw. Rev. Stat. § 92F-3 (Supp. 1991). Although the UIPA does not define the term "maintain", in OIP Opinion Letter No. 91-5 (April 15, 1991), we examined the definition section of the Uniform Information Practices Code ("Model Code"), upon which the UIPA was modeled, for guidance in determining the meaning of this term.

Section 1-105(6) of the Model Code defines the term "maintain" as to "hold, possess, preserve, retain, store or

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administratively control." The commentary¹ to this Model Code provision explains 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.

Model Code, § 1-105(6) commentary at 9 (1980) (emphasis added). Given the Model Code definition of this term, in OIP Opinion Letter No. 91-5, we concluded that an agency "maintains" information if it holds, possesses, preserves, retains, stores or administratively controls the information in question.

In the facts presented, the Article was printed, in type-written form, in a newsletter controlled, possessed, and retained by a governmental agency. Therefore, it is our opinion that the Article is a "government record" under the UIPA so long as it is maintained by the Department.

The general rule under the UIPA is 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. 1991). Specifically, unless protected by one of the exceptions to required disclosure in section 92F-13, Hawaii Revised Statutes, "each agency upon request by any person shall make government records available for inspection and copying." Haw. Rev. Stat. § 92F-11(b) (Supp. 1991).

Section 92F-13, Hawaii Revised Statutes, sets forth exceptions to required agency disclosure, two of which merit our examination herein:

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

¹The UIPA's legislative history provides that the Model Code Commentary should be consulted to "guide the interpretation of similar provisions found in the [UIPA]." H. Stand. Comm. Rep. No. 342-88, 14th Leg., 1988 Reg. Sess., Haw. H. J. 969, 972 (1988); see also Haw. Rev. Stat. § 1-24 (1985).

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(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(1) and (3) (Supp. 1991). We shall examine these two exceptions separately below.

II. CLEARLY UNWARRANTED INVASION OF PERSONAL PRIVACY

In section 92F-2, Hawaii Revised Statutes, the Legislature recognized that the public policy of "open government" must be balanced with the "right of the people to privacy, as embodied in . . . the Constitution of the State of Hawaii." Haw. Rev. Stat. § 92F-2 (Supp. 1991).

Hence, under the UIPA, an agency is not required to disclose "[g]overnment records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy." Haw. Rev. Stat. § 92F-13(1) (Supp. 1991). The UIPA's personal privacy exception must be read together with section 92F-14(a), Hawaii Revised Statutes, which states that the disclosure 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." Haw. Rev. Stat. § 92F-14(a) (Supp. 1991).

Moreover, the UIPA's legislative history provides that "[i]f 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." S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S. J. 689, 690 (1988); H. Conf. Comm. Rep. No. 112-88, 14th Leg., 1988 Reg. Sess., Haw. H. J. 817, 818 (1988). Thus, in order to assess whether the privacy exception applies, the first step is to determine if there is a significant privacy interest involved.

In section 92F-14(b), Hawaii Revised Statutes, the Legislature provided examples of information in which an

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individual has a significant privacy interest. Section 92F-14(b), Hawaii Revised Statutes, provides:

(b) The following are examples of information in which the individual has a significant privacy interest.

- (1) Information relating to medical, psychiatric, or psychological history, diagnosis, condition, treatment, or evaluation, other than directory information while an individual is present at such facility;
- (2) Information identifiable as part of an investigation into a possible violation of criminal law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;
- (3) Information relating to eligibility for social services or welfare benefits or to the determination of benefit levels;
- (4) Information in an agency's personnel file, or applications, nominations, recommendations, or proposals for public employment or appointment to a governmental position, except information relating to the status of any formal charges against the employee and disciplinary action taken or information disclosed under section 92F-12(a)(14);
- (5) Information relating to an individual's nongovernmental employment history except as necessary to demonstrate compliance with requirements for a particular government position;
- (6) Information describing an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or credit worthiness;
- (7) Information compiled as part of an inquiry into an individual's fitness to be granted or to retain a license, except:

(A) The record of any proceeding resulting

in the discipline of a licensee and the grounds for discipline;

(B) Information on the current place of employment and required insurance coverages of licensees; and

(C) The record of complaints including all dispositions; and

(8) Information comprising a personal recommendation or evaluation.

Haw. Rev. Stat. § 92F-14(b) (Supp. 1991).

Based upon our examination of The Ag Rag, we find that the information contained in the Article does not fall within any of the examples set forth in section 92F-14(b), Hawaii Revised Statutes. Although the listing in section 92F-14(b), Hawaii Revised Statutes, does not purport to be exhaustive, in our opinion, the Article's author does not have a significant privacy interest in the Article. The Article's author voluntarily submitted the Article for publication in The AG Rag, a newsletter that is deliberately and widely circulated to various divisions within the Department. While we believe that Department employees may have a significant privacy interest in personal notes or mentions contained in this agency newsletter, we do not believe that the author of a feature article in this newsletter has a privacy interest in that article that approaches a level that can be called "significant."

Since there is no significant privacy interest in the Article, all that is necessary for required disclosure is a "scintilla" of public interest. S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S. J. 689, 690 (1988); H. Conf. Comm. Rep. No. 112-88, 14th Leg., 1988 Reg. Sess., Haw. H. J. 817, 818 (1988). The public interest to be considered is the public interest in disclosure of information that sheds light on government agencies or officials. See OIP Op. Ltr. No. 89-16 (Dec. 27, 1989). Because the Article represents only the views of the author, the Article does not reveal much about the conduct of government agencies or their officials.

Nonetheless, we believe that under the UIPA's balancing test, there is at least a "scintilla" of public interest in the contents of an agency's internal newsletter such as the AG Rag, including the Article. Consequently, we believe that under the UIPA, the Article is not protected by the exception set forth in section 92F-13(1), Hawaii Revised Statutes, because disclosure

would not "constitute a clearly unwarranted invasion of personal privacy."

III. FRUSTRATION OF A LEGITIMATE GOVERNMENT FUNCTION

The UIPA also excepts from required disclosure "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(3) (Supp. 1991).

The legislative history of section 92F-13(3), Hawaii Revised Statutes, provides examples of records which need not be disclosed, if disclosure would frustrate a legitimate government function:

(b) Frustration of legitimate government function. The following are examples of records which need not be disclosed, if disclosure would frustrate a legitimate government function.

- (1) Records or information compiled for law enforcement purposes;
- (2) Materials used to administer an examination which, if disclosed, would compromise the validity, fairness or objectivity of the examination;
- (3) Information which, if disclosed, would raise the cost of government procurements or give a manifestly unfair advantage to any person proposing to enter into a contract or agreement with an agency, including information pertaining to collective bargaining;
- (4) Information identifying or pertaining to real property under consideration for future public acquisition, unless otherwise available under State law;
- (5) Administrative or technical information, including software, operating protocols and employee manuals, which, if disclosed, would jeopardize the security of a record-keeping system;
- (6) Proprietary information, such as research methods, records and data, computer programs and software and other types of information manufactured or marketed by persons under

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exclusive legal right, owned by an agency or entrusted to it;

- (7) Trade secrets or confidential commercial and financial information;
- (8) Library, archival, or museum material contributed by private persons to the extent of any lawful limitation imposed by the contributor; and
- (9) Information that is expressly made nondisclosable or confidential under Federal or State law or protected by judicial rule.

S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S. J. 1093, 1095 (1988).

The Article does not fall within any of the examples given by the UIPA's legislative history of records that may be withheld under this UIPA exception. In previous OIP opinion letters, however, referring to the Federal Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, for guidance, we have extended the UIPA's "frustration of a legitimate government function" exception to intra-agency or inter-agency memoranda that are both predecisional and deliberative. See OIP Op. Ltr. No. 90-8 (Feb. 12, 1990) (drafts and staff notes); OIP Op. Ltr. No. 90-21 (June 20, 1990) (consultant's report); OIP Op. Ltr. No. 91-16 (Sept. 19, 1991) (draft master plan); OIP Op. Ltr. No. 91-24 (Nov. 26, 1991) (interview panelists' notes).

To be "predecisional," a government record must be "received by the decisionmaker on the subject of the decision prior to the time the decision is made." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1984). To be "deliberative," the government record must reflect the "give and take" of the agency's consultative process. See OIP Op. Ltr. No. 91-24 at 7 (Nov. 26, 1991).

In the OIP advisory opinions cited above, the OIP found that there are various policy reasons behind the "deliberative process privilege." In OIP Opinion Letter No. 90-8 (Feb. 12, 1990), we found that the disclosure of predecisional and deliberative records "would frustrate agency decision-making functions, such as the resolution of issues and the formulation of policies." Further, the "candid and free exchange of ideas and opinions within and among agencies is essential to agency decision-making and is less likely to occur when all memoranda for this purpose

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are subject to public disclosure." OIP Op. Ltr. No. 90-8 at 5.

Based on the above discussion, we believe that the "deliberative process" privilege would not apply to the Article in question. The Article was not written to influence a decisionmaker and, therefore, was not "predecisional". Neither was the Article a part of a "give-and-take" exchange of ideas among agency members. The Article primarily contained the opinion of the individual author about the benefits of biomass as an alternate form of energy.

Accordingly, we find that the Article is not a government record that must remain confidential in order to avoid "the frustration of a legitimate government function." Haw. Rev. Stat. § 92F-13(3) (Supp. 1991). Because none of the UIPA exceptions apply to the Article, it must be made available for public inspection and copying.

CONCLUSION

We conclude that the Article is a "government record" as that term is defined by the UIPA. Furthermore, we conclude that the Article must be made available for public inspection and copying because it is not protected from disclosure by any of the UIPA's exceptions to required agency disclosure. Specifically, we find that the Article does not "constitute a clearly unwarranted invasion of personal privacy," nor would disclosure result in the "frustration of a legitimate government function." Haw. Rev. Stat. § 92F-13(1), (3) (Supp. 1991).

Very truly yours,

Lorna J. Loo
Staff Attorney

APPROVED:

Kathleen A. Callaghan
Director

LJL/LY:sc
c: The Honorable Warren Price, III
Attorney General

OIP Op. Ltr. No. 92-15