

March 21, 1994

The Honorable Samuel B.K. Chang
Director
Office of the Legislative Reference Bureau
State Capitol
Honolulu, Hawaii 96813

Dear Mr. Chang:

Re: Review Commission on the State Water Code

This is in response to your letter to the Office of Information Practices ("OIP") dated February 14, 1994 requesting an advisory opinion concerning the records of the Review Commission on the State Water Code ("Commission").

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), the Commission is an "agency" which must file a public records report with the OIP in accordance with sections 92F-18(b) and (c), Hawaii Revised Statutes.

FACTS

The Commission was established by section 5 of Act 45, Session Laws of Hawaii 1987 ("Act 45"). The purpose of the Commission is to "perform a comprehensive review of the state water code and the development of recommendations for its improvement." Act 45, 1987 Hawaii Session Laws 101. Specifically, Act 45 instructs the Commission to review:

(1) [A]ll water issues addressed in the state water code; (2) other water matters of fundamental importance which should be dealt with in a state water code, but which have not yet been incorporated, such as the

OIP Op. Ltr. No. 94-2

Honorable Samuel B.K. Chang
March 21, 1994
Page 2

identification and definition of public and private rights to waters, the institution of a comprehensive statewide permit system to regulate all types and uses of water, the integration of water quality and water quantity matters for a unified management of the resource by a single lead agency; and (3) the appropriate agencies of the state and county levels responsible for protecting, developing, and controlling water, their aims and objectives, the necessary powers to be conferred upon them, and their organizational support.

Act 45, 1987 Session Laws of Hawaii 101.

Under Act 45, the Commission is placed administratively within the Legislative Reference Bureau. The Commission began its review work after the appointment of its seven members in September 1992. Act 45 provides that the Commission shall cease to exist one year after it submits its final report to the Legislature. Because the Commission intends to submit its final report to the Legislature in December 1994, it is expected that the Commission will cease to exist after December 1995. You requested an advisory opinion from the OIP concerning whether the Commission is an "agency" which, under sections 92F-18(b) and (c), Hawaii Revised Statutes, is required to file a public records report with the OIP.

DISCUSSION

Under the UIPA, each agency is required to "compile a public report describing the records it routinely uses or maintains using forms prescribed by the office of information practices." Haw. Rev. Stat. §92F-18(b) (Comp. 1993). These public reports are to be filed with the OIP on or before December 31, 1994.¹

¹Section 11 of Act 57, Session Laws of Hawaii 1993, provides an incremental filing schedule for agencies filing their public records reports with the OIP. Specifically, section 11 states that "each agency shall have filed with the office of information practices twenty-five percent of its public report forms on or before December 1993, fifty percent on or before March 31, 1994, seventy-five percent on or before July 1, 1994, and one hundred percent on or before December 31, 1994." Act 57, 1993 Session Laws of Hawaii 74.

Honorable Samuel B.K. Chang
March 21, 1994
Page 3

Section 92F-18(c), Hawaii Revised Statutes, further requires each agency to "supplement or amend its public report, or file a new report, on or before July 1 of each subsequent year, to ensure that the information remains accurate and complete."

The provisions of the UIPA apply only to records maintained by an "agency". Under the UIPA, the term "agency" is defined as:
[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. 1992) (emphases added).

In previous OIP advisory opinions, we have found that a crucial factor in determining whether an entity is an "agency" subject to the UIPA is whether the entity performs a governmental function. See OIP Op. Ltr. No. 93-18 (Oct. 20, 1993) (Akaku - Maui Community Television, Inc. is not an "agency" under the UIPA because providing community television programming is not a governmental function). Section 5 of Act 45, which sets forth the Commission's duties and functions, requires the Commission to review: 1) all issues addressed in the State water code; 2) all water-related issues of fundamental importance which should be dealt with in a State water code, but have not yet been incorporated; and 3) the aims, objectives, necessary powers, and organizational support of all agencies concerned with water. In addition, Act 45 requires the Commission to report its findings and recommendations to the Legislature. We believe that by performing the enumerated duties set forth in Act 45, the Commission is performing a governmental function.

We also find it significant that under Act 45, the Legislature placed the Commission within the Legislative Reference Bureau for administrative purposes. In OIP Opinion Letter No. 93-17 (Oct. 8, 1993), in determining whether the Legislature is an "agency" under the UIPA, the OIP concluded that "because the term 'agency' includes within its coverage the units, offices, and subdivisions of each agency, we believe that the UIPA also applies to subunits of the Legislature (such as the

Honorable Samuel B.K. Chang
March 21, 1994
Page 4

Senate, the House, research offices, and committees), as well as the offices of each legislator." OIP Op. Ltr. No. 93-17 at 7 (emphasis added). Thus, in our opinion, the placement of the Commission administratively within the Legislative Reference Bureau further evinces the Legislature's intent that the Commission function as a government entity.

Based upon the foregoing, and the express language of the UIPA definition of "agency," the Commission appears to constitute an "agency" whose records are subject to the provisions of the UIPA.

Our research has not uncovered any cases from other jurisdictions that address the treatment, for public records law purposes, of entities created by the legislative branch that exist for only a limited duration. It is our opinion that the limited duration of an entity created to perform a government function is not relevant when determining whether the entity constitutes an "agency" under the UIPA.²

Accordingly, despite the limited duration of the Commission's existence, we believe that the Commission is an "agency" for purposes of the UIPA. Therefore, the records maintained by the Commission are subject to the provisions of the UIPA, and the Commission must, like all other government agencies, submit a public records report to the OIP under sections 92F-18(b) and (c), Hawaii Revised Statutes.

CONCLUSION

Although the Commission will cease to exist after December 1995, the Commission nonetheless is an "agency" for purposes of the UIPA. The UIPA definition of "agency" does not differentiate between permanent agencies and "temporary" agencies. We believe that it is the function and purpose of an entity rather than its length of duration that determines whether an entity is subject to the UIPA. Accordingly, because the Commission was created by the Legislature to review all matters relating to the State's

²Agency records may only be destroyed pursuant to chapter 94, Hawaii Revised Statutes. Even if an agency no longer exists, so long as any records of the agency exist, the disclosure of those records will be governed by the UIPA and, therefore, the records must be included within the public records report in accordance with sections 92F-18(b) and (c), Hawaii Revised Statutes.

Honorable Samuel B.K. Chang
March 21, 1994
Page 5

water code and was placed administratively within the Legislative Reference Bureau, we believe that the Commission functions as a government agency. As a government agency, the Commission must file a public records report with the OIP under sections 92F-18(b) and (c), Hawaii Revised Statutes.

Very truly yours,

Stella M. Lee
Staff Attorney

APPROVED:

Kathleen A. Callaghan
Director

SML:sc