

April 28, 1994

The Honorable Robert P. Takushi  
Comptroller  
Department of Accounting and  
General Services  
P.O. Box 119  
Honolulu, Hawaii 96810

Attention: Ms. Jolyn G. Tamura  
State Archivist

Dear Mr. Takushi:

Re: Former Governors' Records Maintained by State Archives

This is in response to a memorandum from Jolyn G. Tamura, State Archivist, Department of Accounting and General Services ("DAGS"), to the Office of Information Practices ("OIP") requesting an advisory opinion concerning the public's right to inspect and copy the above-referenced records.

**ISSUE PRESENTED**

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), records transmitted to the Archives ("Archives"), a division of DAGS, by former governors of the State of Hawaii ("governors' records") must be made available for public inspection and copying.

**BRIEF ANSWER**

The Governors' records maintained by Archives traditionally have not been made available for public inspection until ten years after each governor's term of office has expired. This restriction was initially imposed pursuant to a policy adopted by the Board of Commissioners of Public Archives ("Board") of the Territory of Hawaii in 1944; however, Archives staff has continued to follow this ten-year restriction on access to the

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governors' records. Preliminarily, in determining whether the governors' records within the ten-year restriction must be available for public inspection under the UIPA, we conclude that the Board's rule does not constitute a "state or federal law" which permits agencies to withhold public access to government records. See Haw. Rev. Stat. § 92F-13(4) (Supp. 1992).

Some information contained in the governors' records may be protected under the UIPA's personal privacy exception, section 92F-13(1), Hawaii Revised Statutes. Examples of information that may be withheld under this exception are: an individual's home address, home telephone number, social security number, birth date, ethnicity, medical information, and financial information. Other personal information may also be protected if, under the UIPA's balancing test in section 92F-14(a), Hawaii Revised Statutes, the individual's privacy interest outweighs the public interest in disclosure. Thus, Archives must segregate any information protected by the UIPA's personal privacy exception before publicly disclosing the governors' records.

Additionally, the UIPA's "frustration of a legitimate government function" exception in section 92F-13(3), Hawaii Revised Statutes, may permit Archives to withhold certain of the governors' records or certain information contained within these records. Examples of information which are protected under this exception are provided in the legislative history of the UIPA and should provide some guidance in determining whether this UIPA exception applies to protect any of the governors' records.

Should Archives require definitive guidance from the OIP concerning whether portions of the governors' records are protected from required public disclosure by one of the UIPA's exceptions, the OIP will be in a position to provide such advice after having had the opportunity to examine the information in question.

Finally, the legislative history of the UIPA provides that the exceptions to disclosure contained in section 92F-13, Hawaii Revised Statutes, were not intended to apply to records that were previously available for public inspection before the adoption of the UIPA. Thus, once the ten-year restriction has passed, the governors' records must be made publicly available without any segregation of information, notwithstanding the applicability of any UIPA exception.

#### **FACTS**

The Archives Division of DAGS "serves as the central depository for the preservation and retention of permanent

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records, documents, and studies. Legislative Reference Bureau, Guide to Government in Hawaii 18 (9th ed. 1989). Section 26-6, Hawaii Revised Statutes, provides that the Archives exists to "manage the preservation and disposal of all records of the State." Before statehood, Archives was governed by the Board of Commissioners of Public Archives ("Board").<sup>1</sup> The policies governing the review of Archives material were set forth in the Board's Rules for Patrons of the Archives ("Policies").

In its policy dated March 13, 1944, the Board provided that all governors' files housed at Archives "for a period of ten (10) years after the termination of the term of a governor are to be regarded as confidential and may not be examined without the written permission of the Governor." Territory of Hawaii, Board of Commissioners of Public Archives, Rules for Patrons (March 13, 1944). This policy was later revised to state that all governors' files "for a period of ten (10) years after the termination of the term of a governor are to be regarded as restricted and may not be examined without the permission of the Archivist." Territory of Hawaii, Board of Commissioners of Public Archives, Rules for Patrons (March 10, 1958).

Archives informs us that it has continued to follow the ten-year restriction upon access to governors' records.<sup>2</sup> In 1986, at the end of his term, former Governor George Ariyoshi deposited his records at Archives with directions that these files could be made public after ten years. The ten-year period will expire in 1996; however, Archives would like to know whether, under the

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<sup>1</sup>Section 26-6, Hawaii Revised Statutes, states in pertinent part that "[t]he functions and authority heretofore exercised by the . . . board of commissioners of public archives . . . [is] transferred to the department of accounting and general services established by this chapter." This section of the Hawaii Revised Statutes was originally enacted in 1959, the year Hawaii became a State.

<sup>2</sup>The Municipal Reference and Records Center ("MRRC"), City & County of Honolulu ("City"), maintains records deposited by the City's mayors at the end of their terms. MRRC informs us that all of the mayors' records maintained by the MRRC are considered public records. However, City mayors are not required to deposit their files with MRRC at the expiration of their terms. Consequently, not all mayors' records are on file at the MRRC.

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UIPA, it can make these records available for public inspection before 1996.<sup>3</sup>

## DISCUSSION

### I. INTRODUCTION

Under the UIPA, "[a]ll government records are open to public inspection unless access is restricted or closed by law." Haw. Rev. Stat. § 92F-11(a) (Supp. 1992). Section 92F-11(b), Hawaii Revised Statutes, states further that "[e]xcept as provided in section 92F-13, each agency upon request by any person shall make government records available for inspection and copying during regular business hours."

Section 92F-3, Hawaii Revised Statutes, defines the term "[g]overnment record" as "information maintained by an agency in written, auditory, visual, electronic, or other physical form." Because they are transmitted to and maintained by Archives upon expiration of the governors' terms, we are of the opinion that the governors' records at Archives are "government records" within the meaning of section 92F-3, Hawaii Revised Statutes, and therefore, the disclosure of these records are governed by the provisions of the UIPA.

Of the five exceptions to required agency disclosure provided in section 92F-13, Hawaii Revised Statutes, we find that two of the exceptions are inapplicable to the factual situation presented here. Accordingly, we will not discuss sections 92F-13(2) and 92F-13(5), Hawaii Revised Statutes. With regard to the three remaining exceptions, we shall address each separately.

### II. RECORDS PROTECTED BY STATE OR FEDERAL LAW

Section 92F-13(4), Hawaii Revised Statutes, permits agencies to withhold "[g]overnment records which, pursuant to state or federal law including an order of any state or federal court, are protected from disclosure." Our research has not revealed any State or federal law requiring the governors' records to be kept confidential.

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<sup>3</sup>Section 94-7, Hawaii Revised Statutes, states that "[a]ll restrictions on access to government records which have been deposited in the state archives, whether confidential, classified, or private, shall be lifted and removed eighty years after the creation of the record."

The Board's policy places a ten-year restriction on access to the governors' records on file with Archives. We have determined in previous OIP advisory opinions that administrative rules or policies restricting public access to records do not constitute "state law" that requires non-disclosure of government records under section 92F-13(4), Hawaii Revised Statutes.<sup>4</sup> This is the case because the uniformity of the UIPA would easily be defeated if agencies were free to adopt rules restricting access to government records. Accordingly, the Board's policy is not a "state law" that permits Archives to restrict public access to the governors' records under section 92F-13(4), Hawaii Revised Statutes.

Because the governors' records maintained by Archives may contain a myriad of information, we can only provide general advice in this opinion concerning what types of information are protected by the UIPA's personal privacy and frustration of legitimate government function exceptions. We turn next to the UIPA's personal privacy exception.

### III. CLEARLY UNWARRANTED INVASION OF PERSONAL PRIVACY

Section 92F-13(1), Hawaii Revised Statutes, permits agencies to withhold records or information which, if disclosed, would result in a "clearly unwarranted invasion of personal privacy." To determine which records fall within this UIPA exception, the Legislature provided a balancing test in section 92F-14(a), Hawaii Revised Statutes, which states that the "[d]isclosure 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."<sup>5</sup> Further assistance is provided in section 92F-14(b), Hawaii Revised Statutes, which contains a list of examples of information in which an individual has a significant privacy interest.

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<sup>4</sup>See OIP Op. Ltr. No. 92-4 at 8-9 (June 10, 1992); OIP Op. Ltr. No. 92-3 at 12 (Mar. 19, 1992).

<sup>5</sup>The UIPA's legislative history explains that "[o]nce a significant privacy interest is found, the privacy interest will be balanced against the public interest in disclosure. If 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., S.J. 689, 690 (1988); H. Conf. Comm. Rep. No. 112-88, Haw. H.J. 817, 818 (1988).

In previous advisory opinions, the OIP has concluded that, generally, the following types of information are protected by the UIPA's personal privacy exception: an individual's home address, home telephone number, social security number, birth date, ethnicity, financial activities, and medical information. See OIP Op. Ltr. No. 91-19 (Oct. 18, 1991) (home address, home telephone number, social security number, birthdate, and ethnicity of Hawaiian Home Lands lessees are confidential); OIP Op. Ltr. No. 90-1 (Jan. 8, 1990) (pension benefits of retired government employees protected by UIPA's privacy exception); OIP Op. Ltr. No. 92-22 (Nov. 18, 1992) (information concerning visual impairment constitutes medical information protected by UIPA's personal privacy exception). These types of information should therefore be segregated from the governors' records before they are publicly disclosed. Other information contained in the governors' records may also be protected under the UIPA's personal privacy exception; the examples provided here are merely guidelines. Archives should contact the OIP for advice if it is uncertain whether section 92F-13(1), Hawaii Revised Statutes, applies to specific information contained within the governors' records.

#### IV. FRUSTRATION OF LEGITIMATE GOVERNMENT FUNCTION

The UIPA's frustration exception contained in section 92F-13(3), Hawaii Revised Statutes, permits agencies to withhold "[g]overnment records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function." Examples of information protected under this UIPA exception are provided in the legislative history of the UIPA:

(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 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).

As a preliminary matter, we do not believe that the example given in the legislative history for "[l]ibrary, archival, or museum material contributed by private persons to the extent of any lawful limitation imposed by the contributor" applies to this situation because governors are not "private persons." Even if the records are transmitted to Archives after a governor's term expires, although it can be argued that a former governor is now a "private person," the former governor is transmitting the records in an official capacity and not as a private person.

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An example not listed in the legislative history, but recognized and extensively discussed in previous OIP advisory opinions, is the common law "deliberative process privilege." See OIP Op. Ltr. No. 93-19 (Oct. 21, 1993); OIP Op. Ltr. No. 93-13 (Sept. 17, 1993); OIP Op. Ltr. No. 92-5 (June 16, 1992); OIP Op. Ltr. No. 90-8 (Feb. 12, 1990).

This privilege protects inter-agency and intra-agency communications that are "deliberative" as well as "predecisional." To be "predecisional," the 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 (1975). To be "deliberative," the government record must "reflect the give and take of the consultative process" within or among agencies. Schell v. United States Dep't of Health & Human Services, 843 F.2d 933, 940 (6th Cir. 1988).

The policy underlying the "deliberative process privilege" is to protect agency decision-making functions and the "candid and free exchange of ideas and opinions within and among agencies [that] is essential to agency decision-making and is less likely to occur when all memoranda for this purpose are subject to public disclosure." OIP Op. Ltr. No. 90-8 at 5 (Feb. 12, 1990).

In particular, we have previously opined that draft documents are protected by the "deliberative process privilege." See OIP Op. Ltr. No. 93-19 (Oct. 21, 1993) (draft State Enforcement Plan); OIP Op. Ltr. No. 91-16 (Sept. 19, 1991) (draft master plan prepared by consultant); OIP Op. Ltr. No. 90-8 (Feb. 12, 1990) (draft correspondence).

Without having had the opportunity to review the actual contents of the governors' records, it is difficult for the OIP to express a definitive opinion concerning whether the information contained therein is protected from public disclosure by one of the exceptions in section 92F-13, Hawaii Revised Statutes. Should Archives staff require assistance in determining whether specific information contained in the governors' records is protected by a UIPA exception, they should contact the OIP for guidance.

#### V. EFFECT OF THE TEN-YEAR LIMITATION IMPOSED BY THE BOARD

The legislative history of the UIPA provides that the UIPA's exceptions in section 92F-13, Hawaii Revised Statutes, were not intended to close access to government records that were previously made available. See S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., S.J. 689, 690 (1988); H. Conf. Comm. Rep. No. 112-88, Haw. H.J. 817, 818 (1988). We believe this applies



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to the present situation because, in the past, Archives has made governors' records publicly accessible after the ten-year restriction has passed. Thus, in accordance with the UIPA's legislative history, we conclude that the governors' records must be made public in their entirety and without segregation, after the ten-year period has expired, notwithstanding the applicability of any of the UIPA's exceptions.

#### CONCLUSION

Although the Board's policy places a ten-year restriction on public access to governors' records maintained by Archives, the policy does not constitute a withholding statute under section 92F-13(4), Hawaii Revised Statutes. Consequently, unless protected by the UIPA's exceptions for personal privacy or for frustration of a legitimate government function, Archives must make governors' records available for public inspection and copying notwithstanding the Board's ten-year restriction. However, once the ten-year restriction has passed, the governors' records must be made publicly available without any segregation of information, notwithstanding the applicability of any UIPA exception.

Very truly yours,

Stella M. Lee  
Staff Attorney

APPROVED:

Kathleen A. Callaghan  
Director

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