

September 2, 1994

Honorable Richard Medina
Chairperson
Finance Committee
Maui County Council
200 S. High Street
Wailuku, Maui 96783

Dear Chairperson Medina:

Re: Inter-Agency Disclosure of Government Records

This is in reply to your letter to the Office of Information Practices ("OIP") dated August 16, 1994.

FACTS

In your letter to the OIP, you explained that in the past, the Finance Committee of the Maui County Council has requested copies of government records from other Maui County executive and legislative branch county agencies, and that these requests have been denied, either temporarily, or completely, on the basis that the requested records were protected from public disclosure under part II of the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA").

ISSUE PRESENTED

You requested the OIP to provide you with general guidance concerning the circumstances under which otherwise confidential records may be disclosed by other Maui County agencies to the Maui County Council, or committees and subcommittees thereof.

DISCUSSION

I. UIPA'S INTER-AGENCY DISCLOSURE PROVISIONS

Section 92F-19(a), Hawaii Revised Statutes, sets forth the circumstances under which an agency may disclose government

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records to other agencies. A copy of section 92F-19, Hawaii Revised Statutes, including the 1993 amendments to the same, is enclosed as Exhibit A for your information.

The OIP has issued several opinion letters concerning the inter-agency disclosure restrictions of the UIPA. These restrictions only apply if the records being disclosed are protected from disclosure under section 92F-13, Hawaii Revised Statutes, usually by the "clearly unwarranted invasion of personal privacy exception." Records that are publicly available under the UIPA must be freely shared between government agencies. See Haw. Rev. Stat. §§ 92F-19(a)(11) and 92F-11(b) (Supp. 1992 and Comp. 1993).

We have previously opined that the provisions of section 92F-19, Hawaii Revised Statutes, do not authorize the disclosure of government records that are protected from disclosure by specific State statutes. See OIP Op. Ltr. No. 92-22 at 8-9 (Nov. 18, 1992). This includes statutes making it a criminal offense to disclose government records, such as those relating to income tax returns and child abuse and neglect reports, as well as the evidentiary privileges established by the Hawaii Rules of Evidence such as the attorney-client privilege and the physician-patient privilege. See OIP Op. Ltr. No. 93-15 at 11 (Oct. 1, 1993). As with any privilege however, it may be voluntarily waived by the holder of the privilege, the client or the patient.

Additionally, section 92F-19(a), Hawaii Revised Statutes, merely authorizes the inter-agency disclosure of otherwise confidential records, if such disclosure is permitted under the restrictions set forth in this statute. It does not compel an agency to disclose otherwise confidential records to another agency upon request. See OIP Op. Ltr. No. 92-22 (Nov. 18, 1992).

While it is true that section 92F-19(a), Hawaii Revised Statutes, does not compel the inter-agency disclosure of government records, given the restrictions imposed by subsection (b) of this section, an agency that is the recipient of a request from another agency should be encouraged to provide the requested information, since the recipient agency is under the same restrictions on the re-disclosure of the information as the agency disclosing the records.¹ As such, there is little threat

¹Section 92F-19(b), Hawaii Revised Statutes, provides:

of harm presented to the disclosing agency. Nevertheless, whether an agency decides to disclose records under section 92F-19(a), Hawaii Revised Statutes, remains a policy decision for that agency.

II. INTER-AGENCY DISCLOSURES TO THE COUNTY COUNCIL UNDER SECTION 92F-19(a)(6), HAWAII REVISED STATUTES

Before the Legislature amended section 92F-19, Hawaii Revised Statutes, in 1993, section 92F-19(a)(6), Hawaii Revised Statutes authorized the inter-agency disclosure of confidential records to the "legislature or any committee or subcommittee thereof."

Recognizing that the county councils perform a legislative function and that they occasionally have a need for access to otherwise confidential records (such as personnel related information), in 1993, at the initiative of the OIP, the legislature amended section 92F-19(a), Hawaii Revised Statutes, to permit disclosure to the "legislature, or a county council, or any committee or subcommittee thereof." Haw. Rev. Stat. § 92F-19(a)(6) (Comp. 1993) (emphasis added).

Accordingly, Maui County government agencies may disclose otherwise confidential records to the Maui County Council, or committees or subcommittees thereof, to the extent that such records are not protected from disclosure by specific State statutes. In OIP Opinion Letter No. 90-10 at 7-8 (Feb. 26, 1990), based upon federal court decisions interpreting a similar provision of the Federal Privacy Act of 1974, we opined that this provision permits the disclosure of records to the legislative bodies, or committees thereof acting as whole, and not to individual legislators (or council persons) acting in their individual capacities. As such, in that opinion, we stated:

In order to apply this principle, we would suggest that legislators making requests under section 92F-19(a)(6), Hawaii Revised Statutes, indicate how the requested government records would

(b) An agency receiving government records pursuant to subsection (a) shall be subject to the same restrictions on disclosure of the records as the originating agency.

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relate to the consideration of matters
brought before the Legislature or
committees or subcommittees thereof.

OIP Op. Ltr. No. 90-10 at 8 (Feb. 26, 1990).

III. INTRA-AGENCY DISCLOSURE OF CONFIDENTIAL GOVERNMENT RECORDS

In your letter to the OIP, you inquired about the intra-agency disclosure of government records. The UIPA was modeled upon the Uniform Information Practices Code ("Model Code") drafted by the National Conference of Commissioners on Uniform State Laws. The commentary of section 3-103 of the Model Code, which is nearly identical to section 92F-19, Hawaii Revised Statutes, provides:

Intra-agency use and disclosure of those records are not regulated in this section or elsewhere in this Article. The policy of this Act is that individually identifiable records can be freely used within an agency.

Model Code § 3-103 commentary at 25 (1981).

It is the OIP's opinion that the UIPA does not regulate the intra-agency disclosure of confidential government records, provided that any such disclosure is to an agency officer or employee with an official need to know in the performance of their duties.² The UIPA was intended to implement the individual's right to privacy under sections 6 and 7 of article I of the Constitution of the State of Hawaii. See Haw. Rev. Stat.

²The OIP's position in this regard is based upon the provisions of the Federal Privacy Act of 1974 ("Privacy Act"). The commentary to the Model Code demonstrates that it drew heavily from provisions of the Privacy Act and the federal Freedom of Information Act. See generally, OIP Op. Ltr. No. 92-24 (Dec. 2, 1992). Like section 92F-19, Hawaii Revised Statutes, the Privacy Act prohibits federal agencies from disclosing to any person or agency individually identifiable records without the individual's consent. However, the Privacy Act does permit such disclosure to "those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties." 5 U.S.C. § 552a(b)(1) (1988).

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§ 92F-3 (Supp. 1992). If the UIPA freely permitted the intra-agency disclosure of government records protected from disclosure under the "clearly unwarranted invasion of personal privacy exception" this policy would clearly be frustrated.

Thus, it is the opinion of the OIP that the intra-agency disclosure of confidential government records is a "public" disclosure if the disclosure is to an official or employee of the agency with no need to know such information in the performance of the person's duties.

To illustrate, as an OIP Staff Attorney, I have no official need to know confidential information contained in the personnel records of other OIP employees. In contrast, the OIP Director does have an official need to know such information, since the Director supervises the work of all OIP employees. Similarly, the secretary to the OIP Director does have an official need to know the details of OIP employee's personnel records, since she is responsible for filing personnel records, and for transmitting personnel records to the Personnel Office of the Department of the Attorney General. For similar reasons, certain individuals employed within the Department of the Attorney General's personnel office also have an official need to know the contents of OIP employees' personnel records.

CONCLUSION

Given the nature of your request to the OIP, we can only provide you with the general guidance set forth above. Should you have particular questions that are not answered by this letter, please contact me at 586-1404 and I would be pleased to provide you with more specific guidance.

Very truly yours,

Hugh R. Jones
Staff Attorney

APPROVED:

Kathleen A. Callaghan
Director

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HRJ:sc
c: Honorable Guy Haywood