

November 15, 1994

Patricia Mau-Shimizu
Chief Clerk
House of Representatives
The State Legislature
State Office Tower, Room 810
235 S. Beretania Street
Honolulu, Hawaii 96813

Dear Ms. Shimizu:

Re: Disclosure of Work Injury Notices Concerning
Former Representative Connie Chun's Work Injury

This is in response to your request on November 1, 1994 for an opinion from the Office of Information Practices ("OIP") concerning the above-referenced subject.

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), the Chief Clerk, House of Representatives, State of Hawaii ("Chief Clerk"), must make available for public inspection and copying the written notices, including the completed forms, that were submitted to the Chief Clerk or to the State Department of Labor and Industrial Relations ("DLIR") concerning former Representative Connie Chun's work injury in 1983 that resulted in Ms. Chun's receipt of workers' compensation benefits ("work injury notices").

FACTS

Ms. Ann Botticelli, a reporter with The Honolulu Advertiser, made a request to the Chief Clerk, House of Representatives, to inspect and copy the work injury notices concerning Ms. Chun's 1983 work injury that resulted in Ms. Chun's receipt of workers' compensation benefits. Ms. Botticelli also contacted the OIP requesting our assistance in determining whether certain records associated with Ms. Chun's receipt of workers' compensation benefits must be made available for public inspection and copying. Ms. Botticelli wrote news articles in the October 28, 1994 and November 3, 1994 editions of The Honolulu Advertiser concerning Ms. Chun's receipt of workers' compensation benefits ("The Honolulu Advertiser articles"). See Exhibits A and B. On November 2, 1994, the Chief Clerk provided to the OIP copies of

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the work injury notices for our in camera review.

In a telephone conversation with OIP Staff Attorney Lorna J. Loo on November 10, 1994, Ms. Chun reviewed the contents of The Honolulu Advertiser articles and confirmed that she had provided the information reported in the articles concerning the nature of her work injury and her receipt of workers' compensation benefits, and had discussed with Ms. Botticelli how the claim for workers' compensation benefits may have been initiated at the time of her work injury. However, Ms. Chun clarified that she had stated in her interview that she does not remember filing a claim for workers' compensation benefits, while The Honolulu Advertiser articles had reported that she did not file a claim.

DISCUSSION

The UIPA states that "[a]ll government records are open to public inspection unless access is restricted or closed by law" and 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." Haw. Rev. Stat. 92F-11(a), (b) (Supp. 1992). The term government record means "information maintained by an agency in written, auditory, visual, electronic or other physical form." Haw. Rev. Stat. 92F-11(b) (Supp. 1992). The copies of the work injury notices maintained by the Chief Clerk would constitute "government records" for purposes of the UIPA.

Section 92F-13, Hawaii Revised Statutes, sets forth the exceptions to the UIPA's general rule of public access, and we find that the only exception relevant to the facts presented in this case is for "[g]overnment records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy." Haw. Rev. Stat. 92F-13(1) (Supp. 1992). The UIPA's personal privacy exception is intended to implement the individual's right

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to privacy under section 6 of article I of the Constitution of the State of Hawaii. See Haw. Rev. Stat. ~~§ 92F-14~~ (Supp. 1992).

Under the UIPA, 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~~ (Supp. 1992). Thus, we must examine and balance Ms. Chun's privacy interest and the public interest in the disclosure of the work injury notices.

The UIPA expressly states that individuals have a significant privacy interest in information concerning their medical, psychiatric, or psychological history, diagnosis, condition, evaluation, or treatment. Haw. Rev. Stat. ~~§ 92F-14~~ (b)(1) (Supp. 1992). The OIP is currently in the process of drafting a formal opinion letter concerning whether, under the UIPA, the DLIR must make available for public inspection and copying basic workers' compensation claim information from its files, such as whether an individual has filed a claim, the nature of the injury for which benefits are sought, the name of the employer, and the date of the claim.

However, the facts presented to us in this case are readily distinguishable from the facts concerning other workers' compensation claims because, in this case, Ms. Chun provided information in The Honolulu Advertiser articles confirming the nature of her 1983 work injury as a heart attack, as well as her receipt of workers' compensation benefits resulting therefrom, and discussed in the newspaper articles how the claim for workers' compensation may have been initiated.

We believe that any privacy interest that Ms. Chun may have in certain information contained in the work injury notices, specifically, the nature of her work injury that resulted in workers' compensation benefits and how the workers' compensation claim was initiated, is substantially diminished because Ms. Chun publicly confirmed or discussed these very matters in The Honolulu Advertiser articles. We reach our conclusion after examining court cases in other jurisdictions concerning an individual's waiver of a privacy interest in records after disclosing information to the media.

For example, in Morales v. Ellen, 840 S.W.2d 519 (Tex. App. Ct. 1992), the court held that records relating to allegations of sexual harassment against a public official who resigned from public employment were not protected from disclosure under the privacy exception in the Texas Open Records Law. The court

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stated that "by publishing a detailed letter explaining his actions and state of mind at the time of his forced resignation, he has waived any privacy interest he may have had in those contents of the investigative file which are addressed in his letter." Morales, 840 S.W.2d at 525; see also Columbian Publishing Company v. City of Vancouver, 671 P.2d 280 (Wash. App. Ct. 1983) (required disclosure of complaints against police chief when police union had issued press release concerning complaints).

In comparison, in Doe v. Shady Grove Adventist Hospital, 598 A.2d 507 (Md. App. Ct. 1991), the court considered whether a person diagnosed with AIDS could maintain an action against a hospital for breach of confidentiality of patient medical records when the patient had given interviews to the press. The published press articles, however, had not identified the AIDS patient by name. The patient also gave several interviews with local television news channels; however, those stories did not mention the patient by name. According to the attorney for the AIDS patient, these interviews were given under a promise that the patient's name would remain confidential. The court in the Shady Grove Adventist Hospital case found that the appellant had not waived his right to confidentiality of his identity due to his contacts with the press for the following reason:

While it is true that the appellant has provided substantial information about himself that could lead to the discovery of his name, he has never revealed his true identity. There is a distinction. To the members of the public-at-large, the information revealed so far means little in the abstract. The revelation of one's name, however, gives one an identity that anyone can readily recognize, stranger and friend alike . . . [a]ppellant has taken precautions to keep his identity hidden; thus, we cannot say that there has been a waiver of his right to confidentiality of his identity.

Shady Grove Adventist Hospital, 589 A.2d at 515.

In the facts presented in this case, we find that Ms. Chun has waived any privacy interest that she may have in information contained in the work injury notices that she publicly confirmed and discussed in a public newspaper, The Honolulu Advertiser. Unlike the plaintiff in the Shady Grove Adventist Hospital case, Ms. Chun was clearly identified by name and her former position

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as State House Representative to be the subject of The Honolulu Advertiser articles about the workers' compensation benefits that she is receiving.

Next, we examine the public interest in information in the work injury notices that is limited to matters confirmed or discussed by Ms. Chun in The Honolulu Advertiser articles. According to the legislative history of the UIPA concerning the "clearly unwarranted invasion of personal privacy" exception, "[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. Rep. No. 112-88, Haw. H.J. 817, 818 (1988).

We find that there is more than a "scintilla" of public interest in the limited information in the work injury notices that was publicly confirmed and discussed by Ms. Chun in The Honolulu Advertiser articles.

Based upon cases decided under the federal Freedom of Information Act, 5 U.S.C. § 552 (1988) ("FOIA"), we have previously opined that the "public interest" to be considered is the public interest in the disclosure of information which sheds light upon an agency's performance of its statutory duties, or upon the actions and decisions of government agencies and public officials:

The basic policy of "'full agency disclosure unless information is exempted under clearly delineated statutory language,'" [citation omitted] indeed focuses on the citizens' right to be informed about "what their government is up to." Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct. In this case--and presumably in the typical case in which one private citizen is seeking information about another--the requester does not intend to discover anything about the conduct of the agency that has possession of the requested records. Indeed, response to this request would not shed any light on the conduct of

any government agency or official.

U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 772 (1989) (emphasis added), quoted in OIP Opinion Letter No. 89-16 (Dec. 27, 1989).

We find that disclosure of information in the work injury notices, as confirmed or discussed in The Honolulu Advertiser articles by Ms. Chun, would shed substantial light upon the actions of a government agency, the Legislature, or one or more of its officials, and also promote governmental accountability, two of the core policies that underlie the UIPA. See Haw. Rev. Stat. § 92F-2 (Supp. 1992). We note that the State of Hawaii is self-insured for workers' compensation purposes, so that any benefits paid to an injured worker are paid directly by the State, rather than by a workers' compensation insurer. Thus, we find that the public has a strong interest in information contained in the work injury notices that Ms. Chun had confirmed or discussed in a public newspaper.

Consequently, in view of Ms. Chun's diminished privacy interest and the public's outweighing interest in disclosure, we find that the UIPA's "clearly unwarranted invasion of personal privacy" exception does not apply to the following information contained in the work injury notices: the types of work injury notices submitted; names of the employee and the employer; the employee's job title, work address, and telephone number; a brief description of the work injury and the time of occurrence; the signatures of employees or officials signing the notices; and the name of the treating physician, a fact that has also been publicly reported in The Honolulu Advertiser articles.

We note that the work injury notices include other information that was not publicly disclosed by Ms. Chun in The Honolulu Advertiser articles and, therefore, would be protected by the UIPA's "clearly unwarranted invasion of personal privacy" exception. Accordingly, the Chief Clerk should segregate the following information from the work injury notices before making them available for public inspection and copying: Ms. Chun's social security number, date of birth, marital status, home address, and home telephone number. See OIP Op. Ltr. No. 89-16 (Dec. 27, 1989); OIP Op. Ltr. No. 90-7 (Feb. 9, 1990); OIP Op. Ltr. No. 91-8 (June 24, 1991). Finally, we do not believe that Ms. Chun has waived her privacy interest in other records relating to her workers' compensation benefits, such as detailed reports concerning the medical treatment and specific amounts of benefits that she receives.

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If you should have any questions regarding the advice set forth above, please contact us at 586-1400.

Very truly yours,

Hugh R. Jones
Staff Attorney

Lorna J. Loo
Staff Attorney

APPROVED:

Kathleen A. Callaghan
Director

LJL/HRJ:sc
Attachments

c: Dayton Nakanelua, Director
Department of Labor & Industrial Relations

Gary Hamada, Disability Compensation Administrator
Department of Labor & Industrial Relations

Ann Botticelli
The Honolulu Advertiser