

March 3, 1995

Ms. Sally T. Geiger
Ms. Carol Ching
Ms. Susan Okamoto
Bureau of Conveyances
1151 Punchbowl Street, Room 121
Honolulu, Hawaii 96813

Dear Ms. Geiger, Ms. Ching, and Ms. Okamoto:

Re: Request for Copy of Petition

This is in response to your letter dated July 5, 1994, to the Office of Information Practices ("OIP") requesting an advisory opinion concerning your right to inspect and copy a petition that was sent to Ms. Barbara Wright, Registrar of the Land Court ("Registrar"), in May, 1994 ("petition").

ISSUE PRESENTED

Whether, under part III of the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), the State Judiciary is required to make a petition allegedly about each of you available to you for inspection and copying.

FACTS

In July, 1994, you sent a letter to Barbara Wright, who was then the Registrar of Land Court ("Registrar"), requesting to inspect a petition that she received concerning your recent appointments to certain positions at the Bureau of Conveyances. Your request to inspect the petition was denied. Consequently, you requested an advisory opinion from the OIP concerning your right to inspect and copy the petition.

In a letter dated July 19, 1994, a copy of which was sent to you, the OIP requested the Honorable Daniel G. Heely, Administrative Director of the Courts, to provide the OIP with a copy of the petition so that the OIP may examine it in accordance with section 92F-42, Hawaii Revised Statutes, in order to respond to your opinion request.

In a letter dated July 29, 1994, Judge Heely sent a portion of the petition to the OIP and explained why he believed that the petition should not be disclosed. Judge Heely's letter stated:

However, we want to emphasize that this petition was provided to us under an express promise of confidentiality. The

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communication would not have been made if confidentiality had not been assured.

The signatories to the petition fear reprisal, if identified. Thus, we are obligated to the source(s) of the petition to maintain this information in confidence. In addition, we are of the view that §92F-22 provides an exemption to the release of the petition to the individuals.

In a telephone conversation with the OIP on January 23, 1995, Barbara Wright, now retired, stated that before receiving the petition in her capacity as Registrar, she had orally promised to keep the names in the petition confidential during a telephone conversation with an individual who signed the petition.

The OIP has examined the portion of the petition that we received from Judge Heely. Apparently, there are two parts to the petition: (1) a cover letter, which was the part sent to the OIP; and (2) one or more pages containing the signatures of the petitioners, which was the part of the petition excluded from Judge Heely's letter to the OIP. After reviewing the petition's cover letter, the OIP responds to your request for an advisory opinion as follows.

DISCUSSION

Part III of the UIPA entitled "Disclosure of Personal Records" governs an agency's obligation to disclose a "personal record," upon request, to the individual to whom the personal record pertains. The purpose of part III of the UIPA is to "[p]rovide for accurate, relevant, timely, and complete government records," and to "[m]ake government accountable to individuals in the collection, use, and dissemination of information relating to them." Haw. Rev. Stat. § 92F-2 (Supp. 1992). Also, the history of section 6 of article I of the Constitution of the State of Hawaii provides that "the right to privacy should insure that at the least an individual should have the right to inspect records to correct misinformation about

himself." Stand. Comm. Rep. No. 68, reprinted in 2 Proceedings of the Constitutional Convention of Hawaii 1978 at 672 (1978).

As to the definition of the term "personal record," the UIPA states:

"Personal record" means any item, collection, or grouping of information about an individual that is maintained by an agency. It includes, but is not limited to, the individual's education, financial, medical, or employment history, or items that contain or make reference to the individual's name, identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph.

Haw. Rev. Stat. § 92F-3 (Supp. 1992).

From our review of the petition's cover letter, we find that the petition refers to one or more of you by name, and that it contains information concerning your employment. Thus, the petition is "about" each of the named individuals. See OIP Op. Ltr. No. 92-24 at 4-5 (Dec. 2, 1992). Further, we find that the petition is "maintained by an agency." See Haw. Rev. Stat. § 92F-3 (Supp. 1992) (the term "agency" means "any unit of government in this State" but not including the "nonadministrative functions of the courts of this State").¹ Therefore, we believe that the petition is a "personal record" pertaining to the individuals named therein.

¹In OIP Op. Ltr. No. 90-4 (Jan. 29, 1990), we opined that "nonadministrative records of the courts, generally speaking, are those records which are provided to the court incident to the adjudication of a legal matter before that tribunal," for example, the charging documents, complaints, motions, pleadings, orders, and decisions, OIP Op. Ltr. No. 90-4 at 5-6, or those relating to the exercise of an inherently judicial function, OIP Op. Ltr. No. 93-8 (Aug. 2, 1993). Based upon the foregoing analysis, we believe that the petition does not fall within the category of "nonadministrative records" as described and, instead, is an administrative record subject to the provisions of the UIPA, since it relates primarily to personnel functions of the Judiciary. See OIP Op. Ltr. No. 91-24 (Nov. 26, 1991) (interview scores summary and interview panelists' notes maintained by the Judiciary's Budget and Planning Office).

With regards to an individual's right of access to a personal record pertaining to that individual, the UIPA provides:

§92F-23 Access to personal record; initial procedure. Upon the request of an individual to gain access to the individual's personal record, an agency shall permit the individual to review the record and have a copy made within ten working days following the date of the request unless the personal record requested is exempted under section 92F-22

Haw. Rev. Stat. § 92F-23 (Supp. 1992). Thus, under section 92F-23, Hawaii Revised Statutes, an agency is required to permit an individual's inspection of "personal records" unless the record falls within one of the exemptions to required individual access set forth in section 92F-22, Hawaii Revised Statutes. See also Haw. Rev. Stat. § 92F-21 (Supp. 1992) ("[e]ach agency that maintains any accessible personal record shall make that record available to the individual to whom it pertains").

The five exemptions to required individual access set forth in section 92F-22, Hawaii Revised Statutes, cover certain criminal law enforcement records, identities of confidential sources, testing materials for employment or licensing, investigative reports relating to pending legal actions against the individual, and information made confidential by law. We find that the only exemption that may be relevant to the petition in the facts before us is as follows:

§92F-22 Exemptions and limitations on individual access. An agency is not required by this chapter to grant an individual access to personal records, or information in such records:

. . . .

- (2) The disclosure of which would reveal the identity of a source who furnished information to the agency under an express or implied promise of confidentiality."

Haw. Rev. Stat. § 92F-22(2) (Supp. 1992).

In his letter to the OIP, Judge Heely referred to this exemption for confidential sources in section 92F-22, Hawaii Revised Statutes, as the basis for his belief that the petition is confidential. According to the facts, the former Registrar had informed the OIP that she had expressly promised to keep the names in the petition confidential in a telephone conversation with an individual who signed the petition.

Furthermore, in addition to the express promise of confidentiality that was apparently given by the Registrar, a promise of confidentiality may also be implied from the request for confidentiality in the petition's cover letter. See OIP Op. Ltr. No. 92-24 (Dec. 2, 1992) (certificate of experience of license applicant). In OIP Opinion Letter No. 92-24, we explained that "a determination concerning whether a person furnished information to an agency under an implied promise of confidentiality must be made on a case-by-case basis because 'from one set [of circumstances] to another the result indicated expectably may differ.'" Id. at 12 (citation omitted). According to a footnote in that OIP opinion letter, as an example, an agency's promise to keep a person's identity confidential may be implied where the person's comments on a certificate of experience indicate the person's expectation that the identity will not be revealed to the license applicant. Id. at fn. 4.

For further guidance in assessing whether an implied promise of confidentiality exists, we refer to federal cases applying the FOIA exception under which a federal agency is not required to allow public inspection and copying of law enforcement records that "could reasonably be expected to disclose the identity of a confidential source." 5 U.S.C. § 552(b)(7)(D) (1988). In several FOIA cases applying this exception, a promise of confidentiality was found to be implied where employees were providing information about their superiors for a law enforcement investigation. See Brant Const. Co. v. United States Environmental Protection Agency, 778 F.2d 1258, 1264 (7th Cir. 1985) (implicit request for confidentiality was found in view of the information source's subordinate position as subcontractor and concern expressed about retaliation); United Technologies Corp. v. National Labor Relations Board, 777 F.2d 90, 94 (2d Cir. 1985) ("[a]n employee-informant's fear of employer retaliation can give rise to a justified expectation of confidentiality"); L & C Marine Transport, Ltd. v. United States, 740 F.2d 919, 924 (11th Cir. 1984) (confidentiality of employee witnesses was implied in view of "great leverage that employers hold over workers and the possibility for retaliation surrounding an OSHA investigation").

In our examination of the petition's cover letter, we found an express request for confidentiality of the names in the petition. We believe that an explicit request for confidentiality of the names in the petition strongly suggests that the petitioners expected that their names will be kept confidential. Furthermore, the request for confidentiality expressly refers to a possible threat of retaliation as the basis for the request. Thus, a promise by the Registrar to keep the names confidential can reasonably be implied.

Regardless of whether the promise of confidentiality by the Registrar is found to be express or implied, the exemption in section 92F-22(2), Hawaii Revised Statutes, is specifically limited only to allowing an agency to withhold "personal records, or information in such records . . . [t]he disclosure of which would reveal the identity of a source who furnished information to the agency" under the agency's express or implied promise of confidentiality. For guidance in analyzing the exemption in section 92F-22(2), Hawaii Revised Statutes, the OIP has previously referred to the exemption in the federal Privacy Act,² that allows an agency to withhold from individual access certain personnel records "but only to the extent that the disclosure of such material would reveal the identity of a source."³ 5 U.S.C.

²The policies and purposes underlying part III of the UIPA are nearly identical to those underlying the Privacy Act's provisions which, among other things, require federal agencies to disclose to individuals records which relate to them, and allows individuals to request correction or amendment of incorrect or misleading factual information in such records. Therefore, it follows that the UIPA's part III exemptions should be construed in pari materia with parallel provisions of the Privacy Act. See 2B N. Singer, Sutherland Statutory Construction § 52.02 (5th ed. rev. 1992) (judicial interpretations of federal statutes useful in construing state statutes copied from federal acts); see also OIP Op. Ltr. No. 92-24 (Dec. 2, 1992).

³Specifically, under section 552a(k)(5) of the Privacy Act, federal agencies are not required to disclose to an individual:

(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under

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§ 552a(k)(5) (Supp. 1990); see Nemetz v. Dep't of Treasury, 446 F. Supp. 102 (N.D. Ill. 1978).

In Nemetz, the court clarified the limited scope of exemption (K)(5) of the Privacy Act as follows:

Even if the defendants are able to support a claim of exemption for information which would identify the furnishing source, they still must produce information about the plaintiff which does not disclose the source. The government has withheld entire documents on the strength of a Section 552a(k)(5) exemption. As previously noted, the exemption is a limited one, and the government has an obligation to disclose reasonably segregable portions of the documents which do not fall within the exemption.

Nemetz, 446 F. Supp. at 105 (emphasis added); see also May v. Dep't of Air Force, 800 F.2d 1402, 1403 (5th Cir. 1986); see generally J. O' Reilly, Federal Information Disclosure § 21.08 (1994) (legislative history behind this Privacy Act exemption).

Like the exemptions in the Privacy Act, the exemptions to individual access set forth in section 92F-22, Hawaii Revised Statutes, "must be narrowly construed and their requirements strictly met."⁴ Hernandez v. Alexander, 671 F.2d 402, 407 (10th

(..continued)

an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

5 U.S.C. § 552a(k)(5) (1988) (emphasis added).

⁴We have stated in past advisory opinions that the exceptions to public disclosure under part II of the UIPA must be narrowly construed in favor of disclosure in order to be consistent with the UIPA's underlying policies. E.g., OIP Op. Ltr. No. 93-5 (June 7, 1993). Similarly, the exemptions in part III of the UIPA must be narrowly construed to further another of the UIPA's purposes, which is to "[m]ake government accountable to individuals in the collection, use, and dissemination of information relating to them." Haw. Rev. Stat. § 92F-2 (Supp. 1992).

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Cir. 1982) (citing Nemetz). Thus, we find that the contents of the petition may be withheld under section 92F-22(2), Hawaii Revised Statutes, only to the extent necessary to protect the identities of source(s) promised confidentiality. This means that, like the federal agency defendant in Nemetz, the Judiciary must segregate and disclose any part of the petition that falls outside of this exemption.

Consequently, we conclude that under section 92F-22(2), Hawaii Revised Statutes, the Judiciary is not required to disclose the signatures in the petition because this information would directly "reveal the identit[ies]" of the individuals, by name, who had submitted the petition under the Registrar's promise of confidentiality, regardless of whether it was expressed or implied.⁵ However, in our review of the petition's cover letter, we find no information in this part of the petition that would reveal in any way the actual identities of the individuals who had signed and submitted the petition. Hence, we find that the petition's cover letter is not protected by any exemption to individual access in section 92F-22, Hawaii Revised Statutes, and, therefore, must be made available for inspection and copying by the individuals to whom this personal record pertains under section 92F-23, Hawaii Revised Statutes.

We will be sending a copy of this advisory opinion to the Judiciary to inform it of our conclusion. If you have any questions regarding this matter, you may contact me at 586-1403.

Very truly yours,

⁵We note that, generally, under part II of the UIPA, an agency must make a petition available for public inspection and copying in its entirety when the petition relates to a matter within the agency's statutory duties and functions. See OIP Op. Ltr. No. 94-10 (June 8, 1994) (petition submitted to the Honolulu Liquor Commission protesting the issuance of a liquor license). In the facts before us, the petition relates to a personnel matter and originated within the agency. Because of the petition's subject matter, we do not believe that it would be subject to public inspection and copying under part II of the UIPA because public disclosure of this record would constitute a clearly unwarranted invasion of privacy of the individuals to whom it pertains under section 92F-13(1), Hawaii Revised Statutes.

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Lorna J. Loo
Staff Attorney

APPROVED:

Kathleen A. Callaghan
Director

LJL:sc

c: Chief Justice Ronald Moon

Honorable Daniel G. Heely
Administrative Director of the Courts

Honorable Wendell K. Huddy
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Kathleen F. Hanawahine
Acting Registrar, Land Court