

July 26, 1995

Honorable Margery S. Bronster
Attorney General
State of Hawaii
Hale Auhau
425 Queen Street
Honolulu, Hawaii 96813

Attention: Steven K. Miyasaka
Deputy Attorney General

Dear Ms. Bronster:

Re: Reconsideration of OIP Opinion Letter No. 95-5
Regarding Occupational Safety and Health Investigation
Records

This is in reply to a letter from Deputy Attorney General Steven K. Miyasaka, requesting the Office of Information Practices ("OIP") to reconsider the advice set forth in OIP Opinion Letter No. 95-5 (March 9, 1995).

FACTS

In OIP Opinion Letter No. 95-5, the OIP concluded that under sections 92F-13(4) and 396-14, Hawaii Revised Statutes, the Department of Labor and Industrial Relations ("DLIR") may withhold from public inspection and copying records and reports relating to the enforcement of chapter 396, Hawaii Revised Statutes, but only to the extent that such reports would result in the likelihood of actual identification of individuals who provide information to the DLIR in connection with the enforcement of State occupational safety and health laws and regulations.¹

Our conclusion was based upon an examination of: (1) the legislative history of section 396-14, Hawaii Revised Statutes, (2) Hawaii Attorney General Opinion No. 76-3 (Apr. 19, 1976), and (3) federal court decisions under Exemption 7 of the federal Freedom of Information Act ("FOIA").

¹We also stated that other information in records compiled under chapter 396, Hawaii Revised Statutes, might be protected by other exceptions in section 92F-13, Hawaii Revised Statutes. See OIP Op. Ltr. No. 95-5, footnotes 3 and 4 on pages 3 and 4.

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Deputy Attorney General Miyasaka requested the OIP to reconsider this opinion letter, and asked the OIP to find that section 396-14, Hawaii Revised Statutes, not only protects the identities of individuals who furnish information to the DLIR, but also protects the information they furnish, along with reports prepared by the DLIR in the enforcement of chapter 396, Hawaii Revised Statutes.

Deputy Attorney General Miyasaka stated that the request for reconsideration was based upon an order of Circuit Court Judge Colleen Hirai on March 23, 1995, which denied a motion to compel disclosure of records relating to elevator inspections under section 397-12, Hawaii Revised Statutes, which is identical in substance to section 396-14, Hawaii Revised Statutes.² Also, Deputy Attorney General Miyasaka stated:

Based upon the statutory language and the 1987 amendment broadening the protection of occupational safety and health files, our advice to our client has consistently been not to disclose investigation reports and statements, unless ordered to do so by a judge. Our position is more fully discussed in our memorandum in opposition to the motion to compel, which we submitted to Judge Hirai. Note the case of Industrial Commission v. Superior Court, 122 Ariz. 374, 595 P.2d 166 (1979), which we believe supports the position we took in our memorandum.

While we recognize that the court had to consider section 397-12, HRS, rather than 396-14, HRS, the language of both sections is identical and the legislative history of both sections is very similar.

Letter from Deputy Attorney General Steven K. Miyasaka to Kathleen A. Callaghan, Former OIP Director dated March 31, 1995.

By letter to the OIP dated May 1, 1995, Jeffrey Harris, Esq. urged the OIP to reaffirm its March 9, 1995 opinion letter. Mr. Harris stated that in the court case before Judge Hirai, the party seeking access to elevator inspection records maintained by the DLIR conceded that section 397-12, Hawaii Revised Statutes prevented disclosure of the records "absent compelling circumstances." Mr. Harris provided the OIP with a copy of the

²See Yolanda A. Akau et al. v. Hawaiian Pacific Elevator Company, et al., Civil No. 93-3726-09, Circuit Court, First Circuit, State of Hawaii (minute order dated March 23, 1995).

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requester's memorandum in support of its motion to compel disclosure of the records, in which it argued that under section 92F-12(b)(3), Hawaii Revised Statutes, the DLIR must disclose the records pursuant to a showing of compelling circumstances affecting the health or safety of any individual.

DISCUSSION

I. INTRODUCTION

In OIP Opinion Letter No. 95-5 (Mar. 9, 1995), we examined whether records and reports compiled by the DLIR connected with the enforcement of State occupational safety and health law must be available for public inspection and copying under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"). In light of the provision of section 92F-13(4), Hawaii Revised Statutes, which permits an agency to withhold records, which pursuant to state or federal law are protected from disclosure, the OIP was constrained to examine and interpret section 396-14, Hawaii Revised Statutes, which provides:

□ **396-14 Evidence.** No record or determination of any administrative proceeding under this chapter or statement or report of any kind obtained, received, or prepared in connection with the administration or enforcement of this chapter shall be admitted or used, whether as evidence or as discovery, in any civil action growing out of any matter mentioned in the record, determination, statement, or report other than an action for enforcement or review under this chapter.

Haw. Rev. Stat. □ ~~439~~(1985) (emphases added).

In our previous opinion, we noted that as a general rule, the authority to withhold a record under section 92F-13(4), Hawaii Revised Statutes, must be found in the actual wording of a State statute. However, we found that in creating a discovery privilege in section 396-14, Hawaii Revised Statutes, the Legislature implicitly assumed that and intended that such information would not be available to the general public. In light of section 92F-13(2), Hawaii Revised Statutes, which permits an agency to withhold government records that are protected by an applicable discovery privilege, see generally, OIP Opinion Letter No. 94-11 (June 24, 1994), the OIP again concludes that records that are protected from discovery under section 396-14, Hawaii Revised Statutes, are also protected from

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disclosure under the UIPA.

II. IDENTIFICATION OF RECORDS THAT ARE PROTECTED FROM DISCOVERY UNDER SECTION 396-14, HRS

In determining what records are protected from discovery, and therefore, disclosure, by section 396-14, Hawaii Revised Statutes, when construing a statute, the court's foremost obligation is to ascertain and give effect to the intention of the Legislature, which is to be obtained primarily from the language contained in the statute itself. Crosby v. State Dept. of Budget & Finance, 76 Hawai'i 332 (1994). If statutory language is ambiguous, or doubt exists as to its meaning, courts may take legislative history into consideration in construing the statute. Pacific Intern. Services Corp. v. Hurip, 76 Hawai'i 209 (1994). However, where the language of the statute is plain and unambiguous, the only duty of the interpreting court is to give effect to the statute's plain and obvious meaning. Ing v. Acceptance Ins. Co., 76 Hawai'i 266 (1994).

The OIP previously concluded that section 396-14, Hawaii Revised Statutes, was ambiguous, on the basis that this statute literally provides that no record "of any kind obtained, received, or prepared" in connection with the enforcement of chapter 396, Hawaii Revised Statutes, may be admitted or used as evidence, or as discovery, in any civil action growing out of any matter mentioned in the record. OIP Op. Ltr. No. 95-5 at 5. We found that statute to be ambiguous largely because as literally applied, the statute prohibited the discovery of records compiled in the enforcement of the chapter, such as citations, that must be publicly posted. As such, the OIP implicitly found that such a construction would lead to absurd results and, accordingly, we examined the legislative history of the statute in an effort to ascertain the intent of the Legislature.

Upon further reflection, based upon a careful examination of the text of section 396-14, Hawaii Revised Statutes, we believe that it is ambiguous only in part. Section 396-14, Hawaii Revised Statutes, is written in the disjunctive. It protects two distinct categories of records or information by providing that: (1) "[n]o record or determination of any administrative proceeding under this chapter," or (2) No "statement or report of any kind obtained, received, or prepared in connection with the administration or enforcement of this chapter," shall be admitted or used, whether as evidence or as discovery in any civil action. We shall examine each of these clauses separately for purposes of clarity.

A. Records or Determinations of Administrative Proceedings and Determinations

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With relation to the phrase records or determinations of administrative proceedings as used in section 396-14, Hawaii Revised Statutes, we believe that the administrative proceedings referred to are those contemplated by section 396-11, Hawaii Revised Statutes.³

Under section 396-11, Hawaii Revised Statutes, an employer may petition the Director to modify the abatement period set forth in any citation. Also, under section 396-11, Hawaii Revised Statutes, any citation, proposed penalty or order of the Director of the DLIR may be contested by an employer by the filing of a written notice of contest. Under section 396-11, Hawaii Revised Statutes, the Labor and Industrial Appeals Board "shall afford an opportunity for a hearing on any notice of contest." Such a hearing is de novo, except where rules and regulations require a prior formal hearing at the department level, the proceedings of which are required to be transcribed, in which case the review shall be confined to the records only. Id. The Labor and Industrial Appeals Board may affirm, modify, or vacate the citation, the abatement requirement therein, the proposed penalty or order or continue the matter, or remand the case to the director with instructions for further proceedings. Id. The decision of the Labor and Industrial Appeals Board is subject to judicial review under section 396-12, Hawaii Revised Statutes.

Based upon an examination of section 396-11, Hawaii Revised Statutes, it is evident to the OIP that the phrase, "[n]o record or determination of any administrative proceeding under this chapter," in section 396-14, Hawaii Revised Statutes, was intended to protect from admission in evidence, or as discovery, the records of administrative proceedings brought under section 396-11, Hawaii Revised Statutes, whereby employers may contest a citation or proposed penalty of the DLIR for alleged violations of chapter 396, Hawaii Revised Statutes, or seek modification of the abatement period set forth in any citation.⁴ Accordingly, we

³The DLIR has confirmed that its past practice has been to give out copies of citations to employers, on the basis that such citations must be publicly posted at the employer's work-place.

⁴We believe that it would be absurd to interpret this statute to make confidential final opinions of the Labor and Industrial Relations Appeals Board, and if fact, the Department's past practice has been to make appeals decisions available for public inspection consistent with sections 91-1(a)(4) and 92F-12(a)(2), Hawaii Revised Statutes. For example, copies of the appeals board's decisions are available electronically on the Hawaii State Bar Association's information service, AccessLine. In our view, while final decisions of the Labor Appeals Board may not be admissible in any civil action growing

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do not believe that this aspect of section 396-14, Hawaii Revised Statutes, is ambiguous, or suffers from uncertainty.

B. Statements Or Reports of Any Kind Obtained, Received or Prepared in Connection with the Administration or Enforcement of Chapter 396, HRS

In our view, that portion of section 396-14, Hawaii Revised Statutes, that provides that no "statement or report of any kind obtained, received, or prepared in connection with the administration or enforcement of this chapter shall be admitted or used, whether as evidence or as discovery, in any civil action growing out of the matter mentioned in the statement or report" does suffer from ambiguity or uncertainty. It could conceivably apply to reports "obtained, received, or prepared" by the DLIR that contain statistical summaries or information, that are only remotely connected with the actual investigation of work-place accidents, or the enforcement of industrial safety laws.

As such, it is appropriate to consult the legislative history of section 396-14, Hawaii Revised Statutes, to ascertain the legislative intention with respect to the usage of the phrase "any report or statement obtained, received or prepared in connection with the administration or enforcement" of chapter 396, Hawaii Revised Statutes. House Standing Committee Report No. 522 on 1969 H.B. No. 280 states::

The purpose of this bill is to prohibit the use of any record, statement or report prepared or obtained by the Department of Labor and Industrial Relations in the course of its administration and enforcement of the industrial safety law in any civil action growing out of any accident or incident mentioned in the record, statement, or report.

Your Committee on Judiciary concurs with your Committee on Labor and Employment Problems in that proper investigation of any industrial accident requires accurate information and statements from witnesses. The assurance that any information given to the Department of Labor will be held confidential and not be used in any civil suit arising out of the

(..continued)

out of any matter mentioned in the decisions, the Legislature could not have intended them to be confidential given the strong public policy of this State that an agency's final opinions and decisions be available for public inspection.

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accident involved or out of the statement or information given will promote a more effective enforcement of the industrial safety law.

H.R. Stand. Comm. Rep. No. 522, 5th Leg., 1969 Reg. Sess., Haw. S.J. 830 (1969) (emphases added).

Senate Standing Committee Report No. 970 on 1969 H.B. No. 284 states:

The purpose of this bill is to prohibit the use of any statement, report, or record prepared or obtained by the labor department in the course of its administration of the industrial safety law in any civil suit arising out of any accident or incident mentioned in the statement, report or record except in cases involving the enforcement or review of the safety law.

Effective enforcement of the industrial safety law requires a thorough and exhaustive investigation of each industrial accident. Such an investigation is difficult to attain unless witnesses are assured that information and statements given to the department of labor will be held confidential and not be disclosed in any civil suit arising out of the accident involved.

This proposal, if adopted will encourage workers and other witnesses to candidly report on any accident and in turn assist the labor department in achieving better safety measures.

S. Stand. Comm. Rep. No. 970, 5th Leg., 1969 Reg. Sess., Haw. S.J. 1254 (1969) (emphasis added).

Furthermore, in 1987, the Legislature amended this statute to include the term "prepared" after the words obtained or received. The legislative history of this amendment provides:

Currently, statements and reports received by the Department in administering the OSHA law are prohibited from being used in civil litigation. This bill extends the same protection to reports prepared by the Department.

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S. Stand. Comm. Rep. No. 727, 14th Leg., 1987 Reg. Sess., Haw. S.J. 1201-02 (1987); see also H. R. Stand. Comm. Rep. No. 1187, 14th Leg., 1987 Reg. Sess., Haw. H.J. 1636 (1987).

Based upon an examination of the legislative history of section 396-14, Hawaii Revised Statutes, we believe the Legislature intended section 396-14, Hawaii Revised Statutes, to prohibit the admission into evidence, or the discovery of: (1) any report or statement received by the DLIR from those providing information to the DLIR concerning a work-place accident or the investigation of violations of the occupational safety and health law; (2) the identities of such persons providing the DLIR with information; and (3) reports prepared by the department investigating violations of the occupational safety laws, or that contain data concerning information furnished by witnesses and their identities. By making confidential the identities of individuals furnishing information to the DLIR, information furnished by witnesses, and reports prepared by the Department concerning violations of the occupational safety law, we believe that the Legislature intended to encourage witnesses to candidly report information relevant to an industrial safety investigation, without fear that the information would be discoverable in a civil action arising out of matters mentioned in the DLIR's records.

Accordingly, upon further consideration, it is the opinion of the OIP that section 396-14, Hawaii Revised Statutes, protects from admission into evidence, or protects from discovery in any civil action, the identities of individuals who furnish information to the DLIR as part of an investigation of alleged violations of the occupational safety and health law, information furnished by such individuals, as well as reports prepared by the Department concerned alleged violations of the chapter 396, Hawaii Revised Statutes, and regulations adopted pursuant thereto. To the extent that this conclusion is inconsistent with our earlier opinion in OIP Opinion Letter No. 95-5, that opinion is expressly repudiated.

III. RECORDS THAT MUST BE MADE PUBLIC PURSUANT TO A SHOWING OF COMPELLING CIRCUMSTANCES AFFECTING THE HEALTH OR SAFETY OF ANY INDIVIDUAL

Section 92F-12(b)(3), Hawaii Revised Statutes, requires an agency to disclose any provision to the contrary notwithstanding, government records "pursuant to a showing of compelling circumstances affecting the health or safety of any individual."

We note that in the court proceeding before Judge Hirai, the party seeking access to the DLIR's records asserted that notwithstanding section 396-14, Hawaii Revised Statutes, which

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the requester conceded protected the records at issue, they must be made available under section 92F-12(b)(3), Hawaii Revised Statutes.

The OIP does not find this argument persuasive for two reasons. First, in OIP Opinion Letter No. 92-10 at 11-12 (Aug. 1, 1992), the OIP concluded that section 92F-12, Hawaii Revised Statutes, does not require an agency to disclose government records that are protected from disclosure by specific State statutes. Secondly, in OIP Opinion Letter No. 93-15 at 11-12 (Oct. 1, 1993), the OIP observed that section 92F-12(a)(3), Hawaii Revised Statutes, virtually identical to a provision in the Federal Privacy Act of 1974, 5 U.S.C. § 552a ("Privacy Act"). We observed that both Senate and House committee reports on the Privacy Act indicate that this provision was intended to be limited to "life or death" situations:

This subsection is designed to protect an agency employee from being in technical violation of the law when they disclose personal information about a person to save the life or protect the safety of that individual in a unique emergency situation. The subsection requires a showing, which should be documented, of compelling circumstances affecting the health or safety of the person, or enabling identification for purposes of aiding a doctor to save such person's life. The discretion authorized here is intended to be used rarely

S. Rep. No. 93-1183, 93rd Cong., 2d Sess. (1974), reprinted in 1974 U.S.C.C.A.N. 6916, 6985; see also, H.R. Rep. No. 93-1416, 93rd Cong., 2d Sess. (1974) ("[t]he Committee is of the view that special consideration must be given to valid emergency situations, such as an airline crash or epidemic, where consent cannot be obtained because of the time and distance and instant action is required").

Based upon the foregoing, we do not believe that section 92F-12(b)(3), Hawaii Revised Statutes, authorizes the disclosure of records that are protected from discovery, or admission into evidence, under section 396-14, Hawaii Revised Statutes.

CONCLUSION

Based upon a careful examination of the text of section 396-14, Hawaii Revised Statutes, the OIP believes, under sections 396-14, and 92F-13(4), Hawaii Revised Statutes, the DLIR may withhold from public inspection and copying, records of or

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determinations in any administrative proceeding under section 396-11, Hawaii Revised Statutes, as well as the identity and information furnished by any individual who provides information to the DLIR in the investigation of alleged violations of Hawaii's industrial safety law. We also believe that it protects from disclosure reports prepared, or received, or obtained by the Department, concerning alleged violations of the State occupational safety and health laws.

Please contact me at 586-1404 if you should have any questions regarding this opinion letter.

Very truly yours,

Hugh R. Jones
Staff Attorney

APPROVED:

Moya Davenport Gray
Director

HRJ:sc
c: Honorable Lorraine Akiba
Jeffrey Harris, Esq.
Dan A. Colon, Esq.
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