

April 17, 1997

Mr. Eugene S. Imai
Vice President for Administration
University of Hawaii
Bachman Hall
2444 Dole Street
Honolulu, Hawaii 96822

Dear Mr. Imai:

Re: Whether Private Donor Records of the University of Hawaii
Foundation are Subject to Public Disclosure

This is in response to your letter dated April 7, 1997, to the Office of Information Practices ("OIP") for an opinion on the above-referenced matter. Your letter also asked OIP to opine on whether the University of Hawaii Foundation ("UH Foundation") is an agency for purposes of the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"). You asked that we respond by April 17, 1997, so that you could provide the Board of Regents of the University of Hawaii with our opinion. Unfortunately, because of the backlog of requests to our agency, we could not provide you with an opinion on both issues by that date. Instead, and in the interest of time, it was agreed that the OIP would address only the treatment of donor information, assuming for purposes of this opinion only, that the UH Foundation is a government agency.

ISSUE PRESENTED

Assuming *arguendo* that the UH Foundation is a government agency under the UIPA, whether the UH Foundation records that reveal financial information about donors must be made available for public inspection and copying.

BRIEF ANSWER

Section 92F-14(b)(6), Hawaii Revised Statutes, provides that individuals have a significant privacy interest in information or records describing their financial activities. It is OIP's opinion that disclosure of individual donors' names and amounts donated to the UH Foundation would reveal the "financial

Mr. Eugene Imai
April 16, 1997
Page 2

activities" of these individuals within the meaning of section 92F-14(b)(6), Hawaii Revised Statutes.

A distinction must be made between individual donors and corporations, partnerships, business trusts, or associations (referred to collectively as "corporate donors") who donated to the UH Foundation. Under the UIPA, only individuals¹ have a cognizable privacy interest; therefore, corporate donors to the UH Foundation do not have any privacy interest in their names and amounts donated.

Weighing the significant privacy interests of the individuals donating funds to the UH Foundation against the minimal public interest in knowing the names of individual donors and the specific amounts donated by individual donors to the UH Foundation, we conclude that disclosure of this information would constitute a "clearly unwarranted invasion of personal privacy." Haw. Rev. Stat. § 92F-13(1) (1993). Hence, assuming for purposes of this limited opinion that the UH Foundation is a government agency, the names of individual donors and the amounts they donated need not be disclosed. However, if the amounts donated by individuals is disclosed in a manner that does not individually identify the donors, or if the individual donors provide written consent to the disclosure of their names and amounts donated, then disclosure of that limited information should not violate any privacy rights.

Corporate donor information is not protected from disclosure under the UIPA exception for information, which if released, would cause the frustration of a legitimate government function. The information maintained by the UH Foundation on corporate donors is not detailed financial information which would warrant protection under section 92F-13 (3), Hawaii Revised Statutes.

FACTS

The UH Foundation is a non-profit corporation established exclusively for educational, scientific, literary, and charitable purposes as follows:

¹The UIPA defines an "individual" as a "natural person." Haw. Rev. Stat. § 92F-3 (1993).

Mr. Eugene Imai
April 16, 1997
Page 3

To aid and assist the University of Hawaii, including all campuses, colleges, schools, departments, centers, institutes and such other units as comprise the University of Hawaii, by the solicitation of gifts of real and/or personal property from individuals, corporations, foundations of the University, the faculty and staff carrying out such functions, and the students served thereby; and, in general, to exercise the powers granted by Chapter 451B,^[2] Hawaii Revised Statutes, for the accomplishment of the foregoing purposes.

Charter and Bylaws of the University of Hawaii Foundation at 5 (amended October 14, 1992).

The UH Foundation solicits donations from private individuals and corporate donors for the benefit of the University of Hawaii ("the University"). The UH Foundation receives from donors two basic types of funds: general funds-unrestricted and general funds-restricted. General funds-unrestricted "are expendable funds used for the operating purposes of the Foundation, and for distribution to the university to be used at its discretion." University of Hawaii Foundation, Annual Report at 12 (1996). General funds-restricted "are expendable funds limited to a specific purpose, and generally support a university program or purpose selected by the donor." Id.

The 1996 Annual Report lists as categories of contributors: friends, corporations, alumni, organizations, and foundations and trusts. Id. at 15. Funds from these contributors are given by the UH Foundation to the University. These contributions support a variety of university programs on all campuses, including student aid and services, special programs, research, publications, public services

²Chapter 451B of Hawaii Revised Statutes, the Hawaii Nonprofit Corporation Act, empowers nonprofit corporations to be perpetual, to sue and be sued, to have a corporate seal, to acquire real property, to sell and dispose of property and assets, to lend money, to handle shares of other corporations, to make contracts and incur liabilities, to invest funds, to conduct its affairs, to elect and appoint officers and agents, to make and alter bylaws, to make charitable donations, to establish and pay pension plans, to cease corporate activities, and to exercise the powers necessary to effect its purposes. Haw. Rev. Stat. § 415B-5 (1993).

and extension, faculty and staff development, library, buildings and equipment, and academic support. Id. at 15.

The UH Foundation makes lists of donations available to the University's Board of Regents at public meetings, but omits from the list the names of donors who requested anonymity. The 1996 Annual Report also lists names of large donors by categories of donation amount (for example, the President's Club lists names of donors who gave an annual gift of at least \$1,500). Id. at 16-31. There are some "anonymous" listings on these pages.

DISCUSSION

I. INTRODUCTION

The UIPA applies to "government records." Section 92F-3, Hawaii Revised Statutes, defines the term "government record" as "information maintained by an agency in written, auditory, visual, electronic or other physical form." For the limited purpose of providing this advisory opinion only, the OIP will assume *arguendo*, that the UH Foundation is a government agency. The OIP specifically renders no opinion at this time as to whether the UH Foundation is an agency for purposes of the UIPA.

II. EXCEPTIONS TO DISCLOSURE UNDER THE UIPA

The UIPA generally mandates that "[a]ll government records are open to public inspection unless access is restricted or closed by law." Haw. Rev. Stat. § 92F-11(a) (1993). Section 92F-11(b), Hawaii Revised Statutes, further provides that "[e]xcept as provided in section 92F-13, Hawaii Revised Statutes, each agency upon request by any person shall make government records available for inspection and copying during regular business hours."

Section 92F-13, Hawaii Revised Statutes, provides in pertinent part:

§ 92-13 Government records; exceptions to general rule. This chapter shall not require disclosure of:

- (1) Government records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy;

. . . .

- (3) Government records that, by their nature, must be confidential in order to avoid the frustration of a legitimate government function; . . .

Haw. Rev. Stat. § 92F-13(1) (1993).

A. Names of Donors and Amounts Donated

A distinction must be made between individuals and corporate donors who donate to the UH Foundation. For purposes of the UIPA's privacy exception, only natural persons have cognizable privacy interests. Haw. Rev. Stat. § 92F-3 (1993). Corporations, partnerships, business trusts, or associations have no "personal privacy" interest in government records maintained by agencies. See OIP Op. Ltr. Nos. 93-1 (Apr. 8, 1993) (disclosure of Native Hawaiian Revolving Loan Fund information); 93-5 (June 7, 1993) (disclosure of the list of prospective employees of Mercy Ambulance Service); and 94-20 (Oct. 20, 1994) (disclosure of Harbors-Boating Complaint and Summons citations). Therefore, corporate donors would have no privacy interest in their names nor in the amounts donated by these corporate donors to the UH Foundation.

To guide our interpretation of the UIPA's personal privacy exception, section 92F-14(a), Hawaii Revised Statutes, provides that "[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." Under this balancing test, "[o]nce a significant privacy interest is found, the privacy interest will be balanced against the public interest in disclosure." H. Conf. Comm. Rep. No. 112-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 817, 818 (1988); S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 690 (1988).

Section 92F-14(b), Hawaii Revised Statutes, provides that an individual has a significant privacy interest in "[i]nformation describing [that] individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or credit worthiness." Haw. Rev. Stat. § 92F-14(b)(6) (Supp. 1996) (emphasis added). See also the decision of the Hawaii Supreme Court, in Nakano v. Matayoshi, 68 Haw. 140, 148 (1985), in which the Court concluded "the people of Hawaii have a legitimate expectation of privacy where their personal financial affairs are concerned." The OIP finds that the names of donors and amounts of the donations is information that describes an individual's financial history or activity.

In order to determine whether disclosure of information would constitute a "clearly unwarranted invasion of personal privacy" pursuant to section 92F-13(1), Hawaii Revised Statutes, we must balance the privacy interests against the public interests involved. Haw. Rev. Stat. § 92F-14(a) (Supp. 1996).

Under the UIPA, the nature of the "public interest" to be considered in this balancing test is whether the information sheds light on the conduct of government agencies in the performance of their duties, or otherwise would promote governmental accountability. See OIP Op. Ltr. No. 93-1 (Apr. 8, 1993) (disclosure of Native Hawaiian Revolving Loan Fund information).

Looking to federal case law for guidance, the United States Supreme Court has held that the only relevant public interest in the Freedom of Information Act ("FOIA") balancing analysis³ is the "extent to which disclosure of the information sought would 'shed light on an agency's performance of its statutory duties' or otherwise let citizens know 'what their government is up to.'" D. Dean Bibles, Director, Oregon Bureau of Land Management v. Oregon Natural Desert Association, No. 96-713, Supreme Court of the United States, decided Feb. 18, 1997, (citing Department of Defense v. FLRA, 510 U.S. 487, 497 (1994) (quoting Department of Justice v. Reporters Comm. For Freedom of Press, 489 U.S. 749, 773, 103 L. Ed. 2d 774, 109 S. Ct. 1468 (1989))). In the facts presented to the OIP, the names of donors and the amounts donated by each individual would in general not shed significant light upon the conduct of the UH Foundation or its officials, assuming that it is a government agency under the UIPA. Thus, the OIP finds that the individual's significant privacy interests does outweigh the minimal public interest in disclosure. Accordingly, because the individual's privacy interests clearly outweigh the public's interest in disclosure, the UIPA would not require the UH Foundation to disclose it.

However, we note that, under the UIPA, the amounts donated by individuals may be disclosed if done so in a manner that does not individually identify the donors, or if the UH Foundation obtains the donors' written consent to disclose this information.

B. Frustration of a Legitimate Government Function

³FOIA is the federal equivalent to the UIPA, and employs the same balancing test as the UIPA when personal privacy interests are at issue.

Although corporate donors do not have cognizable privacy interests, financial information may still be withheld from public disclosure if such release would result in the frustration of a legitimate government function under section 92F-13 (3) of the UIPA.⁴ According to the UIPA's legislative history, one example of information which, if released would cause the frustration of a legitimate government function is "trade secrets or confidential commercial and financial information." See S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1095 (1988).

The OIP uses a two-prong test to determine whether the exception for trade secrets or commercial and financial information applies to government records: (1) disclosure is likely to impair the government's ability to obtain necessary information in the future, or (2) disclosure could result in substantial harm to the competitive position of the entity. See OIP Op. Ltr. No. 94-14 (Aug. 10, 1994) (discussing financial information contained in records of green coffee bean importers).

The OIP does not believe prong one would apply to the UH Foundation records except for individual donors who wish to remain anonymous. Requiring disclosure of information about anonymous donors may impair the UH Foundation's ability to solicit donations. In applying the two prong test here, the OIP follows the analysis used in National Parks and Conservation Ass'n v. Kleppe, 547 F. 2d 672 (D.C. Cir. 1976) (referred to as "National Parks II"). In National Parks II, the court found that substantial competitive harm was likely to occur when the following business information is disclosed about park concessionaires:

⁴The University's Board of Regents is allowed by statute to:

receive, manage, and invest moneys or other property, real, personal, or mixed, which may be given, bequeathed, devised, or in any manner received from sources other than the legislature or any federal appropriation for the purpose of the university, its improvement or adornment, or the aid or advantage of students or faculty, and in general act as trustee on behalf of the university for ant such purposes or objects.

Haw. Rev. Stat. § 304-7 (1993).

[D]iscrete information as to each concessionaire's cash in banks and on hand, marketable securities and investments, notes and accounts receivable, prepaid expenses, fixed assets, and accumulated depreciation . . . notes and accounts payable, mortgages and long-term liabilities, accrued liabilities,

OIP Op. Ltr. No. 94-17 at 12-13 (Sept. 12, 1994) (citing National Parks II, 547 F.2d at 676, n. 9). Based on National Parks II's test, the OIP finds that the type of donor information maintained by the UH Foundation does not meet the tests of the second prong, which protects information likely to result in substantial competitive harm if released. The disclosure of this type of donor information will not result in substantial competitive harm to corporate donors if released because this information about corporate donors is not of a detailed nature as is the information discussed in National Parks II. The information maintained by the UH Foundation is "mundane information" and "not the type of detailed information commonly found protected . . . by federal courts . . ." such as the type of information protected in National Parks II. OIP Op. Ltr. No. 92-7 at 8-9 (June 29, 1992) (applying National Parks II test for substantial competitive harm to information about workers who are self-insured for Workers' Compensation Purposes). See also OIP Op. Ltr. No 95-9 (May 4, 1997) (release of pawn transaction information likely to cause frustration of a legitimate government function because pawn brokers will be likely to discontinue voluntarily submitting such information to the police department).

CONCLUSION

Assuming *arguendo* that the UH Foundation is a government agency, "individual" donors have a significant privacy interest in their financial activities, including the fact that they donated any particular amount. In balancing this interest against the public's interest in this data, the OIP is of the opinion that disclosure would be a clearly unwarranted invasion of privacy. Therefore, under the UIPA, the UH Foundation would not be required to disclose this data. Where it is possible to segregate any identifying data, then public disclosure after segregation would be proper. Additionally, disclosure would be proper if the donors' consent was obtained.

Corporate donors do not have privacy interests in their names and the amounts they donated because they are not natural persons. Nor are corporate donors protected under the UIPA exception for government records which, if

Mr. Eugene Imai
April 16, 1997
Page 9

released, would cause the frustration of a legitimate government function, unless the donor requires anonymity as a condition of the gift. The information maintained by the UH Foundation on corporate donors is mundane in nature and does not rise to the level of detailed financial information that is protected under the UIPA.

Therefore, the OIP finds that except in the case of anonymous donors, no UIPA exception applies to information about corporate donors, and this information must be disclosed.

Very truly yours,

Carlotta M. Dias
Staff Attorney

APPROVED:

Moya T. Davenport Gray
Director

CMD:sc\imai.1

c: Donna M. Howard
Vice President and Executive Director
University of Hawaii Foundation

Jahan Byrne
Thomas Kaser, Honolulu Advertiser