

Op. Ltr. 97-07, Required Disclosure of Certified Payroll records

Section 92F-12(a)(9), the statute at issue in this opinion, was amended in 2005 and 2007, which may materially affect the conclusion reached in similar future opinions.

July 18, 1997

Mr. Gary Wiseman
Executive Director
Associated Builders and Contractors, Inc.
1001 Dillingham Boulevard, Suite 304
Honolulu, Hawaii 96817

Dear Mr. Wiseman:

Re: Reconsideration of OIP Opinion Letter No. 89-8

This letter is in response to your October 8, 1996 letter asking the Office of Information Practices ("OIP") to reconsider the above-referenced opinion letter in light of a recent Ninth Circuit Court ruling on a similar case. In OIP Opinion Letter No. 89-8 (Nov. 20, 1989), the OIP opined that Hawaii's public records law required certified payroll records from public works contracts to be disclosed to the public in their entirety. In contrast, the Ninth Circuit Court, in reviewing a different law, arrived at the opposite conclusion—that personal information from payroll records should be redacted before the information is disclosed to the public. See *Painting Industry of Hawaii Market v. U.S. Air Force*, 26 F.3d 1479 (9th Cir. 1994). Because of the holding in this case and because the federal district of Hawaii is part of the Ninth Circuit, you have asked the OIP to reconsider its previous position regarding the public disclosure of certified payroll information.

ISSUES PRESENTED

1. Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), agencies are required to make all information contained in certified payroll records available for public inspection and copying.
2. Assuming agencies are required to disclose all certified payroll record information, whether the agency may redact private information from the record if the individual employees request the redaction of such information.
3. Whether certified payroll records from State public works projects that are federally funded are required to be disclosed.

OIP Op. Ltr. No. 97-7

BRIEF ANSWERS

1. Yes. Agencies are required to disclose certified payroll records in their entirety. Agencies are not authorized to redact personal information contained on certified payroll records before disclosing those records.

The OIP has previously opined that Hawaii's public records law, the UIPA, requires the disclosure of all information contained in certified payroll records from public works projects. See OIP Op. Ltr. No. 89-8 (Nov. 20, 1989). Section 92F-12(a)(14), Hawaii Revised Statutes, expressly requires agencies to disclose certified payroll records from public works projects. Haw. Rev. Stat. § 92F-12(a)(9) (Supp. 1996). Furthermore, because the privacy exception to disclosure does not apply to records listed under section 92F-12(a), Hawaii Revised Statutes, which includes certified payroll records, all information on certified payroll records must be disclosed. See S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 690 (1988). The Ninth Circuit Court, on the other hand, has ruled that under the federal Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 (1994), a worker's personal information should be redacted from the certified payroll records before the records are disclosed. See Painting Industry of Hawaii Market v. U.S. Air Force, 26 F.3d 1479 (9th Cir. 1994). Although this Ninth Circuit case involved facts similar to those discussed in OIP Opinion Letter No. 89-8, this case applies federal, not Hawaii law, and the analysis required by the two laws, the UIPA and FOIA, are distinctly different, and the OIP consults FOIA cases for guidance purposes only.

2. No. An employee's request to redact private personal information does not authorize an agency to do so before disclosing certified payroll records. Nothing in the UIPA's mandatory disclosure provision permits an agency to redact personal information from certified payroll records before making them available for public inspection or copying. Haw. Rev. Stat. § 92F-12 (1993).

3. The UIPA governs the disclosure of government records which State and county agencies maintain. Haw. Rev. Stat. § 92F-3 (1993). Thus, under the facts you have provided in your hypothetical, if a Hawaii State or county agency maintains or has administrative control over the certified payroll records, then the UIPA governs the disclosure of this record, unless the FOIA is specifically made applicable to the records by law or contract.

FACTS

In your letter to the OIP, you asked us to reconsider the OIP's Opinion Letter No. 89-8 (Nov. 20, 1989) because the Ninth Circuit Court recently issued an opinion which was contrary to the OIP's opinion letter. In OIP

Opinion Letter No. 89-8, we opined that the UIPA requires agencies to disclose entire certified payroll records, including all personal or other information contained therein but not specifically required to be included on the record. See OIP Op. Ltr. No. 89-8 (Nov. 20, 1989). The Ninth Circuit Court, on the other hand, concluded that the federal government may redact personal information from payroll records because disclosing such information would be an unwarranted invasion of the workers' expectations of privacy in that information. See Painting Industry of Hawaii Market v. U.S. Air Force, 26 F.3d 1479 (9th Cir. 1994). To reconcile these apparently conflicting conclusions, what follows is a summary of the opinion letter and the federal case.

DISCUSSION

I. DISCLOSURE OF CERTIFIED PAYROLL RECORDS UNDER THE UIPA

Opinion Letter No. 89-8 advised that an agency must disclose all information contained in certified payroll records from a public works construction project and that the agency may not redact employees' personal information. See OIP Op. Ltr. No. 89-8 at 1 (Nov. 20, 1989).

In arriving at that conclusion, the OIP referred to the UIPA provision mandating that certified payroll records be available for public inspection and copying. Id. at 2. This section reads in relevant part as follows:

§92F-12 Disclosure required. (a) Any other law to the contrary notwithstanding, each

agency shall make available for public inspection
and duplication . . . :

. . . .

- (9) Certified payroll records on public
works contracts;

Haw. Rev. Stat. § 92F-12(a)(9) (Supp. 1996).¹

Based on the plain reading of this statute, the OIP concluded that the records described in that section were not subject to the exceptions to disclosure contained in section 92F-13, Hawaii Revised Statutes, including the exception for personal privacy. See OIP Op. Ltr. No. 89-8 at 3 (Nov. 20, 1989). Therefore, the OIP advised that the UIPA required agencies to disclose certified payroll records without redacting any personal information from the records. Id. at 5.

The OIP's conclusion that the privacy exception to disclosure did not affect the mandatory disclosure of section 92F-12(a), Hawaii Revised Statutes, was supported by the legislative history of that law. The Legislature declared that, as a matter of public policy, the records listed in that mandatory disclosure section were not subject to the exceptions to disclosure "such as for personal privacy and for frustration of legitimate government purpose" OIP Op. Ltr. No. 89-8 at 3 (Nov. 20, 1989) (quoting S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 690 (1988)). OIP Opinion Letter No. 89-8 also noted that the federal courts at that time similarly concluded that disclosing the employee's personal information from certified payroll records would not be an "unwarranted invasion of personal privacy" under the FOIA. Id. at 4 (citing International Brotherhood of Electrical Workers Local 41 v. U.S. Department of Housing & Urb. Dev., 593 F. Supp. 542 affirmed, 763 F.2d 435 (1984)). Based on Hawaii's absolute disclosure requirement for certified payroll records, the OIP concluded that agencies were required to disclose certified payroll records in their entirety. Haw. Rev. Stat. § 92F-12(a)(9) (Supp. 1996).

¹Section 92F-12(a), Hawaii Revised Statutes, was amended by Act 89, Session Laws of Hawaii 1996. The underscored words were added, and the bracketed word was omitted.

- (a) Any [provision] other law to the contrary
notwithstanding, each agency shall make
available for public inspection and duplication

This amendment does not affect OIP Opinion Letter No. 89-8 nor the opinion rendered in this letter.

II. DISCLOSURE OF CERTIFIED PAYROLL RECORDS UNDER THE FOIA

A recent Ninth Circuit Court case concluded that personal information within federal certified payroll records should be redacted to prevent the unwarranted invasion of the worker's privacy interests. Painting Industry of Hawaii Market v. U.S. Air Force, 26 F.3d 1479 (9th Cir. 1994) ("Painting Industry").

In the Painting Industry case, a labor organization requested access to federal certified payroll records under the FOIA. The request for access was made to the United States Air Force ("Air Force") which had received the certified payroll records from a painting contractor. Id. at 1481. Those payroll records contained, among other data, workers' names, addresses, social security numbers, job classifications, hourly pay rates, hours worked, wages, deductions, and fringe benefits. Id. As the Air Force refused to disclose the records, the labor organization sued in federal court to obtain access.

In the lawsuit, the Air Force claimed that disclosure of the payroll records in their entirety would violate the workers' expectation of privacy and, therefore, the government could refuse to disclose the personnel record information. Id. at 1481. The Hawaii federal district court rejected the Air Force's position and ruled that, except for social security numbers, the payroll records should be disclosed in their entirety. Id.

On appeal, the Ninth Circuit disagreed with the district court's ruling. The appellate court found that the workers had a significant privacy interest in some of the information contained on the payroll records and that the public's slight interest in disclosure was insufficient to justify invading the workers' privacy. Id. at 1483-1485. The appellate court then concluded that because disclosing unredacted payroll records would be a clearly unwarranted invasion of the workers' privacy, the government was justified in providing payroll records in which the workers' personal information had been redacted. Id. at 1486.

III. STATE AND FEDERAL LAW TREAT DISCLOSURE OF CERTIFIED PAYROLL RECORDS DIFFERENTLY

Although the UIPA and the FOIA both govern the types of government records to which the public may have access, these two laws are not identical.

The UIPA is a State law that governs disclosure of State and county government records to the public. See Haw. Rev. Stat. § 92F-3 (1993) (the UIPA defines "government record" as information an agency maintains and

defines “agency” as a State or county department, institution, office, etc.). The FOIA is a federal law that governs disclosure of federal records to the public. 5 U.S.C. § 552(a) and (f) (1994 and Supp. 1997) (the FOIA defines “agency” as an executive or military department, an establishment in the executive branch of the government, or any independent regulatory agency).

Although these two laws achieve the same end—providing public access to government records—each law governs different records and treats them differently. For example, the UIPA specifically requires State and county government agencies to disclose certified payroll records from public works contracts. There is no similar disclosure requirement in the federal law. See Haw. Rev. Stat. § 92F-12(a)(9) (Supp. 1996) and 5 U.S.C. § 552 (1994). Because the FOIA does not contain a mandatory disclosure requirement, federal courts must treat payroll records as any other government record and apply the privacy exception to disclosure. Accordingly, the Ninth Circuit Court has considered whether disclosing personal information within the payroll records would be an unwarranted invasion of workers’ expectations of privacy. Painting Industry of Hawaii Market v. U.S. Air Force, 26 F.3d 1479, 1483 (9th Cir. 1994). The Ninth Circuit Court concluded that the disclosure would violate the workers’ privacy right and held that the government was justified in only disclosing redacted versions of the certified payroll records. Id. at 1486.

Under the UIPA, certified payroll records are treated differently from other government records because: (1) they are required to be disclosed to the public, and (2) they are not subject to the exceptions to disclosure. Haw. Rev. Stat. § 92F-12(a) (Supp. 1996). A plain reading of section 92F-12(a), Hawaii Revised Statutes, indicates that agencies must disclose the entire certified payroll record even if the record contains information that might have been protected under the privacy exception to disclosure if such exception applied to certified payroll records. See OIP Op. Ltr. No. 89-8 at 3 (Nov. 20, 1989).

Although the OIP has used FOIA cases to support its interpretation of the UIPA, it would be inappropriate to do so here. When the UIPA’s provision is similar to the FOIA, it is appropriate for the OIP to consult FOIA cases for interpretative guidance. However, because the structure of the two statutes are dissimilar, the Ninth Circuit’s treatment of certified payroll records under federal law is inapplicable.

A. FOIA Cases May Be Consulted as “Additional Guidance” When Interpreting the UIPA

The Hawaii legislative history indicates that the Legislature never intended for federal appellate court rulings to govern interpretations of the UIPA.

The UIPA's legislative history instructs that when interpreting the UIPA, the FOIA cases may be used as guidance. "The case law under the Freedom of Information Act should be consulted for *additional guidance*." See S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1094 (1988) (emphasis added). The Legislature's selection of the words "consulted" and "guidance" indicate that Hawaii is not bound by FOIA case rulings. Indeed, those words indicate that the FOIA cases were to be considered for guidance purposes only. Under the present facts, following the Painting Industry case would lead to a result contrary to the plain reading of the UIPA's requirement that certified payroll records be disclosed in full. Therefore, the Ninth Circuit's position on disclosing redacted versions of certified payroll records cannot be applied to Hawaii law. Thus, the conclusion reached in OIP Opinion Letter No. 89-8 (Nov. 20, 1989), namely that all information contained in certified payroll records must be disclosed in their entirety, remains unaffected by the Painting Industry case.

III. REDACTION OF PERSONAL INFORMATION BEFORE AGENCIES DISCLOSE CERTIFIED PAYROLL RECORDS

A. Agencies may not Redact Information from Certified Payroll Records

Because the OIP has concluded that the UIPA requires agencies to disclose certified payroll records in their entirety, we now address your question of whether agencies may redact personal information contained

within the certified payroll records if the individual employees request non-disclosure of this data.

As was discussed earlier, section 92F-12(a)(9), Hawaii Revised Statutes, requires certified payroll records to be disclosed in their entirety, even if the information would otherwise be confidential under the privacy exception to disclosure. See S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 690 (1988). Nothing within the UIPA authorizes an agency to ignore the mandatory disclosure statute and redact personal information from certified payroll records upon an employee's request. See Haw. Rev. Stat. § 92F-12(a) (Supp. 1996).

Furthermore, the Hawaii Supreme Court recently ruled that an agency cannot avoid performing its UIPA duties of disclosure. State of Hawaii Organization of Police Officers v. Society of Professional Journalists—University of Hawaii Chapter, 83 Haw. 378, 927 P.2d 386, 414 (1996) (confidentiality agreement between the City and the Police union ruled unenforceable because it prevented the City from performing its UIPA duty to disclose disciplinary records).

Section 92F-12(a), Hawaii Revised Statutes, requires the mandatory disclosure of certified payroll records. Nothing within chapter 92F, Hawaii Revised Statutes, allows agencies to redact personal information from a government record which is required to be disclosed under this section. Moreover, as the Hawaii Supreme Court has ruled that agencies may not avoid their UIPA disclosure duties, the OIP concludes that Hawaii law prohibits agencies from redacting personal information from certified payroll records pursuant to a laborer's request.

B. Information Required to be Included in a Certified Payroll Record

Hawaii law requires general contractors and subcontractors on public works contracts to file certified payroll records. Haw. Rev. Stat. § 104-3(a) (1993). Pursuant to section 104-3(b), Hawaii Revised Statutes, certified payroll records must contain the following information:

the name of each employee, the employee's correct classification, rate of pay, daily and weekly number of hours worked, deductions made and actual wages paid. . . .

Haw. Rev. Stat. § 104-3(b) (1993). Whether other data, such as social security numbers, must be included in certified payroll records is an issue over which the OIP has no jurisdiction.

IV. DISCLOSURE OF CERTIFIED PAYROLL RECORDS ON FEDERALLY-FUNDED, STATE-ADMINISTERED PUBLIC WORKS PROJECTS

The question posed implies the involvement of a federal regulation, contract, or law. As it would be inappropriate to speculate as to those possible requirements, the OIP does not usually render opinions on hypothetical situations.

However, in general, the UIPA governs the disclosure of “government records” which State and county agencies maintain. Haw. Rev. Stat. § 92F-3 (1993). The UIPA defines a “government record” as “information maintained by an agency in written, auditory, visual, electronic, or other physical form.” Haw. Rev. Stat. § 92F-3 (1993). If a State or county agency maintains or had administrative control over certified payroll records from this hypothetical project, then the UIPA provisions may govern the public disclosure of the records. If the certified payroll records are considered “government records” under the UIPA and are within a State or county agency’s administrative control, the UIPA may govern this record’s disclosure. However, because federal funding may either impose other requirements or may require the contractor’s records to be governed by federal law, the UIPA may not govern.

CONCLUSION

The OIP has re-examined its conclusion in OIP Opinion Letter No. 89-8 (Nov. 20, 1989) in which the OIP advised that all State and county government agencies must disclose all information submitted by contractors within certified payroll records. The OIP reiterates its previous conclusion that the UIPA specifically requires the complete disclosure of certified payroll records. The OIP opines that the Ninth Circuit’s ruling is inapplicable because it interprets federal law, not the UIPA which is the State public records law governing State and county agencies. Accordingly, the OIP stands by its previous opinion that Hawaii State and county agencies must disclose all the information contained within certified payroll records without first redacting the employees’ personal information.

The OIP also concludes that agencies are prohibited from redacting personal information before certified payroll records are disclosed even if redaction is requested by the employee to whom the payroll record pertains.

Should you have any questions, please feel free to contact me at 586-1400.

Very truly yours,

OIP Op. Ltr. No. 97-7

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APPROVED:

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