

November 22, 2002

Mr. Michael M. Liu

Re: FAMIS Access

Dear Mr. Liu:

This is in response to your letter to the Office of Information Practices (“OIP”) of July 17, 1995, on the above referenced matter.

ISSUES PRESENTED

- I. Whether the language in Section 189 of House Bill 1220 (“H.B. 1220”) introduced in 1995 to the Eighteenth Legislature, which would have allowed the “legislature” read-only access to Hawaii’s Fiscal Accounting and Management System (“FAMIS”), refers to the Legislature as a body, or to each individual Legislator.
- II. Whether the public may access information contained in FAMIS.

BRIEF ANSWER

- I. According to the Department of the Attorney General, the term “legislature” as used in Section 189 of H.B. 1220 was meant to apply to the

Legislature as a body. The OIP does not opine on this issue, as H.B. 1220 did not pass, and the issue is moot.

II. Yes. FAMIS is a government record as defined by section 92F-3, Hawaii Revised Statutes. The public therefore is entitled to access information contained in FAMIS that is not protected from disclosure by section 92F-13, Hawaii Revised Statutes.

FACTS

At the time you first contacted the OIP, you were a Hawaii Senator, and H.B. 1220 was being considered by the Legislature to, among other things, allow it electronic access to executive budget data, including read-only access to FAMIS. H.B. 1220 did not pass.¹

In a Memorandum to the Department of the Attorney General dated November 9, 1995, the OIP asked for the Attorney General's interpretation of the term "legislature" as used in Section 189 of H.B. 1220; specifically, whether it would have provided each individual legislator on-line access to FAMIS. The Department of the Attorney General responded in a letter dated December 11, 1995, advising that it appears that the term "legislature" in Section 189 of H.B. 1220 refers to the lawmaking body as a whole, not to individual legislators who make up that body.

The OIP sought information on FAMIS from Sam Callejo, then Comptroller of the Department of Accounting and General Services ("DAGS"), in a Memorandum dated November 17, 1995. Mr. Callejo advised the OIP, in a letter dated January 18, 1996, that the objectives and scope of operations for FAMIS are:

- A) To provide a means to carry out the following functions and responsibilities of the comptroller as they relate to accounting and reporting:
 - 1) The recording of all receipt and disbursements of state funds through the state treasury.
 - 2) The maintaining of accounting records of all state funds so that the financial status and condition of these funds, assets and liabilities, income and expenditures of the state may be determined.

¹ In 1997, H.B. 202 was introduced, which contained similar language to H.B. 1220, allowing the legislature electronic access to FAMIS. This bill did not pass.

- 3) The preparation of financial statements and reports for official publication.
- B) To provide a means to administer state statutes which restrict the expenditure of funds to what was authorized by the legislature and made available pursuant to the allotment process.
- C) To provide departments with the following:
 - 1) Access to current accounting information on-line via computer terminals.
 - 2) Comprehensive financial reporting.
 - 3) Ad-hoc reporting and on-site printing.

Mr. Callejo advised that at the time of his letter, all except for a few State agencies had on-line access to FAMIS. Access had recently been provided to the staff offices of the House Committee on Finance and the Senate Committee on Ways and Means. Finally, Mr. Callejo advised that DAGS receives numerous requests for financial information generated from data contained in FAMIS, and DAGS has always provided the requested information unless it was either not available or required significant time and effort to assemble.

In an e-mail received by the OIP on November 19, 2002, DAGS Comptroller Mary Alice Evans advised the OIP that FAMIS contains both public and non-public information and therefore is not completely open to either the Legislature, Legislators, or the public. Ms. Evans advised that DAGS has been responding to requests for information from the FAMIS database in the following manner:

1. If the requestor seeks only public information, DAGS puts the request into a time-available queue for programming services to generate the report, calculates the cost of the programming time to create the report and subtracts the first \$30, and offers the report to the requestor.
2. If the request includes both public and non-public information DAGS advises the requestor what information can be legally be provided. If the requestor revises the request, DAGS starts the process outlined in #1.
3. If the requestor seeks purely non-public information, DAGS informs the requestor that it can not, under penalty of law, provide the information.

Ms. Evans further advised that Legislators as individuals and as a body are usually treated the same as the public in terms of the information that is available, but they are not charged for the information if they are acting in their official capacity. There might be instances where a legislative investigative committee has subpoena power to access the private information in FAMIS, in which case DAGS complies if so advised by the Attorney General.

Ms. Evans further explained that FAMIS is not the "record copy" of expenditure information. The "record copy" of expenditures are contained in hard copies such as contracts and purchase orders, encumbrance documents, summary warrant vouchers, etc. Based on section 92F-11(c), Hawaii Revised Statutes, if DAGS receives a request for public information that requires creating a new listing or format that does not already exist, it may be handled on a time-available basis. In cases where DAGS cannot provide a report in a timely manner, it may refer the requestor to the record copies of the documents from which FAMIS data is derived.

The OIP was informed by Deputy Attorney General Randall Nishiyama in a telephone conversation on November 20, 2002, that FAMIS contains some information that is protected from disclosure. For instance, FAMIS contains tax return information that is protected by Hawaii tax laws. In addition, information carrying privacy interests, such as social security numbers, is not disclosed in accordance with section 92F-13(1), Hawaii Revised Statutes. Mr. Nishiyama also explained that some information may not be readily retrievable, and would require some reprogramming of the system.

DISCUSSION

I. ALL GOVERNMENT RECORDS SUBJECT TO UIPA

The Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), governs access to all Hawaii State and county records. A "government record" means "information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. § 92F-3 (1993). The fact that FAMIS is a government record is not being disputed.

Government records are presumed to be available to the public for inspection and copying unless an exception to disclosure applies. Haw. Rev.

Stat. § 92F-11(a) (1993). There are five exceptions to this general rule requiring disclosure:

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

- (1) Government records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy;
- (2) Government records pertaining to the prosecution or defense of any judicial or quasi-judicial action to which the State or any county is or may be a party, to the extent that such records would not be discoverable;
- (3) Government records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function;
- (4) Government records which, pursuant to state or federal law including an order of any state or federal court, are protected from disclosure; and
- (5) Inchoate and draft working papers of legislative committees including budget worksheets and unfiled committee reports; work product; records or transcripts of an investigating committee of the legislature which are closed by rules adopted pursuant to section 21-4 and the personal files of members of the legislature.

Haw. Rev. Stat. § 92F-13 (1993).

A. Clearly Unwarranted Invasion of Personal Privacy

The UIPA allows government agencies to withhold from public disclosure, information which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy. Haw. Rev. Stat. § 92f-13(1) (1993). To determine whether disclosure would constitute a clearly unwarranted invasion of personal privacy, the agency maintaining a requested record must balance the public interest in disclosure against any personal privacy interests therein. Haw. Rev. Stat. § 92F-14(a) (Supp. 2001).

The OIP has opined on numerous occasions that social security numbers should not be disclosed publicly in most circumstances because disclosure would be a clearly unwarranted invasion of personal privacy. See OIP Op. Ltrs. No. 01-03 at 2 (Sep. 17, 2001); No. 96-4 at 2 (Dec. 10, 1996); No. 95-2 at 6 (Jan. 19, 1995).

Social security numbers, and other information to which a privacy interest attaches and that is contained in FAMIS may be withheld from disclosure by DAGS if such disclosure would constitute a clearly unwarranted invasion of personal privacy under section 92F-13(1) (1993).

B. Information Protected From Disclosure by Statute

Section 92F-13(4), Hawaii Revised Statutes, does not require public disclosure of “[g]overnment records which, pursuant to state or federal law including an order of any state or federal court, are protected from disclosure.” DAGS and the Department of the Attorney General have asserted that FAMIS contains tax return information that is protected from disclosure by Hawaii’s tax laws at Title 14, Hawaii Revised Statutes. Any information contained in FAMIS, which, if disclosed, would violate confidentiality provisions in Hawaii tax laws, or other laws prohibiting or restricting public disclosure, may be withheld from disclosure in accordance with section 92F-13(4), Hawaii Revised Statutes.

II. COMPILATION OF RECORDS

The UIPA states that “[u]nless the information is readily retrievable by the agency in the form in which it is requested, an agency shall not be required to prepare a compilation or summary of its records.” Haw. Rev. Stat. § 92F-11(c) (1993). This provision was discussed in the OIP Opinion Letter Number 97-8:

Neither is an agency required to prepare a compilation or summary of its records unless the information is readily retrievable by the agency in the form in which it is requested. Haw. Rev. Stat. § 92F-11(c) (1993). The OIP reviewed section 92F-11(c), Hawaii Revised Statutes, in OIP Op. Ltr. No.90-35 (Dec. 17, 1990):

Section 92F-11(c), Hawaii Revised Statutes, is identical to section 2-102(b) of the Uniform Information Practices Code ("Model Code") drafted

by the National Conference of Commissioners of Uniform State laws. The commentary [...] to this provision is instructive, and states that this provision "makes plain that the agency's duty is to provide access to existing records; the agency is not obligated to create 'new' records for the convenience of the requester."

OIP Op. Ltr. No.90-35 at 9 (Dec. 17, 1990) (emphasis added; footnote in original omitted). So long as an agency maintains the information in the form requested by a UIPA requester, the agency must generally provide a copy of that government record in the format requested by the public unless doing so might significantly risk damage, loss, or destruction of the original records. Id. at 13.

The OIP again discussed section 92F-11(c), Hawaii Revised Statutes in OIP Opinion Letter No. 92-7 (June 29, 1992). The OIP found that government agencies are not required to create new records in response to a UIPA request unless that data can be "routinely compiled" given the agency's programming capabilities. OIP Op. Ltr. No. 92-7 at 10-12 (June 29, 1992) (discussing list of self-insured employers for workers' compensation purposes). In the facts of that opinion letter, the information requested was readily retrievable from existing electronic records, and the OIP recommended the agency make the information available after deleting information to which significant privacy interest attached. Id. at 12.

OIP Op. Ltr. No. 97-8 at 4 (Sep. 9, 1997).

DAGS and the Department of the Attorney General have indicated that at times DAGS receives requests for information contained in FAMIS that is not readily retrievable. Under section 92F-11(c), Hawaii Revised Statutes, DAGS would not have to provide information contained in FAMIS in a format that is not readily retrievable. DAGS has asserted that it makes every effort to comply with such requests.

The OIP's administrative rules, state:

§2-71-31 Fees for searching for, reviewing, and segregating records; exceptions. (a) When an agency intends to charge fees pursuant to section 2-71-19(a)(1), the agency shall charge the following fees, except as otherwise provided in subsection (b):

...

- (3) If applicable, the actual rate of charge, based upon time expenditure, that is charged to the agency by a person other than the agency for services to assist the agency in the search for the record.

H.A.R. § 2-71-31 (1999). This section allows agencies to charge record requesters fees for reprogramming required to accommodate a record request.

CONCLUSION

FAMIS is a government record, and thus is subject to the UIPA. Under the UIPA, all government records are presumed public unless an exception to disclosure at section 92F-13, Hawaii Revised Statutes, applies. DAGS may withhold information from the public that is contained in FAMIS if it fits into one of the exceptions at 92F-13, Hawaii Revised Statutes. While the OIP has not reviewed the contents of FAMIS, it appears that at least some of the information contained therein may be protected from disclosure under section 92F-13(1), (4), Hawaii Revised Statutes. In addition, DAGS has no legal obligation under the UIPA to provide information contained in FAMIS that is not readily retrievable. Haw. Rev. Stat. § 92F-11(c) (1993).

Please feel free to contact me if you have any questions.

Very truly yours,

Carlotta Dias
Staff Attorney

APPROVED:

Moya T. Davenport Gray
Director

CMD: ankd

cc: The Honorable Mary Alice Evans, Comptroller
Mr. Randall Nishiyama, Deputy Attorney General