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January 21, 2005

The Honorable JoAnn A. Yukimura
Councilmember
County Council
County of Kauai
4396 Rice Street, Room 206
Lihu`e, Hawaii 96766-1399

Re: Executive Meetings to Interview Mayor's Appointees
(RFO-G 04-043)

Dear Councilmember Yukimura:

This is in response to your request to the Office of Information Practices ("OIP") for an advisory opinion regarding whether the Kauai County Council (the "Council") may convene an executive meeting to interview individuals who are appointed by the Mayor to County boards and commissions ("appointees"). This letter confirms our verbal advice to you.

ISSUE PRESENTED

Whether the Open Meetings Law, part I of chapter 92, Hawaii Revised Statutes ("HRS") ("Sunshine Law"), authorizes the Council to convene an executive meeting to interview the Mayor's appointees as part of the Council's process of approving those appointments.

BRIEF ANSWER

The Kauai County Council cannot meet in executive session in order to interview the nominees. The interviews do not qualify for any of the exemptions to the Sunshine Law's open meeting requirements, as set forth in section 92-5, HRS.

The County Council's interviews of nominees would not trigger the Sunshine Law exemption that allows a board to meet in executive session in order "[t]o deliberate or make a decision upon a matter that requires the consideration of information that must be kept confidential pursuant to a state or federal law." Haw. Rev. Stat. § 92-5(a)(8)(Supp. 2004). The Uniform Information Practices Act (Modified), chapter 92F, HRS ("UIPA"), is not a state law under which information "must be kept confidential" because the UIPA does not mandate confidentiality of government records, but rather sets forth exceptions to its general rule of public disclosure.

Also, although the UIPA recognizes that individuals have a significant privacy interest in "applications" and "nominations" for "appointment to a governmental position," the OIP has previously opined that this significant privacy interest is outweighed by the public interest in the application information concerning successful applicants, or nominees, because it "sheds light upon the composition, conduct, and potential conflicts of interest of government board and commission members." OIP Op. Ltr. No. 91-8 (June 24, 1991). Therefore, the UIPA would require the disclosure of the appointees' application information, and the Council should not be convening an executive meeting to discuss such information that is public under the UIPA.

Furthermore, the Revised Charter of the County of Kauai ("Charter") requires open meetings "[w]ith the exception of deliberations relating to confirmation of appointees." Although the Charter appears to indicate that the Council's hearings to confirm appointees should be closed to the public, the Charter is not a "state law" for purposes of section 92-5(a)(8), HRS.

Finally, because an individual nominated to a board or commission will not be serving for pay or compensation, a nominee cannot be considered a "hire" for purposes of the exemption to the open meeting requirement in section 92-5(a)(2), HRS. This exemption allows an executive meeting to be held to "[t]o consider the hire, evaluation, dismissal, or discipline of an officer or employee."

FACTS

The Charter provides that "[a]ll members of boards and commissions shall be appointed and may be removed by the mayor, with the approval of the council." Charter, Art. XXIII, § 23.02. It is our understanding that, in accordance with the Charter, the Mayor transmits to the Council the names of the appointees for the Council's approval. A copy of each appointee's application for appointment to the board or commission is also transmitted to the Council. The application includes, among other things, the appointee's name and employer, a summary of the appointee's major work experience, and a statement of the applicant's understanding of the primary duties of the appointment.

Currently, the Council interviews the appointees in an executive meeting closed to the public. Thereafter, in a meeting open to the public, the Council votes on whether to approve the appointees. We understand that the Council's practice of convening an executive meeting for the purpose of interviewing the appointees is based upon an advisory opinion rendered by the Office of the County Attorney ("County Attorney") dated July 18, 2002 ("County Attorney's opinion"), a copy of which you provided to us. In that opinion, the County Attorney concluded that the Council is authorized to interview the appointees in an executive meeting by the Sunshine Law's provision which allows a board to convene an executive meeting to consider information that is required by another statute to be confidential. According to the County Attorney, the UIPA requires that the Council keep certain information being considered about the appointees confidential.

On December 14, 2004, via a telephone inquiry to the OIP, you questioned the Council's practice of interviewing the appointees in an executive meeting. Your question was limited to those appointees who serve voluntarily, without pay or other compensation, and this opinion is accordingly limited to those appointees. After your telephone inquiry, Council Chairperson Bill "Kaipo" Asing, County Attorney Lani D.H. Nakazawa and County Clerk Peter A. Nakamura orally provided us with their comments regarding the issue that you raised. In summary, they conveyed their belief that certain of the council members' questions to the appointees may involve matters that are "private," in which the appointees have a "privacy interest," and, therefore, appropriate for discussion in an executive meeting closed to the public.[1]

DISCUSSION

In light of the arguments that have been raised to justify the Council's current practice of convening an executive meeting to interview the appointees, we feel that it is appropriate to remind the Council of the Sunshine Law's purpose of protecting the public's right to know by allowing the public to participate, to the greatest extent possible, in the discussions, deliberations, decisions and actions of government boards. The statute expressly directs that "[t]he provisions requiring open meetings shall be liberally construed" and that "[t]he provisions providing for exceptions to the open meeting requirements shall be strictly construed against closed meetings." Haw. Rev. Stat. § 92-1 (1993).

[1] It is our understanding that the Council intends to provide the OIP with the minutes of the executive meeting in which the appointees were interviewed for our understanding as to the private information disclosed in response to the council members' questions. If, upon review of those minutes, we believe that reconsideration of this opinion is appropriate, we will advise you accordingly; however, given that the Council is in the process of approving the appointees and, as discussed below, our opinion that the public is entitled to participate in and scrutinize the process, we did not believe that any further delay in our issuance of this opinion was warranted.

With respect to the issue that you have raised, the Sunshine Law requires that "[e]very meeting of all boards shall be open to the public and all persons shall be permitted to attend any meeting unless otherwise provided in the constitution or as closed pursuant to sections 92-4 and 92-5." Haw. Rev. Stat. § 92-3 (1993). More specifically, the statute provides, "[a] meeting closed to the public shall be limited to matters exempted by section 92-5." Haw. Rev. Stat. § 92-4 (1993). Section 92-5, HRS, lists the eight specific purposes for which a board may convene an executive meeting. Those purposes are the only times when a board may close its meetings from the public. Only two of the exceptions are potentially applicable to the present issue:

> **§92-5 Exceptions.** (a) A board may hold a meeting closed to the public pursuant to section 92-4 for one or more of the following purposes:
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> . . . .
>
> (2) To consider the hire, evaluation, dismissal, or discipline of an officer or employee or of charges brought against the officer or employee, where consideration of matters affecting privacy will be involved; . . .
>
> . . . .
>
> (8) To deliberate or make a decision upon a matter that requires the consideration of information that must be kept confidential pursuant to a state or federal law, or a court order.

Haw. Rev. Stat. § 92-5 (Supp. 2004).[2] With the legislature's expressed policy and intent in mind, we first consider section 92-5(a)(8), HRS, the exception that the County Attorney believed supported the Council's present practice of interviewing the appointees in meetings closed to the public. Although not discussed in the County Attorney's opinion, the applicability of section 92-5(a)(2), HRS, will be addressed because we believe that it is potentially applicable.

[2] With regard to our discussion of the Council's interview of appointees, we do not find relevant the other exemptions provided in section 92-5, HRS, concerning individuals applying for professional or vocational licenses, the authority of persons designated to negotiate with respect to labor or public property acquisitions, consultations with the board's attorney on certain matters, investigations of proceedings regarding criminal misconduct, public safety or security, and private donations.

A. Information that Must Be Kept Confidential Pursuant to a State or Federal Law

1. The Uniform Information Practices Act (Modified)

The County Attorney's opinion did not identify any specific statute requiring the confidentiality of information about the appointees that may be discussed during the Council's approval process. Instead, the County Attorney determined that, under the UIPA, an appointee has a significant privacy interest in his or her application for appointment to a County board or commission. Based upon that determination, without any consideration as to whether the appointee's privacy interest was outweighed by the public interest in disclosure, the County Attorney opined, "as a general rule the council should hold an executive meeting closed to the public pursuant to H.R.S. §92-5(a)(8) to interview the nominee concerning the information contained in the application unless the nominee waives his or her privacy interest in this information." (emphasis in original) (footnote omitted).

We, however, cannot agree with the County Attorney's conclusion. First, as we have stated on numerous prior occasions, the UIPA is not a confidentiality statute. See, e.g., OIP Op. Ltr. No. 05-03 (Jan. 19, 2005) (employees' salaries); OIP Op. Ltr. No. 03-03 (April 1, 2003) (Judicial Selection Commission's list of nominees); OIP Op. Ltr. No. 90-1 (Jan. 8, 1990) (pension benefits of retired public employees). Rather, we interpret the UIPA, in section 92F-13, HRS, as containing specific exceptions to the general rule that any record maintained by a government agency is public. The statute allows an agency to withhold those records falling within the exceptions from public disclosure. Haw. Rev. Stat. § 92F-13 (1993). The plain language of the UIPA's exceptions, however, does not prohibit disclosure. Id. ("This part shall not require disclosure of …"); see also OIP Op. Ltr. No. 05-03.

In our opinion, because of the statute's unambiguous language, an agency has discretion under the UIPA to choose to disclose records falling within the exceptions contained in section 92F-13, HRS.[3] OIP Op. Ltr. No. 05-03. In other words, we consider the UIPA exceptions to disclosure to be permissive, not mandatory. Id. Accordingly, we do not interpret the UIPA as requiring that the Council keep confidential the information in the appointee's application and, for that reason, do not believe that section 92-5(a)(8), HRS, is applicable.[4]

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[3] However, an agency may still be subject to disclosure restrictions imposed by other laws.

[4] Like the Sunshine Law exemption in section 92-5(a)(8), HRS, the UIPA recognizes the confidentiality requirements of other laws by providing an exception from required public disclosure for "[g]overnment records which, pursuant to State or federal law including an order of any State or federal court, are protected from disclosure." Haw. Rev. Stat. § 92F-13(4) (1993). We believe that the Legislature had this UIPA exception in mind when it adopted the Sunshine Law exemption in section 92-5(a)(8), HRS, and proclaimed that this new exemption "would make the

Second, while the UIPA recognizes that individuals have a significant privacy interest in "applications" and "nominations" for "appointment to a governmental position," we previously opined that the public interest in disclosure of certain information about successful applicants who have been nominated to boards or commissions outweighs the successful applicants' privacy interest in the information. OIP Op. Ltr. No. 91-8 (June 24, 1991). We found that the public interest is greater in information about these nominees, including their names, employment history, current occupations and education, "because it directly sheds light upon the composition, conduct, and potential conflicts of interest of government board and commission members." Id. at 6. Therefore, certain information on the applications for appointment to boards or commissions by those applicants who are nominated for appointment are not protected from disclosure under the UIPA because disclosure would not constitute a clearly unwarranted invasion of personal privacy. See Haw. Rev. Stat. § 92F-14(a)(1993) ("[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 interest of the individual").[5]

In this case, we consider the appointees to be the successful applicants, or nominees, as they have been selected by the Mayor from, presumably, a pool of applicants to serve on various County boards and commissions. Based upon the form of the application provided to us, even assuming the applicability of section 92-5(a)(8), HRS, with the exception of home telephone number, we find that the information in the application cannot be withheld from public disclosure under the UIPA; therefore, section 92-5(a)(8), HRS, does not support the convening of an executive meeting to interview the appointees regarding that information.[6]

State's public meeting laws consistent with UIPA." Stand. Com. Rep. No. 1580, 20th Leg., 1999 Reg. Sess. Haw. S.J. 1646 (1999).

[5] Although not a confidentiality statute itself, the UIPA has been judicially recognized as a law that "implements" the privacy protection afforded by section 6 of article I of the Constitution of the State of Hawai`i. State of Hawai`i Organization of Police Officers (SHOPO) v. Society of Professional Journalists—University of Hawai`i Chapter, 83 Haw. 378, 396 (1996) ("SHOPO") The privacy protection afforded by section 6 of Article I of the Hawai`i Constitution would be considered a state law for purposes of the Sunshine Law exemption in section 92-5(a)(8), HRS. However, because we have concluded that the UIPA would require public disclosure of the appointees' applications, we doubt that the information would be found to be "highly personal and intimate" so as to fall within the privacy protection under the Hawai`i Constitution. See SHOPO at 398 (assessment by the Hawai`i Supreme Court of whether the constitutional right to privacy is implicated by the public disclosure of police discipline records under the UIPA).

[6] We acknowledge that there is certain information not on the application, such as sexual preference, in which the appointees may have a significant privacy interest that would not be outweighed by the public interest in disclosure. However, such information that is highly personal and intimate and unrelated to an appointee's qualifications or ability to serve on the board or

2. The Charter

The Charter provides that "[w]ith the exception of deliberations relating to confirmation of appointees, or consultations with the county attorney on claims, all council and council committee meetings shall be open to the public." Charter, Art. III, § 3.07 (E). By negative implication, the Charter appears to authorize the Council's current practice of interviewing the appointees in meetings closed to the public.

The OIP has previously opined that a county charter provision is a "county" law and cannot be construed as a "state" law for purposes of section 92F-13(4),HRS. OIP Op. Ltr. No. 95-14 (May 8, 1995) (filing dates of board and commission members' financial disclosure statements); OIP Op. Ltr. No. 96-2 (July 16, 1996) (City Ethics Commission advisory opinions). Similarly, the Charter provision would not qualify as a "state law" for purposes of the Sunshine Law exemption in section 92-5(a)(8), HRS.

Section 2 of Article VIII of the Hawai'i Constitution does grant the counties certain powers of self-government and "home rule" and does instruct that "[c]harter provisions with respect to a political subdivision's executive, legislative and administrative structure and organization shall be superior to statutory provisions, subject to the authority of the legislature to enact general laws allocating and reallocating powers and functions." Haw. Const., Art. VIII, § 2. This Hawai'i Constitution provision has been interpreted by the Hawaii Supreme Court as allowing a county to enact any charter provision, even if it conflicts with statutory provisions, but only if the county is able to demonstrate that: (1) the provision relates to the county's structure and organization, and (2) it is a matter of local, as opposed to statewide, concern. HGEA v. County of Maui, 59 Haw. 65 (1978).

Section 2 of Article VIII of the Hawai'i Constitution is limited by section 6 of the same article that provides that "[t]his article shall not limit the power of the legislature to enact laws of statewide concern." Haw. Const., Art VIII, § 6. Consequently, the Hawaii Supreme Court has upheld the constitutionality of statutes governing such matters as civil service in the State and counties, HGEA v. County of Maui, 59 Haw. 65 (1978); and subpoena powers, Marsland v. First Hawaiian Bank, 70 Haw. 126 (1988).

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commission may be inappropriate as part of the interview process and, in some instances, the Council's inquiries about such information in its interview of the appointee may be illegal under federal law. In our opinion, it is the responsibility of the Council, with the advice from its attorney, to understand the boundaries of its inquiries about the appointees.

The Legislature adopted the Sunshine Law in order to implement the "policy of this State that the formation and conduct of public policy—the discussions, deliberations, decisions, and actions of governmental agencies—shall be conducted as openly as possible." Haw. Rev. Stat. § 92-1 (1993). We find that the Sunshine Law was designed to be and does operate as a law of "statewide concern" because it mandates the State's policy of open government upon all boards statewide. Therefore, we believe that, as a law of "statewide concern," the Sunshine Law's open meeting requirements would not be superseded by the Charter's provision which appears to require confidentiality of "deliberations relating to confirmation of appointees." Charter, Art. III, § 3.07 (E).

B. Hire, Evaluation, Dismissal, or Discipline of an Officer or Employee

Section 92-5(a)(2), HRS, allows a board to convene an executive meeting to consider, among other things, "the hire …of an officer or employee …, where consideration of matters affecting privacy will be involved." Haw. Rev. Stat. § 92-5(a)(2) (Supp. 2004). In order to determine the meaning of the term "hire," we must "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 Dep't of Budget & Finance, 76 Haw. 332, 340 (1994). The Hawaii Revised Statutes instructs that "[t]he words of a law are generally to be understood in their most known and usual signification, without attending so much to the literal and strictly grammatical construction of the words as to their general or popular use or meaning." Haw. Rev. Stat. § 1-14 (1993); see also Ross v. Stouffer Hotel Co. (Hawai'i) Ltd., Inc., 76 Haw. 454, 461 (1994) ("we give the operative words their common meaning, unless there is something in the statute requiring a different interpretation").

Black's Law Dictionary defines the term "hire" as "compensation for the use of a thing, or for labor or services." Black's Law Dictionary at 656 (5th Ed. 1979). Similarly, Webster's Dictionary defines this term as the "payment for labor or personal services: wages." Webster's Ninth New Collegiate Dictionary (1988). Thus, relying on the dictionary definitions of the term "hire," we find that the exemption in paragraph (2) would only apply to those individuals who will be receiving "compensation" or "payment" for their services for the county, and not to the appointees who will be serving in a voluntary capacity.[7] Accordingly, in our opinion, section 92-5(a)(2), HRS, does not support the Council convening an executive meeting to interview the appointees.

[7] For the purposes of this opinion, we need not determine whether the Council, by simply approving of the Mayor's appointees, is involved in the "hiring" of that person.

CONCLUSION

The Kauai County Council must conduct its interviews of the nominees in public and comply with the Sunshine Law's other requirements for conducting an open meeting. There is no exemption to the Sunshine Law that would allow the County Council to conduct the interviews in executive session.

If you, or any of the other recipients of this letter, have any questions or would to discuss this matter further, please do not hesitate to contact us.

Very truly yours,

Lorna L. Aratani
Staff Attorney

APPROVED:

Leslie H. Kondo
Director

cc: The Honorable Bill "Kaipo" Asing
The Honorable Lani Nakazawa
The Honorable Peter A. Nakamura