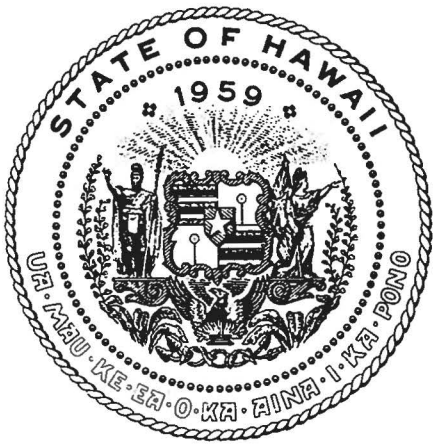


Report of the Governor's Committee on Public Records and Privacy

Robert A. Alm, Chairman
Duane Brenneman
Andrew Chang
Dave Dezzani
Ian Lind
Jim McCoy
Stirling Morita
Justice Frank Padgett
Warren Price III

Volume II
December 1987

OFFICE OF INFORMATION PRACTICES
Department of the Attorney General
335 Merchant Street, Room 246
Honolulu, Hawaii 96813

APPENDIX J

PUBLIC TESTIMONY

Report of the Governor's Committee on
Public Records and Privacy
Volumes II and III

APPENDIX J: PUBLIC TESTIMONY

INDEX

I. Testimony Received Before July 2, 1987

Page No.

1. GOVERNMENTAL AGENCIES 1-115

a. State

(1) Judiciary

Janice Wolf, Administrative Director 1
Office of the Administrator
Director of the Courts

Harry H. Kanada, Probation Administrator 4
Adult Probation Division
First Circuit Court

(2) Legislature

Senate President Richard S. H. Wong 6
State Senate
See also this Index at p. 6.

Representative Rod Tam 7
State House of Representatives

(3) Executive

The Honorable Benjamin J. Cayetano 10
Lieutenant Governor
State of Hawaii

(4) Russel S. Nagata, Director 13
Department of Accounting
and General Services

(5) Ken Kiyabu 14
Acting State Archivist
State Archives

(6) Harold Falk, Acting Director 17
Department of Corrections

(7) Alexis T. Lum, Major General, Hawaii Army 77
National Guard Adjutant General
Department of Defense

(8) Charles Toguchi, Superintendent 78
Department of Education

Page No.

(9) John C. Lewin, M.D., Director 80
Department of Health

(10) Mario R. Ramil, Director 81
Department of Labor and Industrial Relations

(11) William W. Paty, Chairperson 84
Department of Land and Natural Resources

(12) John Ishihara, Esq. 86
Staff Attorney
Legal Aid Society of Hawaii

(13) Kirk Cashmere, Esq. 102
Legal Aid Society of Hawaii

(14) Richard F. Kahle, Jr., Director 109
Department of Taxation

(15) University of Hawaii

Ed Yuen, Director 112
Procurement & Property Management Office

Mari J. Matsuda 114
Assistant Professor of Law
The William S. Richardson School of Law
See also this Index at p. 6.

2. COUNTIES 116-136

a. Honolulu

(1) Jeremy Harris 116
Managing Director
City and County of Honolulu
See also this Index at p. 8 (Exhibits to Testimony).

(2) Arthur Ross 132
Deputy Prosecuting Attorney
Department of the Prosecuting Attorney
City and County of Honolulu

(3) Gary Gill 136
Councilman
County Council, County of Honolulu

b. Hawaii 137-143

(1) Ronald Ibarra 137
Corporation Counsel
County of Hawaii

Page No.

(2) Glenn W. Todd 139
Inspector
Administrative Bureau
Police Department, County of Hawaii

(3) Jon R. Ono 140
Prosecuting Attorney
Office of the Prosecuting Attorney

(4) Stephen K. Yamashiro 141
Council Chairman
County Council, County of Hawaii

c. Kauai

(1) The Honorable Tony T. Kunimura 144
Mayor
County of Hawaii

2. BUSINESSES/ASSOCIATIONS 146-313

a. Aiea General Hospital Association 146
Shizuo Onishi, President

b. American Association of University Women 147
Martha Black, State Legislative Chair

c. Big Island Press Club 148
Marcia Reynolds, Vice President

d. Common Cause/Hawaii 152
Terry Boland, Representative

e. Equifax Services 153
Ronald F. Taylor, General Manager

f. Green, Ning, Lilly & Jones, Attorneys at Law 155
Michael A. Lilly

g. Hawaii Automobile Dealers' Association 197
Hardy Hutchinson, Manager

h. Hawaii Building & Construction Trades Council, AFL-CIO
Joseph Bazemore, Chairman Pro-Tem 199

i. Hawaii Child Care Centers 201
Jim Denzer, Executive Director

j. Hawaii Federation of Physicians and Dentists 216
Francis J. Dann, M.D., Legislative Chairman

		Page No.
k.	Honolulu Advertiser Gerry Keir, Managing Editor	217
l.	Honolulu Community Media Council Ah Jook Ku, Executive Director	221
m.	Honolulu Star-Bulletin John E. Simonds, Senior Editor	224
n.	IRC Walter Oda See also this Index at p. 7	226
o.	Jackson Broadcasting Systems Elijah Jackson, Jr.	229
p.	League of Women Voters of Honolulu Arlene Kim Ellis	233
q.	Maui Association of Editors and Reporters Gary T. Kubota, President	234
r.	Morris, G. A., Inc. G. A. "Red" Morris	239
s.	Native Hawaiian Legal Corporation Mahealani Ing, Executive Director	281
t.	News 7 Hawaii	287
u.	Pacific Business News Mark Coleman, Associate Editor	288
v.	Painting and Decorating Contractors Association Etsuo Shigezawa, Executive Director	305
w.	S. G. Enterprises, Inc. Steve Goodenow, President	308
x.	Sheet Metal Contractors Association Mrs. L. Yonemoto, Manager	312
y.	Statewide Human Services Action Council The Rev. Frank A. Chong Chair, Government Relations Committee	313
3.	PRIVATE CITIZENS	314-432
a.	Aila, Pansy 41-166 Poliala St., Waimanalo, HI 96795	314
b.	Byrne, Desmond J. P. O. Box 10447, Honolulu, HI 96816	317

		Page No.
c.	Byrne, Jahan P. O. Box 10447, Honolulu, HI 96816	332
d.	Christensen, Leila 1560 Kanunu St., #1214, Honolulu, HI 96814	344
e.	Doss, Mrs. Jennie 2203 Apaakuma Street, Pearl City, HI 96782	345
f.	Grycner, Ms. Pamela 1765 Ala Moana Blvd., Apt. 1287, Honolulu, HI 96815	349
g.	Harder, Phillip J. P. O. Box 10335, Lahaina, HI 96761	350
h.	Hustace, Maria M. Star Route 215, Kaunakakai, Molokai, HI 96748	351
i.	Hylton, Kin P. O. Box 31114, Honolulu, HI 96820	352
j.	Jaeger, John 1725 D Kewalo St., Honolulu, HI 96822	353
k.	Kaaiai, Ms. Joan A. 2334 Maunalaha Rd., Honolulu, HI 96822	354
l.	Keever, Beverly Ann Deepe 2176 Aha Niu Place, Honolulu, HI 96821 See also this Index at p. 8	355
m.	Kingsley, John K. 437 Lanipuao Street, Honolulu, HI 96825	372
n.	Lee, Janet 47-624 Puapoo Place, Kaneohe, HI 96744	373
o.	Neller, Earl Office of Hawn. Affairs 1600 Kapiolani Blvd., Suite 1500, Honolulu, HI 96814	376
p.	Orton, Malulani D. 46-307 Auna St., Kaneohe, HI 96744	409
q.	Shepard, Dr. R. Frederick 1649 Kanalui St., Honolulu, HI 96816	412
r.	Shorba, Joe 965A Lei Road, Honolulu, HI 96817	413
s.	Slocum, Frank D. 84-1021 Lahilahi St., #1302, Waianae, HI 96792	414

Page No.

t. Stanback, Lottie Patricia 415
3202 Ahiahina Place, Honolulu, HI 96816

u. Strickland, Ms. Stephanie 418
1316 Honokahua St., Honolulu, HI 96825

v. Tamashiro, Gordon Y. 424
P. O. Box 1541, Kaneohe, HI 96744

w. Thomas, Earl Jr. 430
46-244 Kalali St., Kaneohe, HI 96744

x. Wilson, Mrs. Pat 431
922 Kapahulu Ave., #203, Honolulu, HI 96816

y. Wolff, Ms. Lee 432
1511 Nuuanu Ave., Prince #41, Honolulu, HI 96817

END OF VOLUME II; (Appendix I continues in Volume III of this Report, beginning with page 1).

VOLUME III

II. Testimony Received After July 2, 1987

1. GOVERNMENTAL AGENCIES 1-200

a. State

(1) Robert A. Alm 1
Director
Department of Commerce and Consumer Affairs

(2) Murray E. Towill 193
Deputy Director
Department of Business and Economic Development

(3) Legislature 198
Richard S. H. Wong
President
State Senate

(4) Mari J. Matsuda 200
Assistant Professor of Law
University of Hawaii at Manoa

		Page No.
2.	BUSINESSES/ASSOCIATIONS	201-322
a.	Hawaii Dental Hygienists' Association Cheryl J. M. Oyama, R.D.H.	201
b.	Hawaii Insurance Information Earl Payne, Manager	202
c.	Hawaiian Electric Industries Jackie Mahi Erickson Corporate Counsel	203
d.	Industrial Relations Consultant Corporation Walter T. Oda, President	303
c.	Kapiolani Park Preservation Society David S. Sterrett Executive Vice President	322
3.	PRIVATE CITIZENS	324
	Bill Dougherty 1230 Wilhelmina Rise Honolulu, HI 96816	324

III. Additional Testimony Received After August 14, 1987

1.	GOVERNMENTAL AGENCIES	
a.	State	
	Suzanne D. Peterson Chairman, Board of Agriculture	325
	John Ishihara Staff Attorney, Legal Aid Society of Hawaii	329
b.	County	
	Elmer J. Muraoka Department of Finance, County of Kauai	332
2.	BUSINESSES/ASSOCIATIONS	
a.	American Association of University Women Martha Black, State Legislative Chair	334
b.	Common Cause/Hawaii Lola N. Mench 47-378 Kam Hwy., Kahaluu, HI 96744	336

Page No.

3. PRIVATE CITIZENS

a. Beverly Ann Deepe Keever 338
2176 Aha Niu Place
Honolulu, HI 96821

IV. Exhibits to Testimony of City and County of Honolulu (this Index at p. 2).

Exhibit A 369

Exhibit B 378

Exhibit C 389

Exhibit D 392

V. Additional Submissions

1. GOVERNMENTAL AGENCY

a. State 615

(1) Yukio Takemoto
Director
Department of Budget and Finance

2. BUSINESSES/ASSOCIATIONS

a. John A. Chanin Esq. 620
4 South King Street, Honolulu, HI 96813
Member, Committee on Uniform Information Practices Code
National Conference of Commissioners on Uniform State Laws

Office of the Administrative Director of the Courts
The Judiciary • State of Hawaii

Post Office Box 2560 Honolulu, Hawaii 96804

July 2, 1987

Mr. Robert A. Alm, Chairman
Governor's Committee on Public Records and Privacy
Office of the Director
Department of Commerce and Consumer Affairs
P.O. Box 541
Honolulu, Hawaii 96809

Dear Mr. Alm:

I am answering your letter of June 19, 1987, in which you invited us to present the views of the Judiciary concerning the current laws on public records and privacy, and specifically to report on the strengths and weaknesses of the current provisions. Thank you for inviting our comments.

Your letter mentions Chapter 92E, Hawaii Revised Statutes, as one of the statutes which specifically addresses the issue of disclosure of public records. This chapter at section 92E-1 defines "agency" to exclude " . . . (2) The judiciary, including the courts, and its offices, bureaus, officers, and employees."

The Judiciary believes that this exclusion provision is productive of confusion and that there seems to be little reason for excluding Judiciary information from the reach of this statute which applies to all of the agencies in the executive branch. While we feel that the doctrine of separation of powers sometimes justifies different treatment for the judicial branch of state government, we are not certain that there is sufficient justification for applying that doctrine here. Accordingly, the Judiciary believes that the above-quoted provision should be deleted from section 92E-1 and is considering requesting the submission of such a bill to the 1988 legislative session.

As a branch of the state government of a free people, the Judiciary supports the open disclosure of all records in its possession until and unless their non-disclosure is required by law, or permitted by law for reasons specified in the law.

Accordingly, historically in Hawaii, and throughout our nation, all court records of proceedings held in open court are open to members of the public, just as members of the public would be entitled to attend in person such proceedings held in open court. Some proceedings which are court proceedings are, however, not held in open court, and some records related to open proceedings are confidential, and statutes have grown up over the years protecting the privacy of these proceedings and records.

Some representative examples with statutory citations are:

Mental retardation	HRS §333-81
Mental health, commitment	HRS §334-5
Child protective act	HRS §587-1
Adoptions	HRS §578-15
Paternity	HRS §584-20
Juvenile and other records	HRS §571-84
Promise to render support for child	HRS §584-22
Adult probation records	HRS §806-73
Wiretap records	HRS §803-46(e)
Records ordered confidential by the court	HRS §§602-7, 602-11. 603-21.9, 604-7(e)

The above listing is not exhaustive but is intended to give your committee a general idea of the kinds of information in court records which are confidential and not available to the general public.

Presently the Family Court, First Circuit is reviewing the need and desirability of submitting a request for a bill to make confidential Family Court records relating to the guardianship of an incapacitated adult under HRS Chapter 560, and records relating to Family Court domestic abuse matters under HRS Chapter 586.

The Judiciary believes that present statues making certain court records confidential are well supported by legal authority and experience and should be retained in their present form. In our experience all of these statutes are needed to protect important personal interests.

Your letter also asks about ancillary impacts such as staffing to copy records. In general, providing copying service to the public is not now a problem and can be accommodated by regular staffing. Occasional unanticipated requests involving many records, however, may require special arrangements. Should major changes be made to present law, some impact may be expected. For example, in Family Court a designation of additional records as "confidential" would require staffing to locate and search these records to determine what portions, if any, may be divulged to whom, as well as staff time to make any copies permitted.

The Judiciary thanks your committee for inviting our comments. We will be happy to answer questions from your committee and to provide further information at your request.

Very truly yours,

Janice Wolf

Janice Wolf
Administrative Director
of the Courts

Adult Probation Division
First Circuit Court
The Judiciary • State of Hawaii

Kaahumanu Hale 777 Punchbowl Street Honolulu, Hawaii 96813
Post Office Box 2629 Honolulu, Hawaii 96803

HARRY H. KANADA
Probation Administrator

June 8, 1987

Mr. Robert A. Alm
Chairman, Committee on Public Records
P. O. Box 541
Honolulu, Hawaii 96809

Dear Mr. Alm:

Both as a private citizen and a public official, I have a definite interest in this subject matter. The first question that comes to mind upon reading your notice in the newspaper is "What is the problem?" There has been no publicity on the issue of public records to my knowledge.

My position is that some information are confidential and should be kept that way. The rule of thumb is that whatever is not declared confidential or institutional practice is public record or accessible information.

To determine what information should be accessible to whom, I have provided the following categories with examples:

1. The right to know. Generally, the right to know implies that there is statutory authorization. The prosecutor and defense counsel for example are authorized by law and have a right to receive copies of the presentence report.

2. The need to know. Generally, persons or agencies that have a need to know are given access to information in order to carry out their function. Examples are doctors, treatment professionals and financial institutions.

3. The want to know. This category includes all those that don't have a right or need to know. Examples are the general public that are interested in people and events for no specific purpose and private citizens who wish to gain information for personal reasons.

Basically, a citizen should have the right to confidentiality of certain personal information such as your financial and medical record unless a party has the right or need to know. In turn the citizen should be protected from dissemination of such confidential information by those who gained that information legitimately to all others who don't have the right or need to know.

As the news media are professional gatherers of information with the greatest exposure power, controls, if any, should be focused in their direction. It may be wise to develop clear guidelines prohibiting exposure of certain information statutorily with attendant criminal charges and civil liability. At the same time, similar guidelines and penalties should be developed for government agencies and private entities that release such information which they may have obtained legitimately.

Should you have any questions, please call me at 548-7667.

Very truly yours,

Harry H. Kanada

HARRY H. KANADA
Administrator

HHK/mk

Office of the President
The Senate
State of Hawaii
State Capitol
Honolulu, Hawaii

June 29, 1987

Mr. Robert A. Alm
Director, Department of Commerce
and Consumer Affairs
1010 Richards Street
Honolulu, Hawaii 96809

Dear Mr. Alm:

Thank you for your letter of June 19 concerning the Governor's Committee on Public Records and Privacy.

I am in the process of compiling a response to your inquiry, specifically with respect to the records in the possession of the Senate. The response will be submitted to you as quickly as possible.

Sincerely,

Richard S. H. Wong
President of the Senate

RW/dw

HOUSE OF REPRESENTATIVES
THE FOURTEENTH LEGISLATURE

STATE OF HAWAII
STATE CAPITOL
HONOLULU, HAWAII 96813

July 2, 1987

Chairman Alm and members of the Committee:

In 1975 the legislature placed into law a declaration of policy and intent which clarified the meaning of "sunshine" in the state of Hawaii. It states, "In a democracy, the people are vested with the ultimate decision-making power. Governmental agencies exist to aid the people in the formation and conduct of public policy. Opening up the governmental processes to public scrutiny and participaiton is the only viable and reasonable method of protecting the public's interest. Therefore the Legislature declares that it is the policy of this State that the formation and conduct of public policy--the discussions, deliberations, decisions, and action of governmental agencies--shall be conducted as openly as possible".

This declaration implies that "Sunshine" is a two way street and that democratic government depends on communication between all interested persons and groups in the governmental decision-making process. It has been my experience as a legislator and as Chairman of the House Committee on Education that it is impossible to make good decisions unless I can communicate with everyone who has an interest in an issue under consideration. This is the essence of the democratic system.

I have read many times in our newspapers that individuals and groups are denied access to public information and that one of the principal difficulties is the tension in the law between privacy and sunshine.

Sometimes the executive branch has used the tension between privacy and sunshine to suppress public information, such as the salaries of government employees. Personally, I feel that a government official, such as myself, or a government employee, is a servant of the people. As such, the private citizen is my employer. To say that an employer has no right to know the salary of an employee is ridiculous.

On the other hand, employee personnel records may contain information which should not be public, for example, where I invest my private funds for deferred compensation or what church I attend. I believe that the present statute is not specific enough as to what information regarding public employees should be public and what should be private. I hope the administration will sponsor a bill next year which will clearly define what is private and what is public, perhaps based on the discussions of the Constitutional Convention.

Another issue which concerns me is the extent to which government collects information on individuals which has no public purpose or has no value for the government. Sometimes I feel that government collects and stores too much private information on individuals which is simply a waste of time and money. For example, a report from an informant in a drug case which is of doubtful value might be routinely filed and forgotten until someone steals it and uses it for a malicious purpose. I think we should consider the cost and the public benefit of collecting this type of information. Also, information which cannot be confirmed or is found to be inaccurate should be discarded, such as unfounded accusations of abuse against child care workers. There is a big difference between useful facts and garbage.

One of the major concerns of the public in regard to the sunshine law is the attitude of public officials and employees toward sunshine. I hope that the Governor will issue an administrative directive to every employee of the state which will instruct them to provide information to the public in a respectful and timely manner and which will clearly set out what is private. Information in a document which would invade the privacy of an individual could be deleted from that document and the document then could be released as is done by the federal government under the Freedom of Information Act.

Hopefully, as this new administration moves forward a new attitude toward sunshine will emerge. Government employees should be engaged in a search for excellence. The search for excellence in the business world implies staying close to the needs of the customer and the stockholder and putting an emphasis on service. We also need to develop this attitude in government service by emphasizing the needs of the individual citizen, rather than allowing a continuation of the present attitude of too many public employees--that information is the property of the employee and can be withheld from the public.

I would ask you to recall the testimony of former

Attorney General Michael Lilly this afternoon. He stated that when he was Attorney General he was satisfied that Hawaii had a good sunshine law even though he had been informed by reporters that Hawaii's law was one of the most restrictive in the United States. Now that he is in private practice his attitude toward the law has changed considerable. If he had his present attitude toward the law when he was in office perhaps many of the sunshine problems that took place during his tenure could have been avoided.

All of us in public service must foster an affirmative attitude toward the public's right to information. Thank you very much.

Sincerely,

Rod Tam

Rod Tam
State Representative
Chairman, Committee of Education

OFFICE OF THE LIEUTENANT GOVERNOR
STATE CAPITOL
HONOLULU, HAWAII 96813

BENJAMIN J. CAYETANO
LIEUTENANT GOVERNOR

M E M O R A N D U M

TO: Governor's Committee on Public Records and Privacy

FROM: Benjamin J. Cayetano
Lieutenant Governor

DATE: July 2, 1987

RE: Comments on Public Records within the Possession of the Lieutenant Governor's Office

Your committee has asked for comments on public records within the possession of my office. I am providing the following information on the specific records we control, both public and confidential, and the statutory provisions related to those records.

A. Records within the possession of the Office of the Lieutenant Governor which are available to the public.

(1) Records pertaining to elections (§11-97, HRS)
(2) Attorney General's Opinions (§28-3, HRS)
(3) State Administrative Rules (§91-4, HRS)
(4) County Rules (§91-4, HRS)
(5) Public Meeting Notices (§92-7, HRS)
(6) Proclamations
(7) Reorganizational charts

B. Records within the possession of the Office of the Lieutenant Governor which are confidential.

(8) Name Change Documents (§574-5, HRS)

Records pertaining to elections are kept until all candidates have been certified by the chief election officer or county clerk (§11-154, HRS). However, federal law requires that all documents related to voting in federal elections be kept for 22 months after each election. Due to the difficulty in segregating the materials, we generally retain all voting materials for the longer period of time. Besides hard copy, we have elections data on magnetic tape which is also available to the public.

The county clerks are responsible for the county register (§11-11, §11-14, HRS) however, we maintain a central file of registered voters which is open for public inspection. We receive numerous requests each day for information from this file. There have been concerns about including information such as voter's social security numbers in this register which is then available for public inspection and copying. §11-14(a), HRS, places the responsibility for deciding what information is to be included in the register with the county clerks, and §11-14(b), HRS, provides that the respective county councils decide by ordinance what information contained in the voter registration affidavit is to be released to the public. §11-15, HRS, sets forth the information which is contained in the affidavit which is on file with the county.

Maintenance of the records enumerated above and making them available to the public is not a problem for us. As regards the state administrative rules, however, there are deficiencies indirectly related to their maintenance which consume large amounts of staff time. For example, there is no index to the rules which would allow easy access to specific subject areas. The responsibility for compiling and publishing such an index lies with the Revisor of Statutes who has within the last week indicated that sometime in the future they are considering publishing such an index.

A second area which consumes staff time unnecessarily is researching pre-1981 rules. §91-5, HRS, provided that all agency rules be compiled in a new format by June, 1981; however, the statute did not provide for anyone to monitor for compliance. As a result, if our office receives a request for agency rules and we do not find them in our official (new format) volumes, the staff must also research the pre-1981 ledger books which contain the old rules. These old ledgers are extremely difficult and time-consuming to research.

Another source of considerable staff time is the statutory requirement that we charge a 25 cents per page copying fee. Particularly with the rules, but in elections as well, we receive large requests. For example, if an attorney needs to have portions of the Administrative Rules copied and certified for trial, it may involve a hundred pages. When this occurs, staff time to find and copy the material can be considerable. We would prefer to have some flexibility in this area so that if an agency is able to copy the material using their machine and staff we could allow it.

The other records we possess do not involve extensive use of staff time other than filing upon receipt. The name change documents are considered confidential and will be released only to the Petitioner or their attorney. Once a name change Order has been signed, the documents are forwarded to the Archives and they handle any requests for information from the public.

If you have need for any further information please feel free to contact Jaurene Judy of my staff at 548-2544.

BJC:JRJ:bco

JOHN WAIHEE
GOVERNOR

RUSSEL S. NAGATA
COMPTROLLER

KEN KIYABU
DEPUTY COMPTROLLER

STATE OF HAWAII
DEPARTMENT OF ACCOUNTING
AND GENERAL SERVICES
P. O. BOX 119
HONOLULU, HAWAII 96810-0119

LETTER NO.

PS-87-686.2

June 26, 1987

MEMORANDUM

TO: The Honorable Robert A. Alm, Director
Department of Commerce and Consumer Affairs

FROM: Russel S. Nagata, State Comptroller

SUBJECT: Comments of Public Records and Privacy -
Your Letter of June 5, 1987

In response to subject, DAGS offers the following:

In respect to bid documents, we believe that various information contained in bids should not be available until after actions have been taken. We have no problem discussing bid results and even discussing actions contemplated, but the production of workload does not allow for inspection by bidders or others while bid evaluations are in progress. We believe that the determination that a thing is public record should be withheld until after an action has been taken.

In addition, in respect to bidding and contracting, very often information comes into the State's hands that is confidential to bidders or contractors. Such information should not be made available to competitors or the public. Thus we suggest that this particular type of information not be considered public record.

RUSSEL S. NAGATA

WAIHEE
VERNOR

STATE OF HAWAII
DEPARTMENT OF ACCOUNTING
AND GENERAL SERVICES
STATE ARCHIVES
IOLANI PALACE GROUNDS
HONOLULU, HAWAII 96813

RUSSEL S. NAGATA
COMPTROLLER

KEN KIYABU
DEPUTY COMPTROLLER

DIVISIONS:
ACCOUNTING
ARCHIVES
AUDIT
AUTOMOTIVE
CENTRAL SERVICES
PUBLIC WORKS
PURCHASING
SURVEY

July 6, 1987

Mr. Robert A. Alm, Chairman
Governor's Committee on Public
Records and Privacy
P.O. Box 541
Honolulu, Hawaii 96809

Dear Mr. Alm:

The State Archives welcomes this opportunity to comment on a subject that is central to our function--the preservation and use of government records. We respectfully request the Committee to consider the long range and research use of the records.

Sincerely,

Ken Kiyabu
Acting State Archivist

Department of Accounting and General Services
State Archives

PUBLIC RECORDS AND PRIVACY

The issues of access to public records and protection of personal privacy are central to the administration of archives and are issues that the State Archives is very interested in.

The National Association of State Archives and Records Administrators adopted the following principle on legislation in 1977:

> "...the fundamental nature of the relationship of government records as instruments of accountability by the government to the people, evidence of public and private rights and obligations, an informational source on matters involving the continous administration and management of the governments, preserves the patrimony of the State as evidenced in its records..."

It is based on the following acknowledgement about government:

> "That its power to control and regulate citizens; to comple their obedience within its boundaries; and to protect and care for them renders it in its sovereign power unequalled by an alternative organization within society. Government is the one institution that in one way or another, at one time or another, touches the lives of every single individual within its peridiction. It not only affects the lives of all citizens, but inherent in that contract between government and citizen is complex interdependence of rights and obligations, of mutual responsibility and accountability. While its outward form and characteristics may change, government itself exists in perpetuity. The records of this most fundamental of human institutions therefore partake of a fundamentality of their own in respect to it. Such records must be maintained, managed, preserved, and when appropriate, disposed of according to principles that recognize their unique status."

While recognizing the right to privacy, and other practicable interests, the State Archives asks the committee to consider the long-term research value in records as evidence of government and personal activity. Restricting access to records in perpetuity hinders the research of a major percentage of our researchers, namely genealogists.

The State Archives suggests the adoption of provisions pioneered in the Georgia Records Act of 1972, as amended. The Georgia law contains the following provisions:

1. Removing restrictions in access to confidential, classified or restricted records in the State Archives after 75 years.

2. Establishing procedures lifting restrictions on access after 20 years.

3. Defining conditions for research access to restricted records.

We feel these provisions will protect rights to privacy while permitting access to information for legitimate research.

JOHN WAIHEE
GOVERNOR

Harold Fall
Acting Direc

STATE OF HAWAII
DEPARTMENT OF CORRECTIONS

No. 10521

June 25, 1987

RECEIVED
JUN 29 9 43 AM '87
DEPT OF COMMERCE & CONSUMER AFFAIRS

MEMORANDUM

TO: The Honorable Robert A. Alm
Director, Department of Commerce
and Consumer Affairs

FROM: Harold Falk, Acting Director
Department of Corrections

SUBJECT: Public Records and Privacy

Enclosed for your information is the Hawaii Administrative Rules, Title 17, Subtitle 7, which implements three (3) information system chapters; Chapters 92, 92E and 846 of the Hawaii Revised Statutes.

Subtitle 7 will be repealed some time after July 1, 1987 to reflect the incorporation of the State Intake Service Centers into the new Department of Corrections. Subsequently, the new department will in its rules formation be responsive to address Chapters 92, 92E and 846, HRS, including medical information and records and to some extent criminal justice intelligence and investigative information to reflect the department's programs and activities.

Below are some general comments regarding the rules formation and the implementation of the above three chapters.

We had no serious problems in formulating rules on Public Records (Section 92-50, HRS). In our case, we interpreted "shall not include records which invade the right of privacy of an individual" as reference to Chapters 92E and 846, HRS. Since the agency generates criminal justice research documents, statistics and other materials, we believe that as long as names of offenders, clients, employees and other identification elements are not disclosed, these materials may be determined as public records (i.e., research documents, graphs, statistics, etc.). An exception was made to consider aspects of criminal history record information as public records by permitting the disclosure of certain conviction data on individuals as reflected in subchapter 9, section §17-1202-39 of the rules in accordance with section 352-26.1 and 846-9, HRS. General access to public records is reflected in subchapter 6 of the rules.

**Committee Members: Appendices and exhibits are with the staff.

17

Rules formation on Chapter 92E, HRS, was extremely difficult as no precedent for such a formation was found at that time. The term ""Personal record" includes a "public record" as defined under 92-50" appears conflicting. Subtitle 7 adjusted to this by first setting limits to public records and subsequently setting limits on what constitutes a personal record and a criminal history record. As for this agency, a personal record refers to the definition setforth in 92E-1, HRS, and taken in context to any employment, social and other personal background and identifiable information collected by the agency on non-criminally charged individuals or non-criminal justice clientele and including employees of the agency. Access to personal records are reflected in subtitle 6 of the rules.

Rules formation on Chapter 846, HRS, was the easiest to develop as the definitions and statutes are much clearer than that of Chapters 92 and 92E.

In conclusion, we believe that overall the current statutes are vague, outdated and in certain areas confusing. An inventory would show that there are numerous types of information in existence requiring accountability ranging from investigative and intelligence information, personal, medical, public and criminal history records scattered throughout the Hawaii Revised Statutes. In addition, with the advent of electronic data accumulation and storage, information systems are becoming much more complex requiring a better means of monitoring and safeguarding informational data.

If you have any questions or require further comments, please feel free to call me at 548-2058 or Thomas Hugo at 848-2584.

Harold Falk
Acting Director

Attachments

cc: DSSH DIR

HF/UH:kaw
[doc# 1173b]

HAWAII ADMINISTRATIVE RULES

TITLE 17

DEPARTMENT OF SOCIAL SERVICES AND HOUSING

SUBTITLE 7 STATE INTAKE SERVICE CENTERS

CHAPTER 1200

GENERAL PROVISIONS

Subchapter 1 Definitions

§17-1200-1 Definitions

Subchapter 2 Rules of General Applicability

§17-1200-2 Purpose
§17-1200-3 Applicability
§17-1200-4 General responsibilities of the executive director
§17-1200-5 Authority of the executive director

Subchapter 3 Provision for Rule Relief

§17-1200-6 Purpose
§17-1200-7 Format and certification of petition
§17-1200-8 Rule relief

Subchapter 4 Provision for Declaratory Relief

§17-1200-9 Purpose
§17-1200-10 Format and certification of petition
§17-1200-11 Declaratory relief

Subchapter 5 Provision for Administrative Relief

§17-1200-12 Purpose
§17-1200-13 Certification for hearing proceedings
§17-1200-14 Notice of hearing
§17-1200-15 Proceeding for motions
§17-1200-16 Powers of the hearing officer in conducting hearings
§17-1200-17 Disqualification of hearing officer
§17-1200-18 Ex parte communications
§17-1200-19 Rights of parties

§17-1200-20 Recording of proceedings
§17-1200-21 Decisions

Subchapter 6 Access to Public and Personal Records

§17-1200-22 Purpose
§17-1200-23 Access to public records
§17-1200-24 Access to personal records
§17-1200-25 Challenges to personal records
§17-1200-26 Administrative relief procedures
§17-1200-27 Administrative review

SUBCHAPTER 1

DEFINITIONS

§17-1200-1 Definitions. As used in this chapter:

"Access" means authorization to review personal and public records.

"Agency" means the state intake service centers or any of its subdivisions.

"Agency hearing" means the administrative proceedings provided to the petitioner to contest the denial of review of petitions, or to redress an agency disposition or to provide declaratory relief.

"Challenge" means an oral or written contention by an individual as to the accuracy and completeness of a personal record.

"Contested case" shall be as defined in section 91-1, Hawaii Revised Statutes.

"Declaratory relief" means the agency's declaration that a rule or order of the agency, or a statute which the agency is mandated to administer or enforce, applies to a factual situation in favor of the petitioner.

"Executive director" means the executive director of the state intake service centers.

"Hearing officer" means a person, not interested in the outcome of the matter, who is authorized to conduct hearings or render decisions, or both on any case or controversy within the agency's jurisdiction.

"Individual" means a natural person.

"Party" means:

(1) The agency, if it participates in a proceeding;

(2) Each person named in the proceeding; and

(3) Any interested person or aggrieved person permitted or entitled to participate in a proceeding before the agency in a capacity other than a witness.

"Person" includes individuals, partnerships, corporations, associations, or organizations of any character, except for the agency.

"Personal record" shall be as defined in section 92E-1, Hawaii Revised Statutes.

"Petition" means a properly documented submission of information by an individual seeking relief.

"Program" means a combination of resources and activities designed to achieve an objective or objectives.

"Public record" shall be as defined in section 92-50, Hawaii Revised Statutes.

"Rule" shall be as defined in section 91-1(4), Hawaii Revised Statutes.

"Rule relief" means the adoption, modification, or repeal of any rule by the agency in favor of the petitioner. [Eff AUG 10 1985] (Auth: HRS §§26-35, 91-1, 91-2, 91-8, 92E-10,, 353-1.4) (Imp: HRS §§26-35, 91-1, 91-2, 92-50, 92E-1, 353-1.4)

SUBCHAPTER 2

RULES OF GENERAL APPLICABILITY

§17-1200-2 Purpose. This chapter implements the programs, policies, and practices of the agency. [Eff AUG 10 1985] (Auth: HRS §§26-35, 91-2, 353-1.4) (Imp: HRS §§26-35, 91-2, 353-1.4)

§17-1200-3 Applicability. (a) Chapters 17-1200 to 17-1201 govern the administrative and programmatic practices of the agency.

(b) Chapters 17-1202 to 17-1204 govern the integration and coordination of the criminal history record information system and the presentence credit system of the paroling authority, the corrections division of the department of social services and housing, and the state intake service centers. [Eff AUG 10 1985] (Auth: HRS §§26-35, 353-1.4) (Imp: HRS §§26-35, 353-1.4)

§17-1200-4 General responsibilities of the executive director. The executive director shall:

(1) Develop and adopt rules, policies, and standards to promote the proper application of the operations of the agency;
(2) Administer all intake service centers;
(3) Maintain a liaison and coordinating role with criminal justice agencies in order to integrate state intake service centers' operations; serve as a liaison with federal, state, county, and private agencies as related to the administration of criminal justice;
(4) Maintain a liaison and coordinating role with the Hawaii criminal justice data center to integrate the agency's criminal history record information system with the data center system; and
(5) Perform other responsibilities as necessary to carry out statutory duties.

[Eff AUG 10 1985] (Auth: HRS §§26-35, 353-1.4) (Imp: HRS §§26-35, 353-1.4)

§17-1200-5 Authority of the executive director. The executive director may delegate authority or functions to any subordinate officer or employee of the agency. The executive director shall retain the final authority to make exceptions to and approve or to overrule any decision or action taken by his delegate. [Eff AUG 10 1985] (Auth: HRS §§26-35, 353-1.4) (Imp: HRS §§26-35, 353-1.4)

SUBCHAPTER 3

PROVISION FOR RULE RELIEF

§17-1200-6 Purpose. This chapter shall govern all proceedings brought before the agency for the adoption, modification, or repeal of any agency rule. [Eff AUG 10 1985] (Auth: HRS §§91-2, 91-6) (Imp: HRS §§91-3, 91-6)

§17-1200-7 Format and certification of petition. (a) A person may submit a signed petition

either in person or by mail to the agency. The petition shall be legibly written or typed, identifiable by name, address, zip code, or telephone number.

(b) The petition shall set forth the text of the:

(1) Rule to be repealed; proposed rule sought to be adopted; or existing rule sought to be amended together with the proposed amendment; and

(2) The facts or circumstances giving rise to the petition to include:

(A) The petitioner's interest and reasons for the petition;

(B) The necessity for rule relief;

(C) The anticipated effects or impact of the rule relief;

(D) Questions or issues raised by the rule relief; and

(E) The petitioner's position or contentions with respect to questions or issues raised.

(c) The petitioner may be required to submit a statement of memorandum of additional facts clarifying a specific factual issue which will aid the agency in its consideration of what action to take on a request or petition.

(d) The agency may refuse to consider the petition where:

(1) The petition is not supported by a memorandum of authorities;

(2) The petition is deemed frivolous;

(3) The matter is not within the agency's jurisdiction;

(4) The petition is based on hypothetical or speculative facts; or

(5) A controversy of material fact exists which needs to be resolved before any relief may be considered or granted.

(e) Unless otherwise provided, all petitions shall be filed with the agency.

[Eff AUG 10 1985] (Auth: HRS §§91-2, 91-6) (Imp: HRS §91-6)

§17-1200-8 Rule relief. (a) Upon the filing of the petition, the agency within thirty days shall notify the petitioner of a determination whether or not to proceed with the relief.

(b) If the agency decides to proceed, it shall set the matter for further proceedings pursuant to section 91-3, Hawaii Revised Statutes.

(c) If the agency decides not to proceed, it shall notify the petitioner in writing denying the request and the reasons therefore. The denial shall be final. [Eff AUG 10 1985] (Auth: HRS §§91-2, 91-6) (Imp: HRS §§91-3, 91-6)

SUBCHAPTER 4

PROVISION FOR DECLARATORY RELIEF

§17-1200-9 Purpose. This chapter shall govern all proceedings brought before the agency which are intended to obtain a declaratory relief of the applicability of any rule or order by the agency, or any statute the agency is mandated to administer or enforce with respect to a factual situation. [Eff AUG 10 1985] (Auth: HRS §§91-2, 91-8) (Imp: HRS §§91-2, 91-8)

§17-1200-10 Format and certification of petition. (a) A person may submit a signed petition either in person or by mail to the agency. The petition shall be legibly written or typed, identifiable by name, address, zip code, or telephone number.

(b) The petition shall set forth the text of the:

(1) Nature of the petitioner's interest and reason for submittal;

(2) Identification of the specific provision, order, rule or regulation in question; and

(3) Statement of the position or contention of the petitioner or a memorandum of authorities, including legal authorities, in support of such position or contention.

(c) The petitioner may be required to submit a statement of memorandum of additional facts clarifying a specific factual issue which will aid the agency in its consideration for declaratory relief.

(d) The agency may refuse to consider the petition where:

(1) The petition is not supported by a memorandum of authorities;

(2) The petition is deemed frivolous;

(3) The matter is not within the agency's jurisdiction;
(4) The petition is based on hypothetical or speculative facts; or
(5) A controversy of material fact exists which needs to be resolved before any relief may be considered or granted.

(e) Unless otherwise provided, all petitions shall be filed with the agency.

[Eff AUG 10 1985] (Auth: HRS §§91-2, 91-8) (Imp: HRS §91-8)

§17-1200-11 Declaratory relief. (a) Upon the filing of a petition for declaratory relief, the agency within thirty days shall notify the petitioner in writing whether or not to proceed with the relief.

(b) If it is determined by the agency that a genuine controversy of material fact exists within the petition, the agency shall:
(1) Issue a declaratory order within sixty days from the date of receipt of the petition; or
(2) Dismiss the petition for declaratory relief and allow its refiling as a petition for rule relief.

(c) Declaratory order or rule relief shall apply only to the factual situation alleged in the petition set forth.

(d) If the agency decides not to proceed, it shall notify the petitioner in writing that the petition is denied, and giving reasons for the denial. The petitioner may seek administrative relief pursuant to this chapter or judicial remedies.

[Eff AUG 10 1985] (Auth: HRS §§91-2, 91-8) (Imp: HRS §91-8)

SUBCHAPTER 5

PROVISION FOR ADMINISTRATIVE RELIEF

§17-1200-12 Purpose. This chapter shall govern all proceedings brought before an agency hearing which is intended to obtain:
(1) A final resolution for declaratory relief; and

(2) Resolutions for any contested matter within the agency's jurisdiction.

[Eff AUG 10 1985] (Auth: HRS §§91-2, 353-1.4) (Imp: HRS §§91-2, 353-1.4)

§17-1200-13 Certification for hearing proceedings. (a) A person may petition for a hearing before the agency either in person or by mail. The petition shall include:

(1) The petitioner's name, address, zip code, or telephone number, date and signature of the petitioner; and

(2) A statement of the relief requested and the reasons therefore.

(b) The petition shall be filed with the agency and assigned a document number.

(c) Upon the filing of the petition, the agency within twenty working days shall determine whether or not to proceed with a hearing.

(d) If the agency decides not to proceed, it shall provide the petitioner with a written notice of the determination not to proceed and the reasons therefore. The petitioner may request the agency to reconsider the determination, or may pursue judicial remedies.

(e) If the agency decides to proceed, it shall set the matter for further proceedings before an agency hearing pursuant to this chapter.

[Eff AUG 10 1985] (Auth: HRS §§91-2, 353-1.4) (Imp: HRS §§91-2, 353-1.4)

§17-1200-14 Notice of hearing. (a) Upon determination to proceed with a hearing, the agency shall notify all parties of the hearing date at least fifteen days prior to the hearing.

(b) A new hearing date may be afforded to the parties by the hearing officer; provided that the parties act within seventy-two hours prior to the hearing to extend the hearing date. The hearing officer may:

(1) Approve a stipulation between parties extending the hearing date;

(2) Upon motion by a party, for good cause shown before expiration of hearing date extend the hearing date; or

(3) Upon motion by a party, for good cause shown permit action after the expiration of the seventy-two hour period.

[Eff AUG 10 1985] (Auth: HRS §§91-2, 353-1.4) (Imp: HRS §§91-2, 91-9, 91-9.5)

§17-1200-15 Proceedings for motions. (a) An application for an order shall be made by motion, which, except during a hearing, shall be in writing and state the grounds for the application and the order sought.

(b) Motions referring to facts not of record shall be supported by affidavits, and if involving a question of law, by a memorandum in support.

(c) Except for a motion entitled to be heard ex parte, all motions shall be accompanied by a notice of hearing. Unless otherwise directed by the the hearing officer, the motion and notice shall be served upon all parties not less than seventy-two hours before the hearing, and the opposing parties shall serve any counter affidavits and memorandum in opposition not less than twenty-four hours before the hearing.

(d) Motions shall be filed with the agency except that after a petition has been transferred to the hearing officer, all motions shall be filed with, and decided by the hearing officer.

[Eff AUG 10 1985] (Auth: HRS §§91-2, 353-1.4) (Imp: HRS §§91-2, 353-1.4)

§17-1200-16 Powers of the hearing officer in conducting hearings. (a) The hearing officer, in conducting a hearing, may:

(1) Issue notices of hearings and appearance of parties;
(2) Examine witnesses;
(3) Rule upon offers of proof, receive relevant evidence, and exclude irrelevant evidence or restrict questioning or testimony;
(4) Regulate the manner of any examination to prevent unneccessary harrassment, intimidation, or embarrassment of any witness or party;
(5) Remove disruptive individuals;
(6) Hold conferences;

(7) Rule on motions and dispose of procedural requests on similar matters;
(8) Certify a question to the agency for the agency's consideration;
(9) Submit in writing a report or recommended decision together with the findings of facts and conclusions of law and a recommended order to the agency for consideration;
(10) Render a final decision; and
(11) Dispose of any matter that normally arises in the course of the proceedings and to take action authorized by chapter 91, Hawaii Revised Statutes or any other related laws administered by the agency.

(b) Nothing in this section may prevent the hearing officer to suspend, postpone or terminate the hearing by default. [Eff AUG 10 1985] (Auth: HRS §§91-2, 353-1.4) (Imp: HRS §§91-2, 353-1.4)

§17-1200-17 Disqualification of hearing officer. (a) No matter shall be heard by the hearing officer who:
(1) Has any pecuniary interest in the matter;
(2) Is related within the third degree by blood or marriage to any party in the proceeding; or
(3) Has participated in any pre-proceeding investigation of the matter or in developing evidence to be introduced at the proceeding or in making the decision or taking the action challenged in the proceeding.

(b) The hearing officer affected by the categories in subsection (a) shall be disqualified from hearing the matter, either on own motion or of any party. Any motion to disqualify the hearing officer shall be decided prior to the hearing. [Eff AUG 10 1985] (Auth: HRS §§91-2, 353-1.4) (Imp: HRS §§91-2, 353-1.4)

§17-1200-18 Ex parte communications. (a) In any proceedings before the agency, no party or representative of a party shall communicate with the hearing officer concerning the merits of the case.

(b) It shall be improper for any person interested in a proceeding to seek to influence the

judgment of any member of the agency or hearing officer designated.

(c) It shall be improper for a member of the agency to:

(1) Disclose or reveal to any other member of the agency or hearing officer designated, the contents of any investigatory, agency prepared report concerning the matter the agency member or hearing officer is designated to hear and decide; or

(2) Furnish the report or a copy thereof to any agency member or hearing officer designated, except where authorized by law.

[Eff AUG 10 1985] (Auth: HRS §§91-2, 353-1.4) (Imp: HRS §§91-2, 91-13, 353-1.4)

§17-1200-19 Rights of parties. (a) The parties shall have an opportunity to:

(1) Present oral or documentary evidence;

(2) Examine the case record as well as all documents and records to be used at the hearing at a reasonable time before the date of the hearing as well as during the hearing;

(3) Present the case independently or with the aid of others including legal counsel;

(4) Bring witnesses, including language interpreters;

(5) Establish all pertinent facts and circumstances;

(6) Advance any arguments appropriate to the issue being heard without undue interference; and

(7) Question or refute any testimony or evidence, and to confront and cross examine witnesses.

(b) The parties by stipulation may modify or waive any proceeding procedures prior to and during the hearing.

(c) The parties by stipulation, agreed settlement, consent order, or default may informally dispose of the case in question prior to and during the hearing proceedings. [Eff AUG 10 1985] (Auth: HRS §§91-2, 353-1.4) (Imp: HRS §§91-2, 91-9, 353-1.4)

§17-1200-20 Recording of proceedings. (a) The official records of proceedings shall include materials prescribed in section 91-9(e), Hawaii Revised Statutes.

(b) Records of proceedings requested for the purposes of rehearing or court review, may be transcribed.

(c) The records transcribed shall not include matters outside the record of proceedings.

[Eff AUG 10 1985] (Auth: HRS §§91-2, 353-1.4) (Imp: HRS §§91-2, 91-9, 353-1.4)

§17-1200-21 Decisions. (a) A final decision shall not be rendered by the agency prior to the hearing and examination of all evidence unless the decision is made in the form of a proposal which is subject to the following conditions:

(1) That the proposed decision contains a statement of reasons for the decision, including the determination of issues of fact or law necessary;

(2) That the proposal is served to the party seeking relief; and

(3) That an opportunity is afforded to the party to file oral or written exceptions and to controvert the proposal.

(b) A final decision shall be rendered in writing by the agency to the affected party within one hundred twenty calendar days from the date of request for a hearing. The exception is when the hearing is continued or the record is held open wherein the time limit shall be extended only for the period of the continuance. The decision shall contain:

(1) The findings of fact and conclusions;

(2) Any filed proposed findings of fact and ruling on the proposed finding; and

(3) A statement concerning the petitioner's right to judicial review.

[Eff AUG 10 1985] (Auth: HRS §§91-2, 353-1.4) (Imp: HRS §§91-2, 91-11, 91-12)

SUBCHAPTER 6

ACCESS TO PUBLIC AND PERSONAL RECORDS

§17-1200-22 Purpose. This chapter provides the guidelines for access to public and personal records. [Eff AUG 10 1985] (Auth: HRS §§92E-10, 353-1.4) (Imp: HRS §§92-51, 92E-10, 353-1.4)

"§17-1200-23 Access to public record. (a) The public may obtain public information as to matters within the jurisdiction of the agency by submitting a request in writing to the agency, or by inquiring in person at the agency.

(b) Requests for copies of records shall be in accordance with section 92-21, Hawaii Revised Statutes." [Eff: AUG 10 1985] (Auth: HRS §91-2) (Imp: HRS §§92-21, 92-51)

§17-1200-24 Access to personal records. (a) A person, in writing, may request access to the person's own personal record unless exempt by section 92E-3, Hawaii Revised Statutes, laws, or this chapter. The request shall contain:

(1) Identifying information, including name, address, or telephone number, and date of request; and

(2) The general nature of the request.

(b) Upon prompt certification to proceed with the request by the agency, it shall provide access to the person within ten working days following the date of the request. An additional twenty working days beyond the ten day period may be extended to the agency; provided that the agency within the initial ten working days, notifies the person of the circumstances for the delay.

(c) Access to records shall be permitted; provided that:

(1) Appropriate personal identification is made available prior to the review;

(2) Access to review is conducted during normal business hours of the agency;

(3) Examination of records is conducted under a supervised environment to assure the security of the record; and

(4) Copies for records requested shall be in accordance with sections 92E-6 and 92E-7, Hawaii Revised Statutes.

(d) If the agency refuses the person access to records, the agency within ten working days following the request shall submit in writing the reasons for its refusal and the procedures for administrative relief provided in section 17-1200-26.

[Eff AUG 10 1985] (Auth: HRS §§92E-10, 353-1.4) (Imp: HRS §§92E-2, 92E-6, 92E-7)

§17-1200-25 Challenge to correct or amend personal record. (a) A person may challenge any factual error in the record and to correct or amend the error. The challenge shall be in the form of a request which:

(1) Specifies the requested correction or amendment; and

(2) Provides supportive evidence or information of the record.

(b) Upon date of receipt of the request, the agency, in writing, within twenty working days shall:

(1) Acknowledge the receipt of the request;

(2) State the corrections or amendments to the record; or

(3) State its refusal to correct or amend the record, the reasons for the refusal, and the procedures for administrative relief provided in section 17-1200-26.

[Eff AUG 10 1985] (Auth: HRS §§92E-10, 353-1.4) (Imp: HRS §92E-8)

§17-1200-26 Administrative relief procedures. (a) Upon refusal of the agency to allow a person access to a record or to correct or amend a personal record, or both, the person may petition the agency in writing for an administrative review of its refusal. The petition shall contain among other things:

(1) The reasons for the person's disagreement as to the agency's refusal; and

(2) Any new supportive evidence or information of the record.

(b) Upon receipt, the petition shall be assigned to a hearing officer for review.

[Eff AUG 10 1985] (Auth: HRS §§92E-10, 353-1.4) (Imp: HRS §92E-8)

§17-1200-27 Administrative review. (a) Upon refusal of the agency to allow a person access to a record or to correct or amend a personal record or both, the hearing officer within thirty working days after receipt of the petition for review of the agency's refusal shall:

(1) Make a final determination to permit or deny the person access to a record, or to correct and amend the record, or both; or

(2) Allow the person upon denial to include in writing into the person's personal record wherever appropriate, the reasons for the person's disagreement as to the agency's denial.

(b) Persons denied may seek judicial remedies.

[Eff AUG 10 1985] (Auth: HRS §§92E-10, 353-1.4) (Imp: HRS §§92E-9, 92E-13)

HAWAII ADMINISTRATIVE RULES

TITLE 17

DEPARTMENT OF SOCIAL SERVICES AND HOUSING

SUBTITLE 7 STATE INTAKE SERVICE CENTERS

CHAPTER 1201

PROGRAM IMPLEMENTATION

Subchapter 1 Definitions

§17-1201-1 Definitions

Subchapter 2 Assessment Proceedings

§17-1201-2 General assessment proceedings for voluntary status individuals
§17-1201-3 General assessment proceedings for pretrial, presentence, and post sentenced status offenders
§§17-1201-4 to 8 (Reserved)

Subchapter 3 Recommendation Proceedings

§17-1201-9 Recommendations on pre-arraignment; pretrial proceedings
§17-1201-10 Recommendations on presentence proceedings
§§17-1201-11 to 16 (Reserved)

Subchapter 4 Program Services

§17-1201-17 Purpose
§17-1201-18 Supervision
§17-1201-19 Violations
§17-1201-20 Individualized program services

SUBCHAPTER 1

DEFINITIONS

§17-1201-1 Definitions. As used in this chapter: "Agency" means the state intake service centers.

"Assessment" means the processes used to gather and verify pertinent information, develop impressions and images, and check hypotheses about an individual or an offender's pattern of characteristics which determine the individual's or offender's behavior in interaction with the environment. The definition may include pretrial investigations, presentence investigations, postsentence correctional diagnosis, and other social, cultural, and medical assessments.

"Individual" means a natural person. The definition includes any individual who voluntarily seeks program services from the agency.

"Individualized program services" means any social services extended to an individual or an offender to assist in dealing with a situation or environment.

"Judicial officer" means an officer who has been elected or appointed to preside over a court of law.

"Offender" means those persons arrested, charged or indicted for the commission of a crime; those convicted of a crime; and those sentenced for a crime.

"Postsentence status" means when an offender has been sentenced for the commission of an offense.

"Postsentence supervision" means supervision provided to an offender after sentencing within the community.

"Presentence status" means when an offender has been convicted for the commission of an offense but not yet sentenced by the court of jurisdiction.

"Presentence supervision" means supervision provided to a convicted offender prior to sentencing within the community.

"Pretrial status" means when an offender has been arrested and charged for a commission of a crime.

"Pretrial supervision" means supervision provided to an offender prior to conviction within the community.

"Program service" means a set of processes used to assist an individual or an offender in dealing with a situation and the environment within the community or institution. Assistance may be in the form of supervision, assessment, counseling, referrals and any other service deemed pertinent and necessary.

"Referral" means a process of obtaining from another agency or person, services which aid the individual or offender in adjusting to the environment.

"Supervising agency" means the state intake service centers.

"Supervision" means a one-to-one contact with an offender to ensure that the conditions set by the courts are followed.

"Verification" means the process of corroborating and verifying by whatever methods possible the information received from an individual, an offender, or other sources.

"Voluntary status" means an individual who, by choice, requests assessment and other services from the agency. [Eff AUG 10 1985] (Auth: HRS §§353-1.4, 706-602) (Imp: HRS §§353-1.4, 706-602)

SUBCHAPTER 2

ASSESSMENT PROCEEDINGS

§17-1201-2 General assessment proceedings for voluntary status individuals. (a) Assessment in the form of a personal and social inquiry may be extended to an individual on a voluntary basis; provided that:

(1) No inquiry shall be initiated unless specifically authorized by the individual in writing requesting an assessment; and

(2) The individual is advised of the conditions, limitations, or the restrictions of services.

(b) The intensity and scope of the inquiry shall be according to the needs of the individual. The following common characteristics among others may be explored:

(1) Employment status and history; educational background;

(2) Social history of the individual, including family relationships, marital status, interest and activities, and residence history;

(3) Medical history and present physical and mental condition; and

(4) Any other information that the individual voluntarily provides which does not violate the intent and purpose for which the inquiry is made.

(c) No corroboration of information shall be permitted on references given to interviewer unless specifically authorized by the individual.

(d) Any information collected on the individual shall be construed as a personal record pursuant to

chapter 92E, Hawaii Revised Statutes, where applicable, and shall be maintained as follows:

(1) The information on the individual shall be collected, recorded, and filed separately from any other records to include but not be limited to:
  (A) Criminal history record information;
  (B) Public records;
  (C) Criminal justice intelligence information;
  (D) Criminal justice investigative information; and
  (E) Medical records.

(2) The information shall not be disclosed to any person other than the individual to whom the record pertains without the written authorization of the individual, unless disclosure is in accordance with sections 92E-4 and 92E-5, Hawaii Revised Statutes.

[Eff AUG 10 1985] (Auth: HRS §353-1.4) (Imp: HRS §353-1.4)

§17-1201-3 General assessment proceedings for pretrial, presentence and postsentenced status offenders. (a) The court pursuant to sections 353-1.4 and 706-602, Hawaii Revised Statutes may order the agency to conduct an assessment on any offender charged with, or convicted of, or sentenced for a crime.

(b) The assessment shall be conducted in the following manner:

(1) No inquiry shall be made as to the description and circumstances surrounding the current offense of an offender who has not been convicted of a crime;

(2) The offender shall be advised of the purpose and nature of the inquiry and proceedings;

(3) The inquiry shall be conducted in clear and understandable language;

(4) The information secured shall be properly and accurately documented and recorded; and

(5) The information secured shall be maintained confidential in accordance with chapter 846, Hawaii Revised Statutes.

(c) The assessment may describe:

(1) The offender's delinquency record or criminal record, or both;

(2) The offender's employment status and history and educational background;
(3) The offender's family relationships, marital status, interest and activities, and residence history;
(4) The offender's medical history;
(5) The offender's social environment to which the offender might return; and other character information;
(6) The offender's economic status and capacity to meet monetary responsibilities;
(7) The offender's involvement with clinics, institutions, and other social services; and
(8) Any other information deemed relevant or the courts direct to be included.

(e) The following sources among others may be used in the corroboration of information:
(1) Any reference given by the offender to the agency;
(2) Any relatives who appear at the agency or at the court;
(3) Any judicial officer, parole officer, or other source person or agency;
(4) Prior arrest and conviction records from criminal justice agencies; and
(5) Prior files of the agency if the offender was processed before to check on inconsistencies.

(f) An evaluation summary may vary according to the legal status of the offender, the needs of the offender, the complexity and nature of the case, and the needs of the decision makers. The evaluation summary may address the following characteristics:
(1) If warranted, whether the current offense was situational;
(2) Background of criminal involvement; and the seriousness of the offense;
(3) Psychological, emotional, and physical factors;
(4) Familial situations, employment status and history, and residential stability of the offender;
(5) Personal habits, including substance abuse and other factors relevant to the offender's adjustment;
(6) Risk to the safety and welfare of others; and the risk and benefits of working with the offender in the community; and

(7) The offender's strengths and weaknesses; and whether the offender has made any efforts or is motivated towards self-correction for existing problems.

[Eff AUG 10 1985] (Auth: HRS §§353-1.4, 706-602) (Imp: HRS §§353-1.4, 704-404, 704-405, 706-601, 706-602, 706-603)

§§17-1201-4 to 8 (Reserved)

SUBCHAPTER 3

RECOMMENDATION PROCEEDINGS

§17-1201-9 Recommendations on pre-arraignment; pretrial proceedings. (a) The agency when there is a reason to doubt the offender's fitness to proceed for arraignment, may notify the judicial officer or secure a court order from the judicial officer, authorizing the examination of the offender with respect to physical or mental disease, disorder, or defect. Upon the approval to proceed, the agency shall refer the offender to the mental health courts and corrections team or qualified mental health professionals for evaluation, findings, and recommendations.

(b) The agency shall notify the various offices of the prosecution prior to the recommendation to a judicial officer, any recommendation for the reduction of bail or to conditionally release an offender charged for a class A felony involving force or violence against another person.

(c) The agency may recommend to the judicial officer:

(1) The release of the offender on own recognizance;

(2) The release of the offender under the supervision or monitoring of the agency with or without bail, or any of them;

(3) The release of the offender to a third party or to a program;

(4) A person as surety;

(5) A reduction or increase of bail amount to ensure appearance in court by the offender;

(6) The confirmation of bail established by the judicial officer; and

(7) Any combination of the above or other recommendations which apply to law.

(e) The recommendation shall be made on an official agency form and shall be maintained as an official agency document.

(f) A copy of the evaluation summary, documentation, and recommendation may be furnished to the offender or counsel and the prosecuting attorney to provide an opportunity to controvert or supplement information in the report. [Eff AUG 10 1985] (Auth: HRS §353-1.4) (Imp: HRS §§353-1.4, 353-1.6, 704-404, 704-405, 804-6, 804-9, 804-10, 804-11, 804-12, 804-13, 804-15)

§17-1201-10 Recommendations on presentence proceedings.

(a) The agency may recommend to the judicial officer:

(1) A psychiatric examination and other medical observation and examination per section 706-603, Hawaii Revised Statutes;

(2) Placement on probation per section 706-622, Hawaii Revised Statutes;

(3) Revocation of probation or suspension of sentence per section 706-628, Hawaii Revised Statutes;

(4) The various sentencing provisions per section 706-605, Hawaii Revised Statutes;

(5) Imprisonment per chapter 706, Part IV, Hawaii Revised Statutes;

(6) Fines per chapter 706, Part III, Hawaii Revised Statutes;

(7) Civil commitment in lieu of prosecution or a sentence per section 706-607, Hawaii Revised Statutes;

(8) Suspension of sentence per section 706-620, Hawaii Revised Statutes;

(9) Deferred acceptance of guilty plea and nolo contendere plea per section 853-1, Hawaii Revised Statutes.

(10) Withholding of sentence to imprisonment per section 706-621, Hawaii Revised Statutes;

(11) Conditional discharge per section 712-1255, Hawaii Revised Statutes;

(12) Any combination of the above; and

(13) Any other recommendations that apply to law.

(b) The recommendation shall be held confidential and shall not be disseminated unless ordered by the court.

(c) A copy of the presentence report and other documentation shall be furnished by the agency in accordance with section 706-604, Hawaii Revised Statutes.

(d) The victims of certain crimes shall be notified by the agency as to their respective rights in accordance with sections 351-32, 706-602, and 706-624.5, Hawaii Revised Statutes.

[Eff AUG 10 1985] (Auth: HRS §706-602) (Imp: HRS §§351-32, 706-601, 706-602, 706-603, 706-604, 706-605, 706-607, 706-620, 706-621, 706-622, 706-624.5, 706-640, 706-641, 706-659, 706-660, 706-662, 706-663, 706-667, 712-1255, 853-1)

§§17-1201-11 to 16 (Reserved)

SUBCHAPTER 4

PROGRAM SERVICES

§17-1201-17 Purpose. Program services are provided to enhance the offender's personal adjustment and the safety of the public in the form of:

(1) Pretrial, presentence, and postsentence supervision services as prescribed by law or court order; and

(2) Individualized assessment, counseling and other social and referral services.

[Eff AUG 10 1985] (Auth: HRS §§353-1.4, 706-602) (Imp: HRS §§353-1.4, 706-602, 706-605, 706-622, 706-624, 706-625, 706-626, 706-627, 706-628, 804-7.1)

§17-1201-18 Supervision. (a) The agency may supervise pretrial, presentence, and postsentenced status offenders in accordance with the conditions set forth by court order pursuant to sections 804-7.1 and 706-624, Hawaii Revised Statutes.

(b) Any recommendations for changes or additions to the court order may be requested of the court by motion or hearing and upon approval by a judical officer.

(c) The offender shall be given a copy of the conditions imposed by the court, stated with sufficient specificity to guide the offender's conduct accordingly.

(d) The agency shall provide reports to the court of jurisdiction which describe the progress of the offender under supervision.

[Eff AUG 10 1985] (Auth: HRS §353-1.4) (Imp: HRS §§291-4, 353-1.4, 706-624, 706-625, 712-1255, 804-17, 804-19, 853-1)

§17-1201-19 Violations. (a) When the agency has probable cause or reasonable grounds to believe that the offender, while under the jurisdiction of the court has committed a new offense or intends to commit an offense or threatens to commit an offense, the agency shall immediately report this belief to the appropriate court of jurisdiction.

(b) When the agency has probable cause or reasonable grounds to believe that an individual has threatened to commit an offense against a person or property of another, the agency may file a complaint against the individual with a district court judge.

(c) When the agency determines that an offender has violated the conditions of release on bail, the agency may file an affidavit with the prosecuting attorney in support of the violation.

(d) When the agency determines that an offender has violated the conditions of probation or suspension of sentence, the agency may file an affidavit with the court in support of the determination.

[Eff AUG 10 1985] (Auth: HRS §353-1.4) (Imp: HRS §§706-626, 706-627, 706-628, 804-7.2, 804-31, 804-38)

§17-1201-20 Individualized program services. Individualized program services may be provided on a voluntary basis to individuals and offenders. The exception shall be court ordered services directed to offenders. The services may include but not be limited to:

(1) Orientation to criminal justice processes;
(2) Individualized needs assessment;
(3) Counseling, including crisis intervention to individuals, offenders, families, and significant others;

(4) Noncustodial adjunct services to offenders to facilitate intake and release from institutions; and

(5) Referrals to agencies or persons to include but not be limited to:

(A) Educational and vocational referrals, or placement, or both;

(B) Medical/psychiatric/psychological referrals, or treatment, or both;

(C) Substance abuse referrals, or placement, or both;

(D) Financial, marital, and family planning referrals; and

(E) Other social service referrals, including residential placement and outpatient referrals.

[Eff AUG 10 1985] (Auth: HRS §353-1.4) (Imp: HRS §§353-1.4, 706-624, 712-1255, 804-7.1, 853-1)

HAWAII ADMINISTRATIVE RULES

TITLE 17

DEPARTMENT OF SOCIAL SERVICES AND HOUSING

SUBTITLE 7 STATE INTAKE SERVICE CENTERS

CHAPTER 1202

CRIMINAL HISTORY RECORD INFORMATION SYSTEM

Subchapter 1 Definitions

§17-1202-1 Definitions

Subchapter 2 General Provisions

§17-1202-2 Purpose
§17-1202-3 Applicability of rules
§17-1202-4 Responsibilities of user agencies
§17-1202-5 Responsibilities of agency
§17-1202-6 Enforcement authority

Subchapter 3 Collection of Criminal History Record Information

§17-1202-7 Purpose
§17-1202-8 Collection of criminal history record information
§17-1202-9 Accuracy of data
§§17-1202-10 to 13 (Reserved)

Subchapter 4 Maintenance of Data

§17-1202-14 Maintenance of criminal history record information
§17-1202-15 Separation of data
§§17-1202-16 to 18 (Reserved)

Subchapter 5 Sealing of Data

§17-1202-19 Sealing of data
§§17-1202-20 to 22 (Reserved)

Subchapter 6 Storage of Data

§17-1202-23 Storage manual data
§17-1202-24 Storage electronic data
§§17-1202-25 to 27 (Reserved)

Subchapter 7 Expungement Orders

§17-1202-28 Expungement orders by the attorney general
§17-1202-29 Expungement orders by the courts

Subchapter 8 Security of System

§17-1202-30 Electronic data operations
§17-1202-31 Safety of electronic equipment and peripherals
§17-1202-32 Safety of manual records
§17-1202-33 Personnel security management
§§17-1202-34 to 38 (Reserved)

Subchapter 9 Dissemination of Information

§17-1202-39 Dissemination of information
§§17-1202-40 to 43 (Reserved)

Subchapter 10 Audit

§17-1202-44 Audit

SUBCHAPTER 1

DEFINITIONS

§17-1202-1 Definitions. As used in this chapter:

"Active record" means when an offender is held in incarceration, currently under-going pretrial, presentence, and postsentence proceedings, or who is currently under the jurisdiction of or being supervised by the user agencies, including those offenders on escape status and inter-state compact status.

"Agency" means the state intake service centers.

"Agent in charge of records" means the person designated by the user agency head responsible for the collection, maintenance, seal, storage, purge, dissemination, and security of its respective criminal history record information system.

"Administration of criminal justice" shall be as defined in section 846-1, Hawaii Revised Statutes.

"Audit" means the process to determine the accuracy and completeness of criminal history record information and determining compliance to laws and rules.

"Accurate" shall be as defined in section 846-1, Hawaii Revised Statutes.

"Collection" means the processes for the collection of criminal history record information by manual or electronic data processing means for criminal justice purposes.

"Complete" shall be as defined in section 846-1, Hawaii Revised Statutes.

"Confidentiality" means protection of data or restriction of its dissemination.

"Conviction data" means information disclosing that a person has pleaded guilty or nole contendere to, or was convicted of any criminal offense, sentencing information, and whether such plea or judgement has been affirmed or modified. This information may also refer to "disposition" information as defined in section 846-1, Hawaii Revised Statutes.

"Criminal justice agency" shall be as defined in section 846-1, Hawaii Revised Statutes. The definition excludes the public defender and crime prevention agencies.

"Criminal history record information" shall be as defined in section 846-1, Hawaii Revised Statutes. This definition includes all correctional and parole records as defined in sections 353-8, 353-9, and 353-71, Hawaii Revised Statutes.

"Criminal history record information system" shall be as defined in section 846-1, Hawaii Revised Statutes.

"Criminal justice intelligence information" means information on identifiable individuals compiled in an effort to anticipate, prevent or monitor possible criminal activity.

"Criminal justice investigative information" means information on identifiable individuals compiled in the course of the investigation of specific criminal acts.

"Data center" means the Hawaii criminal justice data center.

"Disposition" shall be as defined in section 846-1, Hawaii Revised Statutes.

"Dissemination" shall be as defined as in section 846-1, Hawaii Revised Statutes.

"Executive director" means the executive director of the state intake service centers.

"Expungment" means the processes in which non-conviction data is annulled, cancelled, rescinded, and purged from the criminal history record information system.

"Inactive record" means when an offender has been released from the jurisdiction of the user agencies, including but not limited to, released from incarceration, discharged from parole, terminated from supervision because of sentencing, revocation, and other status change actions.

"Inter-state information" means the exchange of criminal history record information between states.

"Juvenile justice record information" means information about social, medical or psychological assessments, court dispositions, presentencing reports, and supervision records contained in juvenile court subject records.

"Log" means a recording of transactions of what information has been disseminated, when, and to whom.

"Maintenance of information" means the process of filing active criminal history record information collected manually or by electronic data processing means for criminal justice purposes.

"Medical records" shall be as defined in section 622-51, Hawaii Revised Statutes.

"Non-conviction data" shall be as defined in section 846-1, Hawaii Revised Statutes.

"Personal record" shall be as defined in section 92E-1, Hawaii Revised Statutes.

"Privacy" means individual rights to privacy.

"Public record" shall be as defined in section 92-50, Hawaii Revised Statutes.

"Purge" means a process used in physically destroying manual records or erasure of electronic data.

"Purging of conviction data" means the process of physically destroying, electronically erasing or returning to an individual, any conviction data stored.

"Purging of non-conviction data" means the process of physically destroying, electronically erasing or returning to the individual, non-conviction data where no conviction has resulted from the event triggering the collection of information. This

definition may also include the expungement of non-conviction data.

"Record" means any item, collection, or grouping of criminal history record information collected manually or electronically about an individual that is maintained by the user agency and is filed and retrievable by name or code. The term includes documents, magnetic disks and tapes, electronic data banks, and any other forms used to store information.

"Sealing of information" means the process in which non-conviction and conviction data collected and maintained manually or electronically is removed or restricted from active circulation.

"Security" means the procedural requirements of protecting data systems from unauthorized access, disclosure, sabotage, and artificial and natural disasters.

"Separation of files" means the filing and storing of criminal history record information separate from other data.

"Storage" means the processes of physically storing information by electronic means, microfilm, and the physical storage of manual offender records.

"User agency" means the state intake service centers, the corrections division of the department of social services and housing, and the paroling authority.

"User agency head" means the administrator of the corrections division of the department of social service and housing, the executive director of the state intake service centers, and the chairperson of the paroling authority. [Eff AUG 10 1985] (Auth: HRS §353-1.4) (Imp: HRS §§353-1.4, 846-1, 846-6, 846-11)

SUBCHAPTER 2

GENERAL PROVISIONS

§17-1202-2 Purpose. This chapter relates to the administrative responsibilities of the user agencies to integrate and coordinate the administration of criminal history record information systems. [Eff AUG 10 1985] (Auth: HRS §353-1.4) (Imp: HRS §§353-7, 353-8, 353-9, 353-71, 846-3, 846-4, 846-5, 846-6, 846-7, 846-8, 846-9, 846-10, 846-11, 846-12, 846-13, 846-16)

§17-1202-3 Applicability of rules. (a) The rules apply to the collection, maintenance, seal, storage, purge, dissemination, and security of criminal history record information by the user agencies. The exceptions include but not to be limited to:

(1) Investigative or intelligence information compiled in the course of conducting an investigation of an individual relating to a criminal activity;
(2) Investigative or intelligence information collected by the paroling authority pursuant to sections 353-66 and 706-670, Hawaii Revised Statutes, and the department of social services and housing pursuant to section 346-4.5, Hawaii Revised Statutes and the rules established;
(3) Personal records;
(4) Public records;
(5) Medical records;
(6) Materials and items as per section 846-8, Hawaii Revised Statutes; and
(7) Statistics system which do not reveal the identity of individuals.

(b) The rules of this chapter are general in nature and are superseded by rules adopted by the attorney general where applicable.

[Eff AUG 10 1985] (Auth: HRS §353-1.4) (Imp: HRS §§ 346-4.5, 353-8, 353-9, 353-66, 353-71, 622-51, 706-670, 846-6, 846-8, 846-11, 846-15)

§17-1202-4 Responsibilities of user agencies. (a) Each user agency shall be responsible for the management of its respective criminal history record information system and shall integrate and coordinate its system with the agency in the collection, maintenance, seal, storage, purge, dissemination, and security of criminal history record information.

(b) Each user agency head shall delegate an agent in charge of records who shall exercise the authority subject to laws and the rules established for the implementation of the criminal history record information system. [Eff AUG 10 1985] (Auth: HRS §353-1.4) (Imp: HRS §§353-1.4, 353-8, 353-9, 353-71, 846-6, 846-11)

§17-1202-5 Responsibilities of the agency. The agency shall be responsible for the following administrative functions:

(1) Conducts internal audits to verify the accuracy and completeness of criminal history record information;
(2) Coordinates with criminal justice agencies corrective changes to criminal history record information;
(3) Coordinates with the user agencies the collection, maintenance, seal, storage, purge, and the dissemination of criminal history record information;
(4) Coordinates with the user agencies the security of criminal history record information from unauthorized access, theft, sabotage and from any other artificial or natural disasters;
(5) Monitors the use of equipment, policies and procedural aspects, and the personnel to carry out the implementation of the criminal history record information system;
(6) Integrates and coordinates the criminal history record information of the user agencies with the data center system;
(7) Assumes a developmental and technical support role relative to criminal history record information systems of the user agencies;
(8) Assumes a research and statistical analysis role relative to the criminal history record information of the user agencies; and
(9) Assumes a coordinator role to query the data center prior to any dissemination of information to assure that complete and accurate information is disseminated.

[Eff AUG 10 1985] (Auth: HRS §353-1.4) (Imp: HRS §§353-1.4, 353-7, 353-8, 353-71, 846-4, 846-6, 846-11)

§17-1202-6 Enforcement authority of executive director. Whenever the executive director or a designated representative finds that:

(1) A user agency is not complying to this chapter, policies and procedures established, the executive director shall

advise the user agency agent in charge of records for corrective actions;

(2) The agent in charge of records fails to take corrective actions, the executive director shall notify the user agency head for corrective actions; and

(3) Any employee or individual or agency pursuant to agreements violates the laws in accordance with sections 846-9, and 846-16, Hawaii Revised Statutes, the user agency head shall take action in accordance with the law as may be appropriate.

[Eff AUG 10 1985] (Auth: HRS §353-1.4) (Imp: HRS §§353-1.4, 353-9, 846-9, 846-16)

SUBCHAPTER 3

COLLECTION OF CRIMINAL HISTORY RECORD INFORMATION

§17-1202-7 Purpose. The purposes for the collection of criminal history record information are to:

(1) Enhance the management and operational efficiency and effectiveness of criminal justice administration;

(2) Enhance effective planning, evaluation of management and operations in order to improve and expand services provided to offenders, and to monitor the quality of services; and

(3) Enhance research and analysis of information for the purpose of determining local and national trends, programs and management development, and evaluations.

[Eff AUG 10 1985] (Auth: HRS §353-1.4) (Imp: HRS §353-1.4)

§17-1202-8 Collection of criminal history record information. Criminal history record information may be collected manually or by electronic data processing means to obtain:

(1) Offender identification, personal background, and other characteristics that provide a general profile of the offender;

(2) Facts of arrest and charge, indictments, and subsequent release and terms (bail, own recognizance, other dispositional actions);
(3) Information compiled in connection with pretrial and presentence investigations; and determination of physical and mental conditions of offenders;
(4) Facts and results of pretrial and presentence investigation proceedings;
(5) Facts and results of any trial or proceedings, including sentence or penalty;
(6) Information pertaining to offender supervision and programming within and outside the institutions;
(7) Information pertaining to period and place of confinement, admission, and release;
(8) Information on formal termination to the criminal justice process as to offense charged or convicted;
(9) Information of the results of proceedings revoking parole;
(10) Information on presentence calculations; and
(11) Any other information to enhance the management and operational efficiency and effectiveness of criminal justice administration which apply to law.
[Eff AUG 10 1985] (Auth: HRS §353-1.4) (Imp: HRS §§353-1.4, 353-8, 353-9, 353-71, 706-671, 846-1)

§17-1202-9 Accuracy of data. All electronic or manual record data entries shall be verified for accuracy and completeness by manual, visual, or computer edit and verification programs prior to entry. [Eff AUG 10 1985] (Auth: HRS §353-1.4) (Imp: HRS §846-6)

§§17-1202-10 to 13 (Reserved)

SUBCHAPTER 4

MAINTENANCE OF DATA

§17-1202-14 Maintenance of criminal history record information. (a) Criminal history record

information collected manually and designated as an active record by the user agency shall be filed and located within a secure, protected, and accessible area.

(b) Criminal history record information entered electronically and designated as an active record by the user agency shall be electronically maintained within a secure and protected area, subject to authorized access and retrieval. The agency shall:

(1) Centrally maintain and monitor the filing of electronic data; and

(2) Coordinate its activities with the data center, the electronic data processing division of the department of finance, and all other agencies authorized to collect and store electronic data.

[Eff AUG 10 1985] (Auth: HRS §353-1.4) (Imp: HRS §§846-6, 846-11)

§17-1202-15 Separation of data. (a) All active or inactive criminal history record information collected and maintained manually or by electronic means shall be filed to the extent possible separately from non-criminal history record information.

(b) Non-criminal history record information which cannot be physically separated without affecting other criminal history record information shall be maintained as a criminal history record information, and item or items of the non-criminal history record information shall be subject to possible purge.

[Eff AUG 10 1985] (Auth: HRS §353-1.4) (Imp: HRS §846-6)

§§17-1202-16 to 18 (Reserved)

SUBCHAPTER 5

SEALING OF DATA

§17-1202-19 Sealing of data. (a) The period of time that a manual record shall be maintained as an inactive record shall be determined by each user agency. For the purpose of assuring system operations efficiency of maintaining inactive manual records, a standard of no more than two years is established at

which time the inactive record may be sealed in the following manner:

(1) Upon determination by the user agency that an inactive manual record exists, the user agency may identify and purge irrelevant and non-essential items in the record; and

(2) Upon identification and purge, the user agency may store the record or transfer the record to the agency for central storage.

(b) Upon transfer of the record, the user agency shall log the transfer to the agency, identifiable by offender name or code and date of transfer.

(c) The period of time that inactive electronic data record may be sealed shall be determined by the agency. The agency may:

(1) Identify and purge specific items in the record; and

(2) Seal electronic data which is identifiable by name or code, and retrievable for activation by the user agencies.

[Eff AUG 10 1985] (Auth: HRS §353-1.4) (Imp: HRS §846-6)

§§17-1202-20 to 22 (Reserved)

SUBCHAPTER 6

STORAGE OF DATA

§17-1202-23 Storage of manual criminal history record information. (a) Upon transfer of sealed inactive manual records to the agency, the agency shall microfilm records.

(b) Microfilms shall be stored indefinitely in a security area, inaccessible to damage or destruction from fire, water, and other artificial and natural disasters.

(c) Upon microfilming, all sealed manual records may be stored in a security area or may be purged as follows:

(1) All sealed manual records concerning offenders convicted of a felony may be purged ten years after date of release from supervision with no subsequent arrest and conviction of a criminal offense; and

(2) All sealed manual rec :s concerning offenders convicted c misdemeanor may be purged five years aft date of release from supervision with no subsequent arrests or convictions of a criminal offense.

(d) The purging of sealed manual records shall be in accordance with section 94-3, Hawaii Revised Statutes, and any rules set forth by the department of accounting and general services.

[Eff AUG 10 1985] (Auth: HRS §353-1.4) (Imp: HRS §§94-3, 846-6)

§17-1202-24 Storage of electronic data.

(a) All sealed inactive electronic data shall be stored at the agency, the electronic data processing division of the department of finance, the data center or wherever feasible, and shall be kept secure and accessible for reactivation or authorized access.

(b) The agency shall secure agreements, develop and establish policy and procedural aspects for the preservation of electronic data in coordination with the data center, the electronic data processing division of the department of finance, user agencies, and the department of accounting and general services. [Eff AUG 10 1985] (Auth: HRS §353-1.4) (Imp: HRS §§94-3, 846-6)

§§17-1202-25 to 27 (Reserved)

SUBCHAPTER 7

EXPUNGEMENT ORDERS

§17-1202-28 Expungement orders by attorney general. (a) Any non-conviction data including fingerprints and photographs collected, maintained, sealed, or stored manually on a person arrested for, or charged without a disposition and which are capable of being forwarded without affecting other records, upon order by the attorney general, shall be forwarded to the attorney general for placement in a confidential file.

(b) The agency authorized to conduct presentence investigations for the courts may request information

from the confidential file while preparing a presentence investigation.

(c) Any records subject to expungement orders on magnetic tape or in a computer memory bank shall be purged.

(d) Nothing in this chapter shall be construed to permit or require the user agency not to comply with expungement orders. [Eff AUG 10 1985] (Auth: HRS §353-1.4) (Imp: HRS §§831-3.2, 853-1)

§17-1202-29 Expungement orders by courts.

(a) Any non-conviction data collected, maintained, sealed, or stored manually or by electronic means may be expunged on a person dismissed and discharged of the proceeding against the person in accordance to section 712-1256, Hawaii Revised Statutes.

(b) Upon notification by the court for expungement, the user agency shall expunge manual records in accordance to section 712-1256, Hawaii Revised Statutes, and the rules established by the court.

(c) Any records subject to expungement orders on magnetic tape or in a computer memory shall be purged.

(d) Nothing in this chapter shall be construed to permit or require the user agency not to comply with expungement orders by the court.

[Eff AUG 10 1985] (Auth: HRS §353-1.4) (Imp: HRS §712-1256)

SUBCHAPTER 8

SECURITY OF SYSTEM

§17-1202-30 Electronic data operations. The user agency's electronic network system, dedicated or shared, shall mutually operate in accordance with agreements established by the agency with the State's electronic data processing division of the department of finance, the data center, and by the participating criminal justice agencies. The agency shall institute programs and procedures to assure that:

(1) Electronic data is stored in a manner that it cannot be accessed, modified, altered, or purged in any fashion by non-participating agency terminals;

(2) Any inquiry, input, updates, and any other programming are restricted to terminals and individuals who are designated and approved for criminal justice purposes;
(3) Any purging of data is limited to the direct control of the agency and authorized personnel designated;
(4) Programs are developed to detect any attempts to penetrate electronic data system, program, or file; and
(5) Programs and procedures specified in paragraphs (2), (3), and (4) are knowlegeable to authorized employees and agencies pursuant to agreement to provide such programs and that programs are kept continuously under maximum security conditions. [Eff AUG 10 1995] (Auth: HRS §353-1.4) (Imp: HRS §846-7)

§17-1202-31 Safety of electronic equipment and peripherals. To assure the safety of electronic equipment and peripherals, the agency shall institute procedures specifying:
(1) Designated locations for the equipment and peripherals, and the physical safety of the equipment and peripherals from hazards, sabotage, theft, unauthorized entry, and other safety dimensions;
(2) The controlled use of electronic equipment and the logging of date of inquiry and name of file being queried; and
(3) The maintenance and up-keep of the electronic equipment.
[Eff AUG 10 1985] (Auth: HRS §353-1.4) (Imp: HRS §846-7)

§17-1202-32 Safety of manual agency records. To assure the safety of manual records, each agent in charge of records shall institute the following:
(1) Centralize the location of manual records for easy access to authorized personnel;
(2) Procedures for the safety of records from tampering, theft, sabotage, fire, flood, unauthorized entry, and other safety dimensions;

(3) Procedures for access to, the logging of inquiry, and the removal and return of records; and
(4) Procedures for the up-keep and maintenance of records. [Eff AUG 10 1985]
(Auth: HRS §353-1.4) (Imp: HRS §846-7)

§17-1202-33 Personnel security management. To assure the confidentiality of data and the safety of data from unauthorized access, theft, sabotage, and other artificial hazards, the following procedural guidelines shall be instituted and implemented in the selection, control, transfer, removal, and the training of personnel having access to data:

(1) Each user agency shall select and assign persons authorized for direct access to criminal history record information, equipment, peripherals, and record files, and to any defined area where criminal history record information is collected, maintained, sealed and stored;
(2) The agency may assist the user agency in the selection and assignment of personnel;
(3) Applicants for employment or assigment to handle criminal history record information may be subject to investigation by the user agency to determine honesty and fitness for access to data and systems;
(4) Periodic reviews as to the character and fitness of personnel may be conducted by the user agency;
(5) The user agency has the right to initiate administrative actions leading to the transfer or removal of authorized personnel from having direct access to information when there is good cause to question or determine the fitness and honesty of the authorized personnel; and
(6) The agency shall develop and maintain in conjunction with the user agencies an in-service training program and an information security manual to ensure that each authorized employee who works with or has access to criminal history record information and systems is:

(A) Trained in the use, control, and safety of the criminal history record information system; and
(B) Familarized and trained on the substance and the intent of laws, rules and procedures adopted.
[Eff AUG 10 1995] (Auth: HRS §353-1.4) (Imp: HRS §846-7)

§§17-1202-34 to 38 (Reserved)

SUBCHAPTER 9

DISSEMINATION OF INFORMATION

§17-1202-39 Dissemination of information. (a) The public may obtain current or prior criminal history record information within the jurisdiction of the user agency. Public disclosure shall be limited to:

(1) Information relating to the current offense or offenses for which an individual is currently responsible to the criminal justice system;
(2) Information on place of incarceration and the length of incarceration;
(3) Information relating to bail, including the amount of bail;
(4) Information, in event of escape of an adult offender from a correctional facility, on the physical description of the offender, including photographs, place and time of escape, and whether the offender is considered dangerous;
(5) Information in event of an escape from a youth correctional facility of any committed person, on the name, the place of residence, including photographs, and prior adjudications for offenses; provided that the crime for which the person was committed would be a felony involving the use of force or violence or the threat of force or violence. Disclosure of information shall be with the concurrence of the police; and

(6) Information for the purposes of international travel and granting of citizenship.

(b) The dissemination of criminal history record information shall be permitted without prior agreement directly or through any intermediary to:

(1) Individuals and organizations specified in section 846-10, Hawaii Revised Statutes;

(2) Criminal justice agencies and data processing and analysis components within the State for the purpose of the administration of criminal justice and criminal justice employment; and

(3) Any other individuals and organizations pursuant to sections 346-4.5, 353-7, 846-9(5), and 846-9(6), Hawaii Revised Statutes.

(c) The dissemination of criminal history record information including juvenile records shall be permitted upon prior agreement to non-criminal justice individuals and organizations providing services for the administration of criminal justice or engaging in research, evaluation or statistical activities; provided that the information shall be used only for the purposes for which it was given. The agreement set forth shall be contractual in nature.

(d) No user agency or employee upon request of an individual or organization ineligible to receive criminal history record information shall confirm the existence or non-existence of criminal history record information on an offender.

(e) Each user agency shall maintain a log for a minimum period of one year on all criminal history record information disseminated to individuals, agencies, or organizations within or outside the State. The log shall specify:

(1) The name of individual, agency, or organization;

(2) The purpose for release;

(3) The type of information released; and

(4) The date of information released.

(f) Upon determination that inaccurate or incomplete information of a substantial nature has been disseminated, the user agency, in writing, shall notify the recipients on the inconsistencies of the information and the corrections and amendments made to the information. The user agency shall initiate the following recording actions:

(1) Each notification shall require acknowledgement of the receipt of notification; and
(2) A log shall be maintained on record of notifications and acknowledgements.
[Eff AUG 10 1995] (Auth: HRS §353-1.4) (Imp: HRS §§352-26.1, 346-4.5, 353-7, 846-6, 846-9, 846-10, 846-12)

§§17-1202-40 to 43 (Reserved)

SUBCHAPTER 10

AUDIT

§17-1202-44 Audit. (a) Periodic audits, or random audits, or both, shall be conducted by the agency to ensure the reliability, effeciency, and effectiveness of the criminal history record information system of the user agencies.
(b) The agency shall coordinate its audit functions with the office of the attorney general.
[Eff AUG 10 1995] (Auth: HRS §353-1.4) (Imp: HRS §§846-6, 846-13)

HAWAII ADMINISTRATIVE RULES

TITLE 17

DEPARTMENT OF SOCIAL SERVICES AND HOUSING

SUBTITLE 7 STATE INTAKE SERVICE CENTERS

CHAPTER 1203

ACCESS TO PERSONAL

CRIMINAL HISTORY RECORD INFORMATION

§17-1203-1 Definitions
§17-1203-2 Purpose
§18-1203-3 Access and review proceedings
§17-1203-4 Proceedings to amend or correct record
§17-1203-5 Administrative relief proceedings
§17-1203-6 Administrative appeal

§17-1203-1 Definitions. As used in this chapter:

"Accurate" shall be as defined in section 846-1, Hawaii Revised Statutes.

"Agency" means the paroling authority, the corrections division of the department of social services and housing, and the state intake service centers.

"Agency head" means the administrator of the corrections division of the department of social service and housing, the executive director of the state intake service centers, and the chairperson of the paroling authority.

"Access" means the individual's right to review the individual's own personal criminal history record information.

"Agent in charge of records" means the person designated by the agency head responsible for the collection, maintenance, seal, storage, purge, dissemination, and security of criminal history record information system.

"Challenge" means an oral or written contention by an individual that the personal criminal history record information is inaccurate or incomplete, or both.

"Complete" shall be as defined in section 846-1, Hawaii Revised Statutes.

"Criminal history record information" shall be as defined in section 846-1, Hawaii Revised Statutes. This definition includes all correctional and parole records as defined in sections 353-8, 353-9, and 353-71, Hawaii Revised Statutes.

"Hearing officer" means the administrative officer not interested in the outcome of the subject matter, authorized to review appeals proceedings.

"Individual" means a natural person.

"Log" means recording of transactions of what information has been disseminated, when, and to whom.

"Petition" means any properly documented submission of request by an individual seeking relief.

"Relief" means a resolution of any contested matter within the agency's jurisdiction in favor of the individual seeking relief.

[Eff AUG 10 1985] (Auth: HRS §353-1.4) (Imp: HRS §846-14)

§17-1203-2 Purpose. This chapter governs the proceedings on an individual's right to have access to the individual's own criminal history record information; to challenge the accuracy and completeness of the record; to correct or amend the record; and to seek administrative relief.

[Eff AUG 10 1985] (Auth: HRS §353-1.4) (Imp: HRS §846-14)

§17-1203-3 Access and review proceedings.

(a) The application for access to review an individual's own criminal history record shall be in the form of a written request to the agency. The request shall include:

(1) The name of the individual, social security number, address, or telephone number, and period of confinement, if any; and

(2) The reasons for the request.

(b) Upon receipt of the request, the agency within twenty working days shall, in writing, notify the individual whether to proceed with the request.

(c) If the agency refuses to proceed, it shall state the reasons for its refusal, and the procedures for administrative relief.

(d) If the agency decides to proceed, it shall notify the individual on the time, date, and location for the review, and the following review procedures:

(1) The individual may allow an attorney of choice access to and review of the record. The information subject to review by the attorney shall be no more and no less than that to be reviewed by the individual requestor. The individual must sign a notorized statement which grants the attorney permission for access and review, and the attorney must agree to disclose the information only to the individual requestor;

(2) The review shall be conducted in an agency office by the agent in charge of records or a representative;

(3) The access to records shall be permitted during normal working hours unless specifically authorized by the agency head; and

(4) Each individual seeking access shall be certified as to the individual's identity.

[Eff AUG 10 1985] (Auth: HRS §353-1.4) (Imp: HRS §846-14)

§17-1203-4 Proceedings to amend or correct record. (a) Upon review by the individual, a challenge as to the accuracy or completeness of the information, or both, is expressed, the individual shall complete in writing the exceptions taken to the record.

(b) Upon determination of a challenge, the agent in charge of records or representative shall audit the exceptions taken and shall decide upon whether such exceptions are valid.

(c) Upon determination of the validity of the challenge, the agent in charge of records or representative within twenty working days following the challenge shall correct or amend record and transmit a copy of findings to the individual.

(d) The agent in charge of records or representative shall upon request provide to the individual any names of non-criminal justice agencies to which inaccurate or incomplete data has been given.

(e) The agent in charge of records or representative within thirty working days following the challenge shall issue a notification of the

changes or amendments to all agencies which collect, maintain, or store information on the individual.

(f) Each notification shall require acknowledgement by the notified agency of the receipt of notification.

(g) A log shall be maintained on record of all notifications and acknowlegements.

[Eff AUG 10 1985] (Auth: HRS §353-1.4) (Imp: HRS §846-14)

§17-1203-5 Administrative relief proceedings.

(a) If the agency refuses to provide the individual access to records, or to correct and amend a challenge, or both, the individual within twenty working days upon receipt of the agency's refusal may, in writing, petition for administrative relief to the agency head.

(b) The petition shall be legibly written or typed, specifying the name, address, zip code, or telephone number of the individual, the individual's attorney of choice, if any, and the reasons for the appeal.

(c) If the agency head decides to proceed with the appeal, the agency no less than twenty working days upon receipt of a petition shall set the matter for further proceedings before a hearing officer.

(d) If the agency head decides not to proceed, the agency within twenty working days shall, in writing, notify the individual denying the appeal and the reasons for the denial. The decision shall be final and recourse for judicial remedies may be recommended. [Eff AUG 10 1985] (Auth: HRS §353-14) (Imp: HRS §846-14)

§17-1203-6 Administrative appeal. If the hearing officer, in conducting an administrative appeal, finds that:

(1) There is sufficient evidence to provide the individual access to, or change and amend the record, or both, the hearing officer within fifteen working days after receipt to proceed with the appeal shall issue final written findings and conclusions to the individual which shall state to what relief the individual is entitled; or

(2) There is insufficient evidence to provide access to, or change and amend record, or both, the hearing officer within fifteen working days after receipt to proceed with the appeal shall issue written findings and conclusions to the individual. The findings and conclusions shall be final.
[Eff AUG 10 1985] (Auth: HRS §353-1.4) (Imp: HRS §846-14)

HAWAII ADMINISTRATIVE RULES

TITLE 17

DEPARTMENT OF SOCIAL SERVICES AND HOUSING

SUBTITLE 7 STATE INTAKE SERVICE CENTERS

CHAPTER 1204

MANAGEMENT OF PRESENTENCE CREDIT SYSTEM

Subchapter 1 Definitions

§17-1204-1 Definitions

Subchapter 2 General Provisions

§17-1204-2 Purpose
§17-1204-3 General responsibilities of the executive director
§17-1204-4 General responsibilities of the crediting agencies
§17-1204-5 Applicability

Subchapter 3 Credit Calculation Formula and Criterion

§17-1204-6 Credit calculation formula
§17-1204-7 General criterion for application of presentence credit formula
§§17-1204-8 to 10 (Reserved)

Subchapter 4 Credit Documentation and Reporting

§17-1204-11 Document of recording
§17-1204-12 Credit documentation prior to sentencing
§17-1204-13 Credit documentation upon sentencing
§§17-1204-14 to 16 (Reserved)

Subchapter 5 Credit Application

§17-1204-17 Credit application towards minimum sentence expiration date for sentenced felons

§17-1204-18 Credit application towards maximum sentence expiration date for sentenced felons and misdemeanants
§17-1204-19 Credit application towards incarceration sentence expiration date for sentenced probationers
§§17-1204-20 to 23 (Reserved)

Subchapter 6 Audit

§17-1204-24 Audit

SUBCHAPTER 1

DEFINITIONS

§17-1204-1 Definitions. As used in this chapter:

"Admission" means the time and date that an offender is admitted to a correctional facility.

"Agency" means the state intake service centers.

"Agent in charge of records" means the person designated by the crediting agency responsible for the implementation of its presentence credit system.

"Calculation" means to compute mathematically presentence credit by set formulas.

"Correctional facility" means any State or local institution where offenders are detained.

"Crediting agency" means the paroling authority, the corrections division of the department of social services and housing, and the state intake service centers.

"Crediting agency head" means the chairperson of the paroling authority, the administrator of the corrections division of the department of social services and housing, and the executive director of the state intake service centers.

"Discharge" means the official action in which an offender is no longer under the jurisdiction of the State.

"Executive Director" means the executive director of the state intake service centers.

"Formula" means a set of mathematical formulas by hour, day, week, month or year used to calculate presentence credit.

"Maximum sentence expiration" means the date on which the maximum sentence imposed by the court will

expire. This term can be extended because of escape or when parole is suspended or probation is revoked.

"Maximum sentence" means the maximum time in which a sentenced offender must be detained.

"Minimum sentence" means the minimum time in which a sentenced offender must be detained.

"Minimum sentence expiration" means the date on which the minimum sentence set by the paroling authority will expire. This date may be changed by the paroling authority through official action to reduce the minimum sentence time established previously.

"Other institutions" means any other institution, private or public, where offenders are detained and where presentence credit applies. This definition includes private or public facilities to which offenders were detained or treated as ordered by the courts.

"Parole revocation" means the official action by the paroling authority to take away parole status of an offender and remanding the offender to the custody of a correctional facility.

"Presentence credit" means time extended to an offender for any previous detention in any State and local correctional facilities or other institutions for the crime for which a sentence is to be imposed.

"Presentence credit data bank" means the information collected and maintained by the criminal justice agencies on individuals consisting of identifiable notations of arrests, detentions, and any other formal criminal justice administrative actions used to calculate presentence credit.

"Presentence credit system" means a system, including facilities, procedures, agreements and organizations thereof, for the collection, calculation, documentation, and reporting of presentence credit.

"Probation revocation" means the official action of the court of jurisdiction in which the probation sentence is revoked and the offender is remanded to the custody of a correctional facility.

"Recorder of credit" means the individual who collects, calculates, records, or reports presentence credits.

"Release" means the time and date an offender is released from a correctional facility while under the jurisdiction of the State. [Eff AUG 10 1985]
(Auth: HRS §353-1.4) (Imp: HRS §§353-1.4, 706-671)

SUBCHAPTER 2

GENERAL PROVISIONS

§17-1204-2 Purpose. This chapter sets forth the administrative foundation for the integration and coordination of the presentence credit system for offenders among the crediting agencies, the paroling authority, the corrections division, and the state intake service centers. [Eff AUG 10 1985] (Auth: HRS §353-1.4) (Imp: HRS §706-671)

§17-1204-3 General responsibilities of the executive director. The executive director shall:

(1) Be responsible to develop rules to promote the efficiency and effectiveness of the system;
(2) Be responsible for the proper application of the law and rules;
(3) Assume and exercise the leadership role in developing and implementing the presentence credit system for the crediting agencies;
(4) Be responsible for establishing a central presentence credit data bank to support the system, including coordinating the flow of information among criminal justice agencies to ensure that source documents are available for the determination of presentence credit;
(5) Monitor the flow of information and documents among the crediting agencies; and
(6) Provide management audit of the presentence credit system. [Eff AUG 10 1985] (Auth: HRS §353-1.4) (Imp: HRS §§353-1.4, 706-671)

§17-1204-4 General responsibilities of the crediting agencies. (a) The head of each crediting agency shall be responsible for the management of its respective presentence credit system and shall integrate and coordinate its system with the agency.

(b) The head of each crediting agency shall delegate an agent in charge of records who shall exercise the authority subject to laws and the rules established for the implementation of the presentence

credit system. [Eff AUG 10 1985] (Auth: HRS §353-1.4) (Imp: HRS §706-671)

§17-1204-5 Applicability. Presentence credit shall apply to:

(1) All adult offenders who have been detained in correctional facilities prior to the imposition of sentence, including juvenile offenders sentenced as adult offenders within the jurisdiction of the State; and

(2) All adult offenders detained prior to the imposition of sentence in any other institution, including but not to be limited to federal and other detention or treatment centers, private or public, in which detainment was for a crime for which a sentence is to be imposed.

[Eff AUG 10 1985] (Auth: HRS §353-1.4) (Imp: HRS §706-671)

SUBCHAPTER 3

CREDIT CALCULATION FORMULA AND CRITERION

§17-1204-6 Credit calculation formula.

(a) Credit on an hourly basis shall be calculated when a sentence is specified in hours in the following manner:

(1) Credit calculation shall begin at the specified hour or fraction in minutes thereof recorded at admission time; and

(2) Credit calculation shall terminate at the specified hour or fraction in minutes thereof recorded at release time.

(b) Credit in days shall be calculated when a sentence is specified in days, weeks, weekends, evenings, months and years, based on the following formula:

(1) An offender admitted prior to 12:00 midnight of any given day shall be credited for a full day on the admission date; and

(2) An offender released prior to 12:00 midnight on any given day shall be credited for a full day on the release date.

[Eff AUG 10 1985] (Auth: HRS §353-1.4) (Imp: HRS §706-671)

§17-1204-7 General criterion for application of presentence credit formula. The following general criterion, among others, shall apply:

(1) Credit shall be calculated for each crime the person is charged with and detained.

(2) When a new charge is added to a crime for which the offender is already in custody, the same credits shall apply as for the previous crime.

(3) When there is a surrender of bail or bond and the offender is admitted into a State correctional facility, credit shall begin at date of filing of the surrender document or admission to the facility, whichever is earlier;

(4) When a parole warrant of arrest is served and the offender is admitted on the warrant, credit shall be calculated from date warrant is served;

(5) When a bench warrant is served for contempt of the court and the offender is admitted on the warrant, credit shall be calculated from date bench warrant is served;

(6) When probation is revoked and the offender is admitted pending re-sentencing, the following credits shall apply:

(A) All pretrial time previously spent in any custody for the crime;

(B) All sentenced time previously spent in any custody or a condition of probation for the crime; and

(C) All time spent in any custody after arrest for the probation revocation and prior to imposition of the new sentence.

(7) When parole is revoked and the offender is incarcerated, credit shall apply from the time of arrest on a parole warrant.

(8) When an offender is transferred on a temporary out-count basis to another institution or jurisdiction, credit shall continue to apply.

(9) When an offender escapes or is absent without leave while awaiting disposition on the charge in question, the escape or absence time shall not be credited.

(10) When an offender absconds from the State to escape prosecution, and subsequently surrenders to authorities and requests a

final disposition, credit shall apply from the date the notice of surrender is received by a Hawaii prosecutor or court of jurisdiction. [Eff AUG 10 1995] (Auth: HRS §353-1.4) (Imp: HRS §706-671)

§§17-1204-8 to 10 (Reserved)

SUBCHAPTER 4

CREDIT DOCUMENTATION AND REPORTING

§17-1204-11 Document of recording. (a) Information on presentence credits shall be recorded in the form of a document of recording for each not-sentenced offender admitted into and released from a correctional facility. The information recorded shall be no less than the following:

(1) Facility of confinement;
(2) Name and codification of offender;
(3) Date admitted and date released and any fraction of a day recorded by hours and minutes; the reason for release; and
(4) Total presentence credit calculated in hours or days and any fraction thereof as appropriate.

(b) The document shall be signed and dated by the recorder of credit attesting to its accuracy and completeness and shall constitute as an official document. [Eff AUG 10 1995] (Auth: HRS §353-1.4) (Imp: HRS §706-671)

§17-1204-12 Credit documentation prior to sentencing. (a) When it is determined that an offender shall be sentenced to a correctional facility, and when it is determined that credit time is deductible from the sentence, a certificate shall be forwarded to the court of jurisdiction attesting to the offender's presentence credit for time served.

(b) A facsimile copy of the certificate shall be forwarded to the paroling authority, the corrections division branch office having custodial jurisdiction over the offender, and the agency, except a facsimile copy to the paroling authority for sentenced misdemeanant and sentenced probation offenders.

[Eff AUG 10 1985] (Auth: HRS §353-1.4)
(Imp: HRS §706-671)

§17-1204-13 Credit documentation upon sentencing. (a) When an offender is admitted to a correctional facility upon sentencing, a credit source reference check shall be made from the admission source documents to determine whether presentence credit time has been deducted from the sentence by the court.

(b) If the admission source documents do not reflect credit time deduction, the following credit proceedings shall apply:

(1) Determine from document of recording whether the offender has credits for time served in any correctional facility; and

(2) Determine from any other institutional resources where credit may be appropriately deducted.

(c) Upon determination and verification of information, a facsimile copy of the document of recording on the offender shall be forwarded to the paroling authority, the corrections division branch office having custodial jurisdiction over the offender, and the agency, except a facsimile copy to the paroling authority for sentenced misdemeanant and sentenced probation offenders. The document shall attest to the offender's credit for time served.

[Eff AUG 10 1985] (Auth: HRS §353-1.4)
(Imp: HRS §706-671)

§§17-1204-14 to 16 (Reserved)

SUBCHAPTER 5

CREDIT APPLICATION

§17-1204-17 Credit application towards minimum sentence expiration date for sentenced felons.

(a) Presentence credit accumulated by a sentenced felon offender shall be deducted from the offender's minimum sentence expiration date set by the paroling authority.

(b) Upon the establishment of an adjusted minimum sentence expiration date, the paroling

authority shall forward a facsimile copy of the expiration date to the corrections division office having custodial jurisdiction over the offender and the agency.

(c) The expiration date shall be the earliest date when the sentenced felon offender can be released from a correctional facility prior to and upon further action by the paroling authority.

[Eff AUG 10 1985] (Auth: HRS §353-1.4) (Imp: HRS §706-671)

§17-1204-18 Credit application towards maximum sentence expiration date for sentenced felons and misdemeanants. Presentence credit accumulated by a sentenced felon or a sentenced misdemeanant offender shall be deducted from the offender's maximum sentence expiration date as follows:

(1) Upon the admission of a sentenced felon or misdemeanant offender, each correctional facility, if credit not already deducted by the court, shall adjust the maximum expiration date based on the credit time computed; and

(2) Upon adjustment of the maximum expiration date, the correctional facility shall forward a facsimile copy of the expiration date to the paroling authority and the agency, except a facimile copy to the paroling authority for a misdemeanant offender. The expiration date shall be the official date when a sentenced felon or misdemeanant offender can be released or discharged from a correctional facility.

[Eff AUG 10 1985] (Auth: HRS §353-1.4) (Imp: HRS §706-671)

§17-1204-19 Credit application towards incarceration sentence expiration dare for sentenced probationers. Presentence credit accumulated by a sentenced probationer shall be deducted from the probationer's incarceration sentence expiration date as follows:

(1) Upon admission of a sentenced probationer, each correctional facility, if credit not already deducted by the court, shall adjust

the incarceration sentence expiration date based on the credit time computed; and

(2) Upon adjustment of the sentence expiration date, the correctional facility shall forward a facsimile of the expiration date to the agency. The expiration date shall be the official date when a sentenced probationer can be released or discharged from a correctional facility.

[Eff AUG 10 1985] (Auth: HRS §353-1.4) (Imp: HRS §706-671)

§§17-1204-20 to 23 (Reserved)

SUBCHAPTER 6

AUDIT

§17-1204-24 Audit. Periodic, or random audits, or both, shall be conducted by the agency to ensure the reliability, effeciency, effectiveness, and accountability of the presentence credit system of the crediting agencies. [Eff AUG 10 1985] (Auth: HRS §353-1.4) (Imp: HRS §706-671)

JOHN WAIHEE
GOVERNOR

ALEXIS T. LUM
MAJOR GENERAL
ADJUTANT GENERAL

[redacted]
DEPUTY ADJUTANT GENERAL

STATE OF HAWAII
DEPARTMENT OF DEFENSE
OFFICE OF THE ADJUTANT GENERAL
3949 DIAMOND HEAD ROAD, HONOLULU, HAWAII 96816-4495

JUL 20 87

HIADM

MEMORANDUM

TO: Honorable Robert A. Alm, Director
Department of Commerce and Consumer Affairs

SUBJECT: Governor's Committee on Public Records and Privacy--
Public Hearing Schedule

In response to your memo dated June 17, 1987, subject as above, we have not encountered any problems in administering the privacy laws.

Although our department has Federal and State jurisdictions, information is shared on a need-to-know official basis in our internal operations.

However, we wish to bar access to classified information to the public based on Federal laws.

If there are any questions, please have your staff contact our Personnel Officer, Miss Virginia Okamoto, at 732-3944.

Alexis T. Lum
Major General, Hawaii
Army National Guard
Adjutant General

350 YEARS NATIONAL GUARD 1636-1987

HN WAI . E
OVERNOR

CHARLES T. TOGUCHI
SUPERINTENDENT

STATE OF HAWAII
DEPARTMENT OF EDUCATION
P. O. BOX 2360
HONOLULU, HAWAII 96804

CE OF THE SUPERINTENDENT

June 17, 1987

Honorable Robert A. Alm
Director, Department of Commerce
and Consumer Affairs
1010 Richards Street
Honolulu, HI 96813

Dear Mr. Alm:

Thank you for the opportunity to comment on the subject of public records and privacy.

The Department of Education is guided by several administrative rules in disclosing information to the public and protecting the privacy rights of individuals. They are as follows:

- Title 8, Chapter 1, Rules of General Applicability, which defines "public records" and procedures available to the public to inspect and request copies of public records as pertains to the proceedings of the Board of Education.

- Title 8, Chapter 5, Public Access to Information, which describes information pertaining to the operations of the public school system and public library system which the public may request from appropriate officials at the different levels of administration, and the procedures for requesting such information.

- Title 8, Chapter 6, Confidentiality of Personal Records, which defines personal records and procedures available to individuals (employees, students, parents, library patrons) to review

and correct personal records maintained by the department; sets forth restrictions and procedures concerning access to, and correction and disclosure of personal records to individuals, the public, and other government agencies.

- Title 8, Chapter 22, Test Information to Parents, which governs the release of information to parents concerning student tests, test results, and testing practices.

- Title 8, Chapter 34, Protection of Educational Rights and Privacy of Students and Parents, which defines "educational records" and describes rights and procedures available to parents and students to be informed of educational records maintained by the department; obtain access to and challenge record contents; consent to release of records; and receive a hearing and appeal decisions relating to challenging, correcting, or deleting data considered to be inaccurate. Chapter 34 ensures the protection of the educational rights and privacy of students and parents in conformance with federal laws.

These rules have adequately enabled the Department of Education to respond to informational needs of the public and to protect the privacy of individuals.

We would be most interested in, and will be pleased to provide further comment on, any specific issues which may emerge as a result of your public hearings and on proposals for statutory changes.

Sincerely,

Charles T. Toguchi

Charles T. Toguchi
Superintendent of Education

CTT:vl

cc: Management Analysis & Compliance Branch

JOHN WAIHEE
ERNOR OF HAWAII

STATE OF HAWAII
DEPARTMENT OF HEALTH
P. O. BOX 3378
HONOLULU, HAWAII 96801

JOHN C. LEWIN, M.D.
DIRECTOR OF HEALTH

In reply, please refer to:
File:

July 24, 1987

The Honorable Robert A. Alm, Director
Department of Commerce and Consumer Affairs
1010 Richards Street
Honolulu, Hawaii 96813

Dear Mr. Alm:

Subject: Governor's Committee on Public Records - Privacy

The Department of Health expresses the following broad areas of concern regarding problems encountered with current privacy or public record statutes.

1. There appears to be some difficulty in ascertaining whether certain information is public or confidential. This could be due to a lack of clarity of the statutes or lack of training on how to interpret the statutes clearly.

2. There seems to be confusion on a number of interpretative issues such as interagency information sharing on clients, relationship of Federal Freedom of Information Act to State statutes on public records, etc.

Many of our programs deal with confidential records of clients like medical records and vital records. Much time is spent in screening requests, searching for these records and processing these requests.

Some recommendations for the solution of these problems which may be helpful include more clear-cut, standardized policies and guidelines in determining public records and privacy. Perhaps our Department needs to investigate whether a Departmental public records section which closely coordinates with the Attorney General's Office needs to be established. We do know, however, that more staff may be required in the more volume intensive programs which calls to public requests for information.

We hope that this assists you in your committee.

Please call Fay Nakamoto, Administrative Assistant to the Director, at extension 7406 if there are any questions.

Sincerely,

JOHN C. LEWIN, M.D.
Director of Health

N WAIHEE
OVERNOR

MARIO R. RAMIL
DIRECTOR

SHARON Y. MIYASHIRO
DEPUTY DIRECTOR

STATE OF HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
830 PUNCHBOWL STREET
HONOLULU, HAWAII 96813

July 7, 1987

RECEIVED
Jul 14 7 58 AM '87
DIRECTOR'S OFFICE
DEPARTMENT OF
CONSUMER AFFAIRS

Honorable Robert A. Alm
Director
Department of Commerce and Consumer Affairs
1010 Richards Street
Honolulu, HI 96809

Dear Mr. Alm:

In response to your letter of June 17, 1987, asking for our comments relating to public records and privacy, we submit the following:

The department is concerned about releasing records that contain information which are personal in nature. Unlawful release of records entails severe penalty and punishment. See for example Section 383-144, H.R.S. We will only release records that will not violate the policy of confidentiality that are required by the programs which our department administers. We recognize the right of the public to have access to public records, but we also recognize and respect the need to protect certain records that are private or personal in nature.

Most of the records requested from our department by the public are protected from disclosure by statutes. Various divisions within the department administers the programs that are mandated by the statutes. The four divisions that frequently encounter requests for public records are the Unemployment Insurance Division, the Disability Compensation Division, the Enforcement Division, and the Division of Occupational Health and Safety.

The Unemployment Insurance Division administers the Hawaii Employment Security Law, Chapter 383, H.R.S.

Disclosure of information under the Hawaii Employment Security Law is governed by the following sections of the law: H.R.S. Section 383-95 and Administrative Rules Sections 12-5-211, 12-5-215, and 12-5-219.

The purpose of H.R.S. Section 383-95 and related Administrative Rules is to keep information obtained from individuals, employers, and any other persons or groups, in the course of administering the Hawaii Employment Security Law (HESL) confidential unless disclosure or public inspection of such information is specifically provided by law.

The rationale for keeping information confidential is to limit its use to purposes of administering the HESL. Permitting public inspection of such information would discourage employer compliance with reporting requirements and the claimants' exercise of their full rights in filing claims. The same need for confidentiality of tax records and public assistance and workers' compensation files also applies to employment security records. (Commentary - Section 13(h) from Manual of State Employment Security Legislation, U.S. Department of Labor).

Employment Security information that is public record include general information on employment opportunities, employment levels and trends, labor supply and demand, which does not include information identifiable to individual applicants, employers, or employing establishments. See Administrative Rule Section 12-5-215(5).

Employment Security information that is withheld from the public include benefit determinations, benefit payment records, employer wage and separation reports, contribution records, claimant's personal records such as medical certificates or military discharge documents, and claimant's fact-finding statements.

At the appeals hearing, information in the department's records may be disclosed to parties to the appeal (claimant, employer, and their representatives) for purposes of appealing determinations made under the HESL.

Information in the department's records may also be released to persons other than the claimant (such as a loan company) upon the claimant's written consent.

Information in the department's records may also be released to governmental agencies if such disclosure is provided in connection with the agency's public duties, and the agency agrees not to release or publish in any manner information which would identify or reveal the disclosed

party's identity. (Examples of other agencies that can receive these records are Child Support Enforcement Agency, Internal Revenue Service, and Public Welfare administrating agencies.) Otherwise, the department generally requires a court order before turning over any departmental records to be used publicly, for example in a trial.

The Disability Compensation Division administers the Workers' Compensation Laws, Chapter 386, H.R.S. It maintains employer files for workers' compensation, temporary disability insurance, and prepaid health care. These files contain information relating to the type of coverage the employers has for their employees. These files have always been treated as confidential in nature and not made available to the public.

The division also maintains workers' compensation claim files for all claims filed by employees. These files contains medical reports and information that pertains to the claimant. These files are also treated as confidential and not available to the public.

The Enforcement Division administers the fair employment practice laws (discriminatory practices), Chapter 378, H.R.S. It's files contain complaints, information obtained through investigations, interviews and office memorandums. The files are treated as confidential and not made available to the public.

The Division of Occupational Health and Safety administers the Occupational Safety and Health Law, Chapter 396, H.R.S. Information obtained by the investigators containing or revealing a trade secret is confidential. Information relating to the identification of witnesses and information given by them are also treated as confidential.

We thank you for giving us an opportunity to comment. I apologize that I could not personally be present to testify in the public hearings due to my commitment off-island.

Very truly yours,

Mario R. Ramil
Director, Department of Labor
and Industrial Relations

JOHN WAIHEE
GOVERNOR OF HAWAII

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
P. O. BOX 621
HONOLULU, HAWAII 96809

WILLIAM W. PATY, CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES

LIBERT K. LANDGRAF
DEPUTY

AQUACULTURE DEVELOPMENT PROGRAM
AQUATIC RESOURCES
CONSERVATION AND ENVIRONMENTAL AFFAIRS
CONSERVATION AND RESOURCES ENFORCEMENT
CONVEYANCES
FORESTRY AND WILDLIFE
LAND MANAGEMENT
STATE PARKS
WATER AND LAND DEVELOPMENT

DOC. NO.: 0531E

AUG 3 1987

Honorable Robert A. Alm, Director
Department of Commerce and
Consumer Affairs
1010 Richards Street
P.O. Box 541
Honolulu, Hawaii 96809

Dear Mr. Alm:

Thank you for your letter of June 5, 1987 relating to the Governor's Committee on Public Records and Privacy.

Our Department is currently guided by statutes and Department of Attorney General opinions relating to public records and privacy.

This quidance incorporates both individuals and other entities doing business in our State.

On an individual basis, in addition to considering the propriety of making personal records public, we would ask the Committee's consideration of remaining, as closed files, our investigation of land use violations.

Potential land use violations are brought to our attention in a number of ways: by other agencies, the public and anonymously.

In many cases individuals are wrongly named or accused of certain transgressions. Yet, until the investigation is completed and resolved, a casual reader of the case would come to a quite different conclusion particularly if the investigation is continuing.

Also, after an investigation is completed, some form of balance needs to be reached where public discussion of the facts can be made yet alleged unproven conduct or representations made against or by individuals can remain within the covers of the file itself.

The difficulty here is the dilemma between giving a file to the public (media) with the knowledge that there are unsubstantiated charges against an individual, firm or entity and the possible damage to one's reputation should those charges be made public, balanced against potential accusation from the public that some form of "cover-up" is taking place by withholding a portion of the file thus not providing full disclosure.

Currently, we are proceeding on the basis of no disclosure on investigative matters until it is resolved, and, once resolved, limited disclosure to ensure the protection of one's reputation against unsubstantiated allegations.

In relation to other entities such as corporations or partnerships, etc., we are currently guided by a number of existing statutes such as Chapter 183 relating to leasing and drilling of geothermal resources, Chapter 92E relating to commercial marine licenses, and, Section 189-3 relating to monthly fish reports.

Additionally, we are constrained in some instances from disclosure by the Federal government in areas such as nonfuel mineral production data.

In sum, our approach to your task is to separate individual aspects from corporate aspects in looking at public records and privacy.

We are the first to agree a great deal of judgment is involved and would welcome any guidance your committee may offer us.

Very truly yours,

WILLIAM W. PATY, Chairperson
Board of Land and Natural Resources

LEGAL AID SOCI[illegible] OF HAWAII

1108 NUUANU [illegible]E
HONOLULU, HAW[illegible]17
MAILING ADDRESS: P.O. BOX 37375 [illegible]OLULU, HAWAII 96837

(808) 536-4[illegible]

July 16, 1987

Robert A. Alm, Chairman
Governor's Committee on Public Records
and Privacy
P. O. Box 541
Honolulu, Hawaii 96809

Dear Mr. Alm and Members of the Committee:

I am an attorney with the Legal Aid Society of Hawaii, Welfare Unit. We represent many clients who receive public assistance from the Department of Human Services (formerly the Department of Social Services and Housing). In the course of our representation we have to determine whether the Department is properly following the rules and regulations governing the various assistance programs. We have the Hawaii Administrative Rules which set forth the program requirements, yet we need access to the Department's procedural rules which interpret the Administrative Rules. Attached is an Administrative Rule with the corresponding procedural rules. These procedural rules often have examples of different situations with an explanation of how the Administrative Rule is to be applied. Therefore, the procedural rule will help us determine whether the Department is correctly applying the Administrative Rule.

In 1986 I requested copies of the DSSH procedure manual for review or copying. The Department did not agree to my request. Copies of the correspondence between my office and the Department through its Attorney General are attached.

The refusal of the Department to allow me to review the procedural manual appears to conflict with Hawaii Revised Statute Section 91-2(a)(3) which requires that

> . . . each agency shall make available for public inspection all rules and written statements of policy or interpretation formulated, adopted, or used by the agency in discharge of its functions.

The DSSH procedural manual is a written statement of policy or interpretation which is used by the agency in the discharge of its functions. Therefore, it should have been made available for our inspection. As seen from the correspondence, inspection of this public record was refused.

We are concerned that a state agency has not allowed the inspection of records which are clearly public and which are required by law to be made available for inspection. To correct this problem I suggest that the Governor's Committee consider the following actions or recommendations:

1. Clarify what documents are public records, specifically with respect to H.R.S. § 91-2(a)(3) and provide a list of examples of records fall within the statute;

2. Require each department to provide a list of the records it considers to be public records available for inspection and what records it deems to be private records;

3. Recommend adoption of an administrative remedy for appeals of requests for review of agency records. If an agency refuses to provide records, aggrieved persons should be able to appeal to a three member board before appealing to court.

With these changes I feel that records which should be public will be made available to the public. Rules and procedural interpretations clearly affect the public interest and should not be kept from the public as the Department of Human Services has done by denying us their procedural manual.

Sincerely,

JOHN ISHIHARA
Staff Attorney

JI:rm

Attachments

§17-744-6 Unearned income. The department shall consider the following as unearned income in the month in which it is received:

(1) All social security benefits shall be counted as unearned income. Social Security benefits may include but are not limited to:
  (A) Retirement benefits at age sixty-two;
  (B) Disability benefits to individuals who are unable to work because of physical or mental handicaps;
  (C) Survivor's benefits to the spouse of a deceased wage earner;
  (D) Children's benefits to children of a deceased or disabled parent; or
  (E) Benefits to students aged eighteen to twenty-two;

(2) All veterans' benefits shall be counted as unearned income. Dependents and survivors of veterans may also be eligible for veterans' benefits. Some of the benefits available are service connected disability pensions, non-service connected pensions, retirement benefits for veterans with twenty or more years of service, survivors' benefits to parents or children of a deceased veteran, and aid and attendance benefits to totally disabled veterans;

(3) Pension and retirement income, including that going to dependents and survivors or pension holders;

(4) Unemployment insurance benefits;

(5) Worker's compensation benefits;

(6) Railroad retirement benefits;

(7) Cash and the cash value of all in-kind benefits received by a family on strike;

(8) Cash dividends from stocks and royalties;

(9) Alimony payments;

(10) Child support payments except for the first $50;

(11) Temporary disability payments;

(12) Money received in settlement of a legal claim or an inheritance;

(13) Loans and grants from any source except for:
  (A) Those that are conditioned not to be available for current living expenses;
  (B) Any scholarships or educational benefits; and
  (C) That part of educational grants and scholarships not used for current living expenses;

(14) Regular contributions to the family of food, shelter, utilities, clothing, or other living expenses;

(15) For medical only ABD and GA single related cases, the following allowances, available to military personnel on active duty:
  (A) Basic allowance for quarters (BAQ), often referred to as quarters allowance, shall be paid to military personnel who are married, or who have dependent children, and who are not residing in government quarters. This benefit shall be shown under the entitlement (ent) section of the payroll stub as BAQ;
  (B) Basic allowance for subsistence (BAS), often referred to as separate rations shall be paid to military personnel who do not have all meals at the military mess halls because the military personnel are living in nongovernment quarters, or do not have access to a military mess hall. This allowance shall be shown on the payroll stub under the entitlement section as BAS; and
  (C) Clothing maintenance allowance (CMA), often referred to as clothing allowance, shall not be counted as earned or unearned income. This allowance shall be shown on the payroll stub under the entitlement section as CMA;
(16) For medical only ABD and GA single related cases, occasional gifts and contributions in excess of $20 in a month;
(17) For medical only AFDC and GA family related cases, occasional gifts in excess of $25; and
(18) Any other lump sum cash benefits, which are not considered to be earned income and not exempt in section 17-744-8. [Eff 7/19/82; am 8/23/84; am 12/21/84; am SEP 7 1985]
(Auth: HRS §§346-14; 42 C.F.R. §431.10)
(Imp: 42 C.F.R. §§435.731, 435.732, 435.733)

PROCEDURE SECTION: ____

§17-744-6

[illegible] contributions [illegible] of food, shelter, [illegible] are [illegible] countable [illegible] income for all [illegible], MA singles and couples, [illegible] medical assistance [illegible] categories.

For the AFDC related medical assistance categories, in-kind income is not countable income.

I. Determination of In-Kind Income:

<u>Step 1</u>: Identify the applicant or recipient's living arrangement. The following types of living arrangements are the more common:

1. Applicant or recipient who lives with another person(s) and does not pay his pro rata share of the household expenses; e.g., recipient pays $50.00 for rent, but his pro rata share is $100.00

2. Applicant or recipient does not pay for food, shelter, utilities, clothing, or other living expenses; e.g., recipient lives with a boyfriend who pays for all living expenses.

3. Applicant or recipient who has his shelter, utilities, or other living expenses paid for by someone else outside of the household; e.g., an adult son pays for his mother's rent directly to the landlord.

4. Split household with eligible AABD recipient who has his shelter, utilities, or other living expenses paid by someone else outside of the household, e.g., MA recipient residing with MF spouse and minor children and the landlord is not charging the family any rent.

NOTE: When the applicant or recipient provides verification of rent, regardless of how small the rental amount is, there is no in-kind

[Procedural Rule]

90

[illegible] rent receipt, a [illegible], or other [illegible].

However, when the applicant or recipient rents from a parent or adult child, there is in-kind income. The countable in-kind income must be the actual value, pro rata share or PMV.

<u>Step 2</u>: When an applicant or recipient has been identified as having an in-kind income, a valuation must be placed on the in-kind income.

1. Applicant or recipient shall be given the opportunity to provide verification of the actual value of the in-kind income.

   a. The applicant or recipient must submit an itemization of the household operating expenses for the last 3 months, or if he has not lived there for the 3 months, an itemization for the period of time he has lived there.

      Household operating expenses are construed to be expenses related to running the household, such as, mortgage, rent, utilities, real property taxes, sewer charges, maintenance fees, garbage removal, etc.

   b. Determine the actual value of the in-kind income by averaging the total household expenses, dividing the total by the number of individuals in the household, less the applicant's or recipient's contributions.

   c. When it is determined that the actual value is less than the PMV, use the actual value as the countable in-kind income. However, when it is determined that the actual value is

91

[illegible] the [illegible], or the [illegible] countable in-kind [illegible].

2. When the applicant or recipient does not provide verification of the actual value of his in-kind income, use the presumed maximum value (PMV). Presumed maximum value is a standardized amount, the value of which constitutes the maximum amount which a Medicaid recipient is deemed to receive when evaluating his in-kind income. The calculation of the PMV amount involves the Federal Benefit Rate (FBR), which is the Federal portion of SSI payments for persons "living in independent arrangements". The formula to determine the PMV for individuals and couples are as follows:

Single person:

1/3 of Federal Benefit Rate (FBR) + 20 = PMV
1/3 of $314.00 + 20 = $124.67*

Couple:

1/3 of Federal Benefit Rate (FBR) + 20 = PMV
1/3 of $472.00 + 20 = $177.34*

II. Recipient Rebuttal:

When the PMV is used without calculating an actual value and the applicant or recipient disagrees with the PMV valuation, he shall be given the opportunity to rebut. Explain to the applicant or recipient that he must provide the necessary documentation to establish the actual value. The following is the rebuttal process:

Step 1: **When the individual is an applicant, he must rebut within the time limit set by the application worker.**

When the individual is a recipient, he must rebut within 5 calendar days of request for evidence.

---

* Current rate is subject to change as FBR changes.

92

When the applicant or recipient does not rebut or provide the evidence to establish actual value by the close of the 5th calendar day following the request for evidence or the time limit allowed by the worker at application, the worker shall use the PMV.

Step 2: The applicant or recipient must submit an itemization of the household operating expenses for the last 3 months, or if he has not lived there for the 3 months, an itemization for the period of time he has lived there.

Household operating expenses are construed to be expenses related to running the household, such as, mortgage, rent, utilities, real property taxes, sewer charges, maintenance fees, garbage removal, etc.

Step 3: Determine the actual value of the in-kind income by averaging the total household expenses, dividing the total by the number of individuals in the household, less the applicant's or recipient's contributions.

Step 4: When it is determined that the actual value is less than the PMV, use the actual value as the countable in-kind income. However, when it is determined that the actual value is greater than PMV, use the PMV as the countable in-kind income.

DOCUMENTATION REQUIREMENTS:

1. Document on DSSH-1241 (for applications, ERs) or DSSH-1246 (for on-going cases) discussion of PMV valuation and rebuttal process.

2. When the actual value is used, show the calculation on reverse side of the DSSH-1273A.

3. When the PMV is used, document the explanation for its use on the DSSH-1273A.

4. When the PMV is rebutted, document the verified household operating expenses and show the calculation of actual value on reverse side of DSSH-1273A.

THE FOLLOWING ILLUSTRATE EXAMPLES OF IN-KIND [illegible]:

EXAMPLE 1

An eligible recipient rents an apartment with his brother. The average household operating expenses are $300.00 monthly. The recipient contributes $50.00 for his share of the expenses and his brother pays for the remainder.

CALCULATION:

Total Household Operating Expenses	$300.00
Divided by the Number of Household Members	÷ 2
Recipient's Pro Rata Share	$150.00
Less Recipient's Contribution	- 50.00
Actual Value/Countable In-Kind Income	$100.00

$100.00 is less than the PMV ($124.67 for single person). Therefore, use the $100.00 as the countable in-kind income.

EXAMPLE 2

An eligible recipient lives with her boyfriend. The average household operating expenses are $450.00 monthly. The recipient does not contribute towards any of the living expenses.

CALCULATION:

Total Household Operating Expenses	$450.00
Divided by the Number of Household Members	÷ 2
Recipient's Pro Rata Share	$225.00
Less Recipient's Contribution	- 0
Actual Value/Countable In-Kind Income	$225.00

The PMV ($124.67 for single person) is less than the actual value of $225.00. Therefore, although the recipient may rebut, the PMV is the countable in-kind income.

EXAMPLE 3

An eligible couple lives in an apartment. Their adult daughter pays $160.00 for their rent directly to the landlord.

CALCULATION:

The actual value, $160.00, is less than the PMV ($177.34 for couple). Therefore, the actual value is the countable in-kind income.

94

EXAMPLE 4

An eligible family consisting of a MF recipient and his MF spouse and two children live in an apartment. A brother of the aged recipient pays for the entire rent of $400.00 for the family.

CALCULATION:

Total Household Operating Expenses	$400.00
Divided by the Number of Household Members	÷ 4
Recipient's Pro Rata Share	$100.00
Less Recipient's Contributions	- 0
Actual Value/Countable In-Kind Income	$100.00

Since the in-kind income is only applicable to AABD cases, single individuals and couples, apply the PMV for single person. Therefore, the actual value of $100.00 is the countable in-kind income as it is less than the PMV ($124.67).

However, when the actual value is greater than the PMV, e.g., $150.00, the PMV is the countable in-kind income.

LEGAL AID SOCIETY OF HAWAII

1108 NUUANU AVENUE
HONOLULU, HAWAII 96817

(808) 536-4302

KAHU EDWARD IOPA KEALANAHELE
President, Board of Directors

ALLENE K. RICHARDSON, ESQ.
Executive Director

March 13, 1986

Mr. Shig Nakashima
Public Welfare Administrator
Department of Social Services
and Housing
P. O. Box 339
Honolulu, Hawaii 96809

Dear Mr. Nakashima:

This letter is to request a copy of the Department of Social Services and Housing, Public Welfare Division's Procedure Manual.

In the course of providing advice and representation to clients at fair hearings, we often must interpret regulations which are be covered by sections of the Procedure Manual. In order to understand the Department's interpretation of its regulations, we need to look at the procedure section.

If the Department will loan us a copy of a Procedure Manual, we will copy it on our xerox machine and return it that same day. We also ask to be put on the mailing list for all future procedure sections.
Please contact me if you have any questions upon our request.

Sincerely,

JOHN ISHIHARA
Staff Attorney

JI:sp

cc: Thomas D. Farrell, Esq.

ORGE R. ARIYOSHI
GOVERNOR

CORINNE K.A. WATANABE
ATTORNEY GENERAL

JAMES H. DANNENBERG
FIRST DEPUTY ATTORNEY GENERAL

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
STATE CAPITOL
HONOLULU, HAWAII 96813
(808) 548-4740

March 18, 1986

John Ishihara, Esq.
Legal Aid Society of Hawaii
1108 Nuuanu Avenue
Honolulu, HI 96817

Re: DSSH Procedure Manual

Dear Mr. Ishihara:

Your letter of March 13, 1986 to Mr. Nakashima has been referred to me for reply.

The matters covered in the DSSH Procedure Manual do not affect the rights and benefits available to members of the general public. All such matters are promulgated by way of formal administrative rule-making. Therefore, contrary to your statement that, "in order to understand the Department's interpretation of its regulations, we need to look at the procedure section," you do not need to look at the procedure section to understand the Department's interpretation of its rules. Procedure sections do not interpret rules. Procedure sections merely specify procedures to be followed in implementing the rules, and give illustrative examples. The Administrative Rules are either self-explanatory and in no need of interpretation, or are interpreted by hearings officers' decisions, declaratory rulings, or action transmittals from the Secretary of Health and Human Services, all of which are available to you in the course of providing advice and representation to your clients.

Please contact me should you have further questions regarding this matter.

Sincerely,

THOMAS D. FARRELL
Deputy Attorney General

TDF/sc
cc: Mr. Shig Nakashima
Public Welfare Administrator

1338i

97

LEGAL AID SOCIETY OF HAWAII

1108 NUUANU AVENUE
HONOLULU, HAWAII 96817

(808) 536-4302

KAHU EDWARD IOPA KEALANAHELE
President Board of Directors

ALLENE K. RICHARDSON, ESQ.
Executive Director

March 25, 1986

Thomas D. Farrell, Esq.
Deputy Attorney General
State Capitol
Honolulu, Hawaii 96813

RE: DSSH Manual

Dear Tom:

I have received your reply letter of March 18, 1986. I am disappointed in your refusal to give us a copy of the DSSH Procedure Manual. We feel that the Manual will greatly assist us in providing competent legal advice to our clients regarding their rights. Often times we need to understand the Department's budgeting procedure before we can decide whether or not to represent a client at a fair hearing. Without an understanding of the procedure, we may make a mistake and do the budget incorrectly. For example, see the Catherine Rubio fair hearing on her overpayment problem, which is still pending.

It may have been wrong for me to say that the procedure section interpret rules. We only want to know what procedures are being followed by the Department whenever a rule is being applied. You know that this information will assist us and will ultimately benefit the client.

Of course, there may be disagreements on how rules should be interpreted. These disagreements will be the subjects of fair hearings, administrative appeals and lawsuits, but, I do believe we need to understand how the Department is applying its rules in order to do our job competently. In fact, having the procedure Manual may actually minimize fair hearings, administrative appeals and lawsuits. We can spot potential problems before they become full-blown disagreements, and we can negotiate solutions.

I proposed that you let us borrow a copy of your procedure Manual and we will return it to you within a day. I am making this request in the spirit of cooperation to help our clients and ultimately to assist the Department. Please let me know your feelings in this matter.

Sincerely,

JOHN ISHIHARA
Staff Attorney

JI:sp

cc: Mr. Shig Nakashima
Public Welfare Administrator

GEORGE R ARIYOSHI
GOVERNOR

CORINNE K A WATANABE
ATTORNEY GENERAL

JAMES H DANNENBERG
FIRST DEPUTY ATTORNEY GENERAL

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
STATE CAPITOL
HONOLULU, HAWAII 96813
(808) 548-4740

April 2, 1986

John Ishihara, Esq.
Legal Aid Society of Hawaii
1108 Nuuanu Avenue
Honolulu, HI 96817

Re: DSSH Procedures Manual

Dear Mr. Ishihara:

This is in further response to your letter of March 25, 1986.

As I have previously explained, DSSH procedure sections govern only the methods and not the substance of public welfare administration. They are strictly matters of internal management, and do not concern the Legal Aid Society. We believe that your request for the entire procedure manual is not for the purpose of providing legal advice to individual clients but, rather, for the purpose of filing a lawsuit to obtain a judicial declaration that all of the procedures are invalid for some reason. Needless to say, such a judicial declaration would produce chaos in the administration of public assistance programs, and could result in welfare payments to many persons who are otherwise not entitled.

Anytime you wish to have information on how the department has handled welfare matters involving one of your clients, we will be happy to provide it (even if we are unhappy, we will still provide it). If, in the course of your representation of individuals, the department interprets rules which are not clear on their face, or applies a rule in a way that is not self-evident from the rule itself, and this somehow affects the substantive rights or benefits available to your client, please bring this matter to my attention. If necessary, the Hawaii Administrative Rules may be amended to make the practice or interpretation explicit.

Nothing that concerns only the internal management of DSSH should be the subject of Hawaii Administrative Rules.

1526i

Conversely, anything and everything that directly affects the rights and benefits available to recipients should be in the rules. Given the scope and complexity of welfare programs, there will inevitably be matters that have not been specifically and explicitly covered by the Administrative Rules, and you would certainly be performing a public service to bring those matters to our attention.

Sincerely,

THOMAS D. FARRELL
Deputy Attorney General

TDF/sc

LEGAL AID SOCIETY OF HAWAII

1108 NUUANU AVENUE
HONOLULU, HAWAII 96817
MAILING ADDRESS: P.O. BOX 37375, HONOLULU, HAWAII 96837

(808) 536-4302

July 17, 1987

Mr. Robert A. Alm, Chairman
Governor's Committee on
Public Records & Privacy
P. O. Box 541
Honolulu, Hawaii 96809

Re: Call to Comment on Public Records and Privacy
Right of Welfare Recipients to Privacy

Dear Mr. Alm:

As an attorney who represents public assistance applicants and recipients on a regular basis, I have observed that there is an inconsistency between DSSH regulations governing the confidentiality of applicant and recipient records and the Department's eligibility verification procedures which often require that the individual waive his or her right to confidentiality in order to obtain or retain benefits.

Public assistance recipients in this State are often confronted with a Hobson's choice. If they disclose to landlords, employers, or relatives that they receive public assistance in order to obtain verification required by the Department, they may be subject to humiliation, as well as actual adverse impact on employment or housing. If they fail to provide the requested verification, benefits will be terminated.

State regulations governing the administration of public assistance programs establish a right to privacy for applicants and recipients. Haw. Admin. Rules § 17-601-2(c). State regulations also require that the information concerning the identity of public assistance recipients is to be kept confidential. Haw. Admin. Rules § 17-601-3(b).

The Department's rules reasonably require that applicants for assistance provide information, supported by documents, to establish eligibility. Haw. Admin. Rule § 17-618-4(a)(1). If the information provided is deemed insufficient, applicants must be given additional time to submit supplemental information. Haw. Admin. Rule § 17-618-6(h).

The rules designate the applicant as the primary source of information to meet eligibility criteria. Haw. Admin. Rules § 17-618-7(d). The information provided on the application is to be considered true unless the Department has reason to believe otherwise. Haw. Admin. Rules § 17-618-7(c). However, where the department has policies and procedures which require certain types of verification, additional documentation from other sources may be required. Haw. Admin. Rules § 17-618-7(c)(3).

Most DSSH workers are aware that they cannot make collateral contact to third persons to verify eligibility information without the express consent of the client. As a result, the applicant is told to obtain the third-party verification directly. While some workers are sensitive to the potential problems that such requests have for the applicant, many are not. Our office has seen numerous requests made for information which is irrelevant or could be obtained in such a way that it would not require disclosure that the person is on welfare.

Until recently, DSSH had a common practice of requiring recipients to have their landlords complete a form verifying household composition even though household composition was not at issue. If household composition was at issue, recipients were often not told that such information could be obtained from persons other than the landlord such as neighbors. Since many landlords will not rent to public assistance recipients, many recipients are understandably reluctant to ask their landlords to complete a DSSH form which would identify them as recipients.

The following recommendations, if adopted, would alleviate many of these concerns:

1. Workers should be cautioned during training against requesting third-party verification if the information requested has no direct bearing on eligibility (such as verification of household size when it is not at issue.

2. Administrative rules regarding verification from third-parties should be amended to provide for good cause exemptions. Where obtaining the information and thereby disclosing one's public assistance status would jeopardize employment, housing, family relations, etc., applicants or recipients should be excused from providing the verification.

3. Workers should be required to assist applicants and recipients in obtaining information in such a way that would not require disclosure of their status.

4. Verification from third-parties should not be required on Departmental forms which identify DSSH, the assistance worker or the unit in any way. The Department should accept any written statements from third-parties which provides the information.

If you or members of the committee need to discuss these concerns further, please feel free to contact me.

Sincerely,

KIRK CASHMERE
Staff Attorney

KC:bl

Enclosures

cc: Ms. Judy Ooka,
Public Welfare Administrator

§17-618-7 Requirements for disposition of application. (a) The eligibility worker shall contact the applicant through an office interview, a telephone contact, or a home visit before the application is approved.

(b) Contact with an applicant shall not be required if the application is to be denied by the department or withdrawn by the applicant.

(c) Information on the application form shall be considered completed and substantiated when the individual or the authorized representative states that the information is true and correct by signing the application form, unless:

(1) The applicant's statements do not conform to other facts in the case situation;

(2) Any part of the information furnished is found to be unclear, inconsistent, or incomplete; or

(3) The department has specific policies or procedures which require verification of facts such as income, assets, citizenship, birthdate, social security number, rental payment, and work expenses.

(d) The applicant shall be the primary source of information for establishing eligibility for financial assistance. The applicant shall also be the primary source of information to meet specific eligibility criteria of the various categories of assistance.

(e) The eligibility worker shall determine whether the applicant is eligible for financial assistance, medical assistance, and food stamps according to established departmental rules. If the financial assistance application is denied, the eligibility worker shall make a separate determination as to whether the applicant is eligible for food stamps or medical assistance. Each decision regarding eligibility or ineligibility shall be supported by facts in the applicant's case record. Each application is disposed of by a finding of eligibility or ineligibility unless the application is discontinued.

(f) An application shall be discontinued if:

(1) The applicant voluntarily withdraws the application. A notice shall be sent to confirm the applicant's notification to the department that the applicant does not desire to pursue the application; or

(2) The applicant died or could not be located. The eligibility worker's efforts to contact the absent applicant shall be recorded in the case record. [Eff. 7/19/82; am JUL 23 1984] (Auth: HRS §§346-14, 346-53) (Imp: HRS §346-29; 45 C.F.R. §206.10)

sion. The application packet may
family, or may be given to the applicant or the applicant's representative at any branch welfare office where financial assistance is provided.

(b) An applicant may be assisted in the various aspects of the application process by an individual of the applicant's choice. That individual may accompany the applicant in contacts with the department and when so accompanied, may also represent the applicant.

(c) The applicant requesting financial assistance may also apply for food stamp benefits and medical assistance on the same application form.

(d) The department shall assist the applicant by identifying the documents that are needed to support the request for assistance, and shall assist the applicant in the application process.

(e) An applicant may request a fair hearing when the applicant is not satisfied with the department's decision regarding the application. [Eff. JUL 19 1982] (Auth: HRS §§346-14, 346-53) (Imp: HRS §346-29; 45 C.F.R. §206.10)

§17-618-4 Responsibilities of the applicant.

(a) The applicant shall:

(1) Provide the department with information, supported by documents, to establish the value of the applicant's assets, the amount of income received, and monthly requirements recognized in the standard of assistance;

(2) Apply for and develop potential sources of income and assets; and

(3) Meet all of the requirements of the various categories of assistance.

§17-618-4 Responsibilities of the applicant.

***

(b) The applicant who fails to meet all of the eligibility factors, fails to cooperate with the department by providing the information and verification necessary to determine eligibility for financial assistance by department deadlines, fails to apply for and develop potential sources of income and assets, or refuses to inform the department of the amount of the unapplied for and undeveloped potential source of income and assets when known, shall be ineligible for financial assistance. [Eff 7/19/82; am JUN 7 1985] (Auth: HRS §§346-14, 346-53) (Imp: HRS §346-53; 45 C.F.R. §233.20)

§17-601-3 Restrictions against disclosure of information to persons other than applicants and recipients. (a) This section does not apply to individuals receiving social services under chapter 17-920, Administrative Rules, which have disclosure provisions applicable to those individuals.

(b) The following information shall be confidential and shall not be used or disclosed except as provided in subsection (c):

(1) Names and addresses of applicants and recipients, and amounts of assistance provided. This includes prohibition against release of information to any federal, state, or local committee or legislative body;

(2) Information related to the social and economic condition or circumstances of a particular individual, whether or not an applicant or recipient, including wage information obtained from the state department of labor or from Social Security Administration;

(3) DSSH-PWD's evaluation of recorded or unrecorded information about a particular individual, whether or not an applicant or recipient;

(4) Medical, psychological, or psychiatric data, including diagnosis and past history of disease or disability of a particular individual, whether or not an applicant or recipient;

(5) Correspondence concerning a particular individual, whether or not an applicant or recipient; and

(6) The name of the worker or unit in which the case is or was active.

(c) The use or disclosure of any of the information specified in subsection (b) shall be limited to the following persons or purposes and, unless otherwise stated, this excludes inspection of the entire case record:

(1) Disclosure for purposes directly connected with the administration of public assistance programs.

(A) Only the employees of the DSSH-PWD and the United States government in the performance of the employees' official duties shall have access to the entire case record.

(B) Disclosure shall be allowed to the extent necessary to provide services and to determine eligibility or amount of assistance for applicants or recipients under the public assistance programs identified in section 17-601-1.

recipients in the administration of public assistance programs.

(b) This information shall:

(1) Substantiate the expenditure of public funds;

(2) Be kept in confidential records and files of the DSSH-PWD; and

(3) Not be subject to any other law permitting inspection of public records.

(c) The applicant or recipient shall have a right to privacy and shall be informed in writing about the confidential nature of the information acquired, except as noted in §17-601-3(c). [Eff. JUL 19 1982] (Auth: HRS §§346-10, 346-14) (Imp: HRS §346-10; 45 C.F.R. §§205.50, 205.60, 1391.3)

§17-601-3 Restrictions against disclosure of information to persons other than applicants and recipients. (a) The provisions of §17-601-3 do not apply to individuals receiving social services under chapters 861 and 920 of title 17, Administrative Rules, which have disclosure provisions applicable to those individuals.

(b) The following information shall be confidential and shall not be used or disclosed except as provided in §17-601-3(c):

(1) Names and addresses of applicants and recipients, and amounts of assistance provided. This includes prohibition against release of information to any federal, state, or local committee or legislative body;

(2) Information related to the social and economic condition or circumstances of a particular individual, whether or not an applicant or recipient;

(3) DSSH-PWD's evaluation of recorded or unrecorded information about a particular individual, whether or not an applicant or recipient;

(4) Medical, psychological, or psychiatric data, including diagnosis and past history of disease or disability of a particular individual, whether or not an applicant or recipient;

(5) Correspondence concerning a particular individual, whether or not an applicant or recipient; and

(6) The name of the worker or unit in which the case is or was active.

(c) The use or disclosure of any of the information specified in §17-601-3(b) shall be limited to the following persons or purposes and, unless otherwise stated, this excludes inspection of the entire case record:

JOHN WAIHEE
GOVERNOR

RICHARD F. KAHLE, JR.
DIRECTOR OF TAXATION

GARY S. MIJO
DEPUTY DIRECTOR

STATE OF HAWAII
DEPARTMENT OF TAXATION
P.O. BOX 259
HONOLULU, HAWAII 96809

July 7, 1987

MEMORANDUM

TO: Committee on Public Records and Privacy
Mr. Robert A. Alm, Chairman

FROM: Richard F. Kahle, Jr.
Director

SUBJECT: Records under Department of Taxation Jurisdiction

The Department of Taxation does not favor an expanded disclosure of public and personal records maintained within its jurisdiction.

The Department is charged with the duty to levy, assess, collect, and receive the taxes imposed under the authority of chapters 235, 237 to 239, 241, 243 to 245, 236D, 237D, and 244D, Hawaii Revised Statutes (HRS). With exception of the fuel tax, the revenues from the ten taxes administered by the Department go into the state's general fund, which are used to provide the various services of state government.

While the Department is authorized under law to enforce the payment of the aforementioned taxes, the structure of our tax laws is based upon a self-assessment system. That is, the system relies on every person liable for state taxes to voluntarily report and pay the correct amount of taxes due on a timely basis.

The reporting of taxes is primarily done through the filing of tax return forms prescribed by the Department.

The financial information and identifying Social Security number contained in the tax return would result in the return being classified as a personal record under Section 92E-1, HRS. The public access to personal records is limited by Section 92E-4, HRS, which does not allow disclosure of such information except to the person to whom the records pertain, or the person's duly authorized agent, as required by other State or Federal statutes, or if the information collected was specifically for the purpose of creating a record available to the general public,

or under compelling circumstances affecting the health or safety of any individual.

Additionally, our tax laws contain specific statutory provisions that make it unlawful for any person, officer, or employee of the State to make known any information imparted on a tax return or estimate. These statutes specify that all tax returns as well the return information are confidential. The statutes also provide for sanctions against individuals who unlawfully discloses tax return information to an unauthorized person. For example, Section 235-116, HRS, of our Income Tax Law, provides for a fine of $500 and/or imprisonment of one year, or both.

It should be noted that the Internal Revenue Service has equivalent restrictions relating to the disclosure of federal tax information. The Department has an agreement with the Internal Revenue Service (IRS) that allows for the exchange of tax return information and adjustments. The agreement specifically requires the Department to conform with the confidentiality and disclosure provisions of the Internal Revenue Code, section 6103. The statute provides that tax returns and information contained in the return may not be disclosed except as authorized under this section. A departure from the disclosure restrictions of the IRS would prohibit the State's participation in the information exchange program and would deprive the Department of a vital tax administration resource.

The continued functioning of our self assessment tax system requires a faith and trust by the taxpayer that the information included on the tax returnst the taxpayer has filed will remain confidential. The statutory mechanism relating to the nondisclosure of tax return information is essential to the administration of our state tax laws and should not be altered.

Given the statutory confidentiality of the records maintained by the Department, there are limited records that are available for inspection by the general public. Currently, a file with the names and identification numbers of persons licensed for general excise and/or withholding tax purposes and a listing of the names and amounts of taxes assessed that have become delinquent, as provided under Section 231-32, HRS, are records that may be inspected by the general public.

The Department also makes available to the public, Rules and periodic information releases pertaining to the

interpretation and application of tax laws, and a monthly report of the type and amounts of taxes collected.

In conclusion, we perceive no conflict between the confidentiality restrictions of our tax laws and the need to make records available to the public.

Thank you for your kind attention.

111

UNIVERSITY OF HAWAII

Procurement and Property Management Office

June 29, 1987

Robert A. Alm
Office of the Director
Department of Commerce and Consumer Affairs
P.O. Box 541
Honolulu, Hawaii 96809

Dear Mr. Alm:

President Simone has asked that I respond to your recent correspondence regarding the Governor's Committee on Public Records and Privacy.

In response to requests from members of the general public, the University of Hawaii has endeavored to make available for inspection those University records falling within the definition of "public record" contained in Section 92-50, Hawaii Revised Statutes. Those requests for University records containing personally-identifiable information are reviewed in accordance with the disclosure limitations contained in Chapter 92E, Hawaii Revised Statutes, and additionally, in the case of student educational records, with the Federal statutory restrictions on public access set forth in the Family Educational Rights and Privacy Act (FERPA), upon which the University's receipt of Federal funding is conditioned. Certain University records may also be subject to other statutory requirements, such as those records pertaining to student loans and other financial aid information. If a request presents questions concerning disclosure under the applicable statutes, the matter is referred to the Department of the Attorney General for necessary legal interpretation and guidance.

Generally speaking, it would appear that requests for the inspection of University records by members of the general public are relatively few in comparison to those requests for records from individuals to whom the particular records pertain, such as requests for transcripts and other educational records by current and former students. While our experience would seem to indicate that most of these requests from the general public have been processed in a fairly routine manner, those requests which may have raised disputes concerning the relevant statutory disclosure requirements have to the present time been resolved by the Department of the Attorney General in a manner largely satisfactory to the University.

Thank you for the opportunity to comment on this matter. If you have any questions, please feel free to contact me at 948-8271.

Very truly yours,

Edward Yuen
Director

EY:DZ:em

University of Hawaii at Manoa

The William S. Richardson School of Law
2515 Dole Street
Honolulu, Hawaii 96822

June 12, 1987

Public Records and Privacy
P.O. Box 541
Honolulu, Hawaii 96809

Attention: Mr. Robert A. Alm, Chairman

Gentlemen:

Comment Concerning Availability of Public Records

I teach legal history at this law school. My students and I frequently require access to public records for scholarly purposes. Students have in the past reported difficulty in obtaining government documents, even those relating to events of 100 years ago, because of bureaucratic over-concern with protecting privacy. Legal records, including case files, manuscripts, government memoranda, and other documents, form the major primary source for such research. Important questions of public concern can be answered only through scholarly study of such records. For example, the current concern over the efficacy of the tort system, claims of discriminatory application of the laws, and fairness in land use proceedings are the kinds of public issues that legal scholars hope to address by studying government documents. Significant events in Hawaii's history are also illuminated by such documents.

It would be a loss to the goal of informed democratic debate should vital empirical and qualitative evidence become

114

unavailable under the guise of privacy controls. I believe it is possible to protect individual privacy while allowing scholars access to government records. Please let me know if I can provide assistance to you in this regard.

Submitted by: Mari J. Matsuda*
Assistant Professor of Law

cc: Dean Jeremy T. Harrison
Dean Deane E. Neubauer
President Albert Simone
Mr. Dan Foley, ACLU
Prof. Harry Ball

*The views expressed here are my own and not necessarily those of the University of Hawaii

OFFICE OF THE MANAGING DIRECTOR

CITY AND COUNTY OF HONOLULU

HONOLULU, HAWAII 96813 • AREA CODE 808 • 527-5754

FRANK F. FASI
MAYOR

JEREMY HARRIS
MANAGING DIRECTOR

DUKE T. KAWASAKI
DEPUTY MANAGING DIRECTOR

June 22, 1987

Mr. Robert A. Alm, Director
Department of Commerce and
Consumer Affairs and
Chairman, Governor's Committee
on Public Records and Privacy
1010 Richards Street
Honolulu, Hawaii 96813

Dear Mr. Alm:

Re: Comments Regarding the Current Laws Concerning Public Records and Confidential Records/the Right to Privacy

Thank you for this important opportunity to comment on the delicate balance between the public's right to know and the need for confidentiality and the protection of an individual's right to privacy as pertaining to records maintained by governmental agencies. This is an area of law that has a substantial impact on the public, as well as governmental agencies responding to requests for the disclosure or protection of records in its possession. I commend the Committee on Public Records and Privacy (hereinafter "Committee") for undertaking the complex, but challenging task of seeking improvements to the current state of the law.

Because of the glaring absence of any representative on your Committee from any of the Counties, I sincerely hope that your Committee will give very deep thought and consideration to the comments submitted by the various counties because the Counties are indeed very dramatically affected by these legal issues.

It is very important for the Committee to recognize that the City, like the State, maintains a wealth of records pertaining to (1) private citizens (such as tax

**Committee Members: Appendices and exhibits are with the staff.

records, vehicle registration, voter registration, complaints, autopsy reports, water consumption bills, housing assistance, arrest records, criminal records, etc.); (2) public employees (such as employment records including discipline, pay history, medical records, financial records, home address, etc.); (3) corporations (such as bid documents, tax records, license and permit applications, financial records, etc.); and (4) governmental records (such as investigation reports, strike plans, employment tests, inter- and intra-departmental memoranda, legal opinions, litigation files, employee selection records, test scores, etc.).

I would like to provide comments in three areas regarding the subject of public and confidential records maintained by governmental entities:

1. The laws currently applicable to the City and County of Honolulu (hereinafter "City") regarding public and confidential records;

2. The various contexts in which issues have previously arisen regarding public and confidential records at the City level and advice rendered by our Department of the Corporation Counsel thereon; and

3. Suggestions for changes in the current laws and a discussion of some of the pros and cons relating to such proposals.

I. LAWS GOVERNING THE CITY AND COUNTY OF HONOLULU WITH RESPECT TO PUBLIC AND CONFIDENTIAL RECORDS.

There presently are a number of laws and rules and regulations governing the City with respect to both the public and confidential records which it maintains. The laws that this Committee is probably the most familiar with are Hawaii Revised Statutes (hereinafter "HRS") Sections 92-50 and 92-51, relating to public records and HRS Chapter 92E, Fair Information Practice (Confidentiality of Personal Record).

In addition, while we recognize the superiority of the state laws in this area of the law, we nonetheless do have some provisions in the Revised Charter of the City

and County of Honolulu 1973 (1984 Edition) (hereinafter "RCH") and the Revised Ordinances of Honolulu 1978 (1983 Edition) (hereinafter "ROH") which also might be of interest to the Committee. RCH Section 13-105 provides that public records shall be open for inspection during business hours, authorizes the City Council to fix fees for copies of the records, and specifically states that records of the police department or of the prosecuting attorney shall not be subject to inspection unless permission is granted by the chief of police or the prosecuting attorney, except for traffic accident reports which are available for inspection by the parties directly concerned or their attorneys.[1]

---

[1]RCH Section 13-105 provides, in its entirety, as follows:

> Section 13-105. Records Open to the Public--All books and records of the city shall be open to the inspection of any citizen at any time during business hours. Certified copies or extracts from such books and records shall be given by the officer having custody of the same to any person demanding the same and paying or tendering a reasonable fee to be fixed by the council for such copies or extracts, but the records of the police department or of the prosecuting attorney shall not be subject to such inspection unless permission is given by the chief of police or the prosecuting attorney, except in the case of traffic accidents where such records, including all statements taken, shall be available for inspection by the parties directly concerned in such accident, or their duly licensed attorneys acting under written authority signed by either party. Any person who may sue because of death resulting from any such accident shall be deemed a party directly concerned.

ROH Sections 5-16.1 and 5-16.2, adopted in 1978, define the term "public records" and provide for the promulgation of rules and regulations, as follows:

> Article 16. Public Records.
>
> Sec. 5-16.1. Definition.
>
> The term 'public records' shall be as defined in HRS Section 92-50.
>
> Sec. 5-16.2. Storage Of Public Records.
>
> The Managing Director shall promulgate rules and regulations regarding the maintenance and storage of public records for all City agencies pursuant to HRS Chapter 91. Said regulations shall be complementary to Section 92-51, Hawaii Revised Statutes and shall provide for but not be limited to:
>
> (1) Guidelines to be utilized in determining which documents must remain confidential to prevent invasions of privacy.
>
> (2) Segregation of all public records into confidential files and files open to public inspection.
>
> (3) Maintenance of separate storage facilities for open and confidential files.
>
> (4) Listing (by title) of all records in confidential files.
>
> (5) Certification by the Corporation Counsel that each document contained in confidential files is not a public record as defined in Section 5-16.1.

In 1978, pursuant to ROH Section 5-16.2, the City's Managing Director adopted Rules and Regulations Governing the Accessibility, Maintenance and Storage of Public and Confidential Records of All City Agencies

(hereinafter "City's Rules"). (Exhibit A) Among other things, the City's Rules set forth what records shall be deemed public and confidential; the procedure governing access to public records; guidelines for the maintenance and storage of confidential records; a requirement that each City agency list by title all confidential records in its custody and a procedure for certification that each document contained in confidential files is not a public record within the meaning of HRS Section 92-50. In accordance with the mandate of ROH Section 5-16.2 and the City's Rules, the City's Managing Director keeps on file a complete listing, by each agency, of all confidential records specifying the record's title, type of confidential information involved, the reasons for its confidentiality, and when, if ever, the files should be made public.

Since the above-cited ROH sections and the City's Rules were adopted in 1978 prior to the passage of Act 226 in 1980, which was codified as HRS Chapter 92E, we recognize that the Fair Information Practice Act must be taken into consideration in determining what is a "personal record" and whether it can be released for public inspection. Attached as Exhibit B is a copy of Corporation Counsel M 83-70 (dated December 30, 1983) discussing the relationship between HRS Chapter 92E and ROH Chapter 5, Article 16.

II. ISSUES THAT HAVE ARISEN AT THE COUNTY LEVEL REGARDING PUBLIC AND CONFIDENTIAL RECORDS.

The issue regarding whether a particular document is a public record, a personal record, or otherwise confidential has arisen time and again over the years at the county level of government. When an agency needs assistance in making such a determination, a request for assistance is submitted to the City's Department of the Corporation Counsel and where necessary or warranted, a public written response is prepared. (See Exhibit C for a listing of Corporation Counsel memoranda).

For example, questions have arisen regarding the release of the following types of documents: Honolulu Police Commission's public complaint records (M 86-26, M 86-2, and M 85-3); Department of Health medical

records (M 86-28); ambulance report contents (M 85-18 and letter dated October 11, 1985); workers' compensation records (M 84-27); design/bid competition proposals (M 84-15); building permit plans prior to issuance of a permit (M 84-15); water service consumption data (M 83-13 and letter dated October 1, 1986); release of information to an individual's employer (M 86-16); certified payroll records submitted by private contractors (M 87-8 and M 85-37); investigation records relating to alleged voter irregularities (M 82-95); license applicant waiting lists (M 81-29); computer tapes (M 80-44 and M 76-47); drivers license/motor vehicle information (M 86-36 and M 79-73); names of crime victims (M 79-8); arrest records (M 79-4); Liquor Commission records (M 77-112); and voter registration affidavits (M 71-110).

Attached hereto as Exhibit D are some of the more recent Corporation Counsel memoranda which may be of interest to the Committee since one of your stated objectives is to review "judicial decisions, attorney general opinions, and other specific cases involving implementation of the current laws." (Public Records Law Review Committee Statement of Mission)

III. PROPOSALS REGARDING IMPROVEMENTS TO THE CURRENT LAWS APPLYING TO PUBLIC AND CONFIDENTIAL RECORDS.

The City recognizes the benefits to society that result in a government that is open and responsive to the public, and yet is mindful of its duty to protect an individual's right to privacy. Our current state and city laws have reflected this concern as well and, yet, it is clear from practical experience with these laws that improvements may indeed be warranted.

Of course, how to make these changes is the crucial question. We would be opposed to any type of solution that would attempt to list all public and confidential records since, as seen herein, the types of documents maintained by governmental agencies is extensive. In addition, the maintenance of records is a continual effort, subject to fluctuation with changing times and laws.

One option might be to enact uniform laws similar to the Federal Privacy Act and the Federal Freedom of

Information Act (hereinafter "FOIA"). We are aware of the fact that during the 1987 State Legislature, Senator Donna Ikeda introduced S.B. No. 286, a proposed law based on the FOIA. In concept, this is a good alternative to the current laws, although we do not agree with all of its terms and would want an opportunity to so comment if a similar bill is introduced again in the future. One major advantage to a state law based on the FOIA is that there would be a substantial body of existing analogous federal case law and guidelines available to guide the public, the governmental agencies, and the state courts.

Whether there are only modifications to the existing laws or wholesale changes, such as the adoption of a law based on the FOIA, there are certain recommendations and problem areas that I would like to highlight hereinbelow:

A. HONOLULU POLICE COMMISSION INVESTIGATIVE REPORTS.

Of particular concern to the City has been the status of the investigative reports of the Honolulu Police Commission. Pursuant to RCH Section 6-606(d), one of the responsibilities of the Police Commission is to "receive, consider and investigate charges brought by the public against the conduct of the [police] department or any of its members and submit a written report of its findings to the chief of police. A summary of the charges filed and their disposition shall be included in the annual report of the Commission."

When the Police Commission investigates a complaint, the officer and the complainant are not involved in an adjudicatory hearing. Therefore, the officer does not have an opportunity to confront and cross-examine adverse witnesses. Whether the complaint is sustained or not, the investigative report becomes a part of the officer's personnel file. In addition, the individual lodging a complaint may wish to remain anonymous throughout. These investigative reports are held to be confidential pursuant to HRS Chapter 92E, the RCH and the City's Rules. However, the City is very frequently asked to disclose these records, or served with a subpoena, to which we respond by making a motion to

quash the subpoena. We believe that then the judges should follow the procedures recently reiterated by the Hawaii Supreme Court in State of Hawaii v. James H. J. Estrada, No. 11377, ___ Haw. ___ (June 8, 1987), which discussed whether discovery of a confidential police department internal affairs division file was permissible. The Supreme Court stated as follows in Estrada:

> No absolute privilege insulates police records from discovery. A trial judge should first conduct an in camera review of sensitive police records to fix the scope of discovery on those confidential items sought. Nakagawa v. Heen, 58 Haw. 316, 568 P.2d 508 (1977). The scope of discovery is reviewed for an abuse of discretion. Kaneshiro v. Au, 67 Haw. 442, 690 P.2d 1304 (1984).

State of Hawaii v. James H. J. Estrada, No. 11377, slip op. at 15 (Haw. June 8, 1987) (emphasis added). This ruling by the Hawaii Supreme Court is probably the best resolution to the sensitive situation with respect to police commission investigative reports and internal affairs division files, as well as other confidential police department records. By first conducting an in camera review of the police records, the judge can then determine which ones, if any, are available for discovery. If the judge concludes that none of the records should be disclosed, then the motion to quash the subpoena should be granted.

B. HONOLULU POLICE DEPARTMENT RECORDS.

The Honolulu Police Department (hereinafter "HPD"), like the police departments of the other counties, maintains a large number of records. Already mentioned herein were the traffic reports and internal affairs division reports. Others include criminal investigative reports, criminal records, crime analysis records, personnel records, lists of undercover officers, informants, fingerprints, applications for permits to carry firearms, collective bargaining data, complaints from the public, FBI correspondence, medical reports, psychological testing results, custody log, booking logs, cell block visitor logs, examinations for recruits, letters from the public, safe-house records, evidence

reports and log, found property logs and reports, death reports, and the list goes on. These records are confidential pursuant to various provisions of the current laws, particularly HRS Sections 92-51, 92E-1, and 92E-3. The City is wholeheartedly in favor of keeping all of these records confidential because their disclosure could either impair the effectiveness of an investigation or law enforcement proceeding, could impair the life of an individual, result in the identification of confidential informants or complainants, reveal confidential investigative techniques, or invade an individual's right to privacy.

C. PERSONNEL RECORDS.

Another large body of records maintained by all governmental agencies consists of personnel records. Under the current laws, all personnel and employment records, employment examinations, and personal references of applicants for employment are deemed "personal records" pursuant to HRS Chapter 92E and, thus, are nondisclosable except for to whom the records pertain and under certain limited other exceptions. The City strongly supports keeping such information confidential in order to protect the individual's right to privacy since that interest far outweighs the public's right to know.

However, we are in favor of designating as public records the names, job titles, job descriptions, business addresses, and business telephone numbers of all government employees (except for HPD employees). In addition, we suggest that an employee's resume, at least with respect to previous employment and job qualifications that are relevant to the position currently held, also constitute a public record in order to satisfy inquiries from the press and public regarding an individual's qualifications to hold public employment.

Another area for consideration is whether those individuals not selected for public employment or promotion should have a right to gain access to the test scores or interview scores of the applicants actually selected for the position without resorting to a union grievance, civil service commission appeal, or a court order. There are obviously competing private

interests at play here, but we suggest that it would best serve the interests of the public if the scores of the individual(s) selected were disclosed to those not selected for the position.

Another personnel record that is confidential is an employee's rate of pay or salary. While we agree that such information should be confidential, except as otherwise provided by law with respect to certain officials, there is one instance in which governmental personnel officers constantly receive telephone calls and written inquiries to verify an employee's salary, namely, credit verification for loan purposes. Under the current law, an individual can provide the government with written authorization to release the information to a lending institution, but in practice this is either not done prior to the inquiry from the lender, or at all. It will be absolutely necessary to have the employee's written permission in the future, particularly if criminal sanctions are imposed as part of the amendments to the law.

D. DISCLOSURE OF RECORDS FOR RESEARCH OR STATISTICAL PURPOSES.

The City also maintains many confidential records that are of interest to researchers or statisticians, such as those relating to ambulance reports, crime, workers' compensation, and traffic accidents. On this level of extensive research, sanitization of the records would put an undue burden on the City and might even thwart the purpose of the research. Consequently, we suggest granting access to such records despite their confidential nature pursuant to HRS Chapter 92E, but only with explicit limitations such as those set forth in the City's Rules, Section 3-1.b.5, which provides as follows:

> 3.1. CONFIDENTIAL RECORDS DEFINED
>
> . . . .
>
> b. Unless otherwise provided herein, the granting of access to records shall not be deemed to constitute an invasion of the right of privacy of an individual when:

. . . .

> 5. The granting of access is to a person or group for the express purpose of research, evaluative or statistical activities pursuant to an agreement with the agency. The agreement shall authorize the granting of access to specific records, limit the use of any information obtained from such records to research, evaluative and statistical purposes, provide for the deletion of any personally identifiable information before publication of any information gathered, provide for prior agency review and approval of any publication, require insurance against libel, slander and invasion of privacy where deemed necessary by the agency, insure the confidentiality and security of the records consistent with these rules and applicable law, and provide sanctions for the violation thereof.

(emphasis added).

We suggest that any change to the current laws include a provision with respect to the disclosure of documents for research, evaluative or statistical purposes with constraints such as those mentioned above.

E. GOVERNMENT RECORDS.

The current laws prevent public disclosure of various government records, including, but not limited to, the police records and personnel records previously mentioned, testing or examination or scoring keys used for hiring or promotion in public employment or used to administer a licensing or an academic examination, inter- and intra-agency correspondence or memoranda, strike plans, collective bargaining records relating to negotiations, materials prepared in anticipation of litigation, child support non-payment claims, paternity claims, records identifying real estate that is being considered for public taking, trade secrets and proprietary information. The City is of the opinion that these records must continue to be confidential.

F. DISCLOSURE TO OTHER AGENCIES.

HRS Chapter 92E-5 provides that "personal records" may be disclosed to other agencies for certain enumerated reasons, and we recommend continuing to allow disclosure to other government agencies pursuant to those guidelines.

G. SANITIZATION OF RECORDS AND FEES FOR COPIES, TRANSCRIPTION, AND SEARCHES.

HRS Chapter 92E-7 permits governmental agencies to charge fees as follows:

> §92E-7 Copies. The agency may charge the individual for any copies and for the certification of any copies; provided that such charges or fees shall not exceed the actual cost of duplication or of transcription into readable or intelligible form, duplication, and searching for the record. (emphasis added).

If a law based on the FOIA is eventually adopted, in all likelihood, governmental agencies will be faced with far more inquiries for records than they receive under the current laws. The state lawmakers must be made fully aware of the fact that the normal duties of government employees will be significantly impacted by the time it takes to search for the records requested, collect the records, conduct a review by the government attorney where necessary, transcribe the records, copy the records, return the records to their proper files, write and type letters to the requesting party and transmit, perhaps by mail, the copies of the records to the requesting party. These costs can impact on the tax dollars of our citizens substantially. Thus, the City is completely in favor of, and strongly urges, the retention of a provision allowing the agencies to charge fees for the actual cost of copies, transcription, and searching for the records. The search time can indeed be significant. It may be wise to further clarify that "search time" includes the cost of the employee's wages involved. Your committee may also want to consider allowing the imposition of fees for the time of the government attorneys and for the

cost of mailing or delivering the documents to the requesting party.

Another cost of some significance that can be incurred in responding to a request for documents is that associated with "sanitizing" the records or deleting all personally identifiable information. While the state statutes do not address this issue, it is mentioned in the City's Rules, Section 3-1.b.6 as follows:

> 3-1. CONFIDENTIAL RECORDS DEFINED.
>
> . . . .
>
> b. Unless otherwise provided herein, the granting of access to records shall not be deemed to constitute an invasion of the right of privacy of an individual when:
>
> . . . .
>
> 6. All personally identifiable information is deleted from the record prior to its disclosure. Such deletion shall be made where practical and where it would not unreasonably interfere with the activities and functions of the agency.

(emphasis added).

Thus, according to the City's Rules, there is no duty to delete all personally identifiable information from a confidential record in order that it can be disclosed if the deletion process will unreasonably interfere with the activities and functions of the agency.

The City strongly encourages the Committee to recommend the inclusion of similar language in any future state laws governing public and confidential records. In addition, it would be reasonable to charge a fee for the time involved in the deletion process.

G. LIST OF CONFIDENTIAL RECORDS.

In Part II of this letter, I described a city ordinance and the City Rules which require the City's Managing Director to maintain complete lists submitted by every city agency which sets forth the confidential records kept by the agency, the reason for the records' confidentiality, and the custodian of the record, among other things. A similar requirement for the State and other Counties would greatly assist the general public.

H. PROCEDURES FOR ACCESS TO CONFIDENTIAL RECORDS.

HRS Section 92E-6 currently requires a governmental agency to respond to an individual's request for access to his or her personal record within ten working days. Twenty additional days may be allowed if the agency provides a written explanation within the initial ten days describing the "unusual circumstances" causing the delay.[2]

We submit that a ten-day period is not a very realistic timetable due to the fact that such inquiries are often sent to the incorrect agency and take days longer to be ultimately received by the correct agency. In addition, consultation with the agency's attorneys may

---

[2]HRS Section 92E-6 provides as follows:

> [§92E-6] Access to personal record; initial procedure. Upon the request of an individual to gain access to the individual's personal record, an agency shall permit the individual to review the record and have a copy made within ten working days following the date of the request unless the personal record requested is exempted under section 92E-3. The ten-day period may be extended for an additional twenty working days if the agency provides to the individual, within the initial ten working days, a written explanation of unusual circumstances causing the delay.

be necessary. We suggest either lengthening the initial ten-day period or else providing clarification regarding what constitutes "unusual circumstances" within the meaning of HRS Section 92E-6.

I. COMPUTER DATA.

The governmental agencies of the State and the Counties are fast becoming computerized. We submit that private commercial entities should not be allowed access to governmental data bases in order to completely copy them for their own commercial uses.

J. APPLICATION OF THE LAWS TO THE LEGISLATIVE AND JUDICIAL BRANCHES.

The City recommends that state and county laws governing access to, and the maintenance of, public and confidential records apply not only to the executive branch of government, but to the legislative and judicial branches as well. Currently, HRS Section 92E-1 excludes the application of the laws to the state and county legislative branches, including their respective committees, offices, bureaus, officers and employees, and to the judiciary, including the courts, and its offices, bureaus, officers and employees. The public would best be served if all three branches of government complied with the laws regarding public and confidential records, with appropriate safeguards.

K. CRIMINAL SANCTIONS.

HRS Section 92E-12 currently provides that an employee or officer may be subject to disciplinary action, including suspension or discharge, for a knowing or intentional violation of any provision of HRS Chapter 92E. The Committee should consider expanding this to include criminal sanctions as well, treating such a violation as a misdemeanor. Such an amendment is warranted, particularly in light of conduct that occurred during the 1986 election campaigns.

IV. CONCLUSION.

While the current laws concerning public and confidential records are functional, there is need for improvement. The City maintains extensive records

pertaining to (1) private citizens, (2) public employees, (3) corporations, and (4) governmental agencies. While ever striving to accommodate the public's right to know, governmental agencies must also serve to protect an individual's right to privacy. New laws which protect the rights of both interests will best serve the general public.

Thank you for allowing the City to express its opinions and provide recommendations on this vital subject.

Very truly yours,

JEREMY HARRIS
Managing Director

JH:ek

Encs.

cc: Mayor Frank F. Fasi

DEPARTMENT OF THE PROSECUTING ATTORNEY
CITY AND COUNTY OF HONOLULU
1164 BISHOP STREET, HONOLULU, HAWAII 96813
AREA CODE 808 ● 523-4511

CHARLES F. MARSLAND, JR.
PROSECUTING ATTORNEY

June 26, 1987

Mr. Robert A. Alm
Chairman of Governor's Committee
on Public Records and Privacy
P. O. Box 541
Honolulu, Hawaii 96809

Dear Mr. Alm:

Re: Comments on Current Laws Pertaining to Public Records and Privacy

In response to your request to review the current laws on public records and privacy and to report on the strengths and weaknesses of the existing provisions, the Honolulu Prosecuting Attorney's Office submits the following comments:

a. This office is primarily engaged in the prosecution of criminal offenses brought to our attention by the Honolulu Police Department, the Adult Probation Department, the D.S.S.H., the County Building Department and numerous other State and County agencies. In addition, the Honolulu Charter gives the office investigatory powers which can be exercised through the issuance of administrative subpoenas. R.C.C.H. Section 13-114.1/

Disclosure requests generally originate from four separate sources: (1) the defendant in a criminal case; (2) arrestees, suspects, and witnesses in a potential criminal case or investigation; (3) the media; and (4) other governmental agencies.

1/ An appeal from the quashing of investigative subpoenas for the financial records of Frank and Janice Cockett is presently pending before the Hawaii Supreme Court, No. 12024.

b. The public documents comprising the bulk of the prosecutor's files which are discoverable under the Rules of Penal Procedure are police and other law enforcement agency reports and court pleadings. The remaining documents in our files are attorneys work product which are not discoverable and expert witness reports which are subject to disclosure.

c. Information inputted into the criminal justice data system is for internal use among the participating agencies . The data is exempt from individual access under H.R.S. Section 92E-3. However, the remedies available for intentional violation of Chapter 92-E are limited to disciplinary action against the employee by the appropriate agency head and civil suit by the person harmed by the unauthorized disclosure. It appears that no governmental office is charged with the authority and responsibility to monitor and enforce violations. Either the County Prosecutor or the Attorney General's Office should have jurisdiction to undertake prosecution with resulting criminal penalties or civil suits to enjoin the prohibited conduct.

d. Criminal abstracts (rap sheets) are furnished by the police department and are not subject to reproduction although they can be shown to the attorney of record for the particular defendant and no one else.

e. Victim-Witness Kokua reports and memos are internal documents within the prosecutors' files and should be considered work product. But civil courts have required the disclosure of this material in civil cases arising out of criminal investigations. This places the Prosecutor's Office in a dilemma because many times the Victim-Witness Kokua's files include a copy of the presentence report prepared by the Adult Probation Office with input from Victim-Witness Kokua. In other words, civil litigants have successfully obtained confidential material under the guise of a civil court order.

f. Family Court proceedings and records are confidential and not subject to disclosure. Hawaii Family Court Rules 77 and 79; H.R.S. Section 571-84. Criminal courts have been reluctant to order disclosure of these records and proceedings even where those proceedings are relevant and material to the Circuit Court criminal proceedings. The reasons given by the Circuit Court judges display a confusion with respect to enforcing disclosure.

Although this office favors limited disclosure or qualified privilege of the documents and proceedings, we recognize this is a policy matter for the Legislature. However, the privilege should not be absolute.

g. In matters not under the Prosecutor's control, such as police internal affairs records, surveillances conducted by the police in non-related cases, intelligence gathering and traffic records relating to other cases or where the victim's and witnesses' abstracts are requested by the defendant, the courts have compelled disclosure. This forces the Prosecutor to disclose material which is privileged and private to other people without giving them the opportunity to be heard. These agencies such as H.P.D.'s Internal Affairs unit should be given the opportunity to object before disclosure is ordered.

h. The discovery rules promulgated by the Hawaii Supreme Court are so broad and vague that they allow a defendant unlimited access to virtually everthing in the Prosecutor's file whether or not they are material or relevant to the case at hand. This is a factor which often delays these cases for trial. These overly liberal rules allow a defendant to prepare his case from the prosecutor's file without any investigation of his own.

i. As a law enforcement agency we are repeatedly requested by many individuals and agencies for information contained in our files. A bright line rule must be established to prevent disclosure of confidential material to unauthorized persons and no non-relevant situations. In those cases where the office has been sued for malicious prosecution or a violation of civil rights, the courts have even been more reluctant to protect privileged information without due regard for innocent third parties. For example, police and investigative reports from non-related cases, where the same law enforcement officer has been involved, such as driving under the influence cases and cases where police brutality has been alleged come to mind.

j. The burden of disclosure placed on a Prosecutor's Office becomes more onerous each year. Our office has grown by leaps and bounds and now rivals the Attorney General in size, making it necessary to create a DUI discovery team just to deal with the huge volume and court orders generated by the broad discovery provisions. Likewise, the manhours expended and the cost of providing the material itself has increased.

Although we recognize a defendant's rights to due process, we are of the opinion that more of our records should be protected from discovery where the request appears to have little or no relevancy. We also believe that the public is entitled to know the identity of the juveniles that have been adjudicated a threat to society's safety.

A representative of this office will be in attendance on July 2nd at both 3:00 an 7:00 p.m. to answer any questions the Committee may have.

Very truly yours,

Arthur E. Ross

ARTHUR E. ROSS
Deputy Prosecuting Attorney

CITY COUNCIL

CITY AND COUNTY OF HONOLULU
HONOLULU, HAWAII 96813 / TELEPHONE 523-4000

July 22, 1987

GARY GILL
COUNCILMEMBER

Mr. Robert A. Alm, Director
Department of Commerce and Consumer Affairs
1010 Richards Street
Honolulu, HI 96813

Dear Director Alm:

My staff and I have completed a very preliminary review of the matter of public records and privacy. Some of our thoughts are as follows:

There is an area of private activity where the rights of our citizens to privacy should stand supreme. For example, in nearly all cases, what goes on between two consenting adults in their sexual relations should be protected from government intrusion.

However, there are areas which are clearly public in nature, where the people of our nation or state have decreed that there is an overriding public interest in regulation. Someone wishing to start a bank, construction company, etc., should rightly file an application with representatives of the people, namely the government.

It is my strong feeling that all such applications, memoranda, findings and papers should be fully open to the public. If there is an overriding public interest in requiring the regulations of such activities, then there is an equal public interest to assure that all papers associated with such regulations should be open for review by our citizens.

There may well be exceptions to this general rule. For example, a police informer, fearing for his life, could request that any of his communications remain confidential. An argument can be made to keep such papers secret. However, in light of the "Contra-gate" revelations, I think it is clear that there exists great danger for our government and our country should we allow the realm of public policy be invaded by private or secret interests.

I would be more than happy to review specific proposals in some detail. I hope that the above general thoughts are of help at this time.

Thank you very much.

Sincerely,

GARY GILL
Councilmember

GG/lm

DANTE K. CARPENTER
MAYOR

RONALD IBARRA
CORPORATION COUNSEL
TELEPHONE NO. (808) 961-8251

COUNTY OF HAWAII
OFFICE OF THE CORPORATION COUNSEL
25 AUPUNI STREET
HILO, HAWAII 96720

June 26, 1987

The Governor's Committee on
Public Records and Privacy
P. O. Box 541
Honolulu, Hawaii 96809

Attention Mr. Robert A. Alm, Chairman

Gentlemen:

The following are the comments, in the form of responses to questions posed in your June 17, 1987 letter, of the County of Hawaii, Office of the Corporation Counsel, on the present laws on public records and privacy, primarily chapter 92, part V, and chapter 92E, HRS.

1. What public records within your possession are presently available to the public versus confidential?

Upon request, we have advised various departments that all written entries made by employees and officials and documents filed with the department constitute public records. We have advised that communications between our office and the department are confidential as they are within the attorney-client privilege (A.G. Op. No. 75-7). License applications and rosters of licensees which contain identifying information in addition to the licensee's names are confidential. Motor vehicle registrations are likewise confidential. However, it is our understanding that motor vehicle registrations have been released upon presentation of a subpoena. Although a subpoena is issued under the auspices of the court, the fact that an attorney can issue a subpoena without any finding by a court that there is a compelling state interest for disclosure is problematic.

2. How do current statutes help or hinder the availability or confidentiality of these records?

The treatment in two separate chapters of "public records" and "personal records" is confusing.

Also, the statutes do not set forth the extent of the agency's responsibility to provide access to public records when "personal records" are part of the public record. The Attorney General, in A.G. Op. No. 84-13 stated that rosters containing only names of licensees are disclosable, on the ground that they were collected and maintained specifically for the purpose of creating a record available to the general public. HRS §92E-4(2). The opinion states that addresses and telephone numbers of licensees are "personal records" and, therefore, not disclosable to the general public. The question remains whether the agency must produce rosters with names only in order for the public to have access to this information.

3. What records presently available should be confidential, and vice versa?

The exception to disclosure of public records when such records pertain to the preparation of the prosecution or defense of any action or proceeding, "prior to its commencement," should also apply after litigation has been commenced. The parties to the litigation should be required to observe the discovery rules in order to obtain opposing parties' records.

4. The impact of keeping confidential the records which are material to a lawsuit will be on the remaining general public since they will not have access to these records during the pendency of the lawsuit.

Additionally, on inquiring of the various County of Hawaii departments whether they are having problems complying with requests from the public, the responses were generally in the negative.

Very truly yours,

RONALD IBARRA
Corporation Counsel

SAK:h

POLICE DEPARTMENT
COUNTY OF HAWAII
349 KAPIOLANI STREET
HILO, HAWAII 96720

GUY A. PAUL
CHIEF OF POLICE

WAYNE G. CARVALHO
DEPUTY CHIEF

OUR REFERENCE

YOUR REFERENCE

June 23, 1987

Robert A. Alm, Chairman
Governor's Committee on Public
Records and Privacy
1010 Richards Street
Honolulu, Hawaii 96813

The current laws relating to public records have clearly defined the permissible access to and the restriction of the records kept by our department. Sections 92E-4 and 92E-5 safeguard the individual's right to privacy.

We have not experienced functional difficulties in complying with Chapter 92E of the Hawaii Revised Statutes.

Should you desire further information, please contact Captain William S. Perreira of our Administrative Services Division at 961-2262.

GUY A. PAUL
CHIEF OF POLICE

Glenn W. Todd

GLENN W. TODD
INSPECTOR
ADMINISTRATIVE BUREAU

WSP/fk

JON R. ONO
PROSECUTING ATTORNEY

JAY T. KIMURA
FIRST DEPUTY
PROSECUTING ATTORNEY

KONA OFFICE
CAPTAIN COOK
HAWAII 96704
PH. 323-2658

COUNTY OF HAWAII

OFFICE OF THE PROSECUTING ATTORNEY
34 RAINBOW DRIVE
HILO, HAWAII 96720
PH. 961-0466

July 1, 1987

Robert A. Alm
Director
Commissioner of Securities
Dept. of Commerce and Consumer Affairs
P.O. BOX 541
Honolulu, HI 96809

RE: Governor's Committee on Public Records and Privacy

Dear Mr. Alm:

Thank you for giving us the opportunity to comment. We have been concerned with the confidentiality of public records and privacy.

Needless to say, we feel very strongly that our records, decisions and work products should be considered confidential and discloseable only with a court order. There are no uniform standards or rules indicating clearly what is confidential at this time.

Currently we disclose records when requested by defense counsels in routine discovery for trials. We also would disclose any records that are requested by individuals as long as it is within the statutory mandates. Ongoing investigations are not disclosed for obvious reasons.

The rules of penal procedure requiring the disclosure of certain materials in our possession have already caused staffing problems. Additional disclosures will be an overbearing burden upon the staff.

Thank you again for this opportunity to comment. If we can be of further service, please do not hesitate in calling.

Sincerely,

JON R. ONO
Prosecuting Attorney

JRO:ph

STEPHEN K. YAMASHIRO
Chairman & Presiding Officer

COUNTY COUNCIL
County of Hawaii
Hawaii County Building
25 Aupuni Street
Hilo, Hawaii 96720

July 22, 1987

Mr. Robert A. Alm, Director
Commission of Securities
Department of Commerce and Consumer Affairs
P. O. Box 541
Honolulu, HI 96809

Dear Mr. Alm:

Thank you for allowing the Hawaii County Council to participate in your Committee's assignment to review current laws regarding public records and privacy. We offer the following comments as experienced by the office of the County Clerk, custodian of the County Council's records:

(1) Minutes - HRS 92-9(b) requires that minutes of "Boards" shall be public record and shall be available within thirty days after the meeting.

We are experiencing with recurring frequency problems meeting this thirty-day deadline. Reasons for this situation may be attributed to recent legislative mandates which require public statements, more citizens and organizations willing to participate in the lawmaking process, more litiguous people going after county funds, and basically a general growth of the populace along with a commensurate increase in the council's duty to address new concerns that come with growth. As such, we recommend the following choices by priority for consideration:

(a) Council committees, which are purely advisory with the exception of the Executive Committee, be excluded from providing written minutes, provided that the committee reports include the legislative

COUNTY COUNCIL
County of Hawaii
Hawaii County Building
25 Aupuni Street
Hilo, Hawaii 96720

intent of the discussion of each subject. All other provisions of the Sunshine Law would be applicable and complex matters such as budgets, fee setting, and other meetings deemed important may, upon the council's direction or set by their rules of procedure, be required to keep written minutes; or

(b) Council committees be allowed the option to keep written minutes or a recording of all meetings, provided that if both written minutes and a recording of the meeting are available, the written minutes shall be the official record of the meeting; or

(c) Amend HRS 92-9(b) to increase from thirty to sixty days the time allowed to provide minutes.

Pending before the Fourteenth State Legislature are SB 165 and companion HB 243 which could be used as vehicles to attain some of these proposals.

(2) In elections, the Affidavit on Application for Voter Registration has been deemed to be public record. This document contains the applicant's name, address, birthdate, social security number, and telephone numbers (home, business or unlisted). We believe all of this information should not be public information until such time as it is converted and compiled into our official voter registration list. This is published soon after close of registration, which is thirty days prior to each election. Candidates desiring this information basically have access to service bureaus to rent through the counties the use of voter registration tapes.

Absentee voter applications are also deemed public record. Many candidates or their representatives constantly scan through these documents in their efforts to solicit these voters. Our problem is there is (1) competition for the use of this file by our staff who may be processing it and candidates wanting to see it; (2) there is no space in our office to accommodate public viewing during this period and it is disruptive to our operations when allowed. Making copies of these applications to accommodate certain campaign committees is a solution, but it increases our expenses and is again disruptive to our more important election tasks. We recommend that these absentee voter applications not be classified as public documents.

COUNTY COUNCIL
County of Hawaii
Hawaii County Building
25 Aupuni Street
Hilo, Hawaii 96720

Should you have any questions on the recommendations contained herein, our County Clerk Mr. R. B. Legaspi will be able to respond to your inquiry.

Stephen K. Yamashiro
COUNCIL CHAIRMAN

xc: County Clerk

TONY T. KUNIMURA
MAYOR

DAVID P. PENHALLOW
ADMINISTRATIVE ASST

OFFICE OF THE MAYOR
4396 RICE STREET
LIHUE, KAUAI, HAWAII 96766

June 23, 1987

Chairman Robert A. Alm and
Members of the Governor's Committee
on Public Records and Privacy
c/o Department of Commerce
and Consumer Affairs
P. O. Box 541
Honolulu, Hawaii 96809

Dear Chairman Alm and Committee Members:

Re: Public Hearing Testimony on the
Disclosure of Public Records

Thank you for the opportunity to relay the County of Kauai's concerns regarding the disclosure/nondisclosure of public records.

As a municipality, the County of Kauai is necessarily charged with the responsibility of maintaining both personal and public records. The difficulty often lies in distinguishing between the two for purposes of disclosure to other persons or agencies.

Examples of records deemed private by the County include driver licensing, motor vehicle registration, parks' permits, police reports, criminal computer printouts, and personnel records. Public records include information on real property taxes, voter registration, building permits and planning applications. The problem here is twofold: (1) A person or agency who is denied access to any of the "private" records may, in some instances, obtain the same information from the "public" records. (2) As between agencies, there is often much hesitation as to the appropriateness of disclosing information received for one purpose and disclosed for another purpose.

Pursuant to Chapter 92E, Hawaii Revised Statutes, "personal records", as defined in Section 92E-1, H.R.S., may not be disclosed to any person other than the individual to whom the record pertains nor to any agency. However,

pursuant to Section 92E-5(3), H.R.S., any request that "reasonably appears to be proper for the performance of the requesting agency's duties and functions" may be disclosed. Furthermore, pursuant to Section 92E-4(2), H.R.S., most records can be construed as conceivably containing data or information that should be available to the public. The effect, therefore, is to "dilute" the clear intent of Chapter 92E, H.R.S., which is to protect the privacy of individuals.

In our opinion, the statutes, as presently worded, allow for much discretion on the part of the County agencies. While it is, of course, necessary for the statutes to be broad enough to encompass most situations, Sections 92E-4 and 92E-5, H.R.S., favor the availability of private records rather than promote the confidentiality of such records. While this does simplify the decision on the part of the County by protecting the County when disclosure is made, we are most concerned about the true intent of Chapter 92E, H.R.S., which is to preserve the confidentiality of private records.

On the other hand, Section 92E-11, H.R.S., provides the civil remedies available to an individual whenever an agency fails to comply with the provisions of Chapter 92E, H.R.S. While the penalties apply only when an agency knowingly or intentionally violates a provision of Chapter 92E, H.R.S., a good faith immunity clause would protect the County agencies when the decision to disclose or not disclose becomes a judgment call on the part of the administrator.

In summary, we recognize the ever-present conflict between the public's right-to-know and the individual's right-to-privacy. What we would like to see is legislative relief from the present conflicting statutes or, alternatively, added protection to our agencies that are left with much discretion in determining which records can be disclosed.

Thank you for your time and consideration.

Respectfully submitted,

TONY T. KUNIMURA
Mayor, County of Kauai

AIEA GENERAL HOSPITAL ASSOCIATION
P. O. BOX 451
Aiea, Hawaii 96701

June 25, 1987

Governor's Committee on Public Records and Privacy
c/o Mr. Robert A. Alm, Chairman
P. O. Box 541
Honolulu, Hawaii 96809

Dear Sir:

PEARLRIDGE HOSPITAL MEDICAL RECORDS

This is with reference to medical records now in custody of the Aiea General Hospital Association. These records originated from Pearlridge Hospital/Leeward Hospital. Pearlridge Hospital is now defunct having ceased all hospital operations in November 1982.

The Aiea General Hospital Association now maintains a scholarship trust administered by the Hawaiian Trust Company and does not operate as a health-care provider. Since the medical records are still in our custody, we are paying a storage fee of approximately $80.00 per month to Bekins Record Storage Company located on Kam Hwy.

The State laws, Sec 622-58, requires that medical records be kept for 25 years. Before long, the Aiea General Hospital Association, a voluntary entity, will not be able to finance storage charges. The State Department of Health should be directed to receive these records and also be asked to set up rules for the orderly transfer of these important medical documents.

Sincerely yours,

Shizuo Onishi
President

SO:jb

AMERICAN ASSOCIATION OF UNIVERSITY WOMEN

HAWAII STATE DIVISION

Committee on Public Records and Privacy
Mr. Chairman and Committee Members:

Thank you for this opportunity to testify.

I am Martha Black, State Legislative Chair for the American Association of University Women. AAUW has seven branches and members on all islands. At state convention in April our members voted to continue AAUW support for sunshine laws. AAUW urges this committee to recommend measures that will maintain a reasonable balance between personal privacy and what the public is entitled to know.

First, there is need to make it clear that in the interest of open government, all records held by state and county governments must be accessible to the public except for specific legal exceptions which should be clearly spelled out in language easily understood by both the public and bureaucracies.

Second, There is need for mechanisms to provide for appeal and dispute resolution as well as a means of obtaining correct information from the attorney general's office or other designated authority.

Third, AAUW recognizes that the privacy of an individual is directly affected by the collection, maintenance, use and dissemination of personal information by state and city-county agencies and therefore the legislature should regulate these activities. However, regulation should not deprive the public of its right of access to information about the background and actions of individuals or government agencies who are accountable to the public because they are doing the public's business. It is self-evident that those who choose to act in the public arena must bear public scrutiny.

Last, the public should have access to any relevant information which thanks to tax supported modern technology, all levels of government collect and maintain. Rather than institutionalizing secrecy by passing restrictive legislation, the state needs to reinforce sunshine law and open government, and depend on legal and constitutional means to protect against infringement of privacy rights by individuals, organizations and government.

It seems appropriate for this committee to not only pass your recommendations on to the governor but to the president of the senate and the speaker of the house as well.

Thank you for taking on this important assignment.

Martha Black

Martha Black, State Legislative Chair
American Association of University Women, Hawaii Pacific Div.
June 31, 1987

BIG ISLAND PRESS CLUB

P. O. BOX 1920 ★ Hilo, Hawaii 96721

July 21, 1987

Mr. Robert A. Alm, Chairman
Governor's Committee on
Public Records and Privacy
P. O. Box 541
Honolulu, HI 96809

Dear Chairman & Committee Members:

Thank you for the opportunity to present testimony on public records and privacy laws. Members of the Big Island Press Club regret being unable to attend your public hearings in Hawaii County, but many of us were tied up on work assignments.

The Big Island Press Club is a non-profit organization comprised of some 100 members directly involved in the media or interested in First Amendment rights and open government issues.

During the late 1960s, the Press Club was formed with an initial purpose of pushing for an open meeting provision in the Hawaii County Charter. This goal was accomplished, and later the Press Club helped with lobbying efforts for a State Sunshine Law.

The Press Club has, on a few occasions, gone to court over open meeting disputes. The club has never lost an open meeting case.

Members of the Press Club also spoke before the State Senate Judiciary Committee when the Privacy Law was being drafted.

Our concern now and at that time was that while such laws may be well intentioned, they tend to having a chilling effect on the release of information to the public.

It was our understanding that the purpose of a Privacy Law as outlined at the 1978 Constitutional Convention was to prevent the government from keeping secret files on its citizens. But we believe the law has at times been used to keep information about government from the public.

The privacy Law has caused some confusion among well meaning government employees who are uncertain about what information should be released and what information should be kept confidential.

The Press Club believes there is a sound basis for keeping personnel records concerning the privacy of an individual

confidential. But we believe the individual has a right to see these records and should have the option of releasing this information to the public as he/she sees fit.

This is the same concept that was used to draft the Hawaii County Charter open meeting provision which says meetings of county boards, commissions or agencies can only be closed when personnel matters are being discussed, and only at the request of the individual involved.

We believe the state should follow the same principle. We see no need for the State Board of Education, the University of Hawaii Board of Regents or any other county or state board to meet privately prior to a public meeting.

We believe the public has a right to know about the decision-making process as well as the official, on-the-record vote of government boards and commissions.

As a starting point in opening records, the committee might consider the initial purpose of H.B. 250, H.D. 2, S.D. 2 relating to Fair Information Practice, which was considered at the last session of the Legislature, but died in conference committee.

The Press Club concurred with the section that would release resumes of elected and appointed public officials, and the release of information relating to compensation, job title and job description, business address and telephone number, education and training background, previous work experience or dates of first and last employment of present or former officers or employees of any public agency.

This section was supported by House Judiciary Chairman Wayne Metcalf.

The Press Club opposed a section added to the bill by Senate Judiciary Committee Chairman Clayton Hee which would have made it a misdemeanor to intentionally release any "records obtained or maintained for law enforcement purposes...records specifically resulting from hearings closed to the public... or...confidential communications from an employee or officers to any other persons."

First of all, as Metcalf pointed out, this second section was contrary to the Whistle Blowers bill passed last session.

And the Press Club further noted that a similar measure was passed by the Legislature in the mid-1970s. It prohibited law enforcement officials from releasing certain information about crimes. The result of the law, Act 45, was that virtually no information about crime in Hawaii County was released. Our police chief, Guy Paul, followed the exact letter of the law. He believed that, according to the law, he and his officers could be charged with a misdemeanor crime if they released information.

The Honolulu Police Department took a more open stance, and in most cases, released information about crimes which was felt to be for the public good.

A year after Act 45 was passed by the Legislature, it was repealed following testimony from the Big Island Press Club and the Honolulu Police Department. Both organizations favored repeal.

We mention this because of the prolonged, chilling effect this type of legislation has on the release of information. When government officials are uncertain what information should be released, the tendency is to withhold information.

A specific problem has occurred in the Hawaii County Police Department about the release of the exact location of crimes. A few years ago, there was a shooting homicide at a hotel parking lot in Keauhou, Kona. It took reporters several hours to verify where the shooting had occurred because police were unwilling to release the exact location, apparently in an effort to protect the Keauhou Beach Hotel. We, of course, believe the public has a right to know where a murder occurs.

Police still seem to be somewhat uncertain about what criminal activity information should be released.

Another problem in writing about crime occurs when there are multiple defendants in a Grand Jury indictment. There are instances when one defendant has been served, has pleaded and been sentenced, but the file is not released because there are other unserved defendants named in the indictment.

There also is confusion in our county about when meetings can be closed. This confusion generally centers around when a board or commission can confer in secret with the Corporation Counsel. Some attorneys believe a board or

commission can meet privately on any matter with the Corporation Counsel. We do not agree, and are now in the process of trying to resolve this question administratively with Corporation Counsel Ronald Ibarra.

Our position is that a meeting can only be closed to the public when the privacy of an individual is being discussed, and only at the request of the individual. Although this is a more "open" position than is stated in the State Sunshine Law, it follows the open meeting provision in the Hawaii County Charter. And, there is an amendment to the State Sunshine Law, which says that when there are conflicts between the Sunshine Law and county laws, the more open law prevails. This amendment has been upheld by Circuit Judge Ernest Kubota.

The Press Club realizes the courts also would likely uphold a closed meeting for government officials to consult with the Corporation Counsel on pending lawsuits. Although this type of closed meeting is not permitted under the County Charter, we have not challenged the government's right to do this.

In conclusion, we hope your committee will follow a general guideline - the purpose of a Privacy Law is to prevent the government from maintaining secret records on citizens, and is not for the purpose of closing off information about government to the public.

If you have any specific questions or need further information, please call us at 935-6621 or write to the Big Island Press Club, P. O. Box 1920, Hilo, Hawaii 96721.

Sincerely,

Marcia Reynolds

Marcia Reynolds
Vice President
BIG ISLAND PRESS CLUB

COMMON CAUSE/HAWAII

250 S. Hotel St., Rm. 209, Honolulu, HI 96813 Tel: 533-6996/538-7244

TESTIMONY ON PUBLIC RECORDS AND PRIVACY

presented by Terry Boland on behalf of Common Cause/Hawaii

GOVERNOR'S COMMITTEE ON PUBLIC RECORDS AND PRIVACY

Common Cause/Hawaii has long been concerned with the need to balance the public's right of access to information, with the need to protect the individual from government intrusion into his personal life. The membership of Common Cause/Hawaii debated this issue at great length at our June 27,1987 meeting. Our position is that, when the public interest in disclosure outweighs the private interest, that information must be available to the public.

Common Cause/Hawaii recognizes that individuals must be secure from the collection and dissemination of secret, incorrect, inaccessible, irrelevant or unverified personal data compiled by government agencies. The government must be held accountable by its citizens for the control, collection and use of such data. Only that information necessary to the operation of an agency as required by statute should be collected. Individuals should have access to their own files, and be given the opportunity to correct misinformation. However, the presumption should be that all government records, with certain clearly justified exceptions, are open to the public. Personal records in which there is no public interest would be one of those exceptions.

Common Cause/Hawaii feels very strongly that the public does have an interest in the performance of its public officials. When an individual chooses to accept employment with any government agency, that individual must also accept a higher level of public accountability. The public has a legitimate interest in the qualifications, financial interests and behavior of those in positions of public trust.

The "right to privacy" must not be so broadly interpreted as to interfere with the disclosure of information which clearly ought to be available to the public. Only those records which, if disclosed, would constitute a, "clearly unwarranted invasion of personal privacy", should be confidential. Common Cause/Hawaii urges this committee to adopt recommendations which would ensure that those public records necessary to an informed citizenry be made readily accessible.

On behalf on Common Cause/Hawaii, I would like to thank the members of this committee for the time they are devoting to the deliberation of this most important issue.

# # #

EQUIFAX SERVICES
SUITE 602, HK BUILDING
820 MILILANI STREET
POST OFFICE BOX 176
HONOLULU, HAWAII 96810
808 537-9531

July 2, 1987

Mr. Robert A. Alm, Chairman
Governor's Committee on Public Records and Privacy
P. O. Box 541
Honolulu, Hawaii 96809

Re: HAWAII GOVERNOR'S COMMITTEE ON PUBLIC RECORDS AND PRIVACY

Dear Mr. Alm:

Equifax Services, Inc., provides information services and systems for consumer initiated financial transactions. We have been doing business in Hawaii since 1924, employ a staff of 40 in three cities around the state and have an annual payroll close to $600,000. Our customers include insurance companies, financial institutions, governmental agencies and retail merchants who are evaluating applicants plus many businesses seeking employees for positions of trust. These customers have a need for information about persons who have applied for,or may otherwise enter into a business transaction with them. We are classified as a consumer reporting agency as defined under the federal Fair Credit Reporting Act, (15 U.S.C. 1681--1681t). Under this law we are restricted as to the purposes for which we may make a consumer report. The restrictions help insure that information on an individual is reported only in connection with legitimate business transactions.

One of our services involves public record data. Our role is to obtain the requested record and to send it to our customer. We do not make any determination as to the value of the record, since only our customer can decide that based upon the current transaction.

We feel a good definition of public records is that they are publicly maintained government records which are generally available to the public except to the extent that they relate to extremely private matters. Examples might be medical records or perhaps juvenile court records. We favor the availability of public records in order to give the decision maker we serve as much information as possible to protect the public by issuing only appropriate credit, insurance at proper rates, and by avoiding putting impositions of sensitive employment rules who would defraud or even physically injure members of the public. We are also concerned that any record deemed to be a public record be truly public and, in fact, be available to all individuals and businesses, such as ours.

Thank you for the opportunity of expressing our Company's position to your committee. I will be pleased to be of assistance in answering any questions and or be of assistance in your further studies as you continue your hearings.

Yours truly,

Ronald F. Taylor
General Manager

RFT:JA

GREEN, NING, LILLY & JONES

Attorneys at Law, A Law Corporation
Suite 1100, Pauahi Tower, 1001 Bishop Street, Honolulu, Hawaii 96813
(808) 528-1100

Howard R. Green
Ke-ching Ning
Michael A. Lilly
Stephen A. Jones

MAILING ADDRESS
P.O. Box 3439
Honolulu, Hawaii 96801

June 24, 1987

Mr. Andrew I. Chang
P. O. Box 2750
Honolulu, Hawaii 96840

Re: Governor's Ad Hoc Committee on Public Record

Dear Mr. Chang:

In view of your interest in the problems regarding the right to privacy law in Hawaii, I am enclosing a copy of the Opening Brief I have filed with the Hawaii Supreme Court in S.P. No. 86-0371. This document relates to the privacy and public disclosure law, and is forwarded for your review and consideration.

If you have any questions, or would like to discuss this further, please feel free to contact me.

Yours very truly,

MICHAEL A. LILLY

MAL:pah
Enclosure
cc: Walter T. Oda

NO. 12094

IN THE SUPREME COURT OF THE STATE OF HAWAII

PAINTING INDUSTRY OF HAWAII MARKET RECOVERY FUND Plaintiff-Appellant vs RUSSELL NAGATA, DIRECTOR OF COMMERCE AND CONSUMER AFFAIRS and STATE OF HAWAII Defendants-Appellees	CIVIL NO.: S.P. 86-0371 APPEAL FROM THE: ORDER GRANTING MOTION FOR RECONSIDERATION AND DENYING MOTION TO STRIKE, FILED MARCH 6, 1987 FIRST CIRCUIT COURT HONORABLE RICHARD Y.C. AU Judge

OPENING BRIEF OF APPLICANT-APPELLANT PAINTING INDUSTRY OF HAWAII MARKET RECOVERY FUND

APPENDICES

CERTIFICATE OF SERVICE

MICHAEL A. LILLY 1681
GREEN, NING, LILLY & JONES
1100 Pauahi Tower
1001 Bishop St.
Honolulu, Hawaii 96813
Telephone: (808) 528-1100

Attorneys for Plaintiff-Appellant PAINTING INDUSTRY OF HAWAII MARKET RECOVERY FUND

TABLE OF CONTENTS

	Page(s)
TABLE OF AUTHORITIES	iii
A. Cases	iii
B. Constitution	v
C. Statutes	v
D. Other	v
GROUNDS FOR JURISDICTION	1
STATEMENT OF THE CASE	1
A. Introduction	1
B. Underlying Facts	2
C. The Orders of the Lower Court	3
STATEMENT OF POINTS RELIED UPON	4
STANDARD OF REVIEW	6
STATEMENT OF QUESTIONS PRESENTED	6
ARGUMENT	7
A. CHAPTER 92 SHOULD BE BROADLY CONSTRUED TO FURTHER ITS DOMINANT POLICY FAVORING DISCLOSURE OF PUBLIC RECORDS	7
1. Chapter 92 Establishes a Broad Policy of Disclosure	7
2. Because of this Broad Policy of Disclosure, a Government Agency has the Burden of Proving that a Particular Record Should be Withheld from Disclosure	10

3. Chapters 92 and 92E Should be Liberally Construed in Favor of Disclosure . . . 12

4. The Limitations to Disclosure under Chapters 92 and 92E should be Narrowly Construed 13

5. In Determining Whether a Particular Record Sufficiently Implicates a Privacy Interest to Shield it from Disclosure, Courts Should Weigh the Public Interest against the Privacy Interest and Permit Disclosure Unless the Private Information is "Highly Offensive" 14

6. Mere Speculation about the Effects of Disclosure will not be Sufficient for an Agency to Meet its Burden of Proof 17

B. THE SETTLEMENT IS A PUBLIC RECORD, THE RELEASE OF WHICH WILL IMPLICATE MINIMAL PRIVACY INTERESTS AND WILL FURTHER SUBSTANTIAL AND IMPORTANT PUBLIC INTERESTS IN THE PROPER DISCHARGE OF GOVERNMENT REGULATORY ACTIVITIES 18

1. The Settlement is a Public Record Involving Important Government Activities Justifying Public Scrutiny 18

2. The Settlement Does Not Implicate a Sufficient Privacy Interest to Outweigh the Countervailing Public Interest in Disclosure 20

CONCLUSION 24

STATEMENT OF RELATED CASES

APPENDICES:

Appendix A: Order Allowing Inspection of Certain DCCA Records (entered January 5, 1987)

Appendix B: Order Granting Motion for Reconsideration and Denying Motion to Strike (entered March 6, 1987)

TABLE OF AUTHORITIES

A. Cases

Arieff v. Dep't of the Navy, 712 F.2d 1462 (D.C. Cir. 1983) 18

Associated Dry Goods Corp. v. NLRB, 455 F.Supp. 802 (S.D.N.Y. 1978) 23

Board of Police Commissioners v. Freedom of Information Commission, 470 A.2d 1209 (Conn. 1984) 13

Church of Scientology v. United States Dep't of the Army, 611 F.2d 738 (9th Cir. 1979) . 6

City of Hartford v. Freedom of Information, 518 A.2d 49 (Conn. 1986) 11, 13

Dep't of Air Force v. Rose, 425 U.S. 352 (1976). passim

Ditlow v. Schultz, 517 F.2d 166, 170 (D.C. Cir. 1975). 21

Doe v. Sears, 263 S.E.2d 119 (Ga. 1980). . . . 22

Environmental Protection Agency v. Mink, 410 U.S. 73 (1972). 10, 17

Getman v. NLRB, 450 F.2d 670, 674-75 (D.C. Cir. 1971) 21

Hubert v. Harte-Hanks Texas Newspapers, Inc., 652 S.W.2d 546 (Tex. App. 1983) . . . 15

Heights Community Congress v. Veterans Administration, 732 F.2d 526 (6th Cir. 1984). 16,17,23

In Re Request of Rosier, 717 P.2d 1353, (Wash. banc 1986) . . . . . passim

Intern B. of Elec. v. U. S. Department of H. & U. Dev., 593 F. Supp. 542 (D.D.C. 1984) 10, 22

Kilroy v. N.L.R.B., 633 F.Supp 136 (S.D. Ohio 1985). . . . . passim

Kiraly v. FBI, 728 F.2d 526 (6th Cir. 1984). . . 16

Konigsberg v. Coughlin, 501 N.E.2d 1 (N.Y. 1986) 11, 12

Laborers Intern., Etc. v. City of Aberdeen, 642 P.2d 418 (Wash. App. 1982). 9,11,12

Madeira Nursing Center, Inc. v. NLRB, 615 F.2d 728 (6th Cir. 1980). 16

Maher v. Freedom of Information Commission, 472 A.2d 321 (Conn. 1984) 13

Mid-America Television Co. v. Peoria Housing Auth., 417 N.E.2d 210 (Ill. 1981). 22

Miller v Bell, 661 F.2d 623 (7th Cir. 1981). . . 23

Molokoa Village Development Company, Ltd. v. Kauai Electric Company, Ltd., 60 Haw. 582 (1979). 6

Nat. Ass'n of Retired Federal Employees v. Horner, 633 F.Supp. 1241 (D.D.C. 1986). . . 17,21,23

Penokie v. Michigan Tech. Univ., 287 N.W.2d 304 (Mich. 1979) 22

Poss v. NLRB, 565 F.2d 654 (10th Cir. 1977). . . 23

Robbins Tire & Rubber Co. v. NLRB, 563 F.2d 724 (5th Cir.), rev'd on other grounds, 437 U.S. 214 (1978) 23

State Employees Association v. Department of Management and Budget, 404 N.W.2d 606 (Mich. 1987). 21

Van Bourg, Allen, Weinberg & Roger v. NLRB, 751 F.2d 982 (9th Cir. 1985). 14, 21

Washington Post Co. v. Department of Health and Human Services, 690 F.2d 252 (D.C. Cir. 1982) 10

Wilkinson v. F.B.I., 633 F.Supp. 336 (C.D.Cal. 1986) . . . . . passim

B. Constitution

Article I, Section 6, Hawaii Constitution. . . . 15

C. Statutes

H.R.S.:

Chapter 92 . . . . . passim

§92-1 8

§92-50 . . . . . passim

§92-52 2

§92E-1(3) . . . . . passim

§§602-5 and 641-1 1

Conn. General Statutes §1-19(b)(2) 13

5 U.S.C. §552(b)(7)(C) (1982) 16

D. Other

Committee of the Whole Report No. 15 15

Letter to W.T. Barry, August 4, 1822, 9 The Writings of James Madison 103 (Hunt ed. 1910) 8

Publication of Addresses as Well as Names of Persons as Invasion of Privacy, 84 A.L.R. 3d 1159 (1978) 21

Rule 4, H.R.A.P. 1

Standing Committee Report No. 485, SLH 1975 . . 24

What Constitutes Personal Matters Exempt From Disclosure by Invasion of Privacy Exemption Under State Freedom of Information Act, 26 A.L.R. 4th 666 (1983) . 21

OPENING BRIEF OF PLAINTIFF-APPELLANT PAINTING INDUSTRY OF HAWAII MARKET RECOVERY FUND

Plaintiff-Appellant Painting Industry of Hawaii Market Recovery Fund ("Painting Industry") respectfully submits its Opening Brief.

GROUNDS FOR JURISDICTION

The final Order of the Circuit Court of the First Circuit was entered on March 6, 1987. (Record ("R."), at 98.) The Notice of Appeal was filed on April 6, 1987. This Court has jurisdiction under H.R.S., §§602-5 (jurisdiction and powers of the Hawaii Supreme Court) and 641-1, and Rule 4, H.R.A.P.

STATEMENT OF THE CASE

A. Introduction

The issue on this appeal is whether a member of the public has a right to review a record maintained by the Defendants-Appellees Department of Commerce and Consumer Affairs ("DCCA") with respect to its settlement (the "Settlement") of numerous contractor license law violations by a corporate public works contractor. Essentially, the Circuit Court held that the Settlement was not disclosable because it contained the name of one of the officers of the corporation (Appendix B; and 2/6/87 Tr.).

The basis upon which the Painting Industry requests the Settlement is soundly rooted in law. Public scrutiny of public contracts serves to: permit the public to decide for

itself whether government action is proper; improve government operations; reduce distrust by the public in government decision-making; maintain the public's interest in open government; and improve the integrity of public works contracts.

Conversely, maintaining a veil of secrecy over public works contracts and the Settlement of contractor law violations trivializes the Legislature's mandate "that the formation and conduct of public policy -- the discussions, deliberations, decisions, and action of governmental agencies -- shall be conducted as openly as possible." Chapter 92.

The Settlement is clearly a "public record" under Chapter 92-52. Whatever minimal privacy interest implicated by the inclusion of a person's name in the Settlement does not outweigh the overriding public interest in disclosure.

Failure to require disclosure in this case would violate the spirit and letter of Hawaii's "open government" law.

B. Underlying Facts

The Painting Industry discovered apparent fraud in the certified payroll affidavits filed with the State by a public contractor (Metropolitan Maintenance, Inc.). (Exhibit A; R., at 12.)

Accordingly, The Painting Industry filed a complaint with DCCA and requested that it investigate whether Metropolitan violated the contractor licensing laws (Exhibit A; R., at 12).

The DCCA initially declined to take any action (Exhibit B; R., at 11) until the Department of Labor and Industrial Relations ("DLIR") completed its investigation into wage and hour violations arising out of the fraudulent payroll affidavits. (R., at 11.)

Later, after DLIR completed its investigation and found wage and hour violations, the Painting Industry again asked DCCA to investigate whether Metropolitan violated the contractor licensing laws (Exhibit C; R., at 10).

Subsequently, the DCCA completed its investigation and entered into the Settlement of the contractor license law violations with Metropolitan (Exhibit D; R., at 9). On August 11, 1986, the attorney for the Painting Industry asked for a copy of the Settlement (Exhibit E; R., at 6).

In response, the DCCA contended that the Settlement was a "personal record" and declined to produce it (Exhibit F; R., at 5).

C. The Orders of the Lower Court

On January 5, 1987, the Circuit Court originally ordered that the Settlement be disclosed to the Painting Industry because:

a) it was a public record under §92-50, H.R.S. (Appendix A, at 3; 11/9/86 Tr., at 4:6-9); and

b) the Settlement did "not contain information that affects the privacy rights of any individual", even though the name of one of the corporate officers -- Donald Tagawa -- was contained in the Settlement. (Appendix A., at 3; and 10/9/86 Tr., at 4:9-13 and 5:2-5).

The Court, however, sealed the Settlement from disclosure to the Painting Industry to permit the DCCA an opportunity to appeal the decision. (Appendix A., at 3; 11/9/86 Tr., at 4:14-17)

Subsequently, in response to a Motion for Reconsideration filed by DCCA, on March 6, 1987, the Court reversed itself and precluded disclosure of the Settlement, contending anew that it was "a 'personal record', as that term is defined in §92E-1(3)" (Appendix B, at 2).

STATEMENT OF POINTS RELIED UPON

A. The Circuit Court Erred in Failing to Rule that the Settlement was a public record under Chapter 92

The Circuit Court originally held that the Settlement was a "public record" under Chapter 92 and therefore fully disclosable:

> 6. Having reviewed the settlement in camera, the Court finds that:
>
> a. it is a "public record" in that it is a "written . . . paper . . . of the State . . . which is the property thereof, and in or on which an entry has been made . . . , or which any public officer or empoloyee has received . . . for filing . . .", pursuant to Section 92-50, Hawaii Revised Statutes . . . .

(Appendix A at 3.) However, it erred in refusing, in its reconsideration, to reaffirm its previous finding that it was a public record. (Appendix B.) Indeed, the Painting Industry specifically requested, in its form of order, for the court to so find. (R., at 94-97) However, it adopted the DCCA's form of order. (Appendix B.)

B. The Circuit Court Erred in Ruling as a Matter of Law that the Settlement was a "Personal Record" Under §92E-1

The Circuit Court erred in ruling that the Settlement was a "personal record" and therefore not disclosable to the public:

> 2. The document in question, which is a settlement agreement between the Department of Commerce and Consumer Affairs, Donald Tagawa, and Metropolitan Maintenance is a "personal record", as that term is defined in §92E-1(3), Hawaii Revised Statutes (1980).

(Appendix B, at 2; 2/6/87 Tr.) The Court had originally ruled that the Settlement was not a personal record and that its disclosure would not violate the privacy rights of any person:

> 6. Having reviewed the settlement in camera, the Court finds that:
>
> * * *
>
> b. it does not contain information that affects the privacy rights of any individual and is therefore not a "personal record" under Chapters 92 and 92E, Hawaii Revised Statutes.

(Appendix A; 11/9/86 Tr.)

C. Assuming the Settlement was a "Personal Record", the Court Erred in Failing to allow Disclosure Because of the Minimal Privacy Interests Implicated by Release

Assuming the Settlement was a "personal record", the Court erred in failing to allow disclosure because only minimal privacy interests are implicated by inclusion of a corporate officer's name in the document. (Appendices A and B).

STANDARD OF REVIEW

1. De Novo. Questions of law -- Molokoa Village Development Company, Ltd. v. Kauai Electric Company, Ltd., 60 Haw. 582, 595-96 (1979). [1]

STATEMENT OF QUESTIONS PRESENTED

1. Whether a written settlement between the DCCA and a public works contractor of contractor license law violations constitutes a public record under §92-50, H.R.S.?

2. Whether a settlement between the DCCA and a corporate public works contractor of contractor license law violations which contains the name of a corporate officer is a "personal record" under §92E-1?

---

[1] See also, Church of Scientology v. United States Dep't of the Army, 611 F.2d 738, 742 (9th Cir. 1979); and Wilkinson v. F.B.I., 633 F. Supp. 336, 339 (C.D.Cal. 1986)(lower court must review Federal Freedom of Information Act (FOIA) exemptions de novo).

3. Whether the public interest in open government, in disclosure of public documents and in the integrity of government operations outweighs whatever minimal privacy interest exists in a person's name?

ARGUMENT

A. CHAPTER 92 SHOULD BE BROADLY CONSTRUED TO FURTHER ITS DOMINANT POLICY FAVORING DISCLOSURE OF PUBLIC RECORDS

A "public record" is a written paper of the State which meets one of two criteria: 1) a writing on which an entry has been made; or 2) which the State has received for filing:

> "[P]ublic record" means any written . . . paper . . . of the state . . . which is the property thereof, and in or on which an entry has been made . . . , or which any public officer or employee has received . . . for filing.

§92-50, H.R.S.

The Settlement is clearly a "public record" for which the broad policies underlying Chapter 92 require disclosure to the public.

1. Chapter 92 Establishes a Broad Policy of Disclosure

The post-Watergate years have seen a national insurgence of public disclosure laws. The purpose of these laws has been to provide the public with a mechanism by which it "can be assured that its public officials are honest and impartial in the conduct of their public offices." In Re Request of Rosier, 717 P.2d 1353 (Wash. banc 1986).

As Madison cautioned, a free nation depends upon access to public information:

> A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.

Letter to W.T. Barry, August 4, 1822, 9 The Writings of James Madison 103 (Hunt ed. 1910).

Giving life to Madison's words, the Hawaii State Legislature enacted a public disclosure law in 1975. H.R.S., Chapter 92. The preamble described its intent as a means to open the processes of government to citizens, as the ultimate decision-making power in a democracy:

> 92-1. Declaration of policy and intent. In a democracy, the people are vested with the ultimate decision-making power. Governmental agencies exist to aid the people in the formation and conduct of public policy. Opening up the governmental processes to public scrutiny and participation is the only viable and reasonable method of protecting the public's interest. Therefore, the legislature declares that it is the policy of this State that the formation and conduct of public policy -- the discussions, deliberations, decisions, and action of governmental agencies -- shall be conducted as openly as possible. To implement this policy the legislature declares that:
>
> 1) It is the intent of this part to protect the people's right to know;
> 2) The provisions requiring open meetings shall be liberally construed; and
> 3) The provisions providing for exceptions to the open meeting requirements shall be strictly construed against closed meetings.

(Emphasis added.)

The preamble to Chapter 92 unequivocally establishes the importance of an open and responsive government. Under Chapter 92, disclosure of public records is the rule rather than the exception.

Chapter 92 is identical in principle with other federal and state public disclosure laws. See, In Re Request of Rosier, supra.

In fact, there is no conceptual difference between the purposes of Chapter 92 and the federal Freedom of Information Act ("FOIA"), the "dominant objective" of which "is disclosure". Dep't of Air Force v. Rose, 425 U.S. 352, 361 (1976). Accord, Laborers Intern., Etc. v. City of Aberdeen, 642 P.2d 418, 422 (Wash. App. 1982)("[t]he [Washington State] Public Disclosure Act is a strongly worded mandate for broad disclosure of public records."); Kilroy v. N.L.R.B., 633 F.Supp 136, 140 (S.D. Ohio 1985)("The basic policy of the FOIA favors disclosure. The Act should be broadly construed to further that end.")

The FOIA, like Chapter 92, is broadly worded to make available public "information from possibly unwilling official hands":

> Without question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands.

Environmental Protection Agency v. Mink, 410 U.S. 73, 80 (1972).

"The strong public interest in assuring compliance with the law tilts the balance in favor of disclosure." Intern B. of Elec. v. U. S. Department of H. & U. Dev., 593 F. Supp. 542, 545 (D.D.C. 1984). Thus, even where a state agency, such as DCCA, has already investigated possible law violations, the public has an independent right to verify the agency's actions:

> The fact that the Department of Labor may have investigated these allegations [of violations of wage and hour laws] in no way minimizes the valid public interest in independent verification by the union that the law has been observed.

Id.

That is, the "purpose of FOIA [like Chapter 92] is to permit the public to decide for itself whether government action is proper." Washington Post Co. v. Department of Health and Human Services, 690 F.2d 252, 264 (D.C. Cir. 1982).

2. Because of this Broad Policy of Disclosure, a Government Agency has the Burden of Proving that a Particular Record Should be Withheld from Disclosure.

Because of the broad policy favoring disclosure, courts have consistently held that, under State and Federal public records laws, the government agency has the burden of proving that particular records should be withheld from disclosure.

Thus, under the Connecticut public records law, the City of Hartford had the burden of proving that release of police internal investigation reports, which contained names of individuals, "'would constitute an invasion of privacy.'" City of Hartford v. Freedom of Information, 518 A.2d 49, 55 and 56 (Conn. 1986). Accord, Laborers Intern., Etc., supra at 422 ("The burden of proving that the records should not be disclosed [under Washington law] is on the public agency."); Kilroy, supra 140 (the "burden [is] on the federal agency to prove their applicability."); and Wilkinson v. F.B.I., 633 F.Supp. 336, 339 (C.D.Ca. 1986)("[T]he burden is on the government to establish that the exemptions are justified.").

The Washington Supreme Court also expressed the importance of liberally construing public disclosure laws by imposing a heavy burden on the state to establish a valid reason for withholding records from public access:

> This Court has declared that RCW 42.17 mandates broad disclosure of public records and must be construed liberally by the courts. The burden of proof rests on the agency to prove that it does not have the duty to disclose . . . .

In Re Request of Rosier, supra at 1356.[2] Thus, a state agency, such as the DCCA, has an "independent burden of

---

[2] It is presumed that records held by a public agency are open for inspection. Konigsberg, supra at 4 ("Thus, the broad allegation here that the files contained exempt material is insufficient to overcome the presumption that the records are open for inspection").

establishing that the material fell squarely within the ambit of the statutory exemptions 'by articulating a particularized and specific justification for denying access.'" Konigsberg v. Coughlin, 501 N.E.2d 1, 4 (N.Y. 1986)(Construing New York State Freedom of Information Law).

3. Chapters 92 and 92E Should be Liberally Construed in Favor of Disclosure.

Because of the strong public policy favoring disclosure, Chapters 92 and 92E should be liberally construed in favor of disclosure of public records. Courts, reviewing public records laws similar to Chapter 92, have so concluded:

> [The Washington State Public Disclosure Act] should be liberally construed and its exemptions should be narrowly confined.

Laborers Intern., Etc., supra at 422. Accord, In Re Request of Rosier, supra at 1356. See, Wilkinson, supra at 339. The Court observed that the "Act is a strongly worded mandate for broad disclosure of public records." Id. Yet, the language of that statute is strikingly similar to Chapter 92:

> "Public record includes any writing containing information relating to the . . . performance of any governmental . . . function . . . retained by any . . . local agency . . . .

Id., at 420.

Therefore, Chapter 92 should be liberally construed in favor of disclosure.

4. The Limitations to Disclosure under Chapters 92 and 92E should be Narrowly Construed

While Hawaii's public records laws should be liberally construed in favor of disclosure, their exemptions to disclosure should be narrowly construed.

A number of Courts have reached this same conclusion regarding other public disclosure laws. The Connecticut State Freedom of Information Act, for example, which is similar to Chapter 92, exempts from public release "'personnel or medical files and similar files the disclosure of which would constitute an invasion of privacy'." City of Hartford, supra at 55 (citing Conn. General Statutes §1-19(b)(2)).

In determining whether certain police department internal investigation reports were protected from disclosure as an invasion of privacy, the Court first noted that the Connecticut FOIA was guided by an "overarching policy favoring disclosure of public records." Id. Any "exception to that policy", the Court said, "must be narrowly construed." Id. (Citing Maher v. Freedom of Information Commission, 472 A.2d 321 (Conn. 1984); and Board of Police Commissioners v. Freedom of Information Commission, 470 A.2d 1209 (Conn. 1984)).

Because the Connecticut governmental agency had failed to prove that the "disclosure of the records 'would constitute an invasion of personal privacy'" (id., at 56),

and because the public had a "legitimate interest in the integrity of local police departments and in disclosure of how such departments investigate and evaluate citizen complaints", the records in the case were held to have been properly disclosable to the public (id., at 57).

Other courts have reached the identical conclusion -- i.e., exemptions to public disclosure are to be narrowly construed. Dep't of Air Force, supra at 361; Kilroy, supra at 140 ("There are nine exemptions, however, intended to meet specific confidentiality and privacy interests. Those exemptions are to be narrowly construed. . . ."); Wilkinson, supra at 339 (Because the dominant objective of the Act is disclosure, not secrecy, these exemptions are explicitly made exclusive and are to be narrowly construed."); and Van Bourg, Allen, Weinberg & Roger v. NLRB, 751 F.2d 982 (9th Cir. 1985).

This Court should similarly rule that any exemptions from disclosure under Chapters 92 and 92E should be narrowly construed.

5. In Determining Whether a Particular Record Implicates a Sufficient Privacy Interest to Shield it From Disclosure, Courts Should Weigh the Public Interest Against the Privacy Interest and Permit Disclosure Unless the Private Information is "Highly Offensive"

It is appropriate for this Court to establish standards for disclosure of public records to guide government agencies, the public and lower courts. Several standards have been established by other federal and state

courts. Most have begun with a balancing test that weighs the public interest in disclosure against the private interest in privacy. They have also indicated that personal information is not an "invasion of privacy" unless its release would be "highly offensive".

In In Re Request of Rosier, the Court recognized that, like Chapters 92 and 92E, limited rights to privacy "must be considered and accommodated." Id., at 1356. The test to be applied in balancing the competing public and private interests is whether disclosure would be "highly offensive" to a reasonable person:

> Whenever the information in which an individual has a private interest is not "highly offensive", the public interest in disclosure outweighs the individual's privacy interest.

Id., at 1358. Accord, Hubert v. Harte-Hanks Texas Newspapers, Inc., 652 S.W.2d 546 (Tex. App. 1983) (names and addresses not excluded from disclosure where disclosure would not be highly objectionable to reasonable person).

The history behind Chapter 92E supports a conclusion that only "highly personal and intimate information" about an individual should be protected from disclosure. Chapter 92E was intended to implement the privacy requirements of Article I, Section 6, Hawaii Constitution. The Committee of the Whole Report No. 15 clearly limited nondisclosure to "highly personal and intimate information":

> To make clear its intent, your Committee would like to reiterate and elaborate on certain matters contained in Stand. Com. Rep. No. 69 .

> . . . Privacy as used in this sense concerns the possible abuses in the use of highly personal and intimate information in the hands of government or private parties but it is not intended to deter the government from the legitimate compilation and dissemination of data. More importantly, this privacy concept encompasses the notion that in certain highly personal and intimate matters, the individual should be afforded freedom of choice absent a compelling state interest.

(Emphasis added.)

Similarly, under the Federal FOIA, records may be disclosed unless it "would 'constitute an unwarranted invasion of personal privacy.'" Kilroy, supra at 143; Wilkinson, supra at 344 (FOIA "permits the deletion of identities of persons mentioned in law enforcement files if diclosure would 'constitute an unwarranted invasion of privacy'"); and 5 U.S.C. §552(b)(7)(C) (1982).

The United States Court of Appeals for the Sixth Circuit established a two-prong test to determine whether disclosure would be an unwarranted invasion of personal privacy:

a. whether public access to the information would constitute an invasion of privacy; and, if so,

b. the invasion is balanced against the countervailing public benefit derived from disclosure. Heights Community Congress v. Veterans Administration, 732 F.2d 526, 529 (6th Cir. 1984).[3]

---

[3] See, also, Kiraly v. FBI, 728 F.2d 526, 529 (6th Cir. 1984); and Madeira Nursing Center, Inc. v. NLRB, 615 F.2d 728 (6th Cir. 1980)

An invasion of privacy occurs "when disclosure would subject a person to embarrassment, harassment, physical danger, disgrace, or loss of employment or friends." Kilroy, supra at 143. Accord, Heights Community Congress, supra at 277; and Dep't of Air Force, supra at 377.

Chapters 92 and 92E should be viewed as providing members of the public the same level of access as other state and federal FOIA's, fettered only by substantial and valid considerations of privacy.

While it is "not an easy task to balance the opposing interests, . . . it is not an impossible one either". Mink, supra at 80. The balance depends upon a "formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest possible disclosure." Id.

Chapter 92 emphasizes the "fullest possible disclosure". That is all that the Painting Industry demands of DCCA.

6. Mere Speculation about the Effects of Disclosure will not be Sufficient for an Agency to Meet its Burden of Proof

Moreover, an agency may not rely only on "'unsubstantiated speculation about possible secondary effects of disclosure' in justifying a refusal to disclose information . . . ." Nat. Ass'n of Retired Federal Employees v. Horner, 633 F.Supp. 1241, 1244 (D.D.C. 1986); and Dep't of Air Force, supra at 380 n. 19 (Exemption directed at threats

to privacy interest more palpable than mere possibilities); Arieff v. Dep't of the Navy, 712 F.2d 1462, 1468 (D.C. Cir. 1983)(production of documents, not secondary effects of release, must be the source of invasion of privacy).

B. THE SETTLEMENT IS A PUBLIC RECORD, THE RELEASE OF WHICH WILL IMPLICATE MINIMAL PRIVACY INTERESTS AND WILL FURTHER SUBSTANTIAL AND IMPORTANT PUBLIC INTERESTS IN THE PROPER DISCHARGE OF GOVERNMENT REGULATORY ACTIVITIES

1. The Settlement is a Public Record Involving Important Government Activities Justifying Public Scrutiny

The DCCA virtually conceded below that the Settlement was a public record ("It is the Defendants' position that while the Court may have properly found that the settlement was a 'public record' under Section 92-50 . . . ."). Memorandum in Support of Motion for Reconsideration, at 2 (R., at 38).

The Settlement is a public record because it contains information maintained by the State, the public disclosure of which would not violate individual privacy rights.

H.R.S., §92-50 defines a "public record" as:

> any written or printed report, book, or paper, map or plan of the State or of a county and their respective subdivisions and boards, which is the property thereof, and in or on which an entry has been made or is required to be made by law, or which any public officer or employee has received or is required to receive for filing . . . .

The Settlement is a "public record" because it is a "written . . . paper . . . of the State . . . which is the property thereof, and in or on which an entry has been made . . . or which any public officer or employee has received . . . for filing . . . ." H.R.S., §92-50.

The Legislature declared this law to be liberally construed in favor of disclosure. More importantly, the public policy behind Hawaii's public disclosure law is to maximize the public's dominant right of access to government activities.

In this case, Metropolitan performed work on numerous public works and was paid entirely with public funds. Metropolitan was required to make wage and fringe benefit payments and to submit payroll affidavits to the State in accordance with Chapter 104. Based on a complaint by the Painting Industry, the DLIR and DCCA found that Metropolitan had violated wage and hour laws and contractor license laws.

The investigation by the DCCA took nearly a year and then only after the Painting Industry repeatedly urged the DCCA to take action. The Settlement was based upon violations of state contractor licensing laws.

Accordingly, the Settlement is a public record.

2. The Settlement Does Not Implicate a Sufficient Privacy Interest to Outweigh the Countervailing Public Interest in Disclosure

The sole reason that the Settlement may arguably be shielded from disclosure is because it apparently contains the name of a corporate officer of Metropolitan.

Such information does not implicate a sufficient privacy interest to shield disclosure because:

a. the public interest in the integrity of government operations and in the release of public records outweighs the minimal interest in a person's name;[4]

b. the Settlement regards the violation of contractor license laws by a public works contractor which was paid with public funds; [5] and

---

[4] In Kilroy, the Court discussed the dominant public interest in disclosure: "[I]t is the public that will primarily benefit. The Board is a powerful agency possessing almost total discretion over the issuing of a complaint. It must be held accountable to its congressional mandate, and private parties have an important part to play in seeing that it is. The potential benefit to the public from disclosure of the documents is therefore great." Id., at 145.

[5] The DCCA stated below that the Settlement "pertains to Donald Tagawa and addresses the conduct of his business" (Memorandum in Support of Motion for Reconsideration, at 6; R., at 34). Mr. Tagawa's business in fact pertained to activities of the State through a public contractor. The Settlement does not refer to Donald Tagawa as a person apart from his function as a public contractor on a public job receiving public funds. It does not contain, to our knowledge, any "highly objectionable" or scandalous material which is wholly personal in nature.

c. the person was named in the report only as an officer of a corporation.[6]

The mere disclosure of names and addresses does not implicate a privacy interest. [7] Rather, to constitute an invasion of privacy requires disclosure of "intimate details" of a "highly personal" nature:

> [T]he real thrust of Exemption 6 is to guard against unnecessary disclosure of files . . . which would contain 'intimate details' of a 'highly personal' nature . . . . Disclosure of names and addresses, on the other hand, reveals nothing that would embarrass the addressee.

Nat. Ass'n of Retired Federal Employees, supra at 1243. Other courts have said that an unwarranted invasion must involve the disclosure of painful detail about personalities, activities and proclivities of employers, union members and officials. Van Bourg, Allen, Weinberg & Roger, supra.

---

6 Chapter 92E only applies to the disclosure of personal information regarding a "natural person" and thus does not preclude disclosure of information regarding a corporation. Under §92E-1, certain information regarding a "natural person" may not be disclosed. The Settlement regards a corporation. Donald Tagawa is involved only as an officer of the corporation. Therefore, the Painting Industry is not requesting personal information regarding Mr. Tagawa.

7 See, Annot., Publication of Addresses as Well as Names of Persons as Invasion of Privacy, 84 A.L.R. 3d 1159 (1978); Annot., What Constitutes Personal Matters Exempt From Disclosure by Invasion of Privacy Exemption Under State Freedom of Information Act, 26 A.L.R. 4th 666 (1983); Ditlow v. Schultz, 517 F.2d 166, 170 (D.C. Cir. 1975)(disclosure would result in less than substantial invasion of privacy); Getman v. NLRB, 450 F.2d 670, 674-75 (D.C. Cir. 1971) (disclosure would result in relatively minor loss of privacy; and State Employees Association v. Department of Management and Budget, 404 N.W.2d 606 (Mich. 1987)(disclosure would not constitute "clearly unwarranted invasion of privacy" under Michigan Freedom of Information Law).

The Painting Industry is entitled to the Settlement and the actions taken by the State, no less than the International Brotherhood of Electrical Workers was entitled to the disclosure of the names of non-union employees of a federal contractor. Intern B. of Elec., supra at 545. In that case, disclosure was permitted because of the overriding public interest:

> Under these circumstances, the public interest in disclosure outweighs any personal privacy interest, and disclosure is not 'clearly unwarranted'.

Id.

In reviewing a statute similar to Hawaii's, the Supreme Court of Washington held that the disclosure of names and addresses contained in the records of a public utility district were public and therefore fully disclosable. In Re Request of Rosier, supra at 1358.[8] Similarly, it has been held that a person's name and address carries only a "slight privacy interest":

> Unless the release of names and addresses, standing alone, will embarrass the individuals involved, this circuit has determined that the information is entitled to little protection.

---

8 In addition to names and addresses, the accounting of public funds has never been considered private and thus exempt from disclosure. Doe v. Sears, 263 S.E.2d 119 (Ga. 1980) (payment of public housing rent); Mid-America Television Co. v. Peoria Housing Auth., 417 N.E.2d 210 (Ill. 1981) (public housing tenants forfeit some privacy interest in the receipt of public funds); and Penokie v. Michigan Tech. Univ., 287 N.W.2d 304 (Mich. 1979) (names and salaries of university employees disclosable).

t. Ass'n of Retired Federal Employees, supra at 1244.[9]

Moreover, a remedy refused by the court below was the simple redaction of offending information in the Settlement. Dep't of Air Force, supra; Heights Community Congress, supra; Miller v Bell, 661 F.2d 623 (7th Cir. 1981); and Associated Dry Goods Corp. v. NLRB, 455 F.Supp. 802 (S.D.N.Y. 1978).

In this case, no personal privacy considerations exist. The Settlement deals only with alleged contractor licensing law violations by a contractor who performed work on public works projects. Once a private contractor accepts public works contracts, he is bound by all applicable statutory provisions inherent in the acceptance of such a contract.

As a "public" contractor drawing "public" moneys for his "public" services, any action or inaction on his part is subject to the scrutiny of public review.

The public has a right to know when contractors violate contractor licensing laws while receiving public funds. The public has a right to know what the government has done about the licensing violations. The public right of access in this case is paramount to any minimal effect that access may have on privacy rights.

---

9 Courts have allowed disclosure of witness statements. ...ss v. NLRB, 565 F.2d 654 (10th Cir. 1977)(no privacy terest); and Robbins Tire & Rubber Co. v. NLRB, 563 F.2d ..4 (5th Cir.), rev'd on other grounds, 437 U.S. 214 (1978)(no privacy interest).

The Painting Industry is entitled to review the results of that investigation. And the public has a right to ensure that its public officers are discharging their duties honestly and impartially.

CONCLUSION

The Legislative history of Chapter 92 provides compelling reasons for the Painting Industry's right of access:

> We feel there is justification for concern for greater citizen interest in government, and for better public access to information regarding its operation and the reasons upon which governmental actions are based.

Standing Committee Report No. 485, SLH 1975.

Thus, the basis upon which the Painting Industry requests the Settlement is soundly rooted in law as well as in legislative intent. Opening government to public scrutiny serves to improve government operations, reduce distrust by the public in government decision-making, maintain the public's interest in open government, and improve the integrity of public works contracts.

Conversely, maintaining a veil of secrecy over public works contracts only trivializes the Legislature's mandate "that the formation and conduct of public policy -- the discussions, deliberations, decisions, and action of governmental agencies -- shall be conducted as openly as possible." Chapter 92.

Accordingly, the Settlement is a "public record" that does not implicate overriding privacy interests and therefore should be made open to the public. The decision of the Circuit Court should be REVERSED.

DATED: Honolulu, Hawaii June 23, 1987

MICHAEL A. LILLY
Attorney for the Applicant

NO. 12094

IN THE SUPREME COURT OF THE STATE OF HAWAII

PAINTING INDUSTRY OF HAWAII MARKET RECOVERY FUND Plaintiff-Appellant vs RUSSELL NAGATA, DIRECTOR OF COMMERCE AND CONSUMER AFFAIRS and STATE OF HAWAII Defendants-Appellees	)	CIVIL NO.: S.P. 86-0371 APPEAL FROM THE: ORDER GRANTING MOTION FOR RECONSIDERATION AND DENYING MOTION TO STRIKE, FILED MARCH 6, 1987 FIRST CIRCUIT COURT HONORABLE RICHARD Y.C. AU Judge

STATEMENT OF RELATED CASES

Counsel for Plaintiff-Appellant is unaware of any related cases pending in the Hawaii courts or agencies.

DATED: Honolulu, Hawaii June 23, 1987

MICHAEL A. LILLY
Attorney for Plaintiff-Appellant
PAINTING INDUSTRY OF
HAWAII MARKET RECOVERY FUND

187

APPENDICES

Appendix A: Order Allowing Inspection of Certain DCCA Records (entered January 5, 1987)

Appendix B: Order Granting Motion for Reconsideration and Denying Motion to Strike (entered March 6, 1987)

MICHAEL A. LILLY 1681
GREEN, NING, LILLY & JONES
Pauahi Tower Suite 1100
1001 Bishop Street
Honolulu, Hawaii 96813
Telephone: (808) 528-1100

Attorney for Plaintiff

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

PAINTING INDUSTRY OF HAWAII MARKET RECOVERY FUND Plaintiff, vs. RUSSELL NAGATA, DIRECTOR OF COMMERCE AND CONSUMER AFFAIRS; and THE STATE OF HAWAII Defendants.	S.P. No.: 86-0371 ORDER ALLOWING INSPECTION OF CERTAIN STATE OF HAWAII DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS RECORDS

ORDER ALLOWING INSPECTION OF CERTAIN STATE OF HAWAII DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS RECORDS

Plaintiff Painting Industry of Hawaii Market Recovery Fund's Application for an Order Allowing Inspection of Certain State of Hawaii Department of Commerce and Consumer Affairs Records ("Application") having come on for hearing before the Honorable Richard Au, in his Courtroom at 1:30 a.m., October 3, 1986, and in his Chambers at 10:00 a.m., October 9, 1986, the Plaintiff having been represented by Michael A. Lilly, Esq., and Deputy Attorney General Grant Tanimoto having appeared for the Defendants, and the Court

having considered the files and records in the case and the argument of counsel, and good cause appearing therefor,

IT IS ORDERED, ADJUDGED AND DECREED that the Application be and the same is hereby GRANTED for the following reasons and under the following terms:

1. On October 17, 1985, Plaintiff filed a complaint with the Regulated Industries Complaint Office ("RICO") of the Department of Commerce and Consumer Affairs (DCCA") that Metropolitan Maintenance, Inc. ("Metropolitan") may have violated contractor license laws on a public contract;

2. RICO conducted an investigation of the complaint and ultimately entered into a settlement ("settlement") of the alleged violations with Metropolitan;

3. Plaintiff requested that DCCA make the settlement available to Plaintiff pursuant to Chapter 92, Hawaii Revised Statutes;

4. DCCA refused to comply with Plaintiff's request on the ground that the settlement was not a public record, but rather contained information of a personal nature, and therefore could not be disclosed to the public, under Chapters 92 and 92E;

5. Plaintiff filed this Application pursuant to Hawaii Revised Statute, Sections 92-50, 51, and 52;

6. Having reviewed the settlement <u>in camera</u>, the Court finds that:

a. it is a "public record" in that it is a "written . . . paper . . . of the State . . . which is the property thereof, and in or on which an entry has been made . . . , or which any public officer or employee has received . . . for filing . . . ", pursuant to Section 92-50, Hawaii Revised Statutes; and

b. it does not contain information that affects the privacy rights of any individual and is therefore not a "personal record" under Chapters 92 and 92E, Hawaii Revised Statutes;

7. Accordingly, the Plaintiff's Application is hereby GRANTED and the Defendants are ordered to produce the settlement for inspection by Plaintiff;

8. However, to allow the Defendants an opportunity to appeal this Order, the settlement will be sealed pending appeal; when and if Defendants decide not to appeal this Order or fail to file a notice of appeal, the seal shall forthwith be vacated.

DATED: Honolulu, Hawaii Dec. 30, 1980

/s/ Richard Au (seal)
JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

GRANT TANIMOTO
Deputy Attorney General
Attorney for Defendants

NATHAN J. SULT 3258
Staff Attorney
Department of Commerce and Consumer
Affairs, State of Hawaii
335 Merchant Street, Suite 244
Honolulu, Hawaii 96813
Telephone 548-7071

GRANT TANIMOTO 2630
Deputy Attorney General, State of Hawaii
Kekuanao'a Building, Room 200
465 South King Street
Honolulu, Hawaii 96813
Telephone: 548-6744

Attorneys for Defendants

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

PAINTING INDUSTRY OF HAWAII MARKET RECOVERY FUND, Plaintiff, vs RUSSEL NAGATA, DIRECTOR OF COMMERCE AND CONSUMER AFFAIRS; and THE STATE OF HAWAII, Defendants.	S.P. No. 86-0371 ORDER GRANTING MOTION FOR RECONSIDERATION AND DENYING MOTION TO STRIKE

ORDER GRANTING MOTION FOR RECONSIDERATION AND DENYING MOTION TO STRIKE

The Defendants' "Motion for Reconsideration of Order Allowing Inspection of Department of Commerce and Consumer Affairs Records" and the Plaintiff's "Motion to Strike Motion for Reconsideration and Affidavit" were duly

heard by the Honorable Richard Y.C. Au on February 6, 1987. Plaintiff Painting Industry Market Recovery Fund was represented by Michael A. Lilly, and Defendants Russel S. Nagata, Director of Commerce and Consumer Affairs, and the State of Hawaii were represented by Grant Tanimoto, Deputy Attorney General, and Nathan J. Sult, Staff Attorney of the Department of Commerce and Consumer Affairs.

The Court has considered the Memoranda, Affidavits, Exhibits and other documents filed by the parties, has heard the arguments of counsel, and based on the evidence and argument before it, finds:

1. The Department of Commerce and Consumer Affairs may be represented in these proceedings by its Staff Attorney, who is not a Deputy Attorney General of the State of Hawaii.

2. The document in question, which is a settlement agreement between the Department of Commerce and Consumer Affairs, Donald Tagawa, and Metropolitan

Maintenance is a "personal record", as that term is defined in §92E-1(3), Hawaii Revised Statutes (1980).

3. None of the exceptions contained in §92E-4, Hawaii Revised Statutes (1980) applies to the settlement agreement.

4. Based upon these findings, the Court further finds that the Department of Commerce and Consumer Affairs may not disclose the Settlement Agreement to the Plaintiff, which seeks disclosure as a member of the general public. §92E-4, Hawaii Revised Statutes.

THEREFORE, it is hereby ORDERED, ADJUDGED AND DECREED that the Plaintiff's Motion to Strike Motion for Reconsideration and Affidavit is hereby DENIED; and

It is further hereby ORDERED, ADJUDGED AND DECREED that the Defendants' Motion for Reconsideration is GRANTED, and the "Order Allowing Inspection of Certain

State of Hawaii Department of Commerce and Consumer Affairs Records" entered January 5, 1987, is VACATED.

DATED: Honolulu, Hawaii, MAR 2 1987.

RICHARD Y.C. AU
Judge of the First Circuit
Court, State of Hawaii

APPROVED AS TO FORM:

- Refused -
MICHAEL A. LILLY

Attorney for Plaintiffs

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that two (2) copies of the foregoing document were duly served upon the following party, at the address listed below, by hand delivery, immediately upon filing or as soon thereafter as service could be effected:

NATHAN J. SULT, ESQ.
Staff Attorney
Department of Commerce and
Consumer Affairs
State of Hawaii
335 Merchant Street, Suite 244
Honolulu, Hawaii 96813
Attorney for Defendants-Appellees

DATED: Honolulu, Hawaii, June 23, 1987.

MICHAEL A. LILLY
Attorney for Plaintiff-Appellant

Hawaii Automobile Dealers Association

June 5, 1987

Robbie Alm, Director
State Department of Commerce and Consumer Affairs
1010 Richards St.
Honolulu, Hawaii 96813

Dear Robbie:

This responds to the published request for input on the privacy law which you and others are examining as requested by Governor Waihee.

This law has impacted the automobile retailing industry and its manufacturers particularly with respect to recalls.

Red Morris of Polk is much better versed on the subject as he is trying to get the law amended so that Polk can at least secure registration information that will enable it to notify folks operating registed vehicles of a recall. These recalls can occur a few years after the initial vehicle sale and the manufacturer has no way of knowing who to contact directly of a recall as the vehicle's ownership may have changed hands one or more times.

Efforts to amend the law to enable Polk and others to get this information have been largely unsuccessful.

As I understand it, the law prohibits the dissemination of an individual's name in connection with automobile registrations except to government entities.

My car dealers, who have to implement recall repairs, remain up a tree on what to do about this.

900 Fort St. Mall, Suite 1777, Pioneer Plaza
Honolulu, Hawaii 96813
Telephone 261-9124 or 526-0159

At a Senate Transportation Hearing this past session, Ed Hirata indicated to Senator Lehue Sallings that he believes he might be able to deal with this problem administratively.

In the meantime, I think the commission on which you serve, ought to take a look at the law in this context. I am certain it could be amended to make the necessary information available from car registration data under certain prescribed conditions.

Car dealers here have another interest. With respect to new car sales here, there are two types...retail sales..dealer to consumer..and fleet sales..dealer to multiple car purchasers. And in this latter category are the car rental and car leasing purchasers...who may make fleet purchases through dealers in this State, or through dealers on the mainland, or direct from the factory.

My dealers have been trying to get a handle on how it can ferret out retail sales versus fleet sales. The privacy act apparently prohibits the use of car registration figures for this statistical purpose.

Such statistics, Robbie, would be useful the both the state and private industry. For, were we able to make ca clear determination between retail and fleet...we would be able to accurately determine how tourism impacts fleet sales as well as draw other conclusions regarding trends etc., information I am sure Roger would be interested in.

Members of our industry have no desire to infringe on a person's privacy and believe the privacy law could be so constructed and administered to accommodate that end as well as make available information to deal with the matters of concern I've outlined here.

Should you need more information, please get in touch with me.

Aloha,

Hardy Hutchinson
Manager

HAWAII BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO
1109 BETHEL ST. Honolulu, Hawaii 96813
(808) 538-1505

Herbert S. K. Kaopua Sr. — Howard Taeaka — Edison Keomaka — Herman Meek
TRUSTEES Lawrence Sakamoto Benjamin Saguibo Samson Mamizuka

July 1, 1987

Mr. Robert A. Alm
Chairman
Governor's Committee on Public
Records and Privacy
P.O. Box 541
Honolulu, HI 96809

Dear Mr. Chairman and Committee Members:

My name is Joseph Bazemore. I am here to testify on behalf of the Building Trades Council of the construction industry of Hawaii. We represent 18 construction unions with a total membership of over 25,000 working men and women.

For the past several years our industry has watched a trend develop which threatens to tear down an industry that our people make a living from. The construction industry is being crippled by contractors who have found it very profitable to perform public works contracts and not comply with the law and requirements of those contracts. These contractors have found they have everything to gain and nothing to lose due to a lack of enforcement and a penalty procedure that makes it almost impossible to fine or otherwise punish contractors who do not comply with statutory requirements. I think it is interesting to note that no contractor has ever been fined for violating the law on a public works contract.

To further encourage an environment of noncompliance, the state agencies now refuse to release payroll affidavits or other documents which reveal the resolution of complaints and allow state agencies to make backroom settlements. They conveniently pull out an elastic veil they call the Privacy Act and pull and stretch it into bizarre shapes to block public access to information. Why all the secrecy? Are they afraid their lack of enforcement to the point of negligence may be exposed and prove embarassing to the state.

Millions of taxpayer dollars are being spent annually on public works contracts, but the public is not allowed to see state records which show how the work was performed. If a contractor or their employees do not want their names reviewed by the public on state records, they should not accept work that is paid for by taxpayers dollars.

We have submitted many complaints which uncovered wholesale violations of state regulatory requirements and State Davis-Bacon wage laws. The only action taken by the state against the contractors involved was to require them to pay the wages which they should have paid to begin with by law.

This would be like allowing bank robbers to go around robbing banks until they were caught. Then they would only be required to put back the money into the bank they were caught in with no further penalties. On top of that, you couldn't tell anyone their name because that was prohibited by the Privacy Act.

Our contractors are losing more and more public works contracts because they cannot compete against people that are not burdened by the considerable expense of complying with the law. Something is drastically wrong with an administration that encourages an environment that punishes those that abide by the law and rewards those that don't. Make no mistake, that is exactly what is happening.

Your committee has an opportunity to rectify an unfair situation by opening up public works records for review. Unless they are, we cannot hope to defend our industry against the illegal tactics that I have outlined here. Anytime taxpayers' money is being spent, the public has a right to review any records that show how this money was spent and how the work was performed.

Sincerely,

HAWAII BUILDING & CONSTRUCTION
TRADES COUNCIL, AFL-CIO

Joseph Bazemore
Chairman Pro Tem
Legislative Committee

JB:ak

J. Bazemore

JOHN WAIHEE
GOVERNOR

WARREN PRICE, III
ATTORNEY GENERAL

CORINNE K. A. WATANABE
FIRST DEPUTY ATTORNEY GENERAL

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
STATE CAPITOL
HONOLULU, HAWAII 96813
(808) 548-4740

April 20, 1987

The Honorable Dennis M. Nakasato
Senator, 19th District
State Senate
Fourteenth Legislature
State Capitol, Room 208
Honolulu, Hawaii 96813

Dear Senator Nakasato: APR 20 1987

Re: Constitutionality of H.B. No. 703, "Relating to Wages and Hours of Employees in Public Works"

This is written in response to your request for our opinion regarding the constitutional effect of your proposed amendment to H.B. No. 703 to provide that the certified payroll records of public works contractors may be disclosed to the public once the individual employees' home addresses, social security numbers, and telephone numbers are deleted.

We answer that given the Hawaii Supreme Court decision in Nakano v. Matayoshi, 68 Haw. 142, 706 P.2d 814 (1985), we believe such a proposal would still be violative of section 6, article I of the State Constitution.

In our previous discussion of H.B. No. 703, in our March 20, 1987 letter to Representatives Crozier and Bellinger, we stated that because of Nakano, disclosure of payroll records submitted by public works contractors pursuant to chapter 104, with "identifying particulars" such as employees' names, home addresses, home phone numbers, and social security numbers, would violate the individual employees' state constitutional right to privacy. However, we indicated that the employees' right to privacy would not be violated, if all of the "identifying particulars" were removed from the payroll records

prior to public disclosure, or if the law were amended to require submission of payroll records without "identifying particulars." Accordingly, public disclosure of payroll records from which some but not all "identifying particulars" have been deleted would still be violative of the employees' privacy.

Very truly yours,

Patricia Ohara
Deputy Attorney General

APPROVED:

Warren Price, III
Attorney General

J. Bazemore

HOUSE OF REPRESENTATIVES
THE FOURTEENTH LEGISLATURE

STATE OF HAWAII
STATE CAPITOL
HONOLULU, HAWAII 96813

March 31, 1987

MEMORANDUM:

TO: NEIL ABERCROMBIE & MIKE SLACKMAN

FROM: REPRESENTATIVE MIKE CROZIER MC

RE: H.B, #703 entitled "A Bill For An Act Relating to Wages and Hours of Employees in Public Works."

Enclosed is my letter to Attorney General Warren Price and his reply supporting my opinion that H.B. #703 as written is unconstitutional.

Speaker
RICHARD A. KAWAKAMI
Vice Speaker
EMILIO S. ALCON
Majority Leader
TOM OKAMURA
Majority Floor Leader
PETER K. APO

HOUSE OF REPRESENTATIVES
THE FOURTEENTH LEGISLATURE
STATE OF HAWAII
STATE CAPITOL
HONOLULU, HAWAII 96813

February 28, 1987

The Honorable Warren Price III
Attorney General
Department of Attorney General
State of Hawaii
State Capitol
Honolulu, Hawaii, 96813

Dear Mr. Price:

This is to request your opinion on the constitutionality of H.B. No. 703 entitled "A Bill For An Act Relating to Wages and Hours of Employees in Public Works" as it applies to private contractors.

The bill amends Chapter 104, H.R.S. in several respects. It adds new sections to give employees the right to sue their employers for recovery of wages and other fringe benefits which should have been paid by the employer.

The bill also makes the certified copies of payrolls, which an employer is required to file with the governmental contracting agency, available for public inspection and reproduction. Several other amendments are proposed in the bill.

With respect to making the certified copies of the payrolls available for public inspection and copying, the committee has considered limiting public inspection and copying to appropriate unions and to those contractors who may have bid on the same public works projects.

Under the present law, the payroll records of contractors having public works contracts are only made available to the governmental contracting agency, the director of accounting and general services and any authorized representatives of these agencies.

The present law was established in such a way as to give the department the authority to enforce the salutary purposes

of the law without upsetting competition in the marketplace and the contractor's right to maintain confidential and private payroll records.

The bill, which intends to require contractors on public works projects to make its payroll records available for copying and inspection by other contractors and the union, appears to me to violate the right to privacy of both the contractor and its employees.

Although I am able to conur with the present law's mechanism of giving a governmental body the right to inspect the payroll records of a contractor doing work on a public works project, it appears to me that requiring a contractor on a public works project to lay bare its payroll records to other contractors and the union, goes beyond what is necessary to protect the State's interest in enforcing the minimum wage and hours laws of the State.

I would appreciate a written opinion as to whether or not it would be constitutionally permissable for the Legislature to require a contractor on a public works project to make public its payroll records to competing contractors and the union.

Your early consideration of this matter would be appreciated.

Very truly yours,

Mike Crozier
State Representative
47th District

Reb Bellinger
State Representative
37th District

JOHN WAIHEE
GOVERNOR

WARREN PRICE, III
ATTORNEY GENERAL

CORINNE K. A. WATANABE
FIRST DEPUTY ATTORNEY GENERAL

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
STATE CAPITOL
HONOLULU, HAWAII 96813
(808) 548-4740

March 20, 1987

The Honorable Mike Crozier
Representative, 47th District
House of Representatives
Fourteenth Legislature
State Capitol, Room 311
Honolulu, Hawaii 96813

The Honorable Reb Bellinger
Representative, 15th District
House of Representatives
Fourteenth Legislature
State Capitol, Room 321
Honolulu, Hawaii 96813

Dear Representatives Crozier and Bellinger:

Re: Constitutionality of H.B. No. 703, "Relating to Wages and Hours of Employees in Public Works"

This is written in response to your request for our opinion regarding H.B. No. 703. Specifically you questioned the constitutionality of a law which would require government contracting agencies to make the payroll records of public works contractors available for inspection by competing contractors and union representatives.

Although we believe the objectives of the bill's drafters and proponents can be met without constitutional difficulty, we agree, given the Hawaii Supreme Court decision in Nakano v. Matayoshi, 68 Haw. 142, 706 P. 2d 814 (1985), that the bill as presently written is violative of section 6, article I of the State Constitution.

The language at issue is contained in section 2 of H.B. No. 703, amending section 104-3, Hawaii Revised Statutes. We examined House Draft 1, which in relevant part reads as follows:

> Certified copies of payrolls submitted to a governmental contracting agency shall be available for public inspection and reproduction during established office hours of the governmental contracting agency by employees, employee representatives, any employer or contractor representative.

Section 6, article I of the Hawaii State Constitution provides:

> The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right. [Emphasis added.]

The privacy right established by our State Constitution is not absolute, but only the existence of a compelling state interest may limit the right.

The right to privacy was written into the Hawaii State Constitution in 1978. Regarding the privacy provision in what is now article I, section 7, the Standing Committee on Bill of Rights, Suffrage and Elections of the Constitutional Convention of Hawaii of 1978 reported "it would be appropriate to retain [that] privacy provision...but limit its application to criminal cases, and create a new section [namely section 6, article I] as it relates to privacy in the informational and personal autonomy sense." Stand. Comm. Rep. No. 69, I Proceedings of the Constitutional Convention of Hawaii of 1978 at 674. An awareness "that the right of privacy has meaning varying in degree and nature," id., was duly recorded, and the report proceeded thereafter to "explicitly state the intent of ...[the] Committee as to the scope and nature of the [new] right, id."

The committee continued:

> this [new section] is a recognition that the dissemination of private and personal matters, be it true, embarrassing or not, can cause mental pain and distress far greater than bodily injury. For example, the right can be used to protect an individual from invasion of his private affairs, public disclosure of embarrassing facts, and publicly placing the individual in a false light. In short, this right of privacy includes the right of an individual to tell the world to "mind your own business."

Stand. Comm. Rep. No. 69, I Proceedings of the Constitutional Convention of Hawaii of 1978 at 674.

The recommendation to recognize privacy, in the informational and personal autonomy sense, as a constitutional right was the subject of lengthy debate by the convention, sitting as a committee of the whole. See II Proceedings of the Constitutional Convention of Hawaii of 1978 at 628-44. The committee report reflecting the consensus of the assembly was adopted thereafter, which in relevant part said:

> By amending the Constitution to include a separate and distinct privacy right, it is the intent of your Committee to insure that privacy is treated as a fundamental right for purposes of constitutional analysis. Privacy as used in this sense concerns the possible abuses in use of highly personal and intimate information in the hands of government or private parties but is not intended to deter the government from the legitimate compilation and dissemination of data. More importantly, this privacy concept encompasses the notion that in certain highly personal and intimate matters, the individual should be afforded freedom of choice absent a compelling state interest.

[Emphases added.] Comm. Whole Rep. No. 15, I Proceedings of the Constitutional Convention of Hawaii of 1978 at 1024.

Standing Committee Report No. 69 emphasized that the right to privacy is so important in value to society that it can be infringed upon only by a showing of a compelling state interest. The Committee attempted to define the bounds of a compelling state interest:

> Your Committee expects that at times the interests of national security, law enforcement, the interest of the State to protect the lives of citizens or other similiar interests will be strong enough to override the right to privacy. It is the intent of your Committee . . . to grant the individual full control over his life, absent the showing of a compelling state interest to protect his security and that of others. Thus it is expected that in certain situations the interest of the State will rise to such an intensity that it will be deemed a compelling state interest. For example, in the case of dissemination of information about individuals, law enforcement officers would not be restricted in sharing information about suspected wrongdoers . . . Your Committee is concerned

about abuses such as using such data for illegitimate purposes or revealing it to the public when no legitimate public interest is involved.

I Proceedings of the Constitutional Convention of Hawaii of 1978 at 675.

Only one case in Hawaii, Nakano v. Matayoshi, 68 Haw. 142, 706 P.2d 814 (1985), has discussed the informational facet of the State Constitution's privacy right. 1/ The Hawaii Supreme Court held that for purposes of construing article I, section 6, the right to privacy against disclosure of one's financial information is fundamental and part of the personal privacy right protected by the constitution, and will not be infringed without a compelling state interest. The court cited with approval Standing Committee Report No. 69 and Committee of the Whole Report No. 15, and concluded that the 1978 Constitutional Convention meant to protect the individual's right to privacy against disclosure of personal information when it spoke of privacy in the "informational" sense, and concluded the people of Hawaii have a legitimate expectation of privacy where their personal financial affairs are concerned; absent a showing of a compelling state interest, financial records should be maintained confidentially.

A discussion of whether there is a compelling state interest, which takes into consideration the contracting agency's duties under chapter 104, and the interests of the employees, competing contractors, and union representatives, would be difficult, lengthy, and esoteric. In light of the delegates' stated intent that the showing of a compelling state interest be the same as required of a law which affects a fundamental right, it is very likely we would conclude that

---

1/ In Nakano, a class action was brought by Hawaii County "regulatory employees" who were required by the county ethics code governing their conduct, to submit extensive personal financial histories to the Board of Ethics. The financial information requested included sources of income, names of creditors, real property owned, etc. The court held that as the disclosure requirements of the Hawaii County ethics code paralleled those of the State Constitution's ethics provision in article XIV, these employees could not expect to enjoy the same privacy expectations as non-state employees or employees of political subdivisions. The disclosure of their financial information was found not to be violative of the State Constitution, i.e., section 6, article I, because article XIV of the State Constitution permitted such disclosure.

there is no compelling state interest to permit public disclosure of the payroll records. However, we will forego that discussion since we believe that the bill's objectives may be obtained without the release of the payroll records.

If the proposed bill were amended so that the records required to be submitted by the public works contractors did not contain any "identifying particulars" such as the employees' names, home addresses, home phone numbers, and social security numbers, the employees' privacy would not be violated when those records were made available to the public. Similiarly, if the bill were revised so that even if the payroll records submitted contained "identifying particulars," the contracting agency was required to remove these "identifying particulars" prior to disclosure, that disclosure would not encounter privacy problems.

Since completion of this opinion, we understand H.B. No. 703 has crossed over to the Senate and is pending review by the Labor and Employment Committee. We will provide a copy of this opinion to inform that committee's chairman of our conclusion.

Very truly yours,

Patricia Ohara
Deputy Attorney General

APPROVED:

Warren Price, III
Attorney General

PO:na
4708G

Hawaii Child Centers

629A KAILUA ROAD, #108 / KAILUA, HAWAII 96734 / TELEPHONE (808) 263-4538

June 9, 1987

Mr. Robert A. Alm, Chairman
Governor's Committee on
Public Records and Privacy
Box 541
Honolulu, Hawaii 96809

Dear Mr. Alm;

Reference is made to the Committee's recent solicitation of the public's views on Government record-keeping.

The Day Care Licensing Unit of the State Department of Social Services and Housing (DCLU DSSH) is required to keep running chronological logs of all criticism or accusations against all day care centers and these logs are available to the public.

Three Hawaii Child Centers (HCC) teachers have been accused over the past three years of sex abuse of children. None of the accusations were substantiated; one was dismissed within three hours, one in two days and one in three days. One charge was brought by family on drugs, one by a family in the process of a bitter divorce action and one by a family in dire financial distress; all were single parent families in crisis.

Henry Kikuta, Chief of the DCLU DSSH, is taking administrative actions to ensure the Department is more discriminating in its handling of accusations against day care centers in view of the spurious nature of nearly all of accusations of child abuse made to the Department over the past several years. Nevertheless, public records have to be maintained, the police have to be called-in on each case, etc.

The mere accusation of child abuse can destroy a person or organization. Of the three HCC teachers "accused," one (one of our best teachers) left the profession and two won't touch children despite the HCC requirement that teachers must "use lap and arms for children" (quoted from the HCC Teacher Performance Appraisal).

Proven spurious charges of child abuse should not be made a part of the public record. In the present climate of extreme public concern, unstable people are leveling accusations that are patently a function of the accusers' instability and a public atmosphere bordering on the hysterical rather than on the facts.

Mr. Robert A. Alm, Chairman June 9, 1987

I would recommend that accusations dismissed out of hand as described herein should not be required to be made a part of the public record. The size of the problem can be confirmed with Mr. Henry Kikuta, Chief of the DCLU DSSH, who will tell you 35 of the 38 accusations made against day care centers over the past several years were dismissed out of hand, three were considered "serious" but none were prosecuted.

If I can be of any assistance to the Committee on this issue, I would be happy to do so.

Very truly yours,

Jim Denzer
Executive Director

cc: Henry Kikuta
Gerald W. Grimes
Susan Barr

Hawaii Child Centers

629A KAILUA ROAD, #108 / KAILUA, HAWAII 96734 / TELEPHONE (808) 262-4538

Committee on Public Records and Privacy
July 2, 1987
State Capitol Auditorium, 3 P.M.

Good afternoon Mr. Alm and members of the Governor's Committee on Public Records and Privacy. My name is Jim Denzer. I am Executive Director of Hawaii Child Centers, a private, non-profit, unaffiliated educational organization with six child care centers on Oahu serving 600 children.

Hawaii Child Centers considers this Committee and this hearing an important opportunity for the child care community to express some concerns about current policies regarding public records. We hope some benefit will accrue to the child care profession and thus to the children we care for.

I'd like to go over some of the points that were made in recent correspondence between myself and Mr. Alm (attached). In the past three years, three of our staff at three separate centers have been falsely accused of sexually abusing children. None of the accusations were substantiated; one was dismissed within hours, one in two days and one in three days. In all three cases, the accusations came from a single parent family going through a crisis of divorce, substance abuse or poverty.

The mere accusation of child abuse can destroy a person or an organization. The Hawaii Child Centers organization has been presented to the community via the public record as accused of child abuse. The fact that the government requires this to be done can be construed as an endorsement of the principal that accusations are of equal merit to

convictions. One of the accused teachers left our employment and the profession due to the government's record keeping requirements to keep her name in Department of Social Services and Housing (DSSH) files, in her opinion jeopardizing her employability. The other two teachers are now reluctant to give the warm and nurturing physical contact essential to the emotional growth of very young children. They could handle their investigation; they could not accept making it a public record.

Hawaii Child Centers' teachers do not enjoy being falsely accused, interrogated by the DSSH and investigated by the police. However, they accept that is is reasonable that all accusations be investigated with their assistance for the purpose of doing everything possible for the safety of the children. However, it is not reasonable and serves no useful purpose whatsoever to make a public record of accusations proven spurious by the DSSH investigation. We object not only because of the damage it does to us individually and to our organization but because it provides no deterrent to the child abuser. The sick mind that is compelled to abuse children is not going to be influenced in the slightest by the fact that day care centers are being falsely accused of child abuse.

It is difficult for child abuse to occur at a child care center in this State. Despite newspaper headlines to the contrary, there is little opportunity for such activity at a licensed child care facility where staff is carefully screened, closely supervised and parents come and go throughout the day and where State law requires that all employees submit an employment history, be fingerprinted and have an annual name check through local criminal files.

The abuser is more likely to seek children in unregulated settings such as unlicensed child care programs, "underground" home care, or sports and club activities and school settings that do not require an extensive employment check.

In summary, to make public records of false accusations is destructive of the innocent, serves no useful purpose and will not deter child molestors. It could, however, deter those loving and caring people who might otherwise be willing to work in the most important, most unappreciated, most underpaid profession in Hawaii - child care.

Thank you for the opportunity to testify.

THE HAWAII FEDERATION OF PHYSICIANS & DENTISTS'

TESTIMONY ON PUBLIC RECORDS AND PRIVACY

July 2, 1987

Thank you for giving our organization the opportunity to testify on the topic of public records. As physicians we are particularly concerned about two specific topics:

1. We believe that medical records must always be protected documents unless the patient gives permission for disclosure. During the current legislative session a proposed piece of legislation, SB 442 relating to medical practice, would have required mandatory medical and psychiatric examinations for alledgedly impaired physicians, with the results of such examinations reported to a body whose proceedings <u>are</u> a matter of public record. This clearly violates the protected doctor-patient relationship and we are grateful that the bill in question was amended to reflect our concerns. (We wonder if an attorney in Hawaii would be willing to have his or her consultations with clients disclosed, even if the attorney and client protested.)

2. Concerning malpractice hearings and records, we feel that all such proceedings are confidential and protected, unless they fall under the aegis of Supreme Court decisions relating to such legal hearings and public records. Our legal advisor is Professor of Constitutional Law at the University of Hawaii, John Van Dyke, who will be providing us with the detailed and specific types of hearings whose records have been determined to be open under full disclosure. We strongly feel that items <u>not directly mentioned in the Supreme Court decisions</u> should be considered private and confidential.

Thank you again for asking our opinion on these matters.

Francis J. Dann, M.D.
Legislative Chairman HFPD

Gerry Keir
Managing Editor
The Honolulu Advertiser

Testimony to Governor's Committee on Public Records and Privacy
July 2, 1987

Hawaii's Chapter 92 begins with the ringing declaration that "In a democracy, the people are vested with the ultimate decision-making power... Opening up the governmental processes to public scrutiny and participation is the only viable and reasonable method of protecting the public's interest. The Legislature declares that it is the policy of this state that the formation and conduct of public policy---the discussions, deliberations and actions of governmental agencies---shall be conducted as openly as possible."

That all sounds just fine.

But the same law goes on to outline a pile of exceptions, including the giant category of exemptions for "privacy."

The public records section of the law makes a great sounding statement about what a public record IS, but then EXCLUDES all "records which invade the privacy of an individual" and contains an overbroad definition of personal records. Not only is an individual's own educational, financial, medical and

employment record secret, but so is, and I quote, "any other item that contains or makes reference to the individual's name, identifying number," etc., etc. That pretty well covers the waterfront.

This restricts access to public records which in any way contain personal information about any individual regardless of whether that individual is a public official, regardless of whether tax dollars are being used to pay the salary of that individual, with no attempt to balance the public's right to know versus an individual's right to privacy.

Clearly, the proper day-to-day functioning of any law depends a great deal on the bureaucrats who administer it. And Chapter 92E was written so as to encourage public employees to DENY access for fear of being fired. The biggest problem, especially with state officials, seems to be getting permission from someone with the proper authority to release information. The counter clerks and other front-line bureaucrats tend to err on the side of not releasing information. Given that inherent caution and the overall thrust of the privacy law, the message to custodians of public records is clear: when in doubt, opt for secrecy.

As a result, when the legitimate concern for privacy---"the right to be left alone," if you will---competes with the equally legitimate goal of openness in government, privacy has the inside track.

Yes, there is an appeals procedure through the courts. But the language of the privacy law is so broad that many appeals are doomed to failure. Even where there IS a good chance of victory in court, the cost constitutes a chilling effect on any individual or news medium seeking to challenge a decision made under this chapter.

In my view, there need to be changes to make more information about public employees public, and to allow public record information to be segregated. That would mean that instead of all information of any kind in a record being restricted from public view just because somebody's name is in it, only that limited information deservedly private would be excised. The balance would be open to the public.

There should be a balancing test to determine whether public interest in disclosure outweighs the privacy interest of the individual involved.

Such changes would bring the state law into closer conformity with the federal Freedom of Information Act. That act is far from perfect, and it sometimes leads to comic results. (* on tape) But I believe it to be more workable than the present state law.

And at least the federal act attempts to strike a balance, to release to the public as much information as possible while excising only that limited information deservedly private. Some of the things that have come to light through use of the FOI act are information on FBI harassment of civil rights leaders, auto design defects, consumer product testing, the salaries of public employees, compliance with antidiscrimination laws, sanitary conditions in food processing plants---the list goes on and on.

I think we could do worse than to use the federal law as a starting point in recasting our own law in Hawaii.

And as a final suggestion, I would hope that you would recommend that the sunshine laws recognize advancing technology by clearly allowing access to government records in electronic form. The present law mentions only "written or printed" material. I think it should be made abundantly clear that computerized records are public as well.

The Honolulu Community-Media Council

Post Office Box 22415, Honolulu, Hawaii 96822 (808) 521-6323

July 2, 1987

Mr. Robert A. Alm
Chair, Governor's Committee on
Public Records and Privacy
P. O. Box 541
Honolulu, Hawaii 96809

Dear Mr. Alm,

The Honolulu Community-Media Council (HCMC) and the Sunshine Law Coalition of Hawaii commend you for providing us with this opportunity to present our concerns on public records and privacy.

The Media Council, since its founding in 1970, has had as one of its continuing concerns access of the public and the news media to the operations and records of public business. Government is its people's business. Open government is necessary to establish public confidence. How, then, can we have open government without access?

Perhaps it is appropriate to review how Hawaii's present "Sunshine Law" was enacted and the Sunshine Law Coalition's role in its passage.

Back in January, 1972, Janos Gereben, a reporter on the Honolulu Star-Bulletin, filed with the State Ombudsman and HCMC these "two specific complaints concerning unjustified and potentially harmful secrecy in government operations:

"1. The University of Hawaii Board of Regents meets in closed sessions regularly and frequently, allowing reporters and the public only to its monthly meetings.

"2. The university administration withholds advance notice of actually or potentially controversial items it submits to the Board of Regents."

The committee, assigned to study this complaint and chaired by Edward Joesting, concurred with Gereben. In its investigations it found the university's practices were not uncommon among other state agencies. A June 2, 1972, letter written by Thomas Kaser, Honolulu Advertiser education reporter, to the Board of Education showed he had similar problems with that body. There were other agencies that failed to produce notices and advance agenda and still others guilty of shoddy record-keeping.

Ombudsman Herman Doi had submitted a bill addressing many of these concerns but it languished in the legislature.

The situation led HCMC to initiate its own plans. It sought information from other jurisdictions which had adopted so-called "sunshine laws". Then, using the model law, advocated by Common Cause, Joesting and his committee - Jim Richstad, Stuart Gerry Brown, Robert W. Fiske, Rhoda Miller, Thomas H. Hamilton, Byron Baker, and Wilbur Schramm, with Doi and H. Baird Kidwell as consultants - went to work and framed what today is Hawaii's "Sunshine Law".

Meanwhile, in the community were other groups equally unhappy with the government's secrecy and wanted a change. HCMC invited them to send representatives to its October 17, 1974, meeting to discuss the proposed legislation. Out of that shared concern developed the Sunshine Law Coalition of Hawaii.

Among those participating in this effort were Common Cause/Hawaii, League of Women Voters, Hawaii Bar Association, Ka Leo o Hawaii, Associated Students of the University of Hawaii, Hawaii Council of Churches, Waikiki Residents' Association and Youth Unlimited, as well as the Big Island Press Club.

The coalition agreed its main thrust would be passage of the model bill. Jean King, then a member of the House of Representatives, introduced the measure.

The "Sunshine Act" was passed in the 1975 legislature after several modifications. Coalition consensus was that although this new statute was far from perfect - it could be stronger - nonetheless, it was the best, the most open, that could have been obtained at that time.

Over the years since its enactment, there have been several instances of outright abuse of the law at several governmental levels as well as attempts to circumvent the spirit of openness.

For example, on October 13, 1978, three of the five members of the City's Planning and Zoning Committee met in a restaurant. There was no compliance with the "sunshine" provision on meeting notice or agenda. When the media queried participants on what had happened, the answer: "No decision, no action; only discussion."

Another example: Some of the newly elected and re-elected members of the 1979 City Council, before being seated, conducted a series of closed meetings. This stopped after the media called attention to the practice.

The Star-Bulletin complained to HCMC when the Honolulu Police Commission in November, 1978, without prior notice discontinued its long-standing policy of public disclosure of the names of police officers who were the subject of commission investigation. Police officers, the paper contended, should not be placed in a special category in the treatment of public employees involved in disciplinary proceedings. Welcome Fawcett, a City Councilwoman and a Subcommittee of One Studying the Police Commission, faulted that body for its refusal to allow access to certain public records. Some of her recommendations since then have been implemented.

Still another example of government secrecy involved the State Department of Health and the Sun Press. The paper had published a story about dangerous pollutants in Mililani area waters. The Health Department took issue with the report. When the reporter asked to review records to verify his facts, his request was denied. He appealed to the Attorney General's office but was told the material was classified. The Advertiser then assigned its own reporter to cover this same story and she, too, was denied access by the Health Department.

The Advertiser went to court. Judge Arthur Fong, ruling for the newspaper, had this to say: "What the government wants is censorship - the right of censorship - and I will not impose it."

Today, 15 years after Janos Gereben complained about the secrecy surrounding the University of Hawaii Board of Regents, concealment of public records still persists in that institution, aided and abetted it seems to the coalition, by the Attorney General's office. Two cases in point:

The coalition complained to the State Ombudsman after Durward Long was appointed University's Vice President on October 16, 1981. Creation of this new position was of "reasonably major importance" and "will affect a significant number of persons", it said. Yet no notice of the appointment had been filed within the 72-hour requirement.

Not so, responded the AG's office. "The appointment of a vice president of the university, in our opinion, is a personnel matter, which impacts primarily on the internal management of the university and only indirectly, if at all, affects those outside the university administration." Those of us who remember the Durward Long controversy would hardly describe this as of minimal interest and impact.

Secondly, today, under the attorney general's broad interpretation of the definition of Chapter 92E, Hawaii Revised Statutes, the salaries and the periods of appointment of University personnel is unobtainable.

The question uppermost in the minds of our coalition is: After your hearings and deliberations, what next? Can we expect major changes in the implementation of our "Sunshine law" or shall we continue to experience more of the same?

Must our coalition continue to be ever vigilant lest our government continue its business - the people's business - in secrecy?

Sincerely yours,

Sunshine Law Coalition of Hawaii
Members:

Common Cause/Hawaii
League of Women Voters
Hawaii Council of Churches
Conservation Council/Hawaii
American Association of
University Women
Save Sandy Beach
Inter-Governmental Relations
Committee, City Council

Representative Rodney Tam

Jahan Byrne

Beverly Keever

Honolulu Community-Media Council
Ah Jook Ku,
Executive Director.
Ah Jook Ku

Honolulu Star-Bulletin

June 17, 1987

Robert W. Alm, Chairman
Governor's Committee on
Public Records and Privacy
Post Office Box 541
Honolulu HI 96809

Dear Mr. Chairman:

The Honolulu Star-Bulletin is in favor of opening up the greatest possible number of government records to public view.

This letter may refer to areas outside the jurisdiction of your committee, but we mention them here to provide a broader picture of our support for open acts of government, openly arrived at, in all branches and at all levels.

We also believe that records should be made available for inspection in ways that are convenient to the public. Easy-to-find, easy-to-read ought to be guiding phrases for agencies with responsibilities for maintaining public records.

It's one thing to say certain documents are public records. It's another to make them accessible to the average taxpayer. Government undercuts the intent of openness if it stores the public's information in remote offices staffed by secretive managers and/or indifferent clerks.

People other than lawyers, insurance investigators and friends of friends in power ought to have access to birth, death and marriage certificates; property ownership and tax records, building permits, accident reports, motor vehicle registration and drivers' license records, professional and vocational licensing data, bankruptcy filings, divorce decrees, wills in probate, liquor licenses, state loan information, names of Hula Mae borrowers, environmental agency findings, salaries of federal, state and city/county employees.

Within reason, the information should be available to the inquiring public without creating the impression that the request is disrupting the orderly flow of government. The fact that the uninitiated may be clumsy in their approach or may use the wrong terms should not be reason in itself to reject their requests.

People who may not know the serial number of a case or a report should not be denied access to information without, at least, being told where they can find the number. Reciting magic words or code numbers to dismissive desk clerks should not be requirements for seeing public records.

PERHAPS THE State ombudsman, the City office of information and complaint and a Federal FOI task force could be assigned to review the accessibility and convenience factors of public records in all three levels of government in Hawaii.

Honolulu Star-Bulletin

What records should be withheld from the public? Individual health reports, files of "raw" data collected on individuals, reports of misdemeanors involving minors, income tax records, some welfare records, some family court records, some mental health treatment records.

We need to create windows in the welfare, family court and mental health information policies so that administrators may be free to release information, where public safety or vital public interest are involved, without violating privacy laws.

We ought to be able to find out and report when, for example, a person being treated for mental illness in connection with a serious criminal offense has been released to a community.

We also ought to be able to find out such things as the histories of public officials in the areas of welfare, family court and mental health. The public ought to know if key policy makers in government have been welfare recipients, or figured in a serious Family Court matter, or have been treated for mental illness.

Judgment comes into play here. Public safety and the accountability of public officials ought to be clear determinants in releasing information in this area.

The Star-Bulletin shares the concerns of others in and out of government for the need to protect individual reputations. But privacy, carried to extreme, can lead to ignorance. We sense a danger at times of a community that prefers the comfort of closely held information shared by a few insiders to the general openness of records, meetings, decisions and dockets.

We thank the committee for taking on this task, for its efforts so far and for inviting public comment. We wish it good luck and are available to answer any questions that may arise out of our views as stated in this letter.

Sincerely,

John E. Simonds

John E. Simonds
Senior Editor

JES/rbm
cc Catherine Shen

Century Center, Suite 3-262 / 1750 Kalakaua Ave. / Honolulu, Hawaii 96826
AN INDUSTRIAL RELATIONS CONSULTANT CORPORATION
(808) 942-3786

July 2, 1987

Mr. Robert Alm, Chairman, and
Members of Governor's Ad Hoc Committee on Public Records

Gentlemen:

My name is Walter T. Oda and I would like to testify in behalf of the Fair Trades Practices Committee of the Painting Industry of Hawaii. We are a joint labor-management committee, whose objective is to achieve fair competition among painting and decorating contractors in the building and construction industry in Hawaii.

Our primary function is to identify problem areas as well as areas where the potential for abuse exists. We then work with appropriate and interested parties to achieve an amicable resolution to these problems.

A case in point was our joint effort in working with the then Lt. Governor John Waihee, in developing and adopting a monitoring procedure to insure that Department of Defense contractors, performing federal construction contracts, comply with applicable statutory requirements.

The monitoring procedure preserves the competitive bidding position of our local contractors by insuring that every contractor performing work in Hawaii first obtains a general excise license, pays the applicable taxes, contributes to the unemployment compensation fund, as well as provide their employees with proper workers' compensation insurance, pre-paid medical care, and disability insurance coverages.

In the press release that announced the agreement between the State of Hawaii and USCINCPAC, the Lt. Governor stated that more than $1 Million in delinquent tax assessments were levied and that an additional $1 Million annually is anticipated by the adoption of the monitoring procedure.

Although the adoption of the monitoring procedure is not at issue, I would like to relate the confusion and lack of cooperation we experienced in obtaining information on the implementation of the procedure that completely frustrated us.

In general, the monitoring procedure is effective in insuring compliance with general excise tax and unemployment compensation contributions. However, it is not achieving its intended objective insofar as stabilizing competition is concerned.

The Department of Defense Contracting Offices are cooperating with the State Tax Office by providing copies of summary reports of construction and service contracts awarded.

Then too, in most instances, the contractors are reminded of their statutory requirements at pre-bid conferences which are held after bid award is made.

The problem, however, is that there is no compelling requirement that the contractor must attend these conferences. Consequently, some of the contractors are not aware of the applicable taxes and therefore the costs are not factored in their bids. They are, however, still required to pay these taxes but they enjoy a competitive advantage in securing the contract.

In order to alleviate the problem, we contend that an informational bulletin should be attached to and made a part of the bidding documents. To this end, we are experiencing difficulty to enlist the cooperation of the State agencies to apprise us of the implementation procedure nor additional revenue statistics generated by the adoption of the monitoring procedure.

We are also prepared to cite other instances where our committee monitored activities of other unfair competitors who were not complying with statutory requirements and were subsequently required to make restitutions to their employees for violating wage and hour laws. Rather than belabor the committee with the circumstances of these cases, since they may be referenced by other industry members testifying, we shall make the facts available to the Committee upon your request.

Heretofore, we were provided access to certain payroll reports and in turn we were able to cite the abuses to the appropriate governmental agencies. By this means we served as monitors for the State government while insuring fair competition to all bidders and preserving the integrity of the contracting process.

More recently however, access to payroll information were denied us by virtue of an interpretation of the Privacy Act. We then sought relief from the Legislature by introducing measures which would have provided us continued access to payroll reports. Here again, we were confronted with total confusion and chaos which compounded our frustration in working with the State government.

Our bills, which were patterned after the State of California's regulations as well as the Freedom of Information Act, met with objections from our solons. We then amended the measures to satisfy the requirements of the legislators, only to have them lay in committee without further consideration.

Our goals can only be achieved with an open government--one in which public records are maintained and made accessible to the people. We have demonstrated our sincerity and willingness to work with our governmental agencies to insure that contractors who perform public works projects are complying with all statutory requirements. Our continued efforts to monitor the activities of unfair competitors however are contingent upon

continued access to public information, but the State however is maintaining that payroll reports are private documents and are privileged information under the veil of the Privacy Act.

Additionally, the government claims that it does not have the means to employ sufficient personnel to adequately monitor the activities of contractors performing public work projects. Let the records reflect that we made a proposal to the State Public Works Department to provide the services of volunteer job-site monitors to insure compliance with statutory and specification requirements. Our proposal is now being considered by DAGS, subject to legal review and approval by the Attorney General.

In summation, we would like to point out to the Ad Hoc Committee that the frustration that we are experiencing is due to the roadblocks that the State has created by not providing us meaningful resources to further our goals. Accordingly, we beseech the Committee to make the appropriate recommendations that the spirit of our public records law is followed and that the public records policy should overwhelmingly favor disclosure of these records.

Thank you for the opportunity accorded me to make my presentation and expressing the views of the Fair Trades Practices Committee of the Painting Industry of Hawaii.

Jackson Broadcasting Systems Inc.

Jackson Productions, Inc.
Excellence in Communications

Elijah Jackson Jr.
Chairman of the Board
President

July 20, 1987

Robert A. Alm, Director
STATE OF HAWAI'I
Office of the Director
Department of Commerce &
Consumer Affairs
1010 Richards Street
Post Office Box 541
Honolulu, Hawai'i 96809

Dear Mr. Alm:

I thank you for your letter of July 17, 1987. In response to your letter of the above date I would like to authorize and grant your committe that was established by the Governor to review the current public records and privacy laws, use and permission to add JBS, Inc. and my letter to the materials that the committee is reviewing. I hope that the committee will be able to enhance and improve the current public corporate reviewing process by keeping a roster or listing of all business reviewing by individuals or firms, making or having this information available for the registered business entity etc. Once again thank you.

I look forward to hearing word or message from you at your earliest convenience.

Respectfully Yours,

Elijah Jackson, Jr.

EJ/JBS, Inc.
cc: ej

(808) 533-5475 5476

JOHN WAIHEE
GOVERNOR

ROBERT A. ALM
DIRECTOR
COMMISSIONER OF SECURITIES

SUSAN DOYLE
DEPUTY DIRECTOR

STATE OF HAWAII
OFFICE OF THE DIRECTOR
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
1010 RICHARDS STREET
P. O. BOX 541
HONOLULU, HAWAII 96809

July 17, 1987

Mr. Elijah Jackson, Jr.
Chairman/President
Jackson Broadcasting Systems Inc.
P. O. Box 88106
Honolulu, Hawaii 96830-8106

Dear Mr. Jackson:

I want to acknowledge receipt of your letter concerning the general availability of corporate records. Any change in the current procedures would require a change in the law.

As it happens, however, I am chair of a committee established by the Governor to review the current public records and privacy laws. Your raising of this is, therefore, timely and if you wish, I will add your letter to the materials that the committee is reviewing. However, because you marked your letter "URGENT/CONFIDENTIAL", I hesitate to use it absent some further indication from you, which I will await.

Very truly yours,

ROBERT A. ALM
Director

RAA:kh

230

Jackson Broadcasting Systems Inc.
Jackson Productions

Elijah Jackson Jr.
Chairman/President

July 15, 1987

Robert A. Alm, Director
DEPARTMENT OF COMMERCE & CONSUMER AFFAIRS
Kamamalu Building, 1010 Richards Street,
Post Office Box 541
Honolulu, Oahu, Hawai'i 96809

Dear Mr. Alm:

I send greetings to you. I am writing in regard to several concerns I have with DCCA. After having worked for a senator and lobbied in the Capitol for some years and being in business, I have found one minor item that is of concern to me with DCCA, and I hope that you can be of help and assist with this major concern. My concern my not be for all the business owners in this state and many may not share my view of a business entity record keeping of reviewers or reviewees of business material. Due to the increased competition in the marketplace, I have found it to be very annoying that individuals can review corporate records, partnerships, DBAs, and sole ownership records without DCCA not keeping a roster or listing of who or whom those individuals or firms were.

My letter is to ask you is there anything that can be done without the passing of a bill or law in your department. If not I will introduce a bill in the upcoming Legislative Session, to counter the exploiting of corporate information without the individual or business entity not knowing who or whom is reviewing their records daily. This such a little item but I feel it would help enhance the DCCA as well as business entrepreneurs and owners in economic development and wellbeing. Should you have any questions, please telephone me at (808) 533-5475 or 5476 daily. Once again thank you.

I look forward to hearing word or message from you at your earliest convenience.

Respectfully Yours,

Elijah Jackson, Jr.

EJ/JBS, Inc.
cc: ej

P.O. Box 88106 • Honolulu, Hawaii 96830-8106 **(808) 533-5475**

Ja[illegible]kson Broadcasting Systems Inc.
Jackson Productions

Elijah Jackson Jr.
Chairman/President

May 13, 1987

Aloha;

I send greetings from JBS, Inc. and myself. I would like to congratulate you on your appointment and special thanks for an efficient 14th Legislative Session. I apologize for the late acknowledgement of your appointment, but I have been tied up. Anyway, I am writing in regard to some corporate matters that I am presently trying to clear up, and at the present time JACKSON BROADCASTING SYSTEMS, INC. & Jackson Productions, General Partner is restructuring and reorganizing its corporate structure, and I sincerely ask for your help and assistance in this matter. In the upcoming days and or weeks I will personally be contacting you are coming by to visit with you briefly. I will also be visiting and coming by the various departments to try to package the pertinent documents and information necessary for and or from your services for the "joint venture" called "SUPERSTATION KJBS" & "KEJJ FM" BROADCAST TELEVISION & AUDIO SATELLITE SERVICE FOR THE PACIFIC & ASIA & ALL U.S. TERRITORIES. I would like to discuss some important roundtable issues that can only be disclosed in your presence. Once again congratulations on your appointment.

I look forward to hearing word or message from you at your earliest convenience.

Respectfully Yours,

Elijah Jackson, Jr.

EJ/JBS, INC.
cc: ej

League of Women Voters of Honolulu

49 South Hotel St., Suite 314, Honolulu, HI 96813 (808) 531-7448

My name is Arlene Kim Ellis. I am president of the Honolulu League of Women Voters.

I would like to address the problem of the difficulties the public has to face in preparing for public hearings.

On March 16, 1987, the League of Women Voters received a notice of the City Planning Commission's meeting on March 25, on the General Plan Revision Resolution, together with a report called "General Plan Growth Policies Review". The "Review" we received presented three alternative sets of recommendations. Phone calls to the Department of General Planning resulted in conflicting information about this hearing: one official told us that all three alternatives would be heard; another said that only alternative #3 was before the Commission. Attempts to get an actual copy of the Resolution resulted in the receipt on Saturday, March 21. The League had without success been making numerous requests to the appropriate Department of General Planning staff since the first of the year for information about what would be proposed for revision of the General Plan. If League had not been keeping up with the study of the General Plan for the past ten years, we would not have been ready or able to testify within the alloted four days which included a weekend.

There is no way Neighborhood Boards or other Community or Citizen Groups can testify intelligently at such short notice particularly when information is difficult to obtain. In recent years important planning proposals have regularly been sent out for public review and comment many weeks before a public hearing. We were informed that in the instance of the March 25 Planning Commission meeting this could not be done because the Department wanted to get the General Plan revised by July so that the 1987 Development Plan Amendments package, which in Central Oahu includes land for 21,000 dwelling units more than the current General Plan permits, could be processed.

We feel that rushing a matter of such importance through with such inadequate time for public information, study and input, is an unacceptable procedure and does a great disservice to the Community. We urge that all departments of government make information readily available to the interested public and public notices be given adequate time to ensure dissemination of available information and give the opportunity for all who wish to testify, the right to do so.

233

Arlene Kim Ellis 8-3-87

MAUI ASSOCIATION OF EDITORS & REPORTERS

Good afternoon. I'm Gary Kubota, president of the Maui Association of Editors & Reporters. As members of the working news media on Maui, we are happy to be given the opportunity to express our views.

Generally, state and county government officials have been very cooperative with the Maui news media. But there have been instances, where we've run into conflicts between what is public and private information.

The association is concerned about the practice of governmental bodies holding closed-door meetings, based on their need to discuss issues with legal counsel or personnel matters.

We feel there is a need for a more balanced approach in these matters.

Taxpayers deserve to know why the county has decided to settle a lawsuit out of court and pay thousands of dollars.

Voters deserve to know more than just a summary of why a government administrator has been found in violation of ethics laws.

Also, we are concerned about privacy laws that bar public access to a convicted felon's records.

Currently, the public including the news media are prevented from reviewing pre-sentencing and parole reports. Frequently, the decision by a judge or parole board is based on recommendations in these reports.

The association feels the public has a right to know selective information in these reports, such as the recommendations made for sentencing and parole and any prior convictions, including adult and juvenile crimes.

A separate concern has arisen in recent months about the issue of censorship within the state Department of Education.

For several months, the department has refused to release results of a survey about drug abuse in Maui schools, developed by the Hawaii School of Public Health.

We are talking about a report that involved work by state and county officials, in cooperation with a non-profit organization.

The Maui District School Superintendent has refused to release it, saying she feels the results are invalid.

The official reason for this censorship is disturbing to us, because we believe it intrudes into the public right to know and limits public discussion on a topic of vital interest to the community.

The association feels that even if the study is flawed, the report should be available for public examination.

Let the people decide what is and isn't valid.

The association feels this kind of information is important in presenting as clear a picture as possible about how government works in society.

More importantly, it provides the public a means in which to arrive at informed decisions and to hold public officials accountable for their action.

Thank you very much for listening to our concerns.

June 22, 1987

Harry T. Tabata

The Maui News

Monday, January 30, 1984 Four Sections, 36 Pages 25 Cents

236

Ethics probe: Findings kept secret, but appeals reported

By GARY KUBOTA
Staff Writer

WAILUKU — The Maui County Board of Ethics has finished its initial hearing about government officials who allegedly received free hotel rooms and discounts from the Kaluakoi Corp., The Maui News has learned.

The preliminary judgments have been sent to the accused county officials, and some of them plan to appeal the findings before the board.

At least eight county, state and federal officals allegedly received the free rooms and discounts at the Sheraton-Molokai Hotel at the Kaluakoi resort, a project that has required a number of government permits.

The Ethics Board hearing has focused on four county officials and whether they violated county ethics laws. Under the ordinance, county officials are prohibited from soliciting or receiving any gift under circumstances in which it can be reasonably inferred that it is intended to influence them in their official duti-

Saying he was bound by law to keep personnel matters confidential, county Corporation Counsel H. Rodger Betts declined to say who, if anyone, had been found in violation. Betts also refused to say who might be planning an appeal before the board.

However, a source involved in the investigation said some appeals are planned.

The ethics hearing has been closed to the public since the investigation began in January of 1983. Under the County Charter and state laws, ethics inquiries are kept confidential. One reason is to protect the innocent from being subjected to unfounded charges.

However, the laws protect the identities of guilty parties as well. Thus, even if the board finds persons in violation, it is only required to issue a "deleted opinion" that generally describes the incident but reveals no names of the guilty parties. In these instances, the public is left to guess the identities.

The current investigation is no different than many other ethics cases in its secrecy. But the unusually long time it has taken has created at least one problem: a change in the make up of the Ethics Board.

The commission normally meets once a month and, on occasion, has met twice a month during the year since the probe began. However, there appears to be no force within the Mayor Hannibal Tavares administration or County Council pushing for more frequent meetings and a speedy but thorough disposition.

The last board meeting was Jan. 5 and the next meeting is scheduled for Feb. 9.

Walter Schenk, who became board chairman in January, said he is unsure if the board will meet more frequently than once a month. Schenk said the decision rests with board members.

The board is not under a deadline system, such as that faced by the Cost of Government or Charter Review commissions, which have scheduled meetings as often as weekly to get their work done.

Tavares acknowledged that "it's been too long . . . " since the investigation started. However, he said he has been hesitant to rush board members because they are volunteers.

Betts, who serves as the board's legal counsel, said a lengthy review was necessary because of the complexity of the issue and the relatively large number of county employees charged in the investigation. To his knowledge, this is the first time so many county employees were charged with improprieties in a single case.

Political observers have indicated that one reason why there has been little official criticism about the duration of the review and of those accused of misconduct is because the investigation has implicated too many influential people.

Copies of hotel records obtained during the board's investigation indicate the officials who may have received discounts include those associated with the council and the administration, and the state and

See APPEALS, page A3

Appeals reported in probe of free rooms for officials

Continued from page A1

federal government.

The information could tarnish the image of the Tavares administration, which political supporters have ranked high in integrity.

Three of the four county officials implicated in the investigation work for the administration, including Tavares' political appointee, Ralph Hayashi, who is the director of the Public Works Department. Two people work under Hayashi. The fourth person named in the investigation is Council Member Howard Kihune, who was the council Public Works Committee chairman and now chairs the Finance Committee.

All four county officials have denied any wrongdoings. So too have state officials Lawrence Killion, an environmental pollution investigator, and David Nakagawa, Maui's acting district health officer, as well as federal officials Kelvin K.U. Char, the Santuary Program manager with the Office of Coastal Zone Management, and Eileen Shea, a Congressional affairs specialist with the National Oceanic and Atmospheric Administration.

No government investigation has taken place concerning the conduct of these state and federal employees.

A request for a probe made last year by Common Cause of Hawaii has been set aside by state Ethics Commission on a technicality. The public action group's letter was not notorized as required under commission rules. Common Cause has not submitted another request, but its interest in the case continues.

State health officials apparently feel no commission probe is necessary. Health officials have reprimanded Nakagawa and Killion but made no attempt to investigate the matter beyond interviewing the two men. They also have not referred the matter to the Ethics Commission.

Recently, the length of the county hearing appeared to have complicated the review process itself.

The Rev. Vernon Tom, who served as commission chairman and led the ethics probe, left his appointed position when his term expired. The commission was recently enlarged, and the new appointees were not involved in the investigation and initial hearing.

Schenk said he doesn't feel the addition of new appointees will complicate the process. But he acknowledged that at some point, the board will have to decide if the three should participate in the hearing.

The board's investigation was prompted by a story in The Maui News in December 1982, in which county, state and federal officials were named as those who received free or discounted hotel rooms.

The story also charged that, at the time, a number of them were on official business and receiving government money, supposedly to pay for the rooms.

One person who appeared prominently in copies of hotel records was Hayashi, who apparently made hotel reservations for Kihune and a number of other people.

Instead of booking reservations through the hotel front desk on Molokai, Hayashi apparently called Kaluakoi representatives in Honolulu to make reservations at the hotel, hotel records showed.

In April of 1981, Hayashi made reservations for seven rooms for 14 people. The minimum charge for a room was $32. But they paid only $20 a room, and the remaining $12 difference for each was billed to Kaluakoi, according to the records.

Neither hotel nor county travel records indicate whether Hayashi was on official business during the April trip. Records also do not reveal the identities of these 14 people and whether any were government employees.

On another occasion, however, records indicate the trip was for government purposes: For two nights starting June 12, 1981, Hayashi and another person received a free hotel room at the expense of the Kaluakoi Corp., records show.

On Feb. 8-9, 1982, Hayashi and Kihune stayed at the hotel and paid $20 each for separate rooms. The remaining $12 was billed to the Kaluakoi Corp., records showed.

If the Ethics Board finds culpability, the cases would undergo mayoral and prosecutorial review to determines further action.

Although obtaining free accommodations, Hayashi accepted a per diem allowance of $66 for room and meals from the Maui County government for the June trip. The county also paid for his transportation costs.

227

Tuesday, August 7, 1984 Three Sections, 26 Pages 25 Cents

Ethics probe: Mayor orders official to pay for hotel room

By GARY KUBOTA
Staff Writer

WAILUKU — Mayor Hannibal Tavares said as a result of the Board of Ethics findings, county Public Works Director Ralph Hayashi will pay for the free room he received at the Kaluakoi resort on Molokai.

Tavares said Monday that he asked Hayashi to make the payment and Hayashi has agreed. The standard room rate at the time was $32 a night.

The mayor said he also will be talking to department directors about possibly changing the way in which county employees make travel arrangements.

Tavares said the discussion with directors will also involve a review of ethics laws.

Tavares said he had "lots of respect for Ralph" and that Hayashi was doing a "first class job" as director of the Public Works Department.

The mayor took the action after the board found Hayashi in violation of the ethics law for accepting a free room at the Sheraton-Molokai Hotel from the Kaluakoi Corp. in June of 1981.

The board indicated there was insufficient evidence to indicate the acceptance of free lodging influenced Hayashi's performance of official duties. However, the board said he exercised poor judgment and should have known of the appearance it created.

Hayashi was one of four county officials who were the subject of the board's investigation. One has been found not in violation. The board has not yet publicly issued opinions concerning the two others, engineer Francis Cerizo and Council Member Howard Kihune.

Hayashi's department is in charge of issuing building permits for developments such as Kaluakoi, a wholly owned subsidiary of The Louisiana Land and Exploration Company. Kaluakoi is the managing partner of Kepuhi Partnership, the owner of the Sheraton-Molokai Hotel.

Copies of county records indicated he received $86 from the county for room and food on Molokai, in part to review beach access at Kaluakoi with the developer, consultants and Planning Department officials.

Copies of hotel records indicated he made the room arrangements by contacting Kaluakoi officials in Honolulu, rather than Sheraton reservations officials on Molokai.

The hotel records also indicated that on at least a couple of occasions, Hayashi and others in his company paid $20 for a room and Kaluakoi paid the remaining $12. Hayashi has said he thought he was paying the standard rate and was unaware he was receiving a discount from Kaluakoi at the time.

MAYOR TAVARES
"Lots of respect."

Tavares said he only addressed the issue of Hayashi receiving a complimentary room in 1981 because that was all the board addressed in its findings. However, the mayor said he will be discussing the whole issue including discounts with department heads.

While traveling on government business, county employees receive a per diem of $44 a day for food and lodging, in addition to payments for ground and air transportation.

Employees may receive more money in certain instances but the $44 is the standard amount paid to all, whether or not they actually spent the money.

No receipts are collected by the county to verify that they paid for the room and board.

Tavares indicated he favored a system used by most businesses. He said before a trip, business officials submit an estimate and receive an advance from the company.

After the trip, they submit receipts for expenses to the company and the billing is adjusted accordingly, Tavares said.

The mayor noted that sometimes, especially while traveling on the Mainland, the $44 per diem is not enough and the employee may need more money for food and a hotel room.

The board's probe was prompted by a story in The Maui News in December of 1982, which listed the names of government officials in hotel records as receiving free or discounted rooms. At that time, all the officials denied any wrongdoing.

GA MORRIS, INC.
GOVERNMENTAL AFFAIRS/REAL ESTATE COUNSELOR
THE BLAISDELL ON THE MALL
1154 FORT STREET MALL, SUITE 307
HONOLULU, HAWAII 96813
(808) 531-4551

JULY 2, 1987

MR. ROBERT ALM, CHAIRMAN & MEMBERS
GOVERNOR'S COMMITTEE ON PUBLIC RECORDS & PRIVACY
C/O DEPT. OF COMMERCE & CONSUMER AFFAIRS
810 RICHARDS ST.
HONOLULU, HAWAII 96813

DEAR MR. ALM & MEMBERS:

DURING THE PAST 8 YEARS, I HAVE REPRESENTED A CLIENT WHO HAS AMENDED THE HAWAII REVISED STATUTES, SECTION 286-172, NUMEROUS TIMES IN AN EFFORT TO OBTAIN ACCESS TO THE MOTOR VEHICLE REGISTRATION FILE WHICH WOULD PERMIT THEM TO PROVIDE RECALL NOTICES TO THE OWNERS OF VEHICLES WHICH ARE RECALLED BECAUSE OF A SAFETY PROBLEM EITHER MANDATED BY THE FEDERAL GOVERNMENT OR REQUESTED BY THE MANUFACTURER.

EACH TIME WE'VE MADE THE AMENDMENT, WE THINK WE'VE SOLVED THE PROBLEM ONLY TO FIND OUT THAT WE STILL CAN'T GET THE ENTIRE FILE.

HAVING REPRESENTED CLIENTS FOR OVER 24 YEARS, IT APPEARS THAT THE "PRIVACY LAW" IS USED AS A "SHIELD" SO AS TO NOT PERMIT A PERSON WHO HAS A NEED TO KNOW, ACCESS TO THIS INFORMATION.

THIS "SHIELD" OR "STOP SIGN" TENDS TO BE A JOKE WHEN YOU COMPARE WHAT WE HAVE ATTEMPTED TO OBTAIN, WHAT WE HAVE AGREED TO AND WHAT IS CURRENTLY AVAILABLE IN THE "PUBLIC RECORDS" MARKET IN HAWAII; NOT TO MENTION WHAT IS HAPPENING ELSEWHERE.

FOR EXAMPLE-IF AN AUTO MANUFACTURER WANTS TO RECALL AN AUTO IN HAWAII, THERE IS NO SURE WAY OF CURRENTLY DOING IT. HAWAII RESIDENTS ARE AT A DISADVANTAGE, AND IN MANY INSTANCES, WILL NOT RECEIVE NOTICE IF THEY'VE TRANSFERRED THE VEHICLE WITHIN THE PAST 7 YEARS. (THE LAST TIME WE HAVE THE ENTIRE FILE.)

WHAT'S SO PRIVATE ABOUT MOTOR VEHICLE REGISTRATION RECORDS?
ATTACHED IS A REPORT FROM THE STATE OF ILLINOIS (MARCH, 1983) WHICH, IN ESSENCE, SAYS THAT THIS INFORMATION (MOTOR VEHICLE REGISTRATION DATA) IS "INNOCUOUS" AND IT IS "NEITHER VITAL NOR INTIMATE SO AS TO CAUSE OFFENSE TO A REASONABLE PERSON" (PAGE 10 OF REPORT).

CURRENTLY IN HAWAII, YOU CAN FIND OUT EVERYTHING YOU WANT TO KNOW ABOUT A PERSON, IF HE OWNS REAL ESTATE VIA THE BUREAU OF CONVEYANCES OR THE COUNTY ASSESSOR'S OFFICE.

A FEW YEARS AGO THE CONVEYANCE TAX CERTIFICATE WAS MADE "PUBLIC", THUS, YOU CAN FIND OUT THE ACTUAL "SALES PRICE" OF A PIECE OF PROPERTY. THIS IS PUBLIC RECORD AND THE TYPE OF CAR HE OWNS, ISN'T! IT DOESN'T MAKE SENSE.

STATISTICS AND WHY NAMES AND ADDRESSES ARE NEEDED. ENCLOSED ALSO IS AN OUTLINE OF WHY WE NEED TO USE THE NAME AND ADDRESS IN ORDER TO COMPILE STATISTICS. BASICALLY, IT'S TO DETERMINE WHO ARE THE FLEET BUYERS, LEASING COMPANIES, ETC. THUS, IN ORDER TO KEEP FIGURES CONSTANT, WE NEED THE NAMES. HOWEVER, NO INDIVIDUAL IDENTITIES ARE DISCLOSED.

CONCLUSION

I WOULD URGE YOUR COMMITTEE TO STRIKE A BLOW FOR FREEDOM OF INFORMATION AND RECOMMEND THAT DATA CONTAINED IN THE MOTOR VEHICLE REGISTRATION FILE BE PUBLIC RECORD. ANYTHING LESS ISN'T WORKING.

RESPECTFULLY SUBMITTED,

G. A. "RED" MORRIS
LEGISLATIVE CONSULTANT FOR
R. L. POLK & CO.

CC JOHN O'HARA, PRESIDENT-R. L. POLK & CO.

ILLINOIS STUDY

See page 9, 10 & 11

- Motor Vehicle records are "innocuous"
- Does not constitute an invasion of privacy

- Why Names & Addresses are needed

Report of
Secretary of State Advisory Committee
on
Distribution of Government Information

Committee Members

Richard E. Friedman, Chairman
Paul C. Blume
Bob Collins
Elmer C. Gertz
Edmund J. Rooney

March 17, 1983

Report of Secretary of State Advisory Committee on Distribution of Government Information

Scope

Secretary of State Jim Edgar appointed an advisory committee August 17, 1982 to review disclosure and sale of information received by the Secretary of State. The committee defined the scope of its activity to include review of abstract of drivers license records, vehicle title or registration, registered vehicles list, statistical services, list of corporations, corporate records and fees charged for release of this information.

Background

Committee members are Richard E. Friedman, chairman, attorney, Epton, Mullin, Segal & Druth, Ltd., Chicago; Paul C. Blume, attorney, Lord Bissell & Brook, former Vice President and General Counsel, National Association of Independent Insurers, Chicago; Bob Collins, radio journalist, WGN, Chicago; Elmer Gertz, adjunct professor, John Marshall Law School, and attorney, Chicago; and Edmund J. Rooney, Jr., assistant professor, Loyola University, Chicago. Margaret Gull, attorney, Epton, Mullin, Segal & Druth, Ltd., Chicago, served as counsel to the committee.

Committee meetings were held in Chicago October 1, 1982, November 5, 1982, January 7, 1983, January 28, 1983, and February 18, 1983. Public hearings were held on December 4, 1982 in Chicago, and December 11, 1982 in Springfield. Vigorous efforts were made to publicize the objective of the committee and the public hearings by letters to individuals, public interest groups, business entities, and by news release and public posting. A substantial number of articles appeared in Illinois newspapers, and members of the committee were interviewed on radio and television publicizing the work of the committee. Members of the public attended all meetings of the committee and public hearings.

Ten witnesses presented testimony at the Chicago public hearing, six witnesses presented testimony at the Springfield public hearing. Eleven witnesses who appeared at the public hearings presented written statements. Forty-four additional persons gave written statements to the committee. The committee drew upon a data base of sixteen witnesses, transcripts of proceedings of two public hearings, totalling 188 pages of testimony, and 47 written statements from persons who did not testify at the public hearings. Representative Woods Bowman, Eleventh District, also testified. Approximately 46 persons expressed a view that disclosure of certain information received by the Secretary of State constitutes an invasion of rights of personal privacy; approximately 20 persons expressed a view that disclosure of information received by Secretary of State was proper and constituted a benefit to the public.

Joan Walters, Assistant Secretary of State, and Philip S. Howe, Counsel to the Secretary, attended all committee meetings and public hearings. They fully cooperated with the committee and provided technical information regarding implementation of statutory authority and pertinent regulations, fee structure, automated data processing, and description of material pertaining to the subject of the committee's inquiry. Additional Secretary of State staff members provided information to the committee.

Information Disclosure

The following information is required by statute and disclosed upon request and payment of required fee.

Drivers License Personal Information

Statutory Authority: ch. 95 1/2, sec. 6-118(d).

Pertinent Regulation: None.

Information Release: Distinguishing number assigned to the license, name, address, zip code, date of birth, color of eyes, height and weight, description of license. Social Security number of licensee is required by Secretary, but this information is not released to third-party requester.

Fee: $2.00. A fee is not charged for release of this information to government officials.

Abstract of Drivers Record:

Statutory Authority: ch. 95 1/2, sec. 6-118(b).

Pertinent Regulation: None.

Information Release: Driver's administrative actions, traffic law violations, and reports of convictions. Information pertaining to motor vehicle accidents is not released.

Fee: $2.00. Law enforcement officials are not charged a fee (ch. 95 1/2, sec. 6-118(b) and (e).

In 1982, approximately 2,489,040 requests were made for this information and information requested under sec. 6-118(d), of which 179,121 requests were made by law enforcement officials, producing a total of $4,619,838.00 revenue. Administrative costs incurred for processing requests were $.08 per request, or $199,123.20, leaving a balance of $2,289,916.80.

Vehicle Title or Registration:

Statutory Authority: ch. 95 1/2, sec. 3-823.

Pertinent Regulation: None.

Information Release: Vehicle identification number, license plate number, name and address of owner.

Fee: $2.00 for each registration or title search. No fee is charged for search requested by law enforcement agency.

In 1982, approximately 178,923 requests were made for this information, of which 131,305 requests were made by government officials, producing a total of $95,036 revenue. Administrative costs incurred for processing requests were $1,384,040.02, leaving a deficit of $1,289,054.02.

Vehicle Registration List:

Statutory Authority: ch. 95-1/2, sec. 3-420

Pertinent Regulation: None.

Information Release: An annual list of all registered vehicles, arranged serially according to registration numbers assigned to registered vehicles, name and address of registered owner, and description of vehicle, including serial or other identifying number.

Fee: $400.00. Sheriffs, chiefs of police of cities and villages over 2,000 population and other public officials are not charged a fee (ch. 95-1/2, sec. 3-420).

In 1982, approximately 189 requests were made by the public; 566 requests were made by law enforcement and public officials, producing a total of $75,600 revenue. Administrative costs incurred for processing requests were $80.00 per request, leaving a balance of $60,480.

Statistical Information:

Statutory Authority: ch. 95 1/2, sec. 2-123.

Pertinent Regulation: None.

Information Release: Lists or partial lists of licensed drivers (names, address, date of birth); overall statistical information regarding licensed drivers and vehicle registration.

Fee: State and local governments are charged $4,700.00 for drivers list, $1,218.00 for vehicle registration list. All other requesters $200.00, plus $20.00 per 1,000 names requested.

In 1982, 96 requests were received for statistical information, including 9 requests from the public and 1 request from a law enforcement official for the drivers list. 9 requests from the public and 77 requests from public officials were received for the vehicles list. Revenue produced was $489,512.40, with costs of $151,748, leaving a balance of $337,764.40.

Corporation Information:

List of Corporations:

Statutory Authority: ch. 32, sec. 157.155.

Pertinent Regulation: None.

Information Release: a list of corporations filing an annual report, including the name of corporation, names and addresses of officers and registered agent. A daily list of all newly formed corporations is maintained.

Fee: $30.00. No fee is charged to recorders of deeds, members of the General Assembly, and state agencies. A $144.00 per year fee is charged for the compilation of newly formed corporations. No fee is charged local governments and state agencies.

In 1982, 175 copies of the list of corporations filing an annual report were distributed free to government agencies, and 1,100 were sold to the public. A fee of $30.00 is charged for the annual list, which costs $37.17 to produce and mail. In 1982, 1,275 requests were made for certified annual lists. The daily list was distributed to 10 government agencies, and 18 were sold to the public. A fee of $144.00 per year is charged for the daily list which costs $317.21 to produce. A total of $35,592.00 revenue was produced. Administrative costs were $52,551.00, leaving a deficit of $16,959.00.

Corporate Records:

Statutory Authority: ch. 32, sec. 157.155-1

Pertinent Regulation: None.

Information Release: Abstract of the corporate record of any corporation including charter documents and most recent annual report.

Fee: $2.00 for public requesters. No charge to federal, state or local governmental agencies. Additional lists of officers and directors may be obtained at a fee of $.50 per list. Certified abstracts of corporate records cost $5.00 in addition to the basic fee.

In 1982, 175,012 copies were made at $.50 per page. 15,006 certificates were produced at $5.00 each. 3,769 abstracts of corporate records were prepared at $2.00 each. Total revenues were $170,074.00. Administrative costs incurred for processing requests were $52,000.00, leaving a balance of $118.074.00.

Revenue and Expense

A fee structure, established by statute, requires the Secretary of State to charge a fee to persons requesting information from the Secretary of State. In 1982, $5,445,642.40 of revenue was produced from this source. This money was transferred to the Road Fund. Administrative costs for producing this information were $1,854,632.22. The fee structure has remained constant since 1969 for sec. 6-118 and for sec. 3-823. The last fee increase occurred in 1982 when fees for vehicle registration list (sec. 3-420) were increased to $400.00 effective January 1, 1982 from $200.00 which fee was established in 1969. Fees for statistical services (sec. 2-123) were increased in 1981 to $200.00 plus $20.00 per 1,000 from $200.00 plus $10.00 per 1,000.

The Office of the Secretary of State incurred expenses for producing and transmitting information to requesters. Expenses include staff salary and fringe benefits, automated data processing equipment capitalization and use, and other related administrative costs.

Statistics

In 1982, in Illinois there were 7.5 million drivers licenses, 8.3 million motor vehicle registrations, and 172,751 registered corporations.

Information Use

Information filed with the Secretary of State is used by requesters for a wide range of purposes. Law enforcement officials use information to verify personal information regarding a subject's use of a vehicle and for criminal investigations. Government agencies use information to determine adherence to laws and regulations and to establish demographics and patterns of change useful in development of government policy.

There is a broad range of commercial use of information filed with the Secretary of State. For example, insurance companies verify driver information and driver records for insurance policy purposes and fraud prevention. Vehicle manufacturers use information for automobile safety recall notices that are required by law. Merchandise is sold by catalog using recipient names and addresses assembled from Secretary of State information lists. Charitable organizations solicit donors using name and address lists supplied by Secretary of State. Political candidates use this information for political campaigns. Commercial requesters use overall information for statistical purposes. List brokers use information supplied by Secretary of State to assemble general or specialized lists that are sold or leased to commercial users who use lists for their own purposes, and/or sell or lease lists to other commercial users.

Corporation information, including corporation lists and corporate reports, is available for a statutory fee. It is routinely used by lawyers and others for various purposes including litigation.

Apart from government use, the information filed with the Secretary of State is purchased by commercial requesters and used extensively to generate unsolicited mail.

This committee does not have verified information to estimate the amount of unsolicited mail. However, a recent article in the Los Angeles Times told of one householder who kept and quantified all unsolicited mail received by him in 1982. He received approximately 100 pounds of such mail, 1,017 pieces, about 20 pieces of unsolicited mail a week. We do not know if this is typical, but there is no doubt that much unsolicited mail is received.

Right of Privacy — Legal Considerations

Based upon testimony and written statements received by this committee, the issue to be examined is whether information received by the Secretary of State, pursuant to statute, disclosed to government officials, and to third party requesters for commercial purposes is an invasion of a personal right to privacy or is an aspect of the public's right to know. Right of privacy concerns stated to the committee are both general and specific. There appears to be a general concern that with technological improvement of automated data processing equipment, there will be a continuing trend to collect more information regarding a person, including personal habits and preferences. We share this concern and suggest that personal information collected by government agencies be limited by a severe "need to know test" and by close adherence to applicable statutes.

Specific personal concerns advanced to the committee regarding information collected by Secretary of State center on personal characteristics such as name, address, type of vehicle owned and, most frequently, date of birth. The result of disclosure of this type of personal information is delivery of unsolicited mail. It is is assumed that large quantities of unsolicited mail are received by members of the public. It is also assumed that a large number of people do not object to receiving unsolicited mail, and that those who object to receiving unsolicited mail are selective in their objections, some unsolicited mail being regarded of benefit or value to the recipient or recipient's family. There are means, not infallible, of removing one's name from the list (see, pp. 10-11). The following legal analysis is viewed in this setting.

The right of privacy is a relatively new legal concept. The law of privacy was first articulated in an historic article by Samuel Warren and Louis B. Brandeis which appeared in the December, 1890 issue of the Harvard Law Review. When Brandeis became an Associate Justice of the United States Supreme Court, he wrote a dissenting opinion which is now controlling law:

> (The framers of the Constitution) sought to protect Americans in their beliefs, their thoughts, their emotions, and their sensations. They conferred, as against the Government, the right to be let alone, the most comprehensive of rights and the right most valued by civilized men. To protect that right every unjustifiable intrusion by the Government upon the privacy of the individual whatever the means employed must be deemed a violation of the Fourth Amendment. Olmstead v. U.S., 277 U.S. 438 (1928) (Brandeis, J., dissenting).

The 1970 Illinois Constitution guarantees a person's right to privacy. Article I, Section 6, provides, in part, that:

> The people shall have the right to be secure in their persons, houses, papers, and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means.

The 1970 Illinois Constitution also provides in Article I, Section 12:

> Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly.

The Bill of Rights Committee perceived the need to balance government responsibilities with individual privacy. The committee regarded the protection granted by the Illinois Constitution to lie in the area of privacy of thought and personal behavior. Commentary on the Illinois Constitutional Provision states:

> It is doubtlessly inevitable that any person who chooses to enjoy the benefits of living in an organized society cannot also claim the privacy he would enjoy if he were to live away from the institutions of government and the multitudes of his fellow men. It is probably also inevitable that infringements on individual privacy will increase as our society becomes more complex, as government institutions are expected to assume larger responsibilities, and as technological developments offer additional or more effective ways by which privacy can be invaded. In the face of these conditions the Committee concluded that it was essential to the dignity and well being of the individual that every person be guaranteed a zone of privacy in which his thoughts and highly personal behavior were not subject to disclosure or review. The new provision creates a direct right to freedom from such invasions of privacy by government or public officials. Report of Bill of Rights Committee.

This committee concludes that the right to privacy does not preclude record keeping vital to government functions. Records maintained by Secretary of State in the areas of drivers license, abstract of drivers records, vehicle title or registration, registered vehicles, statistical services, and lists of corporations are deemed appropriate functions of government and are required by statute. Information contained in these lists assembled and maintained by Secretary of State are public records. Where there is an expressed or implied legislative intent that records be available for public inspection, the custodian of the records may not deny access to the record. State ex rel Youmans v. Owens, 28 Wis.2d 672 (1975).

The corollary issue arises when Secretary of State is called upon to respond to a third party request for information that results in unsolicited mail. Personal characteristics of commercial value are name, address, and date of birth. Type of vehicle owned and driving record are also of commercial value. These personal characteristics disclosed by Secretary of State are regarded by this committee as innocuous. Professor Prosser, one of the most distinguished of modern authorities on tort law, stated:

> The matter made public must be one which would be offensive and objectionable to a reasonable man of ordinary sensibilities. The law is not for the protection of the hypersensitive, and all of us must, to some reasonable extent, lead lives exposed to the public gaze. Prosser, Handbook of the Law of Torts, 4th ed., 1971, p. 811.

The release of innocuous information concerning a person is not legally actionable. The measure of how objectionable the revelation of a given piece of information is to be measured by the offense caused to the social values of the community by its content. Sidis v. F-R Pub. Corp., 113 F.2d 806, affirming 34 F.Supp. 19 (2d Cir. 1940). Information of the type disclosed by Secretary of State is "neither vital nor intimate" so as to cause offense to a reasonable person. Lamont v. Commissioner of Motor Vehicles, 269 F.Supp. 880, aff'd. 386 F.2d 449, cert. den. 391 U.S. 915 (1967 S.D.N.Y.).

In recent years federal and state statutes have spelled out the public's right to obtain information from public records. The rationale for this right is spelled out in Cox Broadcasting Corp. et al. v. Cohn, 420 U.S. 469 (1975).

The sale of driver's license lists by a government unit to direct mail firms does not constitute an invasion of privacy. Relying upon the judgment of the Ohio legislature, the court in Shibley v. Time, Inc., stated that the sale of the names of subscribers to a magazine to another direct mail concern does not give rise to a cause of action. Shibley v. Time, Inc., 40 Ohio Misc. 51, 321 N.E.2d 791 (Court of Common Pleas, Cuyahoga County, 1974). So far as determining whether or not the sale of a person's name as part of a mailing list is concerned, there appears to be no basis for distinguishing between sale of the name by a private concern or by a governmental entity. The sale of driver's license statistics by the governmental unit to a third party does not constitute an invasion of privacy because the records are public. Lamont, supra at 883. In Lamont, the court stated:

> The mailbox, however noxious its advertising contents also seem to judges as well as to other people, is hardly the kind of enclave that requires constitutional defense to protect the privacies of life. The short though regular journey from mailbox to trash can . . . is an acceptable burden, at least as far as the Constitution is concerned.

Id. at 883.

Commercial Use of Information

Arrayed against invasion of personal privacy concerns are a substantial number of elements supporting direct mail or unsolicited mail.

Information and data was presented to this committee as follows:

Representatives of the news media expressed a view that the public has a right to know the identity of drivers and owners of vehicles who use public highways. The public has a right to know if abuses have occurred.

The economic benefits of direct mail are substantial. Approximately 12 to 15 percent of all retail sales in the United States are generated by direct mail. There is a trend towards increased retail sales by direct mail. Direct mail sales increased from $82 billion in 1977 to $140 billion in 1981. A five percent annual increase in retail sales is anticipated. It is projected that, by 1990, 20 percent of retail sales will be made by direct mail. The direct mail industry is dependent upon the availability of mailing lists, including information assembled and made available by Secretary of State.

Direct mail printing is a $1.5 billion industry. An estimated 90,000 people are engaged in direct mail printing industry in Illinois. Any substantial loss of jobs in this industry could result in serious economic consequences to the State.

One witness testified that direct mail accounts for 46 percent of contributions made to the Easter Seal Society in Illinois. It is assumed that comparable statistics are applicable to other Illinois charitable organizations. Use of such lists is essential to these organizations.

Secretary of State information is used for automobile safety recall notifications. In 1981, there were 197 safety recalls. Recalls could not be made without access to Secretary to State information lists. The public would be exposed to serious danger if the recalls were not effective.

Insurance companies use Secretary of State information to identify bad risks, ascertain ownership and avoid fraudulent claims. Automobile manufacturers use statistical information to analyze sales performance of a product and to estimate parts requirements for vehicles.

Information as to date of birth is used by hospitals with senior citizen benefit programs. Senior citizens associations use age information to target senior citizens for membership drives and for approval of benefits. Armed Forces target young people to advise them of recruitment opportunities and career benefits. Information is also used for specialized purposes. For example, eyeglass manufacturers offer discount services to persons who wear eyeglasses, based on information derived from driver's license lists. Attorneys use information to locate and identify witnesses for litigation purposes.

The Direct Mail Marketing Association (DMMA) is a voluntary association of approximately 2,700 direct mailers. The DMMA constitutes a substantial portion of direct mailers, but not all direct mailers are members of DMMA. The DMMA has industry standards designed to prevent abuse in the use of mailing lists, telephone marketing, special offers, unordered merchandise, and fund raising. However, the industry standards are advisory and not self-enforcing.

Persons can request DMMA to remove their names from DMMA lists. The DMMA acknowledges that because of volume, change of address and name similarity, not all requests result in deletion of names from DMMA mail preference lists. The mail preference system is actively advertised in many newspapers and magazines. There are presently approximately 500,000 names on the mail preference list. Since 1971 approximately 240,000 people have requested their names be removed from the mail preference list.

Information Disclosure: Other Agencies and States:

A. ILLINOIS AGENCIES

AGENCY	INFORMATION SOLD
Attorney General	None
Central Management Services	None
Capital Development Board	None
Children & Family Services	List of child care facilities @ $100 per computer list or $150 for labels
Commerce & Community Affairs	None
Comptroller	Lists of state employees by agency and county @ $1.00 per page or $.35 per microfiche
Conservation	None
Corrections	None
Board of Education	None
State Board of Elections	Copies of petitions @ $.50 per page by policy
Financial Institutions	None
Board of Higher Education	None
Labor	None
Law Enforcement	None
Public Aid	None
Public Health	None
Registration & Education	Rosters of licensees @ cost
Revenue	None
Treasurer	None; fiscal information available for public inspection

B. OTHER STATES

A survey done by the Secretary of State showed that as of May, 1979, in addition to Illinois, 44 states and the District of Columbia sold drivers license and vehicle information. Six states did not reply to the questionnaire.

Issues and Findings

The following issues and findings pertain to information received and disclosed by Secretary of State: drivers license, abstract of drivers record, vehicle title or registration, registered vehicle list, statistical services and corporation information.

Issue 1: Should disclosure of information to persons or entities other than public officials be prohibited?

Finding 1: Information is received by Secretary of State pursuant to statute. Personal information disclosed is deemed innocuous. Disclosure of this information does not violate the federal or Illinois Constitutional guarantee of right of privacy. Information disclosed does not impinge on a person's privacy of thought or personal behavior. It may be required by the public's right to know.

Issue 2: Which public officials may receive information and what is permissible use of such information?

Finding 2: Statutory authority requiring disclosure to law enforcement officials and state agencies is appropriate. Use of this information shall be limited to law enforcement and government purposes. Government officials who receive such information from Secretary of State shall not disclose such information for political, commercial or non-government related purposes.

Issue 3: Does disclosure of such information constitute a threat to personal safety or property?

Finding 3: No substantive evidence was presented indicating use of such information for criminal purposes or for personal harassment. Neither Secretary of State nor

law enforcement officers using such information have indicated use of subject information for criminal or inappropriate purposes. Although the potential for negative use is present, the likelihood of misuse is remote and does not constitute a present danger.

Issue 4: Should applicant be granted "check-off" option that prohibits disclosure of information by Secretary of State pertaining to applicant to commercial users or non-government third party requesters?

Finding 4: We received communications from persons who believe that disclosure of driver's license information to third party commercial users constitutes an invasion of privacy. Although the number of persons expressing this concern to the committee is relatively small, we assume they are representative of a larger number of Illinois persons who have similar concerns. It is impossible to accurately quantify the number of such persons.

We find that the information disclosed does not constitute an invasion of personal privacy. We have examined the practical effect of Secretary of State granting an option to driver's license applicants to indicate their preference by way of a "check-off" to preclude Secretary of State from disclosing information as to applicant's name, address, date of birth, and other related information to a third party requester or commercial user. The objective of the "check-off" would be to protect persons from receipt of unsolicited mail. We find that the "check-off" would not achieve the objective sought. Information disclosed by Secretary of State to commercial users is only one source of issuance of unsolicited mail and there is high likelihood that a person would continue to receive substantial quantities of unsolicited mail even though the person used the "check-off" option. The likely result would be that Secretary of State would be criticized for misleading persons and not preventing delivery of unsolicited mail and misleading persons to believe using the "check-off" option will terminate their receipt of unsolicited mail.

Issue 5: Should categories of quasi-public users and commercial users of Secretary of State information be created, allowing disclosure to quasi-public users and denying disclosure to commercial users?

Finding 5: Commercial uses of subject information includes vehicle safety recall programs, insurance rate setting and other uses construed as benefitting the public. We find classification of commercial use and quasi-public purposes by commercial users would raise serious constitutional issues.

Issue 6: Should Secretary of State market information to commercial users?

Finding 6: We find that aggressive marketing of lists to commercial users by Secretary of State to increase revenues derived from this source to be inappropriate. However, Secretary of State should continue to make this information available and charge rates for this service to reimburse the State.

Issue 7: Should Secretary of State use decoy names and other techniques to enable tracing of use of information and lists disclosed to commercial users?

Finding 7: We find that Secretary of State use of decoy names and other techniques for tracing and validation purposes to be appropriate.

Issue 8: Should Secretary of State disclose social security number to requesters other than law enforcement officials?

Finding 8: Federal and Illinois statutes authorize Secretary of State to require an individual seeking a driver's license to disclose social security number. Section 7 of Public Law 93-579, the Privacy Act of 1974, 5 U.S.C.A. sec. 552a, note, provides a state agency may deny an individual a right, benefit, or privilege because of such individual's refusal to disclose social security number if the agency was authorized by statute to require disclosure prior to January 1, 1975. Ill. Rev. Stat. ch. 95 1/2, sec. 6-118(d), which requires disclosure of social security numbers to obtain a driver's license, was adopted prior to this date. Section 552a(b)(7) of 5 U.S.C.A. provides social security numbers shall not be disclosed by "agencies"

except pursuant to a written request by, or with the prior consent of the individual except to law enforcement officials, and other officials and agencies including the U.S. Bureau of Census. The term "agency" as defined at 5 U.S.C.A. sec. 552(e) does not include Secretary of State.

We find Secretary of State should not disclose social security numbers except pursuant to a written request by, or with the prior written consent of, the individual except to:

(1) Officers and employees of Secretary of State who have a need for social security numbers in the performance of their duties;

(2) Law enforcement officials for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the law enforcement agency or instrumentality has made a written request to Secretary of State specifying the law enforcement activity for which the record is sought; or

(3) Pursuant to the order of a court of competent jurisdiction.

Recommendations

1. Amend statutes as follows:
   (a) Combine all sale provisions into sec. 2-123.
   (b) Define information to be sold and purposes for sale.
   (c) Clarify "statistical services" in sec. 2-123.
2. Draft implementing regulations for the following:
   (a) Define standards for Secretary of State rejection of third party requests for subject information.
   (b) Establish procedures for purchase and processing of requests.
   (c) Establish procedures for connection of Secretary of State computer to non-Secretary of State users.

(d) Payment procedures.

(e) Establish cost of sale of lists of licensees.

(f) Establish contract procedures.

(g) Establish the list of purchasers and the sale of that list to requesters.

3. Revise fee structure as follows:

(a) Statistical information (ch. 95 1/2, sec. 2-123) should be provided at cost to the requesting government agency.

(b) Raise fee for vehicle and title searches to cover administrative costs. Fee to be set by rule.

(c) The fees for corporation annual list and daily corporation filing list should be increased to cover administrative costs. Fees to be set by rule.

4. Social Security: At a minimum, we recommend a regulation to state the circumstances under which Secretary of State is permitted to disclose social security number. A statute should be considered.

5. Require that third party requester or commercial user provide identification and statement of purpose for which information will be used.

6. Agreement between Secretary of State and commercial user to include the following elements:

(a) Allow primary user to resell, lease or license sub-users; require, as part of re-use, that sub-user will advise primary user of use and purpose of information, and primary user advise Secretary of State of its use and use by sub-users.

(b) Secretary of State may suspend primary user or sub-user from further access to Secretary of State information in the event of violation of agreement with Secretary of State for a period of not less than one year.

(c) Secretary of State standards for rulings and sanctions will comply with Administrative Procedure Act.

7. Secretary of State shall advise persons who object to release of personal information to contact Direct Mail Marketing Association to request deletion of name from commercial mailing lists. The Secretary of State should indicate at the same time that such request may not result in deletion of the name.

8. Secretary of State use decoy names and other devices to enable him to trace use of subject information.

9. Establish a working group composed of state officials of other states who have a responsibility to maintain and disclose similar information.

10. Encourage members of Direct Mail Marketing Association and other commercial users to publicize the mail preference option (deletion of name from mailing list) more broadly, including mail preference option to be noted on a reasonable proportion of direct mail pieces.

We are grateful to the Secretary of State for providing this committee an opportunity to study the issues created by the gathering and release of public information. Testimony by members of the public and the commercial users was of great assistance to the committee.

Respectfully submitted,

Richard E. Friedman, Chairman

Elmer Gertz

Paul C. Blume

Edmund J. Rooney

Bob Collins

Submitted: March 17, 1983.

NEWS

Jim Edgar
Secretary of State

FOR IMMEDIATE RELEASE
April 11, 1983

(83-22)

EDGAR TO SEEK IMPLEMENTATION OF RECOMMENDATIONS OF ADVISORY COMMITTEE ON SALE OF INFORMATION

CONTACT: Mike Walters
217/782-2201

SPRINGFIELD, ILL. - Sec. of State Jim Edgar said Monday he will support legislation and make appropriate administrative changes to fully implement recommendations of a special commission he created to study the sale of information by the Secretary of State's Office.

The commission, chaired by Chicago attorney Richard E. Friedman, former executive director of the Better Government Association, found that the sale of information by the Secretary of State's Office does not violate federal or state constitutional guarantees of the right to privacy nor does it constitute a threat to personal safety or property.

Sale of much of the information obtained by the Secretary of State's Office in the course of its statutory responsibilities is required by law, and includes drivers license records, vehicle registration and title information and listings of corporations doing business in Illinois.

The distribution of such information has been a practice in Illinois for over 20 years, and such information is sold by all 44 states responding to a recent Secretary of State survey.

The Secretary of State Advisory Committee on Distribution of Government Information, noting that the sale of information generated $5.4 million in revenue for the state last year, recommended a number of steps to safeguard abuse of the list by purchasers. These included establishing a system for strict control over re-sale of information lists, and using decoy names and other devices to monitor the types of material sent out by direct-mail users of the lists.

The commission also recommended legislation be adopted to specify information to be sold and purposes for such sale, and also urged fees for such information be increased to reflect actual costs incurred by the office in preparation for distribution.

"The Secretary of State's Office, through the many services it provides Illinois drivers, vehicle owners, businesses and others, is responsible for the collection of a wide range of information," Edgar said.

"To the best of our knowledge, this is the first time in the history of this office that the sale and distribution of this information has been extensively studied.

"The commission's distinguished members worked diligently at its public hearings and meetings to determine if the distribution of any information should be curtailed or further protected, and I am very satisfied that they gave this issue the full and careful study it deserved. I wish to publicly thank them for their many hours of work and the thoughtful consideration they gave this important responsibility."

The commission noted that only one person testified that the availability of information on driving records or vehicle titles be halted, while numerous beneficial purposes for the distribution of such information were brought to the commission's attention.

Among those currently using the information are:

*** Automobile manufacturers to trace ownership of vehicles subject to recall notices to correct mechanical problems;

*** Insurance companies to identify bad risks and avoid fraudulent claims;

*** Attorneys to locate and identify witnesses for litigation purposes;

*** Major charities for fund-raising purposes.

(more)

For persons concerned about receiving direct mail solicitation, the commission noted the Direct Mail Marketing Association, which represents most direct mailers in the country, will remove names from lists used by the association's 2,700 member firms if the association is notified in writing.

Public hearings were held by the commission in Chicago and Springfield prior to the drafting of its report. Members, in addition to Friedman, included Elmer C. Gertz, noted author and civil liberties lawyer; Paul C. Blume, former general counsel of the National Association of Independent Insurers; Edmund J. Rooney, journalism professor and well-known champion of press freedom; and Bob Collins, WGN Radio journalist.

#####

FACT SHEET

SECRETARY OF STATE ADVISORY COMMITTEE

ON DISTRIBUTION OF GOVERNMENT INFORMATION

I. Statutory changes recommended would not expand or limit the sale of any information collected but would:

A. Consolidate statutory references to fees charged for information. There are currently four references. All would be located in one section of the statutes if legislation to be introduced is enacted.

B. Increase fees for sale of some information to reflect actual costs incurred. Based on the committee's recommendations the following fees would be increased:

-- annual corporation listing from $30 to $40 per volume;

-- daily listing of new corporations from $144 to $250;

-- vehicle registration and title searches from $2 to $4 per item searched.

II. Committee recommendations to be implemented administratively by the Secretary of State's Office:

A. Require purchasers to sign contracts stating reasons for use of information;

B. Establish standards for use of information by purchasers. For example, sale would be prohibited to those found to use such information for illegal or questionable purposes;

C. Use of decoy names by the Secretary of State's Office to ensure that purchasers are using the information in accordance with the stated purpose on the contract;

D. Notify persons objecting to use of information about them to contact the Direct Mail Marketing Association in writing to request that their names be removed from the association's member firms.

WHY NAMES AND ADDRESSES ARE NEEDED IN COMPILING STATISTICS

In compiling motor vehicle statistics, R. L. Polk & Co. does not disclose individual identities, but it does need names and addresses to compile a substantial number of extremely detailed statistical reports by small areas, such as census tracts, zip codes or other market areas which are not contiguous with city or county boundaries. Such statistics cannot be compiled without street addresses for registrants. These addresses are only used in the compilation process and addresses of individuals are not disclosed in the published reports.

In order to properly analyze any market for motor vehicles, it is necessary to identify vehicles owned or registered in the names of businesses, in the names of individuals, in the names of motor vehicle manufacturers, in the names of dealers, in the names of lessees, etc. To maintain consistent and uniform procedures in compiling motor vehicle statistics for each state, and nationally, it is essential that R. L. Polk & Co. be able to make these ownership distinctions, using programs and practices that it has developed over the years and that are acceptable to, and understood by, users, particularly the motor vehicle industry. Consequently, names of registrants are needed in compiling statistics but individual identities are not disclosed.

To: Mr. D. Degen
March 3, 1983

REPORTS REQUIRING NAME AND/OR STREET ADDRESS

	Name/Address	Name Only	Address Only
Standard Services		9	2
Market Area	23	28	
Fleet	38		
Special Jobs	14	38	
Census Tract Density	* 41		
Tramp	13		
Motorcycle		2	1
7/1 Basic	0	0	0
7/1 Special Jobs			2
Motor Homes		3	
NVPP			1
Recall	* 84		
Vehicle Origin Survey	—	—	* 11
Total	213	80	17

Grand Total: 310

* 1982 Calendar Year Volume

DETROIT NEWS

Sunday - March 13, 1983

Our Opinions

Michigan's Central Problem

New evidence that Michigan's economy is out of synch with the rest of the nation can be found in the R.L. Polk & Co. study on the age of the auto fleet.

The company, a reliable source in such matters, says the average age of cars in the United States increased last year to 6.2 years, making this the oldest fleet on the road since the 1950s.

Further, the total number of cars increased just 1 percent in 1982, the lowest growth rate since World War II. Only 6.5 percent of the fleet was scrapped, the second-lowest junk rate since 1953.

Such numbers suggest the extent of the damage done by high sticker prices, inflated interest rates, and long loan periods, factors that force people to hold onto their old cars.

The median car age in 1970 was 4.9 years, 1.3 years less than today's figure — which translates into a market decline that has nothing to do with the brilliance of the Japanese. Rather, foreign car sales merely exacerbate a more basic problem.

It is unwise, therefore, to assume the auto industry will recover at the same rate as the national economy. Cars are big-ticket items. High prices and high interest rates have forced changes in auto-buying habits, and a general economic recovery isn't likely to alter that attitude very much.

Hertz Corp. studies covering 20 years show that people have a built-in governor on car-spending, 12 percent of personal income up to the 1973 oil embargo, just over 14 percent thereafter. The figure has always been below 15 percent. As the costs of auto ownership rise, people economize to stay within that bracket by driving less and keeping cars longer.

Because Michigan is so dependent on the auto industry, it is apparent that the new attitude toward cars will result in a slower recovery rate for the state.

Nevertheless, we in Michigan can anticipate a half-recovery or a three-quarters recovery which, while hardly representing a return to the old boom years, would do much to improve the condition of state finances, as well as our collective digestion. It will, unfortunately, still leave thousands of our neighbors out of work.

What this means is that, even as auto sales rise in the months ahead, the effort to diversify the state economy must be broadened and intensified. And essential to the success of the effort is the realization that singularly high wage and tax rates are a ball-and-chain on our industries.

A new era is upon us and to prosper we must adjust. The auto business will remain an important economic generator, but it can no longer by itself guarantee the prosperity of Michigan.

Copies: R. L. Polk, Jr.

THE DETROIT NEWS

March 9, 1983

U.S. car owners are driving them longer

By The Associated Press

Americans continued to hold onto their old autos last year as the median age of cars on U.S. roads reached 6.2 years, marking the oldest auto popuiation in this country since the 1950s.

R.L. Polk & Co. in Detroit also said in a statement the numbers of cars on roads increased just 1 percent during the year ended last June 30, the lowest growth rate since World War II.

In addition, only 6.5 percent of the cars on the road were scrapped last year, second-lowest since 1953.

The previous record low in median age for U.S. cars was during the 1950s, although that exact age has not been calculated recently, according to John Casey of the public relations firm of MG and Casey Inc. in Detroit.

In contrast with the 6.2-year age of cars last year, in 1970 the median age of cars was 4.9 years.

Last year's 1 percent growth rate was the worst since the mid-1940s when the nation's factories were building war machines rather than cars, Casey said.

In contrast, growth in numbers of cars on U.S. roads in the 10-year period ending in mid-1976 was 3.2 percent followed by 2.1 percent in 1977, 3.1 percent in 1978, 1.7 percent in 1979 and 1.2 percent in 1980 and 1981.

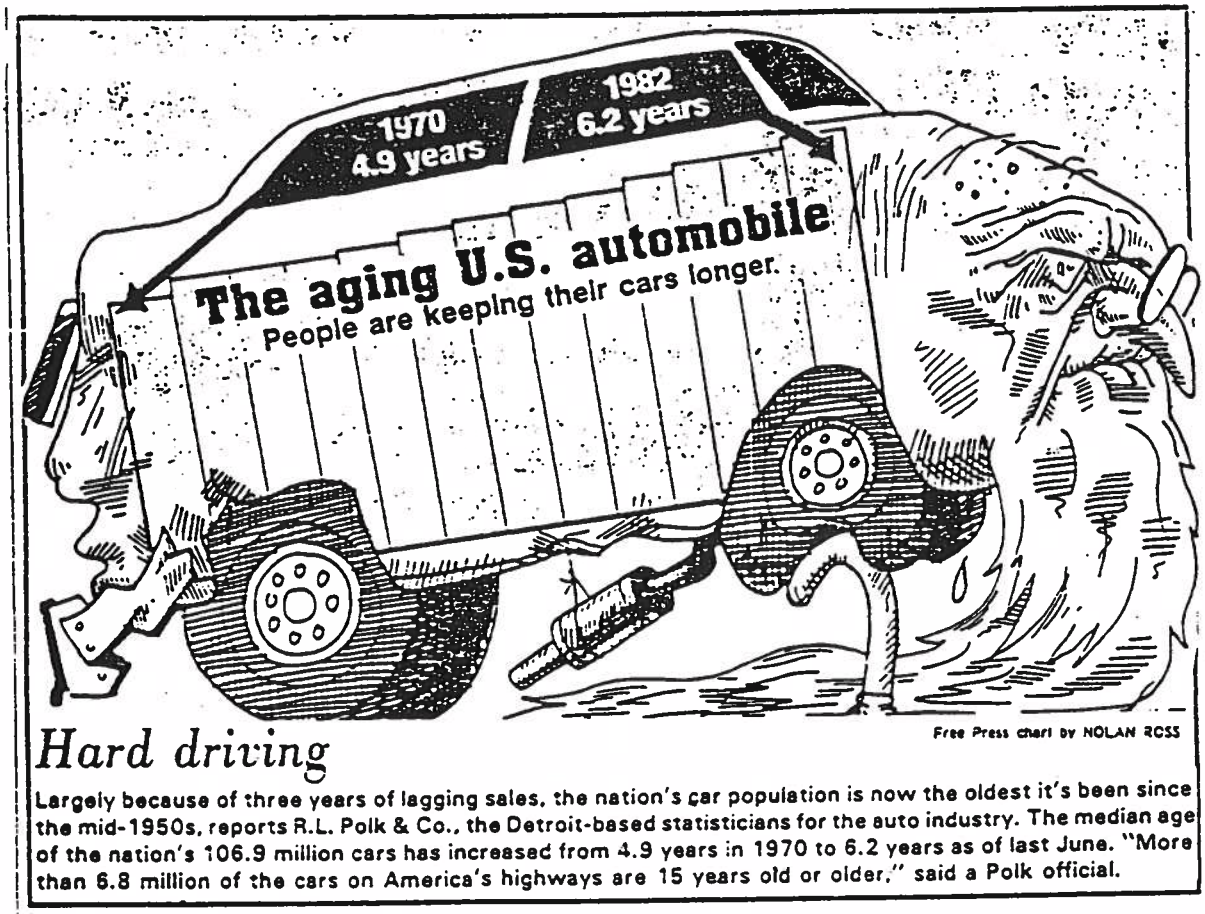
Americans scrapped the fewest numbers of cars in the past few years in 1975, when 6.1 percent were taken off roads, Casey said. That was followed by 6.2 percent in 1953 and last year's 6.5 percent, he said.

Car sales last year fell 6 percent from already-depressed 1981 levels.

Copies: R. L. Polk
R. L. Polk, Jr.

DETROIT FREE PRESS

March 10, 1983



Hard driving

Largely because of three years of lagging sales, the nation's car population is now the oldest it's been since the mid-1950s, reports R.L. Polk & Co., the Detroit-based statisticians for the auto industry. The median age of the nation's 106.9 million cars has increased from 4.9 years in 1970 to 6.2 years as of last June. "More than 6.8 million of the cars on America's highways are 15 years old or older," said a Polk official.

270

U.S.A TODAY

March 9, 1983

6-year-old car just average

Special for USA TODAY

The average car on the USA's highways today is 6.2 years old — older than at any time in more than 25 years, and good news for automakers down the road.

R.L. Polk & Co., a statistical firm, reports 6.8 million cars in the USA's fleet of 106.9 million are at least 15 years old.

"I'd say new car sales will increase during the 1980s, if only to replace our ever-aging fleet," Joseph Cirrincione of Polk said Tuesday. Older cars should also mean a boom in replacement parts and auto service industries.

271

NEW VEHICLE REGISTRATION INFORMATION

ITS ROLE AND IMPACT ON THE AMERICAN VEHICLE INDUSTRY SCENE

FORWARD

New vehicle registration information serves the analytical needs of city, state, and federal governments, trade associations, the banking and automotive industries as well as a great many of the nation's leading corporations. This registration information in statistical form, has literally been the barometer for measuring the development and growth of the automobile industry in Twentieth Century America.

Accuracy and versatility have always been the goal in the compilation of the statistics and thus complete vehicle and owner data is essential to provide the users with the myriad of reporting services which have been required since publication of the first reports in 1922.

The individual vehicle description, as determined by the vehicle identification number, facilitates the tabulation of make, series, body style, engine type and size characteristics necessary for nearly every manufacturer serving the American automobile and truck markets.

Registered owner information, including complete name and address, is the cornerstone of virtually hundreds of specially prepared reports ranging from commercial user segmentation to assisting individual dealers in the promotion and merchandising of their vehicles.

The use of the vehicle and owner information is explained in detail on the pages that follow. Each page describes either a reporting service or the use of the vehicle statistics in satisfying an essential need for governmental and/or commercial entities.

DESCRIPTION: Fleet Reports

Statistical reports showing quantities of vehicles purchased by recognized fleet accounts registering ten or more cars and/or trucks nationally, in a calendar year. The name of the owner of each vehicle registered is the basis for identifying the fleet accounts and compiling the associated vehicle volumes.

These reports are an invaluable aid for manufacturers, suppliers and dealers alike in assessing this important segment of the vehicle industry.

DESCRIPTION: Rental and Leasing Reports

Statistical reports showing quantities of vehicles registered to either Rental or Leasing Agencies in volumes of ten or more cars and/or trucks nationally in a calendar year. As is true with the Fleet reports, the name of the vehicle registrant is the basis for identifying and compiling the vehicle volumes associated with these agencies.

Because of the impact of leasing on the retail area of the business, manufactuers and dealers, as well as financial institutions, closely follow trends in this segment of the market to develop merchandising and distribution strategies over a period of time.

DESCRIPTION: Census Tract Reports

Passenger car and truck reports, tabulated by census tract or Zip Code, for the metropolitan markets throughout the nation. A complete and accurate street number and name is required to tract or Zip Code these registration volumes.

The vehicle manufacturers and many associated suppliers use such information to survey the larger markets in their planning for the numbers, size, and locations of dealers. Over a period of time, the monitoring of trends allows the manufacturers to recommend to their dealers either facility expansion or relocation to provide for optimum sales and profit opportunities.

DESCRIPTION: Planning Potentials

Developed by the individual manufacturers using registration information, planning potentials ordinarily represent an average three year sales expectancy rate for an individual or group of dealers in a market. The planning potentials are also the basis for facility guides and investment criteria for new dealer candidates or proposed dealer relocations. Because a dealer's business is predominantly retail, the registration information and associated planning potentials must also be retail only in nature. This requires that fleet, rental and leasing, governmental and manufacturer registered units be subtracted from the total registration in a state, county, town, or even Zip Code or census tract. To accomplish this requires complete registrant name and address on all individual vehicles received for tabulation.

DESCRIPTION: Recall Notifications

By Federal law, vehicle manufacturers are required to notify their vehicle owners of safety defects or exhaust emission problems and to repair or correct those deficiencies. In some instances, the manufacturer has been required to send its owners a warning notice - Ford Motor Company on a transmission problem in its vehicles. Similarly, a tire manufacturer must send defect notices to owners of its tires and must replace those tires - Firestone Tire Corporation. Finally, manufacturers from time to time notify owners of their vehicles that a vehicle defect, not safety related, will be repaired at the manufacturer's expense. All of these notification programs use vehicle registration information supplied by R. L. Polk & Co.

Polk continually updates registration information, recording changes of ownership and address (see description of Debit-Credit Program on the next page). Thus, at any time, a manufacturer can locate not only the original but subsequent owners of its vehicles.

DESCRIPTION: Debit-Credit Program

After the initial crediting of a vehicle registration, it is essential that credit for the same vehicle not be duplicated should a change in owner address or a transfer of ownership occur. To avoid this duplication, beginning in January of each year, all succeeding months registrations are matched in Vehicle Identification Number with the registrations previously credited for the year to date. As duplicate registrations are encountered, specific statistical and procedural actions are implemented. For example:

... A vehicle initially registered to a dealer is sold, and re-registered by the buyer who is located in a different town. Action: The registration volume in the dealer's town (dealer registered units) would be reduced by one unit and the volume in the buyer's town (retail registered units) would be increased by one.

By means of relatively sophisticated procedures known as Debit-Credit, the processing of registrations avoids duplications and at the same time, maintains the integrity of essential segments such as fleet, governmental, dealer/manufacturer, etc. volumes. This entire reporting system depends on complete and accurate owner name and address, as well as vehicle information.

CONCLUSION

Vehicle registration statistics have, and continue to play a vital role in the growth and development of the passenger car and truck industry in the United States. The vehicle manufacturers can program their marketing operations in the public interest because such information tells them

... how many vehicles and which body styles and series to build

... where to distribute them

... where additional dealers are required ... or where too many dealers exist

... when and how to assist their dealers in market support and advertising campaigns

... how their sales volumes compare with those of competitors

... which models of cars or trucks are selling best and which are moving slowly

Beyond the vehicle manufacturers, others directly associated with the industry and businesses and governmental agencies in general, also use the vehicle statistics. For registration reports are used by law enforcement agencies ... automobile dealer associations ... vehicle trade publications ... the tire industry ... oil companies ... finance companies ... the insurance industry ... state and city governments ... state labor departments ... the U.S. Government ... the Federal Reserve Board ... urban planners ... highway engineers ... advertising agencies ... magazines and newspapers ... colleges and universities ... departments of taxation ... railroads ... legal departments ... the trucking industry ... and countless other enterprises.

And each of these report users depend to varying degrees on the essential characteristics of each officially registered vehicle ... the vehicle identification number and the name and address of the owner.

TESTIMONY BY THE NATIVE HAWAIIAN LEGAL CORPORATION
ON PUBLIC RECORDS

Good afternoon Chairman Alm and members of the Governor's Committee on Public Records and Privacy.

My name is Mahealani Ing, and I am the Executive Director of the Native Hawaiian Legal Corporation, or NHLC.

NHLC is a non-profit, public interest lawfirm incorporated in 1974 which serves Hawaiians. Five attorneys and ten individuals who comprise their support staff work almost exclusively to assert, protect and defend Hawaiian land and traditional rights. It is governed by a twelve-member Board of Directors. Of these, eight members are attorneys appointed by the Hawaii Bar Association and four are community representatives. Our organization's priorities were developed in 1974 and have changed very little since.

They include (1) formal recognition for the Native Hawaiian people as Native Americans with full access to federal programs benefitting natives; (2) protection and expansion of rights of Native Hawaiians as they relate to kuleana lands; (3) protection and expansion of rights of ahupua'a tenants; (4) issues involving implementation of the Hawaiian Homes Commission Act; (5) issues dealing with obtaining full benefits for Native Hawaiians of the ceded lands trust set forth in Hawaii's Admission Act and recognized in the Hawai'i State Constitution; and finally,

issues dealing with reparations for the loss of Native Hawaiian lands and other rights.

In working within the parameters described by these priorities, NHLC represents individuals in cases which require review of state and county records. In attempting to secure access to these records, we have experienced problems which fall into two major categories:

1) disagreement over what items constitute "public records, and

2) disagreement over when public records may be withheld from public inspection and copy by the offices of the Attorney General and county corporation counsels.

I would like to briefly discuss two statutes, one of which defines public records, and a second which describes the circumstances under which public records may be withheld.

The definition of "public records" is found in H.R.S. § 92-50. It states:

> . . . "public record" means any written or printed report, book or paper, map or plan of the State or of a county and their respective subdivisions and boards, which is the property thereof, and in or on which an entry has been made, or is required to be made by law, or which any public officer or employee has received or is required to receive for filing, but shall not include records which invade the right of privacy of an individual.

There is disagreement between our firm and various agencies as to what exactly constitutes a "public record." For example, in a case involving appeal of a conservation

district use permit issued by the Department of Land and Natural Resources, we interpret "public records" as defined by H.R.S. § 92-50 to include any correspondence between an applicant and the DLNR regarding the permit, the permit application, any DLNR staff memoranda or reports regarding the application, and the permit itself.

We believe the only documents not included under the foregoing definition would be confidential information of a personal nature. It seems unlikely that information pertaining to the application or granting of a permit could include confidential information of a personal nature which would be subject to right of privacy statutes.

DLNR staff has taken the position that the application, related correspondence and staff memoranda are not public records. As a result, they have refused to make these items available for our inspection without clearance from the Attorney General's office.

Thus, we are required to contact the attorney general, describe the documents we need, and why we need them. Eventually the documents are released. While the AG's office has been very helpful, the clearances required take up to three or more days. We believe this forced delay is a disservice to our clients and unwarranted, given the statutory definiton of public records.

With regard to the withholding of public records, Hawaii Revised Statues § 92-51 reads:

> All public records shall be available for inspection by any person during established office

> hours unless public inspection of such records is in violation of any other state or federal law, provided that except where such records are open under any rule of court, the attorney general and the responsible attorneys of the various counties may determine which records in their offices may be withheld from public inspection when such records pertain to the preparation of the prosecution or defense of any action or proceeding, prior to its commencement, to which the State or county is or may be a party, or when such records do not relate to a matter in violation of law and are deemed necessary for the protection of a character or reputation of any person.

We believe that under the foregoing statute, records may be withheld from public inspection only under two circumstances.

The first circumstance occurs when the following three conditions are met: 1) the record is generated by or in the offices of the AG or county Corporation Counsel; 2) the record is being used to prepare the prosecution or defense of any action to which the state or county may be a party; and 3) the use is prior to the commencement of an action.

The second circumstance which we believe justifies the withholding of public records occurs in the context of a pending criminal or civil violation in which records requested do not relate to the matter which is the subject of the violation and must be withheld to protect the character or reputation of a person.

NHLC recently had problems with the County of Hawaii's Corporation Counsel over this issue. It is litigating a case involving access rights along an ancient

Hawaiian trail in Kona. To support a Motion for Summary Judgment, NHLC attempted to obtain certified copies of building, grubbing, grading and SMA permits from the county. These permits are in the possession of the county Public Works and Planning Departments, and were available to NHLC for inspection prior to the initiation of its suit.

After filing of the lawsuit, the Corporation Counsel's office instructed these departments not to provide NHLC with certified copies of the permits. County staff were even instructed not to let NHLC see the permits. Corporation Counsel then informed NHLC that it had authority to close any public records relating to litigation.

The Corporation Counsel further advised that county documents were available only through formal discovery procedures; i.e. a Rule 34 request for production of documents to which the county would generally be allowed 30 days to respond.

We believe that the county's action violates H.R.S. 92-51. The permits do not fall within either of the two exceptions described in that statute. The permits at issue are not kept in the offices of the Corporation Counsel and are only related to litigation which has already commenced.

Secondly, the permits are not necessary for the protection of any person's character or reputation.

NHLC further believes public records are excluded from the discovery procedures used to obtain documents from

private parties. Accordingly, certified copies of public records should be available even after commencement of litigation in which the state or county is a party.

Although H.R.S. 92-52 allows our clients to apply to the circuit court when denied the right to inspect or copy public documents, going to court to enforce rights already conferred by statute is onerous, and at best provides a piecemeal approach to the overall problem. It further promotes unnecessary litigation.

We sincerely hope this committee will be able to solve problems like the ones described above by making very clear exactly which documents constitute "public records", and by further clarifying the circumstances under which government counsel may withhold these records.

Thank you for giving me this opportunity to testify.

NEWS 7 HAWAII
P. O. Box 90566
Honolulu, Hawaii 96835

N7H feels that the public should be told how much it costs them each year to support Hawaii's retired elected officials! We particularly would like to know what the State is paying George Ariyoshi now that he's no longer Governor?!!!

We also feel that the public should be allowed to inspect Medical Examiner Records to find out first hand what happened to their loved ones!!!

Mahalo!!!

HOW MUCH ARE THEY GETTING?!

WE'RE NEWS 7 HAWAII

WE'LL GET THE NEWS YOU WANT!

Got a story you want covered? Can't get it yourself??! Then call NEWS 7 HAWAII! Our staff of experienced, freelance reporters is ready to serve you.

We cover Hawaii news whenever & wherever it happens!! We're also capable of getting it to you minutes after it does!!!

Hard news?! Feature reports?! You want 'em? We'll get 'em!!

So call us today!! We're NEWS 7 HAWAII & we'll get the news you want!!!

NEWS 7 HAWAII!
808-948-1117
Leave name & phone number after beep!

PACIFIC BUSINESS NEWS

Our 25th Year
First Monday Since
March 8, 1969

August 4, 1987

Mr. Robert A. Alm
Governor's Committee
on Public Records
Honolulu, Hawaii

Dear Robbie:

Aloha.

Enclosed are two sets of opinions and decisions taken from Ian Lind's, Hawaii Sunshine Law Opinions: A Keyword Index.

The first set contains opinions and decisions that we at Pacific Business News consider in keeping with the public's right to know about government operations. The second covers those that we think have worked against the public's best interest.

Our position generally is that the more government records are available for public inspection the better.

Aside from making government accountable to the people who sanction and finance its operations, freedom of information forces government to be more open about its mistakes, and promotes a healthy learning process.

On the positive side, we at Pacific Business News generally find government employees to be quite helpful in our effort to obtain government documents.

Where we run into trouble sometimes is when the government employees think they are unauthorized by law to release certain information, as in the case of the Honolulu Liquor Commission, which, citing state law, will not release any information about applicants for liquor licenses other than what is contained on the commission's public hearing notices. The state Bank Examination Division has at times taken the same approach regarding applicants for industrial loan licenses.

Other problem points do not relate so much to the law as they do departmental inefficiency, such as at the state

FAX # (808) 526-3273
PUBLISHED WEEKLY BY CROSSROADS PRESS, INC. ● P.O. BOX 833, HONOLULU, HAWAII 96808 ● TELEPHONE 521-0021

Bureau of Conveyances, where employees generally are rude and uncooperative, and service is slow.

Time also is wasted when we deal with the state Department of Transportation, which sometimes requires us to funnel requests for information through its public relations office.

At the state Business Registration Division, one of the biggest improvements that could be made from our standpoint would be to cross index all the companies registered against the names of their owners or officers. We also would appreciate more information about the foreign corporations that register to do business in Hawaii.

Thanks, Robbie, for this opportunity to express our concerns about Hawaii's public records and privacy laws.

Please write or call us if we can help the commission in any way.

Aloha,

Mark

Mark Coleman
Associate Editor

rf

"Good"

1/00/00	3rd Circuit Court, C.A. No. 2366	The Big Island Press Club went to court to challenge a county ordinance which allowed proceedings of the Board of Ethics to take place in meetings closed to the public. The Court ruled that Board deliberations could be closed only after a finding that "the subject does involve personal matters affecting the privacy of an individual." In addition, based on a lengthy analysis of the public's right to know, the Court invalidated two provisions requiring that information about ethics violations be kept confidential. The Court held that these provisions were overly broad and violated the first amendment. Big Island Press Club, et. al., vs. Board of Ethics of the County of Hawaii.
79/00/00	1st Circuit Court, SP 4997; 79 HLR 79-0543	The Honolulu Advertiser brought suit against the State Department of Health to gain access to records about the Mililani Sewage Treatment Plant and related pollution problems. The court held that the requested records had to be released. Further, the court held that "the State of Hawaii has no discretion to withhold the requested records contained in its files from the public unless the records requested are specifically exempted from public inspection by constitution, statute, properly enacted regulation, or court rule." Honolulu Advertiser vs. George Yuen, Director of the Department of Health, and the State of Hawaii.

78/05/31	Honolulu Corporation Counsel Op. #78-54	Any person desiring to see the record books of an auctioneer may inspect them during regular business hours. The records must include an inventory of items offered for sale in each public auction. The director of Finance has no authority to grant or deny any person the right to inspect auctioneer's records.
76/06/25	Maui Corporation Counsel Opinion	The director of the Maui County Board of Water Supply asked whether Board records are considered "public records" subject to the Sunshine Law. The Corporation Counsel responded that the Board of Water Supply is a board as defined by the Sunshine Law, and that all records "which do not invade the right of privacy of any individual" must be available for public inspection.
	Ombudsman Opinion 76-2379	The Department of Accounting and General Services (DAGS) required a written request and reasons in order to obtain a copy of the State Government Telephone Directory. After consultation with the Ombudsman, DAGS "was uncertain whether the directory could be considered a public document". However, effective immediately, DAGS agreed to sell the directory to the general public, as long as copies are available, without requiring a written request.
	Ombudsman Opinion 74-365	A local organization requested access to a list of residents of the state prison, but the Corrections Division maintained that the list was not public information. After review by attorney general, the Corrections Division was advised that a list of residents at the Prison would appear to be a matter of public record and the prison should not keep such information from the public.
72/01/28	Maui Corporation Counsel Opinion	The Maui Corporation Counsel advised the mayor that all records of the county, except those that would invade the personal privacy of any individual, should be considered public records and made available upon request.

Late get one

16e

80/08/27	Honolulu Corporation Counsel Op. #80-44	Real estate data services requested access to computer tapes controlled by various City agencies, notably the Building Department and the Department of General Planning. The information sought included the street name, street address, tax map key number and zoning status of parcels of land throughout Honolulu. It was held that provisions of the Sunshine Law protecting privacy referred to the privacy of persons, not property. The Corporation Counsel therefore concluded that the information is a public record and available for public inspection, and that duplicate tapes could be made available to the public.
81/00/00	Ombudsman Opinion 81-547	The Tax Department followed a policy of allowing the public to review general excise tax applications at its offices, but would not furnish copies of these documents. Responding to a complaint, the Attorney General determined that "there is no legal basis to prohibit the furnishing of copies of GET applications," and the Department therefore agreed to make copies available upon request.
80/00/00	1st Circuit Court, Civ 59632	The City Building Department refused to allow public access to building permit applications, and "all plans, specifications and other documentation submitted" with them, related to a new condominium proposed at Kaola Way and Pacific Heights Road. A suit was filed seeking access to these records. Judge Arthur Fong ordered the Building Department to make all of the documents available without delay. Pauoa-Pacific Heights Community Group, et. al, vs. Building Department, City and County of Honolulu.
	Ombudsman Opinion 78-2528	A fisherman was denied access to data from the monthly catch reports submitted to the Department of Land and Natural Resources by commercial fishermen. After review, the Attorney General held that "there is no question that the reports are public records...." In addition, the AG said that "we do not see any problem in releasing of harvest data by island." However, it was also held that "information revealing the bait and fishing grounds" are trade secrets and could not be disclosed.

84/04/12	Honolulu Corporation Counsel Op. M84-15	Common Cause/Hawaii requested access to proposals submitted to the City Housing Department pursuant to a design/bid competition. An opinion of the Corporation Counsel held that such proposals are public records that are open to inspection unless release of the information would (a) violate personal privacy, (b) reveal trade secrets, or (c) impair present or imminent contract awards. In order to justify withholding, "the burden is on the party to prove that the information is a trade secret". In addition, the public's interest in disclosure must be balanced against any reasons alleged to justify withholding of records from the public. The opinion appears to require a change in City policy, which in the past routinely denied public access to these proposals.
	Ombudsman Opinion 82-860	An individual complained that a $1 per page fee for copies being charged by the Department of Transportation was excessive. The Ombudsman noted that the Sunshine Law allows charges for "reasonable cost" of such copies. Subsequently the Department reduced its copy fee to 25 cents per page.
	Ombudsman Opinion 82-2277	The Department of Health awarded a contract for the printing of its newsletter. The amount involved was under $4,000 and, therefore, formal bidding procedures were not required. However, several companies were asked to submit cost estimates, and an unsuccessful bidder asked the Department to disclose the amount of the successful bid. The Department refused. After consultation with the Ombudsman, the Department agreed to provide the information about the successful bid.

	Ombudsman Opinion 80-2794	Following publication of a newspaper article listing the names and Medicaid incomes of doctors who earned the most money through the program, a complaint was filed alleging that the release of the information violated the privacy of doctors. The AG determined that there was no statute prohibiting the release of such information...
86/01/21	Hawaii County Corporation Counsel Opinion	The Corporation Counsel advised the County Council that a proposed rule to restrict public testimony to committee meetings would be inconsistent with the Sunshine law as amended in 1985. "Therefore, we conclude that the proposal to limit an individual's right to testify on a specific item to only one council meeeting is not a 'reasonable administration of oral testimony by rule.' It is likely that a court would find it to be an infringement of the public's rights...."
88/08/00	1st Circuit Court	A Painters' Union committee went to court to compel the State Department of Labor and Industrial Relations to disclose its findings in the case of a contractor accused of fraud. The union had filed a complaint alleging that a contractor has filed fraudulent payroll affidavits with the state. The Department of Labor and Industrial Relations investigated, but refused to disclose the result of its investigtion. After reviewing the documents, the Court ordered that the findings be made public. Painting Industry Recovery Fund vs. Robert Gilkey, director of Labor and Industrial Relations, and the State of Hawaii.
84/12/14	Attorney General Opinion 84-15	The Professional and Vocational Licensing Division of the State Department of Commerce and Consumer affairs licenses various professionals. A computerized roster is maintained of the name, address, and type of license held by each individual licensee. The AG held that the address and telephone numbers of licensees are personal information and are required to remain confidential by Chapter 92E HRS. However, the names and type of license held by each individual is a matter of public record and should be available.

794

"Bad"

86/04/28	Honolulu Corporation Counsel Op. No. 86-13	During deliberations over the proposed Waiola Subdivision, the City Council requested the list of people who had submitted applications in response to published advertisments. The Corporation Counsel held that the list is a "personal record" as defined by Section 92E-1 HRS. Further, the Corporation Counsel found that the the statute does not provide for release of personal records to legislative agencies of the state or counties. Therefore, it was determined that the law requires that the list be maintained on a confidential basis and not released to the City Council.
----------	Dept. of Commerce and Consumer Affairs Letter	Copies of financial audits of offices within the State Department of Commerce and Consumer Affairs were requested by a local business. The agency director responded in writing that a financial audit of the Hawaii Public Broadcasting Agency was available for inspection. "However, Department of the Attorney General has informed us that copies of the audit are not considered public records, and therefore it is my understanding that HPBA will only allow public inspection." [Note: This position appears to be contrary to the language of Section 92-21 HRS, which states that copies must be made available of any document that is open for public inspection.]
----------	----------	
86/04/29	Attorney General letter	In response to a request for information, the Attorney General wrote that "Our office documents are protected by the attorney-client privilege, executive privilege and specific statutory privileges." The letter went on to state that "we [the Department of the Attorney General] are the attorneys for state government and the government agencies and officials, not for individual private citizens of this State. If we were considered to be attorneys for individual private citizens, we would not be able to represent the state government or its agencies or officials in any case involving a private citizen, because there would be a potential conflict of interest in representation."

85/01/21	Letter from Chief of Police Douglas Gibb	In response to a request from a private citizen, Police Chief Douglas Gibb responded that "Chapter 92E of the Hawaii Revised Statutes limits this department from disclosing or authorizing the disclosure of personal records by any means to any person other than the individual to whom the record pertains." For this reason, lists of persons holding gun permits issued by the Honolulu Police Department are not considered public records by the Police.
84/04/11	Honolulu Corporation Counsel Letter	In response to an inquiry by Common Cause, the City Corporation Counsel stated that the rules and regulations of the Honolulu Police Department "are matters of internal management and, by law, are not available for public inspection unless the department chooses to make them so available." Further, the letter stated that the Chief of Police "has already indicated that these particular documents should not be released." [Letter from Gary M. Slovin, Corporation Counsel, City and County of Honolulu, to Ian Lind, executive director, Common Cause/Hawaii.]
83/03/01	Honolulu Corporation Counsel Op. M83-13	The Campbell Estate requested access to Board of Water Supply water consumption data pertaining to tenants in Campbell Industrial Park. The Estate wanted to analyze the data and utilize the findings in projecting future development of the area. The Corporation Counsel held that water consumption records constitute a "public record", but they they cannot be released because they are also "personal records" of tenants and their release would violate the personal privacy of those tenants. A written statement from each tenant would be necessary to authorise release of these records. [This opinion conflicts with later opinion that "personal records" apply only to "natural persons"]
	Ombudsman Opinion 82-67	The Department of Transportation was asked for information about the number of persons intending to bid on a certain contract. In consultation with the Attorney General, it was determined that "the names and the number of persons" submitting bids is confidential "until after the opening of bids...."

86/05/12	Attorney General Opinion No. 86-14	The F al Bureau of Apprenticeship and Training asked the Apprenticeship Division of the State Department of Labor and Indus. al Relations to disclose information about Hawaii apprentices. The requested information included the apprentice's name, social security number, birth date, sex, ethnic code, and veteran code. The requested information would be used only to derive statistical data "purged of individual indentification criteria." The Attorney General responded that "While recognizing the merits of a computerized system of record keeping, we were unable to locate any statutory authority enabling the Apprenticeship Division to release the information requested. Therefore, we respond to your inquiry in the negative." According to the Attorney General, Chapter 92E HRS prohibits disclosure of this information to this federal agency, even for research and/or statistical purposes.
85/10/10	Honolulu Corporation Counsel Letter	The Hawaii Kai Neighborhood Board requested access to the emergency ambulance service logs maintained by the Department of Health of the City and County of Honolulu. It was held that these logs constitute "personal records" that are not subject to disclosure because such disclosure would violate the right of privacy of persons involved.
85/01/29	Honolulu Corporation Counsel Opinion 85-3	The Corporation Counsel interprets Chapter 92E to prevent the public release of the names of police officers against whom a complaint has been filed and sustained by the Police Commission. According to the Corp Counsel, such information would be part of a "personal record", would not fall under any of four specific exemptions, and therefore must remain confidential as a matter of law.
85/09/27	Maui Corporation Counsel Opinion	The Maui Corporation Counsel held that an "informational meeting" between the Planning and Land Use Committee of the Maui County Council and members of the Kihei-Makena Citizens Advisory Committee did not violate the Sunshine Law, Chapter 92 HRS. The opinion concluded that because the meeting would not appear to involve either making a decision or deliberating towards a decision, it was not a "meeting" as defined by the Sunshine Law. The rules of the Council would govern its conduct.

83/00/00	1st Circuit Court, Civ. No. 78696	Television station KHON went to court after the state Department of Health refused to allow the public and press to attend a meeting of its advisory committee appointed to consider the problem of pesticides in drinking water. The Court held that the committee was purely advisory, had no final decision-making power, and was made up of volunteers. Thus, the committee was "not formed by statute, constitution, rule or executive order" and is not subject to the open meeting provisions of the Sunshine Law. An appeal to the Hawaii Supreme Court was rejected on the grounds that the issue was moot. KHON-TV, Inc., vs. George Ariyoshi, et al.
83/10/12	Honolulu Corporation Counsel Op. M83-54	The Corporation Counsel held that plans and specifications that accompany applications for building permits are not public records, suoject to disclosure, until after the issuance of a building permit. If the disclosure of such plans and specifications prior to the issuance of the permit cannot be obtained voluntarily from the applicant, the recourse should be through application to the circuit court. This opinion sidestepped the decision in an earlier court case which held that similar building plans had to be made public.
82/05/21	State Board of Education letter	The Sunshine Law Coalition requested a complete list of the persons who had applied for the positions of Superintendent of Education and State Librarian in 1981 and 1982. The Board of Education refused to disclose the names of applicants, holding that the release of this information is prohibited by Chapter 92E, HRS. Even if the applications are public records, the Board held that it could not reveal the names because this would violate the privacy of the persons involved.
79/10/26	Honolulu Corporation Counsel Op. M79-73	A company involved in mailing services requested information on all new owners of cars and trucks, including names and address of registered and legal owners. The company intended to use such information to develop mailing lists. Such information was held to be exempt from release under the Sunshine Law because its release would violate other statutes.

79/02/27	Attorney General Memorandum	In a memorandum addressed to John Farias, chairman of the state Board of Agriculture, the Attorney General advises that information on the status of loans made by the Kauai Task Force is confidential. The memo holds that information on individual delinquent accounts is specifically exempt from public disclosure under the federal Freedom of Information Act and, therefore, should not be released by the state. The Attorney General states that written consent of individual borrowers would have to be obtained before further data could be released. The memo was prepared by Leo B. Young, Deputy Attorney General.
	Ombudsman Opinion 77-985	A researcher living on a neighbor island requested access to birth, death, and marriage records for research purposes. The request was turned down by a neighbor island District Health Office because permission of the Director of Health is necessary for release of such records. It was determined that due to "stringent statutory provisions", birth records were accessible only in Honolulu. However, death and marriage records could be made available for purposes of research provided that the researcher complied with certain conditions to protect the confidentiality of the records.
78/02/14	Honolulu Corporation Counsel Op. 1978-7	No express or implied language was found in relevant provisions of the City Charter to permit the City Ethics Commission to release the names of Board of Water Supply employees found to be in violation of ethics guidelines. The Corporation Counsel recommended an ordinance to allow such public disclosure.
78/04/19	Attorney General Op. 78-3	The Attorney General held that records from investigations of the Department of Occupational Safety and Health are not public records. The legislative history of relevent laws shows that such records were meant to remain confidential. Disclosure of information relating to the identification of witnesses and information and statements given by them in an accident investigation cannot be released to the public. (Other information such as recommended safety measures can be released.) Nothing prevents anyone from seeking information directly from witnesses to an industrial accident.

Honolulu Corporation Counsel Op. 61-52

Records of the Honolulu Police Department, except records of traffic accidents under certain conditions, are not subject to public inspection unless permission is granted by the Chief of Police or the Prosecuting Attorney.

3/02/05 Attorney General Memorandum

In a legal memorandum addressed to Hideto Kono, director of the Department of Planning and Economic Development, the Attorney General states that data concerning "loans, including borrowers' names, amounts, and status of repayment" are confidential. The memo finds that the reports "are prepared only for the purpose of internal management of the accounts," and that no entries are required to be made by law. In addition, the Attorney General finds that certain information, including "identifying information (the loan numbers, the names of borrowers, and the dates of the loans), the amounts and balances, and the status of repayment (whether current or delinquent)" may invade the right of privacy of individuals "since the status of repayment without further explanation of the circumstances...may unfairly and adversely affect the reputation of the borrowers." Memo prepared by Maurice S. Kato, Deputy Attorney General.

-30-

'Good' and 'Bad'

72/09/11	Honolulu Corporation Counsel Op. M72-68	Information from City payroll records, including exact gross pay, deductions, garnishments, etc., held to be confidential. Other information, such as employee title, grade level, salary range and total amount of City payroll is public.	bad / good

10c

Re: Honolulu Liquor Commission

HAWAII SUNSHINE LAW OPINIONS

YR/MON/DAY	SOURCE	ABSTRACT
48/00/00	Honolulu Corporation Counsel Op. 46-18/68 (prior to enactment of 92E)	Records of the Liquor Commission, including information furnished by applicants for liquor licenses, are public records and open for inspection.
77/11/30	Honolulu Corporation Counsel Op. M77-112	Certain records kept by the Liquor Commission are public records and subject to public inspection. These include minutes of Commission meetings, and the following documents accompanying license applications: Tax clearance, partnership agreements, certificate of incorporation, map of premises, names of neighboring property owners. Employee registration records and gross sales reports are confidential. Correspondence and intra-office memos may be public, depending on their "contents and purpose".

Honolulu Star-Bulletin

Published by Gannett Pacific Corporation

Stuart T. K. Ho
Chairman

Alexander Atherton
President

Albert Dolata
Executive Vice President

Catherine Shen
Publisher

John Flanagan
Executive Editor

John E. Simonds
Senior Editor and
Editorial Page Editor

A.A. Smyser
Contributing Editor

Managing Editor: David Shapiro

Ass't Managing Editor/News: Cynthia Oi
News Editor: James Blankenship
Ass't Editorial Page Editors:
Charles B. Frankel, Carl H. Zimmerman
City Editor: Gwenda Iyechad
Business Editor: Frank Bridgewater
Sports Editor: Bill Kwon
Today Editor: Dianne Conrad
Graphics/Photo Editor: Scott Rutherford

A-6 Saturday, June 27, 1987

Hawaii's public records and rights of privacy

Governor Waihee's Committee on Public Records and Privacy has begun a series of hearings on what state records people think ought to be open to the public and which ones closed for reasons of privacy.

This is naturally a subject of great interest to news organizations, but it also should command the attention of everyone who cares about keeping the process of government open to the full view of the taxpayers.

It's our belief that the public should have open and reasonably convenient access to birth, death and marriage certificates, accident reports, property ownership and tax records, building permits, motor vehicle registration, drivers' license records, professional and vocational licensing data, findings of environmental agencies, information on state loans and leases, liquor licenses, divorce decrees, wills in probate, salaries of federal, state and local officials.

Some of these are already open and easily available. Some are under the jurisdiction of the counties or the courts. Some are open but available only to lawyers, doctors or insurance agents. Some are public but hard to find. In some cases public inquiry is discouraged.

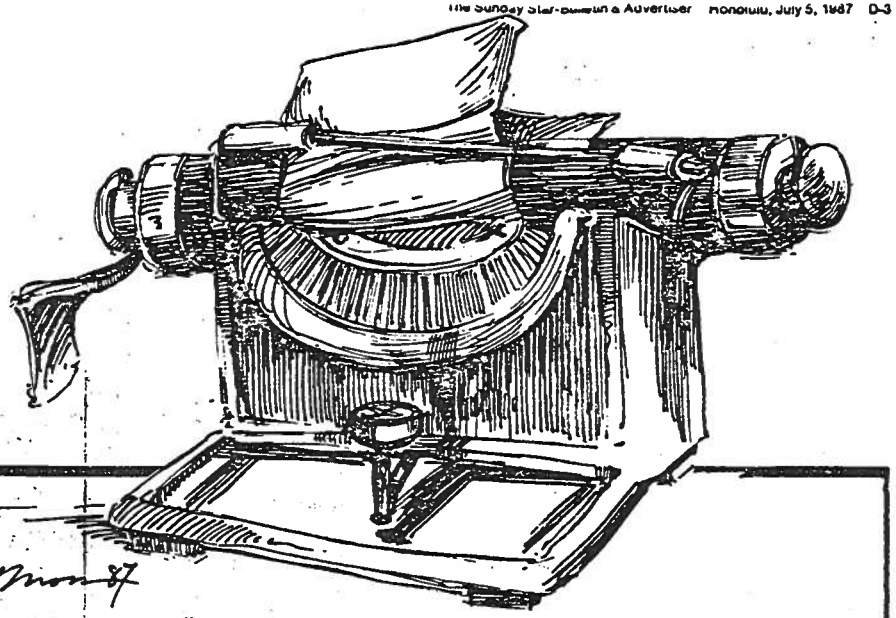
With the possible exception of personal health records, income taxes and reports of misdemeanors involving minors, we would like to see everything open — records, meetings, decisions — in all branches and at all levels of government.

Hawaii's privacy law, mandated by the 1978 State Constitutional Convention, is considered one of the most restrictive in the nation. It has put obstacles in the path of information, given some officials a general excuse for not releasing data that should be routinely available, and contributed further to a spirit of secretiveness among government agencies.

The governor is to be commended for appointing a committee, under Robert Alm, director of Commerce and Consumer Affairs, to look into this area. It has been gathering opinion on the Neighbor Islands this week and has scheduled hearings for next Thursday in the State Capitol auditorium.

This is a chance for those who feel, as we do, that state government needs to open up more, to say so; and also for those who may disagree to argue for more privacy. In any case, it's a rare opportunity to make your views known on the public record.

Balancing privacy and public interest



Editor's note: This testimony was delivered at last week's state Capitol hearing of the Governor's Committee on Public Records and Privacy.

By Gerry Keir
Advertiser Managing Editor

Hawaii's law on public meetings and records begins with the ringing declaration that "In a democracy, the people are vested with the ultimate decision-making power."

"The Legislature declares that it is the policy of this state that the formation and conduct of public policy — the discussions, deliberations and actions of governmental agencies — shall be conducted as openly as possible."

That all sounds just fine.

BUT THE SAME law goes on to outline a pile of exceptions, including the giant category of exemptions for "privacy."

The public records section of the law makes a great-sounding statement about what a public record *is*, but then *excludes* all "records which invade the privacy of an individual" and contains an overbroad definition of personal records. Not only is an individual's own educational, financial, medical and employment record secret, but so is "any other item that contains or makes reference to the individual's name, identifying number, symbol or other identifying particular."

This restricts access to public records which in any way contain personal information about any individual regardless of whether that individual is a public official, regardless of whether tax dollars are being used to pay the salaries of that individual, with no attempt to balance the public's right to know versus an individual's right to privacy.

Clearly, the proper day-to-day functioning of any law depends a great deal on the bureaucrats who administer it. And the privacy law was written so as to encourage public employees to deny access for fear of being fired. Counter clerks and other front-line bureaucrats tend to err on the side of not releasing information. Given that inherent caution and the overall thrust of the privacy law, the message to custodians of public records is clear: when in doubt, opt for secrecy.

AS A RESULT, when the legitimate concern for privacy — "the right to be left alone," if you will — competes with the equally legitimate goal of openness in government, privacy has the inside track.

There is an appeals procedure through the courts. But the language of the privacy law is so broad that many appeals are doomed to failure. Even where there is a good chance of victory in court, the cost constitutes a chilling effect on any individual or news medium seeking to challenge a decision made under this chapter.

In my view, changes are needed to make more information about public employees public, and to allow public record information to be segregated. That would mean that instead of all information of any kind in a record being restricted from public view just because somebody's name is in it, only that limited information deservedly private would be excised. The balance would be open to the public.

There should be a balancing test to determine whether public interest in disclosure outweighs the privacy interest of the individual involved.

Such changes would bring the state law into closer conformity with the federal Freedom of Information Act. That act is far from perfect, but . . . and at least the federal act attempts to strike a balance, to release to the public as much information as possible while excising only that limited information deservedly private.

SOME OF THE things that have come to light through use of the FOI Act are information on FBI harassment of civil rights leaders, auto design defects, consumer product testing, the salaries of public employees, compliance with antidiscrimination laws, sanitary conditions in food processing plants — the list goes on and on.

I think we could do worse than to use the federal law as a starting point in recasting our own law.

304

304

Painting and Decorating Contractors Association of Hawaii

CHAPTER OF THE
PAINTING AND DECORATING
CONTRACTORS OF AMERICA

1259 SOUTH BERETANIA STREET • HONOLULU, HAWAII 96814 • TELEPHONE 536-3561

July 2, 1987

Governor's Committee
on Public Records and Privacy,
P. O. Box 541
Honolulu, Hawaii 96809

Attention: Mr. Robert A. Alm, Chairman.

On the question:

"WHAT GOVERNMENT RECORDS SHOULD BE AVAILABLE TO THE PUBLIC ON REQUEST?"

(Testimony of Etsuo Shigezawa, in behalf of the Painting and Decorating Contractors Association of Hawaii, and also the Hawaii Construction Industry Association)

This testimony is being limited to the Hawaii Construction Industry Association's position that relevant information---names, job classifications, rates of pay, hours worked, fringes provided, deductions made, etc. as called for under Chapter 104, HRS---on work being performed for the state or any of its agencies or subdivisions are and should be treated as public records.

In the last session of the legislature, a bill (HB 703, A Bill for an Act Relating to Wages and Hours of Employees in Public Works) which, among other things, would have made certified payroll affidavits submitted as part of public works projects available for public inspection was defeated because of questions pertaining to the privacy of the information. We were unsuccessful in our support of that bill.

It was and still is our feeling that, where specific requirements are clearly spelled-out in law, then access to information pertaining to compliance or non-compliance with respect to such requirements on the part of any contractor, vendor, or person doing business with governmental agencies should be made available so that interested members of the public---especially including any competitors of the person or firm doing such

business---may ascertain and secure assurance that the laws are being fully complied with, that reasonable enforcement actions are being applied uniformly and consistently, and that competition for such public works contracts is therefore being conducted on the bases of differing skills, experience, knowledge and projected profit-margins among the competitors rather than on such invalid bases of exploitation of workers and evasions of laws.

Except through the mechanism of exposure to public scrutiny, how can the general public---and the successful low-bidders' competitors---be able to ascertain that the work is being executed in an up-and-up manner? How can they be assured that no favoritism is being played by those charged with enforcement? And to be reassured that the low-bidder got the job by outcompeted them fairly and squarely? Are they not entitled to such ascertainments, assurances and reassurances?

The present state of confusion over the question of public records vs. privacy has served to place many state administrators in difficult positions. When asked for public records, they are forced to rule on the question, and, as expedience often dictates due to the absence of clear guidelines, have therefore tended to lean in favor of privacy.

Legitimate competitors and businesses should not only have no qualms over the public examination of their payroll affidavits---in fact, they should insist upon it; irresponsible businessmen and shysters, on the other hand, understandably would not wish to have their shady practices exposed to public scrutiny---and they should not be allowed to do so in conjunction with public works project through the protection afforded by misplaced concerns for their privacy. The most obvious and legitimate way to separate one from the other would be to let the records speak for them.

In California, public access to payroll affidavits filed in conjunction with state construction projects has long been an accepted practice. On the basis of monitoring mechanisms established by interested members of the public---such as the various "work preservation fund" arms of specialty trades unions and their counterpart contractors---a large number of wage and hour as well as public contracts violations have been uncovered and the violators made to correct their misdeeds.

More recently (1983, in Redmond vs. U.S. Navy), the right of the public to know what is going on in federal public works contracts was also raised under circumstances similar to what is now before your committee and substantially settled in favor making such documents available for inspection by interested members of the public.

Through the monitoring activities of the various construction trade organizations, in California fair competition is in the process of being restored, better protection for workers and their wages are being provided, proper payments of applicable taxes are now more often being made, etc. In short, the public interest has been fostered by the state's policy of open access to public records.

Our efforts to institute similar monitoring machinery because of several instances of flagrant violations which have been brought to our attention have been frustrated by overly cautious and misconceived rulings being issued holding that what, to us, clearly ought to be public records---such as payroll affidavits and decisions of public administrative bodies--- were invested with the cloak of privacy. We think this is wrong. We think it is high time that Hawaii's public business be conducted in an open and forthright manner. We think we should have a right to know what is going on in our government.

Thank you for this opportunity to express our views on this very important issue. We would be pleased to respond to any requests for further comments or information which you may wish to make.

Respectfully Submitted:

Etsuo Shigezawa,
Executive Director, PDCA of Hawaii;
Chairman, HCIA Gov't Relations Committee.

SG
ENTERPRISES, INC
Suite 608, 1000 Bishop Street
Honolulu, Hawaii 96813
Telephone (808) 526-2002

June 26, 1987

Robert A. Alm, Chairman
Governor's Committee on Public
Records and Privacy
P. O. Box 541
Honolulu, Hawaii 96809

Dear Mr. Alm:

The issue of privacy in a free society is not only complex but perplexing to define and regulate. How do you weigh an individual's right of privacy with the democratic tradition of openness and the public's right to know? As a professional investigator, I confront this dilemma every day. Having served as the Chairman of the Hawaii State Board of Private Detectives and Guards and as a Board member for over six years, I have had first-hand knowledge in reviewing matters of privacy that come in front of the Board as well as regulating the information that is released to the general public. Currently I am National Director of the National Association of Legal Investigators. In that position I have become aware of a discrepancy that exists state-wide in the releasing of information. There appears to be no unilateral policy with respect to the dissemination of information possessed by government in the various states. It is with this background I address my comments.

Information possessed by government seems to fall in several distinct categories.

1) Court documents.
2) Regulatory documents to include applications, permits and administrative hearings.
3) Government personnel information.
4) Law enforcement data.

Court documents would include all of that information contained in District, Circuit and Appellate Court records. Regulatory information would include driver's license and automobile registration as well as permits issued by the Department of Health and licensing information maintained by the Department of Commerce and Consumer Affairs. Personnel information would

include the records of state and county employees. Law enforcement data would include files of state and county law enforcement agencies.

Presently, information contained in District, Circuit and Appellate Court files is open to the public. These agencies have maintained a method by which the public currently has access to file documentation. With the exception of Family Court, Court proceedings are open. This system must not be changed. The potential abuse of secret Court proceedings far outweighs an individual's right of privacy. The open Court system has been established, to protect against governmental abuses and maintains the right of a fair trial and for judgment of an individual's by their peers.

A more complex issue concerns the information maintained by government for regulatory purposes. If we are to say that we live in a free society, the regulatory process must also be open to public scrutiny. The framers of our Constitution mandated the public's right to know by establishing a due process provision in the Bill of Rights. A complex society requires regulation, yet it is the principal of fairness that requires that information possessed by government obtained during the regulatory process be open to the general public. The public's right to insure evenhandedness in the granting of permits and licenses outweighs an individual's right of privacy when it comes to obtaining permits or licenses. If the people's government sets up regulations to protect the general public from abuses, it is inherent within that system for the public to review and scrutinize the process. The public is the ultimate jury. To deny the public access to information is to equate government with the ultimate arbitrator of fact and to take that responsibility away. To insure government's compliance with the intent of regulation, the public has the right as well as the duty, to insure that the process is fair and equal. The framers of our Constitution envisioned an informed public. It is only by being informed that we can be responsible. To take away the public's ability to access information contained in the regulatory process is tantamount to the creation of government by an elite. If I apply for a license, whether it be as a private detective or to operate a motor vehicle, the public has a right to insure that the licensing process was done fairly and not granted because of special favor. Since those applying are all judged by the same standard, the public has a right to judge whether that standard is applied equally. It is only by having access to the records and documentation contained in government files that the public's right to know is not hindered.

Another argument for the public's need to access regulatory records is an individual's need to make an informed choice. Administrative hearings on issues of malpractice or violation of rules and regulations should be open to the general public. Since the public has granted, through Legislative mandate, the various divisions of government authority to regulate for the public welfare and safety, it holds that the same public has the right to be fully informed of violations or charges of misconduct. If there are accusations, loss of licenses, or other administrative hearings that concern those that are regulated, the public needs access to that information in order to make an informed choice when in the market for services. It appears that the present view of government is to limit access to this type of information on the theory that an individual's right of privacy comes before the public's right to know. This is putting the cart before the horse. It is only by the public's total access to information that the public welfare and safety can be ultimately maintained. Far better for the public to be fully informed than to receive selected information that may be biased by government's regulatory process and/or the party defendant's fear of exposure.

The government as an employer as it relates to the public's right to know, presents a different set of standards than the Court or regulatory process. Although there can be an argument that it is the public dollar that is received by public officials and civil servants, there is an obvious right of the individual to fair treatment on employment matters. Certainly the public has a right to be informed of dismissals and disciplinary actions when it relates to a violation of the public trust, however, routine employment matters should be private, with the employee having the right to open the matter to discussion at his or her own choosing. Political appointments and matters involving elected officials, however, should be open to the scrutiny of the general public. Access to information about our "public" citizens should not be denied.

Information contained in law enforcement files presents other complexing problems. Regulation has been set up in these areas to protect an individual's right of privacy and this right should not be abridged. Certainly, matters that relate to convictions of any crime should be made available to the public. This right is normally afforded through the Court process. I feel the current regulation in this area is adequate, and that an individual's right of privacy is adequately protected.

I realize that my comments are of a philosophical bent. I obviously favor public's access to records of birth, death, marriage, and divorce. I also favor the access by the public to all information contained in any Court and regulatory files. Access to police reports and investigations where no charges have been brought, should be maintained as confidential, subject to the review by an independent panel to prevent selective law enforcement. Tax records that apply to individuals or corporations concerning income tax should be kept confidential. Since the tax laws apply equally, and across the board, an individual or corporation's right of privacy becomes paramount over the general public's need to know. Regulatory information such as business licenses, the names and addresses of partners or individuals requesting to do business should be open to the general public. The public's right to know has been established since regulation has been created to protect the public and its safety. Providing access to this information allows the public to control its own destiny by allowing informed choice.

I am available to speak in greater detail to those specific areas of public record where testimony or comment may be required. As an investigator with over 20 years of experience, I can cite many specific examples where the denial of government information to the public has caused great harm and abuse.

Yours very truly,

Steve Goodenow

STEVE GOODENOW, PRESIDENT
S G ENTERPRISES

SG/jh

SMCA SHEET METAL CONTRACTORS ASSOCIATION
905 UMI STREET, ROOM 306 / HONOLULU, HAWAII 96819 / TELEPHONE 845-9393

HARRY M. UYEMA
EXECUTIVE SECRETARY

June 3, 1987

Mr. Robert A. Alm
Chairman of the Committee
1010 Richards Street
P.O. Box 541
Honolulu, Hawaii 96809

Dear Mr. Alm:

Question was raised at a family gathering recently (Mother's Day) in reference to our privacy when an application is filed for a loan i.e. mortage refinancing because of the recent drop in finance percentages. A family member says that "our financial status is made public as far as assets/liabilities are concerned. **THIS IS VERY DISTURBING!** To be quite frank with you, it is rather humiliating to know that your fellow worker/friends/relatives and God knows who else can obtain these confidential information "without your knowing it".

My family and I personally feel that the availability of personal records should be permitted only of utmost importance to a few. Where's the control?

Have you ever thought of appearing on KHET-Publivision? You may write to them at the following address:

Hawaii Public Television
2350 Dole Street
Honolulu, Hawaii 96822
PH 955-7878

Thank you.

Sincerely,

MRS. L. Yonemoto
Manager

:kkk

312

Statewide Human Services Action Council

Room 602, 200 N. Vineyard Blvd., Honolulu, HI 96817 - Phone 521-3861

June 26, 1987

Governor's Committee on Public Records and Privacy
Attention: Robert A. Alm, Chairman
P.O. Box 541
Honolulu, HI 96809

Dear Mr. Alm:

We are responding to the call for comment from the public on the subject of public records and privacy.

The Statewide Human Services Action Council is a broad-based voluntary organization comprised of both private, nonprofit agency members and individuals concerned about the quality of life for the people of Hawaii. Our membership representation includes the following service areas: child care, Hawaiian affairs, elderly, health, immigrants, mental health, and substance abuse.

SHSAC represents the human services arena at the Legislature and advocates on behalf of human services in general. We also work very closely with key State department personnel to initiate partnership opportunities between the private, nonprofit sector and the public sector. As such, we are very interested in public officials, both elected and appointed, and factors that could influence their deicision-making.

Therefore, we are suggesting that public records should include any information about elected and appointed officials that could have impact on their decision-making, such as salaries and other sources of income, organizational affiliations, occupation and employment history, etc.

Making this information public will help in identifying possible conflicts of interest before a decision is made.

Thank you for this opportunity to express our opinion on this matter.

Sincerely,

The Rev. Frank A. Chong, M.S.W., M. Div.
Chair, Government Relations Committee
SHSAC

Executive Director
Waikiki Health Center

41-166 Poliala St.
Waimanalo, Hi 96795
30 June 1987

Governor's Committee on
Public Records and Privacy
Attention: Robert A. Alm, Chairman
P.O. Box 541
Honolulu, Hi 96809

Dear Sir:

I am very much concerned regarding what records (government) and documents should or should not be available to the public on request.

I have been tracing my genealogical records for over 20 years through the use of vital statistics information at the Board of Health for Birth, Marriage and Death certificates. I also have found information at the

Archives and the Hawaii State Library. I was able to help not only myself but also family and friends who were trying to trace their genealogy to obtain a Hawaiian homestead lot— information which was necessary to show their Hawaiian blood line.

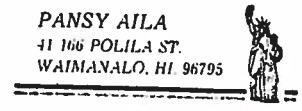
Also, I was able to find gainful information at the Bureau of Conveyance and the Hawaii Tax office in order to rightfully claim kuleana lands for my family.

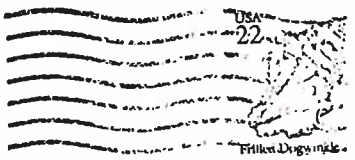
I believe strongly these records should continue to be open to the public.

what I think should not be open to the public are police reports, child support nonpayment claims, paternity claims, blood test, Aids test, State mental health exams, investigation reports, income tax records, traffic ticket reports, etc, unless these are necessary and pertinent to the individuals "need to know".

Sincerely,
Mrs. Pansy K. Aila

PANSY AILA
41 166 POLILA ST.
WAIMANALO, HI 96795





The Governor's Committee
on Public Records and Privacy
Robert A. Alm, Chairman
P.O. Box 541
Honolulu, Hi 96809

DESMOND J. BYRNE
P. O. BOX 10447
HONOLULU HAWAII 96816

Tel: 521-4734

DJB Ref: PRP/25

July 23, 1987

Robert Alm
Chairman
Governor's Committee on
Public Records and Privacy
1010 Richards Street
Honolulu HI 96813

I would like to supplement my oral testimony presented on July 2nd with this written testimony.

After 20 years in Hawaii, I have done considerable research and have sought access to court and government public records at the federal, state and county levels. At the federal level, I am very familiar with the Freedom of Information Act (FOIA) process, including its appeal procedure.

A. General Remarks

1. The existing law and in fact any law would work much better if there was an attitude of openness in government. This attitude should be spelled out in a policy statement by the Governor and amplified by his department heads.

2. A letter requesting access to public records should be answered promptly or at least acknowledged by a postcard giving a reply date. This too needs guidelines from the Governor. If correspondence is not answered promptly, the question arises: "Do I have to have influence to get a reply?".

3. It appears departments and agencies are not conversant with the existing public records law. They need guidelines.

4. Departments do not publish a list of categories of records they produce and indicate what is available and what is not.

5. Public records are part of a larger general problem in that government has not thought out what citizens need to know to become informed. They have never had an outsider tell them.

6. Hawaii does not have a Superintendent of Documents or a state printer so there is no current, systematic way to determine what is published and available from each agency of the government. DOE and DBED (both large publishers) do not even make lists available of what they publish.

7. There is no equivalent of the code of federal regulations (CFR) and one has to check with the Lt. Governor's office and the agency itself to make sure you have an up to date set of rules for a particular agency.

8. Unlike many states, there is no State Register (equivalent of the Federal Register).

9. Copying charges at 25 cents per page are too expensive for copying public records. Upon bringing it to their attention, two agencies reduced their charges.
a) DCCA from 50 cents to 25 cents a copy
b) State Circuit Court from $1.00 to 25 cents on a self service machine.
Commercial retail copying charges average 3 to 5 cents a copy and 8 to 10 cents for copying pages from bound material.

10. Annual Reports should be published whether they are required or not and give qualitative and quantitative data about the department, agency, or board.

11. Blue Book - There is no blue book for Hawaii. Many states publish one annually. They appear to be more comprehensive than the LRB publications.

12. There is an impression that insiders in the local establishment, obtain the information they need through their network, a kind of extention of 'Land & Power in Hawaii'. Therefore it is essential to have better definition in order to ensure the reality and appearance of fairness.

13. Data Banks.
Hawaii, like most states, does not have a law on public and private data banks, comparable to those found in Europe e. g. U. K.
It should be clear, especially with government data banks:
- what information is collected.
- why is it collected.
- under what conditions can data be made available to other government agencies and the public.
- how is it updated.

<u>B. Particular Remarks</u>

1. Letter from DOT 5/21/86
Is there a category of public records where one can get a copy, but it is not to be reproduced for distribution?

2. Attorney - Client privilege of the Attorney General.
See attached letter of 4/29/86. This area needs review.

3. Letter from DCCA 12/17/82
Again records not open even after THC Financial bankruptcy. Was this to protect the bank examiner?

4. Consultant's Report
'An analysis of Concession Management Issues' a report by

Coopers & Lybrand for the State Department of Transportation dated January 1986, and not released until October 1986.

Reasons for delay:

a)Keeping it in draft for some considerable time, although on the final version the changes were minimal.

b)Not issuing the report because it may mislead potential bidders of merchandise concessions.

5. Financial Institutions

If State regulated then they are not obligated to publish audited financial statements, only a brief very uninformative uncertified balance sheet. This I believe stems from a paternalistic approach of Government regulation - 'Trust us to look after the depositors, we have the information and you don't because we don't trust the public to interpret information on a company, like an investor would on a public company, where disclosure is mandated by the SEC.

If good information had been in the public domain, it might have saved the grief for THC and Manoa Finance Company depositors, because they would never have grown to the size they did unless they had been soundly run. Also this would have saved the State from bailing out the depositors, it was meant to protect, at a cost to the taxpayers of at least $30 million.

6. Ian Lind's 'Hawaii Sunshine Law Opinions'

I presume this is required reading for the committee. Several of my experiences are listed in this book.

C. RECOMMENDATIONS

1. Adopt the equivalent of Federal FOIA with the appeal process.

2. Create an attitudinal change in the State Government.

-Government and its records belong to the people.

-Government should be service oriented, even though some of its functions are regulatory but even these functions should exist only to protect the public.

3. Produce guidelines to translate the law into practice. Might also save government employees a lot of time.

4. Examine the wider context of information in Government and have more preciseness as to what is published. Consider having:

-Superintendent of Documents/Government Printer
-State Register
-Code of State regulations.

5. Have a positive plan to 'publish' as much as possible. Publishing can be stapling 2 photocopies together.

6. Have all agencies submit to the Governor periodically, and make available to the public, a list of the types of documents, with an indication of availability.

7. Salaries of Government employees.

No question that this information should be made public

each year. They are public employees! Even Hong Kong publishes a list.

8. Copying charges should be reduced from 25 cents to 10 cents. Where appropriate self service copiers should be available. Commercial copy shops charge 3-6 cents and 8-10 cents to copy a book, and they make a profit!

9. Registration and control of data banks.

B1

GEORGE R. ARIYOSHI
GOVERNOR

WAYNE J. YAMASAKI
DIRECTOR

DEPUTY DIRECTORS
JONATHAN K. SHIMADA, Ph.D.
WALTER T.M. HO
CHERYL D. SOON
ADAM D. VINCENT

IN REPLY REFER TO:
AIR-A
86.088

STATE OF HAWAII
DEPARTMENT OF TRANSPORTATION
AIRPORTS DIVISION
HONOLULU INTERNATIONAL AIRPORT • HONOLULU, HAWAII 96819

May 21, 1986

Mr. Desmond Byrne
International Tourism Research
P. O. Box 10447
Honolulu, Hawaii 96816

Dear Mr. Byrne:

As requested, enclosed is a copy of the negotiated Mutual Release Agreement of DFI/Host and DOT. Please remit $1.75 to cover administrative cost.

This document is not to be reproduced for distribution.

Very truly yours,

Jonathan K. Shimada
Deputy Director

Enclosure

321

B2.

GEORGE R. ARIYOSHI
GOVERNOR

CORINNE K.A. WATANABE
ATTORNEY GENERAL

JAMES H. DANNENBERG
FIRST DEPUTY ATTORNEY GENERAL

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
STATE CAPITOL
HONOLULU, HAWAII 96813
(808) 548-4740

April 29, 1986

Mr. Desmond J. Byrne
International Tourism Research
P. O. Box 10447
Honolulu, Hawaii 96816

Dear Mr. Byrne:

This responds to your letter of March 10, 1986. Please be advised that the working files of the Attorney General's office are not open for public inspection. Our office documents are protected by the attorney-client privilege, executive privilege and specific statutory privileges.

Hawaii Revised Statutes, Section 92-51, states as follows:

> Public records; available for inspection. All public records shall be available by any person during established office hours unless public inspection of such records is in violation of any other state or federal law, provided that except where such records are open under any rule of court, the attorney general and the responsible attorneys of the various counties may determine which records in their offices may be withheld from public inspection when such records pertain to the preparation of the prosecution or defense of any action or proceeding, prior to it commencement, to which the State or county is or may be a party, or when such records do not relate to a matter in violation of law and are deemed necessary for the protection of a character or reputation of any person.

Rule 503 of the Hawaii Rules of Evidence states as follows:

Rule 503 Lawyer-client privilege. (a) Definitions. As used in this rule:

(1) A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him.

(2) A "representative of the client" is one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client.

(3) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

(4) A "representative of the lawyer" is one directed by the lawyer to assist in the rendition of professional legal services.

(5) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure would be in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(b) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (1) between himself or his representative and his lawyer or his lawyer's representative, or (2) between his lawyer and the lawyer's representative, or (3) by him or his representative or his lawyer or a representative of his lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest, or (4) between representatives of the client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.

(c) Who may claim the privilege. The privilege may be claimed by the client, his guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication shall claim the privilege on behalf of the client unless expressly released by the client.

(d) Exceptions. There is no privilege under this rule:
(1) Furtherance of crime or fraud. If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud; or
(2) Claimants through same deceased client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction; or
(3) Breach of duty by lawyer or client. As to a communicator relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer; or
(4) Document attested by lawyer. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or
(5) Joint clients. As to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.

The attorney-client privilege is especially compelling and relevant because our office advises and represents state officers and departments. In fact, we are specifically limited by legislative enactments to limiting our services to State departments and public officials.

Hawaii Revised Statutes, Section 28-4, states as follows:

> Advises public officers. He shall, without charge, at all times when called upon, give advice and counsel to the heads of departments, district judges, and other public officers, in all matters connected with their public duties, and otherwise aid and assist them in every way requisite to enable them to perform their duties faithfully.

In essence, we are the attorneys for the state government and the government agencies and officials, not for individual private citizens of this State. If we were considered to be attorneys for individual private citizens, we would not be able to represent the state government or its agencies or officials in any case involving a private citizen, because

there would be a potential conflict of interest in representation. To avoid that situation, Hawaii law prohibits us from engaging in the private practice of law -- i.e. advising or representing individual private citizens.

Hawaii Revised Statutes, Section 28-10, states as follows:

> Prohibition on private practice of law by the attorney general, first deputy, and other deputies. The attorney general, his first deputy, and other deputies shall devote their entire time and attention to the duties of their respective offices. They shall not engage in the private practice of law, nor accept any fees or emoluments other than their official salaries for any legal services. This section shall not apply to any special deputy employed on a part-time basis for a limited period.

We are, accordingly, unable to accommodate your request. However, certain Department of Transportation files relevant to duty-free matters may be considered public records and as such are available for inspection during office hours. You may direct your inquiries in this regard to Mr. Wayne J. Yamasaki, Director of the Department of Transportation. If you have further concerns about the "Duty Free Legislation," you may wish to discuss them with your legislators.

Very truly yours,

Corinne K. A. Watanabe

Corinne K. A. Watanabe
Attorney General

INTERNATIONAL TOURISM RESEARCH
P. O. BOX 10447
HONOLULU HAWAII 96816

Tel: 547-5002 / 735-6747

ITR Ref:aghav/19

March 10, 1986

No REPLY RECEIVED 4/17/86

Ms. Corrine Watanabe
Attorney General
Attorney General Department
State Capitol
Honolulu, HI 96813

Dear Ms. Watanabe,

Several months ago I spoke to Ms. Sonia Faust and I requested to review the files relating to duty free in the antitrust division. Ms. Faust verbally denied my request on the grounds of attorney-client privilege

By this letter I am formally requesting access to these files. Additionally I would like access to the files regarding the legal advice leading up to the Department of Transportation offering for bid in 1981 two duty free concessions.

If the reason for denying access is attorney-client privilege I would appreciate your quoting the statute and explaining to me, a layman, how the attorney general can claim this as I thought that the client is the state which is not confined to the governor or the state department but the people of the state. Also, if you deny my request to whom can I appeal.

Also if denied who precisely is the client as I perhaps have the option of going the client such as the State Department of Transportation.

One further consideration is separating the factual from the advice or opinions in the files.

I look forward to your early reply as this is important on my research into the current legislation - HB 1392

Yours truly,

Desmond J. Byrne

B 3

GEORGE R. ARIYOSHI
GOVERNOR

STATE OF HAWAII
OFFICE OF THE DIRECTOR
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
1010 RICHARDS STREET
P. O. BOX 541
HONOLULU, HAWAII 96809

MARY G. F. BITTERMAN
DIRECTOR
Commissioner of Securities
Bank Examiner

DONALD D.H. CHING
DEPUTY DIRECTOR

December 17, 1982

Mr. Desmond J. Byrne
Vice President, Administration
Computab, Inc.
P. O. Box 3886
Honolulu, Hawaii 96812

Dear Desmond:

I am in receipt of your letter of December 1, 1982, and apologize for not being able to respond sooner. You have requested access to this Department's records relating to THC Financial Corp. Unfortunately, such documents and files are not public records, and we are prevented from disclosure of the same pursuant to Sections 408-27 and 401-14, Hawaii Revised Statutes.

You have also requested to examine the "corporate file" of The Hawaii Corporation for the period 1970-1976. As you may know, the Bank Examination Division had no regulatory authority with respect to The Hawaii Corporation. If, however, your interest relates to the Articles of Incorporation or Annual Exhibits, I am certain that our Business Registration Division can provide such documents for your examination. I would also suggest that you contact John T. Goss, Trustee of the Estate of the Hawaii Corporation.

If I can be of further assistance, please feel free to contact me.

Sincerely yours,

Mary

MARY G. F. BITTERMAN
Director

cc: Mr. Lester Wee, Executive Bank Examiner

327

COMPUTAB, INC.
P. O. Box 3886
Honolulu, Hawaii 96812
(808) 521-4734

December 1, 1982

Copy
Just in case you did not receive original
Desmond 12/15/82.

Dr. Mary G.F. Bitterman
Director
Dept. of Commerce &
Consumer Affairs
P. O. Box 541
Honolulu, Hawaii 96809

Dear Mary,

As part of the Business Policy course (Prof Joe Miccio) of the Executive MBA program I have to prepare a case history on The Hawaii Corporation.

I believe that the Regulatory records relating to the THC Financial are public information and I would appreciate being able to examine them and make copies of particular documents.

I would also like to examine the corporate file of The Hawaii Corporation 1970-1976.

I would appreciate your early reply.

Yours sincerely,

Desmond J. Byrne
Vice President
Administration

DJB:je

State Public Records: Database Goldmine or Landmine?

By Peter Marx
IIA General Counsel
Chmn., The Marx Group, Inc.

Commercial distribution of state databases is years behind distribution of Federal and private databases. When it comes to state databases, there are a few great success stories such as Mead Data Central's Lexis service which distributes state statutes and court decisions. But these are a small portion of the legal, corporate, demographic and other information which is contained in state public records.

The Promise

State databases should have a ready market. For example, information compiled by states on corporations and real estate transactions has important data that should be valuable for marketing and market research purposes. In fact, in many instances there is more detail in state records than in Federal databases.

The Risks

If state databases have value, why aren't more distributed? One reason is the condition of the data. This varies tremendously, ranging from available online or on magnetic tape, to available only in hard copy, to unavailable in any format or medium.

Another reason is a lack of understanding among the state public records custodians who are tyically responsible for the state data. Without understanding the ultimate usage of the data, they frequently decide that hard copy is just as good as online. In addition, they decide how much to charge. Charges have ranged from average cost, to marginal cost, to market value. Incredible as it sounds, some public records officers are trying to figure out the market value of the data in their possession and charge that price to anyone who wishes to redistribute it.

Finally, many of the relevant statutes and regulations—such as freedom of information acts—were enacted prior to information age technology. Because these laws and regulations may be outdated, filers, custodians and users may be unsure of their rights and obligations.

A Case Study

The difficulties information companies may encounter when distributing state databases is illustrated by a court case involving Legi-Tech Corporation, which markets a computerized legislative information retrieval service.

New York State refused to permit Legi-Tech to subscribe to a state-run electronic legislative information retrieval service. Legi-Tech filed suit on First Amendment

(Continued on page 28)

Peter Marx

Public Records

(Continued from page 21)

and other grounds. The New York Court of Appeals ruled in favor of Legi-Tech requiring the state to provide the data. However, the court's opinion said if the state service lost revenues due to competition from Legi-Tech's service, Legi-Tech had to compensate the state for this loss. Relying on that language, the state tried to charge a large fee for Legi-Tech's access to its service. Legi-Tech finally obtained reasonable access through an out-of-court settlement.

The Risks for the Information Industry

In the future we could be faced with a situation at the state level similar to certain problems that have arisen at the Federal level. For example, through the EDGAR system the Securities and Exchange Commission has tried to create an information dissemination capability which if launched improperly could disrupt the efficient market for fundamental corporate data. The risk at the state level is that there could be 50 different such systems. If so, access to valuable state databases could be delayed indefinitely. The need for uniformity and sound policies and implementation is clear.

As state public records become more readily available in the market other issues will arise or become more significant. One of the most sensitive is privacy. State data is often valuable because it contains detailed personal information. Thus, there is a risk of privacy abuse. The information industry needs to be in the forefront of this issue to avoid a backlash from concerned citizens and organizations.

Also, as information companies become more active with state data, state regulators will become more aware of the industry and may decide to regulate or tax it. Such threats must be closely monitored to avoid adverse precedents.

Conclusions

Despite some risks to individual information company distributors and to the industry as a whole, the value and importance of state databases cannot be ignored. Uniform and reasonable access to these databases must be granted. Far sighted information companies are positioning themselves to obtain rights to the state databases which strategically fit with their services. For those companies that are pursuing such strategies the rewards will outweigh the risks and costs.

Peter Marx, IIA's General Counsel, is Chairman of The Marx Group, Inc., which provides publishing, consulting, and seminar services to information companies on information law issues.

For New York Patients, More Access to Records

By RONALD SULLIVAN

A long medical tradition that has given doctors and hospitals unquestioned control over the medical records of their patients will end in New York with a new state law that takes effect Jan. 1.

According to James R. Tallon Jr., the chairman of the Assembly Committee on Health and a sponsor of the new law, most physicians and hospitals do not make their medical records available to their patients.

"But we have now made this a fundamental right of health-care consumers," said Mr. Tallon, a Binghamton Democrat, in describing the new law in an interview last week.

'No Longer Subservient'

According to Mr. Tallon, while the new law gives patients the legal power to obtain their medical records — a change he regards as considerable — the larger impact is "that it says patients have a much larger role in making decisions about their treatment, that patients are equal to doctors and no longer subservient to their decisions."

At the same time, said Mr. Tallon, "We are saying to patients that they must take a more responsible role over their health care."

According to other legislators, the new law also will allow patients to make more informed judgments on whether they have received adequate care, or to decide if they have suffered from medical malpractice or incompetence.

Exemptions to Law

The new law will allow most interested patients to get copies of their records in doctors' offices, their medical charts from hospitals, including X-rays, laboratory and diagnostic tests, and consulting information provided by other doctors. Hospitals and physicians can withhold the records if they decide the information would harm the patient. For example, a doctor might decide that news of an unfavorable prognosis would hamper a patient's chance of recovery.

Any denial based on harm to a patient would be subject to review by medical access review committee set up by the Medical Society of the State of New York.

The law also allows physicians to withhold personal notes attached to the record, and it does not apply to the records of patients in psychiatric hospitals, institutions for the mentally disabled, or in alcohol and drug treatment centers.

Explaining Opposition

According to legislators, the reason for this exemption is that many psychiatric or mentally disabled patients are not capable of fully understanding the nature of their illnesses.

The law was opposed by the medical society, which represents 41,000 doctors.

A spokesman for the society, Ed Hynes, said that the organization's main reason for opposing the law was that it applied to all existing records. "We would have supported it," Mr. Hynes said, had the law applied only to new records as of Jan 1.

Until now New York has had no law that either required doctors or blocked them from giving patients access to their medical records. However, doctors and hospitals in New York have traditionally held that all records are their exclusive property and have not, as a rule, released them to patients.

Reason for Reluctance

Patients seeking their records, laboratory results, or X-rays often would arrange to have them released to another doctor who had agreed to make them accessible, or would seek a court order.

While many patients contend that doctors have refused to make their records available, some doctors have generally made them available.

For example, Dr. Attila Toth, an obstetrician and fertility expert at New York Hospital Cornell Medical Center, said he usually makes his medical records available to patients.

At hospitals, the difficulty of retrieving medical records and the fear of medical malpractice suits have generally made the institutions reluctant release a patient's record.

However, Michael Kaminsky, president of Flushing Hospital and Medical Center in Queens, said, "Patients have a right to see what was in their charts."

Mr. Kaminsky said he did not anticipate "much of a problem" in complying. "The main expense would be the copying charges," he said.

Impact on Poor Patients

Kofi Scott, a lawyer with the New York chapter of the American Civil Liberties Union, which lobbied for the new law, said that poor patients covered by Medicaid have been the ones most often denied access to their records.

"We thought that if employers and insurance companies were given access to these records, then patients should, too," he said.

He recalled a case he handled as a legal services lawyer in which a woman asked her doctor for a copy of her medical record to determine whether the previous removal of an interuterine device had contributed to a subsequent miscarriage.

"But the doctor refused to let her see her own records," he said. "Now she will be able to get them."

Jahan Byrne

P. O. Box 10447
Honolulu, Hawaii 96816

July 2, 1987

Robert Alm
Chairman
Commission on Public Records and Privacy
c/o 1010 Richards Street
Honolulu HI 96813

Dear Chairman Alm and Members of the Commission:

Thank you for the opportunity to testify today.

My name is Jahan Byrne, and as a legislative aide in the Senate and as an investigative researcher for an information service company, I have had much experience in trying to obtain access to government records and proceedings. I would like first to touch briefly on two experiences I have had in obtaining public records.

The first involves the Judiciary. For years, the Traffic Violations Bureau has adopted a policy of selectively releasing an individual's traffic abstract. This policy is outlined in the correspondence attached to my testimony. Yet for the last 20 years Chapter 287-14, Hawaii Revised Statutes states in part that any person shall have access to any other persons certified abstract. After bringing this portion of the law to the Judiciary's attention, they have since changed their policy to that of one which is in accordance with the law. Traffic abstracts are not confidential, simply because they act as another interpretation of an already public court calendar.

My other example is a less successful one. Perhaps the most flagrant violators of Hawaii's Sunshine law and Administrative Procedures Act are the police departments of the respective counties.

The Honolulu Police Department does not have one single rule adopted under Chapter 91, nor does it make one policy or procedure of their's a matter of public record. Their claim for secrecy is that all of their rules and policies are internal in nature, and therefore ~~not subject~~ EXEMPT to public review.

However, there are many areas in which the public would directly benefit from knowing what certain police procedures are. The use of police roadblocks, officers identifying themselves upon request, the 48 hour rule, and the list goes on. If a citizen wishes to make a complaint to the Internal Affairs Unit of the HPD, the procedure in which to do it is confidential. I have enclosed some of my personal correspondence with the Honolulu Police Department and in the next few days will provide you with additional information.

Respectfully submitted,

Jahan Byrne

In the next few months, you will have to come to a decision as to how much government openness is enough.

My general stance is that citizens and the press must have maximum access to government, the people who run it, and the records it keeps. I prefer to keep my exceptions and exemptions to this statement grudgingly, and few in number.

The best reason for more openness is simply because its the right thing to do. The United States Constitution does not specifically mention nor protect the public's right to know. But this doctrine is included in the first amendment, wherein the freedom of speech and of the press are guaranteed. The first amendment would be uselss however, if people could not have access to the government to learn more about it. A policy of maximum openness is also right because government is doing the people's business with the people's money. They have a perfect right to know how that business is being conducted and how that money is being spent.

Many of you on the Commission are on the public payroll and it seems to me that that carries with it a responsibility to tell people who ask how you conduct your duties and why and how you spend the money you are entrusted with, even if it means revealing how much you and your staff are paid for carrying out these duties. I think if you search your own experiences and feelings, you will sense what I am trying to say. If people are not informed about the governmental process, they will be distrustful of it. If they do not have access to a meeting, they will discount the decisions made in it. If they do not have access to a government record, they will not be able to assess

the accuracy of it. For the government, more openness will mean more cost, more manpower, and more frustration. But for the public, it will mean more accountability and responsiveness in government.

You are also charged with determining the extent of the right of privacy. The right of privacy is a relatively new one in American jurisprudence, although I do not mean to say that there isn't one or that people are not entitled to private lives. I just think the problems of privacy are less than you might think. Many intrusions into what we call privacy come as a result of a news event of a citizen who was not news prior to it. Most of this information comes from already open records, such as court documents and police arrest reports. By withdrawing a public document in the name of privacy will result in backward steps as far as openness in government.

When it comes time to write your findings and recommendations, I hope you will be sensitive to the needs and rights of individuals, because they are the basis of our system of government. But do not forget that government is also dedicated to free expression in the press and by the people. That, in my opinion, means a policy of maximum access to government proceedings, officials, and records. Thank you.

Jahan Byrne

P. O. Box 10447
Honolulu, Hawaii 96816

April 6, 1987

Janice Wolf
Administrative Director
The Judiciary
State of Hawaii
P.O. Box 2560
Honolulu HI 96804

Dear Ms. Wolf:

This letter is in regards to the Traffic Violations Bureau's (TVB) current policy in disseminating certified traffic abstracts.

According to [redacted], the Bureau will only release an individual's abstract to one of the following persons:

(1) the individual;
(2) a family member with the same last name as the individual;
(3) a person who has a certified letter from the individual authorizing release of the abstract.

[redacted] was extremely unhelpful in explaining this policy or in providing me with a written copy. Apparently, no written policy exists which is a violation of Chapter 91, HRS, the Hawaii Administrative Procedures Act.

Furthermore, Chapter 287-3, HRS, states:

> "The traffic violations bureau of the district courts shall upon request furnish <u>any person</u> a certified abstract of the bureau's record, if any, <u>of any person</u> relating to alleged moving violations, as well as any convictions resulting therefrom, arising from the operation of a motor vehicle. The traffic violations bureau may collect fee, to be a realization of the general fund of not in excess of $2 for any such certificate."(emphases added)

This would seem to make the TVB policy directly contradict that of the law which specifically states any person shall have direct access to any other person's traffic abstract.

Your clarification of this inconsistency would be appreciated.

Yours sincerely,

Jahan Byrne

336

Office of the Administrative Director of the Courts
The Judiciary • State of Hawaii

Post Office Box 2560 Honolulu, Hawaii 96804

Herman Lum
Chief Justice

Janice Wolf
Administrative Director

Tom Okuda
Deputy Director

June 5, 1987

Mr. Jahan Byrne
P.O. Box 10447
Honolulu, Hawaii 96816

Dear Mr. Byrne:

Your letter of April 6, 1987 to the Administrative Director of the Courts was given to the Staff Attorney's Office for my reply. I apologize for the delay in answering your letter which expresses a legitimate concern. Your letter arrived at the same time I was helping another person with the same problem and your letter was misfiled with his.

Thank you for calling your problem to our attention.

Since your letter, our Traffic Violation Bureau employees have been instructed to make the information authorized by Section 287-3, Hawaii Revised Statutes available in accord with that statute.

If upon your next request, you again have a problem, please telephone Mr. Eddie Lee at 548-2481 or call me at 548-3096 or 548-3099; Mr. Lee is the acting head administrator for the district courts on Oahu; usually the best time to reach him by telephone is between 7:45 a.m. and 8:30 a.m.

Again, thank you for letting us know about your problem. Please feel free to telephone Mr. Lee or me if you have any more concerns.

Very truly yours,

Ruth Hood

Ruth Hood
Staff Attorney

cc: Mr. Eddie Lee
Court Administrator

Judiciary

337

HONOLULU INFORMATION SERVICE
P.O. BOX 10447
HONOLULU, HAWAII 96816

January 27, 1987

Douglas Gibb
Chief of Police
Honolulu Police Department
1455 S. Beretania St.
Honolulu HI 96814

Dear Chief Gibb:

Please provide me with a copy of the department's Standard of Conduct, revised March 1986.

Also, please provide me with copies of the following internal policy guidelines:

1) department personnel drug testing procedures

2) department's "Roadblock" rules and procedures

Thank you for your attention to these matters.

Yours sincerely,

Jahan Byrne

jgb:jld

HONOLULU INFORMATION SERVICE
P.O. BOX 10447
HONOLULU, HAWAII 96816

January 27, 1987

Internal Affairs Division
Honolulu Police Department
1455 S. Beretania St.
Honolulu HI 96814

Dear Sir or Madam:

Please provide me with a copy of the number of public complaints lodged against police officers by the public during the years of 1982-84. Also, please provide me with a breakdown by type of violation.

Thank you for attention to this matter.

Yours sincerely,

Jahan Byrne

jgb:jld

POLICE DEPARTMENT
CITY AND COUNTY OF HONOLULU
1455 SOUTH BERETANIA STREET
HONOLULU, HAWAII 96814 - AREA CODE (808) 943-3111

FRANK F. FASI
MAYOR

DOUGLAS G. GIBB
CHIEF

WARREN FERREIRA
DEPUTY CHIEF

OUR REFERENCE RA-KA

February 3, 1987

Mr. Jahan Byrne
Honolulu Information Service
P. O. Box 10447
Honolulu, Hawaii 96816

Dear Mr. Byrne:

This is in response to your request for information.

The Honolulu Police Department's Standards of Conduct, personnel drug testing and roadblocks are internal in nature and not a matter of public record. Therefore, we regret we are not able to provide this information.

The Honolulu Police Commission's annual report may contain the information you requested regarding complaints against police officers. You may correspond directly with them.

Sincerely,

DOUGLAS G. GIBB
Chief of Police

By Ersel Kilburn
ERSEL KILBURN
Inspector
Internal Affairs

340

HONOLULU INFORMATION SERVICE
P.O. BOX 10447
HONOLULU, HAWAII 96816

our Reference: **RA-KA**

February 25, 1987

Inspector Ersel Kilburn
Internal Affairs Unit
1455 South Beretania Street
Honolulu HI 96814

Dear Inspector Kilburn:

This is in response to your letter of February 3, 1987 in which you refer me to the Honolulu Police Commission for a record of complaints against police officers.

To further clarify my request, I am interested in obtaining a breakdown of complaints handled by the department's Internal Affairs Unit. These are internal complaints (generated from within the department) and external complaints (generated from outside the department and referrals from the Police Commission). These types of complaints would clude conduct, procedural, and operational violations.

Thus, I am once again requesting a copy of the number of complaints lodged against police officers handled by the Internal Affairs Unit with a breakdown by type of violation and the sustainment/dismissal rate.

Thank you for your attention to this matter.

Yours sincerely,

Jahan Byrne

jb:lk

POLICE DEPARTMENT
CITY AND COUNTY OF HONOLULU
1455 SOUTH BERETANIA STREET
HONOLULU, HAWAII 96814 - AREA CODE (808) 943-3111

FRANK F. FASI
MAYOR

DOUGLAS G. GIBB
CHIEF

WARREN FERREIRA
DEPUTY CHIEF

OUR REFERENCE EK-KA

April 21, 1987

Mr. Jahan Byrne
Honolulu Information Service
P. O. Box 10447
Honolulu, Hawaii 96816

Dear Mr. Byrne:

The Honolulu Police Department does not make public the statistics regarding the investigations conducted by Internal Affairs nor does it make public any discipline imposed should an investigation be sustained.

We do, however, communicate the results of an investigation directly to the person who has registered a complaint.

Sincerely,

DOUGLAS G. GIBB
Chief of Police

By Ersel Kilburn
ERSEL KILBURN
Inspector
Internal Affairs

HONOLULU INFORMATION SERVICE

P.O. BOX 10447
HONOLULU, HAWAII 96816

June 24, 1987

Douglas Gibb
Chief of Police
Honolulu Police Department
1455 South Beretania Street
Honolulu HI 96814

Dear Chief Gibb:

This is in response to your letter of February 3, 1987, in which you deny my requests for copies of the Honolulu Police Department's Standards of Conduct and roadblock procedure.

Chapter 286-162.5, Hawaii Revised Statutes, states,

> "The police departments of the respective counties are authorized to establish and implement intoxication control roadblock programs in accordance with the minimum standards and guidelines provided in section 286-162.6. The chief of police in any county establishing an intoxication control roadblock program pursuant to this section shall specify the procedures to be followed in carrying out the program in rules adopted under chapter 91; provided that the procedures shall be in conformity with and not more intrusive than the standards and guidelines described in section 286-162.6"

I would therefore like to request again a copy of the police department's roadblock procedure that have been adopted under the Hawaii Administrative Procedures Act (Ch. 91, HRS).

Regarding the Honolulu Police Department's Standards of Conduct, Chapter 91-2, Hawaii Revised Statutes, states,

> "...(3)Make available for public inspection all rules and written statements of policy or interpretation formulated, adopted or used by the agency in the discharge of its functions."

It is apparent that under this provision of the sunshine law, the department's Standards of Conduct is a matter of public record. Therefore, I am again requesting a copy of the Standards of Conduct of the Honolulu Police Department.

Yours sincerely,

Jahan Byrne

July 20, 1987

GCOPR&P
Mr. Robert A. Alm, chairman
P. O. Box 541
Hono., Hi 96809

Dear Mr. Alm,

It has been brought to my attention that your committeeis soliciting input on Public Records and Privacy. Since I consider this area of great importance in order to pursue life, liberty and the pursuit of happiness, the following are my recommendations:

1) All family court records and health records should not be available on public request because it is damaging to both the child and the family.

2) All documents involving an unfounded allegation of child abuse be expunged from the record, and most critical——

3) Any documents requested by the attorney of the accused, during a case in process, be made available in fairness to the accused. It is my experience that records needed for the defense have been withheld, and subpoenas have not been honored, thus, denying the right of the accussed to clear himself. And when and if documents are finally obtained, it is at the time of the hearing. This does not give adequate time for preparation of defense.

Sincerely,
Leila Christensen
Leila Christensen

Leila Christensen
1560 Kanunu St., 1214
Hono., Hi 96814

MRS. JENNIE DOSS
2203 APAAKUMA ST.
PEARL CITY, HI.
96782

June 22, 1987

Governor's Commitee On Public Records
and Privacy
Box 541, Honolulu Hawaii 96809

Attention: Chairman

Dear Mr. Alm,

A recent Star-Bulletin Newspaper ad requested public comment on which public records should be available to the public and which should not. I would like to comment on this.

I feel all medical records should always remain private and unavialabe to the public at large, unless there isa dire necessity for the public good, such as a highly contageous fatal disease. Even then it should only be made availabe where it has a direct bearing on the health and safety of others. An example would be a kitchen worker who prepares food for the public, who could cut his finger and his blood which carries Aids get into food the public might eat..probably would eat, where the kitchen worker was was a known andproven Aides carrier. But an employee with Aides who did office work, would probably be of no risk to others. and therefore his records should remain closed. I feel that Doctors records where there has been proven mal-practise, should be open public record, so that the public can wisely choose who they trust their life, body or families to. The same should be true of any publically licenced professional people. But the people concerned.. that is their record, should have the fact that this is in their record and it will be available tothe public, like a credit record, have a chance to contest it, or atthe very least include their verseion of things.

Records such as births, deaths, marriages and divorce should also be public. Paternity claims should remain private Police reports also should remain private, only open court records and jury verdicts open to the general public. All juven

minor childrens court records should be closed and destroy when they reach the age of 18. Wipe the slate clean, and let everyone start with a clean record when adult. The same should be true of prison records when a prisoner has served his sentence and is released.

Personnel records of people serving in either public or private employment should remain private If employers want to write letters of recommendation. this avenue is always open to an employee if seeking work elsewhere In the age of Big Brotherism andthe commputers much mischief. black balling. mistakes and lies can be done in record keeping. Because a computer is what it is, the temptation from the public view is to gather store and deduct computer stored information on everything. This information most often does not paint a true picture anyway. It wastes tax dollars in an endless paper chase, but keeps a certain number of people employed to keep the paper chase going and naturally they want their jobs. As a citizen already paying too much in taxes, I object to this. We need fewer records, not more of them.

In the field of Mental Health, I think all records on patients should be strictly guarded from the public. Only in cases where criminal acts come into it, should there be any public knowledge, andthen only to authorities trusted with the public safety, where this information should be acted upon in a much better manner than has been true in the past. Too many judges and psychiatrists have failed in their duty to protect the public. It must be realized that some mentally ill people in the nature of their illness can pose a very seriousthreat to the publics safety. not because of any real malace on the patients part, but becuase of their fearsand delusions. The public has painted too twisted a pictureof mental illness for too many years, to give a known mentally ill patient a chance at normal life when recoved without facing extreem prejudice Psychatirst advisetheir patients of this as they did with my first husband who became mentally ill and was trying to recover without anyone knowing, as his best chance to resume and renter society. In his case he never did recoverand has since passed away

with

with no healing.

I believe that a child's school records, all of them should be available upon request to parents withouta hassel of any kind, andthe parents should have the right to contest any misinformation, or wrong information contained in these records. Certainly any health records kept by the schools on their child should always be availabl to parents who are held responsible for minor children. They should be able to know if their child has been cousellе at all on abortion, on pregnancy, on sex, oron birth control and what if anything has been done about it. Planned Parenthood is now working through student groups in our public schools to sneak in health clinics, surveys on sex and suicide are being taken with the Principals knowledge and consent, but with no prior notification to parents, andon a free to answer basis our minor children are being asked the most personal of questions even an adult would blanch to answer! From these phoney balogney surveys have come the suposed base to have these health clinics in our public schools. I personally questioned the vlaidity of the surveys with the Principal of one of our large public high schools, and pointedout tohim, how foolish and innacura such surveys were. and he got mad and insisted they were valid. I protested this all theway to Charles Toguchi and my legislative representative. I understand from a group called "Concerned Women for America"who attended the legislative hearing on a bill to permit these health clinics in the schools that the student goverment group of kids who werasponsoring this, were asked before the legislature if there had been any objection by parents in this one public high school. The child said "none" "Concerned Women for America"asked for the right to speak, and brought outthe testimony I had already given them of my objection..so you can see in public records, the truth is not always brought out unless the public is very watchful. If we areto make decisions in government, keep records,that will affect people's lives, etc. then for heaven sakes get it above board, at a minimum, put the spot light of the sunshine of truth on it, reveal only what is crucial for the public goood, eliminate the unecessary, and see that anything kept

pri

rivate just serve a specific purpose in government that will do not harm.

We certainly do not want the horror of Hitler's Germany and record keeping, made even more pervasive and universally avialable by computers, an absolute weapon in a dictators hands.

Confidences between doctors and patients, should still be a sacred thing. The same between ministers, priests and their flock. There are some areas that always should remain a sacred confidence.

Sincerely,

Jennie Doss

Mrs. Jennie Doss

MRS. JENNIE DOSS
2203 APAAKUMA ST.
PEARL CITY, HI.
96782

P. S. For heavens sake stop recording birth dates for all kinds of records. These areonly really necessary for specific legal documents such as a birth certificate, or death certificate. The public domain does much damage by midgeon holeing people by age, forinstance take a drivers lisence which must carry a persons birth date. Many, many places now require that you show a drivers lisence to cash a check, enrolment, identification etc. and right out there is your age!!!! Age should have little to do with who you are as a person, or your abilities skills, looks, etc. which are the things you should be judged on not your birthdate. It worksagains the young and the old both even people inbetween. It severely limits our entire population to a few short years, say between 21 and 35 which are acceptable, yetthe average person today must account for andlive a long life span, especially in Hawaii, this means self support formany many years for most people, closed opportunityes etc.

Apartment 1287
1765 Ala Moana Blvd.
Honolulu, Hawaii 96815

June 5, 1987

Robert A. Alm, Director
Department of Commerce and Consumer Affairs
Chairman of the Committee on
Public Records and Privacy
P. O. Box 541
Honolulu, Hawaii 96809

Dear Mr. Alm:

I was glad to see your notice in the Star Bulletin on June 3rd re hearings on diclosure of public records. As a legal assistant, I would like to see restrictions lifted on access to motor vehicle registration records, applications for general excise licenses and applications for reservation of corporate/partnership names.

MVR records of ownership and liens should be as open to the public as are real property ownership and mechanics' and tax liens filed in court. G.E. License applications contain no confidential material whatsoever, and the prospective use of corporate or partnership names should, on occasion, be allowed to be a negotiable matter between an initial applicant and a subsequent one. Access to the initial applicant's identity should not be denied to a subsequent applicant.

Very truly yours,

Pamela Grycner

Pamela Grycner

PG/1

349 2

PHILIP J. HARDER

July 6, 1987

Governors Committee on Public Records
P.O. Box 541
Honolulu, Hi. 96809

Attn: Mr. Robert A. Alm-Chairman

Dear Mr. Alm;

It is my understanding that your committee is going to be recommending which public records should be available or not available at public request.

I strongly feel that any records or documents regarding unfounded allegations of child abuse be kept from being part of any public record. If any documents while in process are needed by the attorney or the accused that they be made available to them.

Thank You,

Philip J. Harder

350

P.O. Box 10335 Lahaina, Hawaii 96761 808-661-4519

MARIA M. HUSTACE

Star Route 215
Kaunakakai, Hawaii 96748
Molokai 558-8228
Honolulu 521-3103

Testimony

July 2, 1987

Committee on Public Records & Privacy
Public Hearing

Aloha!

I am Maria Hustace of Molokai. I believe in:

OPEN RECORDS
FULL DISCLOSURE
EASY ACCESS

"The right to privacy" is too often used as a place to hide questionable deals, and/or situations and connections.

You and I are paying the Government to make decisions that affect our lives in many ways, including our pocket books and wallets. Too often, Government employees, elected, appointed, and civil service are rude, arrogant, and secretive. OPEN GOVERNMENT is mandatory for our survival as a democracy. Secrecy breeds contempt for the law and deprives citizens of their rights, bit by bit.

When you embark upon an elected career in public office, you gain certain privileges - recognition, status and good pay. BUT you are not entitled to hide behind privacy laws. Everything about the financial dealings of those who dispense our money should be available for the public to scrutinize and evaluate.

Please Turn 351

All Government meeting records must be included. It is your money, your taxes. It is my money, my taxes. We must demand, you and I, full, easy disclosure - and ready access to all but the most intimate records. We must demand no less than full, complete and easy access.

The right to privacy should, of course, obviously protect the names of rape victims, child abuse and the like. But that is about it.

The right to privacy has been used to shield some questionable practices and it is this attitude of hiding information that we oppose. Hawaii has one of the most restrictive privacy laws in the nation. We want all public records to be available to the public. Let us open up and let the fresh air in.

Mahalo,

Maria Hustace

Maria Hustace

351-1

Monday, August 3, 1987

Dear Chairman:

Information from all sectors regarding an individual should be made available to that individual without question. This is not the case under our present system of laws. Today, an individual has no rights to see his personnel records, if she has been employed in the private sector. A past employer may be giving information found on the personnel record to whomsoever they desire, but the employee has no rights to see those same records, even if she wants to make sure that the information is correct. I think that a law should be made that extends the rights found in the State and Federal governments to the people in the private sector.

signed,

Kin Hylton
P.O.Box 31114
Hono., HI 96820.

1725 D Kewalo Street
Honolulu, Hawaii 96822

June 11, 1987

Governor's Committee on Public Records & Privacy
Attn: Robert A. Alm, Chairman
P.O. Box 541
Honolulu, Hawaii 96809

Dear Mr. Alm:

From experience as an insurance claims adjuster over twelve years now, there is no such thing as privacy. Each and every record listed on your "Call to Comment" advertisement is accessible if you're willing to pay for such record.

Clearly, privacy is violated routinely within the City and State government by reporters, private detectives and others, usually with the complicity of a faceless bureaucrat.

To merely freeze access is not the answer. More bureaucracy will doubtless make matters more cumbersome. However, controlled access with accountability and penalties for violating privacy would allow both privacy and freedom of information.

The rights of the individual must be re-enforced constantly otherwise we move incrementally towards fascism. Perhaps with the new computers we have actually gone beyond the point of no return.

You may wish to write to the University of Missouri School of Journalism Freedom of Information for articles and research papers on the delineation between public access and individual privacy. They have been studying this matter for decades now.

Yours very truly,

John Jaeger

John Jaeger

TTM

June 11, 1987

Governor's Com. on Public Records + Privacy
att. Robert A. Alm, Chairman,
P.O. Box 541
Honolulu, Hawaii 96809

Re: What is Public Records

Dear Sir:

I do not favor that the following records should be available to the public without written consent from the owner or in case of a deceased owner, without written consent from a Judiciary department.

Birth certificate, marriage licenses, child support, income tax records, excise tax records, drivers (licenses) license and personnel records of state and county employees.

I also am against the newspaper advertising birth and marriages without the consent of the involved parties.

Sincerely

Joan A. Kaaiai

JOAN A. KAAIAI
2334 MANNALAHA Rd.
HON. HI 96822

TESTIMONY OF BEVERLY ANN DEEPE KEEVER

Before the Governor's Committee on Public Records and Privacy
Thursday, July 2, 1987
State Capitol Auditorium

My name is Beverly Keever. I am a journalism educator and have worked as a professional journalist.

I would like to make two main points, which were developed with the help of my colleagues in the Sunshine Law Coalition.

First, the Governor by himself can--with the whisk of a pen and without costing a cent--take immediate steps to begin resolving the confusion that surrounds the public records versus personal records controversy.

This controversy has arisen in part not because the state Legislature passed ill-drafted statutes. Rather it is partially caused when the heads of executive-branch agencies either a) have failed to abide by the law or else b) have interpreted the law in exceedingly narrow ways.

Let's take the matter of H.R.S. 92E-10. That section in its entirety states:

> Rules and regulations. Each agency shall adopt rules, under chapter 91, establishing procedures necessary to implement or administer this chapter.
>
> Such procedures and rules, subject to the direction of and review by the attorney general in the case of state agencies and by the corporation counsel or county attorney of each county in the case of county agencies, shall be uniform, insofar as practicable, respectively, among state agencies and among the county agencies of each county.

That section became law in 1980, yet no state agency has adopted rules under chapter 91 that requires public hearings and other orderly procedures. I ask that the Governor urgently direct the heads of his executive-branch agencies to follow the law and to begin the public-hearing process to adopt rules that were long ago mandated by the legislature.

Rather than implementing Chapter 92E (Fair Informtion Practice) according to this mandated public-hearing process, however, one state executive-branch agency instead relied on an attorney general's memorandum dated March 12, 1984.

Memoranda such as this one are ordinarily unavailable to the public. This one was obtained from a non-official source. Our requests to see those memorandum relating to Sunshine have been denied by the attorney general's office.

The memorandum of March 12, 1984, responded to this question: under the attorney general's interpretation of H.R.S. Chapter 92E, could the University of Hawaii continue its practice of making available to the public the name, position title, period of appointment and salary of individuals appointed by the Board of Regents?

In responding, then Attorney General Tany Hong noted the broad definition of "personal record" in 92E-1(3). But he said said that a literal construction of that definition need not be made because to do so would lead to the "absurd result" of barring the governments from releasing even the names of their employees and the official jobs they were filling. "...to preclude State agencies from disclosing the name and position title of their employees would lead to absurd results and therefore should be rejected," he concluded. Therefore, the names of govenment employees and their position titles could be released to the public--but only those two bits of information. I have attached a copy of that memorandum. (pp. A1-A4).

All other details should be withheld from the public, he wrote. Thus, information that had historically been available in Hawaii and is routinely available in most states is now treated as confidential. The information includes:

--salaries; the public can learn the salary limits or ranges of government officials whose pay is set either by statute or by union contract, but it has no similar means for learning the approximate pay of appointed employees excluded from union contracts--the very policymakers who are running the government on behalf of the public;

--the periods of appointment;

--professional, academic, vocational background and past employment.

In contrast, New York state law permits disclosure of a government employee's name, compensation, job title, business address, business telephone number, job description, education and training background, previous work experience, or dates of first and last employment of present or former officers or employees of the agency.

This Committee is in a better position to assess the soundness of Mr. Hong's legal interpretation. But as a citizen, I am quite concerned about the lack of information about government employees paid by my tax dollars and about the denial of opportunity to attend public hearings to implement the state's

constitutional right of privacy. A buildup of such concerns can cause citizens to feel alienated from the governments supposedly serving them.

As a result, I ask that this Committee review internal memoranda relating to personal and public records issued from the attorney general's office since statehood--and make the results of that review public. Then I hope that the Governor will void those that are out-of-date or no longer serve the public interest. In addition, in order to establish an orderly process of administration in all state agencies, I urge this Committee to recommend that an administrative code be published as soon as possible.

Second, I urge this Committee to recommend that the public-records law and Chapter 92E be modernized so that they provide, in this information age, more safeguards for Hawaii's citizens.

These laws now fail to protect adequately BOTH citizens' right to public records and individuals' right to be free from untimely, haphazard or secret governmental recordkeeping.

For the public-records law, I urge this Committee to recomend adherence to the presumptions of the federal Freedom of Information Act*, including:

--that the government and the information of government belong to the people;

--that the state and local governments thus serve as custodians of records in the service of the people and thus are accountable to those they serve;

--that all records held by state and city agencies be presumed to be open--with certain exceptions. One such exception certainly is the records of private citizens in which there is no public interest;

--that the burden of proof is shifted from the citizen to the government; then the onus is upon the government to justify secrecy rather than the citizen to obtain access.

For re-writing Chapter 92E, I hope that this Committee will recommend the main protections provided to individuals under the federal Privacy Act of 1974, including:

--compelling the state and local agencies to disclose its systems of record-keeping on individuals so that no secret record systems be maintained on anyone in Hawaii;

--permitting state and local government agencies to maintain only those records on individuals that are accurate, relevant, timely and complete;

--barring state and local agencies from maintaining a record describing how any individual exercises rights guaranteed by the First Amendment unless such a record is expressly authorized in specified ways;

--permitting agencies to maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required of it by statute, ordinance or executive order.

In addition, I hope this Committee will be more specific than the federal Privacy Act in limiting the extent of "computer matching" permitted between government agencies. I will attach an article on this new threat to privacy as explained in the ABA Journal of Jan. 1, 1987. (pp. A5-A6).

Most of the state and local governmental records held on private citizens in Hawaii lie outside the interest of the public. One example is medical records held by the state hospitals.

But both private citizens and public employees need better protection to ensure that these governmental records about themselves are complete, timely, relevant and accurate. Most important, citizens need to know what records the state and local agencies are maintaining on individuals. For the effectiveness of the federal Privacy Act relating to medical records, please see the attached article from The Washington Monthly of October 1986. (pp. A7-A11).

In contrast, under H.R.S. Chapter 92E, citizens are permitted to correct inaccurate information about themselves--but they have no way of knowing what records are being kept on them or whether they are shown all of the records held on them by given state or local agencies.

For public employees, there is a public interest in some of their personal background and this should be released along the lines of New York's law that I have described above.

However, public employees also have much to gain from a stronger law that follows the federal Privacy Act. In Arizona, for example, some state government workers were required to submit to background checks, to promise not to sue anyone for inaccurate information and to pledge that they will not even ask to see what kind of information is dug up. I will attach the Associated Press story that exposed these abuses. (p. A12).

The threats to personal privacy have grown with computerization of governmental records, Congressional committees have found. For those of us in Hawaii, I urge this Committee to provide adequate safeguards from unreasonable governmental encroachments.

On the other hand, I also urge this Committee to expand the definition of "public record" in H.R.S. 92-50 so that it includes electronic data. For example, electronic bulletin boards might be instituted to make government records more readily accessible to the individual.

The millions of dollars' worth of computers and computer-related equipment now used in Hawaii by all branches and levels of government has revolutionized government record-keeping. But as of yet it has done virtually nothing to give Hawaii's citizens/taxpayers more access to or information about the public records amassed by the governments they fund. Failure to make these data more readily accessible may well lead to a split-level society of informational haves and have-nots.

Beverly Ann Deepe Keever

* Please see House Report No. 95-793, 13th report by the Committee on Government Operations, U.S. Government Printing Office, Washington: 1977.

To: FJ — Date
File — Return — FYI
Check Files and Return Findings
Draft reply
Return Directly — Advice
Info action

Still waiting
mgm

UHM
CHANCELLOR'S
OFFICE

'84 MAR 13 P2:18

UNIVERSITY OF HAWAII • HONOLULU, HAWAII 96822

THE PRESIDENT

March 12, 1984

MEMORANDUM

TO: All Vice Presidents and Chancellors

SUBJECT: Fair Information Practice

This is to remind you and your administrative personnel about the Hawaii statute regarding Fair Information Practice (Confidentiality of Personal Record) which was enacted to implement the section of the Hawaii Constitution guaranteeing the right to privacy.

This law (Chapter 92E of the Hawaii Revised Statutes) expressly prohibits the University of Hawaii and its personnel from disclosing or discussing personal records by any means of communication to any person other than the individual to whom the records pertain.

The statute defines personal records broadly as any item, collection, or grouping of information about an individual that is maintained by the University. It includes, but is not limited to, the individual's educational, financial, medical, or employment history, or items that contain or make reference to the individual's name, identifying number, symbol, or other identifying particular.

Given this broad definition, the attorney general's office has advised the University to refrain from disclosing any information about University personnel other than name and position title. Salaries and periods of appointment are considered confidential.

In case of violations, the individual may bring a civil suit against the University. Knowing or intentional violation of this law by any employee of the University can be the cause for disciplinary action, including suspension or discharge. Any person can file a complaint.

For self-protection, all University personnel should refrain from discussing personnel matters with anyone, especially the media. I would appreciate your reminding your administrative personnel about this matter.

Fujio Matsuda

cc: Stanley Y. Mukai
Chairman, BOR

360
A1

MEMORANDUM

DATE: January 11, 1984

TO: Harold S. Masumoto
Vice President for Administration

FROM: Edward Yuen
Deputy Attorney General

SUBJECT: Applicability of Chapter 92E, HRS, to Board of Regents' Agenda

This is in response to your January 5, 1984 memorandum concerning the applicability of Chapter 92E, HRS (Fair Information Practice Act), to the University's current practice of making available to the public the name, position title, period of appointment and salary of individuals appointed by the Board of Regents.

Chapter 92E, HRS, was enacted to implement Article I, Section 6, of the Hawaii Constitution which guarantees the right of the people to privacy. Essentially, Chapter 92E, HRS, prohibits State agencies from disclosing personal records, except in certain statutorily permissible circumstances. A "personal record" is defined in Section 92E-1(3), HRS, to mean:

> [A]ny item, collection, or grouping of information about an individual that is maintained by an agency. It includes, but is not limited to, the individual's educational, financial, medical, or employment history, or items that contain or make reference to the individual's name, identifying number, symbol, or other identifying particular

> assigned to the individual, such as a finger or voice print or a photograph. "Personal record" includes a "public record," as defined under section 92-50.

Given this broad definition, it is the opinion of this office that the information currently being provided to interested members of the public must be considered part of an individual's personal record.

Section 92E-4, HRS, contains the following prohibition on the disclosure of personal records:

> No agency may disclose or authorize disclosure of personal record by any means of communication to any person other than the individual to whom the record pertains unless the disclosure is:
>
> (1) To a duly authorized agent of the individual to whom it pertains;
>
> (2) Of information collected and maintained specifically for the purpose of creating a record available to the general public.
>
> (3) Pursuant to a statute of this State or the federal government that expressly authorizes the disclosure;
>
> (4) Pursuant to a showing of compelling circumstances affecting the health or safety of any individual.

It is our further opinion that none of the above-enumerated exceptions apply to the situation described in your memorandum. Nonetheless, even where a statute is unambiguous, the law will reject literal construction of a

statute where to do so would lead to an absurd result. In re Spencer, 60 Haw. 497 (1979); Tangen v. State Ethics Commission, 57 Haw. 87 (1976); In re Park, 56 Haw. 492 (1975); State v. Park, 55 Haw. 610 (1974); Pacific Insurance Co. v. Oregon Automobile Ins. Co., 53 Haw. 208 (1971). We are of the opinion that reading Sections 92E-1(3) and 92E-4, HRS, to preclude State agencies from disclosing the name and position title of their employees would lead to absurd results and therefore should be rejected. Public access to State services is dependent upon access to State officials, which is only possible where such individuals are identified by name and position. Moreover, the State publishes a directory which provides the name and position title of many public officials to facilitate such access. The position held by a State official is also made public through correspondence, as well as in numerous other ways in their everyday performance of their duties. Therefore, it is the conclusion of this office that the University is not precluded from disclosing the name and position title of Board of Regent appointees. Their salaries and periods of appointment, however, would not appear to be essential information required by the public and is customarily held to be confidential and therefore should not be made public.

I hope this adequately addresses your inquiry. Should you have any further questions, please contact me.

APPROVED:

/s/
TANY S. HONG
Attorney General

(A4)

NEW PRIVACY THREAT SEEN

Bill would regulate U.S. agencies' sharing of personal data

Concern for individual privacy rights as government agencies increasingly trade computerized information has prompted legislation in the U.S. Senate.

In August, Sen. William Cohen, R-Maine, introduced a bill to provide more privacy and due process protection to people whose personal data is being exchanged among federal agencies. The bill died in committee but Cohen plans to reintroduce it this winter.

For example, such "computer matching" could mean checking IRS data to see whether a woman applying for welfare has unearned income not reported on her welfare application.

Currently, federal agencies have electronic access to more than half of the government's 3.5 billion records. As many as 200 ongoing matching programs involve benefit programs—from student loans to Medicare.

The information is used to locate persons who have not registered for the draft or paid child support, according to Abner Mikva, chairperson of the ABA's Individual Rights and Responsibilities Section and author of a report on the subject prepared for the ABA House of Delegates.

AN IRS MASTER FILE

The IRS also proposes creating a master debtor file to match against tax returns so that debts owed the government can be deducted from tax refunds.

As required by law, the Federal Register contains notices of first-time computer matches of recipients of civil service pensions, veteran disability benefits, railroad retirement benefits, subsidized housing and black lung payments.

While this type of "computer matching" is legal, it conflicts with the ABA-backed Fair Information Practice guideline that personal information collected for one purpose may not be used for another without notice or consent, according to Jerry Berman, director of the ACLU's Privacy and Technology Project in Washington, D.C.

▲ Abner Mikva

The Privacy Act of 1974, which regulates government records containing information about individuals, could conceivably have helped to regulate abuses in this area, but critics argue that a "routine use" exception has taken the teeth out of the act.

THE BILL

Sen. Cohen's bill, originally known as the Computer Matching and Privacy Protection Act of 1986, would amend the Privacy Act of 1974 by requiring federal agencies and state agencies working with them to enter into written agreements before disclosing records for use in matching programs.

These agreements would specify the procedures the agencies must follow in securing records used in matches. They also would specify the conditions governing return and destruction of data after a match has been completed.

These agreements also would restrict how the data can be used, such as "redisclosing the information and creating new, permanent files about persons who are identified as 'hits' in computer matches," said Cohen.

"Unchecked disclosures and exchanges of personal records could result in 'fishing expeditions' by overzealous government officials who may be insensitive to the privacy and confidentiality rights of citizens," asserted Cohen.

DATA INTEGRITY BOARDS

He maintained his bill would remedy the "lack of attention paid to privacy implications of matches" by establishing Data Integrity Boards in federal agencies subject to the Privacy Act of 1974.

These boards would review and approve the matching agreements proposed in Cohen's Act. These boards are modeled after one already in existence—the Defense Department's Defense Privacy Board.

Also in August, at the ABA Annual Meeting, a resolution was passed by the House of Delegates backing legislation to prohibit such "nonconsensual use of income tax, census, political activity, religious affiliation

▲ Jerry Berman

▲ Sen. William Cohen

and similarly sensitive data files for the purpose of verifying the eligibility of citizens for government benefit programs."

SPECIFIC NOTICE

The ABA resolution supports legislation requiring specific notice to applicants for any government benefits that information they supply may be given out to other federal agencies. Cohen's bill has this provision.

"Citizens must be given notice on the forms they fill out that this is going on and should be asked for their consent," said Berman, a backer of Cohen's bill and the ABA resolution.

"Now the only notice given that this kind of thing is taking place is in the Federal Register, and very few people read that," said Berman.

The ABA resolution recommends that government agencies independently verify any computerized data comparison before a government benefit is cut off or denied. Cohen's bill also proposes such independent verification.

"Computers make mistakes and human beings make errors inputting data into them," noted Berman. "Human verification of discrepancies [in data comparisons] is also necessary."

If Cohen's bill passes, Berman suggested that injunctive relief and damages could become viable options to give weight to its provisions:

—Nancy Blodgett

365

DOUBLE INDIGNITY

You can't see your medical records—but everyone else can

by Esther Schrader

Ed Mulligan set up his picket in front of Community-General Hospital in Syracuse, New York, in August 1976. Community-General had seen pickets before, but this one was different. Mulligan wasn't demanding higher wages or making a political statement. He wanted the hospital to give him something it had denied him for more than three years: a copy of his medical records.

After four years of illness and two operations, the 71-year-old cancer victim had requested a copy of his records from Community-General. When the hospital denied him access to all but the results of a few tests, Mulligan filed a $440,000 lawsuit. Since New York does not require hospitals to release medical records to patients, his case was thrown out of court. So Mulligan took matters into his own hands. Carrying a sign that read, "This Hospital has Something to Hide," Mulligan picketed Community-General for several weeks. He succeeded in getting the hospital's attention, but only enough to cause it to sue him for creating a nuisance. Only after the local media did stories on Mulligan's picket did the hospital allow him to see a laundered version of his records, a pyrrhic victory which, after three years of time, money, and frustration, was all Mulligan could hope for.

Mulligan's persistence is unusual, but his problem is not. In dozens of states, patients are denied the critical, personal details in their medical records. Yet insurance companies, law-enforcement officials, medical professionals, intelligence agencies, and others have easy access to these records—usually without the patients' knowledge. As a result of this injustice, some people have been denied jobs, demoted, or given inadequate medical care. Worse, these actions have been taken on the basis of medical records that—without any input from the patient—are often misleading and sometimes inaccurate.

Nevertheless, the debate over access to medical records has received little media attention. Moreover, legislative proposals to give patients access to their records have lost in all but 14 states. Much of the opposition has come from doctors who have spent a lot of time and money to keep their patients in the dark.

Esther Schrader is a New York writer.

A7
366

For three years the doctors who refused to treat Anne Stern didn't tell her it was because her medical records mistakenly listed her as schizophrenic.

Insane system

Pamela Abbott was 20 years old when she entered Bennett Hospital in Plantation, Florida, to have a benign tumor removed from her bronchial tube. The operation required two surgeons and an anesthesiologist to remove the growth and keep oxygen flowing to her lungs. At some point during the operation Abbott went into cardiac arrest. By the time the medical team could react, her brain was permanently damaged. "The best we could determine," says David Kahn, the lawyer who represented the family in its malpractice suit, "is that for some reason the tube that was put down her throat to her lungs was blowing oxygen not into her lungs, but into the operating room."

None of this, however, is reflected in the record of the operation. While it is noted that the patient was in trouble, there is no explanation for why Abbott's heart stopped. A section of the report titled "Remarks" also says nothing, and Abbott's post-operative status is noted, amazingly, as "satisfactory." Eleven days after the operation, she died.

Abbott's parents requested her medical records. The hospital refused their request, the family sued, and after two years of litigation the Abbotts accepted a $450,000 settlement from the surgeons involved. But they never got a look at their daughter's complete medical records. When the hospital released the records after Kahn obtained a subpoena for them, 90 percent of Pamela Abbott's X-rays, and all of her brain wave reports were missing.

The Abbotts were lucky to get that much. Florida is one of 36 states where physicians are obligated to supply a patient's medical records only to another treating physician. Though the vast majority of doctors probably keep accurate records, many patients suffer hardship needlessly because of errors they could easily correct if they had access to their files.

That's what happened to Anne Stern who, in 1974, underwent a lung-cancer operation at the prestigious New York University Medical Center. The operation was successful, but in the diagnosis section of her discharge summary, along with "adenocarcinoma of the right lower lobe," and "basal cell cancer skin of face," a resident, reading from another doctor's notes, added "paranoid schizophrenic." For three years Stern could not find a doctor. None was willing to provide even the most basic treatment to a woman whose medical records indicated she was crazy.

But Stern was perfectly sane. She learned of the misdiagnosis only after her frustrated search for a doctor led her to ask for a copy of her medical records. After being denied access, Stern turned to the New York Public Interest Research Group, which, threatening legal action, succeeded in getting Stern her records. When she saw her diagnosis, Stern went to three psychiatrists, each of whom found her sane. She showed the reports to the hospital, which wrote her a letter of apology. "The resident...who filled out the records at that time," wrote Arthur Boyd, the doctor at the University Medical Center who had been responsible for Stern's records, "apparently misinterpreted these notes and put down that diagnosis." As upset as she remains over the misdiagnosis, Stern is equally angry that for three years neither the hospital nor the doctors who refused to treat her told her she had been diagnosed as mentally ill. There is no more compelling argument for patient access than this: What if she had been paranoid schizophrenic? Not treating Stern was bad enough, but the doctors who knew of her diagnosis yet did nothing didn't seem to care whether she got any treatment at all. They offered no referrals, no suggestions, nothing. They didn't even tell her family. "They shied away from me like poison and I didn't understand why," she says. "A thing like this certainly should have been communicated to my family, if not to me."

(A8) 367

While such extreme cases are rare, patients with less serious problems also suffer because they can't see their medical records. When an attorney in Albany, New York was diagnosed in 1980 as having a rare form of rheumatoid arthritis, she made an appointment with an expensive specialist in Boston. To assure that her records would arrive in time for her appointment, she asked her family doctor and the Albany Medical Center Hospital whether she could bring copies of them with her. Though her doctor gave her copies of those records he had on file, the hospital told her its files would be made available only upon written request from the Boston physician. As she feared, her records didn't come in time for her appointment. "It was terribly frustrating," she says. "You're already sick and you're already anxious. It made me feel awfully suspicious and distrustful. I didn't understand why they wanted to hide them from me."

The larger question

As patients fight their way through legal barriers and reluctant physicians in search of information about themselves, the doors to medical records rooms are thrown open to numerous third parties. Lawyers can obtain subpoenas for medical records, police can simply walk into local hospitals and demand them, and insurance companies can withhold payment for their clients' medical treatment until they've read them.

Such easy access has led to abuse. In testimony before the Senate Committee on Governmental Affairs in 1979, John Shattuck, then director of the Washington office of the American Civil Liberties Union, told of a woman who, despite having graduated Phi Beta Kappa from college and having scored in the top 1 percent on the National Medical College Admission Test, was turned down by 13 medical schools because her medical records indicated she had once been a voluntary patient in a psychiatric institution. Shattuck also testified that in 1976, a man was denied a license to drive a taxi in New York City because the cab company read in his medical records that he had been placed in a mental institution for six months. No matter that at the time he was a 13-year-old orphan and that the mental hospital was the only place authorities could find for him for that short period.

Employees have also been victimized by their bosses on the basis of incorrect medical records. In 1983, two years after he was hired as a customer-service representative for a computer manufacturer, a New York man found himself demoted to a dead-end job loading paper into printers. His misfortune, although he did not know it at the time, was the result of incorrect diagnoses made by a company doctor that he was a "possible manic depressive," and "possible schizophrenic."

He might still be working at a job he calls "one step off the assembly line" if he hadn't been lucky. While undergoing a compulsory hearing and vision examination six months after he'd been demoted, he saw his medical records sitting on the desk next to him. Over the protestations of a nurse, he scanned them and found the mistaken diagnoses. "After I saw what was in them, I talked directly to a company doctor about getting copies of my records because they were obviously wrong," he says. "I was flat out refused."

Denied his records and discouraged in his career, he took a leave of absence and completed substantial work toward a master's degree in computer science. When the company refused to promote him despite his additional expertise, he took his case to the New York State Division of Human Rights. Three years after requesting his medical records, he still hasn't seen more than his diagnosis sheet. But since threatening legal action he has been promoted to a computer programming position and the company has apologized for the mistaken diagnosis.

The information insurance companies use to decide whether to accept your policies and claims may be inaccurate, but right or wrong the patient isn't allowed to see it.

To get some idea of how accessible your medical records are to others, consider the Medical Information Bureau (MIB). A nonprofit service based in Boston, MIB is a huge repository of information gleaned from medical records. Using MIB's computer, the more than 800 life insurance companies belonging to the service share information about their policyholders. While policyholders routinely sign consent forms giving their carrier access to their medical records, few realize that, through MIB, medical information about them is available to insurance companies across the country. There is no guarantee that the records on file with MIB are any more accurate than Anne Stern's, but one thing is certain: right or wrong, the information in MIB's computer is often the basis on which an insurance company decides whether to accept your policies and claims—and right or wrong, the patient isn't allowed to see it.

The access to individuals' medical records provided by MIB begs a larger question posed by all abuses of medical records: is third party access to such private records a violation of individual civil rights? "It's sort of the last, best privacy issue," says Robert Belair, a partner at the Washington law firm of Kirkpatrick and Lockhart, who twice worked on federal legislation to regulate access to medical records. "After all, if your medical records aren't private, what is?"

Misplaced mystique

On the surface, the answer to the medical records mess seems simple: give patients access to their records and restrict access to third parties. But for more than 12 years, legislators, patients' rights groups, and medical professionals have failed in repeated attempts to do just that. At both the state and federal levels, legislation to restrict third party access has met strong opposition from doctors. In those 14 states where bills have passed guaranteeing patient access, there have always been fights. In New York State, a patient access bill was passed into law last July after a four-year battle. The bill, which doesn't address the question of third party access, represents a compromise between patients' rights advocates and the New York State Medical Society, which assured itself of a strong voice in the debate over the bill by directing its political action committee to spend $226,975 on legislators last year—more than all but one PAC in the state. Most of this money was spent on members of the legislature's health and insurance committees, where records access bills have languished again and again.

Since they were first proposed by the New York State Department of Health in 1982, patient-access bills were repeatedly blocked in the Republican-controlled Senate, where the powerful medical society organized letter-writing campaigns, phone calls, and meetings with key legislators. The bill that finally did pass allows physicians to decide which patients may see their records. Legislation to give patients in California access to their medical records was proposed three times before it finally passed the legislature in 1982, over the intense opposition of the California Medical Association. Like other advocates of patient access, Howard Berman, the former majority leader of the California State Assembly who introduced the bill, encountered opposition primarily from doctors worried about malpractice suits—a fear that is likely to increase in the years ahead. "Young doctors coming out of medical school are scared" of such cases, says Dr. Robert Pulle, a general practitioner in West Chester, Pennsylvania. Other physicians sensitive to malpractice are, he says, "becoming very paranoid about giving patients their records." Some argue the malpractice paranoia is overstated. "The litigious climate that prevails between doctors and patients is prominent despite [restricted] access to records," says Arthur Caplan, associate director of the Hastings Center, a New York organization that studies ethical problems in health care. He argues that if doctors became more open with patients, an informed relationship would emerge that would lead to fewer malpractice claims. But even if it didn't, the only time open records would lead to a successful malpractice suit would be when there's something in the record that indicates negligence. And that's as it should be. Arresting the growth of malpractice claims by suppressing the evidence is ridiculous.

Doctors also frequently proffer the argument that medical records are the property of the physician, created for his use and not for the eyes of the patient. "We feel that it is a record that is made by the doctor for his purposes and is not the property or inalienable right of the patient," says Dr. Donald T. Lewers, president of the Maryland physicians association. But over the past 20 years, as patients have begun to contest this notion, most courts have ruled that while the doctor owns the record itself, the patient has an interest in, and a right to, the information in those records.

The courts are right. After all, the records at

issue are composed of information about the patient, provided by the patient, to a physician who is being paid by the patient or his representative. The patient's right to see his medical record is just common sense.

Of course, the whole idea of denying any patient knowledge of his illness is dubious, yet doctors also claim that if patients see their records it will increase their anxiety and make them less likely to comply with their physicians orders.

Certainly there may be cases where telling a patient details of his illness would be more dangerous than not telling him. That is why every patient access law that has been proposed or enacted leaves ample room for appeal. The question is not whether some of the patients could be hurt some of the time by seeing their records, but whether we're willing to let doctors have power over decisions in which they have potentially adversarial interests.

But all this concern is probably academic. Physicians' concerns have proved spurious in one rather large test case—the federal government hospitals. The Privacy Act of 1974 gave patients access to records at federally-run hospitals. Administrators at these hospitals have found few of the problems predicted by doctors—even in the area of psychiatric care. "The patient knows what's going on and knows why he's being treated as he is," says Dr. Harold Thomas, a spokesman for St. Elizabeth's, a federally-operated mental health facility in Washington. "They understand better how they can progress to the next step."

Patient access has also been tested in the private sector. A study at the Given Health Care Center at the University of Vermont, in which 100 patients were given copies of their own records, found that 84 percent were more careful about taking medicine prescribed for them, and 97 percent worried less about their health care.

There is one aspect of the medical records issue on which doctors and hospitals are most intractable, and which careful legislative craftmanship of patient access laws may begin to change. The mystique of the physician as healer has bred an unequal relationship between doctor and patient in which the patient is asked to blindly trust while the doctor magically heals. The paternalistic role physicians have carved out in our society leaves little room for a curious, well-informed patient to participate in his own care. Older doctors are particularly guarded. "It's usually the most senior physicians who just don't buy the idea of showing patients their records," says Bob Leamer, counsel to the New York Assembly Health Committee.

Bills giving patients access to some control over their medical records are before many state legislatures. Given the history of previous bills, however, reform efforts may drag on for years. In the meantime, people like Ed Mulligan have no choice but to wear out their shoes, and their patience, fighting the medical community just to see information about their own bodies. ■

Statement of Ownership, Management and Circulation (*Required by 39 U.S.C. 3685*) 1. Title of publication: The Washington Monthly. A. Publication No. 704640. 2. Date of filing: October 1, 1986 3. Frequency of issue: monthly except for combined July/August issue. 3A. Number of issues published annually: 11. 3B. Annual subscription price: $33. 4. Location of known office of publication: 1711 Connecticut Ave. N.W., Washington, D.C. 20009. 5. Location of the headquarters or general business offices of the publishers: same. 6. Names and complete addresses of publisher, editor, and managing editor: Publisher, Timothy A. Ruder; Editor, Charles G. Peters, Jr. , 5025 V St. N.W., Washington D.C. 20007; Managing editor, vacant. 7. Owner: The Washington Monthly Co., an unincorporated joint venture between The Washington Monthly Corporation and The Washington Monthly Limited Partnership, of which The Washington Monthly Publishing Corporation is sole general partner. All entities at 1711 Connecticut Ave. N.W., Washington, D.C. 20009. Owners of 1 percent or more of shares of The Washington Monthly Limited Partnership: Preston Brown, Washington, D.C.; Warren Buffett, Omaha, Neb.; W.E. Chilton III, Charleston, W Va.; Timothy Cole, Cleveland, OH; Alexander Ewing, New York, N.Y.; James Fallows, Washington, D.C.; Gene Gordon, Bethesda, Md.; Robert Hellawell, New York, N.Y.; Edgar Kaiser Jr., Oakland, Calif.; Phillip Keisling, Portland, Or.; Roger S. Kuhn, Bethesda, Md.; Morton Mandel, Cleveland, OH; New Haven Terminal, Inc., New Haven, Conn.; Matthew Nemerson, New Haven, Conn.; Richard Ottinger, Washington, D.C.; Ann Peretz, Cambridge, Mass.; Joseph Rosenfield, Des Moines, Ia.; Sidney S. Sachs, Washington, D.C.; Fred Stanback Jr., Salisbury, N.C.; Philip M. Stern, Washington, D.C.; Stuart Thayer, New York, N.Y.; Howard W. Young, Washington, D.C. Owners of 1 percent or more of stock of The Washington Monthly Corporation: Timothy J. Adams, Washington, D.C.; Russell Baker, New York, N.Y.; Taylor Branch, Washington, D.C.; A. Whitney Ellsworth, New York, N.Y.; Joseph Freitas, Jr., San Francisco, Calif.; Murray Kempton, New York, N.Y.; Suzannah Lessard, New York, N.Y.; Estate of Peter Lisagor, Arlington, Va.; Charles Peters, Washington, D.C.; PKL Co., Inc, New York, N.Y.; John Rothchild, Miami, Fla.; Eleanor Rovere, Tarrytown, N.Y.; Hugh Sidey, Potomac, Md.; Carole Lee Smith, Salem, Or.; James C. Thomson Jr., Cambridge, Mass.; Carol Trueblood, Washington, D.C. Owners of 1 percent of more of stock in The Washington Monthly Publishing Corporation: Alfred C. Clark, New York N.Y.; Joseph D. Crowley, New Haven, Conn.; Kanawha Banking and Trust, Trustee for John D. Rockefeller IV, Charleston, W. Va.; Fiona F. Rust, Monroe, Ore.; John Spencer, Middlebury, Vt.; Carol Trueblood, Washington D.C. 8. Known bondholders, mortgagees, and other security holders owning or holding 1 percent or more of total amount of bonds, mortgages or other securities: none 9. Not applicable. 10. Extent and nature of circulation: (Average number of copies each issue during preceding 12 months), actual number of copies of single issue published nearest to filing date. A. Total number of copies printed: (35,000) 39,000. B. Paid circulation: 1. Sales through dealers and carriers, street vendors and counter sales: (1,754) 3,143; 2. Mail subscriptions: (27,118) 29,113. C. Total paid circulation: (28,372) 32,256. D. Free distribution by mail, carriers or other means, samples, complimentary, and other free copies: (3,246) 2,610. E. Total distribution: (32,118) 34,866. F. Copies not distributed: 1. Office use, left over, unaccounted, spoiled after printing (600) 819; 2. Returns from news agents: (2,282) 3,315. G. Total: (35,000) 39,000. I certify that the statements made by me above are correct and complete. Tim Ruder.

370
(A11)

THE ARIZONA REPUBLIC

DATE: MONDAY November 17, 1986
PAGE:*A1*
SECTION: Front
ILLUSTRATION: PHOTO
SOURCE: By LARRY LOPEZ , Associated Press
EDITION: Final
LENGTH: Medium

PERSONNEL PROBES CRITICIZED
MOTOR-VEHICLES DIRECTOR OKS CHECKS ON WORKERS

Some workers and all job applicants in the state's Motor Vehicles Divisic are required to submit to background checks, to promise not to sue anyone fc inaccurate information, and to pledge that they will not even ask to see wha kind of information is dug up.

The division's chief, Juan Martin, said in an interview Friday that he thinks it is important to have access to as much information as possible because most employees handle money, sensitive documents, or both.

For example, he said, the state should try to avoid hiring those accusec of a crime even if the accusation is later dismissed.

Spokesmen for the Arizona Civil Liberties Union and the labor union

representing state workers said they are shocked by the policy and by Martir attitude.

Martin's policy means ''that you're guilty until you prove yourself innocent, but you can never prove yourself innocent,'' ACLU Executive Direct uis Rhodes said Sunday. ''It's something that's going to have to be challenged. It sounds horrendous.''

Gov. Bruce Babbitt was out of town and unavailable for comment, but an aide said Babbitt ''had enough personal concerns that he would discuss it ar explore the issue'' when he returns to Arizona this week.

Peter Fears, executive director for the Arizona branch of the American Federation of State, County and Municipal Employees said Friday that the uni does not object to background checks. But he said it is only fair to let the target of checks respond, much the way that people are allowed to inspect their credit files and respond to any negative information.

Fears said the AFSCME already is representing employees who have had problems with the policy, and Rhodes said the ACLU will probably offer to jc with the AFSCME if the union files suit, or would mount its own challenge if approached by applicants.

The Motor Vehicles Division, an agency of the state's Department of Transportation, has conducted some background checks for the past four or fi years, especially for workers in law-enforcement positions, Martin said.

But a four-page policy statement issued in April broadened the scope. It

requires background checks for all new hires and for virtually all those switching positions.

All applicants must submit their fingerprints and sign a ''waiver of liability'' that allows the division's office of special investigations to gather information and keep it for up to three years after the worker leaves s te government. So must any employees who ''transfer, promote or demote ou of their current classification into a classification requiring a more in-depth background investigation.''

The waiver form has gone through three drafts. The latest, and least harsh, of the versions, requires that the applicant or employee let the department obtain ''any information pertaining to my character, work performance or education.''

''I also understand that the information or source of information provic to the department will not be made available to me, my agent or my attorney

371

A12

John K. Kingsley
437 Lanipuao Street
Honolulu, Hawaii 96825

4 June 1987

Mr. Robert A. Alm,
Chairman of the Committee
Committee On Public Records And Privacy
Post Office Box 541
Honolulu, Hawaii 96809

Dear Mr. Alm:

With regard to the advertisement, "CALL TO COMMENT" (3/6/87), I am particularly interested in presenting my views concerning public availability and access to records now "deemed confidential and shall not be disclosed" under Rule 2.2, Supreme Court of Hawaii covering the activities of the Disciplinary Board and Office of Disciplinary Counsel to include, "files, records, and proceedings".

Please advise me as to:

a.) Can I appear and personally offer testimony?

b.) Is written testimony required?

c.) If so, how many copies, to whom, and advance submittal date, i.e. prior to that hearing?

Your assistance is appreciated.

Very truly yours,

JOHN K. KINGSLEY

Tel: 395-5855

372
5

Janet Lee
47-624 Puapoo Place
Kaneohe, HI 96744

Committee on Public Records and Privacy
July 2, 1987
State Capitol Auditorium 3 P.M.

Good afternoon, members of the Governor's Committee on Public Records and Privacy. My name is Janet Lee. I'm speaking today as a private citizen who has been working in the child care profession for many years. My duties have ranged from aide, to teacher, to director, to administrator. I am active in the state organization for child care professionals, HAEYC--the Hawaii Association for the Education of Young Children.

This public hearing is a welcome opportunity. As our society strives to balance the public gain against the private loss in many areas, the answers are not carved in stone but change as public and private needs change. It's gratifying to see our State recognize and deal with this fact.

I have two concerns about government records and privacy as they relate to care givers, especially those who work in child care centers. One of the concerns is about information that is too available, the other is about information that should be available and is not.

Child care in Hawaii is highly regulated. At least, licensed programs are highly regulated. The State tells us where we can have a child care center, who we can hire, how many people we need to hire, the qualifications for those we hire, what we teach, how we teach, who we teach, when we feed the children, etc, etc, etc. Some feel these regulations are unnecessarily complex and stringent. Some feel they discourage organizations and individuals from establishing more child care facilities, Some feel they make child care more expensive. The State has decided that the public gain, protection of children, outweighs private loss, inconvenience to care givers.

DSSH Licensing and Registration Division accumulates a great deal of information about a child care center and the people who work there. DSSH is also responsible for handling complaints against a center. Each complaint is investigated and a report is made of the results of the investigation and whether the complaint was substantiated or not. These reports are open public records. A parent can go to Licensing and

Registration on Bethel Street to check for any complaints against a child care facility before they select a center for their child. These complaint files were made public several years ago so parents could make informed decisions about child care arrangements.

The problem is, where should the line be drawn on what the parents need to know for the protection of their child and what they don't need to know for the protection of the child care center and its staff? Currently these files contain reports of unsubstantiated accusations of child abuse. Over the past several years there have been 35 accusations made against child care centers that were dismissed out of hand. Howevever, these spurious accusations are in the complaint files for those centers, available to be read by the public who may put more weight on the accusation than on the investigation which judged the accusation without merit.

These complaint files were not intended to serve as a deterrent to potential child abusers but were intended to keep the public informed. The public certainly has a right to know about substantiated accusations of child abuse in a child care center. DSSH certainly has a right and an obligation to investigate all accusations, no matter how spurious. But the public's right to know does not include knowledge of mere accusations. Accusations of abuse found to be without merit should not be included in the public complaint files.

My second concern is with records that should be more available. In an effort to protect children from those with a history of violence, every employee of a licensed child care program must be fingerprinted and have their prints cleared through the FBI files. Their names are run through the Hawaii Criminal Justice Data Center files annually and their employment history for the past three years is checked. These steps serve as a deterrent to those who "pose a risk to children in care."

The criminal abstracts come directly to the Licensing and Registration Division. When Licensing finds a "hit" on an abstract or in other background materials, they notify the employer in writing that the employee must be fired. The employer has seven days to comply or to respond to Licensing in writing stating why they do not wish to terminate the employee. There is an established appeals procedure. However, at no time during this procedure can the employee see the records upon which Licensing based their decision to request termination. Allowing the employee to see these records would not necessarily give them an advantage during the appeals process nor result in an unsuitable person

being allowed to work at a child care center. It is unfair (perhaps unconstitutional?) that the accused employee is not allowed to see these reports. The private loss, the denial of the accused rights, outweighs any public gain during the appeals process. In this instance, the person has a right to know and the State has an obligation to make the records available.

Thank you for your time and attention.

Matt

Box 641
Honolulu, HI. 96809
26 July 1987

GOVERNOR'S COMMITTEE
ON PUBLIC RECORDS AND PRIVACY
Mr. Robert A. Alm, Chairman
P.O. Box 541
Honolulu, HI. 96809

Dear Mr. Alm:

In addition to my oral testimony given on July 10, I would like to make the following comment:

The quality of archaeological fieldwork and research in Hawaii has suffered because of the way in which historic preservation laws have been implemented. It is particularly difficult for interested persons to get information. Historic preservation laws should be amended to give interested persons the following rights: reasonable access to all documents related to the government administration of historic preservation laws, including scopes-of-work, research designs, preliminary reports, draft reports, interim reports, interagency memos and letters, minutes of meetings, and so on; request copies of such documents without charge; the ability to review such documents on all islands, including Moloka'i and Lana'i; and access to project sites while fieldwork is in progress. These rights should be made explicit in H.R.S. Section 6E: Historic Preservation Program.

Sincerely,

Earl Neller

Earl Neller

GEORGE R. ARIYOSHI
GOVERNOR OF HAWAII

SUSUMU ONO, CHAIRMAN
BOARD OF LAND & NATURAL RESOURCES

EDGAR A. HAMASU
DEPUTY TO THE CHAIRMAN

DIVISIONS:
AQUACULTURE DEVELOPMENT PROGRAM
AQUATIC RESOURCES
CONSERVATION AND RESOURCES ENFORCEMENT
CONVEYANCES
FORESTRY AND WILDLIFE
LAND MANAGEMENT
STATE PARKS
WATER AND LAND DEVELOPMENT

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
DIVISION OF STATE PARKS
P. O. BOX 621
HONOLULU, HAWAII 96809

December 2, 1985

MEMORANDUM

TO: Mr. Earl Neller, Staff Archaeologist

FROM: Ralston Nagata, State Parks Administrator

SUBJECT: Reprimand for Improper Release of Report

This memorandum is intended as a reprimand for recent release of a staff report to Representative Robert Nakata without first having the material reviewed and released through the proper channels. While I appreciate your prompt notification of your becoming aware of the report subsequently being released to the news media, you have been counseled a number of times in the past about distributing materials generated as part of your employment with us without authorization.

As you informed me, you hand carried a copy to Representative Nakata's office sometime prior to the article in the Honolulu Advertiser on Tuesday, November 26. While you had drafted a transmittal to the Federal Highways Administration on Monday, November 25, who the report may have benefitted and whose project has been under review and coordination with our office over a number of years, you chose to favor another who is not a part of our review process by presenting him with an advance copy before anyone else. Such action severely undermines our credibility with agencies involved with us in reviews or other matters and I believe jeopardizes relationships we have tried to develop with other agencies and even the private sector in gaining greater public acceptance of our historic preservation program. The State Department of Transportation Highways Division, as we discussed, may have at times gone beyond their responsibilities to accommodate our concerns and a positive relationship had developed. Your action may have unfortunately set our relationship back considerably.

In the past, we have counseled you about releasing staff reports or any other documents/drafts on your own. Such information needs to be reviewed and as necessary, edited by your superiors to 1) remove extraneous materials, 2) clarify items, 3) assure consistency with departmental practices, 4) assure factual correctness, and any other appropriate reasons. Then if it is appropriate for release, I or the Chairperson would be the ones to transmit the document, consistent with our practice on any written correspondence or documents.

Further, in responding to inquiries from the news media or elected officials, it is important to provide only factual information and referring policy questions to myself or the Chairperson. As has been the departmental practice, your superiors should be immediately notified of such contact and the nature of the information requested. As you indicated to me on other occasions where it may be appropriate for other staff members to respond, the inquirer should be referred to such person rather than for you to feel obligated to respond and, further, as the situation may merit, a "no comment" response may also be appropriate.

This letter is intended to make you fully aware of the procedures to be followed. If future incidents of a similar nature occurs, appropriate action will be taken. You may grieve this letter of reprimand under Article 11, Grievance Procedure of the Professional and Scientific Employees' Agreement.

RALSTON NAGATA

Letter received 4 DEC 85
(Date)

Earl Neller
EARL NELLER

'Banana patch' called a significant site

By Floyd K. Takeuchi
Advertiser Government Bureau

A State Historic Preservation Office report says the "banana patch" area, where an H-3 Freeway interchange is planned, "is a significant archaeological resource that should be preserved, if at all possible." The report also says the Hawaiian argiculturalterraces there should be nominated to the National Register of Historic Places, and should be considered for nomination as a National Historic Landmark.


Neller

State archaeologist Earl "Buddy" Neller, who wrote the just-released study, said it was done to give a "good idea" of the extensive terrace system there.

The state Transportation Department and Federal Highways Administration have said the interchange, which would connect H-3 and Likelike Highway, could either be widened to encircle most of the sites or moved althogether. A recent Bishop Museum study, done on contract to the Transportation Department, said two sites in particular were of historic significance.

In his report, Neller wrote the area has historic and cultural significance because of the terraces, house and grave sites, a heiau or shrine there, and because of the "extensiveness of the (taro) fields.

"The Luluku settlement is an important archaeological resource which should contain data related to the events and processes associated with the evolution, adaptation, and disintegration of Hawaiian culture," Neller wrote.

Neller, who has made 11 trips to the area, said the terraces have public use value. "Up to the present time, public use and development of Hawaiian archaeological sites has focused on the ruins of large luakini heiau (temples for human sacrifice), but Hawaiian archaeologists are beginning to appreciate the public use potential of other kinds of sites, such as (taro) terraces, for talking about Hawaiian archaeology and cultural evolution," he noted.

Neller strongly recommends that the area be nominated to the National Register of Historic places, and that the state submit the sites to the National Park Service for consideration as a National Historic Landmark. While neither step would guarantee preservation of the area or necessarily stop H-3, he said, it would "provide a measure of the site's significance."

"Avoiding (historic) sites has not guaranteed preservation, nor development for public use, nor maintenance, nor scientific study," Neller wrote. "And the questions need to be asked: Why wasn't this site placed on the National Register years ago? And who is representing the public's interest in preserving Hawaiian archaeological sites?"

MEMORANDUM

11 December 1985

TO: Ralston Nagata, Administrator
State Parks Division, Department of Land & Natural Resources
FROM: Earl Neller

Your written reprimand of December 2, 1985, alledging misconduct on my part came as a surprise and hurt me very deeply. I have always considered it an honor to be the state archaeologist in Hawaii, working in the State Historic Preservation Office, and have committed myself to public service to a degree that goes far beyond the rest of the staff in State Parks. This job is the most important thing in the world to me, and it is very important to me to do the best job possible.

The allegations made in your reprimand are false, and completely distort the facts of the case, and I think it is you yourself who are guilty of misconduct, by taking the good work that I do and calling it bad, and by attempting to make me look like an employee with a discipline problem and damaging my reputation.

As an administrator and head of State Parks you have a responsibility, when making a reprimand, to be as explicit and as clear as possible. Your reprimand is too vague and evasive to allow for an intelligent response and needs to be clarified, before I can comment further. My questions follow.

What is your basis for claiming that I have released an official state report?

In other words, what is your basis for saying that my Luluku report was an official state report and that it had been released without going through proper channels?

What is your basis for saying that the public records in our office cannot be released without your permission?

What are the procedures for releasing state reports and what are the rules and laws governing the production and release of such reports?

Explain your statement that the Department of Transportation Highways Division has at times gone beyond their responsibilities to accommodate our concerns and that a positive relationship has developed?

In what way does my report on the Luluku sites undermine our credibility and jeopardize our relationship with the Department of Transportation Highways Division and set our relationship back considerably?

I would like a list of all historical and archaeological reports that have been released through proper channels during the time that I have worked for State Parks.

I would like a list of all those reports that you claim I have distributed without authorization.

I would like a list of any and all documents, letters, and reports in our files which are not part of the public record and should not be disseminated to the public.

Your reprimand implies a history of misconduct on my part. I would like a complete list of the specific incidents of wrong doing to which you refer.

I would like you to explain in detail what attempts you made to resolve this issue between the time I gave you a copy of my report and the time you gave me a written reprimand.

I would like to know each and every instance that you claim a report of mine has contained 1)extraneous material, 2) items which need clarification, 3) material inconsistent with departmental practices, 4) incorrect, inaccurate, or false information, 5) anything else that in any way requires a review by you or anyone else in the Department.

Explain your reference to questions from the news media and elected officials with specific examples. What do you mean by factual information and policy questions?

What is your legal basis for saying that I may not talk to news media about items of concern to me, be they archaeological, political, or anything else on which I have information and knowledge?

I would like a list of all instances that you claim I have not provided factual information to anyone, and when I have not referred someone to you or Susumu Ono, as appropriate.

381-1

I want this matter to be reviewed by a committee of my peers.

Your reprimand is too vague and general to make me fully aware of the procedures to be followed in the future, or of any wrong doing on my part, or of the basis for your formal written reprimand. Therefore, it is innappropriate for me to comment further, pending the answers to my questions. Your reprimand is completely unjustified, and makes necessary a full and complete response from me.

Earl Neller

GEORGE R. ARIYOSHI
GOVERNOR OF HAWAII

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
DIVISION OF STATE PARKS
P. O. BOX 621
HONOLULU, HAWAII 96809

SUSUMU ONO, CHAIRMAN
BOARD OF LAND & NATURAL RESOURCES

EDGAR A. HAMASU
DEPUTY TO THE CHAIRMAN

DIVISIONS:
AQUACULTURE DEVELOPMENT PROGRAM
AQUATIC RESOURCES
CONSERVATION AND RESOURCES ENFORCEMENT
CONVEYANCES
FORESTRY AND WILDLIFE
LAND MANAGEMENT
STATE PARKS
WATER AND LAND DEVELOPMENT

December 17, 1985

MEMORANDUM

TO: Mr. Earl Neller, Staff Archaeologist

FROM: Ralston Nagata, State Parks Administrator

SUBJECT: Reprimand for Improper Release of Report

In response to your unsigned memorandum of December 11, 1985 to me, I believe my memorandum of December 2, 1985 to you adequately states my position on the matter.

RALSTON NAGATA

MEMORANDUM 26 Dec 1985

TO: Ralston Nagata, Administrator
Division of State Parks, Dept. of Land & Natural Resources

FROM: Earl Neller

I'm not surprised that you believe your memorandum of December 2, 1985 adequately states your position on the matter. However, you still haven't answered my questions. Nor have you taken any actions to resolve the issue. I have broken no laws or regulations, and if there is a problem on this issue or any other concerning our archaeology program, the problem begins with the person responsible for administering the program, Ralston Nagata. You have not provided clear direction. You have not shown a willingness to discuss the issues. You have not answered my questions. You have distorted the facts to suit your own vindictive interests. Your criticisms of my work are severe and excessive, and your only interest seems to be in achieving total employee submissiveness.

I believe that Hawaiian archaeological sites are important public resources, and that we have a responsibility to the public to do the best we can to preserve and protect archaeological sites. This is my belief, and it is also mandated by the historic preservation laws that direct our office's activities. I have done nothing to violate the public trust, nor have I done anything that deserves a written reprimand. On the contrary, I should have been commended for a job well done. Only a sadistic manager would engage in the kind of personal vendetta that characterizes your relationship with me.

What is your basis for saying that my Luluku report was an official state report and that it had been released without going through proper channels?

What is your basis for saying that the public records in our office cannot be released without your permission?

What are the procedures for releasing state reports and what are the rules and laws governing the production and release of such reports? What are the rules and laws pertaining to the professional rights of public archaeologists to write articles for professional and public journals and to give public lectures?

Explain your statement that the Department of Transportation, Highways Division has at times gone beyond their responsibilities to accommodate our concerns and that a positive relationship has developed.

In what way does my report on the Luluku sites undermine our credibility and jeopardize our relationship with the Department of Transportation, Highways Division and set our relationship back considerably?

I would like a list of all historical and archaeological reports that have been released through proper channels during the time that I have worked for State Parks.

I would like a list of all those reports that you claim I have distributed without authorization.

I would like a list of any and all documents, letters, and reports in our files which are not part of the public record and should not be disseminated to the public.

Your reprimand implies a history of misconduct on my part. I would like a complete list of the specific incidents of wrong doing to which you refer.

I would like you to explain in detail what attempts you made to resolve this issue between the time I gave you a copy of my report and the time you gave me a written reprimand.

I would like to know each and every instance that you claim a report of mine has contained 1) extraneous material, 2) items which needed clarification, 3) material inconsistent with departmental practices, 4) incorrect, inaccurate, or false information, 5) anything else that in any way requires a review by you or anyone else in the Department.

Explain your reference to questions from the news media and elected officials with specific examples. What do you mean by factual information and policy questions?

What is your legal basis for saying that I may not talk to the news media about items of concern to me, be they archaeological, political, or anything else on which I have information and knowledge?

I would like a list of all instances that you claim I have not provided factual information to anyone, and when I have not referred someone to you or Susumu Ono, as appropriate.

I want this matter to be reviewed by a committee of my peers.

Your reprimand is too vague and general to make me fully aware of the procedures to be followed in the future, or of any wrong doing on my part, or of the basis for your formal written reprimand. Nor does your memorandum of December 17, 1985 do anything to resolve the issue. Your reprimand is completely unjustified, and makes necessary a full and complete response from me. I will endeavor to do this in a timely manner, but as you know I have a heavy workload and my response will have to be written on my own time.

Earl Neller

16 January 1986

MEMORANDUM

TO: Ralston Nagata

FROM: Earl Neller

The attached list contains some of the subjects on which I am likely to be contacted during the days ahead, because of my recognized knowledge and expertise in the field of archaeology, and because of my familiarity with the archaeological resources in these particular areas, and because of my experience and understanding of archaeological matters in general. I am likely to be contacted by news reporters, schoolteachers, interested citizens, concerned citizens, government workers, elected officials, lawyers, archaeologists, and students. If you know of any information that is related to any of these subjects that is not for release to the public, please let me know now. If you know of any reason why I should not talk to these people, or why I should not answer their questions, or why I should not be able to talk freely to anyone from the public about anything related to my job as an archaeologist or my volunteer archaeological projects, please let me know now.

While under normal circumstances it would not be necessary, because of the ambiguities and distortions of truth contained in your recent reprimand to me, please provide me with a written answer.

Old Kona Airport State Park
Kukailimoku Point
Keahole Point
Hilton Hawaiian Village, Waikiki
Kaho'olawe Island Archaeological District
Kealakekua Bay
Poipu, Kauai
Mahaulepu, Kauai
Kapalama Fire Station
Kiahuna Golf Resort
Keahole Agricultural Park
Kalaoa-Ooma Caves
Kaluako'i, Moloka'i
Kawainui Marsh
Kaneohe Marine Corps Air Station
HARC project in Kailua
Kamanele Square Park, Manoa
Kalama Valley
Pa'ia
Waiehu burials
Pu'upiha cemetery, Mala Wharf
Kawela, Moloka'i
Iliiliopae Heiau
Halawa Valley, Moloka'i
Halekulani Hotel, Waikiki
Kawaiahao Church
Adobe Schoolhouse
Century Square, Honolulu
Campbell Industrial Park
Barbers Point Harbor
Palolo Valley
Kawakiu, Moloka'i
Kualoa
Hau'ula
Waimea Falls Park
One'ula Beach Park
West Beach
Haleakala National Park
Waianapanapa State Park
Wai Lohia project, Manoa
Alii Landings project, He'eia
Koke'e
Waimea Canyon
Hanapepe
Hanakapiai
Menehune Ditch
Waimanalo Agricultural Park

Kaena State Park
Burials at Punchbowl and Halekauwila
Kailua
He'eia State Park
Makaha
Kaupo
Hanakao'o Beach Park
Honokowai School
McDonald's in Lahaina
Ukumehame Beach Park
Kalepolepo Pond
Kamaole Beach Park
Kawa'ewa'e Heiau
Manoa Stream taro patch
Maunawili
Nanakuli
Waianae
North Halawa Valley, Oahu
South Halawa Valley, Oahu
H-3 sites
Kawailoa projects
Anahulu
Smith-Beretania Block, Chinatown
Kaawa Burial Caves
Makaloa Street
Nuuanu petroglyphs
Kapena Falls State Park
Kaena Point
Leleahina Heiau
Kuhio Avenue
Makaha Surfside, Waianae
Liliuokalani Gardens, Waikiki
Bellows Air Force Station
Kahawainui flood control project, Laie
Makahoa Point
Makiki Valley
Sunset Beach
Pupukea
Malaekahana Beach Park
Keaau Beach Park
Kahuku
Kuakina Highway realignment burials
Keauhou Resort
Ka'u
Ka Lae (South Point)
Mahana Bay
Ahuena Heiau
Hikiau Heiau

Pu'uhonua o Honaunau National Historic Park
Anaehoomalu
Puukohola Heiau
Lapakahi State Park
Mo'okini Heiau
Pololu Valley
Niumalu
Nawiliwili
Na Pali
Halawa Mediuam Security Prison
Judd Street Cave
Dole Street storm relief drain
Hulopo'e Bay
Poaiwa petroglyphs
Pu'upehe Rock
Keomuku
Luahiwa petroglyphs
Kaunolu Village
Lanaihale
Baldwin Beach
Halekii Heiau
Pihana Heiau
Kalahao burials, Pa'ia
Kahalu'u Taro Lo'i
Makaha wells
Kahuku golf course
University of Hawaii
Fort DeRussy storm drain
Hee Hing Restaurant, Kapahulu
Ohikilolo
Kea'au
Ulupo Heiau
Barbers Point Naval Air Station
Kahana Valley
Waimanalo
Kaniakapupu, Nu'uanu
Maili Point
Laiewai Stream
Pahu Gardens project, Waipahu
Paumalu Girl Scout Camp
Diamond Head
Maunaolu Subdivision, Makaha
Kalaeloa Lime Kiln Site
Kahe Point fishing shrine
Beretania Street mortuary
Haleiwa Theater
Pahukini Heiau

Wailea Golf Course
O.H.A. Task Force
La Perouse Bay
Waiale'e Beach Park
Historic park and preserve at Mauna Lani Hotel
Kawailoa Burial Caves
Kohokuwelowelo
Kapalama
Keanakamano
Waianae Army Recreation Center
Waikane Valley
Russian Fort Elizabeth
Wailua State Park
Poliahu Heiau
Waikakalaua Stream
Kukuipahu Heiau
Kumaipo Trail, Waianae
Queen's Beach resort
Makapuu Point
Haiku Plantations
Waiahole Valley
Kahuku Agricultural Park
Keana Cave and burial platform
Olomana
Kanahau Heiau
Wailuku Sand Hills
Kamananui
Kuilima Point
Kawela Bay
Kahuku Point
Puu o Mahuka Heiau
Kupopolo Heiau
Aina Haina
Kaluanui Agricultural Subdivision
Schofield Barracks
Kukuipilau Heiau
Mokuleia
Ho'okipa Beach Park
Kahanahaiki and Makua
Waimanalo heiaus
Pohakunui Heiau
Nu'upia Ponds
Ulupau Dunes
Ulupau Crater
Luluku, Kaneohe
Honolulu Hale
Wailupe

Paumalu burials
Pu'u Kapolei
Lulani Street burial
Kahawai stream clearing project
Hawaii Kai
Pahua Heiau
O-16
O-18
Aina Haina tennis courts (Maunalua Bay tennis club)
Haena State Park
Kapa'a Park burials
Hauola City of Refuge
Hikinaakala Heiau
Moanalua Valley burial caves
Haiku Valley
Ki'i Pond
Waokanaka Street
Manana Island
Kakaako
Wa'ahila Ridge
Alewa Heights
Kalihi
Ewa Marina
Kahala burials
Keawanui Pond
Mo'omomi Beach
Kaiaka Rock
Papohaku Beach
Kalaupapa Peninsula
Makakilo
Hale Mohalu
Ninole
Pacific Beach Hotel
Honolulu Soda Works/Vineyard Street
Spreckelsville Sewerline project
Poli-o-Hi'iaka Heiau
Waiokilo Stream heiau and sites
Loaloa Heiau
Piilanihale Heiau
Kanekauwila Heiau
Hamoa heiaus and sites
Hauola Heiau
Kealia Sand Mine
Polihale Heiau and sites

Nualolo Kai
Awaawapuhi
Honopu
Kalalau
Hanakoa
Pali Complex
Waioli Mission
Keaiwa Heiau State Park
Lyon Arboretum
Pauoa Flats
Puohala Subdivision
Waolani
Nahiku
Makapipi
Nua'ailua
Keanae
Waikamoi
Haipuaena
Pahole Natural Area Reserve
Pepeopae Bog
Ironworks site, Auahi Street
Hanauma Bay
Papaenaena Heiau
cultural resources management
historic preservation
state and federal laws and regulations
archaeological method and theory
archaeological field techniques
human osteology
faunal analysis
ruins stabilization
federal archaeology programs
ethnoarchaeology
Hawaiian customs
historic archaeology
ceramics analysis
professional standards in archaeology
professional ethics in archaeology
Hawaiian archaeology
Maui sites
Molokai Sites
Lanai sites
Kahoolawe sites
Big Island sites
Oahu sites
Kauai sites
Published and unpublished reports in Hawaiian archaeology

archaeological research, techniques, and strategies
reconnaissance surveys
sampling
chronology
settlement patterns
evaluation of archaeological reports by contract archaeologists
evaluation of State Historic Preservation Program
evaluation of Federal Historic Preservation Program
Functional Plan
Historic Sites Section
Dept. of Land and Natural Resources
Bernice P. Bishop Museum
Hawaiian archaeologists
human ecology
environmental archaeology
surveying
research designs
statewide surveys
stratigraphy
soils
excavation
artifact analysis
lithics
archaeological publications and organizations
fieldwork opportunities
financial aid for archaeological research
University of Hawaii
charcoal analysis
radiocarbon dating
basaltic glass dating
Puna cave
personal goals
history of Hawaiian archaeology
problems in Hawaiian archaeology
problems in contract archaeology

23 January 1986

MEMORANDUM

TO: Garen DeWeese, HGEA

FROM: Earl Neller, DLNR/Historic Sites

SUBJECT: Grievance of unfair administrative actions taken by Ralston Nagata, State Parks Administrator

Ralston Nagata's written reprimand to me of 2 December 1985 is unfair for the following reasons:

1) It does not accurately present the facts. Rather, it distorts the facts of the incident to make it appear that I have done something wrong. This distortion of the truth is done maliciously, without conscience, with full knowledge of the real truth.

The reprimand pretends to be for the improper release of a report, but it is really an attempt to punish me for speaking to television reporters, newspaper reporters, elected officials, and the public about the recently discovered archaeological sites in the Luluku banana patches of Kaneohe, which also happen to be directly in the pathway of the proposed H-3 Interstate Highway. I know this to be the truth, because I was told by Ralston Nagata when I was hired that I had no right to ever talk to reporters, and because the main theme of my conversation with Ralston Nagata on the morning of November 26 was that I should not be talking to anyone about the archaeological sites in the pathway of H-3, because the Governor is a strong supporter of the H-3 project and the revelation of a significant Hawaiian archaeological site in the Luluku banana patch might jeopardize the H-3 project. I know this to be the truth, because Ralston Nagata has kept the Highway Division's archaeological report on the Luluku sites, prepared by Bishop Museum, locked up in his office, so that no copies can be made of the report, and so that all inquiries regarding the report are referred to him. The normal office procedure is for such reports to be passed on to me for review and evaluation. The normal office procedure for inquiries regarding archaeological reports, archaeological sites, and review of development projects related to archaeology is to refer them to the archaeological staff responsible for the administration of a particular project review. The normal procedure for release of such reports of archaeological

surveys done for development projects is to make them available to anyone who comes into the office looking for information and to provide one free copy, if requested.

The reprimand alledges that I have distributed materials generated as part of my employment with DLNR without authorization, but this is not true. My report on the Luluku sites was not generated as part of my job as a state archaeologist in DLNR responsible for reviewing the H-3 project. My job has been to be familiar with previous archaeological reports and correspondence related to the H-3 project, to attend meetings with planners from the State's Highways Division and their archaeological consultants, to provide the Highways Division with authoritative, professional recommendations regarding the management of archaeological resources related to the H-3 project, to review all incoming correspondence related to archaeological resources on the H-3 project and to draft responses to such correspondence. I have done all these things in a responsible, professional manner. At no time was it ever my responsibility to write a report on the archaeological resources to be affected by the H-3 project. At no time did Highways Division or anyone else formally or informally request such a report from the State (DLNR). At no time did Ralston Nagata ever ask me to write such a report. My report on the Luluku banana patch sites was done at my own initiative. My Luluku report was done on my own time, and at my own expense. The photographs in the report were taken on my own time with my own personal cameras. As a general rule, our staff archaeologists in Historic Sites are not responsible for writing archaeological reports and archaeological reports are not included in the "materials generated as part of our employment with DLNR." For instance, there are no such reports on file in our office generated by my predecessor, Farley Watanabe. My Luluku report was done because of my volunteer community activities with friends of mine who believe, as I do, that archaeological sites are important cultural resources. A great deal of my time and money is spent on volunteer community activities related to the preservation, protection, and study of archaeological sites. Ironically, Ralston Nagata has told me that such activities are a "conflict of interest," and he has persistently tried to prevent me from taking part in such activities. As an example, he once told me not to join the Society for Hawaiian Archaeology; and he told me not to go on a field trip to Kaho'olawe with the Protect Kaho'olawe Ohana.

The reprimand alledges that I have been counseled a number of times in the past about releasing reports without authorization. I do not know what Nagata is talking about. I have never been told about any report: "Do not show this report to anyone." Even in Nagata's reprimand of December 2, he does not say: "Do not show this Luluku report to anyone," or make any specific comments related to my Luluku report, or make any specific recommendations regarding changes that might be made in my Luluku report before it be made available to the public, or make any specific criticisms regarding my Luluku report. The Luluku report is a good one, and Nagata knows it. There is no reason why my Luluku report should be suppressed, and it should be forwarded to the Highways Division immediately. In my conversation with Nagata on the morning of November 26, he told me that he was going to send my report over to Highways Division. He did not forward the report, however; and it is still in DLNR.

The truth is that Nagata has insisted that I do not have the right to consult with other archaeologists in preparing my reviews. It is a common practice among professional archaeologists to circulate draft copies of archaeological reports to other professionals to get their comments. In fact, it is poor archaeology not to do so. I take a great deal of pride in my work, and I want my archaeological reports to be the best that could possibly be written. Nagata's actions have been an attempt to keep me from being a good professional. Nagata has never shown an interest in running a good archaeological program. He has never shown an interest in archaeology or preserving archaeological sites.

2) The reprimand is unfair because it sets invisible standards. It is too vague and generalized for anyone to be aware of the specific details of the alledged misconduct. This is typical of the sadistic behavior that characterizes Nagata's style of management. The purpose of Nagata's reprimand is to hurt me, not to correct a problem. Nagata's purpose is not to communicate standards but to leave matters open so that no matter what I do he can come back later and say I'm not following orders.

The reprimand is for the alledged release of a staff report but does not give the name of the report.

The reprimand alledges that the report in question was a staff report but makes no attempt to explain the distinction between a staff report and other kinds of reports that

a professional archaeologist might be expected to write during the normal course of events.

The reprimand alledges that I have been counseled a number of times in the past about similar offenses, but does not cite a single example.

The reprimand refers to an article in the Honolulu Advertiser, but does not explain what was in the article that justifies giving me a written reprimand.

The reprimand alledges that I have severely undermined DLNR's credibility with the Highways Division, but does not explain how my report, which only puts down in writing exactly what I have consistently reported orally during the past year, undermines DLNR's credibility or why that undermining is considered by Nagata to be severe.

The reprimand alledges that my report jeopardizes DLNR's program to gain greater public acceptance of our historic preservation program, but does not explain why or how this is the case.

The reprimand alledges that the Highways Division has at times gone beyond their responsibilities to accomodate historic preservation concerns on the H-3 project, but does not cite any examples. The opposite is true, such as their improper behavior following my discovery of previously unsurveyed areas and previously unrecorded sites in the Halawa Valley portion of the H-3 project, and such as their unsatisfactory response to my warning about their improper use of the Archaeological Resources Protection Act in keeping the H-3 archaeological reports out of the public's hands.

The reprimand alledges that my actions have set DLNR's relationship with the Highways Division back considerably, but provides no justification for the accusation.

The reprimand alledges that my reports need to be edited by Nagata to remove extraneous materials, clarify items, assure consistency with departmental practices, and assure factual correctness, but cites no examples from my Luluku report or any other report I have written.

The reprimand alledges that staff reports and documents will be released when appropriate, but does not explain the distinction between a report that is appropriate for release and a report that is not appropriate, nor does the reprimand cite specific examples.

The reprimand alludes to a distinction between factual information and policy questions, but provides no information as to what is meant by this distinction, nor does it cite any specific examples.

The reprimand alledges that there are occasions when it is inapropriate for me to respond to public inquiries, but provides no guidelines which explain the distinction between appropriate situations and inappropriate situations, nor does it cite specific examples.

The reprimand alledges that if future incidents of a similar nature occur, then appropriate action will be taken by Nagata, but the reprimand does not specify what incidents would be considered "of a similar nature," nor does it specify what is meant by "appropriate action."

3) Nagata's reprimand is unfair because he has never made a reasonable effort to communicate with his professional staff or to resolve the numerous grievances our staff has had regarding his administration of our State archaeological program. He tolerates no dissent and demands complete agreement with whatever he says. He uses his power to achieve employee submissiveness by denying privileges and rewards as a form of punishment. He refuses to give the archaeologists keys to their own office. He has made no attempt to provide the archaeologists with adequate office facilities containing sufficient space, privacy, and security. He has allowed the archaeologists to drive an unsafe vehicle until it was driven to the point that the clutch was so worn that it cannot be driven out of the parking lot, even though he was informed early on of the problem. He has made no attempt to provide the historic sites archaeologists with the tools they need to do emergency field investigations. He does not pay the archaeologists for the overtime work they do. He makes no effort to see that the archaeologists get the promotions they deserve. He makes no effort to see that the archaeologists get the training and experience they need to achieve upward mobility. He makes no effort to see that the archaeologists receive the same opportunities he was given while he was working his way up the ladder to become the head of State Parks. He makes no effort to help the archaeologists in the office get additional university training. He has made no effort to ensure that the human bones in the possession of DLNR are being cared for properly. He has never attempted to work with the archaeologists to resolve these issues, and does not seem to care whether the archaeologists are

happy with their jobs or not.

Nagata's reprimand follows a familiar pattern. He has not attempted to discuss the matter with me. He has not answered my questions. He has not responded to my written memoranda.

4) Nagata's reprimand is unfair, because I'm a good archaeologist and a good worker. I work very hard to do the best job I possibly can. The file of letters and other documents which I provided you are a good indication of my ability and competence as an archaeologist and of the efforts I have made to be the best archaeologist the State has ever had. I work long hours, much, much longer than any other person on our staff. For six years now, I have come to work earlier than anyone else in the office, often coming to work an hour early. And I work late into the night and on weekends, trying to get the things done that there isn't enough time for during the day. I have contributed an average of 20 hours a week of overtime for the last six years. I do not take "comp time" like the rest of the staff, because there is just too much work to be done, and I want to do the best job I possibly can. I spend my own money in many ways to help preserve and protect archaeological sites in Hawaii. I use my vacation leave to help out with school groups and to conduct emergency excavations of endangered human burial sites that the State is not willing to spend the time and money on. I have volunteered my time to help the Society for American Archaeology by being Hawaii's COPA Representative. I am a member of the Archaeological Conservancy, the American Society for Conservation Archaeology, and the New Zealand Archaeological Association, among others. I spend in excess of 10% of my take home pay to support various archaeological organizations and journals. I am an advisor to Hui Lama at Kamehameha High School. I have been an archaeologist for 24 years, which makes me one of the most experienced archaeologists in Hawaii. It is an insult for Ralston Nagata to say that he has to review my written reports to correct inaccuracies or to in any way imply that he knows more about writing archaeological reports than I do. I was hired because of my archaeological expertise; he was not. He is not competent or qualified to correct professional archaeological reports. I am widely recognized among Hawaiian archaeologists as the most knowledgeable archaeologist in Hawaii regarding Hawaiian sites and what's been written about them. I am also recognized as the most knowledgeable regarding public archaeology and cultural resources management.

Ralston Nagata has persistently slandered my reputation during the last six years by continually denying my competence. This reprimand is just one more example of a situation in which he has criticized my hard work, work that has been praised by others. The management abuses committed by Nagata are numerous, and a detailed, comprehensive report on these abuses needs to be prepared. This is because identifying a problem is the first step in solving a problem. I have previously identified some of the problems of our State archaeology program, and I have attached a copy of the most recent report. What remains to be documented is the way in which Nagata has abused his professional staff. It is especially unfair that Nagata is allowed to tarnish my reputation with a reprimand that presents a distorted version of the facts, for an incident for which I should be praised, while Nagata has been allowed to continue to inflict pain and suffering on his subordinates without any recognition of the poor quality of his performance as an administrator. An independent investigation needs to be conducted to document Nagata's failures as the administrator responsible for our State's archaeology program, and investigation which should also attempt to document the many contributions I have made to the program in spite of Nagata's resistance.

CONCLUSION: I have not done anything wrong, and I deserve an apology from Ralston Nagata.

I deserve to be rewarded for the exceptional quality of my performance and for the extra effort I have put in during the last six years; and I should be given a promotion and a raise. Because our State's archaeologists are exempt employees, this is easy to do.

Archaeologists are professional scientists with professional rights. These rights need to be enumerated and recognized, through regulation or legislation.

Date Received by Employer _____

LABOR AGREEMENT GRIEVANCE FORM
HGEA - Unit # 13
STEP I

TO: Ralston Nagata (Division Head) | State Parks Administrator (Position Title) | Department of Land and Natural Resources (Department)

FROM: Earl Neller (Name of Grievant) | Staff Archaeologist (Position Title) | Department of Land and Natural Resources (Department)

In accordance with the grievance procedure contained in the HGEA Labor Agreement, a formal grievance is hereby submitted. I attempted to resolve this grievance through the informal stage on January 21, 1986 with Ralston Nagata.

A. STATEMENT OF GRIEVANCE:

1. Date of alleged violation or if alleged violation is continuous, date first became known. December 2, 1985 (Date)

2. Section or provision of the agreement allegedly violated Article 8 - Discipline; Article 4 A., B. - Personnel Policy Changes; Article 3 - Maintenance of Rights and Benefits, BU-13 Agreement.

3. Nature of grievance. (Dates, facts, location, individuals involved, how was agreement violated, circumstances, etc.)

See attached.

4. Name of grievant's union steward _____

5. Name of grievant's union agent Garen Deweese

B. REMEDY SOUGHT:

1. Rescission of Letter of Reprimand.
2. Expulsion of all derogatory material relative to the incident from grievant's personnel file.

C. INFORMATION REQUESTED:

Any policies or procedures promulgated by the Employer indicating the proper method of information dissemination and proof that efforts were made to make employees aware of the existence of such.

_____ (Signature of Union Representative, if applicable)

_____ (Signature of Grievant)

Date _____

Date _____

ATTACHMENT

3. Nature of Grievance

On December 2, 1985, Mr. Earl Neller, Staff Archaeologist with the State Parks, Outdoor Recreation and Historic Sites Division of the Department of Land and Natural Resources received a written reprimand from Mr. Ralston Nagata, Division Chief of the aforementioned division for an improper release of a report.

A review of the situation indicates that there are no existing rules, regulations, policies or procedures promulgated by the employer to address the issue of releasing of information nor has there been any determination as to what constitutes proper or improper procedures. Indications from discussions with the Division Chief on January 21, 1986 indicate that certain types of information are released or disseminated without prior authorization and the determination as to improper or proper release is arbitrary and capricious on the part of management.

In the absence of the Employer's efforts to communicate to employees what the expectations are relative to this issue and the failure of the Employer to make a definite determination as to what is an accepted practice and what is not, the Union contends that Mr. Neller is being disciplined without proper cause and we demand that this practice cease and desist.

NOTE: The deadline to meet informally to discuss this case was extended by mutual agreement on December 24, 1985.

Please call me at 536-2351 to arrange for a meeting to discuss this matter.

5 Bard

374

DEPARTMENT OF LAND UTILIZATION
CITY AND COUNTY OF HONOLULU
650 SOUTH KING STREET
HONOLULU, HAWAII 96813 ● (808) 523-4432

'85 JAN 23 P 1:34

149

FRANK F. FASI
MAYOR

JOHN P. WHALEN
DIRECTOR

NATURAL RESOURCES
STATE OF HAWAII

(RF)

January 22, 1985

Mr. Susumu Ono, Chairperson
Board of Land & Natural Resources
State of Hawaii
P.O. Box 621
Honolulu, Hawaii 96809

Dear Mr. Ono:

Coordination with State Historic Preservation Office
On Archaeological Concerns

I am writing to express our appreciation for the slide presentation on archaeology provided to our staff by Earl Neller, of the State Historic Preservation Office (SHPO). We benefit by frequent consultations with Mr. Neller and other members of the Office concerning archaeological and historic resources relating to project proposals under our review. We, therefore, especially benefitted from the slide presentation and informal discussion on issues of archaeology in relation to land use permits.

Mr. Neller's presentation focussed on Waikiki and gave us new insights on archaeology and, in particular, on the practice of salvage archaeology. When we receive applications for projects having potential impacts on archaeological resources, we affix mitigating conditions to permits. In devising appropriate conditions, we are concerned with the following issues:

1. How much effort should the applicant be required to expend, given existing information on the site's archaeological resources, the scope of the project, and the cost of proposed mitigating measures?

2. How will permit conditions relating to archaeological resources be enforced?

3. How can we improve predictability for the applicant/developer?

404

With regard to the last item, your office has recommended various permit conditions, such as (a) stopping construction when archaeological deposits are discovered; or (b) engaging an archaeologist to monitor excavation, conduct salvage activities, and prepare a report on findings. We think that such permit conditions might be clearer and more predictable to the developer if there were guidelines for salvage operations, monitoring, and reports. Such guidelines could be incorporated into construction contracts, or used as the basis for monitoring activities. At any rate, guidelines would provide the developer with more information about how to comply with archaeological requirments; and enforcement by your staff and ours might be facilitated. We would be glad to provide any assistance we could to the SHPO in preparing and distributing guidelines.

Once again, thank you for Mr. Neller's useful presentation. We look forward to continued cooperation on the preservation of archaeological resources.

Very truly yours,

JOHN P. WHALEN
Director of Land Utilization

JPW:sl

6 Parks

430
see 409

DIVISION OF
STATE PARKS

APR 23 11 12 AM '84

STATE OF HAWAII

University of Hawaii at Manoa

Department of Anthropology
Porteus Hall 346 • 2424 Maile Way
Honolulu, Hawaii 96822

April 16, 1984

Mr. Susumu Ono
Chairman
P. O. Box 621
Department of Land and Natural Resources
State of Hawaii
Honolulu, HI 96813

Dear Mr. Ono:

Please allow me to compliment, directly to you, the work of one of your employees, Mr. Earl Neller, of the Historic Sites Section, State Parks. I have just now read his report "Comments on the Kahawainui Stream Flood Control Study's Archaeological Reconnaissance Survey, Including the Results of An Archaeological Reconnaissance Survey along Laiewai Stream, Laie, Oahu. (TMK: 5-5-05 & 09) I consider it an extremely important document, and one that reflects well on the efforts of DLNR State Parks to ensure the preservation of the heritage of the peoples of Hawaii. Done to the highest professional standards, the report points out problems faced in the preservation and review process, and makes a definite contribution to the archaeology of our state. Not least, Mr. Neller notes the importance of the study and preservation of the cultural heritage remains of all the peoples of Hawaii, in this case the archaeological remains of early Japanese immigrants and haole missionaries. He has properly stated that these should not be discounted by archaeologists, nor should they be callously destroyed.

Again, I compliment your employee's work, and especially note his extra personal efforts put into the job. I believe this devotion to "a job well done" is typical of many of the state employees.

Thank you.

Sincerely,

P. Bion Griffin
Associate Professor

PBG:it

cc: Ralston Nagata
Earl Neller

TO:

PBG

406

85-711

Kona Area Libraries
P.O. Box 768
Kealakekua, HI 96750
April 22, 1985

Mr. Earl Neller
Office of Historic Site Preservation
Dept. of Land & Natural Resources
1151 Punchbowl Street
Honolulu, HI 96813

Dear Mr. Neller,

Thank you for speaking at Kailua-Kona Library on Historic Site Preservation. Your lecture was helpful in raising awareness of the problems of site preservation as well as the potential sites in our area. Your lecture was refreshingly candid and informative.

Best of luck in your work.

Sincerely,

patricia j. parker

Patricia Parker
Kona Area Librarian

820

S Parks

DIVISION OF
STATE PARKS
FEB 27 12 03 PM '81

DEPARTMENT OF THE NAVY
PACIFIC DIVISION
NAVAL FACILITIES ENGINEERING COMMAND
(MAKALAPA, HI)
PEARL HARBOR, HAWAII 96860

25 FEB 1981

RECEIVED
FEB 27 8:30
DEPT. OF LAND AND NATURAL RESOURCES
STATE OF HAWAII

Mr. Susumu Ono
State Historic Preservation Officer
Department of Land and Natural Resources
State of Hawaii
P. O. Box 621
Honolulu, HI 96809

Dear Mr. Ono:

During the past several months, personnel of this Command and the Navy's archaeological consultant have been involved in completing the archaeological survey of the island of Kahoolawe, determining appropriate erosion control methods to preserve some endangered sites and preparing a Cultural Resources Management Plan (CRMP). In accomplishing the foregoing, it has been necessary to work closely with members of your staff. As you are aware, all phases of the work have been subject to close public scrutiny.

One member of your staff, Mr. Earl (Buddy) Neller, should be especially commended for performing his duties as a SHPO representative in a highly professional and competent manner while maintaining a helpful but impartial attitude. His participation as a representative of your office in a nine-day field survey of 35 sites believed to be subject to erosion is particularly commendable. Additionally, his suggestions and recommendations with regard to site preservation methods and the preparation of a CRMP have been of great value.

Please extend my thanks and appreciation to Mr. Neller for his "can do" attitude and for the assistance that he has provided the Navy in this important project.

Sincerely,

H. W. CLEMENTS
Rear Admiral
Civil Engineer Corps
U. S. Navy
Commander

TO:
---- ADMIN.
---- ASST ADMIN.
---- ASST
---- PR.
---- SR.
---- SR.
---- REF
---- SEC.

---- CIVIL
---- & REC.
---- SUPPLY

408

June 20, 1987

Dear Mr. Robert A. Alm,

I'm writing in regards to your appeal to public opinion on the disclosure or nondisclosure of public records.

After reading an ad you submitted to the Honolulu Advertiser June 16th issue, I became alarmed. I was under the impression a change of policy was being considered. That in itself, was an indication that I had been taking my privacy for granted. I've never publicly responded to a poll before, however. I've not held an opinion with such conviction, either.

Regarding: BIRTH CERTIFICATES

As is now, I believe you should have the option whether or not to have the newspapers print or publish an announcement of the birth. Releasing information or copies of birth records should require identification of requesting party, the request recorded, as well as their reasons for wanting the information.

For someone other than the immediate family, (ie: parents, siblings, spouse, children), a judge should make the decision whether to release or not.

In the case of the adopted child of legal age, original birth records should be released upon request. In an age when knowledge of complete family medical history is imperative, records can be an important missing puzzle piece. If a couple is aware of certain hereditary diseases that affect offspring, that informa-

tion can play a big part in the decisions of family planning.

Regarding: MEDICAL RECORDS

The AIDS virus is a very real concern of people today. Test results should continue to remain confidential. Making the results public knowledge will cause discrimination in jobs, housing, medical insurance, etc., and more importantly, it will discourage potential carriers in getting tested. That will prevent the process of aquiring the already incomplete statistics of the infected, as well as allowing an epidemic to reach catastrophic proprtions.

However, an HTLVIII test should be a requirement, as is the present blood test with the results informing both people contemplating the marriage. In this case, it affects the .ves of many people, as well as their unborn children.

Regarding: POLICE RECORDS

Almost two years ago, there was a much publicized case about a windward preschool. There was an abundance of unreleased police reports relating to problems involving this particular school. There was an outcry from the parents of children considering, or already attending the school. These parents should have the right to obtain police reports complete with all details of any criminal incidents.

Regarding: ALL OTHERS

I highly value my privilege of privacy when it comes to the nondisclosure of birth, marriage, divorce, death certificates, and family court transcripts, as I do the confidentiality of

my bank savings account balance. If information was disclosed without my knowledge or permission, I would feel violated. In the future, I would hope we could reenforce, rather than relax present disclosure policy. Thank you for your time and consideration.

Sincerely,

Malulani D. Orton

Malulani D. Orton
46307 Aona Street
Kaneohe, Hawaii
96744

R. Frederick Shepard, M.D.
PHYSICAL MEDICINE AND REHABILITATION
CONSULTATION
1649 KANALUI STREET
HONOLULU, HAWAII 96816

Robert A. Alm
Governor Committee on Public Records
Box 541, Honolulu, Hawaii 96809

Dear Mr. Alm,

The Fourth Amendments of the Constitution addresses issues of what is private and what is public. The vast majority of items listed in the newspaper announcement are private matters and most Americans cherish the notion that privacies are guaranteed by the constitution.

There are established legal mechanisms when goverment agencies or legal authorities have the need to know of certain and most private personal data. That's where it belongs and it's readily available to law enforcement agencies. The idea of things being personal becoming available to every Tom, Dick & Harry is highly objectionable and individuals or groups, or agencies (non-governmental) should have all conceivable road blocks and due process of the constitution to prove that making personal data public makes the U.S.A. a better country — on a c by case situation. Who is behind changing things now personal. Like --- Chairman Mao? resurrected.

Sincerely, Fr Shepard

412

CALL TO COMMENT

What is a PUBLIC RECORD?

BIRTH, and DEATH certificates, MARRIAGE licenses, DIVORCE decrees, CHILD support nonpayment claims, PATERNITY claims; BLOOD test, AIDS test, PESTICIDE contamination test results, ANIMAL disease information; MALPRACTICE claims against doctors; DRUG dispensing records, POLICE reports, GRAND JURY records; MUG shots, reports on INVESTIGATIONS closed with no changes; STATE MENTAL HEALTH examinations, INCOME TAX records, EXCISE TAX records, TRAFFIC ticket reports, DRIVERS license information; REAL ESTATE license information, PERSONNEL records of state and county employees and many more.

This is only a partial list of the records documents and information kept by government. Some of this is public record, some is not.

* * * * *

The question is WHAT GOVERNMENT RECORDS SHOULD BE AVAILABLE TO THE PUBLIC ON REQUEST? And WHICH SHOULD NOT BE AVAILABLE.

This is the SECOND CALL TO COMMENT from the public on the subject of public records and privacy. WHAT RECORDS SHOULD BE DISCLOSED? WHAT INTERESTS WILL BE SERVED BY DISCLOSURE OR BY NON-DISCLOSURE?

* * * * *

IF YOU HAVE ANY COMMENTS concerning these issues, please consider submitting your thoughts in writing to: GOVERNOR'S COMMITTEE ON PUBLIC RECORDS AND PRIVACY, Attention: Robert A. Alm, Chairman, P.O. Box 541, Honolulu, Hawaii 96809.

Bob -

I would like to recommend that death certificates be required for all aborted babies. Or is it already required?

Joe Shorba
956A Lei Rd.
HON 96817

413

84-1021 Lahilahi Street #1302
Waianae, Hawaii 96792
June 22, 1987

Mr Robert A Alm
Chairman
Governors Committee on Public Records
Box 541
Honolulu, Hawaii 96809

Dear Sirs:

When a lady whose husband was murdered by a burglar while in their bed and she seriously injured and later she is not allowed to learn if the murderer was still confined in Oahu State Prison, there is something wrong with the system. Information on who is confined should be public record.

Likewise, any pardons and commutation of sentences of convicted persons made by the Executive Branch should be in the public area.

Sincerely,
Frank D Slocum
Frank D Slocum

July 7, 1987

Dear Mr. Chairman and Committee Members:

Here are your copies of the only answer I've received from Judge Ruddy @ Circuit Court.

I have written him 3 times altogether with only this one response.

I personally fail to see how keeping this sort of info. from a parent can be justified, let alone for the benefit of my child.

Thanks for looking into this matter for us & please let me know the outcome and decision of your research.

Personally if you ~~check~~ check the papers in the vault, I think you will find someone for some reason has already opened the envelope.

Thank you

Lottie Patricia Stanback
3202 Rhineland Pl.
Hon. Ha 96817
732-7448

P.S. The biggest thing I noticed @ this hearing is everyone wants only things to benefit them open and all the rest closed.

Good Luck!!

415

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

CHRISTOPHER DAVID ALLEN STANBACK, aka "CHRIS" STANBACK, a minor, by LOTTIE PATRICIA STANBACK, his Next Friend, Plaintiff, vs. TERENCE CAROLAN, M.D., KAPIOLANI-CHILDREN'S MEDICAL CENTER (alias KAUKEOLANI), JOHN DOES 1-10, JANE DOES 1-10, and DOE CORPORATIONS 1-10, Defendants.	CIVIL NO. 68184 ORDER AUTHORIZING RELEASE OF IN CAMERA PRELIMINARY REPORT NO. 1 OF GUARDIAN AD LITEM AND IN CAMERA FINAL REPORT OF GUARDIAN AD LITEM TO CHRISTOPHER DAVID ALLEN STANBACK UPON HIS ATTAINING THE AGE OF MAJORITY

ORDER AUTHORIZING RELEASE OF IN CAMERA PRELIMINARY REPORT NO. 1 OF GUARDIAN AD LITEM AND IN CAMERA FINAL REPORT OF GUARDIAN AD LITEM TO CHRISTOPHER DAVID ALLEN STANBACK UPON HIS ATTAINING THE AGE OF MAJORITY

Upon consideration of the matters contained in Civil No. 68184, Stanback, et al. vs. Carolan, et al., styled as a medical malpractice action, the Court directs, subject to further order of a court of competent jurisdiction:

1. that upon Christopher David Allen Stanback's attaining the age of majority;

2. and upon his request in writing directed to the clerk of the court;

3. the clerk of the court shall release copies of the In Camera Preliminary Report No. 1 of Guardian Ad Litem and In Camera Final Report of Guardian Ad Litem to Christopher David Allen Stanback.

Dated: Honolulu, Hawaii, FEB 4 1966.

Wendell K. Huddy

WENDELL K. HUDDY
Judge of the above-entitled Court

EXECUTIVE CHAMBERS
HONOLULU

JOHN WAIHEE
GOVERNOR

March 2, 1987

Ms. Stephanie Strickland
1316 Honokahua Street
Honolulu, Hawaii 96825

Dear Ms. Strickland:

Your letter regarding the Governor's appointments to the Ad Hoc Committee charged with reviewing the State's public records and privacy laws has been forwarded to Robert Alm, Director of Commerce and Consumer Affairs and the Chairman of the Governor's Ad Hoc Committee.

Please be assured that during the course of the Committee's review process there will be opportunities for input and suggestions from interested parties such as yourself and you colleagues.

Sincerely,

Carolyn Tanaka

CAROLYN TANAKA
Governor's Press Secretary

418

OFFICE OF THE GOVERNOR
STATE OF HAWAII

MEMORANDUM

Date: March 1, 1987

To: Robbie Alm

From: Carolyn Tanaka

Subject: Governor's ad hoc committee on public records review/ FYI

Attached is a letter regarding the make up of the committee and my response letter.

d19

Stephanie A. Strickland
1316 Honokahua Street
Honolulu, Hawaii 96825

26 February 1987

Ms. Carolyn Tanaka
State Capitol
Executive Chambers
Honolulu, Hawaii 96813

Dear Ms. Tanaka:

Enclosed is a letter that I wrote to the Editor of the Honolulu Advertiser. It concerns your recent announcement that Governor Waihee appointed a nine member committee charged with reviewing the state public records laws.

I believe that the people of this state and the Governor would receive a more accurate review if at least one third of the members appointed had library credentials. As I said in my letter, librarians have extensive training and knowledge of the aspects of public records which are being reviewed. As a profession, we are acutely aware of the individual's right to know as well as an individual's right to privacy. We, above all others, know the extent of government policies affecting both sides.

During October of this past year, Congressman Major Owens (D-NY) addressed a gathering at the Graduate School of Library Studies. A major portion of his presentation concerned the economic decisions being made by the current administration which impact on the collection and dissemination of information. Decisions concerning information are being made by individuals who lack the knowledge and skill to do so. The decisions made today will affect future generations and must, therefore, be formulated by persons possessing the knowledge to do so.

I will not reiterate the entire contents of my letter to the Editor. I believe decisions on the availability of information are too important to be made by a committee deficient in information professionals.

Sincerely,

Stephanie A. Strickland

Stephanie A. Strickland

Stephanie A. Strickland
1316 Honokahua Street
Honolulu, Hawaii 96825

26 February 1987

The Honolulu Advertiser
Editorial Page Editor
605 Kapiolani Boulevard
Honolulu, Hawaii 96813

Dear Editor:

On 25 February, Governor Waihee, according to an article in The Honolulu Advertiser, "named a nine member committee to review state public records laws." A quick review of the credentials of this committee indicates three lawyers, two businessmen, two journalists, one government appointee, and one from a citizen,s watch group.

The list of appointees does not include one person who is specifically trained in information management. A person with these credentials is trained in the collection, organization, and dissemination of information. An information management specialist knows all aspects of freedom of information, privacy, censorship, and intellectual freedom. These professionals know the types of governmental and private sector materials published. They have far greater knowledge of the extent and variety of public records than any of those individuals appointed to this Committee.

Who are the individuals who have been excluded from the Governor's Committee? Most citizens know these professionals as Librarians. What type of academic credentials are required to practice in this profession? A Master's degree. In fact, the Governor has a number of these individuals on the state payroll. There are librarians in every public school, public libraries, and the University. There are librarians in the Department of Planning and Economic Development, Legislative Reference Bureau, and several other governmental agencies.

The Governor might have considered appointing the librarians from Hawaiian Electric, The Supreme Court, or one from the publisher of The Honolulu Advertiser. He might have considered

University of Hawaii at Manoa librarians who have extensive knowledge in government documents or faculty members from the Graduate School of Library Studies.

Governor Waihee had the opportunity to appoint highly knowledgeable people to this committee. It seems very peculiar that those who have the most to offer on such an important committee have been totally excluded. Decisions that are made on information today will affect future generations. I believe that this Committee is a shibai. The purpose of this committee is something known only to the Governor and his advisors.

Sincerely,

Stephanie A. Strickland

17 pp.

Gordon Y. Tanishiro
P.O. Box 1541
Kaneohe, Hi 96744

6/14/87

Dear Mr. Robert A. Alm

I am writing in response to your add enclosed in this letter.

My own personal feelings are as follows, we the citizens of this State of Hawaii are de subjected to mail and mail abus due to the fact that many rule and regulations and laws allow for the public and private secto of our community information wh should remain confidential for leg and liability purposes. Laws enacte today favor those who are cron of politics as well as influen persons in our community.

I personally do not believe that we have privacy in many cases due to the lack and gree of individuals who uses our govern ment systems and positions within as a medium for financial gain and status within our communities.

424

a perfect example of laws not being carried out and enforced is our own former Governor Aryoshi and his problem with custom officials at the airport upon his arrival at Honolulu International airport from the Orient. He himself enacted these laws and turns around and breaks these very same laws and gets away without being prosecuted by Federal officials, this is thoroughly outrageous. Are we gonna be able to get information pertinent to his crime as a matter of public record? Probably not! The news media will also play it down and drown the knowledge of what actually took place what was involved and how he was able to truly remedy the situation. This is where I say not all records should be public records. We as citizens and human beings have had to give up alot of privacy due to the unquestionable lack of officials of our government systems tampering with public documents which should

remain private. There are thousands of laws we must live with and not one individual could claim that they know of every law written. This is where we are more and more subjected to having attorneys who I personally feel are educated destroyers of our system. They represent their own self interests rather their clients or the people who are suffering in one way or another. I personally feel they have a system set up with an understanding that they work to the best interest of insurance companies and their peers which is their associations as attorneys. They have their own code of ethics that goes against that of the Hawaii Bar Associations oath to serve their clients to the best of their ability, rather they work with one another along with insurance claims adjusters to not have the people who are insured to receive what is truly fair and just to injuries damages, pain, suffering, punitive and in general damages for claims brought.

forward and asked for. I believe we live a life of social upheaval due to these types of problems. So if we make public records available to everyone we would create a society of mentally incapable citizens.

I believe the state should monitor professional people and check to see if they are indeed qualified to serve in their chosen fields of practice. Else we would be deluged by hundreds, maybe thousands of fraudulent practitioners operating in this state of ours and taking us after making their fortunes in a manner in which is outrageously upsetting.

Many of the things listed in the add pertains to personal things in nature and should remain private rather than public.

I'm sure you personally wouldn't want myself personally to obtain many of these records of yourself personally so I hope we share a common understanding of peoples privacy an act which is covered in our Federal Civil

Rights Act, it is an act of our rights to our privacy, so we as citizens should use our powers to protect exactly those rights that we have and defend the constitutionality of our great country The United States of America as well as the State of Hawaii and County Governments.

I thank you for your time and sharing this opportunity to express my personal views with you.

Mahalo and Aloha!

Debbie J. Ohta

P.S. What is underlined is what I feel that could be public and available to any citizen or resident alien and only to that degree.

CALL TO COMMENT

What is a PUBLIC RECORD?

BIRTH, and DEATH certificates, MARRIAGE licenses, DIVORCE decrees, CHILD support nonpayment claims, PATERNITY claims; BLOOD test, AIDS test, PESTICIDE contamination test results, ANIMAL disease information; MALPRACTICE claims against doctors, DRUG dispensing records, POLICE reports, GRAND JURY records; MUG shots, reports on INVESTIGATIONS closed with no changes; STATE MENTAL HEALTH examinations, INCOME TAX records, EXCISE TAX records, TRAFFIC ticket reports, DRIVERS license information; REAL ESTATE license information, PERSONNEL records of state and county employees and many more.

This is only a partial list of the records documents and information kept by government. Some of this is public record, some is not.

* * * * *

The question is WHAT GOVERNMENT RECORDS SHOULD BE AVAILABLE TO THE PUBLIC ON REQUEST? And WHICH SHOULD NOT BE AVAILABLE.

This is the SECOND CALL TO COMMENT from the public on the subject of public records and privacy. WHAT RECORDS SHOULD BE DISCLOSED? WHAT INTERESTS WILL BE SERVED BY DISCLOSURE OR BY NON-DISCLOSURE?

* * * * *

IF YOU HAVE ANY COMMENTS concerning these issues, please consider submitting your thoughts in writing to: GOVERNOR'S COMMITTEE ON PUBLIC RECORDS AND PRIVACY, Attention: Robert A. Alm, Chairman, P.O. Box 541, Honolulu, Hawaii 96809.

Mr. Chairman: 6-IV-87

By including Income and Excise Tax records, Personnel records of State + County employees in your "Call to Comment" column makes me wonder - is some group trying to make the above records public? - If not, why include them.

My personal feeling is - if I'm required by a government decree to submit personal information in order to receive a piece of paper "allowing" me to do what I desire, then that info should be maintained as "private."

I'd appreciate receiving a copy of the directive forming this Committee which hopefully will explain the reason for said formation.

I'm sure this isn't the type of response you desire, but without more explanation, it's the best I can do.

Sincerely
Earl Thomas Jr.

Earl Thomas, Jr.
46-244 Kalali St.
Kaneohe, HI 96744

947-3455

June 23, 1987

Governor's Committee on Public Records and Privacy
Attention: Robert A. Alm, Chairman
P. O. Box 541
Honolulu, Hawaii 96809

Such a question! At first, it seems public (government) records should be public, but within the list in the newspaper are private and personal items. Perhaps, we should be sure that government actually needs all the things they record for a truly useful reason.

Such things as birth, death, marriage, divorce certificates should be available as they are now (at least my understanding of availability for birth and death records).

Such things as blood, AIDS, mental/physical health, income/excise tax, and licensing information should not be public except for the most urgent of reasons and/or upon authorization of person (only) involved. One exception would be in the case of donation of blood/organs, birth and marriage, when the information directly affects others; there should be safeguards including punishment for carelessly or purposely disseminating such privileged reports.

Such things as malpractice claims against doctors, lawyers, businesses and others who merit trust in society, and all records of unethical or illegal activities (or lack of same if needed) should be available to the prosecution AND defense in the face of new charges, but records of No Guilt should not be released without purpose. Release of the smear during our last election campaign point up a need for purposeful release and confidentiality backed up with punishment; the minute those who first heard of the smear, they should have publicized the lack of merit.

However, if all records of all who are elected, appointed or employed in and by government in every position and capacity are open to the public, then perhaps the "bad eggs" will seek employment elsewhere. This would include teachers and professors, police and firemen, everyone. These people are paid with public money; the public should have thorough access to what kinds of people they are (or have been). I think doctors and attorneys also should be subject to this kind of scrutiny because of the importance of the trust they request from the public (and in many instances, they receive income from public funds), and even unpaid appointees influence laws and society beyond mere counting of dollars directly.

In general, some reason or need to know should govern complete accessibility of records about individuals, and paying the taxes that pay wages or the costs of government activities and the protection of individuals other than the personal record of any single individual are reasons to know; in addition, criminal or unethical behavior should be known, if in no other way then through some agency such as the Better Business Bureau of records of complaints and solutions (of lack) to those complaints.

Good luck in your search for equity and reasonableness.

Pat Wilson

Mrs. Pat Wilson
922 Kapahulu Avenue, #203
Honolulu, Hawaii 96816

1511 Nuuanu Avenue
Prince Tower 41
Honolulu, Hawaii 96817

June 5, 1987

Robert A. Alm, Director
Department of Commerce and Consumer Affairs
Chairman of the Committee on
Public Records and Privacy
P. O. Box 541
Honolulu, Hawaii 96809

Dear Mr. Alm:

I was glad to see your notice in the Star Bulletin on June 3rd re hearings on disclosure of public records. As a legal assistant, I would like to see restrictions lifted on access to motor vehicle registration records, applications for general excise licenses and applications for reservation of corporate/partnership names.

MVR records of ownership and liens should be as open to the public as real property ownership and mechanics' and tax liens filed in court are. G.E. License applications contain no "confidential" material, and the prospective use of corporate or partnership names should, on occasion, be allowed to be a negotiable matter between an initial applicant and a subsequent one. Access to the initial applicant's identity should not be denied to a subsequent applicant.

Very truly yours,

Lee Wolff

Lee Wolff

4152v