

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 III
December 1987**

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

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

A P P E N D I X J

P U B L I C T E S T I M O N Y
(CONTINUED)



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

	<u>Page No.</u>
(9) John C. Lewin, M.D., Director Department of Health	80
(10) Mario R. Ramil, Director Department of Labor and Industrial Relations	81
(11) William W. Paty, Chairperson Department of Land and Natural Resources	84
(12) John Ishihara, Esq. Staff Attorney Legal Aid Society of Hawaii	86
(13) Kirk Cashmere, Esq. Legal Aid Society of Hawaii	102
(14) Richard F. Kahle, Jr., Director Department of Taxation	109
(15) University of Hawaii Ed Yuen, Director Procurement & Property Management Office	112
 Mari J. Matsuda Assistant Professor of Law The William S. Richardson School of Law <u>See also</u> this Index at p. 6.	114
2. COUNTIES	116-136
a. Honolulu	
(1) Jeremy Harris Managing Director City and County of Honolulu <u>See also</u> this Index at p. 8 (Exhibits to Testimony).	116
(2) Arthur Ross Deputy Prosecuting Attorney Department of the Prosecuting Attorney City and County of Honolulu	132
(3) Gary Gill Councilman County Council, County of Honolulu	136
b. Hawaii	137-143
(1) Ronald Ibarra Corporation Counsel County of Hawaii	137

	<u>Page No.</u>
(2) Glenn W. Todd Inspector Administrative Bureau Police Department, County of Hawaii	139
(3) Jon R. Ono Prosecuting Attorney Office of the Prosecuting Attorney	140
(4) Stephen K. Yamashiro Council Chairman County Council, County of Hawaii	141
c. Kauai	
(1) The Honorable Tony T. Kunimura Mayor County of Hawaii	144
2. BUSINESSES/ASSOCIATIONS	146-313
a. Aiea General Hospital Association Shizuo Onishi, President	146
b. American Association of University Women Martha Black, State Legislative Chair	147
c. Big Island Press Club Marcia Reynolds, Vice President	148
d. Common Cause/Hawaii Terry Boland, Representative	152
e. Equifax Services Ronald F. Taylor, General Manager	153
f. Green, Ning, Lilly & Jones, Attorneys at Law Michael A. Lilly	155
g. Hawaii Automobile Dealers' Association Hardy Hutchinson, Manager	197
h. Hawaii Building & Construction Trades Council, AFL-CIO Joseph Bazemore, Chairman Pro-Tem	199
i. Hawaii Child Care Centers Jim Denzer, Executive Director	201
j. Hawaii Federation of Physicians and Dentists Francis J. Dann, M.D., Legislative Chairman	216

	<u>Page No.</u>
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 <u>See also</u> 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

	<u>Page No.</u>
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 <u>See also</u> 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

	<u>Page No.</u>
t. Stanback, Lottie Patricia 3202 Ahiahina Place, Honolulu, HI 96816	415
u. Strickland, Ms. Stephanie 1316 Honokahua St., Honolulu, HI 96825	418
v. Tamashiro, Gordon Y. P. O. Box 1541, Kaneohe, HI 96744	424
w. Thomas, Earl Jr. 46-244 Kalali St., Kaneohe, HI 96744	430
x. Wilson, Mrs. Pat 922 Kapahulu Ave., #203, Honolulu, HI 96816	431
y. Wolff, Ms. Lee 1511 Nuuanu Ave., Prince #41, Honolulu, HI 96817	432

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 Director Department of Commerce and Consumer Affairs	1
(2) Murray E. Towill Deputy Director Department of Business and Economic Development	193
(3) Legislature Richard S. H. Wong President State Senate	198
(4) Mari J. Matsuda Assistant Professor of Law University of Hawaii at Manoa	200

	<u>Page No.</u>
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 Kever | 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 | |

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

August 12, 1987

Governor's Committee on Public
Records and Privacy Laws
P. O. Box 541
Honolulu, Hawaii 96809

Dear Committee Members:

The Department of Commerce and Consumer Affairs has been one of the most active participants in the controversy over the application of Hawaii's public records and privacy laws. This participation has almost always taken the form of asserting privacy interests in resisting disclosure of various records. And while the Department has to date been sustained in every challenge which has been taken to the courts, the experience has not left either the Department or the public with a sense of great satisfaction.

Unlike some others, however, I do not share the view that this situation is simply the result of restrictive legal interpretation. While such a view is comforting in the sense that it holds out a prospect of instant change through reinterpretation, it also represents a danger in that it diverts attention from the need to remedy the legal foundation for the handling of government records. The current public records and privacy laws are the cause of the difficult situation in which we all find ourselves today and there is simply no substitute for a substantial and dramatic revision of those laws.

The primary change that the Department believes needs to be made is to change the focus of the laws from an examination of one attribute of a record (whether it contains information about a person) to an examination of the type of record involved and whether that type of record should be public.

Governor's Committee on Public Records
and Privacy Laws
August 12, 1987
Page 2

The following discussion about the Department assumes that the current structural framework of these laws will be changed and instead focuses on the type of record involved.

There are a number of specific issues involving records which arise in the course of the Department's work. (Many other records are handled with little or no controversy or dispute and will not be discussed.) The records and issues to be discussed are the following:

1. Application files for licenses;
2. Records of complaints filed;
3. Investigation files and reports;
4. Attorney work product;
5. Settlement agreements;
6. Examination materials;
7. Proprietary information and trade secrets;
8. Division of Financial Institutions files;
9. Donor lists at the Hawaii Public Broadcasting Authority; and
10. Prospective application of changes made to the records laws.

Application files have traditionally been held to involve strong privacy interests. Even before the adoption of Chapter 92E, Hawaii Revised Statutes ("HRS"), applications were held not to be public record. See Attorney General Opinion No. 75-7 which relies directly on the legislative history of the public records provision. Standing Committee Report No. 594 (Judiciary), 1959 House Journal, p. 797. There are some who believe that this should change and that such records should be open to public inspection. The Department, however, believes that the current law is appropriate and that these records should remain confidential.

Governor's Committee on Public Records
and Privacy Laws
August 12, 1987
Page 3

The process of licensure involves the verification by the Department, and in some cases by a board or commission, that a person possesses the required qualifications to engage in a particular profession or vocation. These qualifications are usually established by statute and involve such things as education, experience, and financial capacity. Many of these can only be demonstrated by revealing very personal information about the applicant. Examples include financial statements; credit reports; experience affidavits or statements (which may include such items as wages earned, hours worked, quality of work, commissions, etc.); medical reports and clearances; franchise agreements; lines of credit; military discharges; and lease agreements.

What needs to be carefully considered is whether the ability to engage in a profession or trade in this State should be conditioned on not only meeting a usually stringent set of conditions but also on having a great deal of personal information about oneself placed into the public record. The Department does not believe that the public disclosure of such information should be a condition of being a physician or a dentist or a contractor or a massage therapist and so on in this State.

The Department maintains records of complaints filed by consumers against licensees. These files are handled by the Regulated Industries Complaints Office and contain information on all complaints filed and the disposition of those complaints. At this point, only information about closed complaints is released. This does, however, pose problems especially in cases where there are multiple complaints about the same individual but none has yet been resolved. In such cases, a consumer inquiry would meet with a negative response as to complaints even though the Department might feel that a warning to consumers is in order. A standard which would allow for a balance of interests could make a substantial difference in such cases.

In the course of looking into complaints filed by consumers or on the Department's own motion, investigative files are created and investigation reports written. Both the files and reports contain a substantial variety of information ranging from uninformed gossip to direct physical evidence. All material submitted or acquired is evaluated and the disposition of the case depends upon that evaluation. It is, therefore, essential that the file and report contain all raw data collected as well as a candid review of that data. As a result,

there is substantial concern about allowing access to the information contained in the files and report. Further there is concern about the compromising of sources or potential sources of information if their names and participation in cases are revealed. Like criminal law enforcement records, civil or administrative law enforcement records need to be kept substantially confidential.

There is a significant level of legal work done in the Department by the Attorney General's Office representing various divisions and by the Department's own Staff Attorneys. Regardless of what decision is made as to the withholding of other records during litigation, the Department believes that the attorney's own notes and records must remain confidential. Essentially, the attorney work product rule (taken from the law of evidence) needs to be recognized as a component of the larger issue of government records.

In resolving consumer complaints, the Department frequently enters into various kinds of "settlement agreements" or similar dispositions of cases. If these dispositions must be approved by some authority within the Department, the agreement is likely to become a matter of public record. On the other hand, some of the dispositions need not receive any other approvals and the attorneys for the licensees involved often seek to have the agreements kept confidential.

Under the current law which keys on the presence of information about a person, a settlement agreement which involves an individual can probably be kept confidential. That issue is currently on appeal at the Hawaii Supreme Court after the Circuit Court held such an agreement to be confidential. Attachment A contains the record of the case in the courts.

If, however, the presence of a person's name were no longer the critical issue, or if all dispositions are specifically made public, then this issue could be resolved in favor of public release of this material.

Examination materials used in the licensing process must remain confidential if there is to be any validity whatsoever to the testing process. Those who wish to appeal specific examination results have been able to do so without compromising the examination materials and no one else should be permitted any type of access to these materials.

Governor's Committee on Public Records
and Privacy Laws
August 12, 1987
Page 5

Proprietary information and trade secrets are occasionally shared with the Department, most likely with the Division of Consumer Advocacy (in public utilities cases) or with the Cable Television Division. This issue will be discussed with the Committee in more detail by others but the Department believes that this material should be protected to the greatest extent possible.

The records of the Division of Financial Institutions have been the subject of some discussion during the course of the Committee's work. Under current law (Section 401-14, HRS), the Division's records are required to be kept confidential except for the release of composite material. The Division may also, of course, cooperate and share information with other agencies in the course of its work. The Department believes that this treatment is appropriate and believes that current law should be retained. Not only is confidentiality essential to being able to work with federal agencies, it also is imperative if we are to get all the necessary information from the regulated institutions and if we are to supervise those institutions in a spirit of candor and cooperation.

The list of donors who give to the Hawaii Public Television Authority (HPBA) should be confidential. Those who specifically underwrite a particular program must, under federal law, be so identified by the Authority. On the other hand, the individual donor is not required to be identified and the Department does not believe they should be on an available list. There is no public interest to be served by such disclosure.

The public television donor is a precious commodity and everything possible should be done to avoid losing that donor. The public interest is served by achieving the highest possible level of contribution. One potential way in which such donors might be lost is if their names were used in other solicitation efforts by people who secured the mailing list from HPBA.

As a final comment, it is important that serious consideration be given to the issue of to what records any revision of the current law would apply. In other words, will the proposed revision apply prospectively or will it open records which had previously been closed? This is no small question especially to the degree that expectation of privacy is a valid point of view. In some cases, material was turned over to the government based to a substantial extent on the understanding that it would be held confidential. If the law now changes, do all of those prior understandings and expectations become inoperative?

Governor's Committee on Public Records
and Privacy Laws
August 12, 1987
Page 6

In conclusion, I would urge that the current situation be viewed as a strong argument for major changes, and that any revision of the law in this area should seek to directly and specifically address as many of the specific concerns raised during the comment process as possible.

Very truly yours,

A handwritten signature in black ink, appearing to read "Robert A. Alm", with a long horizontal flourish extending to the right.

ROBERT A. ALM
Director

RAA:kh
Attachment

FILED DOCUMENT INDEX
Regulated Industries Complaints Office, D.C.C.A.

Selected Documents from:
Painting Ind. of Hi. Mkt. Rec. Fund v. Alm & State
Appeal No. 12094

Painting Ind. of Hi. Mkt. Rec. Fund v. Nagata & State
S.P. No. 86-0371

A	Application for an Order Allowing Inspection of Certain DCCA Records	PIHMRF	9/10/86
B	Memo in Opposition to Application	AG Office	10/1/86
C	Order Allowing Inspection	PIHMRF	1/5/87
D	Motion for Reconsideration of Order	RICO	1/15/87
E	Motion to Strike Motion for Reconsideration	PIHMRF	1/19/87
F	Memo in Opposition to Motion for Reconsideration	PIHMRF	1/26/87
G	Memo in Opposition to Motion to Strike Motion for Reconsideration	RICO	2/2/87
H	Supplemental Memo in Support of Motion for Reconsideration	RICO	2/4/87
I	Order Granting Motion for Reconsideration & Denying Motion to Strike	RICO	3/6/87
J	Notice of Appeal	PIHMRF	4/6/87
K	Opening Brief	PIHMRF	6/24/87
L	Answering Brief of State	RICO	8/3/87

-----END OF

INDEX-----

NO. 12094

IN THE SUPREME COURT OF THE STATE OF HAWAII
OCTOBER TERM, 1986

RECEIVED
CLERK SUPREME COURT
MARCH 3 1987

PAINTING INDUSTRY OF	)	S.P. No. 86-0371
HAWAII MARKET RECOVERY FUND,)	
Plaintiff-Appellant,	)	APPEAL FROM THE ORDER
vs.	)	GRANTING MOTION FOR
	)	RECONSIDERATION AND DENYING
	)	MOTION TO STRIKE, FILED
	)	MARCH 6, 1987
ROBERT A. ALM, DIRECTOR OF)	
COMMERCE AND CONSUMER AFFAIRS;	)	CIRCUIT COURT OF THE
and THE STATE OF HAWAII,	)	FIRST CIRCUIT
Defendants-Appellees.	)	THE HONORABLE RICHARD Y.C.
	)	AU, Circuit Judge
)	

ANSWERING BRIEF
OF DEFENDANTS-APPELLEES STATE OF HAWAII
AND ROBERT A. ALM, DIRECTOR OF COMMERCE AND CONSUMER AFFAIRS

CERTIFICATE OF SERVICE

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

WARREN PRICE, III 1212
Attorney General, State of Hawaii

GRANT TANIMOTO 2630
Deputy Attorney General,
State of Hawaii
465 South King Street, Rm. 200
Honolulu, Hawaii 96813
Telephone: 548-6744

Attorneys for
Defendants-Appellees

SUBJECT INDEX

Subject Index.	i
Table of Authorities	iii
I. Jurisdictional Statement	1
II. Counterstatement of the Case	2
III. Standard of Review	6
IV. Counterstatement of Question Presented	6
V. Argument	
A. The settlement agreement which Plaintiff -Appellant seeks may not be disclosed to the general public, based upon the five -step analysis mandated by Chapters 92 and 92E, Hawaii Revised Statutes	7
1. <u>Question</u> : Does the document fall within the general definition of a 'public record' under §92-50, Hawaii Revised Statutes?	
<u>Answer</u> : No.	8
2. <u>Question</u> : Is the agreement exempt from the definition of 'public record' in §92-50 because disclosure would invade Donald Tagawa's right of privacy?	
<u>Answer</u> : Yes.	12
3. <u>Question</u> : Do other statutes potentially preclude the disclosure of the agreement?	
<u>Answer</u> : Yes, Chapter 92E, Hawaii Revised Statutes.	20

4. Question: Is the agreement a 'personal record' subject to protection from disclosure under Chapter 92E?

Answer: Yes. 21

5. Question: Is the Plaintiff-Appellant allowed to review the agreement pursuant to §92E-4, Hawaii Revised Statutes?

Answer: No. 23

B. Conclusion 25

Statement of Related Cases

Appendix

- Section 92-50, Hawaii Revised Statutes (1975)
- Section 92-51, Hawaii Revised Statutes (1975)
- Section 92E-1, Hawaii Revised Statutes (1980)
- Section 92E-4, Hawaii Revised Statutes (1980)

- \$16-77-69, Hawaii Administrative Rules (1983)
- \$16-77-75, Hawaii Administrative Rules (1983)

- 5 United States Code §552 (1976)

TABLE OF AUTHORITIES

Cases

<u>Alirez v. National Labor Relations Board,</u> 676 F.2d 423, 427 (10th Cir. 1982)	17
<u>Associated Dry Goods Corp. v. National Labor</u> <u>Relations Board,</u> 455 F.Supp. 802, 814 (S.D.N.Y. 1978).	17
<u>Augustin v. Dan Ostrow Construction Co., Inc.,</u> 64 Hawaii 80, 83, 636 P.2d 1348, 1351 (1981).	11
<u>Department of the Air Force v. Rose,</u> 425 U.S. 352, 378, n. 16, 96 S.Ct. 1592, 1607, n. 16, 48 L.Ed.2d 11, 31, n. 16 (1976) . .	17
<u>Doe v. Sears,</u> 245 Ga. 83, 263 S.E.2d 119, appeal dismissed, 446 U.S. 979, 100 S.Ct. 2958, 64 L.Ed.2d 836 (1980).	19
<u>Gakiya v. Hallmark Properties, Inc.,</u> 68 Hawaii _____, 722 P.2d 460, 463 (No. 11019, July 18, 1986)	12
<u>Heights Community Congress v. Veterans</u> <u>Administration,</u> 732 F.2d 526, 528 (6th Cir.) cert. denied, 469 U.S. 1034, 105 S.Ct. 506, 83 L.Ed.2d 398 (1984).	17
<u>Hubert v. Harte-Hanks Texas Newspapers, Inc.</u> 652 S.W.2d 546, 549 (Tex.App.3 1983) . . .	18
<u>In re: Request of Rosier,</u> 105 Wash.2d 606, 717 P.2d 1353, 1357-8 (1986)	14, 18
<u>Judiciary Committee of the General Assembly</u> <u>v. Freedom of Information Commission,</u> 39 Conn. Supp. 176, 473 A.2d 1248, 1252-3 (1983).	18
<u>Mid-America Television Company v. Peoria</u> <u>Housing Authority,</u> 93 Ill.App.3d 314, 417 N.E.2d 210, 211-4 (1981)	19
<u>Molokoa Village Development Company Ltd., v.</u> <u>Kauai Electric Company,</u> 60 Hawaii 582, 595-6, 593 P.2d 375, 384 (1979).	6

<u>State Employees Association v. Department</u> <u>of Management and Budget, Mich.</u> , 404 N.W.2d 606, 609 (1987)	18
<u>Washington Post Co. v. U.S. Department of</u> <u>Health and Human Services</u> , 690 F.2d 252, 261 (D.C. Cir. 1982)	17
<u>Wilson v. Freedom of Information Commission</u> , 181 Conn. 324, 435 A.2d 353, 357 (1980). .	18
<u>Wong v. Hawaiian Scenic Tours, Ltd.</u> , 64 Hawaii 401, 405-6, 642 P.2d 930, 933 (1982) . . .	16

Constitution & Statutes of Hawaii

Hawaii Constitution (1978)

Article I, Section 6	21
--------------------------------	----

Hawaii Revised Statutes

\$11-195(b)	11
\$92-7(b)	11
\$92-50	3, 4, 9, 10
\$92-51	4, 9, 20
\$92E-1	4, 14, 20, 21, 22, 23
Revision Note to \$92E-1.	5
\$92E-4	5, 24
\$444-11(5)	23
\$502-11.	10
\$502-12.	10
\$502-13.	10
\$502-14.	10
\$602-5	1
\$641-1	1

Revised Laws of Hawaii 1955

\$60-2.	13
\$64-3(a)-(f)	14
\$160-38.	14

Hawaii Session Laws

1959 Hawaii Sess. Laws, Ch. 43, §1(b).	13
1975 Hawaii Sess. Laws, Ch. 166.	13
1980 Hawaii Sess. Laws, Ch. 226.	5, 21

Legislative Reports

Conference Comm. Rpt. No. 56-80, 1980 <u>Senate Journal</u> , pg. 973.	20, 21
Standing Comm. Rpt. No. 594 (Judiciary) 1959 <u>House Journal</u> , pg. 797.	13, 16, 20

Federal Statutes

United States Code

5 U.S.C. §552.	15
5 U.S.C. §552(b)(6).	16
5 U.S.C. §552(b)(7)(C)	16

Public Laws

Pub. L. No. 90-23, 81 Stat. 54 (1967).	16
--	----

Other States' Statutes

Mich. Comp. Laws §15.243(1)(a)	18
Tex. Civ. Code Ann. tit. 6252-17a, §3(a)(2). .	18
Wash. Rev. Code §42.17.260(1).	18

Treatises

1A N. Singer, <u>Sutherland Statutory Construction</u> , (4th ed. 1985) §23.28.	13
2A N. Singer, <u>Sutherland Statutory Construction</u> , (4th ed. 1984) §52.01.	16
2A N. Singer, <u>Sutherland Statutory Construction</u> , (4th ed. 1984) §52.03.	16

Hawaii Administrative Code

§16-77-69.	23
§16-77-75.	23

Hawaii Rules of Court

Hawaii Rules of Appellate Procedure

Rule 39(b)	25
Rule 43(c)(1).	1

Hawaii Rules of Civil Procedure

Rule 52(a)	6
----------------------	---

Miscellaneous

Black's Law Dictionary (5th ed. 1979), pg. 599	11
--	----

NO. 12094

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM, 1986

PAINTING INDUSTRY OF	)	S.P. No. 86-0371
HAWAII MARKET RECOVERY FUND,)	
	)	APPEAL FROM THE ORDER
Plaintiff-Appellant,	)	GRANTING MOTION FOR
	)	RECONSIDERATION AND DENYING
vs.	)	MOTION TO STRIKE, FILED
	)	MARCH 6, 1987
ROBERT A. ALM, DIRECTOR OF)	
COMMERCE AND CONSUMER AFFAIRS;	)	CIRCUIT COURT OF THE
and THE STATE OF HAWAII,	)	FIRST CIRCUIT
)	
Defendants-Appellees.	)	THE HONORABLE RICHARD Y.C.
	)	AU, Circuit Judge
)	

ANSWERING BRIEF
OF DEFENDANTS-APPELLEES STATE OF HAWAII
AND ROBERT A. ALM, DIRECTOR OF COMMERCE AND CONSUMER AFFAIRS

I. JURISDICTIONAL STATEMENT

Defendants-Appellees STATE OF HAWAII and ROBERT A. ALM¹, Director of Commerce and Consumer Affairs, agree that this Court has jurisdiction to hear this appeal pursuant to §§ 602-5 and 641-1, Hawaii Revised Statutes.

-
1. Robert A. Alm succeeded Russel S. Nagata as Director of Commerce and Consumer Affairs, State of Hawaii, during the pendency of this action, and is substituted in that capacity pursuant to Rule 43(c)(1), Hawaii Rules of Appellate Procedure.

II. STATEMENT OF THE CASE

Walter Oda filed a complaint with the Department of Commerce and Consumer Affairs ("DCCA"), alleging violations of wage-and-hour laws by Metropolitan Maintenance, Inc., a licensed contractor. [R. 16, 18.²]

The DCCA, Metropolitan Maintenance, and Metropolitan's Responsible Managing Employee, Donald Tagawa, subsequently entered into an agreement to settle the case. [R. 40.] A "part and parcel" of the settlement was that the agreement would not be made a matter of public record unless Metropolitan Maintenance or Donald Tagawa violated its terms. [R. 40.]

The Plaintiff-Appellant brought this lawsuit against the State of Hawaii and the DCCA's Director (collectively referred to hereafter as "the State") to compel public disclosure of the agreement. [R. 1-2.] The Plaintiff-Appellant acknowledged that its interest in obtaining the agreement is simply that of a member of the general public. [R. 16; Transcript of Proceedings, October 9, 1986, pg. 3.] The State raised defenses under both Chapters 92 and 92E, Hawaii Revised Statutes. [R. 32-6.]

2. References to the Record on Appeal are designated "R."

The Circuit Court examined the agreement in camera and ordered disclosure, finding that:

a. [The agreement] 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 * * * [R. 45.]

The State then moved for reconsideration of the disclosure order on the ground that the Court had not not fully applied the statutory analysis required by Chapters 92 and 92E. [R. 46-8.] Based on the facts of this case, that analysis was divided into five discrete steps:

STEP 1: Does the document fall within the general definition of a 'public record' set forth in §92-50, Hawaii Revised Statutes?

If not, then disclosure is not permitted by Chapter 92. (Proceed to Step 4 for Chapter 92E analysis) If it falls within the definition, then--

STEP 2: Would disclosure of the document "invade the right of privacy of an individual"? (\$92-50, Hawaii Revised Statutes.)

If so, then disclosure is not permitted by Chapter 92. (Proceed to Step 4 for Chapter 92E analysis)

If it does not 'invade the right of privacy', then--

STEP 3: Do other state or federal statutes govern the disclosure of the document? (\$92-51, Hawaii Revised Statutes.)

This step requires a determination of the applicability of Chapter 92E, Hawaii Revised Statutes--

STEP 4: Does the document fall within the definition of a 'personal record' subject to protection under Chapter 92E, Hawaii Revised Statutes? (\$92E-1, Hawaii Revised Statutes.)

If it is not a 'personal record', Chapter 92E does not apply; 'public records' may be disclosed, and items which are not 'public records' cannot be disclosed. If it is a 'personal record', then--

STEP 5: Is the disclosure: (1) "to a duly authorized agent of the individual to whom [the item] pertains", (2) of information "collected and maintained specifically for the purpose of creating a record available to the general public", (3) expressly permitted by statute, or (4) "pursuant to a showing of compelling circumstances affecting the health or safety of any individual"? (§92E-4, Hawaii Revised Statutes.)

If so, the document may be disclosed. If not, then the agency is prohibited by Chapter 92E from disclosing the item to the general public. (Id.) [R.51.]

The Court vacated its original order, ruling that the State was prohibited from disclosing the settlement agreement. [R. 100.] It held that:

[] The document in question. . . is a 'personal record', as that term is defined in §92E-1(3), Hawaii Revised Statutes (1980).³

3. The 'personal record' definition was numbered §92E-1(3) in 1980 Hawaii Sess. Laws, Ch. 226. The subsection designation was subsequently dropped by the Revisor of Statutes. See, 'Revision Note' following §92E-1 in the 1985 Hawaii Revised Statutes replacement volume.

[] None of the exceptions contained in §92E-4, Hawaii Revised Statutes (1980) applies to the settlement agreement. [R. 99-100.]

The Plaintiff-Appellant has appealed the granting of the State's Motion for Reconsideration. [R. 102-3.]

III. STANDARD OF REVIEW

The Circuit Court made both findings of fact and conclusions of law in determining the applicability of Chapters 92 and 92E in this case. Findings of fact are subject to reversal only if they are "clearly erroneous", while conclusions of law are "freely reviewable" by the appellate court. Molokoa Village Development Company, Ltd. v. Kauai Electric Company, Ltd., 60 Hawaii 582, 595-6, 593 P.2d 375, 384 (1979); Rule 52(a), Hawaii Rules of Civil Procedure ['clearly erroneous' standard.]

IV. COUNTERSTATEMENT OF QUESTION PRESENTED

Question: Did the Circuit Court err in holding that the agreement between the DCCA, Donald Tagawa, and Metropolitan Maintenance, Inc. is not subject to disclosure to members of the general public under Chapters 92 and 92E, Hawaii Revised Statutes?

V. ARGUMENT

- A. The settlement agreement which the Plaintiff-Appellant seeks may not be disclosed to the general public, based upon the five-step analysis mandated by Chapters 92 and 92E, Hawaii Revised Statutes.

The statutory framework of Chapters 92 and 92E provides a number of tests for determining whether information in the State's possession may be disclosed, depending upon the type of information sought and the identity of the person requesting access. The tests under Chapter 92 determine whether a record may be inspected by the general public without restriction. The tests under Chapter 92E determine whether access to a record (including those which meet the tests of Chapter 92) should be limited to those persons with a recognized interest in disclosure.

In this particular case, five tests must be satisfied before the settlement agreement sought may be released to the Plaintiff-Appellant. These tests are:

1. Does the document fall within the general definition of a 'public record' under §92-50, Hawaii Revised Statutes?

2. Is the agreement exempt from the definition of 'public record' in §92-50 because disclosure would invade Donald Tagawa's right of privacy?
3. Do other statutes potentially preclude the disclosure of the agreement?
4. Is the agreement a 'personal record' subject to protection from disclosure under Chapter 92E?
5. Is the Plaintiff-Appellant allowed to review the agreement pursuant to §92E-4, Hawaii Revised Statutes?

The Plaintiff-Appellant's request for disclosure fails under each of these tests. Each step will be examined and applied in the following sections.

STEP 1. Question: Does the document fall within the general definition of a 'public record' under §92-50, Hawaii Revised Statutes?

Answer: No.

A document which meets all of the disclosure requirements of Chapter 92, Hawaii Revised Statutes, is open to public

view without any regard for the purpose of the inspection or the use to be made of the information obtained. (See, §92-51, Hawaii Revised Statutes (1975).) For that reason, Chapter 92 severely restricts the types of documents which are subject to unlimited examination.

§92-50, Hawaii Revised Statutes, is the starting point for determining whether information in the possession of the State is subject to unlimited disclosure as a 'public record'. A 'public record' is defined as:

"[A]ny 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." (§92-50, Hawaii Revised Statutes (1975).)

There is no dispute that the settlement agreement is a "paper" which is the property of the State.

In order to meet the criteria of §92-50, however, the agreement must also have been: (1) one "in or on which an entry has been made or is required to be made by law", or (2)

"received or [which a State official] is required to receive for filing".⁴ (§92-50, Hawaii Revised Statutes.)

The settlement agreement does not fall within either of these categories. Clearly, entries "required by law" are those which are mandated by a statute or regulation. For example, the Registrar of Conveyances is required to make entries in certain records when deeds and instruments are presented for recordation. (§§ 502-11, 502-12, 502-13, and 502-14, Hawaii Revised Statutes (1984).)

There is no statute or regulation which requires the DCCA to enter the terms of an informal settlement into a written agreement. Thus, the settlement agreement here does not contain entries 'required to be made by law.'

The settlement agreement was also not received for "filing". The verb "file" is used in other parts of the Hawaii

4. In its original order permitting disclosure, the Circuit Court found that the settlement agreement was a paper belonging to the State "in or on which an entry has been made . . . , or which any public officer or employee has received . . . for filing . . .". [R. 45; See also, Transcript of Proceedings, October 9, 1986, pg. 4.] Although the original order was subsequently "vacated", the Court did not specifically reverse this finding in ruling upon the State's Motion for Reconsideration. [R. 98-101.]

Revised Statutes to mean "[t]o deliver an instrument or other paper to the proper officer or official for the purpose of being kept on file by him as a matter of record and reference in the proper place." (Black's Law Dictionary (5th ed. 1979), pg. 566.) Examples of this usage include the filing of campaign spending reports (§11-195(b), Hawaii Revised Statutes (1984)) and the filing of public meeting agenda (§92-7(b), Hawaii Revised Statutes (1985)).

The term "filing" in §92-50, Hawaii Revised Statutes, should be given a meaning consistent with the definition of filing used in other parts of the Hawaii Revised Statutes. Agustin v. Dan Ostrow Construction Co., Inc., 64 Hawaii 80, 83, 636 P.2d 1348, 1351 (1981). Applying this definition, there is no evidence that the settlement agreement was either filed or required to be received for filing. The agreement is therefore not a 'public record' under §92-50, Hawaii Revised Statutes.⁵

5. Although the Circuit Court clearly erred by finding that the settlement terms were entered under a legal requirement and that the agreement had been filed, the error was rendered harmless by the subsequent granting of the State's Motion for Reconsideration.

STEP 2. Question: Is the agreement exempt from the definition of 'public record' in §92-50 because disclosure would invade Donald Tagawa's right of privacy?

Answer: Yes.

Under §92-50, Hawaii Revised Statutes, "records which invade the right of privacy of an individual" are excluded from the definition of a 'public record'.⁶ Assuming that the settlement agreement falls within the general definition of a 'public record', the second step of the statutory analysis is to determine if its disclosure will constitute an invasion of Donald Tagawa's right of privacy.

The term 'right of privacy of an individual' is not defined in Chapter 92. The legislative history of this proviso, however, may be used as an aid in determining the scope of information which the legislature intended to protect. Gakiya v. Hallmark Properties, Inc., 68 Hawaii ___, ___, 722 P.2d 460, 463 (No. 11019, July 18, 1986).

6. The Plaintiff-Appellant contends that the State "virtually conceded below that the Settlement was a public record", citing the memorandum supporting the State's Motion for Reconsideration. [Opening Brief, pg. 18.] On the contrary, the State did not concede the issue, specifically reserving its right to appeal the rulings previously made by the Court under Chapter 92. [Transcript of Proceedings, February 6, 1987, pages 5-6.]

"Your Committee intends that records which invade the right of privacy of a person should remain confidential. Among the list of records which the Committee felt should remain confidential were examinations, public welfare lists, unemployment compensation lists, application[s] for licenses and other similar records." Standing Comm. Rpt. No. 594 (Judiciary), 1959 House Journal, pg. 797 [emphasis added].⁷

The inclusion of applications for licenses among the government records which the legislature intended to shield from disclosure suggests that a high level of privacy protection was intended. A review of the licensing statutes in force in 1959 shows that applications generally did not contain deeply private information about the applicant.

For example, applicants for chiropractic licenses were required to demonstrate citizenship, residency, 'good moral character', proof of college attendance, and to submit a photograph and photostats of diplomas. (§60-2, Revised Laws of Hawaii 1955 (1957).) Similarly, physicians were required to

7. The operative language of §92-50, Hawaii Revised Statutes (1975) was first adopted in 1959. (1959 Hawaii Sess. Laws, Ch. 43, §1(b) at pg. 30.) The recodification of the section (then known as §92-1, Hawaii Revised Statutes) by its repeal and simultaneous re-enactment as §92-50, Hawaii Revised Statutes (1975 Hawaii Sess. Laws, Ch. 166), has no substantive effect. 1A N. Singer, Sutherland Statutory Construction §23.28 (4th ed. 1985).

submit proof of citizenship, residency, 'good moral character', graduation from an accredited medical school, completion of an internship, and study of Hansen's disease. (§64-3(a)-(f), Revised Laws of Hawaii 1955 (1959).) Automobile license applicants were required to provide their name, date of birth, sex, occupation, addresses, and previous license history. (§160-38, Revised Laws of Hawaii 1955.)

These statutory requirements show that the information obtained by the government through license applications would not be inherently embarrassing, and in fact contained information that most people would be proud to have disclosed (e.g., graduation from an institution of higher education). The common element of this information, however, is that it would not be readily available to the general public unless the applicant took steps to make the information known.

Courts have recognized that a privacy interest attaches to government records "whenever information which reveals unique facts. . .is linked to an identifiable individual." In re: Request of Rosier, 105 Wash.2d 606, 717 P.2d 1353, 1358 (1986)⁸. This standard should be applied to define the scope

8. This standard is consistent with the scope of privacy afforded under Chapter 92E, Hawaii Revised Statutes. (§92E-1, Hawaii Revised Statutes (1980).)

of privacy under Chapter 92, except where the subject of the information has provided information under circumstances which would demonstrate a relinquishment of the privacy interest (e.g., by filing a deed at the Bureau of Conveyances for public reference).

In this case, the Circuit Court had irrefuted evidence that a promise of confidentiality was a 'part and parcel' of the settlement agreement. [R. 40.] Donald Tagawa's privacy interest in the settlement terms was not waived, but instead was specifically reserved, taking the agreement outside the scope of 'public record' under Chapter 92.

The Plaintiff-Appellant argues that §92-50, Hawaii Revised Statutes, requires this Court to 'balance' the public's interest in disclosure of the agreement against Mr. Tagawa's privacy interests, with great weight being given to the disclosure interest. This argument rests heavily upon cases interpreting the Federal Freedom of Information Act ("FOIA") (5 U.S.C. §552) and several state public records laws. These cases, however, are inapplicable to the interpretation of §92-50, Hawaii Revised Statutes.

In order for this court to consider rulings by other courts upon Federal and other states' statutes for the purpose

of interpreting a Hawaii statute, there must be some demonstrable relationship between the foreign statute and the Hawaii language. (2A N. Singer, Sutherland Statutory Construction, §52.03 (4th ed. 1984).) "[S]tatutes having different historical origins and serving different purposes, even though both pertain to the same subject, have no interpretive relevance in regard to each other." (Id., §52.01.) Hawaii's courts have carried this doctrine to the point of rejecting decisions on statutes Hawaii has copied, if those decisions vary from the "spirit or policy" of the Hawaii law. Wong v. Hawaiian Scenic Tours, Ltd., 64 Hawaii 401, 405-6, 642 P.2d 930, 933 (1982).

There is no legislative history or other evidence suggesting that the Hawaii 'invasion of privacy' proviso was drawn from any existing statute. (See, Standing Comm. Rpt. No. 594 (Judiciary), 1959 House Journal, pg. 797.)

This particularly true with respect to the Federal Freedom of Information Act ("FOIA") privacy exemption, which was not enacted until eight years after the Hawaii law was adopted. (See, Pub. L. No. 90-23, 81 Stat. 54 (1967).) Further, comparisons to the Federal FOIA are irrelevant since its language differs substantially from that in Chapter 92. For instance, the Federal FOIA explicitly requires that information be withheld only if it would result in a "clearly unwarranted invasion of privacy" (5 U.S.C. §552(b)(6)) or an "unwarranted invasion of privacy" (5 U.S.C. §552(b)(7)(C)) [emphasis added].

The use of 'clearly unwarranted' to modify 'invasion of privacy' in 5 U.S.C. §552(b)(6) was "a clearly considered and significant determination" by Congress. Department of the Air Force v. Rose, 425 U.S. 352, 378 n. 16, 96 S.Ct. 1592, 1607 n. 16, 48 L.Ed.2d 11, 31 n. 16 (1976). It requires a balancing of the benefits of disclosure against the privacy rights involved. Heights Community Congress v. Veterans Administration, 732 F.2d 526, 528 (6th Cir.), cert. denied, 469 U.S. 1034, 105 S.Ct. 506, 83 L.Ed.2d 398 (1984). In order to satisfy the 'clearly unwarranted' standard, courts must "'tilt the balance [of disclosure interests against privacy interests] in favor of disclosure.'" Washington Post Co. v. U.S. Department of Health and Human Services, 690 F.2d 252, 261 (D.C. Cir. 1982) [brackets in original].

The subsequently-enacted 'unwarranted invasion of privacy' standard in 5 U.S.C. §552(b)(7)(C) has been interpreted to either incorporate the 'clearly unwarranted' standard (Associated Dry Goods Corp. v. National Labor Relations Board, 455 F.Supp. 802, 814 (S.D. N.Y. 1978)) or to require a balancing of disclosure interests against a "serious invasion" of privacy (Alirez v. National Labor Relations Board, 676 F.2d 423, 427 (10th Cir. 1982)). Unquestionably, the Federal FOIA's privacy exemptions are substantially different from the Hawaii

standard, and cases based on the Federal FOIA are of no value in interpreting §92-50, Hawaii Revised Statutes.

The Plaintiff-Appellant's citations to cases ruling upon other states' privacy exemptions are also distinguishable. Washington law (Wash. Rev. Code §42.17.260(1)) applies a statutory 'unreasonable invasion of personal privacy' standard. (See, In re: Request of Rosier, 105 Wash.2d 606, 717 P.2d 1353, 1357 (1986).) The public records laws in Michigan (Mich. Comp. Laws §15.243(1)(a)) and Texas (Tex. Civ. Code Ann. tit. 6252-17a, §3(a)(2) (Vernon, 1985) impose a "clearly unwarranted invasion" standard. (See, State Employees Association v. Department of Management and Budget, ___ Mich. ___, 404 N.W.2d 606, 609 (1987); Hubert v. Harte-Hanks Texas Newspapers, Inc., 652 S.W.2d 546, 549 (Tex.App.3 1983).)

The Connecticut FOIA "reflects a legislative intention to balance the public's right to know what its agencies are doing, with the governmental and private needs for confidentiality." Wilson v. Freedom of Information Commission, 181 Conn. 324, 435 A.2d 353, 357 (1980). This requires a balancing test to determine the scope of its 'invasion of privacy' exception. Judiciary Committee of the General Assembly v. Freedom of Information Commission, 39 Conn. Supp. 176, 473 A.2d 1248, 1252-3 (1983).

The Georgia case of Doe v. Sears, 245 Ga. 83, 263 S.E.2d 119, appeal dismissed, 446 U.S. 979, 100 S.Ct. 2958, 64 L.Ed.2d 836 (1980), turned on the question of whether the public housing tenants in question had waived their right to privacy in rental payment records altogether by failing to make payments. (263 S.E.2d at 122-3.) The Illinois case cited by the Plaintiff-Appellant was decided on the grounds that the financial information sought was governed by a constitutional provision requiring disclosure of public expenditures, and because the names of the welfare recipients which might be discovered through the disclosure were already in the public domain. Mid-America Television Company v. Peoria Housing Authority, 93 Ill.App.3d 314, 417 N.E.2d 210, 211-4 (1981).

Because of these differences, the cases cited by the Plaintiff-Appellant have no value in determining the intent of the Hawaii invasion-of-privacy exemption. Neither the language of §92-50, Hawaii Revised Statutes, nor its legislative history suggests that a balancing of interests was envisioned as the method of determining whether a particular disclosure would "invade the privacy of an individual". On the contrary, the legislature's stated intent that examinations, public welfare lists, unemployment compensation lists, applications for licenses and similar records would "remain confidential" without exception negates any suggestion that public disclosure

interests are to be considered under this section. (See, Standing Comm. Rpt. No. 594 (Judiciary), 1959 House Journal, pg. 797.)

This is not to say that public disclosure interests are irrelevant under Hawaii law. Chapter 92E, Hawaii Revised Statutes, was created specifically to balance "freedom of information, which involves public access to public records, and information practices, which involves the confidentiality of personal records". (Conference Comm. Rpt. No. 56-80, 1980 Senate Journal, pg. 973.) The application of Chapter 92E to the settlement agreement is discussed in Steps 4 and 5, infra.

STEP 3. Question: Do other statutes potentially preclude the disclosure of the agreement?

Answer: Yes, Chapter 92E, Hawaii Revised Statutes.

Assuming, arguendo, that the settlement agreement had fallen within the definition of a 'public record' in §92-50, Hawaii Revised Statutes, the next step would be to determine if "public inspection of such records is in violation of any other state or federal law". (§92-51, Hawaii Revised Statutes (1975).)

§92E-1, Hawaii Revised Statutes (1980), which defines the "personal records" to be governed by Chapter 92E, specifically includes "a 'public record', as defined under section 92-50." Thus, the analysis must turn to the applicability of Chapter 92E to the settlement agreement.

STEP 4. Question: Is the agreement a 'personal record' subject to protection from disclosure under Chapter 92E?

Answer: Yes.

Chapter 92E, Hawaii Revised Statutes, was enacted to: (1) allow an individual to gain access to his or her personal records; (2) allow the individual to amend or correct those records; and (3) "to secure the confidentiality of personal records." (Conference Comm. Rpt. 56-80, 1980 Senate Journal, pg. 973.) The law is specifically intended to implement the right of privacy incorporated into the 1978 Hawaii Constitution (Article I, Section 6).⁹ (1980 Hawaii Sess. Laws, ch. 226, pg. 378.)

9. The Plaintiff-Appellant argues that Chapter 92E, Hawaii Revised Statutes, should be restricted by the constitutional right-of-privacy provision. [Opening Brief, pages 15-6.] Even assuming that the constitutional privacy right is narrower than that created by Chapter 92E, there is nothing which prohibits the legislature from providing greater privacy protection.

The "personal records" which are governed by Chapter 92E are defined as:

"[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." §92E-1, Hawaii Revised Statutes (1980).

It should be noted that the scope of the definition is extremely broad, requiring that the settlement agreement be evaluated under Chapter 92E even if it is not subject to disclosure as a 'public record' under Chapter 92.

The Plaintiff-Appellant's only apparent challenge to the inclusion of the settlement agreement within the definition of 'personal record' is that "Donald Tagawa is involved only as an officer of [Metropolitan Maintenance]." [Opening Brief, pg. 21, n. 6.] The Plaintiff-Appellant encourages this court to determine whether this "implicate[s] a sufficient privacy interest". [Id., pg. 20.]

§92E-1, Hawaii Revised Statutes, only requires that information be "about an individual", which includes "items that contain or make reference to the individual's name. . .or

other identifying particular assigned to the individual". There is no requirement that an examination be conducted to determine the extent of an individual's privacy interest in the item.

Further, Donald Tagawa's participation in the settlement was not passive or tangential. As the responsible managing employee of Metropolitan Maintenance, Donald Tagawa is a licensed contractor (See, §444-11(5), Hawaii Revised Statutes (1985)), was subject to discipline if Metropolitan violated the law, and was a party to the settlement agreement. [R. 40.] (See, §§16-77-69 and 16-77-75, Hawaii Administrative Rules (1983) [Rules of the Contractors License Board].) Plainly, the settlement agreement is 'about' Mr. Tagawa, which brings it within the broad definition of 'personal record' in §92E-1, Hawaii Revised Statutes.

STEP 5. Question: Is the Plaintiff-Appellant allowed to review the agreement pursuant to §92E-4, Hawaii Revised Statutes?

Answer: No.

If the settlement agreement is a "personal record" under Chapter 92E, Hawaii Revised Statutes, the State is expressly prohibited from disclosing the record "to any person

other than the individual to whom the record pertains" unless it 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." §92E-4, Hawaii Revised Statutes (1980).

As the Plaintiff-Appellant admits, "[n]one of the exceptions contained in [§]92E-4 apply in this case." [R. 75.] A review of the record in this case confirms the point.

There is no evidence that the Plaintiff-Appellant is a "duly authorized agent" of Donald Tagawa¹⁰; the Plaintiff-Appellant has not cited any federal or state statute which "expressly authorizes" disclosure of the settlement agreement; and there has been no showing of "compelling circumstances affecting. . .health or safety" in this case. On the other hand, the State has submitted un rebutted evidence that the settlement agreement was not "collected and maintained" to create a public record. [R. 37-8, 40.]

10. The Plaintiff-Appellant's interest is admittedly that of a member of the general public. [R. 16.]

The Plaintiff-Appellant has placed great emphasis on the fact that its complaint to the DCCA about Metropolitan Maintenance and Donald Tagawa arose from their conduct on a public-works project. The legislature, however, has simply not seen fit to include this as a factor in the statutory balancing test established under Chapter 92E, Hawaii Revised Statutes.

B. Conclusion.

The settlement agreement is not subject to disclosure under Chapters 92 and 92E, Hawaii Revised Statutes. Based upon the record before it, the Circuit Court did not err in vacating its original order and granting the State's Motion for Reconsideration.

The State respectfully requests that this Court affirm the judgment of the Circuit Court, and award it those costs of appeal permitted by law. (Rule 39(b), Hawaii Rules of Appellate Procedure.)

DATED: Honolulu, Hawaii, August 3, 1987.



NATHAN J. SULT
GRANT TANIMOTO

Attorneys for Defendants-Appellees

STATEMENT OF RELATED CASES

The Defendants-Appellees are not aware of any cases which are related to this appeal, as that term is defined in Rule 28(b)(11), Hawaii Rules of Appellate Procedure.

DATED: Honolulu, Hawaii, August 3, 1987.



NATHAN J. SOLT
GRANT TANIMOTO

Attorneys for Defendants-Appellees

[PART V.] PUBLIC RECORDS

Note

This part, enacted as Part IV, is redesignated.

§92-50 Definition. As used in this part, "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. [L 1975, c 166, pt of §2]

Attorney General Opinions

Applications for licenses are not "public records." Att. Gen. Op. 75-7.
Referred to generally. Att. Gen. Op. 76-3.

Hawaii Legal Reporter Citations

Inspection of public records. 79 HLR 79-0117.
Inspection of building permit application and all related materials, including building plans and specifications. 79 HLR 79-0543.

§92-51 Public records; available for inspection. 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. [L 1975, c 166, pt of §2; am L 1976, c 212, §4]

Attorney General Opinions

Referred to generally. Att. Gen. Op. 76-3.

[§92E-1] Definitions. As used in this chapter:

"Agency" means every office, officer, employee, department, division, bureau, authority, board, commission, or other entity of the executive branch of the State or of each county, but excludes:

- (1) The legislature and the council of each county, including their respective committees, offices, bureaus, officers, and employees; and
- (2) The judiciary, including the courts, and its offices, bureaus, officers, and employees.

"Individual" means a natural person.

"Personal record" means any 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. [L 1980, c 226, pt of §2]

Revision Note

Definitions restyled.

Attorney General Opinions

Items of information on public agency records are "personal records" of the person to whom the information pertains. Att. Gen. Op. 84-14.

[§92E-4] Limitation on public access to personal record. 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. [L 1980, c 226, pt of §2]

Attorney General Opinions

List containing only names of holders of professional and vocational licenses and type of license held may be made available to public. Att. Gen. Op. 84-13.

SUBCHAPTER 11

OWNERSHIP AND MANAGEMENT OF LICENSEE

§16-77-69 License issued. A contractor's license shall only be issued to a contracting entity (corporation, partnership, joint venture, or individual) if the contracting business is under the direct management of an individual who holds an appropriate license and who is the principal responsible managing employee thereof. [Eff. 8/14/80; am and ren §16-77-69, 6/22/81; am and comp 11/7/83] (Auth: HRS §444-4) (Imp: HRS §444-12)

§16-77-75 Revocation, suspension, and refusal to renew license of principal RME. The license of the principal RME may be suspended, revoked, terminated, or refused to be renewed if the license of contracting entity of which the person is the principal RME is revoked, terminated, suspended, or refused renewal pursuant to section 444-17, HRS. [Eff. 8/14/80; am and ren §16-77-75, 6/22/81; am and comp 11/7/83] (Auth: HRS §444-17) (Imp: HRS §444-7)

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

- (i) it has been indexed and either made available or published as provided by this paragraph; or
- (ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4)(A) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constituent units of such agency. Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may exam-

§ 552. Public information: agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

line the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(D) Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Civil Service Commission shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Commission, after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Commission recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on

appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request—

(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(b) This section does not apply to matters that are—

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(d) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. The report shall include—

(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

(4) the results of each proceeding conducted pursuant to subsection (a)(4)(F), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

(5) a copy of every rule made by such agency regarding this section;

(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

(7) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections (a)(4)(E), (F), and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(e) For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 383; Pub. L. 90-23, § 1, June 5, 1967, 81 Stat. 54; Pub. L. 93-502, §§ 1-3, Nov. 21, 1974, 88 Stat. 1561-1564; Pub. L. 94-409, § 5(b), Sept. 13, 1976, 90 Stat. 1247.)

NO. 12094

IN THE SUPREME COURT OF THE STATE OF HAWAII


OCTOBER TERM, 1986

PAINTING INDUSTRY OF	)	S.P. No. 86-0371
HAWAII MARKET RECOVERY FUND,)	
	)	APPEAL FROM THE ORDER
Plaintiff-Appellant,	)	GRANTING MOTION FOR
	)	RECONSIDERATION AND DENYING
vs.	)	MOTION TO STRIKE, FILED
	)	MARCH 6, 1987
ROBERT A. ALM, DIRECTOR OF)	
COMMERCE AND CONSUMER AFFAIRS;	)	CIRCUIT COURT OF THE
and THE STATE OF HAWAII,	)	FIRST CIRCUIT
)	
Defendants-Appellees.	)	THE HONORABLE RICHARD Y.C.
	)	AU, Circuit Judge
)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the "Answering Brief of Defendants-Appellees State of Hawaii and Robert A. Alm, Director of Commerce and Consumer Affairs" and its attachments were served upon Michael Lilly, Esq., attorney for the Plaintiff, at 1100 Pauahi Tower, 1001 Bishop Street, Honolulu, Hawaii, on August 3, 1987, by means of hand delivery.

DATED: Honolulu, Hawaii, August 3, 1987.



NATHAN J. SULT
GRANT TANIMOTO

Attorneys for
Defendants-Appellees

NO. 12094

IN THE SUPREME COURT OF THE STATE OF HAWAII

PAINTING INDUSTRY OF HAWAII	)	CIVIL NO.: S.P. 86-0371
MARKET RECOVERY FUND)	
	)	APPEAL FROM THE:
Plaintiff-	)	ORDER GRANTING MOTION
Appellant	)	FOR RECONSIDERATION AND
	)	DENYING MOTION TO STRIKE,
vs	)	FILED MARCH 6, 1987
)	
RUSSELL NAGATA, DIRECTOR OF	)	FIRST CIRCUIT COURT
COMMERCE AND CONSUMER AFFAIRS)	
and STATE OF HAWAII	)	HONORABLE RICHARD Y.C. AU
	)	Judge
Defendants-)	
Appellees)	
)	
)	

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

	<u>Page(s)</u>
TABLE OF AUTHORITIES	iii
A. Cases	iii
B. Constitution	v
C. Statutes	v
D. Other	v
GROUND 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

<u>Arieff v. Dep't of the Navy</u> , 712 F.2d 1462 (D.C. Cir. 1983)	18
<u>Associated Dry Goods Corp. v. NLRB</u> , 455 F.Supp. 802 (S.D.N.Y. 1978)	23
<u>Board of Police Commissioners v. Freedom of Information Commission</u> , 470 A.2d 1209 (Conn. 1984)	13
<u>Church of Scientology v. United States Dep't of the Army</u> , 611 F.2d 738 (9th Cir. 1979) .	6
<u>City of Hartford v. Freedom of Information</u> , 518 A.2d 49 (Conn. 1986)	11, 13
<u>Dep't of Air Force v. Rose</u> , 425 U.S. 352 (1976).	passim
<u>Ditlow v. Schultz</u> , 517 F.2d 166, 170 (D.C. Cir. 1975).	21
<u>Doe v. Sears</u> , 263 S.E.2d 119 (Ga. 1980). . . .	22
<u>Environmental Protection Agency v. Mink</u> , 410 U.S. 73 (1972).	10, 17
<u>Getman v. NLRB</u> , 450 F.2d 670, 674-75 (D.C. Cir. 1971)	21
<u>Hubert v. Harte-Hanks Texas Newspapers, Inc.</u> , 652 S.W.2d 546 (Tex. App. 1983) . . .	15
<u>Heights Community Congress v. Veterans Administration</u> , 732 F.2d 526 (6th Cir. 1984).	16, 17, 23
<u>In Re Request of Rosier</u> , 717 P.2d 1353, (Wash. banc 1986)	passim
<u>Intern B. of Elec. v. U. S. Department of H. & U. Dev.</u> , 593 F. Supp. 542 (D.D.C. 1984)	10, 22
<u>Kilroy v. N.L.R.B.</u> , 633 F.Supp 136 (S.D. Ohio 1985).	passim

<u>Kiraly v. FBI</u> , 728 F.2d 526 (6th Cir. 1984). . .	16
<u>Konigsberg v. Coughlin</u> , 501 N.E.2d 1 (N.Y. 1986)	11, 12
<u>Laborers Intern., Etc. v. City of Aberdeen</u> , 642 P.2d 418 (Wash. App. 1982).	9, 11, 12
<u>Madeira Nursing Center, Inc. v. NLRB</u> , 615 F.2d 728 (6th Cir. 1980).	16
<u>Maher v. Freedom of Information Commission</u> , 472 A.2d 321 (Conn. 1984)	13
<u>Mid-America Television Co. v. Peoria Housing Auth.</u> , 417 N.E.2d 210 (Ill. 1981).	22
<u>Miller v Bell</u> , 661 F.2d 623 (7th Cir. 1981). . .	23
<u>Molokoa Village Development Company, Ltd. v. Kauai Electric Company, Ltd.</u> , 60 Haw. 582 (1979).	6
<u>Nat. Ass'n of Retired Federal Employees v. Horner</u> , 633 F.Supp. 1241 (D.D.C. 1986). . .	17, 21, 23
<u>Penokie v. Michigan Tech. Univ.</u> , 287 N.W.2d 304 (Mich. 1979)	22
<u>Poss v. NLRB</u> , 565 F.2d 654 (10th Cir. 1977). . .	23
<u>Robbins Tire & Rubber Co. v. NLRB</u> , 563 F.2d 724 (5th Cir.), rev'd on other grounds, 437 U.S. 214 (1978)	23
<u>State Employees Association v. Department of Management and Budget</u> , 404 N.W.2d 606 (Mich. 1987).	21
<u>Van Bourg, Allen, Weinberg & Roger v. NLRB</u> , 751 F.2d 982 (9th Cir. 1985).	14, 21
<u>Washington Post Co. v. Department of Health and Human Services</u> , 690 F.2d 252 (D.C. Cir. 1982)	10
<u>Wilkinson v. F.B.I.</u> , 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.

GROUND'S 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 disclosure 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).

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).

Nat. 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. Poss v. NLRB, 565 F.2d 654 (10th Cir. 1977)(no privacy interest); and Robbins Tire & Rubber Co. v. NLRB, 563 F.2d 24 (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.

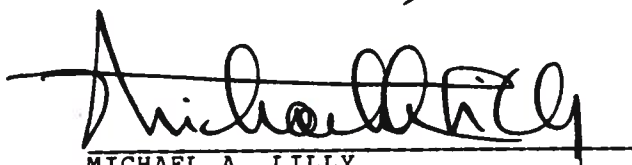
Standing Committee Report No. 485, SLH 1975.

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

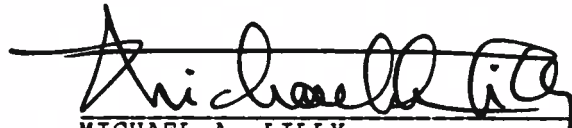
IN THE SUPREME COURT OF THE STATE OF HAWAII

PAINTING INDUSTRY OF HAWAII	)	CIVIL NO.: S.P. 86-0371
MARKET RECOVERY FUND)	
	)	APPEAL FROM THE:
Plaintiff-	)	ORDER GRANTING MOTION
Appellant	)	FOR RECONSIDERATION AND
	)	DENYING MOTION TO STRIKE,
vs	)	FILED MARCH 6, 1987
)	
RUSSELL NAGATA, DIRECTOR OF	)	FIRST CIRCUIT COURT
COMMERCE AND CONSUMER AFFAIRS)	
and STATE OF HAWAII	)	HONORABLE RICHARD Y.C. AU
	)	Judge
Defendants-)	
Appellees)	
)	

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

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

1ST CIRCUIT COURT
STATE OF HAWAII
FILED

1987 JAN -5 PM 2:53

M. TANAKA
CLERK

Attorney for Plaintiff

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

PAINTING INDUSTRY OF	)	S.P. No.: 86-0371
HAWAII MARKET RECOVERY FUND)	
	)	ORDER ALLOWING INSPECTION
Plaintiff,	)	OF CERTAIN STATE OF HAWAII
	)	DEPARTMENT OF COMMERCE AND
vs.	)	CONSUMER AFFAIRS RECORDS
)	
RUSSELL NAGATA, DIRECTOR OF)	
COMMERCE AND CONSUMER AFFAIRS;)	
and THE STATE OF)	
HAWAII)	
)	
Defendants.)	

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 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 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;

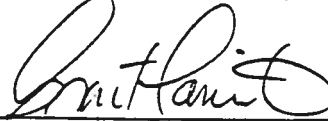
7. Accordingly, the Plaintiff's Application is hereby GRANTED and the Defendants are ordered to produce the settlement for inspection by Plaintiff;

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, 1989

(S) Richard Fu (ssn)
JUDGE OF THE ABOVE-ENTITLED
COURT

APPROVED AS TO FORM:


GRANT TANIMOTO
Deputy Attorney General
Attorney for Defendants

-3-

MAR 10 1987

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

1987 MAR -10 PM 3:38

M. TANAKA
CLERK

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	)	S.P. No. 86-0371
HAWAII MARKET RECOVERY FUND,)	
	)	ORDER GRANTING MOTION
Plaintiff,	)	FOR RECONSIDERATION
	)	AND DENYING MOTION TO
vs	)	STRIKE
)	
RUSSEL NAGATA, DIRECTOR OF)	
COMMERCE AND CONSUMER AFFAIRS;)	
and THE STATE OF HAWAII,)	
)	
Defendants.)	
)	
)	

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

Order Granting Motion for Reconsideration
and Denying Motion to Strike

Painting Industry of Hawaii Market Recovery
Fund v. Nagata and State of Hawaii
S.P. No. 86-0371
Page Two

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

Order Granting Motion for Reconsideration
and Denying Motion to Strike

Painting Industry of Hawaii Market Recovery
Fund v. Nagata and State of Hawaii
S.P. No. 86-0371
Page Three

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

Order Granting Motion for Reconsideration
and Denying Motion to Strike

Painting Industry of Hawaii Market Recovery
Fund v. Nagata and State of Hawaii
S.P. No. 86-0371
Page Four

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

RECEIVED
STATE OF HAWAII
FILED
APR 6 1987

1987 APR -6 AM 11: 09

MICHAEL A. LILLY 1681
GREEN, NING, LILLY & JONES
Pauahi Tower Suite 1100
1001 Bishop Street
Honolulu, Hawaii 96813
Telephone: (808) 528-1100

B. CHC
CLERK

Attorneys 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

) NOTICE OF APPEAL;
) DESIGNATION OF RECORD
) APPEAL; EXHIBIT A;
) CERTIFICATE OF SERVICE

RECEIVED
APR 6 12 03 PM '87
DEPT. OF ATTORNEY
GENERAL
ANTITRUST DIVISION

NOTICE OF APPEAL

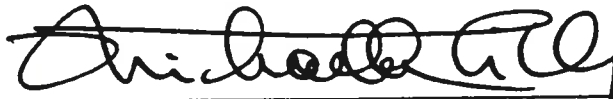
Notice is hereby given that Plaintiff, Painting Industry of Hawaii Market Recovery Fund, by and through its attorney, Michael A. Lilly, pursuant to Rule 3 of the Hawaii Rules of Appellate Procedure, Rule 72 of the Hawaii Rules of

Civil Procedure, and Section 602-5, Hawaii Revised Statutes, appeals to the Supreme Court and Intermediate Court of Appeals of the State of Hawaii from the Circuit Court of the Fifth Circuit Order Granting Motion for Reconsideration and Denying Motion to Strike, entered on March 6, 1987 (Exhibit A).

DESIGNATION OF RECORD ON APPEAL

COMES NOW Plaintiff, Painting Industry of Hawaii Market Recovery Fund, by its undersigned attorney, and hereby designates the entire record and transcripts of the hearings in this case as the record on appeal.

DATED: Honolulu, Hawaii, March 19, 1987.


MICHAEL A. LILLY
Attorney for Painting Industry
of Hawaii Market Recovery Fund

MAR 16 1987

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

STATE OF HAWAII
FILED
1987 MAR -6 PM 3:38

M. TANAKA
CLERK

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	)	S.P. No. 86-0371
HAWAII MARKET RECOVERY FUND,)	
	)	ORDER GRANTING MOTION
Plaintiff,	)	FOR RECONSIDERATION
	)	AND DENYING MOTION TO
vs	)	STRIKE
)	
RUSSEL NAGATA, DIRECTOR OF)	
COMMERCE AND CONSUMER AFFAIRS;)	
and THE STATE OF HAWAII,)	
)	
Defendants.)	
)	
)	
)	

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

EXHIBIT A.91

Order Granting Motion for Reconsideration
and Denying Motion to Strike

Painting Industry of Hawaii Market Recovery
Fund v. Nagata and State of Hawaii
S.P. No. 86-0371
Page Two

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

**Order Granting Motion for Reconsideration
and Denying Motion to Strike**

**Painting Industry of Hawaii Market Recovery
Fund v. Nagata and State of Hawaii
S.P. No. 86-0371
Page Three**

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

Order Granting Motion for Reconsideration
and Denying Motion to Strike

Painting Industry of Hawaii Market Recovery
Fund v. Nagata and State of Hawaii
S.P. No. 86-0371
Page Four

State of Hawaii Department of Commerce and Consumer
Affairs Records" entered January 5, 1987, is VACATED.

DATED: Honolulu, Hawaii, 1 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

The undersigned certifies that a copy of the foregoing document was duly served upon the following by hand delivery this 14th day of April, 1987 to the following:

GRANT TANIMOTO, ESQ.
Deputy Attorney General
State of Hawaii
Kekuanao'a Building, Room 200
465 South King Street
Honolulu, Hawaii 96813

DATED: Honolulu, Hawaii, April 6, 1987.

Tiffany Millen
Tiffany Millen
Secretary to Michael A. Lilly.

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

1987 MAR -6 PM 3:38

M. TANAKA
CLERK

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	)	S.P. No. 86-0371
HAWAII MARKET RECOVERY FUND,)	
	)	ORDER GRANTING MOTION
Plaintiff,	)	FOR RECONSIDERATION
	)	AND DENYING MOTION TO
vs	)	STRIKE
)	
RUSSEL NAGATA, DIRECTOR OF)	
COMMERCE AND CONSUMER AFFAIRS;)	
and THE STATE OF HAWAII,)	
)	
Defendants.)	
)	
)	

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

Order Granting Motion for Reconsideration
and Denying Motion to Strike

Painting Industry of Hawaii Market Recovery
Fund v. Nagata and State of Hawaii
S.P. No. 86-0371
Page Two

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

Order Granting Motion for Reconsideration
and Denying Motion to Strike

Painting Industry of Hawaii Market Recovery
Fund v. Nagata and State of Hawaii
S.P. No. 86-0371
Page Three

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

Order Granting Motion for Reconsideration
and Denying Motion to Strike

Painting Industry of Hawaii Market Recovery
Fund v. Nagata and State of Hawaii
S.P. No. 86-0371
Page Four

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

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

1ST CIRCUIT COURT
STATE OF HAWAII
FILED

1987 FEB -4 PM 1:34

GRANT TANIMOTO 2630
Deputy Attorney General, State of Hawaii
Kekuanao'a Building, Room 200
465 South King Street
Honolulu, Hawaii 96813
Telephone: 548-6744

SMEDA

CLERK

Attorneys for Defendants

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

PAINTING INDUSTRY OF	)	S.P. No. 86-0371
HAWAII MARKET RECOVERY FUND,)	
	)	SUPPLEMENTAL MEMORANDUM
Plaintiff,	)	IN SUPPORT OF "MOTION
	)	FOR RECONSIDERATION"
vs)	
)	
RUSSEL NAGATA, DIRECTOR OF)	
COMMERCE AND CONSUMER AFFAIRS;)	
and THE STATE OF HAWAII,)	
)	
Defendants.	)	Hearing set for Friday,
	)	February 6, 1987 at 3:00
	)	before Judge Richard Au

SUPPLEMENTAL MEMORANDUM
IN SUPPORT OF MOTION FOR RECONSIDERATION

I. INTRODUCTION

Plaintiff Painting Industry Market Recovery Fund
raises four arguments in opposition to to the State's

Motion for Reconsideration: (1) The document in question is a "public record" under §92-50, Hawaii Rev.Stat.; (2) Chapter 92E applies only to natural persons; (3) Chapter 92E does not apply in this case; (4) Article I, Section 6 of the Hawaii Constitution was not intended to grant a right of privacy as broad as that granted by Chapter 92E.

None of these arguments overcomes the clear mandate of Chapter 92E, as will be discussed below, and the State's Motion for Reconsideration should be granted.

II. ARGUMENT

A. The Finding of Public Record Status under §92-50, Hawaii Rev.Stat. does not Automatically Permit Disclosure of Government Documents.

The argument that the document in question is a "public record" and therefore automatically disclosable was addressed in the Memorandum in Support of Motion for Reconsideration. (Pgs. 2-4.) The determination of "public record" status is simply one intermediate step in determining whether a document is subject to disclosure.

The position taken by the Plaintiff is interesting, since it runs counter to an opinion issued by Plaintiff's counsel when he served as acting Attorney General

of the State of Hawaii. Attorney General Opinion 84-14 analyzed the interplay of §§92E-1(3), 92-50 and 92-51 of the Hawaii Rev.Stat., noting:

Under our general impression of the word 'personal', we would have thought that only 'records which invade the right of privacy of an individual' and excluded from the definition of 'public records' in Section 92-50 would be 'personal records' under Chapter 92E. * * * However, apparently there may be 'personal records' [under Chapter 92E] that are available for public inspection and 'public records' [under §92-50] that are not available for public inspection. [AG Opinion 84-14, December 27, 1984, at pages 27-8, emphasis added.]

This analysis certainly supports the State's position that Chapters 92 and 92E must be read in concert to determine whether the disclosability of the information.

B. The Information Concerning Donald Tagawa Contained in the Settlement Document is Inseparable From That Pertaining to Metropolitan Maintenance.

The Plaintiffs contend that the information pertaining to Metropolitan Maintenance is disclosable since it does not involve a "natural person". The Court's review of the document in question, however, showed that the settlement document pertained to both Donald Tagawa and Metropolitan Maintenance, and that disclosure of the terms pertaining to Metropolitan would necessarily result in disclosure of the terms pertaining to Tagawa.

The inclusion of terms for both Tagawa and Metropolitan within the same settlement document is completely consistent with the nature of Tagawa's liability under the Contractor's licensing law:

§16-77-75 Revocation, suspension, and refusal to renew license of principal [Responsible Managing Employee]. The license of the principal RME [of a corporate licensee] may be suspended, revoked, terminated, or refused to be renewed if the license of the contracting entity of which the person is the principal RME is revoked, terminated, suspended, or refused pursuant to section 444-17, HRS. [§16-77-75, Hawaii Administrative Rules (Rules of the Contractors License Board)]

In short, if Metropolitan Maintenance is sanctioned under §444-17, Hawaii Rev.Stat., then Mr. Tagawa is also subject to sanctions for the same violation.

- C. Chapter 92E applies to the Settlement Document, and contains no exemption for settlement of disciplinary cases arising out of a public contract.

The Plaintiff admits that "none of the exceptions contained in [Hawaii Rev.Stat. section] 92E-4 apply in this case." (Memorandum in Opposition, page 3.) It argues, however, that Chapter 92E does not apply because it was not intended to govern this document, and because the document relates to discipline arising out of a public contract. Neither of these propositions has merit.

The language of §92E-1(3) is clear and unambiguous: "'Personal record' means any item, collection, or grouping of information about an individual that is maintained by an agency." [emphasis added.] As discussed in an Attorney General opinion (Attorney General Op. No. 84-13, December 18, 1984) issued by Michael Lilly to the DCCA, §92E-4(2) provides the mechanism for release of information "collected and maintained specifically for the purpose of creating a record available to the general public." Since the Plaintiffs admit that §92E-4 does not apply here, the information is not subject to disclosure.

The Plaintiffs cite no law supporting the proposition that administrative disciplinary action arising from a public contract is exempt from Chapter 92E. Plainly, the bid and the the contract itself may be disclosable under §92E-4(2) as documents "collected and maintained specifically for the purpose of creating a record available to the general public" (See, e.g., §103-27, Hawaii Rev.Stat.), but again the document at issue here is admittedly not within that exception to the Chapter 92E requirements.

D. Article I, Section 6 of the Hawaii Constitution does not control over the clear and unambiguous language of Chapter 92E.

Although the purpose of Chapter 92E is "to implement in part" the 1978 amendment to Article I, Section 6 (1980 Session Laws Hawaii Ch. 226, §1 at page 378), there is no language which limits its application to the scope of that constitutional section. As in all cases in which statutory interpretation is required, the court here must follow the clear and unambiguous language of the statute, which is presumed to be constitutional unless proven otherwise beyond a reasonable doubt. (Woodruff v. Keale, 64 Haw. 85, 90 (1981) and State v. Petrie, 65 Haw. 174, 179 (1982).)

The Plaintiffs have failed to demonstrate that Chapter 92E is limited in a manner not explicitly contained in its terms or that the statute somehow violates the provisions of Article I, Section 6.

III. CONCLUSION

For the reasons set forth above, the Plaintiff's Motion for reconsideration should be granted.

DATED: Honolulu, Hawaii, February 4, 1987.



NATHAN J. SULT
GRANT TANIMOTO

Attorneys for Defendant

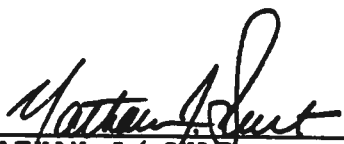
IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

PAINTING INDUSTRY OF	)	S.P. No. 86-0371
HAWAII MARKET RECOVERY FUND,)	
)	
Plaintiff,)	
	)	CERTIFICATE OF SERVICE
vs)	
)	
RUSSEL NAGATA, DIRECTOR OF)	
COMMERCE AND CONSUMER AFFAIRS;)	
and THE STATE OF HAWAII,)	
)	
Defendants.)	
)	
)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Supplemental Memorandum in Support of Motion for Reconsideration was served upon Michael Lilly, Esq., attorney for the Plaintiff, at 1100 Pauahi Tower, 1001 Bishop Street, Honolulu, Hawaii, on February 4, 1987, by means of hand delivery.

DATED: Honolulu, Hawaii, February 4, 1987.



NATHAN J. SULT
GRANT TANIMOTO

Attorneys for Defendant

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

111 CIRCUIT COURT
HONOLULU, HAWAII
128

1987 FEB -2 P 12

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

)
) MEMORANDUM IN OPPOSITION
) TO "MOTION TO STRIKE
) MOTION FOR RECONSIDER-
) ATION AND AFFIDAVIT";
) CERTIFICATE OF SERVICE

)
) Hearing set for Friday,
) February 6, 1987 at 3:00
) before Judge Richard Au

MEMORANDUM IN OPPOSITION TO
"MOTION TO STRIKE MOTION FOR RECONSIDERATION AND AFFIDAVIT"

I. INTRODUCTION

Plaintiff Painting Industry Market Recovery Fund
seeks to strike the State's pending Motion for Reconsider-

ation and its supporting affidavit on the ground that Nathan Sult, the Department of Commerce and Consumer Affairs (DCCA) attorney who signed the motion and affidavit, is "a person who lacks authority to appear on behalf of the State of Hawaii".

As will be discussed below, the Plaintiff's argument is defective on a number of grounds:

(1) DCCA attorneys are specifically empowered under §26-9, Hawaii Revised Statutes, to participate in cases involving the disclosure of records and documents within the custody and control of the Regulated Industries Complaints Office, DCCA;

(2) The statutes cited by the Plaintiff do not disqualify DCCA attorneys from acting in Circuit Court proceedings arising from Chapters 92 and 92E, Hawaii Revised Statutes; and

(3) Even if DCCA Attorneys may not participate in these proceedings, the Motion for Reconsideration is not subject to striking under Rule 11, Hawaii Rules of Civil Procedure, because it was filed jointly with the Department of the Attorney General, which Plaintiffs admit has authority in this matter.

II. ARGUMENT

- A. DCCA Attorneys are specifically empowered by Section 26-9, Hawaii Rev. Stat. to act on matters involving the application of privacy interests to Departmental documents

DCCA Attorneys derive their authority in part from §26-9, Hawaii Revised Statutes. This statute, in part, provides that the attorneys

"...shall be empowered to exercise all authority granted to the attorney general and to the responsible attorneys of the various counties under section 92-51 in all cases involving documents and records within the custody and control of the regulated industries complaints office." [§26-9(g), Hawaii Rev.Stat. (1984), emphasis added.]

Section 92-51, Hawaii Rev.Stat., grants the Attorney General and county attorneys the power to "determine which records in their offices may be withheld from public inspection".

The legislative history of §26-9 makes it clear that the authority of DCCA Attorneys to "determine" the availability of records extends to Circuit Court litigation about those documents:

"Section 92-51, Hawaii Revised Statutes, provides for the availability of public records for public inspection except in certain instances. This bill would allow attorneys retained by the Department [of Commerce and Consumer Affairs] to represent it in

cases involving records and documents within the custody and control of the Regulated Industries Complaints Office. It was noted that upon occasion the Department is the subject of a subpoena duces tecum, making such representation necessary by the deputy attorney generals assigned to the department. Passage of the bill would contribute to the departmental efficiency of the Regulated Industries Complaints Office." Standing Committee Report 687-84 (House Consumer Protection and Commerce), 1984 House Journal at 1192, 1193.

Since the document at issue here is unquestionably under the "custody and control" of the Regulated Industries Complaints Office, DCCA Attorneys may properly participate in proceedings before this Court.

- B. The statutes cited by Plaintiff do not restrict DCCA attorneys from appearing jointly with the Department of the Attorney General's attorneys in privacy cases involving Departmental documents.

The Plaintiffs cite §§28-1 and 103-3, Hawaii Rev. Stat., in support of their position that DCCA attorneys may not appear as co-counsel in privacy determination cases under Chapters 92 and 92E, Hawaii Revised Statutes. A careful review of these statutes, however, demonstrates that no such prohibition exists.

Section 28-1 provides:

"§28-1 Appears for the State. Except in those cases where the office of consumer protection represents the State, the respective counties, and the general public as consumers, the attorney general shall appear for the State personally or by deputy, in all the courts of

record, in all cases criminal or civil in which the State may be a party, or be interested, and may in like manner appear in the district courts in such cases." [§28-1, Hawaii Rev. Stat. (1969)]

The language of the statute itself does not provide that the Attorney General shall be the exclusive representative of the State, only that he has a duty to appear.

If the narrow reading advocated by the Plaintiff were correct, for example, the county prosecuting attorneys would be unable to appear in criminal cases without the attendance of the Attorney General. This is plainly not the case. In addressing this relationship, the Hawaii Supreme Court noted that ". . . traditionally and pursuant to law. . . the primary agency charged with initiating criminal prosecutions has been the office of the prosecuting attorney." Sapienza v. Hayashi, 57 Hawaii 289, 294 n.1 (1976).

Here, the Attorney General has appeared on behalf of the State, and is continuing to appear as co-counsel with the DCCA's attorney, thus satisfying the requirement of §28-1, Hawaii Rev. Stat.

Similarly, §103-3, Hawaii Rev. Stat. also fails to preclude DCCA Attorneys from participating in lawsuits involving disclosure of DCCA documents. As noted by the

Plaintiff, DCCA Attorneys are specifically exempted from this statute ". . .provided that such attorney shall be responsible for the prosecution of consumer complaints". [§103-3(9), Hawaii Rev.Stat.] Noticeably missing from this exemption is a requirement that DCCA attorneys only handle consumer complaints.

In fact, DCCA Attorneys have authority to perform functions in a number of areas which are not necessarily related to prosecution of consumer complaints. For example, §26-9(g), Hawaii Rev.Stat., grants DCCA Attorneys authority under §480-3.1, Hawaii Rev.Stat., which permits the bringing of lawsuits "on behalf of the State" for violation of §480-2, Hawaii Rev.Stat. §480-2 does not require a consumer complaint as a basis for an action.

Thus, §103-3, Hawaii Rev.Stat., does not in itself deny DCCA Attorneys the right to act outside of the prosecution of consumer complaints, as asserted by the Plaintiff.

C. Even if DCCA Attorneys may not Appear in this case, the Motion for Reconsideration was Properly Filed in the Name of the Attorney General.

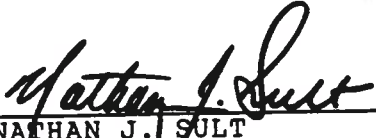
The Plaintiff's entire argument appears to be premised on the notion that the Motion for Reconsideration

should have been signed by the Attorney General or one of his deputies. Even if this were true, the fact that the Attorney General has appeared in this matter and is co-counsel with the DCCA Attorney means that the Motion is not subject to striking for noncompliance with Rule 11, Hawaii Rules of Civil Procedure. Where co-counsel signs a pleading and is later found to be unqualified, ratification of the pleading by a qualified attorney is sufficient to meet the Rule 11 requirement. Pavlak v. Duffy, 48 F.R.D. 396, 398 (D.Conn. 1969).¹

III. CONCLUSION

For the reasons set forth above, the Plaintiff's Motion to Strike is without merit, and should be denied.

DATED: Honolulu, Hawaii, February 3, 1987.


NATHAN J. SULT
GRANT TANIMOTO

Attorneys for Defendant

1. The current Hawaii R.Civ.P. 11 parallels Rule 11 of the Federal Rules of Civil Procedure prior to its 1983 amendment. Interpretation of counterpart Federal Rules is "highly persuasive" in construing Hawaii court rules. Ellis v. Crockett, 51 Haw. 45, 61, 451 P.2d 814, 824 (1969).


IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

PAINTING INDUSTRY OF	)	S.P. No. 86-0371
HAWAII MARKET RECOVERY FUND,)	
)	
Plaintiff,)	
	)	CERTIFICATE OF SERVICE
vs)	
)	
RUSSEL NAGATA, DIRECTOR OF)	
COMMERCE AND CONSUMER AFFAIRS;)	
and THE STATE OF HAWAII,)	
)	
Defendants.)	
)	
)	
)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Memorandum in Opposition to Motion to Strike Motion for Reconsideration and Affidavit was served upon Michael Lilly, Esq., attorney for the Plaintiff, at 1100 Pauahi Tower, 1001 Bishop Street, Honolulu, Hawaii, on February 3, 1987, by means of hand delivery.

DATED: Honolulu, Hawaii, February 3, 1987.



NATHAN J. SULT
GRANT TANIMOTO
Attorneys for Defendant

RECEIVED
DEPARTMENT OF
ATTORNEY GENERAL
STATE OF HAWAII

JAN 26 11 03 AM '87

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	)	S.P. No.: 86-0371
HAWAII MARKET RECOVERY FUND)	
	)	MEMORANDUM IN OPPOSITION
Plaintiff,	)	TO MOTION FOR
	)	RECONSIDERATION OF ORDER
vs.	)	ALLOWING INSPECTION OF
	)	DEPARTMENT OF COMMERCE AND
	)	CONSUMER AFFAIRS RECORDS
RUSSELL NAGATA, DIRECTOR OF	)	and CERTIFICATE OF SERVICE
COMMERCE AND CONSUMER AFFAIRS;)	
and THE STATE OF HAWAII	)	DATE: February 6, 1987
	)	TIME: 3:00 p.m.
Defendants.	)	JUDGE: Richard Y.C. Au
)	

MEMORANDUM IN OPPOSITION TO MOTION FOR
RECONSIDERATION OF ORDER ALLOWING INSPECTION
OF DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS RECORDS

The Motion for Reconsideration, filed by
Defendants, fails to address any new issue not previously
decided by the Court and therefore should be denied
forthwith.

There is also no basis in law for the Motion.
Indeed, were this court to adopt the reasoning offered by the
Defendants, the open government principles of Chapter 92,
HRS, would be emasculated. In fact, such a reasoning would
virtually preclude the release of any State documents and

DEPT. OF ATTORNEY
GENERAL
ANTITRUST DIVISION

JAN 26 2 21 PM '87

RECEIVED

would do injustice to the laudatory principles under which the Chapter was enacted.

More particularly, there is no basis in fact or law for the Motion for Reconsideration.

1. Public Record under Section 92-50. The Defendants concede that the requested report is 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" Because it is a public record, the Court properly ruled that it was disclosable to the Plaintiff under Section 92-50.

2. Chapter 92E applies only to natural persons. Chapter 92E does not apply to a corporation or a corporate officer. Under Section 92E-1, certain information regarding a "natural person" may not be disclosed. In this case, the Plaintiff has requested information regarding Metropolitan Maintenance, Inc., a Hawaii Corporation. Donald Tagawa is involved only to the extent that he is an officer of that corporation and therefore Plaintiff is not requesting personal information regarding Mr. Tagawa. Chapter 92E only applies to the disclosure of personal information regarding a "natural person" and therefore does not preclude disclosure of information regarding Metropolitan Maintenance, Inc.

3. Chapter 92E does not preclude disclosure of a public record. Chapter 92E is the so-called "privacy act" which, among other things, was intended to preclude the distribution of "private" information about individuals to

unauthorized information. It was not intended to shield the State from releasing information filed with or maintained by the State which does not invade the right to privacy of an individual.

a. The exceptions. None of the exceptions contained in 92E-4 apply in this case. Chapter 92E does not preclude the disclosure of the report in this case because it is a public record. Just because a document contains a person's name does not shield its disclosure, else the State could hide all documents simply by including the name of a private individual in each State document.

b. The record is about public, not private activity. In this case, the document, which the State admits "pertains to Donald Tagawa and addresses the conduct of his business", in fact pertains to activities of the State and a public contractor. The document does not refer to Donald Tagawa as a person apart from his function as a public contractor on a public job who received public funds. It does not contain, for example, any scandalous material which is wholly personal in nature.

The document is about a public contract, the expenditure of public funds, and the conduct of public officers in regulating inherently public activity.

Had the State investigated personal conduct of Mr. Tagawa, it could argue that the information pertains to Mr. Tagawa as an individual and therefore arguably not disclosable. That is not the case here.

This is about a public record -- the type that the Legislature intended to be fully releasable.

4. Article I, Section 6, Hawaii Constitution.

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 limits nondisclosure to "highly personal and intimate information":

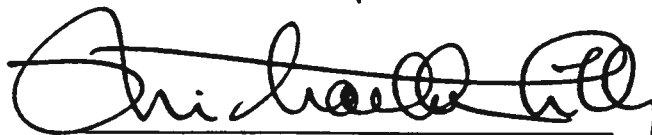
To make clear its intent, your Committee would like to reiterate and elaborate on certain matters contained in Stand. Com. Rep. No. 69 Privacy as used in this sense concerns the possible abuses in the use of highly personal and intimate information in the hands of government or private parties but it 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.)

Obviously, the types of information intended to be shielded from public dissemination is not the type of information contained in the document requested from the Defendants.

For the foregoing reasons, the Motion for Reconsideration should be DENIED forthwith.

DATED: Honolulu, Hawaii

January 22, 1987

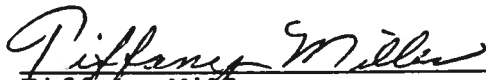

MICHAEL A. LILLY
Attorney for

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing document was duly served upon the following by depositing the same in the U.S. Mail, first-class postage affixed, addressed to their last known address this 22nd day of January, 1987:

GRANT TANIMOTO, ESQ.
Deputy Attorney General
State of Hawaii
Kekuanao'a Building, Room 200
Honolulu, Hawaii 96813

DATED: Honolulu, Hawaii, January 22, 1987.



Tiffany Millen
Secretary to Michael A. Lilly.

1ST CIRCUIT COURT
STATE OF HAWAII
FILED

1987 JAN 19 A 8 50

MICHAEL A. LILLY 1681
GREEN, NING, LILLY & JONES
Pauahi Tower Suite 1100
1001 Bishop Street
Honolulu, Hawaii 96813
Telephone: (808) 528-1100

R. HIGA
CLERK

Attorney for Plaintiff

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

PAINTING INDUSTRY OF	)	S.P. No.: 86-0371
HAWAII MARKET RECOVERY FUND)	
	)	MOTION TO STRIKE MOTION FOR
Plaintiff,	)	RECONSIDERATION AND AFFI-
	)	DAVIT; MEMORANDUM IN SUPPORT
vs.	)	OF MOTION; NOTICE OF
	)	HEARING MOTION and
RUSSELL NAGATA, DIRECTOR OF	)	CERTIFICATE OF SERVICE
COMMERCE AND CONSUMER AFFAIRS;)	
and THE STATE OF)	
HAWAII)	
)	
Defendants.)	

MOTION TO STRIKE MOTION FOR
RECONSIDERATION AND AFFIDAVIT

Comes now Plaintiff, by and through its undersigned
counsel, and moves, pursuant to Rule 11, Hawaii Rules of
Civil Procedure, to strike the:

1 Defendants' Motion for Reconsideration of Order
Allowing Inspection of Department of Commerce and Consumer
Affairs Records ("Motion for Reconsideration"); and

2 Affidavit of Nathan Sult.

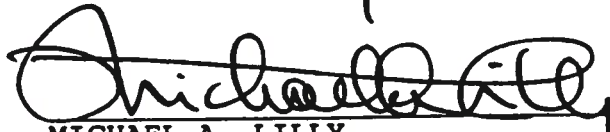
This Motion is predicated upon the grounds that the
Motion for Reconsideration was not signed by a person
authorized to appear in court on behalf of the State and the

RECEIVED JAN 20 1987

Affidavit represents that the affiant is "counsel for the Defendants" when in fact he does not, as a matter of law, have any authority to act in that capacity before this Court.

This Motion is based upon the attached memorandum and the files and records in this case.

DATED: Honolulu, Hawaii January 16, 1987


MICHAEL A. LILLY
Attorney for Plaintiff

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

PAINTING INDUSTRY OF	)	S.P. No.: 86-0371
HAWAII MARKET RECOVERY FUND)	
	)	MEMORANDUM IN SUPPORT OF
Plaintiff,	)	MOTION
)	
vs.)	
)	
RUSSELL NAGATA, DIRECTOR OF)	
COMMERCE AND CONSUMER AFFAIRS;)	
and THE STATE OF)	
HAWAII)	
)	
Defendants.)	

MEMORANDUM IN SUPPORT OF MOTION

The Motion for Reconsideration and its attached affidavit should be stricken because they were filed and signed by a person who lacks authority to appear on behalf of the State of Hawaii or any of its agencies or officers.

Pursuant to Section 28-1, HRS, only the Attorney General of Hawaii may appear for the State "in all the courts of records, in all cases criminal or civil in which the State may be a party, or be interested"

Section 103-3, HRS, further precludes any department of the State "other than the attorney general" from hiring an "attorney for the purpose of representing the State or such department in any litigation, rendering legal counsel to the department"

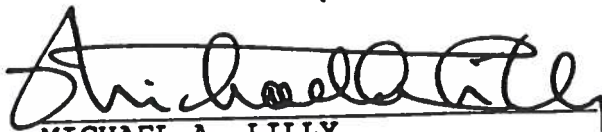
The only relevant exception to these statutes is Section 103-3(9), in which the Department of Commerce and

Consumer Affairs ("DCCA") is entitled to hire an attorney for the sole purpose of prosecuting consumer complaints.

There is no authority for an attorney for the DCCA to appear as counsel for the DCCA in a complaint against the DCCA for the release of a public document.

Accordingly, the Motion for Reconsideration and the affidavit attached thereto must be stricken.

DATED: Honolulu, Hawaii January 16, 1987


MICHAEL A. LILLY
Attorney for Plaintiff

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	)	S.P. No.: 86-0371
HAWAII MARKET RECOVERY FUND)	
	)	NOTICE OF HEARING MOTION
Plaintiff,)	
)	
vs.)	
)	
RUSSELL NAGATA, DIRECTOR OF)	
COMMERCE AND CONSUMER AFFAIRS;)	
and THE STATE OF)	
HAWAII	)	DATE: February 6, 1987
	)	TIME: 3:00 P.M.
Defendants.	)	JUDGE: Richard Y.C. Au
)	

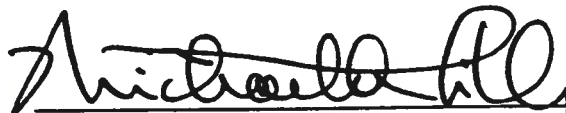
NOTICE OF HEARING MOTION

GRANT TANIMOTO, ESQ.
Deputy Attorney General
State of Hawaii
Kekuanao'a Building, Room 200
465 South King Street
Honolulu, Hawaii 96813

NOTICE IS HEREBY GIVEN that Plaintiff's Motion to
Strike Motion for Reconsideration and Affidavit and

Memorandum in Support of Motion shall come on for hearing before the Honorable Richard Y.C. Au, Judge of the above-entitled Court, in his Courtroom in the Kaahumanu Hale, Honolulu, Hawaii, at 3:00 o'clock p.m. on February 6, 1987, or as soon thereafter as counsel may be heard.

DATED: Honolulu, Hawaii, January 16, 1987.


MICHAEL A. LILLY
Attorney for Plaintiff

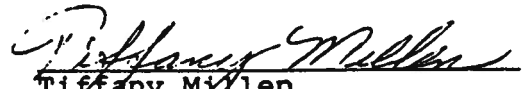
CERTIFICATE OF SERVICE

I certify that upon the filing of the foregoing document a copy will be served upon the following by depositing in the United States Mail, postage prepaid, to their last known address on January 16, 1987:

NATHAN J. SULT, ESQ.
Staff Attorney
Dept. of Commerce & Consumer Affairs
State of Hawaii
335 Merchant Street, Suite 244
Honolulu, Hawaii 96813

GRANT TANIMOTO, ESQ.
Deputy Attorney General
State of Hawaii
Kekuanao'a Building, Room 200
465 South King Street
Honolulu, Hawaii 96813

DATED: Honolulu, Hawaii, January 16, 1987.


Tiffany Millen,
Secty. to Michael A. Lilly

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

1007 JAN 15 PM 3:18

M. TANAKA
CLERK

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

	)	S.P. No. 86-0371
)	
	)	MOTION FOR RECONSIDERA-
	)	TION OF ORDER ALLOWING
PAINTING INDUSTRY OF	)	INSPECTION OF DEPARTMENT
HAWAII MARKET RECOVERY FUND,	)	OF COMMERCE AND CONSUMER
	)	AFFAIRS RECORDS;
Plaintiff,	)	MEMORANDUM IN SUPPORT
	)	OF MOTION FOR
vs	)	RECONSIDERATION;
	)	AFFIDAVIT OF NATHAN J.
RUSSEL NAGATA, DIRECTOR OF	)	SULT;
COMMERCE AND CONSUMER AFFAIRS;	)	EXHIBIT "1";
and THE STATE OF HAWAII,	)	NOTICE OF HEARING MOTION
	)	& CERTIFICATE OF SERVICE
Defendants.)	
	)	(Motion originally heard
	)	October 3 & 9, 1986
	)	Order filed January 5,
	)	1987)
)	
	)	DATE: <u>2/6/87</u>
	)	TIME: <u>3:00 pm</u>
	)	JUDGE: <u>Richard Y.C. Au</u>

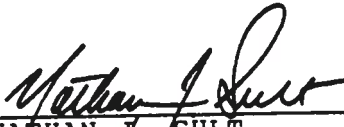
MOTION FOR RECONSIDERATION OF ORDER ALLOWING INSPECTION OF
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS RECORDS

The Director of Commerce and Consumer Affairs, and the State of Hawaii (hereinafter referred to as the "Defendants") respectfully request that the Court reconsider its "Order Allowing Inspection of Certain State of Hawaii Department of Commerce and Consumer Affairs Records", and filed January 5, 1987. The Plaintiff's "Application for an Order Allowing Inspection of Certain State of Hawaii Department of Commerce and Consumer Affairs Records" was heard by the Honorable Richard Y.C. Au on October 3 and October 9, 1986.

It is the Defendants' position that the Court did not fully apply the statutory standard in determining whether the document sought was subject to disclosure under Chapters 92 and 92E, Hawaii Revised Statutes, and that application of the standard requires that the document be withheld from public inspection.

This Motion is based upon Rules 59(e), 60(b)(1) and 60(b)(6) of the Hawaii Rules of Civil Procedure; upon the Memorandum of Law, Affidavit and Exhibit attached hereto and incorporated herein by reference; and upon the pleadings and other documents filed in this matter.

DATED: Honolulu, Hawaii, January 14, 1987.



NATHAN J. SULT
GRANT TANIMOTO

Attorneys for Defendant

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

PAINTING INDUSTRY OF	)	S.P. No. 86-0371
HAWAII MARKET RECOVERY FUND,)	
)	
Plaintiff,	)	MEMORANDUM IN
	)	SUPPORT OF MOTION FOR
vs	)	RECONSIDERATION
)	
RUSSEL NAGATA, DIRECTOR OF)	
COMMERCE AND CONSUMER AFFAIRS;)	
and THE STATE OF HAWAII,)	
)	
Defendants.)	
)	
)	

MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION

I. INTRODUCTION

The Plaintiff brought this action to obtain public disclosure of a settlement agreement between the Department of Commerce & Consumer Affairs (hereinafter referred to as the "DCCA"), Donald Tagawa, and Metropolitan Maintenance, Inc. [See, "Application for an Order Allowing Inspection of Certain State of Hawaii Department of Commerce and Consumer Affairs Records", filed September 18, 1986.]

On October 9, 1986, a chambers conference was held at which the settlement agreement was reviewed in camera by the Honorable Richard Y.C. Au. The Court

subsequently approved disclosure of the document, and rendered the following conclusions as part of its order:

a. [The agreement] 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 * * *

["Order Allowing Inspection of Certain State of Hawaii Department of Commerce and Consumer Affairs Records", (hereinafter referred to as the "Inspection Order"), a copy of which is attached hereto and incorporated herein by reference, p. 3.]

It is the Defendants' position that while the Court may have properly found that the settlement was a "public record" under Section 92-50, Haw.Rev.Stat., it did not fully implement the statutory analysis required by Chapter 92E, Hawaii Rev. Stat., to determine if the document was one of the "public records" not subject to release.

II. ARGUMENT

1. The Standards to be Applied in Determining Public Access to State Data.

The interplay of Chapters 92 and 92E, Hawaii Rev. Stat., often creates the confusing situation in which a

document which is a "public record" under Chapter 92 is not subject to public disclosure under Chapter 92E, Hawaii Rev. Stat. (§92E-1(3), Hawaii Rev. Stat.) Broken down to its steps, the statutory analysis is:

1. Is the item "[a] 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 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. . ." (§92-50, Hawaii Rev. Stat.) If not, then no disclosure is required; if so, then--

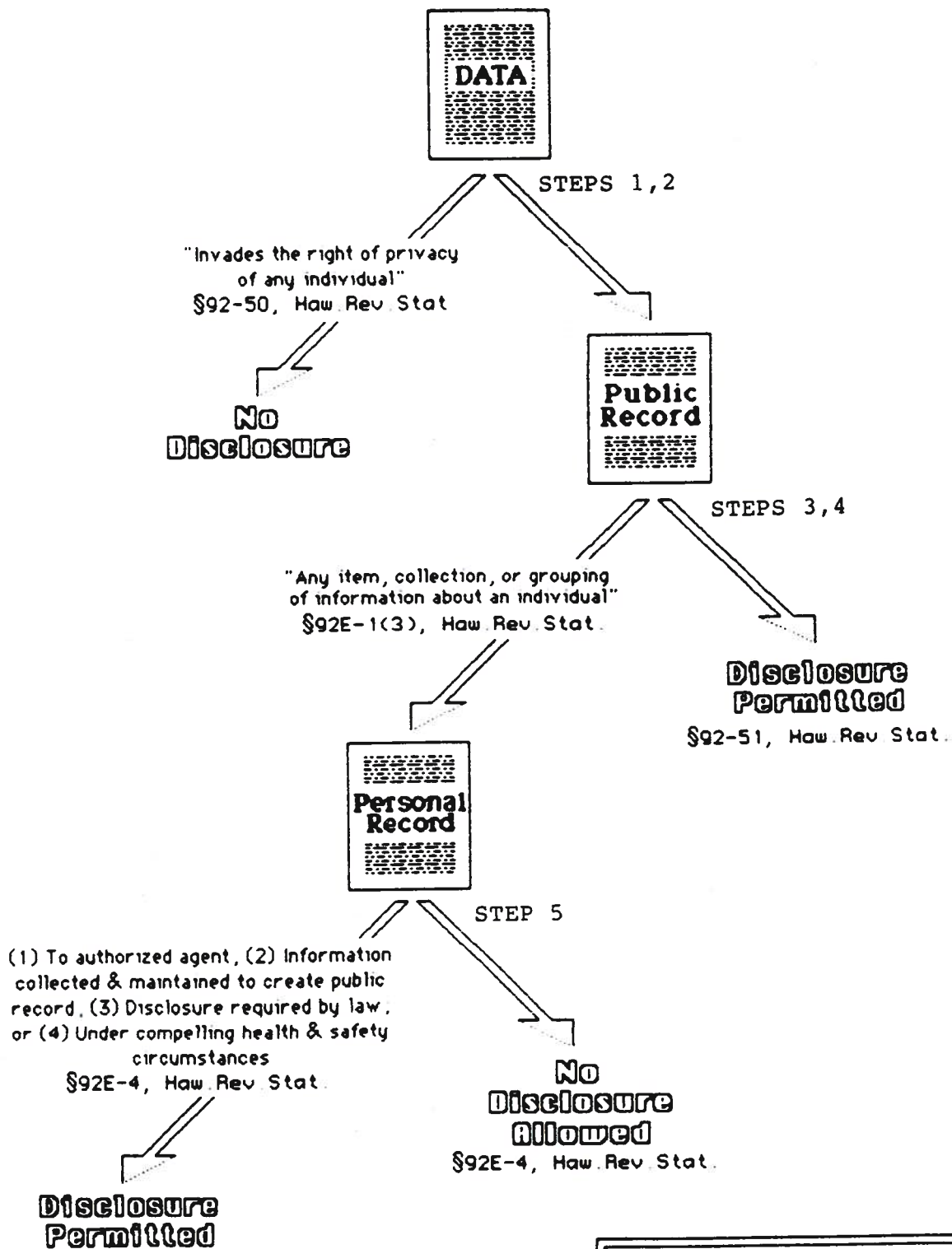
2. Does it "invade the right of privacy of an individual"? (§92-50, Hawaii Rev. Stat.) If so, then disclosure is not permitted; if not, then--

3. It is available for public inspection unless inspection is "in violation of any other state or federal law". (§92-51, Hawaii Rev. Stat.) Thus, the analysis must turn to the applicability of Chapter 92E, Hawaii Rev. Stat.--

4. Is the "public record" an "item, collection, or grouping of information about an individual that is maintained by an agency", including but not limited to "items that contain or make reference to the individual's name, identifying number, symbol, or other identifying particular assigned to the individual. . ." (§92E-1(3), Haw. Rev. Stat.) If not, then Chapter 92E does not apply; if so, however, then--

5. Is the disclosure: (1) "to a duly authorized agent of the individual to whom [the item] pertains", (2) of information "collected and maintained specifically for the purpose of creating a record available to the general public", (3) expressly permitted by statute, or (4) "pursuant to a showing of compelling circumstances affecting the health or safety of any individual." (§92E-4, Hawaii Rev. Stat.) If not, then the agency is prohibited by law from disclosing the item to the general public. [Id.]

The statutory analysis is diagrammed on the following page.



**Public Disclosure Criteria
Under Chapters 92 and 92E,
Hawaii Revised Statutes**

From the Inspection Order and the transcript of the in camera inspection (a copy of which is attached hereto as Exhibit "1" and incorporated herein by reference), it is clear that the Court restricted its inquiry to whether the settlement document was a "public record" under §92-50, Hawaii Rev. Stat. (steps 1-3, supra):

THE COURT: Let's go back on the record.

The application is made pursuant to HRS Section 92-50, 51 and 52. I will find the same to be a public record within the meaning of the scope of 92-50, and therefore, allow the inspection thereof and I only have a copy that I have fully inspected. It contains no matters which concerns the private rights of any individuals nor any matters which are not to be disclosed by reason of the personal nature of the content of the assurance of compliance. * * * [Transcript of Proceedings before the Honorable Richard Y.C. Au, Thursday, October 9, 1986, pg. 4, lines 2-10 (emphasis added).]

[See also, Inspection Order, paragraph 6.] The record does not specifically reflect application of the analysis required by Chapter 92E (steps 4-5, supra). As will be discussed below, that analysis requires that the DCCA withhold the document from public inspection.

2. The DCCA is prohibited from disclosing the settlement document by Chapter 92E

Under the broad definition of a "personal record" in §92E-1(3), Hawaii Rev. Stat., any "item, collection, or grouping of information about an individual", comes within

the scope of Chapter 92E. It is unquestionable that the settlement document pertains to Donald Tagawa and addresses the conduct of his business, and is thus a "personal record".

Since the document meets the definition of a "personal record", public disclosure is only permitted under the four circumstances set forth in §92E-4, Hawaii Rev. Stat. None of these circumstances is met here. There is no evidence before the court that the Plaintiff is either acting as an agent for Mr. Tagawa, or that disclosure of the document is necessary under "compelling circumstances affecting the health or safety" of a person. (§§92E-4(1), (4), Hawaii Rev. Stat.) On the contrary, the Plaintiff admits that its interest in the document is "only that of a member of the public." [Transcript of Proceedings, page 3, line 17.]

The Plaintiff has not cited any state or federal law which grants a right of public inspection of the document which supercedes the prohibition of Chapter 92E. (§92E-4(3), Hawaii Rev. Stat.) Finally, the Defendants have submitted unrebutted evidence that the settlement agreement was "not collected and maintained specifically for the purpose of creating a record available to the general public." [Affidavit of Alfred G. Costa, filed October 1, 1986, paragraph 3 (§92E-4(2), Hawaii Rev. Stat.).]

The Hawaii courts have repeatedly held that they are "bound by the plain, clear and unambiguous language of a statute unless the literal construction would produce an absurd and unjust result and would be clearly inconsistent with the purposes and policies of the statute." Survivors of Medeiros v. Maui Land & Pineapple, 66 Haw. 290, 296, 660 P.2d 1316, 1321 (1983). Since the expressed purpose of Chapter 92E is "to implement in part the 1978 amendment to the Hawaii State Constitution (Article I, Section 6) relating to the right of privacy" (1980 Hawaii Sess. Laws, Ch. 226, Sec. 1), the direct application of Chapter 92E in this situation will be neither "absurd or unjust".

III. CONCLUSION

Under these circumstances, the settlement agreement is not subject to disclosure as a matter of law, and the Inspection Order should be modified accordingly.

DATED: Honolulu, Hawaii, January 14, 1987.



NATHAN J. SOLT
GRANT TANIOTO

Attorneys for Defendants

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

PAINTING INDUSTRY OF	)	S.P. No. 86-0371
HAWAII MARKET RECOVERY FUND,)	
)	
Plaintiff,	)	AFFIDAVIT OF NATHAN J.
	)	SULT
vs)	
)	
RUSSEL NAGATA, DIRECTOR OF)	
COMMERCE AND CONSUMER AFFAIRS;)	
and THE STATE OF HAWAII,)	
)	
Defendants.)	
)	
)	

AFFIDAVIT OF NATHAN J. SULT

STATE OF HAWAII)	
	)	ss.
CITY & COUNTY OF HONOLULU)	

NATHAN J. SULT, having first been duly sworn upon oath, deposes and says that:

1. He is employed by the Regulated Industries Complaints Office, Department of Commerce and Consumer Affairs, State of Hawaii, as a staff attorney.

2. In that capacity, he serves as counsel for the Defendants in this action.

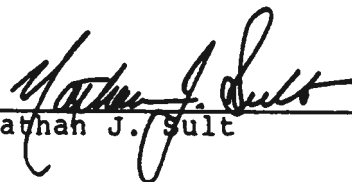
3. He has examined the document attached hereto as Exhibit "1" and certifies that it is a copy of the

Affidavit of Nathan J. Sult
Painting Industry v. Nagata
S.P. No. 86-0371

Page Two

"Transcript of Proceedings before the Honorable Richard Y.C. Au" dated October 9, 1986, and received by the Regulated Industries Complaints Office, Department of Commerce and Consumer Affairs, and that it has not been altered or amended in any manner since its receipt.

Further Affiant sayeth naught.



Nathan J. Sult

Subscribed to and sworn before me
this 15th day of January, 1987.

LS Darrelle R.A. Sambrano
Notary Public, State of Hawaii
My commission expires: 6/3/90

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

PAINTING INDUSTRY OF HAWAII)
MARKET RECOVERY FUND,)

Plaintiff,)

vs.)

SP NO. 86-0371

RUSSEL NAGATA, DIRECTOR OF)
COMMERCE AND CONSUMER AFFAIRS)
and THE STATE OF HAWAII,)

Defendants.)

TRANSCRIPT OF PROCEEDINGS

before the HONORABLE RICHARD Y.C. AU, Second Judge, Presiding,
on Thursday, October 9, 1986. Chambers conference.

APPEARANCES:

MICHAEL A. LILLY, ESQ.

For the Plaintiff

GRANT TANIMOTO, ESQ.

For the Defendants

REPORTER:

LORI GROVE, C.S.R. #261
Official Reporter,
First Circuit Court

State's Exhibit

1

1 THURSDAY, OCTOBER 9, 1986

10:30 O'CLOCK A.M.

2 --oOo--

3 (The clerk called the case.)

4 MR. LILLY: Michael Lilly for the Painting
5 Industry, Your Honor.

6 MR. TANIMOTO: Grant Tanimoto on behalf of the
7 Defendants in this case.

8 THE COURT: This matter in chambers is convened
9 for the purpose of allowing the Court pursuant to what had
10 previously indicated to inspect an assurance of compliance
11 provided by the State of Hawaii with respect to the
12 responsible managing employee contractor's license of
13 Donald Tagawa.

14 I'm inclined to release the same, Mr. Tanimoto.
15 Do you wish to state any argument on the record at this time?

16 MR. TANIMOTO: Basically we would submit based
17 upon memorandum and note again that we do not believe that
18 this document is public record and subject to disclosure
19 and on that basis again we would urge the Court not to release
20 the document. I have nothing further.

21 THE COURT: Mr. Lilly, do you wish to add
22 anything for the record?

23 MR. LILLY: No, Your Honor, we're relying on
24 92-50 to the extent that this document does not contain
25 information of a personal nature either under Chapter 92 or

1 92(e) that it's a public record, and therefore, the public
2 has a right of access.

3 MR. TANIMOTO: Your Honor, I have one last
4 comment for the record. To elaborate further on a point
5 we do not believe that this is a public record, we would
6 submit that this document is not required to be made by law
7 nor is it received or is it required to be received for
8 filing and on that basis we would submit it is not a public
9 record.

10 MR. LILLY: Well, under 92-50 it is a public
11 record if it is a state document on which an entry has been
12 made or a state document which has been received for filing.
13 Under either of those it's a public record, Your Honor.

14 THE COURT: I'm just wondering, Mr. Lilly, the
15 applicant interest in the public disclosure of the assurance
16 of clients.

17 MR. LILLY: Only as a member of the public,
18 Your Honor.

19 THE COURT: I see.

20 MR. LILLY: You know the Painting Industry
21 Market Recovery Fund is made up of contractors and union
22 representatives of the Painting Industry set up to insure
23 integrity in the contracting industry but their interest
24 in this case is as a member of the public.

25 THE COURT: Let's go off the record.

1 (A discussion was held off the record.)

2 THE COURT: Let's go back on the record.

3 The application is made pursuant to HRS Section
4 92-50, 51 and 52. I will find the same to be a public record
5 within the meaning of the scope of 92-50, and therefore, allow
6 the inspection thereof and I only have a copy that I have
7 fully inspected. It contains no matters which concerns the
8 private rights of any individuals nor any matters which are
9 not to be disclosed by reason of the personal nature of the
10 content of the assurance of compliance. If the State intends
11 to take any appellate proceedings, I ought to, however, seal
12 the assurance of compliance for his position of the matter
13 pending the position of the matter by the public.

14 MR. TANIMOTO: Yes, Your Honor, we would ask
15 the Court to do that that it is possible that my client may
16 want to pursue by way of clarification of the Court order,
17 I would just ask what the Court has done of a balance --
18 they balance the rights of the applicants as a member of the
19 public against -- What has the Court balanced?

20 THE COURT: I have not. I have simply
21 interpreted the provisions of 92-50 and have done no balancing
22 of competing interest. I shall find the same to be an entry
23 which is made by a political official and receive of and the
24 record does not invade the right of privacy of any individual.

25 MR. TANIMOTO: And again by way of clarification,

1 Your Honor, when the Court holds that this document has been
2 received for filing, I believe the Court has also taken into
3 consideration Paragraph 3 of Mr. Costa's affidavit which is
4 attached to our memorandum and specifically states that such
5 documents are, in fact, not received for filing.

6 THE COURT: I disagree. I don't think that a
7 public official could simply on his own initiative refuse
8 the filing of document and exclude the same from the
9 provisions of 92-50. It's a legislative matter, not one for
10 the executive to tailor as he seems fit under the circumstances
11 of the case.

12 MR. LILLY: We have no --

13 THE COURT: I'll, therefore, ask that the
14 issuance of compliance be received as Court's Exhibit A and
15 receive pending further order of this Court or Appellate
16 Court.

17 MR. LILLY: I think I'll prepare an order and
18 if counsel agrees with it, perhaps the appeal and sealing
19 thereafter won't be necessary but if so, then we'll have to
20 proceed with what happens after that, but I'll go ahead and
21 prepare an order.

22 THE COURT: Okay. Thank you.

23 MR. TANIMOTO: Thank you, Your Honor.

24 (Proceedings were concluded at 10:43 a.m.)
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

STATE OF HAWAII)
) ss
CITY AND COUNTY OF HONOLULU)

I, LORI GROVE, C.S.R. #261, Official Reporter
of the First Circuit Court, do hereby certify that the
foregoing pages are a true, complete and correct transcription
of my stenographic notes in the above-entitled matter.

Dated this 14th day of October 1986.



OFFICIAL REPORTER

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

PAINTING INDUSTRY OF	)	S.P. No. 86-0371
HAWAII MARKET RECOVERY FUND,)	
)	
Plaintiff,	)	NOTICE OF HEARING MOTION
	)	& CERTIFICATE OF SERVICE
vs)	
)	
RUSSEL NAGATA, DIRECTOR OF)	
COMMERCE AND CONSUMER AFFAIRS;)	
and THE STATE OF HAWAII,)	
)	
Defendants.)	
)	
)	

NOTICE OF HEARING MOTION

TO: MICHAEL A. LILLY, Esq.
Pauahi Tower, Ste. 1100
1001 Bishop Street
Honolulu, Hawaii 96813

Attorney for Plaintiff

NOTICE IS HEREBY GIVEN that the Defendants' Motion for Reconsideration of Order Allowing Inspection of Department of Commerce and Consumer Affairs Records shall come on for hearing before the Honorable RICHARD Y.C. AU, Judge of the above-entitled Court, in his Courtroom in the Kaahumanu Hale, Honolulu, Hawaii, at 3:00 o'clock p.m. on February 6, 1987, or as soon thereafter as counsel may be heard.

DATED: Honolulu, Hawaii, January 15, 1987.




NATHAN J. SULT
GRANT TANIMOTO

Attorneys for Defendants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Defendants' Motion for Reconsideration of Order Allowing Inspection of Department of Commerce and Consumer Affairs Records was served upon Michael Lilly, Esq., attorney for the Plaintiff, at 1100 Pauahi Tower, 1001 Bishop Street, Honolulu, Hawaii, on January 15, 1987, by means of hand delivery.

DATED: Honolulu, Hawaii, January 15, 1987.



NATHAN J. SULT
GRANT TANIMOTO

Attorneys for Defendant

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

1ST CIRCUIT COURT
STATE OF HAWAII
FILED

1987 JAN -5 PM 2:53

M. TANAKA
CLERK

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

PAINTING INDUSTRY OF	)	S.P. No.: 86-0371
HAWAII MARKET RECOVERY FUND)	
	)	ORDER ALLOWING INSPECTION
Plaintiff,	)	OF CERTAIN STATE OF HAWAII
	)	DEPARTMENT OF COMMERCE AND
vs.	)	CONSUMER AFFAIRS RECORDS
)	
RUSSELL NAGATA, DIRECTOR OF)	
COMMERCE AND CONSUMER AFFAIRS;)	
and THE STATE OF)	
HAWAII)	
)	
Defendants.)	

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

RECEIVED JAN 8 1987
DEPARTMENT OF
ATTORNEY GENERAL
STATE OF HAWAII

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 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 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;

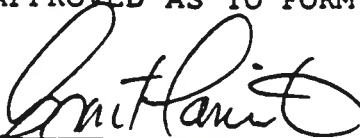
7. Accordingly, the Plaintiff's Application is hereby GRANTED and the Defendants are ordered to produce the settlement for inspection by Plaintiff;

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

-3-

(Painting Industry vs Russell Nagata, DCCA & State of Hawaii - ORDER
ALLOWING INSPECTION OF CERTAIN STATE OF HAWAII DEPARTMENT OF COMMERCE AND CONSUMER
AFFAIRS RECORDS. SP. No. 86-0371)

150

CORINNE K. A. WATANABE 1429
Attorney General
State of Hawaii

1986 OCT -1 PM 12 18

GRANT TANIMOTO 2630
Deputy Attorney General
Kekuanao'a Building, Room 200
465 South King Street
Honolulu, Hawaii 96813
Telephone: 548-6744

~~M. TANAKA~~
CLERK

Attorneys for Defendant

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;)
STATE OF HAWAII,)
)
Defendants.)
)
)
)
)

S.P. No.: 86-0371

MEMORANDUM IN OPPOSITION TO
APPLICATION FOR AN ORDER
ALLOWING INSPECTION OF CERTAIN
STATE OF HAWAII DEPARTMENT OF
COMMERCE AND CONSUMER AFFAIRS
RECORDS; AFFIDAVIT OF ALFRED
COSTA; AFFIDAVIT OF NATHAN
SULT; CERTIFICATE OF SERVICE

DATE: FRIDAY, OCTOBER 3, 1986
TIME: 1:30 P.M.
JUDGE: ROBERT KLEIN

MEMORANDUM IN OPPOSITION TO APPLICATION FOR AN ORDER
ALLOWING INSPECTION OF CERTAIN STATE OF HAWAII
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS RECORDS

COMES NOW, RUSSEL NAGATA, Director of Commerce and
Consumer Affairs, and the STATE OF HAWAII (hereinafter
collectively referred to as the "State"), by and through their
undersigned attorneys, and hereby files this Memorandum in
Opposition to Plaintiff's Application for an Order Allowing
Inspection of Certain State of Hawaii Department of Commerce and

Consumer Affairs Records.

I. STATEMENT OF PROCEDURAL AND FACTUAL BACKGROUND

This is a proceeding arising from a request dated October 17, 1985 for an investigation from Walter Oda ("Oda") to Alfred Costa, Chief Enforcement Officer of the Regulated Industries Complaints Office ("RICO"). Oda alleged that Metropolitan Maintenance, Inc. ("Metropolitan") had done work for the State of Hawaii and had filed falsified payroll information in controvention of HRS Chapter 104 . The request for an investigation, apparently, was based upon the fact that Metropolitan was a licensed contractor pursuant to HRS chapter 444 and the Regulated Industries Complaints Office, pursuant to HRS section 26-9(g), was vested with the authority to investigate complaints regarding licensed contractors. Oda alleged in his letter that the falsification of payroll information was a violation of HRS section 104-3(a) and thus was grounds for the revocation or suspension of Metropolitan's license pursuant to HRS section 444-17(7).

By letter dated November 15, 1985, RICO informed Oda that RICO would not intervene at that time pending the outcome of an investigation by the Department of Labor and Industrial Relations (hereinafter "DLIR").

By letter dated June 18, 1986, Oda represented that Metropolitan had been found in violation of certain sections in the State law and again urged that those violations were cause for suspension or revocation of its license. By letter dated

July 21, 1986 Oda was advised that following an investigation and review by RICO Metropolitan had agreed to settle the matter with RICO. By letter dated August 11, 1986, counsel for Industrial Relations Consulting Corporation and the Painting Industry Marketing Recovery Fund requested a copy of the settlement entered into between RICO and Metropolitan and Donald Tagawa. This request was subsequently denied.

In a separate but related proceeding, an order was entered in S.P. No. 86-0291 Allowing Inspection of Certain State of Hawaii Department of Labor and Industrial Relations Records. They were required to provide, in pertinent part, the findings of wage and hour violations by Metropolitan.

II. ARGUMENT

Plaintiffs then filed this application with the court, apparently seeking a copy of the settlement entered into between RICO and Metropolitan and Donald Tagawa.

HRS sections 92-50 to 92-52 provides for public access to public records. Conversely, HRS Chapter 92E provides for the confidentiality of personal records. These two competing interests obviously must be carefully balanced and the State submits that in this case the records sought by Plaintiff should not be disclosed.

Plaintiffs of page 7 of their memorandum quote partially from the statute and allege that the settlement agreement is on public record. This claim, however, is refuted

when the entire definition is revealed. HRS section 92.50 provides as follows:

As used in this part, "public record" means any written or printed report, book or paper, map or plan of the State 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.

Clearly the State is not required to receive settlement agreements for filing and thus these agreements are not public records as Plaintiffs urge.

Assuming arguendo that what Plaintiff seeks herein is what they sought in a letter dated August 11, 1986, i.e. "a copy of the resolution of the Metropolitan Maintenance matter," and further assuming for the moment that a settlement agreement between RICO and a licensee is a public record as Plaintiff contends at page 7 of its memorandum, there are numerous exceptions to disclosure. Thus, public records do not include records which invade the right of privacy, HRS section 92-50; where such inspection is in violation of any state or federal law, HRS section 92-51; when they pertain to proposed litigation by or against the State or its subdivisions, HRS section 92-51; or records which do not relate to a matter in violation of law and are deemed necessary for the protection of the character and reputation of any person. HRS section 92-51.

HRS Chapter 92E implements the right of privacy which is set forth in Article 1 section 6 of the Constitution of the State of Hawaii. HRS chapter 92E, generally, provides for an individual's access to his own personal record, public access to personal records, the guidelines for disclosure of personal records to other agencies. The Director submits that the relevant provision applicable in this case is HRS section 92E-4 relating to limitation of public access to personal records which provides as follows:

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.

The Director submits that Plaintiffs seek personal records as defined in HRS § 92E-1. Moreover Plaintiffs are unable to bring themselves within any of the enumerated exceptions in HRS section 920-4. Plaintiff clearly is not a duly authorized agent of Metropolitan or Metroplitan's shareholders or officers. As indicated in the attached affidavit of Alfred Costa, settlement agreements are not collected and maintained specifically for the purpose of creating a record available to

the general public. There is no statute that expressly authorizes the disclosure that Plaintiff requested and further there is no showing of compelling circumstances affecting the health or safety of any individual. Clearly Plaintiff has not met its burden.

Moreover, upon a closer examination the authorities cited in Plaintiff's memorandum the Director submits that this case is clearly distinguishable since the cases cited therein relate merely to disclosure of names and addresses. In Re Request of Rosier, 717 P.2d 1353 (Wash. banc 1986) (Disclosure of names, addresses and electrical usage of customers). Int'l. Bd. of Elec. Workers v. United States Dept. of Hous. & Urban Dev., 593 F.Supp 542 (D.D.C. 1984) (Disclosure of names and wages listed on certified payroll reports), Hubert v. Harte-Hanks Tex. Newspapers, Inc., 652 S. W.2d 546 (Tex. App. 1983) (Disclosure of names and qualifications of university presidential candidates), Mid-America Television Co. v. Peoria Hous. Auth., 417 N.E. 2d 210 (Ill. 1981) (Disclosure of names, addresses and amounts of federal funds received by Peoria Hous. Auth.), Doe v. Sears, 263 S.E. 2d 119 (Ga. 1980) (Inspection of City Housing Authority's list of names, addresses and sources of income and rents owned by tenants), Penokie v. Mich. Technological Univ., 287 N.W. 2d 304 (Mich. 1979) (Disclosure of names and salaries of University employees).


Further as indicated in the attached affidavit of Nathan Sult, Esq. the agreement Plaintiffs are seeking was

executed with the understanding that it would not be released, except under circumstances not relevant in this proceeding.

Finally, the State would note that HRS Chapter 104 was enacted by Act 133, 1955 Hawaii Session Laws. Senate Stand. Com. Rep. No. 318 states that it was patterned after the Davis Bacon Act. The apparent effect of this law is to ensure that nonunion employers who have contracts with the State pay equivalent "minimum wages" to its employees that union employers pay its employees. Following the violations and sanctions by the Department of Labor, Plaintiffs are now, apparently, seeking to put further pressure on Metropolitan. Further they may be attempting to "second guess" the administrative expertise at RICO in settling the case. The court, however, should not permit this given the strong presumption of validity accorded to administrative agencies acting within their sphere of expertise. In re Hawaiian Electric Light Co., 60 Haw. 625, 630, 594 P.2d 612, 617 (1979).

DATED: Honolulu, Hawaii, OCTOBER 1, 1986.

CORINNE K. A. WATANABE
Attorney General
State of Hawaii



Grant Tanimoto
Deputy Attorney General

Attorney for Defendant

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

PAINTING INDUSTRY OF	)	S.P. No.: 86-0371
HAWAII MARKET RECOVERY FUND,)	
	)	AFFIDAVIT OF ALFRED G. COSTA
Plaintiff,)	
)	
vs.)	
)	
RUSSEL NAGATA, DIRECTOR OF)	
COMMERCE AND CONSUMER AFFAIRS;)	
THE STATE OF HAWAII,)	
)	
Defendants.)	

AFFIDAVIT OF ALFRED G. COSTA

STATE OF HAWAII)	
	)	SS.
CITY AND COUNTY OF HONOLULU)	

ALFRED G. COSTA, being first duly sworn upon oath, deposes and says that:

1. I am the Complaints and Enforcement Officer of the Regulated Industries Complaints Office, Department of Commerce and Consumer Affairs, State of Hawaii.

2. In that capacity, I am familiar with the operating procedures of the Regulated Industries Complaints Office.

3. Settlement agreements between the Regulated Industries Complaints Office and Respondents to complaints filed with the

Painting Industry of
Hawaii Market Recovery Fund
vs. Russel S. Nagata, et al.
Affidavit of Alfred G. Costa
Page 2

Regulated Industries Complaints Office are not collected and
maintained specifically for the purpose of creating a record available
to the general public.

Further Affiant sayeth naught.

Alfred G. Costa
ALFRED G. COSTA

Subscribed and sworn to before me
this 15 day of October, 1986.

Cynthia M. Sabatelli
Notary Public, State of Hawaii

My commission expires: 7/21/89

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

PAINTING INDUSTRY OF HAWAII	)	S.P. No. 86-0371
MARKET RECOVERY FUND,)	
	)	AFFIDAVIT OF NATHAN J. SULT
Plaintiff,)	
)	
vs.)	
)	
RUSSEL NAGATA, DIRECTOR OF)	
COMMERCE AND CONSUMER)	
AFFAIRS; THE STATE OF)	
HAWAII,)	
)	
Defendants.)	

AFFIDAVIT OF NATHAN J. SULT

STATE OF HAWAII)	
	)	SS.
CITY AND COUNTY OF HONOLULU)	

NATHAN J. SULT, having first been duly sworn upon oath, deposes and says that:

1. He is an attorney-at-law licensed to practice before all courts of the State of Hawaii.

2. He is and at all times relevant hereto was employed as a Staff Attorney by the Regulated Industries Complaints Office, Department of Commerce and Consumer Affairs, State of Hawaii.

3. In that capacity, he is one of the persons who may negotiate and enter into settlements on behalf of the Regulated Industries Complaints Office with persons

Painting Industry of Hawaii Market
Recovery Fund v. Russel Nagata, et al.

Affidavit of Nathan J. Sult
Page Two

against whom complaints have been lodged with the
Regulated Industries Complaints Office.

4. As part of his duties, he negotiated and entered into a settlement agreement on behalf of the Regulated Industries Complaints Office with Donald Tagawa and Metropolitan Maintenance in case number CLB 85-345.

5. As part and parcel of the settlement agreement with Donald Tagawa and Metropolitan Maintenance, it was understood that the terms of the settlement agreement would not be made a public record, but that the settlement agreement could be made a matter of public record in the event that the Regulated Industries Complaints Office determined that a violation of the terms of the agreement had occurred within five years of the date of the agreement.

6. Upon information and belief, the Regulated Industries Complaints Office has not to date determined that a violation of the terms of the agreement has occurred.

7. The undersigned was not instructed to provide Donald Tagawa or Metropolitan Maintenance with any particular type of settlement or any particular sanction, and to his knowledge never communicated with Donald Tagawa or any other person directly connected with Metropolitan

Painting Industry of Hawaii Market
Recovery Fund v. Russel Nagata, et al.

Affidavit of Nathan J. Sult
Page Three

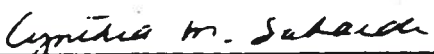
Maintenance at any time prior to the assignment of case number CLB 85-345 to him or after the signing of the settlement agreement.

8. It is the opinion of the undersigned that the ability to negotiate settlement agreements which are not automatically made a public record is an important tool in the satisfactory resolution of complaints filed with the Regulated Industries Complaints Office, without which many cases would have to be closed with no assurance of present and future compliance with applicable laws and regulations.

Further Affiant sayeth naught.


NATHAN J. SULT

Subscribed and sworn to before me
this 1st day of October, 1986.


Notary Public, State of Hawaii

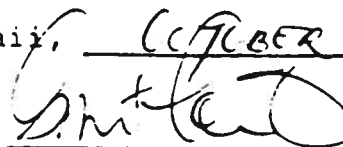
My commission expires: 7/21/89

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Motion was duly served on the following party at his last known address by hand delivery.

Michael A. Lilly, ESQ.
GREEN, NING, LILLY & JONES
Pauahi Tower Suite 1100
1001 Bishop Street
Honolulu, Hawaii 96813

DATED: Honolulu, Hawaii, OCTOBER 1, 1986.



GRANT TANIMOTO

HOWARD R. GREEN 927
MICHAEL A. LILLY 1681
GREEN, NING, LILLY & JONES
Pauahi Tower Suite 1100
1001 Bishop Street
Honolulu, Hawaii 96813
Telephone: (808) 528-1100

Attorneys for Plaintiff

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

PAINTING INDUSTRY OF	)	S.P. No.: <u>86-0371</u>
HAWAII MARKET RECOVERY FUND)	
	)	APPLICATION FOR AN ORDER
Plaintiff,	)	ALLOWING INSPECTION OF
	)	CERTAIN STATE OF HAWAII
vs.	)	DEPARTMENT OF COMMERCE AND
	)	CONSUMER AFFAIRS RECORDS;
RUSSELL NAGATA, DIRECTOR OF	)	MEMORANDUM IN SUPPORT OF
COMMERCE AND CONSUMER AFFAIRS;	)	APPLICATION; AFFIDAVIT OF
and THE STATE OF HAWAII	)	WALTER T. ODA; EXHIBITS
	)	A - F; and NOTICE OF MOTION
Defendants.)	

APPLICATION FOR AN ORDER ALLOWING INSPECTION
OF CERTAIN STATE OF HAWAII DEPARTMENT OF
COMMERCE AND CONSUMER AFFAIRS RECORDS

COMES NOW The Painting Industry of Hawaii Market Recovery Fund ("Painting Industry") and asks this Court for an order, pursuant to Hawaii Revised Statutes Section 92-52, directing the Director of the State of Hawaii Department of Commerce and Consumer Affairs ("DCCA") to make available to it certain public records pertaining to DCCA's investigation of alleged contractor license law violations by Metropolitan Maintenance, Inc.

INTIFICATE OF SERVICE ATTACHED

164

RECEIVED
SEP 13 3 03 PM '86

RECEIVED SEP 23 1986

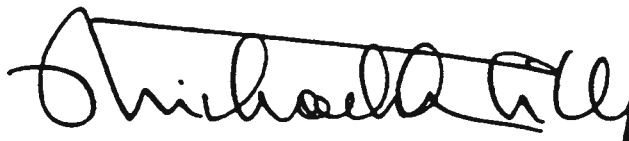
The Basis for this Application is that DCCA denied the Painting Industry access to the public records. As the attached affidavit of Walter Oda states, the State has "maintained a virtual 'blackout' of information regarding its investigation of contractor license violations by contractors in public works contracts".

The State's refusal was not for just and proper cause, violated the spirit and intent of Chapter 92 and severely infringed upon the public's right to know.

This application is based upon Hawaii Revised Statutes, Sections 92-50, 92-51, and 92-52, the Affidavit of Walter T. Oda, the attached Memorandum of Law, and Exhibits A through F.

DATED: Honolulu, Hawaii

September 18, 1986


MICHAEL A. LILLY
Attorney for the Applicant

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

PAINTING INDUSTRY OF	)	S.P. No.: _____
HAWAII MARKET RECOVERY FUND)	
)	
Plaintiff,)	
)	
vs.)	
)	
RUSSELL NAGATA, DIRECTOR OF	)	MEMORANDUM IN SUPPORT OF
COMMERCE AND CONSUMER AFFAIRS;	)	APPLICATION
and THE STATE OF HAWAII)	
)	
Defendants.)	
_____)	

MEMORANDUM IN SUPPORT
OF APPLICATION

I.

INTRODUCTION

The Painting Industry has a right to review the public records of DCCA with respect to its findings of numerous contractor license violations by Metropolitan Maintenance, Inc. ("Metropolitan") in public works contracts.

The basis upon which the Painting Industry requests the findings 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 only serves to trivialize 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 documents sought by the Painting Industry are clearly within the definition of "public records" under Chapter 92-52, and should be made open to the public.

Failure to permit access in this case would violate the spirit and letter of Hawaii's "open government" law.

II.

FACTS

The salient facts pertinent to this case began with the Painting Industry's discovery of apparent fraud in the certified payroll affidavits filed with the State by Metropolitan.

The Painting Industry filed a complaint with DCCA and requested that it investigate whether Metropolitan violated the contractor licensing laws (exhibit A).

The DCCA initially declined to take any action (exhibit B) until the Department of Labor and Industrial Relations ("DLIR") completed its investigation into wage and hour violations arising out of the payroll affidavits.

Later, after DLIR completed its investigation, the Painting Industry again asked DCCA to investigate whether Metropolitan violated the contractor licensing laws (exhibit C).

Subsequently, the DCCA completed its investigation and entered into a settlement agreement with Metropolitan (exhibit D). On August 11, 1986, the attorney for the Painting Industry asked for a copy of the settlement agreement (exhibit E).

In response, the DCCA contended that the settlement agreement was a "personal record" and declined to produce it (exhibit F).

III.

OPEN GOVERNMENT

The post-Watergate years have seen an insurgence of public disclosure laws throughout the nation. The purpose of those laws has been to provide the public with a mechanism by which they "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, 105 Wash. 2d 606 (Wash. 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. Hawaii

Revised Statutes, 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.

Thus, 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 public disclosure laws elsewhere. See, In Re Request of Rosier, 717 P.2d 1353 (Wash. banc 1986).

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". Department of the Air Force v. Rose, 425 U.S. 352, 361 (1976).

Thus, disclosure of names of employees of a federal contractor was permitted because of the overriding public interest in access to government operations:

Under these circumstances, the public interest in disclosure outweighs any personal privacy interest, and disclosure is not 'clearly unwarranted'.

Intern. B. of Elec. v. U. S. Department of H. & U. Dev., 593 F. Supp. 542, 545 (D.D.C. 1984)

Chapter 92 and the FOIA are both 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., supra at 545. 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 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).

Chapter 92 should be viewed as providing members of the public the same level of access as the FOIA, fettered only by proper 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.

That 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.

IV.

THE STATE INVESTIGATIVE REPORT ON METROPOLITAN IS A PUBLIC RECORD.

The DCCA's settlement agreement with Metropolitan is a public record because it contains information which is maintained by the State, the public disclosure of which would not violate any individual rights to privacy.

Hawaii Revised Statutes, Section 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 Painting Industry seeks to have access to the settlement agreement entered into between Metropolitan and the DCCA. The DCCA's investigation was prompted, in part, by a complaint from the Painting Industry regarding alleged fraud in the payroll affidavits submitted by Metropolitan.

Metropolitan had performed numerous public works contracts and was required to make wage and fringe benefit payments in accordance with Chapter 104. The investigation by the DCCA took nearly a year and then only after the Painting Industry urged the DCCA to take action.

The documents are public records because they are "written report[s] . . . of the State . . . which is the property thereof, and in or on which an entry has been made" H.R.S., Section 92-50.

The Legislature has declared that this law is 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 right of access to government.

In this case, Metropolitan performed work on numerous public works and was paid entirely with public funds. The DCCA entered into a settlement agreement with

Metropolitan, apparently based upon violations of state contractor licensing laws.

DCCA may argue that the Painting Industry is not entitled to information which includes the names of employees of Metropolitan because of putative rights to privacy. However, such information is not private because it involves people paid with public funds to perform a public contract. The Painting Industry is entitled to the results of the investigation 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.

Generally, courts have held that the disclosure of names and addresses does not implicate a privacy interest. See, Annot., Publication of Addresses as Well as Names of Persons as Invasion of Privacy, 84 A.L.R. 3d 1159 (1978); and 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).

The Supreme Court of Washington reviewed a statute similar to Hawaii's. It held that the disclosure of names and addresses contained in the records of a public utility district have been held to be public and therefore fully discloseable. In Re Request of Rosier, supra at 1358.

The 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

Id., at 1356.

The Court recognized that, like H.R.S. Chapter 92, limited rights to privacy "must be considered and accommodated." *Id.*, at 1356. The test it applied in balancing the public interest in disclosure and an individual's private interest was whether the 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. And even "highly offensive" information may not preclude release. *Id.* 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).

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).

In this case, no personal privacy considerations exist. The information sought deals only with alleged contractor licensing law violations by a contractor performing 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.

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 in an honest and impartial method.

V.

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.

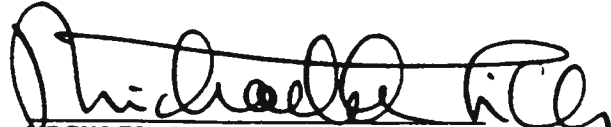
Thus, the basis upon which the Painting Industry requests the relevant documents is soundly rooted in law as well as in legislative intent. By opening government to public scrutiny, it also serves to improve government operations, reduce distrust by the public in government decision-making, maintain 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 serves to trivialize 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 documents sought by the Painting Industry are "public records" and should be made open to the public.

DATED: Honolulu, Hawaii

September 18, 1986


MICHAEL A. LILLY
Attorney for the Applicant

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

PAINTING INDUSTRY OF	)	S.P. No.: _____
HAWAII MARKET RECOVERY FUND)	
)	
Plaintiff,	)	AFFIDAVIT OF WALTER ODA
)	
vs.)	
)	
RUSSELL NAGATA, DIRECTOR OF)	
COMMERCE AND CONSUMER AFFAIRS;)	
and THE STATE OF HAWAII)	
)	
Defendants.)	
_____)	

STATE OF HAWAII)
) SS
CITY & COUNTY OF HONOLULU)

AFFIDAVIT OF
WALTER T. ODA

WALTER T. ODA, being first duly sworn on oath,
deposes and says that:

1. I make this affidavit from my own personal
knowledge in my capacity as a consultant to the Painting
Industry of Hawaii Market Recovery Fund ("Painting Industry");

2. Among other things, the Painting Industry is
vitally concerned about the integrity of the painting
contracting industry and public works contracts; however, the
State of Hawaii has maintained a virtual "blackout" of

information regarding its investigation of contractor license violations by contractors in public works contracts;

3. I filed a complaint with the Department of Commerce and Consumer Affairs regarding the Painting Industry's discovery of apparent fraud in the certified payroll affidavits filed with the State by Metropolitan Maintenance, Inc. ("Metropolitan")(exhibit A);

4. In response, DCCA declined to take action (exhibit B) until the Department of Labor and Industrial Relations ("DLIR") completed its investigation into wage and hour violations arising out of the affidavits;

5. Later, after DLIR completed its investigation, the Painting Industry again asked DCCA to investigate whether Metropolitan violated the contractor licensing laws (exhibit C);

6. Subsequently, DCCA completed its investigation and entered into a settlement agreement with Metropolitan (exhibit D); On August 11, 1986, my attorney asked for a copy of the settlement agreement (exhibit E);

7. In response, DCCA contended that the settlement agreement was a "personal record" and declined to produce it (exhibit F);

8. The Painting Industry finally decided to bring this Application because it believes that, as a member of the general public, it has been denied access to information regarding the decision-making powers of government; it is not right and it is not fair for the public to be treated so

indifferently by people whose salaries are paid by taxpayers' funds.

FURTHER AFFIANT SAYETH NAUGHT.


WALTER T. ODA

Subscribed and sworn to before me
this 26 day of AUGUST, 1986.


NOTARY PUBLIC, STATE OF HAWAII

My commission expires: 5-5-90

L.S.



Century Center, Suite 3-262 / 1750 Kalakaua Ave. / Honolulu, Hawaii 96826

AN INDUSTRIAL RELATIONS CONSULTANT CORPORATION

October 17, 1985

(808) 942-3786

Mr. Alfred G. Costa
Division Administrator
Regulated Industries Complaint Office
335 Merchant Street, Room 244
Honolulu, Hawaii 96813

Dear Mr. Costa:

Metropolitan Maintenance, Inc., has just completed its contract with the Department of Accounting and General Services, State of Hawaii, on the Exterior Painting, Solomon Elementary School project.

Attached herewith are copies of certified payroll affidavits which were filed weekly in compliance with Section 104-3 HRS. Also attached are copies of Confidential Disclaimers filed by two former employees who contends that they did not perform any painting work, they did not work on the job in question, nor were they compensated at the rates reported in the affidavits.

The falsification of payroll information is a violation of Section 104-3(a) HRS. Consequently, any willful violation of State law is cause for suspension or revocation of the contractor's license, as prescribed in Section 444-17(7) HRS.

In order to preserve the competitive position of legitimate painting contractors who are complying with the requirements of law, may we, in behalf of the Fair Trades Practices Committee of the Painting Industry in Hawaii, respectfully request that an investigation be conducted and appropriate action be taken.

May we also prevail upon you to keep us advised of your findings and disposition of this matter.

Respectfully,

IRC, INC


WALTER T. OKA
President

Encls.

18.1

EXHIBIT A

GEORGE A. ARIYOSHI
GOVERNOR

RUSSEL S. NAGATA
DIRECTOR

ALFRED G. COSTA
COMPLAINTS AND
ENFORCEMENT OFFICER



STATE OF HAWAII
REGULATED INDUSTRIES COMPLAINTS OFFICE
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS

Nov. 15, 1985

OAHU OFFICE
P. O. BOX 2396
HONOLULU, HI 96804

HILO OFFICE
P. O. BOX 424
HILO, HI 96721

KONA OFFICE
P. O. BOX 130
CAPTAIN COOK, HI 96704

MAUI OFFICE
P. O. BOX 818
WAILUKU, MAUI, HI 96793

KAUAI OFFICE
P. O. BOX 446
LUNUE, KAUAI, HI 96766

Walter T. Oda
Century Center, Ste. 3-262
1750 Kalakaua Ave.
Honolulu, HI 96826

Dear Mr. Oda:

Re: Your Complaint Against
Metropolitan Maintenance, Inc.
Case No. 85-1266-CLB-345

Our preliminary investigation based on your complaint against the respondent has been completed. The results were reviewed with the following determination:

1. The Regulated Industries Complaints Office declines to intervene in this matter until after the Department of Labor and Industrial Relations takes any appropriate disciplinary action and we are subsequently notified of the results. Therefore, we are closing this case and no further action will be taken.
2. May we suggest that you consider contacting the Department of Labor and Industrial Relations and discuss the subject of your complaint with them. You may also wish to discuss this issue with the Department of Accounting and General Services.

If you have any questions, please feel free to contact me at 548-7079. Please refer to the above case number in any future correspondence.

Thank you for sharing your concern with us.

Very truly yours,

Randy Bisho
RANDY BISHO
Intake Specialist

RB:d
cc: Metropolitan Maintenance, Inc.

182

EXHIBIT B



Century Center, Suite 3-262 / 1750 Kalakaua Ave. / Honolulu, Hawaii 96826

AN INDUSTRIAL RELATIONS CONSULTANT CORPORATION

June 18, 1986

(808) 942-3786

Mr. Randy Bisho
Intake Specialist
Regulated Industries Complaints Office
P. O. Box 2399
Honolulu, Hawaii 96804

Dear Mr. Bisho:

RE: Metropolitan Maintenance, Inc.
Case No. 85-1266-CLB-345

We wrote to you on October 17, 1985 and requested an investigation be conducted, and appropriate action be taken, against Metropolitan Maintenance, Inc., for violation of Section 444-17 (7) HRS.

We provided you with copies of certified payroll affidavits as well as disclaimers of two former employees who contended that they did not perform any painting work, they did not work on the job in question, nor were they compensated at the rates reported in the affidavits.

You responded to our request on November 15, 1985 and advised that RICO declines to intervene in this matter until after the Department of Labor and Industrial Relations takes any appropriate disciplinary action and you are subsequently notified of the results.

We have been advised by Mr. Robert C. Gilkey, Director, Department of Labor and Industrial Relations, State of Hawaii, that the Enforcement Division concluded its investigation. Furthermore, if the Department of Commerce and Consumer Affairs decides to investigate our complaint against Metropolitan Maintenance, Inc., under Chapter 444, he will be happy to cooperate with you.

We understand that the investigation extended beyond the Solomon Elementary School project we cited and that it included the Ala Wai Elementary School, Heeia Elementary School, Farrington High School, Fern Elementary School, as well as a couple of City & County of Honolulu projects. We also understand that the contractor was found in violation of the following sections of the law:

1. Section 104-2 (b) in failing to pay proper prevailing wage rates;
2. Section 104-2 (c) in failing to pay overtime for work performed on a Saturday, Sunday or State holiday;
3. Section 104-2 (d) (1) in failing to pay the full amount of wages earned each week on a timely basis;

182
EXHIBIT C

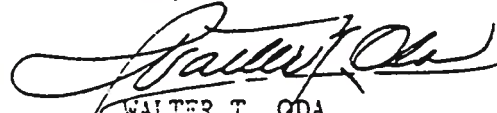
Mr. Randy Bisho
Intake Specialist
June 18, 1986
Page 2

4. Section 104-3 (a) in failing to submit correct and complete certified copies of payrolls;
5. Section 104-3 (b) in failing to maintain and preserve payroll records for all laborers and mechanics who worked on the project;
6. Section 388-7 (4) in failing to provide a written record of earnings and deductions to each employee at every payday;
7. Section 390-2 in gainfully employing uncertified minors and in allowing a minor to be employed in an occupation deemed to be hazardous by the Director of Labor.

The blatant disregard to statutory requirements is cause for suspension or revocation of the contractors license. Therefore, may we, in behalf of the Fair Trades Practices Committee of the Painting Industry of Hawaii, reactivate our complaint against Metropolitan Maintenance, Inc. Then too, we would also like to prevail upon you to keep us advised of your findings and disposition of this matter.

Respectfully,

IRC, INC.



WALTER T. ODA
President

WTO: joy

GEORGE R. ARIYOSHI
GOVERNOR

RUSSEL S. NAGATA
DIRECTOR

ALFRED G. COSTA
COMPLAINTS AND
ENFORCEMENT OFFICER



STATE OF HAWAII
REGULATED INDUSTRIES COMPLAINTS OFFICE
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS

July 21, 1986

OAHU OFFICE
P. O. BOX 2399
HONOLULU, HI 96804

HILO OFFICE
P. O. BOX 424
HILO, HI 96721

KONA OFFICE
P. O. BOX 130
CAPTAIN COOK, HI 96704

MAUI OFFICE
P. O. BOX 818
WAILUKU, MAUI, HI 96793

KAUAI OFFICE
P. O. BOX 444
LIMUE, KAUAI, HI 96766

Mr. Walter T. Oda, President
IRC, Inc.
1750 Kalakaua Avenue, Ste. 3-262
Honolulu, HI 96826

Re: Your complaint against Metropolitan
Maintenance, Inc. and Donald Tagawa,
Our Case No. CLB 85-345

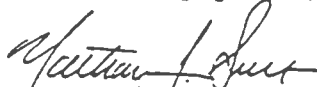
Dear Mr. Oda:

Please be advised that your complaint against Metropolitan Maintenance, Inc. has been referred to me for further action. Upon receipt of your letter of June 18, 1986, additional investigation of the activities of Metropolitan Maintenance, Inc. was undertaken by this office.

Based upon the information obtained by our investigation, Metropolitan Maintenance, Inc. agreed to settle this matter with the Department of Commerce and Consumer Affairs. Although the details of the settlement are not subject to disclosure (See S 92E-4, Hawaii Revised Statutes), it is my opinion that the settlement is both equitable and will deter similar conduct by Metropolitan Maintenance in the future.

If you have any questions concerning this matter, please do not hesitate to contact the undersigned at P.O. Box 2399, Honolulu, Hawaii 96804. Thank you for your cooperation with this office in its investigation of this matter.

Very truly yours,


Nathan J. Sult
Staff Attorney

NJS:ipo

185

EXHIBIT D

GEORGE R. ARIYOSHI
GOVERNOR

RUSSEL S. NAGATA
DIRECTOR

ALFRED G. COSTA
COMPLAINTS AND
ENFORCEMENT OFFICER



STATE OF HAWAII
REGULATED INDUSTRIES COMPLAINTS OFFICE
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS

July 25, 1986

OAHU OFFICE
P. O. BOX 2399
HONOLULU, HI 96804

HILO OFFICE
P. O. BOX 424
HILO, HI 96721

KONA OFFICE
P. O. BOX 130
CAPTAIN COOK, HI 96704

MAUI OFFICE
P. O. BOX 818
WAILUKU, MAUI, HI 96793

KAUAI OFFICE
P. O. BOX 448
LIMU, KAUAI, HI 96794

Mr. Walter Oda
President, IRC, Inc.
1750 Kalakaua Avenue, Ste. 3-262
Honolulu, HI 96826

Re: Your complaint against Metropolitan
Maintenance and Donald Tagawa
Our File No.: CLB 85-345

Dear Mr. Oda:

This is to confirm our telephone conversation of July 25, 1986 regarding your complaint against Metropolitan Maintenance and Donald Tagawa.

In our conversation, you noted that you had received my letter of July 21, 1986 regarding the settlement of this matter by the Department of Commerce and Consumer Affairs ("DCCA"). You asked what the scope of the settlement was, and I explained that the Regulated Industries Complaints Office had settled the complaint under the jurisdiction of the Contractors License Board.

You requested clarification of whether the DCCA's settlement affected any action which the Department of Labor and Industrial Relations has taken or will take on this matter, and I advised you that since DCCA and the Department of Labor enforce separate areas, settlement of any claim by one does not affect the enforcement activities of the other.

If you have any questions concerning this matter, or if the above does not accurately reflect the substance of our conversation, please contact me at 548-7071.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Nathan J. Sult".
Nathan J. Sult
Staff Attorney

NJS:ipo

1816

GREEN, NING, LILLY & JONES

Attorneys at Law - A Law Corporation
1100 Paahoa Tower, 1001 East Street, Honolulu, Hawaii 96813
(808) 528-1100

Howard K. Green
Keeching Ning
Michael A. Lilly
Stephen A. Jones

MAILING ADDRESS
PO Box 3436
Honolulu, Hawaii 96807

August 11, 1986

Hon. Russell Nagata, Director
Department of Commerce and Consumer Affairs
1010 Richards Street
Honolulu, Hawaii 96813

Subject: Metropolitan Maintenance, Inc.
Case No. 85-1266-CLB-345

Dear Mr. Nagata:

I am writing on behalf of my clients, Industrial Relations Consultant Corporation ("IRCC") and the Painting Industry Market Recovery Fund.

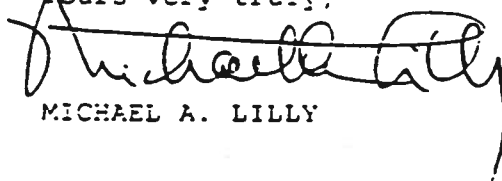
On October 17, 1985, IRCC requested an investigation be conducted into Metropolitan Maintenance, Inc., for an alleged violation of Chapter 444. My client provided your department with certified payroll affidavits and statements of two former employees of Metropolitan that they did not receive compensation at the rates reported in the affidavits.

At that time, your Department refused to investigate because the matter was being investigated by the Department of Labor and Industrial Relations. Subsequently, however, the Department of Labor completed its investigation and your department entered into a settlement with Metropolitan.

Your Department has taken the position that the settlement is protected from disclosure by Section 92E-4, Hawaii Revised Statutes. I do not agree that the results of an investigation into alleged public contract violations is protected from disclosure by that section.

On behalf of my client, I request a copy of the resolution of the Metropolitan Maintenance matter. May I kindly request a response within ten days.

Yours very truly,


MICHAEL A. LILLY

MAL:tm

187

EXHIBIT E.

AUG 21 1986



GEORGE R. ARIYOSHI
GOVERNOR

RUSSEL S. NAGATA
DIRECTOR

ALFRED G. COSTA
COMPLAINTS AND
ENFORCEMENT OFFICER

STATE OF HAWAII
REGULATED INDUSTRIES COMPLAINTS OFFICE
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS

OAHU OFFICE
P. O. BOX 2309
HONOLULU, HI 96804

HILO OFFICE
P. O. BOX 424
HILO, HI 96721

KONA OFFICE
P. O. BOX 136
CAPTAIN COOK, HI 96704

MAUI OFFICE
P. O. BOX 818
WAILUKU, MAUI, HI 96793

KAUAI OFFICE
P. O. BOX 448
LIMUE, KAUAI, HI 96706

August 20, 1986

Michael A. Lilly, Esq.
1100 Pauahi Tower
1001 Bishop Street
P.O. Box 3439
Honolulu, Hawaii 96801

Re: Complaint against Metropolitan Maintenance
Our Case No.: CLB 85-345

Dear Mr. Lilly,

I am in receipt of your letter of August 11, 1986 regarding the above-referenced matter. As you will recall, your clients, Industrial Relations Consultant Corporation (hereinafter "IRCC") and the Painting Industry Market Recovery Fund have requested a copy of the settlement which resulted from this office's investigation of Metropolitan Maintenance. This document is a "personal record" as defined in § 92E-1(3), Hawaii Revised Statutes (hereinafter "Haw.Rev.Stat.").

I must disagree with your position that §92E-4, Haw.Rev.Stat. does not apply to limit your clients' access to this document. Chapter 92E was intended to protect the privacy of personal information in the custody of governmental agencies. Attorney General Opinion 84-14 (hereinafter "AG Op."), states:

The motivating force behind the legislative action [which created Chapter 92E] was Section 6 of Article I of the Constitution of the State of Hawaii, specifically, the second sentence:

Section 6. 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.

The Legislature's intent to have Chapter 92E protect the public's right to privacy is clear from the Conference Committee Report on H.B. 501-80, which states:

188

EXHIBIT F

The purposes of this bill are to allow an individual to gain access to personal records which pertain to that person, and which are maintained by state or county agencies, to allow persons who are the subjects of personal records to amend or correct such records when they are neither accurate, timely, nor complete, and to secure the confidentiality of personal records.

You will note that open access by the public to other persons' personal records is not one of the enumerated purposes of Chapter 92E. In light of this legislative history, Attorney Generals' opinions concerning Chapter 92E have consistently taken the position that the exemptions to the privacy protection afforded must be narrowly interpreted. (See, AG Ops. 84-14, 85-23, 85-29, and 86-14.)

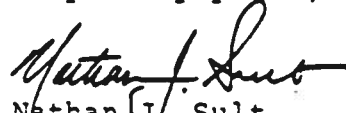
AG Op. 85-29 found that the right held by a complainant in State administrative proceedings to information which did not pertain directly to him is no greater than that of the general public. Thus, it is this office's opinion that IRCC may only obtain the settlement here if it falls within one of the exemptions to privacy set forth in §92E-4, Haw.Rev.Stat. That is not the case here.

AG Op. 84-13 narrowly construed the right of the public to disclosure of "personal records" under the 'public record' exemption of §92E-4, Haw.Rev.Stat. The statutory exemption in the same section was narrowly construed in AG Op. 86-14. Given these narrow interpretations of the exemptions to the privacy requirements of Chapter 92E, I am unable to see how your clients' request falls within the exemptions to privacy set forth in §92E-4, Haw.Rev.Stat.

For the reasons set forth above, your clients' request for a copy of the settlement between this office and Metropolitan Maintenance is declined. Your client, IRCC, has been provided with the information that this matter has been investigated and resolved by settlement, which is the full extent of information which is generally available to the public in cases such as this.

If you have any questions concerning this matter, please feel free to contact me.

Very truly yours,


Nathan J. Sult
Staff Attorney

cc: Russel S. Nagata, Director

HOWARD R. GREEN 927
MICHAEL A. LILLY 1681
GREEN, NING, LILLY & JONES
Pauahi Tower Suite 1100
1001 Bishop Street
Honolulu, Hawaii 96813
Telephone: (808) 528-1100

Attorneys for Plaintiff.

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

PAINTING INDUSTRY OF	)	S.P. No.: _____
HAWAII MARKET RECOVERY FUND)	
)	
Plaintiff,)	
)	
vs.)	
)	
RUSSELL NAGATA, DIRECTOR OF)	
COMMERCE AND CONSUMER AFFAIRS;)	
and THE STATE OF HAWAII)	
	)	NOTICE OF MOTION
Defendants.)	
_____)	

NOTICE OF MOTION

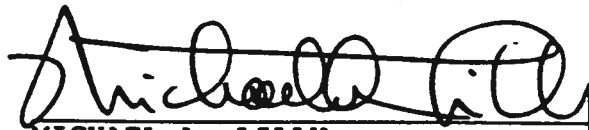
TO: RUSSELL NAGATA, Director of Commerce and Consumer
Affairs; and THE STATE OF HAWAII
1010 Richards Street
Honolulu, Hawaii 96813

Defendants:

PLEASE TAKE NOTICE that the foregoing
Motion will be presented for hearing before the Honorable

~~Robert J. Jones~~
~~Robert J. Jones~~, Judge of the above-entitled Court in his
courtroom in the Kaahumanu Hale, 777 Punchbowl Street,
Honolulu, Hawaii, on Friday, the 2nd
day of October, 1986, at 1:30 o'clock p..M., or
as soon thereafter as counsel may be heard.

DATED: Honolulu, Hawaii _____



MICHAEL A. LILLY

Attorney for Plaintiff.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document will be duly served upon the following by hand delivery or by the U.S. Mail, first-class postage affixed, addressed to their last known addresses upon filing and receipt from the Court.

Hon. Russell Nagata, Director of
Commerce and Consumer Affairs; and the
State of Hawaii
1010 Richards Street
Honolulu, Hawaii 96813

1986.

DATED: Honolulu, Hawaii,

9-18-86

Tiffany Millen

Tiffany Millen
Secretary to Michael A. Lilly.



DEPARTMENT OF BUSINESS AND ECONOMIC DEVELOPMENT

KAMAMALU BUILDING, 250 SOUTH KING ST., HONOLULU, HAWAII
MAILING ADDRESS: P.O. BOX 2339, HONOLULU, HAWAII 96804 TELEEX: 7430250 HDPED

JOHN WAIHEE
GOVERNOR
ROGER A. ULVELING
DIRECTOR
MURRAY E. TOWILL
DEPUTY DIRECTOR
BARBARA KIM STANTON
DEPUTY DIRECTOR

August 3, 1987

RECEIVED
AUG 6 7 49 AM '87
DIRECTOR OF BUSINESS
AND ECONOMIC DEVELOPMENT
CONSUMER AFFAIRS

MEMORANDUM

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

FROM: Murray E. Towill *Murray E. Towill*

SUBJECT: DBED Comments on Public Records and Privacy

Attached are DBED comments on issues of Public Records and Privacy. Comments were received from our Business and Industry Development Division, Foreign Trade Zone Division, and the Hawaii Community Development Authority.

The issues raised by the Business and Industry Development Division are of particular concern. The confidentiality of loan applications is inadequately addressed in current statutes.

MET:A0:dh

Attachments



DEPARTMENT OF PLANNING AND ECONOMIC DEVELOPMENT

KAMAMALU BUILDING, 250 SOUTH KING ST, HONOLULU, HAWAII
MAILING ADDRESS: P.O. BOX 2359, HONOLULU, HAWAII 96804 • TELEX: 7430250 HDPED

JOHN WAIHEE
GOVERNOR
ROGER A. ULVELING
DIRECTOR
MURRAY E. TOWILL
DEPUTY DIRECTOR
BARBARA KIM STANTON
DEPUTY DIRECTOR

DIVISIONS
BUSINESS AND INDUSTRY DEVELOPMENT DIVISION
ENERGY DIVISION
335 Merchant St., Room 110, Honolulu, Hawaii 96813
FOREIGN-TRADE ZONE DIVISION
Per 2, Honolulu, Hawaii 96813
LAND USE DIVISION
PLANNING DIVISION
RESEARCH AND ECONOMIC ANALYSIS DIVISION
OFFICES
ADMINISTRATIVE SERVICES OFFICE
INFORMATION OFFICE

July 1, 1987

MEMORANDUM

TO: Murray E. Towill
FROM: T. J. Smyth *T. J. Smyth*
SUBJECT: PUBLIC RECORDS AND PRIVACY

In reviewing our procedures, practices and the type of material we receive, store and disseminate, I believe we have the following concerns as to public records and privacy:

1. Business Plans, Marketing Plans, Inventions and Other New Ideas

We frequently receive unsolicited documents from persons interested in obtaining State support (or referral to other types of support) other than formal loan applications. Sometimes this information is marked "Confidential," "Proprietary" or in a similar way; often it is not, but we are asked to treat it in that fashion. This we do now. There has been little public interest in this type of information because few know we have it. Since no public money is spent on these matters (except our time and related costs), there seems to be no compelling reasons why it should be released--it effectively remains the "property" of the sender although that concept could be challenged.

The current statutes really don't deal with this, even with the extracts, quotes or other uses we might make of this material in our own correspondence as we assist the originator in getting the assistance requested.

This matter is an underlying concern in regard to privacy issues and our refusal to turn it over in a "discovery process" or upon other requests could lead us into court.

2. Of more direct concern is the matter of the same type of material (plans, ideas, etc.) in addition to financial, net worth and tax documents which are part of a formal loan application. As Doreen Shishido indicates in the attached memo and reference material, this type of material has been the subject of specific requests.

I believe that we are on solid ground in our refusal to turn over the material within a loan application. Of greater concern is the individual case or total list of loans data dealing with the "externals" of the loan, i.e., company name, amount, terms, status of payments, actions to enforce payment or obtain collateral, etc. To date, we have not provided this data either, even to legislators, unless they can show that they are acting on behalf of a constituent who is the loan applicant.

MEMORANDUM TO MURRAY E. TOWILL
July 1, 1987
Page Two

Our response to these requests for external information have been handled by leaving out applicants' names and/or aggregating the information by time, industrial sector, delinquency status, etc.

This remains a difficult area within current statutes and regulations.

TJS:jtm

Attachments



Hawaii Community Development Authority

John Waihee
Governor

Kenneth K. Takenaka
Chairman

Rex D. Johnson
Executive Director

677 Ala Moana Boulevard, Suite 1001
(808) 548-7180

Honolulu, Hawaii 96813

Ref. No.: GF ST 3.4.4

June 30, 1987

MEMORANDUM

TO: Mr. Murray E. Towill, Deputy Director
Department of Planning and Economic Development

FROM: Rex D. Johnson, Executive Director
Hawaii Community Development Authority *RJ*

SUBJECT: Public Hearings on Public Records and Privacy

The following information is provided in response to information sought by the Chairman of the Governor's Committee on Public Records and Privacy.

1. With the exception of personnel records, the records of the HCDA are open to the public.
2. Current statutes do not adversely affect public access to our records.
3. Presently, we have no need to convert any public records we have to confidential.
4. Making copies of public records, such as the transcript of a public hearing, could be costly if the transcript is very lengthy. Statutes, however, do provide that State agencies may assess a charge to duplicate information on paper.

We trust that the above meets your requirements. Please contact us if additional information is needed.



DEPARTMENT OF PLANNING AND ECONOMIC DEVELOPMENT

KAMAMALU BUILDING, 250 SOUTH KING ST, HONOLULU, HAWAII
MAILING ADDRESS: P.O. BOX 2359, HONOLULU, HAWAII 96804 • TELEX: 7430250 HDPED

JOHN WAIHEE
GOVERNOR
ROGER A. ULVELING
DIRECTOR
MURRAY E. TOWILL
DEPUTY DIRECTOR
BARBARA KIM STANTON
DEPUTY DIRECTOR

July 2, 1987

DIVISIONS
BUSINESS AND INDUSTRY DEVELOPMENT DIVISION
ENERGY DIVISION
335 Merchant St., Room 110, Honolulu, Hawaii 96813
FOREIGN-TRADE ZONE DIVISION
Pier 2, Honolulu, Hawaii 96813
LAND USE DIVISION
PLANNING DIVISION
RESEARCH AND ECONOMIC ANALYSIS DIVISION
OFFICES
ADMINISTRATIVE SERVICES OFFICE
INFORMATION OFFICE

MEMORANDUM

TO: Murray E. Towill
FROM: H. A. Maxey
SUBJECT: Public Hearings on Public Records and Privacy

This is in reference to your memo of June 26, 1987.

Under FTZ Board regulations operators of Foreign-Trade Zones are required to maintain confidentiality of information concerning users of the FTZ unless they (users) allow release of information.

Such information might pertain to invoice pricing from shippers of merchandise, sources, marks and labels on merchandise, information on customers names, shipping information, routes, rates and other related information.

Employment information on personnel may also be restricted information.

In preparation of an application for a Foreign-Trade Zone or Subzone, information exempt from public inspection must be marked business confidential before the FTZ Board will agree to accept it as part of an application.

We believe these areas are the primary concerns of our office as regards treatment of information handled by this Division.

HAM:ayh--0258A

JUL 6 1987- 197

RICHARD S. H. WONG
PRESIDENT

PATSY K. YOUNG
VICE-PRESIDENT

GERALD T. HAGINO
MAJORITY LEADER

MILTON HOLT
RICHARD M. MATSUURA
ASSISTANT MAJORITY LEADERS

RUSSELL BLAIR
MAJORITY FLOOR LEADER

STEVE COBB
NORMAN MIZUGUCHI
ASSISTANT MAJORITY FLOOR LEADERS

BERTRAND T. KOBAYASHI
MAJORITY POLICY LEADER

CLAYTON H. W. HEE
MARY-JANE McMURDO
ASSISTANT MAJORITY POLICY LEADERS

RICHARD HENDERSON
MINORITY LEADER

MARY GEORGE
MINORITY FLOOR LEADER

FIRST DISTRICT
RICHARD HENDERSON

SECOND DISTRICT
RICHARD M. MATSUURA

THIRD DISTRICT
MALAMA SOLOMON

FOURTH DISTRICT
MAMORU YAMASAKI

FIFTH DISTRICT
RICK REED

SIXTH DISTRICT
RON MENOR

SEVENTH DISTRICT
GERALD T. HAGINO

EIGHTH DISTRICT
JIMMY WONG

NINTH DISTRICT
CLAYTON H. W. HEE

TENTH DISTRICT
MARY GEORGE

ELEVENTH DISTRICT
DONNA R. IKEDA

TWELFTH DISTRICT
STEVE COBB

THIRTEENTH DISTRICT
BERTRAND KOBAYASHI

FOURTEENTH DISTRICT
ANN KOBAYASHI

FIFTEENTH DISTRICT
MARY-JANE McMURDO

SIXTEENTH DISTRICT
RUSSELL BLAIR

SEVENTEENTH DISTRICT
ANTHONY K. U. CHANG

EIGHTEENTH DISTRICT
MILTON HOLT

NINETEENTH DISTRICT
DENNIS M. NAKASATO

TWENTIETH DISTRICT
RICHARD S. H. WONG

TWENTY-FIRST DISTRICT
NORMAN MIZUGUCHI

TWENTY-SECOND DISTRICT
JOSEPH T. KURODA

TWENTY-THIRD DISTRICT
PATSY K. YOUNG

TWENTY-FOURTH DISTRICT
JAMES AKI

TWENTY-FIFTH DISTRICT
LEHUA FERNANDES SALLING

CHIEF CLERK
T. DAVID WOO, JR.

The Senate
The Fourteenth Legislature

of the
State of Hawaii

STATE CAPITOL
HONOLULU, HAWAII 96813

AUG 19 8 04 AM '87

REGISTERED



August 14, 1987

Mr. Robert A. Alm
Director, Department of Commerce and
Consumer Affairs
P. O. Box 541
Honolulu, Hawaii 96809

Re: Governor's Committee on
Public Records and Privacy

Dear Mr. Alm:

This is in response to your letter of
June 19, 1987 regarding the above referenced
matter.

I know I speak for all members of the
Senate in expressing full support of the laws
ensuring public access to public records.
However, I have concerns regarding whether or
not certain working papers and documents
generated during the legislative process are to
be classified as "public records."

Specifically, it has been contended by
some that the term "public records" include the
following:

- (1) Committee reports which are being
circulated for signatures and
which have not yet been filed with
the Clerk of the Senate; and
- (2) Senate budget worksheets which are
prepared by the Senate Ways and
Means Committee staff for use by
the Senate conferees on the budget
and which contain the Senate
position on various disputed
budget items.

198

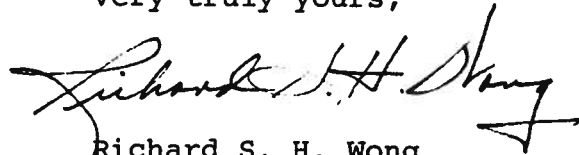
Mr. Robert A. Alm
August 14, 1987
Page two

The latter item was the subject of a court action in which the circuit court held that the worksheets were not public records. An appeal to the Hawaii Supreme Court was dismissed on the basis of mootness and the question was not decided by the Court on the merits.

It has been and continues to be my position that such documents are confidential internal working papers of the Senate and are not public records.

Thank you for providing me the opportunity to present my views to the Governor's Committee. If I can be of any further service to the Committee, please feel free to contact me.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Richard S. H. Wong", with a stylized flourish at the end.

Richard S. H. Wong
Senate President



University of Hawaii at Manoa

The William S. Richardson School of Law
2515 Dole Street
Honolulu, Hawaii 96822

RECEIVED
AUG 11 8 15 AM '87
FARS

August 12, 1987

Mr. Robert Alm
State of Hawaii
Office of the 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 23, which I only now read as I was out of town. If your hearings are pau, you may not need my input, but, for what its worth, historians frequently use old court records, agency files, etc. to understand how the law affected society in a particular period. Some of the leading works in legal history, such as Professor Willard Hurst's study of regulation of the Wisconsin lumber industry, rely on such records. Thus, my concern is that records be preserved and made available to scholars, perhaps with temporary withholding of access to protect privacy.

Thank you for requesting my input and congratulations for your fine work in studying this issue.

Very truly yours,

Mari J. Matsuda
Assistant Professor of Law

MJM:hns



HAWAII DENTAL
HYGIENISTS' ASSOCIATION

RECEIVED

August 11, 1987

AUG 14 8 20 AM '87

Governor's Committee on Public Records & Privacy
P.O. Box 541
Honolulu, HI 96809

RECEIVED
GOVERNOR'S
COMMITTEE ON
PUBLIC RECORDS & PRIVACY

Mr. Alm:

Dental hygienists are licensed by the State of Hawaii to practice dental hygiene. Public access to records identifying licensees by name and address is restricted. As a result, disseminating information to all licensees pertaining to statutory changes, changes in Board of Dental Examiners rules, and continuing education is impossible.

The Department of Commerce and Consumer Affairs does not assume the responsibility of informing licensees of statutory or rule changes. In numerous other states, regular communication via letter and/or newsletters is distributed by State agencies.

The Hawaii Dental Hygienists' Association strongly recommends that access to dental hygienist names and addresses be available so that professional information can be disseminated.

Please feel free to contact us at this address: P.O. Box 91025, Honolulu, HI 96835 or call Dee Woods at 734-7283.

Sincerely,

Cheryl J.M. Oyama, R.D.H.

Cheryl J.M. Oyama, R.D.H.

HAWAII INSURANCE INFORMATION

1616 LILIHA STREET • ROOM 101
HONOLULU, HAWAII 96817

TELEPHONE (808) 537-2812

RECEIVED
a division of
CREDIT DATA OF HAWAII, INC.
(a Credit Reporting Agency)
AUG 21 9 05 AM '87

August 20, 1987

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

Subject: "WHAT IS A PUBLIC RECORD?"

The questions: A. What government records should be available to the public on request?

B. What interest will be served by disclosure or non-disclosure.

I wish to submit comments for consideration in the areas of traffic ticket reports and drivers license information disclosure.

I feel that a service to the public (in some instants the state) would be rendered by making this type of information available. For instance:

Drivers license abstracts: The states present "disclosure" system (in spite of a recent system upgrading) is slow, cumbersome and very inconvenient to the individual and or an "agent" for the individual. There are a number of ways to make this "already available information" available to those who are authorized to obtain it. Plus, it can be accomplished much more quickly, more conveniently and at a considerable savings to the state. At the same time the state would still collect it's fee for each disclosure while either reducing staff or utilizing their time (labor) in other areas. I would very much like to discuss the method of disclosure with you. The concept nor the technology is new, only the antiquated rules and or established procedures stand in the way of progress.

The public would benefit by not having to: Go downtown, find parking, pay for parking, go stand or sit in line to be called for some basic information about themselves for processing by a clerk, then go stand or sit around and wait for the abstract, then go get in line to pay for it, then put it to the use for which it was obtained.

We, "Hawaii Insurance Information" (H.I.I.) a division of Credit Data of Hawaii, a credit reporting agency, are in the process of establishing a central auto-accident-claims information bureau for the insurance industries use. They would use the information to help determine the individual insurance premiums. The industry has already indicated that it would be most beneficial to them and the potential insured, to have the drivers license abstract also available through this same central processing source (H.I.I.)

Again, I request an audience with you to discuss in detail these comments. I might mention that California has already made drivers license abstract information available to the private sector.

Sincerely,



Earl Payne
Manager



Jackie Mahi Erickson
Corporate Counsel

RECEIVED

AUG 7 8 25 AM '87

DIRECTOR OF
UTILITY AND
CONSUMER AFFAIRS

August 4, 1987
804-1

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

Dear Chairman Alm:

In response to the question "What government records should be available to the public on request?" I am enclosing some of the materials Hawaiian Electric Company, Inc. and members of the "Yellow Committee" of the Public Utilities Commission of Hawaii have used to address similar concerns in PUC hearings.

For your information, the PUC has not decided yet whether the attached "Umbrella Protective Order" will be used in cases before the Commission, however, the materials are being forwarded to your committee for its review and consideration in determining from a broader prospective what should be a public record.

Sincerely,

A handwritten signature in cursive script that reads "Jackie Mahi Erickson".

Jackie Mahi Erickson
Corporate Counsel

Attachment

cc: Andy Chang

HOW TO HANDLE PROPRIETARY
INFORMATION IN UTILITY CASES

by Louis A. Schapiro*



NINETY-EIGHTH ANNUAL CONVENTION
AND REGULATORY SYMPOSIUM
OF
NATIONAL ASSOCIATION OF REGULATORY
COMMISSIONERS

PHOENIX, ARIZONA

November 18, 1986

* This paper reflects the personal views of the author, and not necessarily those of AT&T.

CONTENTS

I. THE CONFLICTING POLICY CONSIDERATIONS:	
PRIVATE INFORMATION AND PUBLIC HEARINGS.....	1
II. THE USE OF PROTECTIVE ORDERS IN PUBLIC	
UTILITY PROCEEDINGS.....	8
1. Protective Orders Are Compatible	
With Public Interests.....	8
2. Overview of Protective Order	
Procedure.....	12
III. THE ELEMENTS OF AN UMBRELLA PROTECTIVE	
ORDER IN A PUBLIC UTILITY PROCEEDING.....	14
1. The Example Umbrella Order in The	
<u>Mountain States</u> Case.....	14
2. The Forms of Evidentiary Materials	
Covered.....	16
3. The Breadth of the Confidentiality	
Granted.....	18
3(a). The Subject Matters of The	
Materials Protected.....	19

3(b).	The Persons to Whom The Confidential Material May Be Disclosed.....	20
3(b)(1).	Disclosure to Experts and Consultants.....	21
3(c).	The Purpose for Which The Confidential Material May Be Used.....	29
4.	Procedures For Designating Material As Confidential.....	29
5.	Procedures for Handling the Confidential Information In The Commission's Records and Files.....	30
6.	Procedures For Challenging The Confidential Status Of The Materials.....	36
7.	Non-Waiver Of Objections As To Relevancy and Materiality.....	39
8.	Non-Waiver As To Appeal.....	39
9.	Return Of Confidential Materials.....	39
10.	Modification Of The Order.....	40

IV. CONCLUSION.....	42
---------------------	----

The author acknowledges the research assistance of
Mr. J. C. Caputo and the comments of numerous colleagues.

I. THE CONFLICTING POLICY CONSIDERATIONS:
PRIVATE INFORMATION AND PUBLIC HEARINGS.

A leading treatise states a cardinal principle of the state administrative process:

Normally, administrative hearings are open to the public; and it is ordinarily desirable that this be so, for public observation of open hearings offers some assurance that those hearings will be conducted in a manner satisfactory to the public and to the parties. F. Cooper, STATE ADMINISTRATIVE LAW, 353 (1965).

On the other hand, a respected treatise in the intellectual property law field highlights a different interest:

[A]ny information which is in the nature of a secret, any knowledge which is valuable because a few only know the facts of which it consists, is property, and the business conditions of today make its imperative that publication or use of such secret information should be controlled by law. 1 Nims, UNFAIR COMPETITION AND TRADEMARKS, pp. 402-403 (4th ed. 1947).

*Produced
- 11/16/66*

It is the tension between these two propositions, as well as possible avenues of accommodation, that this paper will explore.

The tension between the open state administrative agency process and private property rights in secret or confidential information of parties subject to the agency process, has intensified in recent years. The introduction of unregulated competition into fields which were previously subject to total regulation has increased this conflict; it has also increased the

urgent need to find a workable compromise which will meet both public and private interests.

The Supreme Court in FCC v. Schreiber, 381 U.S. 279, 293-94 (1965) recounted some of the policy reasons in favor of open administrative agency proceedings:

The procedural rule, establishing a presumption in favor of public proceedings, accords with the general policy favoring disclosure of Administrative Agency proceedings....[I]t is highly desirable that the facts, information, data and opinion supplied by one group or individual be known to other groups and individuals involved, so that they may verify, refute, explain, amplify or supplement the record from their own diverse points of view. The Commission observed that, in addition to stimulating the flow of information, public hearings serve to inform those segments of the public primarily affected by the agency's regulatory policies and those likely to be affected by subsequent administrative or legislative action of the factual basis for any action ultimately taken -- a practical inducement to public acceptance of the results of the investigation. Also implicit in the Commission's discourse is a recognition that publicity tends to stimulate the flow of information and public preferences which may significantly influence administrative and legislative views as to the necessity and character of prospective action. Id. at 293-94. (footnotes omitted).

The Court in Schreiber went on to uphold the F.C.C.'s procedural rule favoring public disclosure and placing the burden of demonstrating the need for in camera proceedings on the party seeking to protect the information. Implicit in the Court's

ruling is the recognition that under certain circumstances, the public's interest in administrative agency proceedings may yield in order to protect the privacy, confidentiality or trade secret needs of the private individual or corporation.

When and how should the normally open administrative forum shield relevant information from public scrutiny?

The Court in Southwestern Bell v. State Corporation Commission, 629 P. 2d 1174 (Kan. App. 2d 1981), offered the following guidelines:

We hold that, when deciding whether to publicly disclose information which the Commission has found to be relevant and necessary for its proceedings and which a party contends to be in the nature of a trade secret or confidential research, development or commercial information, the Commission should proceed as follows: First, it should determine whether the information is a trade secret or confidential commercial information. In considering this matter, the burden is on the party seeking to prevent disclosure. Secondly, the Commission should weigh the competing interests. In doing so, it should consider, inter alia, the financial or competitive harm to the party seeking to prevent disclosure; whether disclosure will aid the Commission in its duties; whether disclosure serves or might harm the public interest; and whether alternatives to full disclosure exist. Id. at 1184.

With respect to the first step in the Commission's task, determining the trade secret or confidential status of the information, the factors to be applied are no different from those employed in other litigation involving trade secrets and confidential information. It is beyond the scope of this paper

to review these factors of substantive trade secret law. The literature and case law are replete with learned discussions of these factors. See 1 MILGRIM ON TRADE SECRETS, Chs. 1-2 (1985; M. Jager, TRADE SECRETS LAW, chapters 1-3 (1985).

Once it has been established that a valid trade secret or confidential business information is at stake, the Commission must weigh a number of competing interests -- among them, "the public interest." It is with respect to identifying the "public interest," that the unique role of the public utility commission comes into play. First, it must be noted that there is no fixed formula by which a commission is to determine the "public interest." This is so because the circumstances in the marketplace are changing and with them the definition of the public interest. Where once the commission had only to consider protection of the public interest vis-a-vis a single regulated monopoly, it must now consider protection of the public interest in the context of a competitive marketplace.

The predominant purpose underlying public utilities law is, of course, the protection of the consuming public -- the ratepayers -- not competitors. Thus, the essential question often is whether the public interest would be served by the disclosure of a company's valuable trade secrets and confidential business information to its unregulated competitors.

Those courts and commissions which have faced the issue, have answered the question in the negative. It is not in the public interest to provide a regulated utility's competitors with unrestricted access to its valuable confidential information and trade secrets. If the disclosure of the trade secret or confidential information may result in a loss of revenue to the regulated utility, it is the ratepayer who may bear the cost ultimately. Re Pacific Northwest Bell Telephone Co., 9 PUR 4th 49 (OR. 1975).

As the court stated in South Central Bell Telephone Co. v. Mississippi Pub. Serv. Comm., 61 PUR 4th 310, (Miss. Ch. Ct. 1984):

Disclosure may well harm the public interest by giving South Central Bell's competitors millions of dollars of information at no cost to them and by allowing these competitors the means of targeting South Central Bell's most profitable areas, South Central Bell's ability to subsidize the below cost residential telephone service will be jeopardized and its rates for this type of service will rise dramatically. id. at 313.

Impact on the ratepayer is not, the only form of public interest involved in a public utility proceeding. Other, perhaps broader, public interests reside in the public's ability to understand the bases for the administrative body's decisions; the public's interest in free speech and dissemination of ideas; and

the public's interest in a free exchange of opinions and public input before an administrative decision is made.

At the same time it must be recognized that there is a public interest in the preservation of the private property rights of the owner of trade secrets or confidential business information. In the landmark case of Kewanee Oil Company v. Bicorn Corp., 416 U.S. 470, 94 S. Ct. 1879, 40 L.Ed. 2d 315 (1974), the Supreme Court recognized the national public policy in favor of protecting confidential information in the competitive marketplace:

[I]t is hard to see how the public would be benefited by disclosure of customer lists or advertising campaigns; in fact, keeping such items secret encourages businesses to initiate new and individualized plans of operation, and constructive competition results. This, in turn, leads to a greater variety of business methods than would otherwise be the case if privately developed marketing and other data were passed illicitly among firms involved in the same enterprise. Id. at 483.

On the other hand, due process and equal protection under the law are individual rights which may be asserted to protect trade secrets and confidential business information. Legal protection against unauthorized use and disclosure can be provided by both the State and Federal Constitutions. In particular, the Fifth Amendment to the U.S. Constitution prevents the federal government or its agencies from depriving persons of

their property without due process of law, prevents the taking of private property for public use without just compensation, and prevents the taking private property for private use. These proscriptions are made applicable to the states through the Due Process Clause of the Fourteenth Amendment. As Judge Biunno stated in Wearly v. FTC, 462 F. Supp. 589 (D.C., N.J. 1978), vacated, on other grounds, 616 F.2d 662 (3rd Cir.) cert. denied, 449 U.S. 822, (1980):

Failure to provide adequate protection to assure confidentiality, when disclosure is compelled by the government, amounts to an unconstitutional "taking" of property by destroying it, or by exposing it to the risk of destruction by public disclosure or by disclosure to competitors. The constitutional limitation cannot be altered by any branch of government. Id. at 598.

This paper deals with the attempts by the public utility commissions and the courts to accommodate the public interests and private rights of owner of the owner of confidential information in the context of public utility proceedings. The mechanism most often utilized by public utility commissions and courts to accomplish these often conflicting goals is the protective order. The protective order allows the public utility commission and necessary parties access to the information needed in regulatory proceedings, but prevents unrestricted public disclosure and misuse of trade secrets.

II. THE USE OF PROTECTIVE ORDERS IN PUBLIC UTILITY PROCEEDINGS.

1. Protective Orders are Compatible with Public Interests.

Despite the general rule in favor of public proceedings, an increasing number of public utility commissions and courts have issued protective orders to safeguard the utility's trade secrets and confidential business information, (including, marketing studies, expert's estimates of market shares, and cost and pricing data) from unrestricted disclosure to the utility's competitors and to the public at large. A public utility commission has the authority to issue orders protecting the confidentiality of trade secrets or confidential business information received in a proceeding, even where, for example, state law requires that its proceedings shall be "public records," In the Matter of New York Telephone Company v. Public Service Commission of the State of New York et al. 451 N.Y.S. 2d 679 (N.Y. 1982), or where state law provides that no person shall be denied admission to a commission hearing, Southwestern Bell Telephone and Telegraph Company v. State Corporation Commission, 629 P.2d 1174 (Kan. App. 2d 1981).

Indeed, the protective order has been upheld by a number of courts as compatible with various public policies favoring open disclosure of information. In 1984, the Supreme Court held that a protective order covering information obtained through discovery in a private litigation and prohibiting the parties

from publishing the protected information did not offend the public's First Amendment right of access to information. Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984). Although the Seattle Times involved confidential protection for a religious organization's private membership list, the Court's rationale in that case is clearly also applicable to a trade secret or confidential commercial information case. 2 MILGRIM ON TRADE SECRETS at 7-93 n. 10.8.

It should be noted that Seattle Times deals with protective orders in the pretrial stages of discovery.

[R]estraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information. Id. at 33.

Nevertheless, the argument might be extended to cover the protecting of confidential evidence at trial, in certain circumstances. There is a substantial governmental interest in the rules governing the conduct of a trial, as well as in those which regulate the discovery process. Also the Court mentions the "chilling effect" on the right of persons to seek redress of grievances in the courts if private information could not be shielded. Id. at 36 n.23.

As one commentator has noted, "to some extent every judicial decision is of interest to the public because it is part of the mosaic of judicial resolution." R. Marcus, Myth and Reality in

Protective Order Litigation, 69 Cornell L. Rev. 1, 47 (1983).

The argument has been made that final decisions on the merits of a case are peculiarly imbued with the public interest. Thus, when a court actually relies on certain documents as grounds for a final decision on the merits, the documents attain such significance that public access is presumed. Id.

Courts, however, have not found the presumption of public access so compelling as to override all considerations of confidentiality. For example, in Southwestern Bell, supra, the Commission held that Kansas law required public access to the evidence upon which a Commission decision is based. The court reversing the Commission's decision stated:

The Commission also referred to the requirement that it make specific findings of fact in its orders, stating that '[i]f the documents in question were held to be confidential, it is clear that the Commission could not comply with its legal obligation to make specific findings of material facts regarding the concealed evidence.' Again, the Commission's analysis is too broad. Taken to its logical conclusion, it would abrogate any protection for trade secret information, a situation not required by law. There may be occasions when the Commission can fulfill its duty to make specific findings only be referring to specific trade secret information. On other occasions, it may be sufficient to summarize the data or refer to it generally. Each case will undoubtedly turn on its own facts. Nothing in the record made on the motion for a protective order demonstrates a need for total disclosure. Southwestern Bell, 629 P. 2d at 1185.

In the same vein, the 1981 final version of the Revised Model State Administrative Procedure Act (Section 102(a) Public Inspection and Indexing of Agency Orders) provides, in part, with respect to public access to agency orders:

In addition to other requirements imposed by any provision of law, each agency shall make all written final orders available for public inspection and copying and index them by name and subject. An agency shall delete from those orders identifying details to the extent required by any provision of law [or necessary to prevent a clearly unwarranted invasion of privacy or release of trade secrets]. In each case the justification for the deletion must be explained in writing and attached to the order.

The Official Comment explains that the bracketed language is necessary only if the state does not already have a privacy act or similar statute dealing with the subject matter.*

* Discerning the intent of a particular state's laws regarding public access to administrative proceedings often requires that the particular state law be placed in the context of the overall state administrative scheme.

For example, the Court in Southwestern Bell determined that the Commission had improperly interpreted the law of Kansas regarding public access to Commission evidence. The Court found that the provision the Commission deemed controlling in the case was not relevant to disclosure of evidence. The Court held that the Commission, pursuant to other Kansas statutes, was authorized in its discretion to hold a closed meeting to examine the evidence and had authority to issue a protective order shielding confidential evidence from public disclosure. Southwestern Bell, supra, at 1185.

An entirely separate, but very real concern for preserving the confidentiality of information furnished to the Commission and its Staff, is the impact of a state's freedom of information statute or other open records laws. These laws differ greatly from state to state. See, Braverman & Heppler, A Practical Review of State Open Records Laws, 49 Geo. Wash. L. Rev. 720 (1981).

2. Overview of the Protective Order Procedure.

In private litigation, the parties customarily stipulate to protective orders negotiated by opposing counsel. These stipulated orders usually provide "umbrella" protection for all materials designated confidential by the producing party.

The "umbrella" protective order enables the parties to carry on with the proceedings, relieving the commission and the courts from the burden of closely supervising and immediately resolving discovery disputes. The "umbrella" order is not an administrative or judicial determination that the materials are indeed confidential and worthy of protection from disclosure. The order permits any party to challenge the designation or claim of confidentiality and obtain a ruling on the issue. At that point, the burden of showing that the designated materials are confidential falls on the producing party and the task of applying the substantive legal and policy considerations to the particular fact situation presented rests with the commission or Court.

In a recent decision, Cippollone v. Liggett Group, Inc., 785 F 2d 1108 (3d Cir. 1986), the Third Circuit specifically endorsed the "umbrella" type protective order which expedites the flow of discovery while protecting against unwarranted disclosures stating:

First, because in any large-scale litigation the movant will likely have far more documents that it wants to designate as confidential than the respondent will object to being so designated, the umbrella order approach is less time-consuming and burdensome to the parties and the court than the document-by-document method.

Second, although a smooth, largely self-regulating discovery process should be the court's goal, the document-by-document approach guarantees extensive involvement by the court in the discovery process, deterring the parties from themselves conducting discovery to a significant extent. The umbrella order approach we have described encourages parties to work problems out between and among themselves.

Finally, the document-by-document approach may prevent the parties and the magistrate or judge from getting a broad overview of the documents. The magistrate or judge may be so burdened by the argument over each document that she or he will 'lose the forest for the trees.' This confusion is not a problem under the umbrella order solution proposed here. Id. at 1122 n.18.

As explained above, until such time as the commission or Court invalidates a party's designation of materials as confidential, the umbrella protective order, by its terms, restricts disclosure and use of the information designated "confidential." Part III of this paper examines some of the standard "terms" in an umbrella protective order.

III. THE ELEMENTS OF AN UMBRELLA PROTECTIVE ORDER IN A PUBLIC UTILITY PROCEEDING.

1. The example umbrella order in Mountain States case;
 2. The forms of evidentiary materials covered;
 3. The breadth of the confidentiality granted;
 - a. The subject matters of materials protected;
 - b. The persons to whom the confidential material may be disclosed;
 - c. The purposes for which the confidential material may be used;
 4. Procedures for designating material as confidential;
 5. Procedures for handling the confidential information in the Commission's records and files.
 6. Procedures for challenging the confidential status of the material;
 7. Non-waiver of objections as to relevancy and materiality;
 8. Non-waiver as to appeal;
 9. Return of confidential materials;
 10. Modification of the order.
1. The Example Umbrella Order in the Mountain States Case.

For purposes of discussion of the elements of a protective order, we have utilized as an example the "umbrella" protective order entered by the Supreme Court of Montana in Mountain States Telephone and Telegraph Company v. Department of Public Service Regulation, 634 P.2d 181, 190-91 (Mont. 1981).

In the Mountain States case, the Montana Supreme Court was critical of the State Commission's failure to consider potential public and private harm which might result from the disclosure of the utility's confidential information:

Here, neither the District Court nor the PSC balanced the competing public and private interests presented in this case. Rather, they determined that if the data was necessary for the determination by the PSC, that fact alone made it necessary to disclose all of the information to all of the parties, including persons not necessarily interested in the ratemaking process. Such a construction may lead in this case to the destruction of a property right based on materiality rather than on a consideration of whether full public disclosure is based upon a reasonable and rational means to achieve the purpose inherent in the right to know provision. Id. at 187. (citations omitted)

The Montana Supreme Court found that due process required the balancing of private interests and the needs of the public. As a result of the balancing, the court determined that a protective order was required:

We find it possible to protect fully the ownership of the trade secret information and at the same time, supply fully the need of the state agencies for the information required in the exercise of their duties. We find that an order can be fashioned in such a manner that the state public agencies can perform their duties with the fullest available information and at the same time disclose to the public all information required to enable citizens to determine the

propriety of governmental actions affecting them. Id.

The Court went on to describe the terms of the protective order it issued to safeguard the utility's confidential information while providing for the commission's ability to carry out its regulatory duties:

We have therefore issued a directive for a protective order in this case. In it is the result of the balancing process that we have described above. The order gives the PSC full access to all information needed by it in its regulatory duties with the right in the commission to preserve that information in its offices. Likewise, we have provided that the Consumer Counsel may receive such information and preserve the same in its office. We have made the same information available to any party, corporate or private, participating in the rate hearings before the PSC, subject to provisions which protect the confidentiality of the trade secret information. We are confident that such provisions provide consumers with adequate knowledge to participate fully in the commission's proceedings while at the same time protecting the interests of the utility. Id.

2. The Forms of Evidentiary Materials Covered.

Example: Paragraph 1 of Mountain States protective order states:

All documents, data, information, studies and other matters furnished pursuant to any interrogatories or requests for information, subpoenas, depositions, or other modes of discovery that are claimed to be trade secret,

privileged or confidential nature shall be furnished pursuant to the terms of this Order, and shall be treated by all persons accorded access thereto pursuant to this Order as constituting trade secret, confidential or privileged commercial and financial information (hereinafter referred to as 'Confidential Information'), and shall neither be used nor disclosed except for the purpose of this proceeding, and solely in accordance with this Order. Id. at 190

Comment: A protective order should expressly state that it covers materials and information garnered in a variety of formats ("documents, data, information", etc.) and through any mode of discovery ("requests for information", etc.). In this manner, the gathering of information can proceed unhampered by disputes over "form" (ie., regarding the appropriateness of confidentiality attaching to a form of discovery such as deposition answers), as opposed to disputes over substantive issues regarding the confidential status of the underlying information.

The Order might also state that confidential treatment is to be given not only to the Confidential Information furnished, but also to any notes, summaries, abstracts or analyses prepared by counsel or experts who have access to the confidential information pursuant to the Order, and which reflect the underlying confidential information.

The order should also state whose confidential materials are covered. For example, paragraph 12 of the Mountain States Order (supra at 191) provides:

The provisions of this Order are specifically intended to apply to data or information supplied by or from any part to this proceeding, and any non-party that supplies documents pursuant to process issued by this Commission. Id. at 191.

3. The Breadth of the Confidentiality Granted.

Example: Paragraph 2 of Mountain States Order, states:

All Confidential Information made available pursuant to this Order shall be given solely to counsel for the parties, and shall not be used or disclosed except for purposes of this proceeding; provided, however, that access to any specific Confidential Information may be authorized by said counsel; solely for the purpose of this proceeding, to those persons indicated by the parties as being their experts in this matter. Any such expert may not be an officer, director or employee (except legal counsel) of the parties, or an officer, director, employee or stockholder or member of an association or corporation of which any party is a member, subsidiary or affiliate. Any member of the Public Service Commission, and any member of its staff, the Consumer Counsel, and any member of his staff may have access to any Confidential Information made available pursuant to this Order. Id. at 190.

Comment: The above paragraph addresses (i) the subject matters protected ("all Confidential Information"); (ii)

the persons to whom the confidential material may be disclosed; and (iii) the purposes for which the confidential material may be used ("for purposes of this proceeding").

All of these points are elaborated upon in other paragraphs of the order, as well.

3(a). The Subject Matters of the Materials Protected.

Example: Paragraph 1 of Mountain States Order quoted above.

Comment: This Order allows for the initial designation of confidential status to be totally within the discretion of counsel for the asserting party. It is well known that most clients--and utilities are no exception-- believe that all business information they possess is too sensitive or valuable to reveal to any outsider. Accordingly, it is the obligation of counsel in overseeing the assertions of confidentiality claims, to exercise the necessary judgment and restraint to prevent overly broad claims of confidentiality. The Manual for Complex Litigation, Second (1985) (hereinafter referred to as "MCL 2d") states that each assertion of confidentiality should be treated by a counsel as if it were a particularized motion for a protective order.

It is possible to negotiate a narrower order which limits confidentiality claims to identified categories of documents and information such as customer lists, production costs, etc. This type of order, however, requires that counsel have enough foresight to anticipate from the outset what information will be subject to production.

3(b). The Persons to Whom the Confidential Material may be Disclosed.

The Example paragraph 2 from the Mountain States Order precludes disclosure to anyone other than counsel for the parties, their experts, the commission, its staff and counsel. Disclosures to the parties themselves is not allowed. The fear is that commercially useful information cannot be erased from the mind of the person to whom it has been revealed (This is analogous to the concept of "inevitability of use" in trade secret misappropriation cases against former employees. See e.g., Allis -Chalmers Mfg. Co. v. Continental Aviation & Eng. Corp., 255 F Supp. 645 (E.D. Mich. 1966).)

The fact that parties, themselves, may not have access to the confidential information need not interfere with the ability of counsel to adequately consult with, and represent the parties. Consider, for example, the following clause in the MCL 2d Sample Order, Sect. 41.36 at p. 382:

Client Consultation. Nothing in this order shall prevent or otherwise restrict counsel from rendering advice to their clients and, in the course thereof, relying generally on examination of stamped confidential documents; provided, however, that in rendering such advice and otherwise communicating with such client, counsel shall not make specific disclosure of any item so designated except pursuant to the procedures of paragraph 2(b) and (c).

But see Note, Balancing Competing Discovery Interests in the Context of Attorney-Client Privilege: A Trilemma, 56 S. Cal. L. Rev. 115 (1983).

3(b)(1). Disclosure to Experts and Consultants'

Example: Paragraph 3 of the Mountain States Order states:

Prior to giving access to Confidential Information as contemplated in paragraph 2 above to any expert, counsel for the party seeking review of the Confidential Information shall deliver a copy of this Order to such person, and prior to disclosure such person shall agree in writing to comply with and be bound by this Order; and said counsel shall, at the time of the review of such information and data, or as soon thereafter as practicable, deliver to counsel for the party furnishing said information and data a copy of such written agreement (which shall show signatory's full name, permanent address, and employer). Mountain States, 634 P. 2d at 190.

Comment: A shortcoming in the above provision is the absence of notice to the owner of the Confidential Information as to the identity of the expert, prior to the expert's obtaining access to the material, and, therefore, the lack of opportunity to object to the disclosure.

Sometimes, the commercial relationships of a consultant or expert advising the commission staff will so "taint" the consultant as to preclude full disclosure to the consultant. For example in Ohio PUC Case No. 79-1184-TP-AIR, Order (October 10, 1980), the Public Utility Commission ordered that various case authorizations of Bell Laboratories not be disclosed to a consultant who was acting as an expert for the commission's staff. In that case pursuant to a protective order, Ohio Bell made available to the Office of Consumers' Counsel (OCC) and its expert witness, an outside consultant, who also represented commercial enterprises, a number of "representative" Bell Labs' case authorizations. The OCC then sought by way of a Motion to Compel Compliance and a Subpoena Duces Tecum to review the remaining 85 case authorizations. Bell Labs contended that the remaining case authorizations contained trade secrets and proprietary information and that the release of the remaining case authorizations to its consultant would cause a competitive harm to the Company. Bell Labs did offer to release the

remaining case authorizations to the OCC and its internal staff or outside experts who did not represent commercial interests.

The Commission agreed with Bell Labs that the disclosure of the remaining case authorizations would not be made to the expert witness who also represented commercial interests which were competitors of the Bell System in other rate cases. The order required the OCC to insure that the consultant would not gain access to the remaining case authorizations.

The MCL 2d provides the following notice provision in its sample Confidentiality Order (at pp. 380-81):

Before disclosing a stamped confidential document to any person listed in subparagraph (a) or (b) who is a competitor (or an employee of a competitor) of the party that so designated the document, the party wishing to make such disclosure shall give at least ten days advance notice in writing to the counsel who designated such information as confidential, stating the names and addresses of the person(s) to whom the disclosure will be made, identifying with particularity the documents to be disclosed, and stating the purposes of such disclosure. If, within the ten day period, a motion is filed objecting to the proposed disclosure, disclosure is not permissible until the court has denied such motion. The court will deny the motion unless the objecting party shows good cause why the

proposed disclosure should not be permitted. Id. at 380-81.

The above sample notice provision only applies to disclosure to a "competitor" or "employee of a competitor." Literally, the provision would not have reached the situation of the outside consultant in the Ohio PUC case, discussed above.

In Diamond State Telephone v. P.S.C., No. 81 A-DE-1, Slip Op. (Del. Sup. Ct. Aug. 12, 1982), the protective order at issue had contained specific provisions dealing with consultants for competitors. The court in its opinion quotes these provisions:

. . . If a consultant of any party also serves as a consultant to a competitor or the affiliate of any competitor of any other party, said consultant must: (1) advise the affected party of the competitor's or affiliate's name(s); (2) make reasonable attempts to segregate those personnel assisting in the consultant's participation in this proceeding from those personnel working on behalf of any competitor or affiliate of any competitor of any party to this proceeding; and (3) if segregation of such personnel is impractical, the consultant shall give to the affected party written assurances that the lack of segregation will in no way jeopardize the interests of the affected party. The affected party retains the right to challenge the adequacy of the written assurances that its interest will not be jeopardized.

Prior to making the Proprietary Information available as contemplated in

paragraph 2 above to any expert, counsel for the party seeking review of the Proprietary Information shall deliver a copy of this Order to such person, and prior to disclosure such person shall execute the written agreement attached hereto by which the expert shall agree to comply with and be bound by this Order; and said counsel shall, at the time of the review of such information and data, deliver to counsel for the party furnishing said information and data, a copy of such written agreement (which shall show each signatory's full name, permanent address, and employer). Id. at 6.

In the Diamond State case, the Delaware Commission had ordered a disallowance of certain License Contract expenses because Bell Labs had refused to produce certain relevant proprietary Case Authorizations to the Public Advocate's expert witness. Bell Labs offered to produce to the expert witness under a protective order a representative sample of the Case Authorizations. All of the Case Authorizations, however, would be available to the Public Advocate, himself, and to the Commission's staff and their experts.

Bell Labs based its refusal to produce on the above-quoted language in the protective order which allowed the Company to refuse production of proprietary information to a witness working for a trade competitor. The Commission had held that the protective order granted no right to unilaterally limit the Public Advocate's expert witness to a

review of a limited number of sample Case Authorizations. The Commission also found that the refusal to allow inspection to the Public Advocate of relevant and material documents necessitated a disallowance of that portion of expenses claimed by Diamond State.

On appeal to the Delaware Superior Court, Diamond State argued that the disallowance was a sanction for refusing to produce the documents and that it was arbitrary under the circumstances to impose this sanction without requiring the Public Advocate to first obtain an order compelling production. The PSC argued that the disallowance was a ruling that Diamond State did not meet its burden of proving this expense and not a sanction, but that even if it were a sanction, the ruling was not arbitrary in view of the testimony that the documents would not be produced even if the Commission entered an order compelling production.

Based on the lack of a clear statement in the Commission's opinion that Diamond State had failed to meet its burden of proof on the issue, the Superior Court found that the disallowance was indeed meant to be a sanction for Diamond State's failure to provide discovery. The Court therefore sought to decide on appeal whether the sanction was arbitrary under the circumstances.

After Bell Lab's had stated its position as to the terms under which it would produce sample Case Authorizations, the expert witness of the Public Advocate refused to sign the assurances required by the protective order. The Public Advocate thereafter unsuccessfully sought to revoke the protective order that had been ordered by the PSC. The PSC contended on appeal that the refusal to sign was justified in view of Diamond State's unilateral imposition of limitations on discovery and that any order requiring production would be futile.

The Court rejected the PSC's argument:

Since Diamond State had the right under the protective order to refuse to disclose the documents claimed to be proprietary until the Public Advocate's expert signed the agreement attached to the order unless otherwise ordered by the Commission, and Bell Labs' proposal to limit his inspection of case authorizations to a representative sample was not plainly unreasonable or inconsistent with the protective order, it was unfair for the Commission to impose the sanction without first rejecting Diamond State's position on the issues between the parties and then giving it an opportunity to avoid the sanction. Nor was the sanction justified by the testimony that Bell Labs might refuse to produce the documents if it were ruled that they were not proprietary. Under the circumstances, the sanction was arbitrary. Id. at 10.

Finding the sanction arbitrary, the Court accordingly reversed the PSC's disallowance of the license contract expenses.

As was the case in Diamond State Telephone, Paragraph 3 of the Mountain States Order also requires that the expert "agree in writing" to be bound by the terms of the order before given access to the confidential information. Many protective orders will have as an appendix to them, the form of the "written agreement." The form can range from a simple statement that paraphrases Paragraph 3 (e.g., "I have read and agree to comply with be bound by the attached order") to a more comprehensive explanation of the obligations undertaken by the person given access to confidential material.

Professor Milgrim observes that the requirement that one sign an agreement to be bound by the order "may overcome jurisdictional and other issues implicit in the regulatory procedure". 2 MILGRIM ON TRADE SECRETS, Section 7.06 [1] at 7.102. See generally, Note, The Argument for Agency Self-Enforcement of Discovery Orders, 83 Colum. L. Rev 215 (1983).

3c. The Purpose for which the Confidential Material may be Used.

Example: Paragraph 8 of Mountain States Order, states:

All persons who may be entitled to receive, or who are afforded access to any Confidential Information by reason of this Order shall neither use nor disclose the Confidential Information for purposes of business or competition, or any other purpose other than the purposes of preparation for and conduct of this proceeding, and then solely as contemplated herein, and shall take reasonable precautions to keep the Confidential Information secure and in accordance with the purposes and intent of this Order. Mountain States, 634 P. 2d at 191.

4. Procedures for Designating Material as Confidential.

Example: Paragraph 4 of the Mountain States Order states:

Where feasible, Confidential Information will be marked as such and delivered to counsel. In the alternative, the Confidential Information may be made available for inspection and be reviewed by counsel and experts as defined in paragraph 2 herein in a place and a time mutually agreed on by the parties, or as directed by the Public Service Commission. Id. at 190-91.

Comment: The most common method of asserting a claim of confidentiality is to provide that the party designating the material as confidential do so by means of a stamp or marking on the face of the document itself. This procedure has obvious advantages over one where unmarked documents are produced, and the assertion is simply made by means of a

transmittal letter or by means of a statement on the record.
A "marked" document carries its own caveat.

The MCL 2d suggests that a log be maintained, describing the confidential document, where numerous documents are being produced (p. 53 n.59).

In certain situations, one should consider putting into the Order the exact language which is to appear as a legend marked on the confidential document. (See Sample Confidentiality Order in MCL 2d, Sect. 41.36 at p. 379.) This eliminates needless confusion, especially where the document may carry as well a company's own internal confidential designations, which may or may not correspond to the confidentiality claims in the immediate proceedings.

In a proceeding where several parties may each be asserting confidentiality claims on its documents, it is preferable to also indicate the name of the asserting party in the legend.

5. Procedures for Handling the Confidential Information in the Commission's Records and Files.

Example: Paragraph 7 of the Mountain States Order
states:

Those parts of any writing,
depositions reduced to writing, written
examination, interrogatories and answers

thereto, or other written references to Confidential Information in the course of discovery, if filed with the Commission, will be sealed by the Commission, segregated in the files of the Commission, and withheld from inspection by any person not bound by the terms of this Order, unless such Confidential Information is released from the restrictions of this Order either through agreement of the parties or, after notice to the parties and hearing, pursuant to the Order of the Commission and/or final order of a Court having jurisdiction. All written Confidential Information coming into the possession of the Consumer Counsel under this order may be retained by him in his office files, but shall be withheld from inspection by others, except for his staff and his counsel, unless released by the Public Service Commission and/or a final order of a court under this paragraph 7, and subject always to the terms of paragraph 8 of this Order. Mountain States, 634 P. 2d at 191.

Comment: The Order's provision for handling confidential materials by the Commission, its staff and its counsel deals with what may be the overarching issue in any protective order scheme---how is the confidential material to be used as evidence without compromising its confidentiality? Paragraph 7 of the Mountain States Order provides that confidential information incorporated into filings with the commission, should be filed and held under seal, unless released by agreement of the parties or pursuant to a hearing and final order.

An analogous situation is presented by the use of confidential information at trial. The MCL 2d Sample Order has the following provision:

Confidential Information at Trial.
Subject to the Federal Rules of Evidence, stamped confidential documents and other confidential information may be offered in evidence at trial or any court hearing, provided that the proponent of the evidence gives five days' advance notice to counsel for the party or other person that designated the information as confidential. Any party may move the court for an order that the evidence be received in camera or under other conditions to prevent unnecessary disclosure. The court will then determine whether the proffered evidence should continue to be treated as confidential information and, if so, what protection, if any, may be afforded to such information at the trial. Id. at 381-82.

The in camera mechanism is frequently utilized by courts in trade secret cases to safeguard the trade secret against undue disclosure. See generally, Annot. In Camera Trial or Hearing and Other Procedures to Safeguard Trade Secrets, 62 ALR 2d 509 (1958).

Professor Milgrim states that administrative agencies have the power to seal records and hear matters in camera in order to discharge their duty to maintain matter under consideration as a trade secret. 2 Milgrim on Trade Secrets, Section 7.06 [3] at 7-121, citing, In re Sarkar,

575 F.2d 870 (C.C.P.A. 1978), and In the Matter of E. I. DuPont de Nemours, 1981 Trade Cas. Para 21, 796 (1981).

Protection of confidential information before utility commissions through the use of in camera hearings has been upheld by some courts. For example, in Town of New Shoreham v. Rhode Island Public Utilities Commission, 464 A. 2d 730 (R.I. 1983), the Supreme Court of Rhode Island upheld the PUC's protective order, which contained an in camera provision. The order specified in part that if,

It should become necessary to use the [c]onfidential [i]nformation as evidence*** it shall be offered in an in camera hearing***. Similarly, cross-examination on or using [c]onfidential [i]nformation shall be conducted in camera. Id. at 735.

In the New Shoreham case, the court rejected the argument that an in camera protective order had deprived the party opposing the utility of a "meaningful public hearing":

The protective order sought to protect the confidentiality of the requested documents through the use of in-camera proceedings. It did not prevent the town from using the information before the commission subject to the limitations set out in the order. Moreover, the protective order did not deprive the town of a meaningful public hearing or of some right to have the information made public. Id.

Similarly, in Re Pacific Northwest Bell Telephone Co., 9 PUR 4th 49 (1975), the Oregon Public Utility Commission ordered in camera treatment and restrictions on the production, inspection and use of a cost study abstract (prepared by the commission Staff from a full cost study produced by the utility) and limited to counsel for a trade association opposing PNB's new tariff filing. The trade association was composed of companies in direct competition to PNB. Id. at 50.

The Commission's ruling in PNB utilized a number of prophylactic measures, beyond in camera procedures, in order "to minimize the competitive loss that might result from full public disclosures...." Id. at 55.

The actual cost study by PNB was not furnished. Rather, an abstract prepared by the Commission staff was furnished to the trade association's counsel for in camera use. PNB was permitted to delete from the abstract information that was both: demonstrably damaging to PNB if disclosed and unnecessary for the trade association in order to rebut the cost study's conclusions.

Finally, if the trade association wanted additional information originally deleted, it would require a "showing"

of need for such information for cross-examination. As the commission stated:

This will help ensure that the association can contribute to the record, but will shift the burden to require a showing of the need for particular information. Id. at 55.

The Mountain States Order made no express provision for handling confidential information at depositions. The MCL 2d sample protective order contains the following provision relating to depositions:

Confidential Information in
Depositions.

A deponent may during the deposition be shown, and examined about, stamped confidential documents if the deponent already knows the confidential information contained therein or if the provisions of paragraph 2(c) are complied with. Deponents shall not retain or copy portions of the transcript of their depositions that contain confidential information not provided by them or the entities they represent unless they sign the form prescribed in paragraph 2(b). A deponent who is not a party or a representative of a party shall be furnished a copy of this order before being examined about, or asked to produce, potentially confidential documents. MCL 2d, Sect. 41.36.

A shortcoming of the MCL 2d sample order is that it does not anticipate the presence at depositions of representatives of the parties (other than counsel covered by the order) who might be in a position to misuse the confidential

information. The party asserting confidentiality should be authorized by the terms of the protective order to exclude from the deposition room unauthorized persons when confidential information will be disclosed. See Joslin, Confidentiality Orders in Complex Litigation 4 Rev. of Litigation 109, 128 (1984).

6. Procedures for Challenging the Confidential Status of the Materials.

Example: Paragraph 5 of the Mountain States Order, states:

In the event that the parties hereto are unable to agree that certain documents, data, information, studies or other matters constitute trade secret, confidential or privileged commercial and financial information, the party objecting to the trade secret claim shall forthwith submit the said matters to the Commission for its review pursuant to this Order. When the Commission rules on the question of whether any documents, data, information, studies or other matters submitted to them for review and determination are Confidential Information, the Commission will enter an order resolving the issue. Id. at 191.

Comment: The provision for challenging the confidential status of designated information is a key element to a successful "umbrella" protective order. The provision should, as does this one, allow for the parties to attempt to resolve their differences without the need for the Commission to rule in the first instance.

The parties to a protective order should consider whether the procedural standard for challenging the confidential status of the information, or the standard for overcoming the challenge, is to be incorporated into the Order itself. For example, the Sample Confidentiality Order in MCL 2d provides:

To maintain confidential status, the proponent of confidentiality must show by a preponderance of the evidence that there is good cause for the document to have such protection. Id. at 381.

The significance of expressly stating in the protective order that the burden of justifying the confidentiality of a document still lies with the party asserting the confidentiality is made clear in Cippollone v. Liggett Group, Inc., 785 F.2d 1108 (3d. Cir. 1986). The Third Circuit there held, inter alia, that the district court was mistaken in taking the view that it had to rule on the confidentiality of each document which the defendants might seek to protect from disclosure. Following the recommendation of the MCL 2d, the court of appeals held that it would be proper to issue a broad "umbrella" protective order which would initially protect all documents that the producing party designated in good faith as confidential; if the other party objected to any particular documents, the burden of proof would remain on the party seeking the order:

The district court felt compelled to adopt this solution because it recognized that the burden of persuasion fell on the party seeking the protective order, and it believed that allowing defendants to mark documents confidential in the first instance--bound only by their good faith--and requiring plaintiffs to oppose the confidentiality designation would impermissibly shift the burden of proof to the plaintiffs....

It is correct that the burden of justifying the confidentiality of each and every document sought to be covered by a protective order remains on the party seeking the protective order;.... That does not mean, however, that the party seeking the protective order must necessarily demonstrate to the court in the first instance on a document-by-document basis that each item should be protected. It is equally consistent with the proper allocation of evidentiary burdens for the court to construct a broad "umbrella" protective order upon a threshold showing by one party (the movant) of good cause.... After the documents delivered under this umbrella order, the opposing party could indicate precisely which documents it believed to be not confidential, and the movant would have the burden of proof in justifying the protective order with respect to those documents. The burden of proof would be at all times on the movant; only the burden of raising the issue with respect to certain documents would shift to the other party" Id. at 1122. (Footnotes omitted).

If the "burden" is clearly delineated in the protective order, it may alleviate some of the confusion surrounding the procedure.

7. Non-Waiver of Objections as to Relevancy and Materiality.

Example: Paragraph 9 of the Mountain States Order states:

The parties hereto affected by the terms of this Protective Order further retain the right to question, challenge, and object to the admissibility of any and all data, information, studies and other matters furnished under the terms of this Protective Order in response to interrogatories, requests for information or cross-examination on the grounds of relevancy or materiality. Id. at 191.

8. Non-Waiver as to Appeal.

Example: Paragraph 10 of the Mountain States Order states:

This Order shall in no way constitute any waiver of the rights of any party herein to contest any assertion or finding of trade secret, confidentiality or privilege, and to appeal any such determination of the Commission or such assertion by a party. Id. at 191.

9. Return of Confidential Materials.

Example: Paragraph 11 of the Mountain States Order states:

Upon completion of this proceeding, including any administrative or judicial review thereof, all Confidential Information, whether the original or any duplication or copy thereof, furnished under the terms of this Protective Order, and finally determined to be confidential or trade secret, shall be returned to the party furnishing such Confidential

Information upon request. Confidential Information made part of the record in this proceeding shall remain in the possession of the Commission, and may remain in the possession of the Consumer Counsel as above provided in paragraph 7. Id. at 191.

Comment: An alternative to return of the confidential materials might be their destruction and a certification to that effect by counsel who had received the other party's materials.

10. Modification of the Order.

Example: The last two decretal paragraphs of the Supreme Court of Montana's order read:

If any provision of the foregoing order required to be entered by the Public Service Commission shall impede or make impossible the performance of the lawful duties of the Public Service Commission, or the Montana Consumer Counsel in a manner not heretofore argued in this cause, such parties are hereby granted express permission to file directly in this Court such motions as may be appropriate to amend or vacate the offending provisions of said order, and this Court retains jurisdiction of the cause for that purpose.

This Court further retains jurisdiction of the cause for the purpose of issuing an opinion herein and for such further and other relief or judgment as may be appropriate in the premises. Id. at 192.

Comment: A more typical form of provision in a commission's protective order would read as follows:

The Commission may modify this Order on motion of any party or on its own motion upon reasonable prior notice to the parties and an opportunity for hearing. Nothing contained herein shall limit any party's rights to judicial review of this Order or any decision rendered hereunder.

If a protective order has been granted, who has the burden of persuasion on a motion to modify the Order? In the federal courts there is an apparent split of authority in the context of private party litigation. Compare In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 101 F.R.D. 34 (C.D. Cal. 1984) (burden on party seeking protection), with Zenith Radio Corp. v. Matsushita Electric Industrial Co., 529 F. Supp. 866 (E. D. Pa. 1981) (burden on party seeking modification or lifting of the order). In H. L. Hayden Co. of N.Y. v. Siemens Medical Systems, Inc., 106 F.R.D. 551 (S. D.N. Y. 1985) the court created a four factor test for determining which party bears the burden on motions to modify an order: (i) the degree of good cause for the protection; (ii) whether the party resisting modification has relied on the protective order; (iii) the existence of other litigation which modification of the order would facilitate; (iv) whether it is the government who seeks the information. Should the same factors be applied to modification of a public utilities commission's protective order?

We note that in Mountain States the court prefaced the right to apply for modification of the order with the words, "if any provision...shall impede or make impossible the performance of the lawful duties" of the Commission or the Consumer Counsel. Should modification be limited to these circumstances?

IV. CONCLUSION

Having to deal with the proprietary information of private companies and individuals in a public forum or public context is a problem that faces numerous public and quasi-public institutions. Public utility commissions can and should draw upon the accumulated experience of federal and state courts, of various federal and state agencies and government commissions in resolving such issues.

✓ Many of the public policy issues will be similar. Others, such as the impact on the public rate payer, may be unique to the public utility commission's role. As we have seen, the commissions and the courts recognize that in a competitive environment, the disclosure of a utility's confidential information in public utility proceedings may well harm the public interest, as well as the utility's private interests.

Perhaps the only constant is the ephemeral nature of proprietary information or trade secrets. As Judge Biunno bluntly stated, "Proprietary information...is not unlike the status of virginity. Once taken without consent, whether by seduction or rape, it is gone forever." Wearly v. FTC, supra, at 600 n.12. In certain circumstances, the Government's power to compel disclosure of trade secrets or confidential business information can have more serious consequences than the power of eminent domain .

The protective order is one means of tempering the power to compel disclosure. By stipulating a procedure to which the parties and commission must adhere before confidential information must be disclosed, the protective order becomes a method for consensually structuring due process. To work fairly and efficiently, however, it requires the good faith and dedication of all those involved--counsel, the parties, commission and staff.



reasonable access during business hours to each document in any such depository and may copy or obtain copies at the inspecting parties' expense. Such inspection shall not be subject to monitoring by any party. A log will be kept of all persons who enter and leave the depository, and only duplicate copies of documents may be removed from the depository except by leave of court. [Access to, and copying of, confidential documents is subject to the limitations and requirements of the order protecting against unauthorized disclosure of such documents.]

4. **Subsequent Filings.** After the initial deposit of documents in the depository, notice shall be given to both Liaison Counsel of all subsequent deposits.

Dated: _____

United States District Judge

41.36 Sample Confidentiality Order.

Confidentiality Order

To expedite the flow of discovery material, facilitate the prompt resolution of disputes over confidentiality, protect adequately material entitled to be kept confidential, and insure that protection is afforded only to material so entitled, it is, pursuant to the court's authority under Fed. R. Civ. P. 26(c) and with the consent of the parties, ORDERED:

1. **Non-disclosure of Stamped Confidential Documents.** Except with the prior written consent of the party or other person originally designating a document to be stamped as a confidential document, or as hereinafter provided under this order, no stamped confidential document may be disclosed to any person.

[A "stamped confidential document" means any document which bears the legend (or which shall otherwise have had the legend recorded upon it in a way that brings its attention to a reasonable examiner) "CONFIDENTIAL—SUBJECT TO PROTECTIVE ORDER IN CIVIL ACTION NO. _____, UNITED STATES DISTRICT COURT, _____ DISTRICT OF _____" to signify that it contains information believed to be subject to protection under Fed. R. Civ. P. 26(c)(7). For purposes of this order, the term "document" means all written, recorded, or graphic material, whether produced or created by a party or another person, whether produced

pursuant to Rule 34, subpoena, by agreement, or otherwise. Interrogatory answers, responses to requests for admission, deposition transcripts and exhibits, pleadings, motions, affidavits, and briefs that quote, summarize, or contain materials entitled to protection may be accorded status as a stamped confidential document, but, to the extent feasible, shall be prepared in such a manner that the confidential information is bound separately from that not entitled to protection.]

2. Permissible Disclosures. Notwithstanding paragraph 1, stamped confidential documents may be disclosed to counsel for the parties in this action^{1/} who are actively engaged in the conduct of this litigation; to the partners, associates, secretaries, paralegal assistants, and employees of such an attorney to the extent reasonably necessary to render professional services in the litigation; to persons with prior knowledge of the documents or the confidential information contained therein, and their agents; and to court officials involved in this litigation (including court reporters, persons operating video recording equipment at depositions, and any special master appointed by the court). Subject to the provisions of subparagraph (c), such documents may also be disclosed—

(a) to any person designated by the court in the interest of justice, upon such terms as the court may deem proper; and

(b) to persons noticed for depositions or designated as trial witnesses to the extent reasonably necessary in preparing to testify; to outside consultants or experts retained for the purpose of assisting counsel in the litigation; to employees of parties involved solely in one or more aspects of organizing, filing, coding, converting, storing, or retrieving data or designing programs for handling data connected with these actions, including the performance of such duties in relation to a computerized litigation support system; and to employees of third-party contractors performing one or more of these functions; provided, however, that in all such cases the individual to whom disclosure is to be made has signed and filed with the court a form containing—

(1) a recital that the signatory has read and understands this order;

(2) a recital that the signatory understands that unauthorized disclosures of the stamped confidential documents constitute contempt of court; and

(3) a statement that the signatory consents to the exercise of personal jurisdiction by this court.

(c) Before disclosing a stamped confidential document to any person listed in subparagraph (a) or (b) who is a competitor (or an employee of a competitor) of the party that so designated the document, the party wishing to make such disclosure shall give at least ten days' advance notice in writing

to the counsel who designated such information as confidential, stating the names and addresses of the person(s) to whom the disclosure will be made, identifying with particularity the documents to be disclosed, and stating the purposes of such disclosure. If, within the ten day period, a motion is filed objecting to the proposed disclosure, disclosure is not permissible until the court has denied such motion. The court will deny the motion unless the objecting party shows good cause why the proposed disclosure should not be permitted.

3. **Declassification.** A party (or aggrieved entity permitted by the court to intervene for such purpose) may apply to the court for a ruling that a document (or category of documents) stamped as confidential is not entitled to such status and protection. The party or other person that designated the document as confidential shall be given notice of the application and an opportunity to respond. To maintain confidential status, the proponent of confidentiality must show by a preponderance of the evidence that there is good cause for the document to have such protection.

4. **Confidential Information in Depositions.**

(a) A deponent may during the deposition be shown, and examined about, stamped confidential documents if the deponent already knows the confidential information contained therein or if the provisions of paragraph 2(c) are complied with. Deponents shall not retain or copy portions of the transcript of their depositions that contain confidential information not provided by them or the entities they represent unless they sign the form prescribed in paragraph 2(b). A deponent who is not a party or a representative of a party shall be furnished a copy of this order before being examined about, or asked to produce, potentially confidential documents.

(b) Parties (and deponents) may, within 15 days after receiving a deposition, designate pages of the transcript (and exhibits thereto) as confidential. Confidential information within the deposition transcript may be designated by underlining the portions of the pages that are confidential and marking such pages with the following legend: "Confidential—Subject to protection pursuant to Court Order." Until expiration of the 15 day period, the entire deposition will be treated as subject to protection against disclosure under this order. If no party or deponent timely designates confidential information in a deposition, then none of the transcript or its exhibits will be treated as confidential; if a timely designation is made, the confidential portions and exhibits shall be filed under seal separate from the portions and exhibits not so marked.

5. **Confidential Information at Trial.** Subject to the Federal Rules of Evidence, stamped confidential documents and other confidential information may be offered in evidence at trial or any court hearing, provided that the proponent of the evidence gives five days' advance notice to counsel for the party or other person that designated the information as confidential. Any party may move the

court for an order that the evidence be received in camera or under other conditions to prevent unnecessary disclosure. The court will then determine whether the proffered evidence should continue to be treated as confidential information and, if so, what protection, if any, may be afforded to such information at the trial.

6. **Subpoena by Other Courts or Agencies.** If another court or an administrative agency subpoenas or orders production of stamped confidential documents which a party has obtained under the terms of this order, such party shall promptly notify the party or other person who designated the document as confidential of the pendency of such subpoena or order.

7. **Filing.** Stamped confidential documents need not be filed with the Clerk except when required in connection with motions under Fed. R. Civ. P. 12 or 56 or other matters pending before the court. If filed, they shall be filed under seal and shall remain sealed while in the office of the Clerk so long as they retain their status as stamped confidential documents.

8. **Client Consultation.** Nothing in this order shall prevent or otherwise restrict counsel from rendering advice to their clients and, in the course thereof, relying generally on examination of stamped confidential documents; provided, however, that in rendering such advice and otherwise communicating with such client, counsel shall not make specific disclosure of any item so designated except pursuant to the procedures of paragraph 2(b) and (c).

9. **Prohibited Copying.** If a document contains information so sensitive that it should not be copied by anyone, it shall bear the additional legend "Copying Prohibited." Application for relief from this restriction against copying may be made to the court, with notice to counsel so designating the document.

10. **Use.** Persons obtaining access to stamped confidential documents under this order shall use the information only for preparation and trial of this litigation (including appeals and retrials), and shall not use such information for any other purpose, including business, governmental, commercial, or administrative or judicial proceedings. [For purposes of this paragraph, the term "this litigation" includes other related litigation in which the producing person or company is a party.]

11. **Non-Termination.** The provisions of this order shall not terminate at the conclusion of these actions. Within 120 days after final conclusion of all aspects of this litigation, stamped confidential documents and all copies of same (other than exhibits of record) shall be returned to the party or person which produced such documents or, at the option of the producer (if it retains at least one copy of the same), destroyed. All counsel of record shall make certification of compliance herewith and shall deliver the same to counsel for the party who produced the documents not more than 150 days after final termination of this litigation.

12. **Modification Permitted.** Nothing in this order shall prevent any party or other person from seeking modification of this order or from objecting to discovery that it believes to be otherwise improper.

13. **Responsibility of Attorneys.** The attorneys of record are responsible for employing reasonable measures to control, consistent with this order, duplication of, access to, and distribution of copies of stamped confidential documents. Parties shall not duplicate any stamped confidential document except working copies and for filing in court under seal.

Dated: _____

United States District Judge

Notes:

1/ The order should indicate whether or not disclosure may be made to house counsel actively involved in conduct of the litigation and to attorneys involved in related litigation in other courts.

41.37 Sample Order Referring Privilege Claims to Master.

Referral of Privilege Claims to Master

It appearing that submission of claims of privilege to a special master appointed under Fed. R. Civ. P. 53 is warranted by the expected volume of such claims and by the likelihood that in camera inspection may be needed to rule on these claims and should be accomplished, to the extent possible, by someone other than the judge to whom this litigation has been assigned, the court hereby, with the consent of the parties, ORDERS:

1. **Appointment.** _____ is appointed under Rule 53 as special master for the purpose of considering all claims of privilege (including assertion of protection against disclosure based on the "work product" doctrine) that may be asserted during the course of discovery in this litigation and for such other matters as may be referred to such master by the court, such as resolution of disputes under the Confidentiality Order.

2. **Procedures.** The master shall have the rights, powers, and duties as provided in Rule 53 and may adopt such procedures as are not inconsistent with that rule or with this or other orders of the court. Until directed otherwise by

HRS Chapter 91, Administrative Procedure

§91-10 Rules of evidence; official notice. In contested cases:

- (1) Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. The agencies shall give effect to the rules of privilege recognized by law.

Rules of Practice and Procedure before the Public Utilities Commission of the State of Hawaii General Order No. 1 (eff. 2/2/78)

3-17 EVIDENCE.

- (1) Form and Admissibility. The Commission shall not be bound by the common law rules relating to the admission or rejection of evidence, but may exercise its own discretion in such matters, limited only by considerations of relevancy, materiality and repetition, and with a view to doing substantial justice. The rules of privilege recognized by law shall be adhered to.
- (2) Rulings. The presiding officer shall rule on the admissibility of evidence. Such rulings may be reviewed by the Commission in determining the matter on its merits. In extraordinary circumstances, where prompt decision by the Commission is necessary to promote justice, the presiding officer may refer the question of admissibility to the Commission for determination.
- (3) Objections and Exceptions. When objections are made to the admission or exclusion of evidence, the grounds relied upon shall be stated briefly. Formal exceptions to rulings are unnecessary and need not be taken.

HAWAII RULES OF EVIDENCE

Rule 508 Trade secrets. A person has a privilege, which may be claimed by him or his agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by him, if allowance of the privilege will not tend to conceal fraud or otherwise work injustice. When disclosure is directed, the judge shall take such protective measure as the interests of the holder of the privilege and of the parties and the furtherance of justice may require.

RULE 508 COMMENTARY

This rule is similar to Uniform Rule of Evidence 507. Unlike the other privileges in this section, the rule provides a qualified right against disclosure, subject to broad judicial discretion. Hawaii courts have not addressed the issue at the appellate level; however, HRCp 26(c)(7) provides qualified protection against such disclosure

during pre-trial discovery, investing the court with discretion to order "that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way." This rule extends that protection to the trial stage.

HRS Chapter 92, Public Agency Meetings and Records

§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.

*Reason for
Statute*

§92-50 Definition. As used in this part, "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.

§92-51 Public records; available for inspection. 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.

§92-52 Denial of inspection; application to circuit courts. Any person aggrieved by the denial by the officer having the custody of any public record of the right to inspect the record or to obtain copies of extracts thereof may apply to the circuit court of the circuit wherein the public record is found for an order directing the officer to permit the inspection of or to furnish copies of extracts of the public records. The court shall grant the order after hearing upon a finding that the denial was not for just and proper cause.

HRS Chapter 91, Administrative Procedure

§91-2 Public information. (a) In addition to other rulemaking requirements imposed by law, each agency shall:

- (1) Adopt as a rule a description of the methods whereby the public may obtain information or make submittals or requests.

. . . .

(c) Nothing in this section shall affect the confidentiality of records as provided by statute. [L 1961, c 103, §2; Supp. §6C-2]

Rules of Practice and Procedure before the Public Utilities Commission of the State of Hawaii General Order No. 1 (eff. 2/2/78)

1-5 REQUESTS FOR PUBLIC INFORMATION AND RECORDS.

All requests for public information, for copies of public records, or to inspect the public records of the Commission, shall be directed to the Administrative Director, either in writing or in person.

1-7 PUBLIC RECORDS; INSPECTION; COST OF COPIES.

The term "public records" shall have the same meaning as defined in HRS, Section 92-50. The inspection of public records of the Commission is governed by HRS, Part V, Chapter 92. Copies of public records of the Commission and the costs and fees therefor are governed by HRS, Section 92-21.

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Notice)
by)
YOUNG BROTHERS. LIMITED)
of Changed Rates and Rate)
Structure Investigation)

DOCKET NO. 3216

STIPULATION RE DTB TOWING CHARGES

WHEREAS, the Commission has requested YB to provide certain information with respect to comparative towing charges of DTB for other clients, and YB has provided six contracts between DTB and unregulated third parties to the Commission in confidence; and

WHEREAS, the Commission recognizes that it cannot set rates for DTB or regulate DTB but wishes to consider the comparative towing charges for other parties in reaching a decision as to the reasonableness of DTB's charges to YB and therefore wishes the comparative information to be part of the record in this proceeding; and

WHEREAS, PUD, as Consumer Advocate, concurs in the Commission's desire to have the material part of the record; and

WHEREAS, YB asserts that this is privileged, confidential, proprietary information ("trade secrets") which DTB is not at liberty to make public and that public release of 259

...injury to DTB's customers
...to DTB in its relations with present and future
non-regulated customers and in its competitive posture with
other non-regulated tug companies; and

WHEREAS, the Commission and PUD agree that the information constitutes "trade secrets" which should be given confidential treatment; and

WHEREAS, it appears possible to meet the foregoing objectives and concerns by including these contracts and testimony concerning them in the record but sealing it to prevent public disclosure and limiting the persons at the hearing to government officials and their attorneys who agree to maintain confidential treatment of the information.

THEREFORE, THE PARTIES AGREE THAT:

The material on DTB contracts with other customers will be admitted into evidence and testimony may be taken with respect to the same. However, all evidence and testimony regarding such contracts shall be taken in camera, and the hearing of any argument thereon shall be held in camera so far as the argument might involve or necessitate discussion of such contracts. This portion of the record will be sealed as containing trade secrets or confidential proprietary information. No person other than the Commission, its counsel, designated members of its Staff, counsel for PUD, designated members of PUD's Staff, and YB or DTB representatives and their counsel and the official reporter shall be present at the hearing or have access to this material. A transcript of the proceedings shall be taken and sealed. If the parties

wish to refer to particulars of the contracts or in camera proceedings in briefs or other pleadings, or if the Commission wishes to make findings of fact or conclusions of law disclosing basic facts or specific details of the contracts or testimony concerning them, then such briefs, pleadings, findings, or conclusions shall be submitted in camera, made subject to inspection by the parties, and sealed. All persons participating in in camera proceedings, or having access to portions of the record sealed or to be sealed, shall agree not to disclose any such information, and such persons shall have a continuing duty to maintain the confidentiality of such information.

If the Commission wishes to refer to the non-YB contracts of DTB in the public record, it will do so in general terms without disclosing confidential information.

DATED: Honolulu, Hawaii, June 19th, 1978.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By Albert Tom
Albert Tom, Chairman

APPROVED AS TO FORM:

By R. H. Rath, Sr.
R. H. Rath, Sr., Commissioner

Harry S. Y. Kim
Harry S. Y. Kim
Commission Counsel

By Sunao Kido
Sunao Kido, Commissioner

YOUNG BROTHERS, LIMITED

PUBLIC UTILITIES DIVISION of the
Department of Regulatory Agencies

By Marshall M. Goodsill
Marshall M. Goodsill
Its Attorney

By Barry M. Utsumi
Barry M. Utsumi
Deputy Attorney General

ELEMENTS OF A PROTECTIVE ORDER

*Protective Order
more specific in case
doc)*

1. Introduction
Summary
2. Terms of the Order
3. Classification of Material as Confidential.
4. Forms of Evidence covered by Protective Order.
5. Procedures for Designating Material Confidential.
6. Persons entitled to Disclosure of Confidential Information.
7. Procedures for Disclosure.
8. Use of Confidential Information.
9. Retention of Confidential Information.
10. Duration of Confidential Status.
11. Procedures for Appeal to the Commission.
12. Non-waiver of Objections and Rights.
13. Modification of the Protective Order.
14. Disposal of Confidential Information.

more specific?

Sec. 92-50 PUBLIC PROCEEDINGS AND RECORDS

§92-50 Definition. As used in this part, "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. [L 1975, c 166, pt of §2]

Attorney General Opinions

Applications for licenses are not "public records." Att. Gen. Op. 75-7.
Referred to generally. Att. Gen. Op. 76-3.

§92-51 Public records; available for inspection. 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. [L 1975, c 166, pt of §2; am L 1976, c 212, §4]

Attorney General Opinions

Referred to generally. Att. Gen. Op. 76-3.

§92-52 Denial of inspection; application to circuit courts. Any person aggrieved by the denial by the officer having the custody of any public record of the right to inspect the record or to obtain copies of extracts thereof may apply to the circuit court of the circuit wherein the public record is found for an order directing the officer to permit the inspection of or to furnish copies of extracts of the public records. The court shall grant the order after hearing upon a finding that the denial was not for just and proper cause. [L 1975, c 166, pt of §2]

[PART VI. GENERAL PROVISIONS]

[§92-71] Political subdivision of the State; applicability. The provisions contained in this chapter shall apply to all political subdivisions of the State. Provided, however, in the event that any political subdivision of the State shall provide by charter, ordinance or otherwise, more stringent requirements relating to mandating the openness of meetings, the more stringent provisions of said charter, ordinance, or otherwise, shall apply. [L 1976, c 212, §5]

CHAPTER 93 GOVERNMENT PUBLICATIONS

PART I. STATE PUBLICATIONS DISTRIBUTION CENTER

SECTION

- 93-1 ESTABLISHMENT OF STATE PUBLICATIONS DISTRIBUTION CENTER
- 93-2 DEFINITIONS

THE ATTORNEY GENERAL OF HAWAII
AND REFER TO
INITIALS AND NUMBER
CES:IO



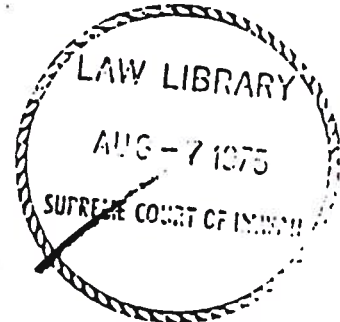
ORIGINAL
Please Return
to library

CABLE ADDRESS
ATTGEN
BERNHAM I. KANEHARA
ATTORNEY GENERAL

Op. No. 75-7

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HAWAII STATE CAPITOL
4TH FLOOR
HONOLULU, HAWAII 96813

July 25, 1975



Honorable Wayne Hinami
Director of Regulatory Agencies
State of Hawaii
1010 Richards Street
Honolulu, Hawaii 96813

Dear Sir:

This letter is in response to your request for a legal opinion from this office in regard to the following question:

Whether applications for motion picture operator's licenses under Chapter 448E, H.R.S., are public records and thus, open for inspection and review by the public?

It is our opinion that the applications for motion picture operator's licenses under Chapter 448E, H.R.S., are not public records and thus, are not subject to inspection and review by the public.

Section 92-51, H.R.S., reads as follows: 1/

1/ It should be noted that Sections 92-50 and 92-51, H.R.S., were recently enacted as part of Act 166, S.L.H. 1975 (Sunshine Law) and they are identical to former Sections 92-1(2) and 92-4, H.R.S., respectively, which were repealed by Act 166. In light of this fact, any interpretation of or facts relating to former Sections 92-1(2) and 92-4, H.R.S., would seem to be appropriate and applicable to Sections 92-50 and 92-51, H.R.S., respectively.

Op. No. 75-7

Honorable Wayne Minami
July 25, 1975
Page 2

"Sec. 92-51 Public records; available for inspection; cost of copies. 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 prosecution of a character or reputation of any person.

"Certified copies of extracts from public records shall be given by the officer having the same in custody to any person demanding the same and paying or tendering twenty cents per folio of one hundred words for such copies or extracts."

Section 92-50, H.R.S., defines "public record," as follows:^{2/}

"[A]ny 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." (Emphasis added.)

^{2/} See footnote No. 1.

Honorable Wayne Minami
July 25, 1975
Page 3

While these applications and accompanying documents appear to fall within the definition of "public records," they are exempt from said definition because inspection would "invade the right of privacy of an individual."

Our opinion is based upon a review of the legislative history of the bill enacting former Section 92-1(2), F.R.S. (present Section 92-50 of Act 166), which defined "public record." The House Judiciary Committee, in discussing and recommending for approval Senate Bill No. 30, which later was enacted as Act 43, S.L.H. 1959, defining "public record," stated in Standing Committee Report No. 594, as follows:

"Your Committee intends that records which invade the right of privacy of a person should remain confidential. Among the list of records which the Committee felt should remain confidential were examinations, public welfare lists, unemployment compensation lists, application for licenses and other similar records. Your Committee also does not intend to modify any common law or statutory privilege which exists by reason of a confidential relationship.

"Your Committee upon consideration of this bill recommends the following amendments:

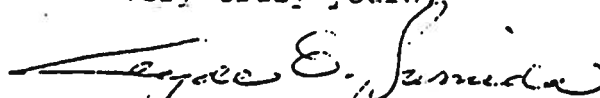
"1. Section 1 (b) be amended by excluding from the definition of public records all records which invade the right of privacy of an individual. . . . (emphasis added)."

Thus, it is clear that it was the legislative intent, in excluding from the definition "public record," records which invade the right of privacy of a person, that it intended that applications for licenses be excluded and that the information contained therein were confidential and not open to public inspection.

Honorable Wayne Minami
July 25, 1975
Page 4

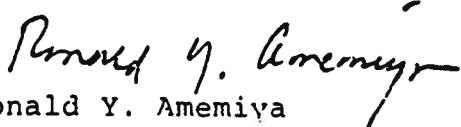
We therefore conclude that the applications for motion picture operator's license under Chapter 448F, H.R.S., are not public records and thus, are not subject to inspection and review by the public.

Very truly yours,



Clyde Sumida
Deputy Attorney General

APPROVED:



Ronald Y. Amemiya
Attorney General

N. Y. TELEPHONE v. PUBLIC SERVICE COM'N, ETC.

679

86 N.Y.2d 213

Cite as, Ct.App., 451 N.Y.S.2d 679

No appeal having been taken from so much of the judgment as found in favor of defendants on the cause of action for false arrest, that issue is not before the court.

For the reasons stated, the order of the Appellate Division should be modified by deleting so much of that order as dismisses the cause of action for malicious prosecution, and the case remitted to Supreme Court, Westchester County, for a new trial on the cause of action for malicious prosecution, with costs to abide the event, and, as so modified, the order should be affirmed.

COOKE, C. J., and GABRIELLI, JONES, WACHTLER, FUCHSBERG and MEYER, JJ., concur.

Order modified and case remitted to Supreme Court, Westchester County, for a new trial in accordance with the opinion herein, with costs to abide the event, and, as so modified, affirmed.



436 N.Y.2d 1281

56 N.Y.2d 213

In the Matter of NEW YORK TELEPHONE COMPANY, Appellant,

v.

PUBLIC SERVICE COMMISSION of the STATE OF NEW YORK, Respondent.

**Robert Abrams, as Attorney-General of the State of New York, et al.,
Intervenors-Respondents.**

Court of Appeals of New York.

May 20, 1982.

Article 78 proceeding was brought to annul Public Service Commission's refusal to issue protective order or otherwise grant confidential status to information obtained from petitioner. The Supreme Court, Special Term, Albany County, Lawrence E. Kahn, J., dismissed and petitioner appealed.

The Supreme Court, Appellate Division, 82 A.D.2d 172, 442 N.Y.S.2d 608, affirmed, and petitioner appealed. The Court of Appeals, Jones, J., held that if material at issue constituted trade secrets, Commission had affirmative responsibility to provide for protection of interest of petitioner.

Order reversed, petition granted to extent of vacating Commission's denial of permanent protective order and matter remitted with directions.

1. Public Utilities ⇐145

Records ⇐59

Public Service Commission has authority to issue orders protecting confidentiality of trade secrets received in evidence in rate-fixing proceedings, notwithstanding statutory prescription that all proceedings and records of Commission shall be public. McKinney's Public Service Law § 16, subd. 1.

2. Records ⇐59

Statute providing that proceedings of Public Service Commission shall be public records does not foreclose restriction by Commission of access to its proceedings when such restriction is necessary or appropriate for protection of confidential trade information. McKinney's Public Service Law § 16, subd. 1.

3. Mandamus ⇐82

Records ⇐62

If material prepared by telephone company and sought to be put into evidence at rate-fixing hearing constituted trade secrets, Public Service Commission not only was not without power but had affirmative responsibility to make provision, appropriate to exercise of its regulatory authority, for protection of interest of company in trade secrets which it had made available to participants in proceeding; to fail to do so would be arbitrary and capricious and erroneous as matter of law, subject to being set aside in Article 78 proceeding. McKinney's CPLR 7801 et seq.; McKinney's Public Service Law § 16, subd. 1.

¹²¹⁴ Guy Miller Struve, James L. Kerr, Harold S. Levy and Gerald M. Oscar, New York City, for appellant.

¹²¹⁵ Charles R. Gibson and David E. Blabey, Albany, for respondent.

¹²¹⁶ Robert Abrams, Atty. Gen. (John F. Duane, Asst. Atty. Gen., Shirley Adelson Siegel, Sol. Gen., Melvyn R. Leventhal, New York City, and Paulann M. Caplovitz, Asst. Atty. Gen., of counsel), for Robert Abrams, intervenor-respondent.

¹²¹⁷ OPINION OF THE COURT

JONES, Judge.

[1] The Public Service Commission (Commission) has authority to issue orders protecting the confidentiality of trade secrets received in evidence in rate-fixing proceedings notwithstanding the statutory prescription that all proceedings and records of the Commission shall be public.

In the course of hearings being conducted by the Public Service Commission on tariff revisions filed by petitioner New York Telephone Company, certain user parties (intervenor in the present proceeding) proposed to introduce in evidence material gained from a "Migration Study" which had been prepared by the telephone company and had been made available by it to the user parties under a protective agreement. The "Migration Study" contained detailed, year-by-year projections of transfer of the company's customers from older to newer, more sophisticated types of telephone systems, as well as specifics of the company's future price plans, schedules of new product introduction, and particular sales tactics, representing confidential commercial information which would be valuable to the utility's competitors and which petitioner characterizes as trade secrets. When the telephone company requested that a protective order be granted precluding disclosure of the "Migration Study" data to the public (as contrasted with disclosure to the Commission, its hearing officers and the parties to the

proceeding), the Administrative Law Judges before whom the hearing was being held denied receipt in evidence of the confidential information pending determination by the Public Service Commission whether it would grant such protective relief. The Commission on August 14, 1980 denied the protection sought and directed that the proof, insofar as the hearing officers determined it to be relevant and material, be placed in evidence without measures to preserve confidentiality. When the Administrative Law Judges thereafter concluded that much of the alleged confidential information was relevant and material, petitioner again sought a protective order from the Commission which, on August 27, 1980, declined to alter its prior denial of such relief. The Commission did however grant an order, effective only through September 30, 1980, limiting disclosure of the described material to the Commission, its Administrative Law Judges, the parties to the proceeding, and such additional persons as the Commission might specify, to afford the utility an opportunity to obtain judicial review of the Commission's refusal to grant a permanent protective order. ¹²¹⁸

On September 5, 1980 the telephone company commenced the present proceeding under CPLR article 78 to annul the determinations of the Commission on August 14 and August 27 to the extent that the Commission directed that the relevant portions of the "Migration Study" should be admitted into evidence *without any protective measures to preserve their confidentiality*.¹ Special Term dismissed the proceeding, concluding that the Public Service Commission had neither "abused its discretion [n]or acted in an arbitrary or capricious manner in refusing to seal the record" to protect the "Migration Study" material. The Appellate Division unanimously affirmed, but on a different ground, holding that by virtue of subdivision 1 of section 16 of the Public Service Law the Commission is without authority to issue an order protecting trade

1. The temporary protective order issued by the Commission on August 27, 1980 has been con-

tinued through this litigation by orders of Supreme Court and of the Appellate Division.

98 N.Y.2d 220

Cite as: Ct.App., 451 N.Y.S.2d 679

secrets against public disclosure once the information has been admitted into evidence during the course of a rate-making proceeding.

Although acknowledging in its August 14 order that there might be "circumstances where we would need to protect those rare items of proprietary material whose disclosure would cause injury more significant than secrecy's effects on the openness of our decisional process", but noting too that "it would be extraordinary if information in a regulated company's possession were relevant and material to a Commission proceeding yet also deserving of secrecy", the Public Service Commission now joins the intervenor Attorney-General in arguing in support of the holding of the Appellate Division, asserting that it does not have power to issue any protective order because subdivision 1 of section 16 of the Public Service Law requires that the testimony and records in a rate-fixing case be public records.²

We hold a different view and give no such limiting effect to the statutory provision, failing to find in it any proscription against protection from general public disclosure by appropriate order of the Commission of information put in evidence at hearings held by it which falls within the category of trade secrets.³ The importance of trade secret protection and the resultant public benefit are well recognized (e.g., *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 481-482, 94 S.Ct. 1879, 1886, 40 L.Ed.2d 315). Numerous decisions in this and other jurisdictions demonstrate the variety of protective means that have been fashioned to maintain the confidentiality of trade secret information that is the subject of litigation (*Du Pont Powder Co. v. Masland*, 244 U.S. 100, 37 S.Ct. 575, 61 L.Ed. 1016; *Tymko v. K-Mart Discount Stores*, 75 A.D.2d 987, 429 N.Y.S.2d 119, mot. for lv. to app.

dsmd. 51 N.Y.2d 879; *Snyder v. Parke, Davis & Co.*, 56 A.D.2d 536, 391 N.Y.S.2d 579; *National Starch Prods. v. Polymer Inds.*, 273 App.Div. 732, 79 N.Y.S.2d 357). This court has itself on at least two occasions noted the propriety of restricting attendance of the public during portions of a trial at which trade secret proof is to be introduced (*Sybron Corp. v. Wetzel*, 46 N.Y.2d 197, 207, 413 N.Y.S.2d 127, 385 N.E.2d 1055; *People v. Jelke*, 308 N.Y. 56, 63, n. 2, 123 N.E.2d 769), despite the fundamental precept that trials and judicial proceedings generally shall be open to public view and the mandate of section 4 of the Judiciary Law that "the sittings of every court within this state shall be public" (with exceptions which do not include trade secrets).

[2, 3] For the same reason that section 4 of the Judiciary Law (providing that court sessions shall be public) does not preclude a court's exclusion of the public when such exclusion is necessary or appropriate to the protection of confidential trade information, subdivision 1 of section 16 of the Public Service Law (providing that proceedings of the Public Service Commission shall be public records) does not foreclose restriction by the Commission of access to its proceedings when such restriction is necessary or appropriate for protection of similar confidential material. Indeed, absent an express statutory prohibition (of which there is none and as to the validity of which we have no occasion to comment), no rationale is suggested why the Commission should not extend the same evidentiary privileges and protection to trade secrets that a court would in a judicial proceeding (cf. *Matter of City Council of City of N. Y. v. Goldwater*, 284 N.Y. 296, 302, 31 N.E.2d 31; see *FCC v. Schreiber*, 381 U.S. 279, 296, 85 S.Ct. 1459, 1470, 14 L.Ed.2d 383). The Commission was therefore not free in the present case to

2. Public Service Law (§ 16, subd. 1), provides: "All proceedings of the commission and all documents and records in its possession shall be public records."

3. A useful and widely adopted definition of a trade secret is that which was set out in Restatement of Torts (§ 757, Comment b): "A

trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it."

decline to provide any protection for confidentiality to the information taken from petitioner's "Migration Study" and to be put in evidence at the rate-fixing hearing if in fact such material constituted trade secrets. It not only was not without power but it had an affirmative responsibility to make provision, appropriate to the exercise of its regulatory authority, for the protection of the interest of the utility in any trade secrets which the telephone company had made available to participants in the proceeding. To fail to do so would be arbitrary and capricious and erroneous as a matter of law, subject to being set aside in an article 78 proceeding.

Whether or not a permanent protective order in some form should be granted in the present case cannot now be resolved because there has as yet been no determination whether in fact the "Migration Study" data received in evidence subject to the temporary protective order of August 27, 1980 constitutes trade secrets. The case must therefore be remitted to Supreme Court with directions to remand to the Commission for such determination and, if trade secrets be found to be involved, for formulation by it of an appropriate permanent protective order, the terms of which, if unsatisfactory, would of course be subject to judicial review in another article 78 proceeding.

Pending such action by the Commission on the utility's application, the temporary ¹²²¹ protective order (which petitioner's counsel advised on oral argument is satisfactory and which the Commission has not indicated is other than a considered order on its part) should be continued in effect.

For the reasons stated, the order of the Appellate Division, 82 A.D.2d 172, 442 N.Y.S.2d 608, should be reversed, without costs, the petition granted to the extent of vacating the Commission's denials of a permanent protective order on August 14, 1980 and August 27, 1980, and the matter remitted to Supreme Court with direction to remand to the Public Service Commission for further proceedings by it in accordance with this opinion, pending which the tempo-

rary protective order of August 27, 1980 should be continued in effect.

COOKE, C. J., and JASEN, WACHTLER and MEYER, JJ., concur.

GABRIELLI and FUCHSBERG, JJ., taking no part.

Order reversed, without costs, petition granted to the extent of vacating the Commission's denials of a permanent protective order on August 14, 1980 and August 27, 1980, and matter remitted to Supreme Court, Albany County, with directions to remand to the Public Service Commission for further proceedings in accordance with the opinion herein.



436 N.E.2d 1284

56 N.Y.2d 222

James COPELAND et al., Appellants, ¹²²²

v.

Abraham SALOMON, Respondent.
(Action No. 1.)

(And Another Action.)

Court of Appeals of New York.

May 20, 1982.

In two actions, the first for personal injuries and the second to foreclose mortgage, appeal was taken from two orders of the Supreme Court, Special Term, Queens County, Harold Hyman, J., the first of which, 103 Misc.2d 611, 426 N.Y.S.2d 699, denied a motion to dismiss personal injury action for lack of jurisdiction and the second of which, made in the foreclosure action, granted the motion of two individuals for permission to institute a personal injury action against the receiver. The Supreme Court, Appellate Division, Second Department, 81 A.D.2d 824, 438 N.Y.S.2d 599, reversed on the law. Appeal was taken. The Court of Appeals, Meyer, J., held

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details

when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4)(A) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constituent units of such agency. Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under

any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(D) Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Civil Service Commission shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Commission, after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Commission recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request—

(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(b) This section does not apply to matters that are—

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential; ✓

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(d) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Sen-

ate for referral to the appropriate committees of the Congress. The report shall include—

(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

(4) the results of each proceeding conducted pursuant to subsection (a)(4)(F), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

(5) a copy of every rule made by such agency regarding this section;

(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

(7) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections (a)(4)(E), (F), and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(e) For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 383; Pub.L. 90-23, § 1, June 5, 1967, 81 Stat. 54; Pub.L. 93-502, §§ 1-3, Nov. 21, 1974, 88 Stat. 1561-1564; Pub.L. 94-409, § 5(b), Sept. 13, 1976, 90 Stat. 1247.

Historical and Revision Notes

Derivation:	United States Code	Revised Statutes and Statutes at Large
	5 U.S.C. 1002	June 11, 1946, ch. 324, § 3, 60 Stat. 228.

§ 552b. Open meetings

(a) For purposes of this section—

(1) the term "agency" means any agency, as defined in section 552(e) of this title, headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of the agency;

(2) the term "meeting" means the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business, but does not include deliberations required or permitted by subsection (d) or (e); and

(3) the term "member" means an individual who belongs to a collegial body heading an agency.

(b) Members shall not jointly conduct or dispose of agency business other than in accordance with this section. Except as provided in subsection (c), every portion of every meeting of an agency shall be open to public observation.

(c) Except in a case where the agency finds that the public interest requires otherwise, the second sentence of subsection (b) shall not apply to any portion of an agency meeting, and the requirements of subsections (d) and (e) shall not apply to any information pertaining to such meeting otherwise required by this section to be disclosed to the public, where the agency properly determines that such portion or portions of its meeting or the disclosure of such information is likely to—

(1) disclose matters that are (A) specifically authorized under criteria established by an Executive order to be kept secret in the interests of national defense or foreign policy and (B) in fact properly classified pursuant to such Executive order;

(2) relate solely to the internal personnel rules and practices of an agency;

(3) disclose matters specifically exempted from disclosure by statute (other than section 552 of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) involve accusing any person of a crime, or formally censuring any person;

(6) disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;

(7) disclose investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records, but only to the extent that the production of such records or information would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) disclose information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;

(9) disclose information the premature disclosure of which would—

(A) in the case of an agency which regulates currencies, securities, commodities, or financial institutions, be likely to (i) lead to significant financial speculation in currencies, securities, or commodities, or (ii) significantly endanger the stability of any financial institution; or

(B) in the case of any agency, be likely to significantly frustrate implementation of a proposed agency action,

except that subparagraph (B) shall not apply in any instance where the agency has already disclosed to the public the content or nature of its proposed action, or where the agency is required by law to make such disclosure on its own initiative prior to taking final agency action on such proposal; or

(10) specifically concern the agency's issuance of a subpoena, or the agency's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in section 554 of this title or otherwise involving a determination on the record after opportunity for a hearing.

(d)(1) Action under subsection (c) shall be taken only when a majority of the entire membership of the agency (as defined in subsection (a)(1)) votes to take such action. A separate vote of

the agency members shall be taken with respect to each agency meeting a portion or portions of which are proposed to be closed to the public pursuant to subsection (c), or with respect to any information which is proposed to be withheld under subsection (c). A single vote may be taken with respect to a series of meetings, a portion or portions of which are proposed to be closed to the public, or with respect to any information concerning such series of meetings, so long as each meeting in such series involves the same particular matters and is scheduled to be held no more than thirty days after the initial meeting in such series. The vote of each agency member participating in such vote shall be recorded and no proxies shall be allowed.

(2) Whenever any person whose interests may be directly affected by a portion of a meeting requests that the agency close such portion to the public for any of the reasons referred to in paragraph (5), (6), or (7) of subsection (c), the agency, upon request of any one of its members, shall vote by recorded vote whether to close such meeting.

(3) Within one day of any vote taken pursuant to paragraph (1) or (2), the agency shall make publicly available a written copy of such vote reflecting the vote of each member on the question. If a portion of a meeting is to be closed to the public, the agency shall, within one day of the vote taken pursuant to paragraph (1) or (2) of this subsection, make publicly available a full written explanation of its action closing the portion together with a list of all persons expected to attend the meeting and their affiliation.

(4) Any agency, a majority of whose meetings may properly be closed to the public pursuant to paragraph (4), (8), (9)(A), or (10) of subsection (c), or any combination thereof, may provide by regulation for the closing of such meetings or portions thereof in the event that a majority of the members of the agency votes by recorded vote at the beginning of such meeting, or portion thereof, to close the exempt portion or portions of the meeting, and a copy of such vote, reflecting the vote of each member on the question, is made available to the public. The provisions of paragraphs (1), (2), and (3) of this subsection and subsection (e) shall not apply to any portion of a meeting to which such regulations apply: *Provided*, That the agency shall, except to the extent that such information is exempt from disclosure under the provisions of subsection (c), provide the public with public announcement of the time, place, and subject matter of the meeting and of each portion thereof at the earliest practicable time.

(e)(1) In the case of each meeting, the agency shall make public announcement, at least one week before the meeting, of the time, place, and subject matter of the meeting, whether it is to be open or closed to the public, and the name and phone number of the official

designated by the agency to respond to requests for information about the meeting. Such announcement shall be made unless a majority of the members of the agency determines by a recorded vote that agency business requires that such meeting be called at an earlier date, in which case the agency shall make public announcement of the time, place, and subject matter of such meeting, and whether open or closed to the public, at the earliest practicable time.

(2) The time or place of a meeting may be changed following the public announcement required by paragraph (1) only if the agency publicly announces such change at the earliest practicable time. The subject matter of a meeting, or the determination of the agency to open or close a meeting, or portion of a meeting, to the public, may be changed following the public announcement required by this subsection only if (A) a majority of the entire membership of the agency determines by a recorded vote that agency business so requires and that no earlier announcement of the change was possible, and (B) the agency publicly announces such change and the vote of each member upon such change at the earliest practicable time.

(3) Immediately following each public announcement required by this subsection, notice of the time, place, and subject matter of a meeting, whether the meeting is open or closed, any change in one of the preceding, and the name and phone number of the official designated by the agency to respond to requests for information about the meeting, shall also be submitted for publication in the Federal Register.

(f)(1) For every meeting closed pursuant to paragraphs (1) through (10) of subsection (c), the General Counsel or chief legal officer of the agency shall publicly certify that, in his or her opinion, the meeting may be closed to the public and shall state each relevant exemptive provision. A copy of such certification, together with a statement from the presiding officer of the meeting setting forth the time and place of the meeting, and the persons present, shall be retained by the agency. The agency shall maintain a complete transcript or electronic recording adequate to record fully the proceedings of each meeting, or portion of a meeting, closed to the public, except that in the case of a meeting, or portion of a meeting, closed to the public pursuant to paragraph (8), (9)(A), or (10) of subsection (c), the agency shall maintain either such a transcript or recording, or a set of minutes. Such minutes shall fully and clearly describe all matters discussed and shall provide a full and accurate summary of any actions taken, and the reasons therefor, including a description of each of the views expressed on any item and the record of any rollcall vote (reflecting the vote of each member on the question). All documents considered in connection with any action shall be identified in such minutes.

(2) The agency shall make promptly available to the public, in a place easily accessible to the public, the transcript, electronic re-

ording, or minutes (as required by paragraph (1)) of the discussion of any item on the agenda, or of any item of the testimony of any witness received at the meeting, except for such item or items of such discussion or testimony as the agency determines to contain information which may be withheld under subsection (c). Copies of such transcript, or minutes, or a transcription of such recording disclosing the identity of each speaker, shall be furnished to any person at the actual cost of duplication or transcription. The agency shall maintain a complete verbatim copy of the transcript, a complete copy of the minutes, or a complete electronic recording of each meeting, or portion of a meeting, closed to the public, for a period of at least two years after such meeting, or until one year after the conclusion of any agency proceeding with respect to which the meeting or portion was held, whichever occurs later.

(g) Each agency subject to the requirements of this section shall, within 180 days after the date of enactment of this section, following consultation with the Office of the Chairman of the Administrative Conference of the United States and published notice in the Federal Register of at least thirty days and opportunity for written comment by any person, promulgate regulations to implement the requirements of subsections (b) through (f) of this section. Any person may bring a proceeding in the United States District Court for the District of Columbia to require an agency to promulgate such regulations if such agency has not promulgated such regulations within the time period specified herein. Subject to any limitations of time provided by law, any person may bring a proceeding in the United States Court of Appeals for the District of Columbia to set aside agency regulations issued pursuant to this subsection that are not in accord with the requirements of subsections (b) through (f) of this section and to require the promulgation of regulations that are in accord with such subsections.

(h)(1) The district courts of the United States shall have jurisdiction to enforce the requirements of subsections (b) through (f) of this section by declaratory judgment, injunctive relief, or other relief as may be appropriate. Such actions may be brought by any person against an agency prior to, or within sixty days after, the meeting out of which the violation of this section arises, except that if public announcement of such meeting is not initially provided by the agency in accordance with the requirements of this section, such action may be instituted pursuant to this section at any time prior to sixty days after any public announcement of such meeting. Such actions may be brought in the district court of the United States for the district in which the agency meeting is held or in which the agency in question has its headquarters, or in the District Court for the District of Columbia. In such actions a defendant shall serve his answer within thirty days after the service of the complaint. The burden is on the defendant to sustain his action. In deciding

Ch. 5 ADMINISTRATIVE PROCEDURE 5 § 552b

such cases the court may examine in camera any portion of the transcript, electronic recording, or minutes of a meeting closed to the public, and may take such additional evidence as it deems necessary. The court, having due regard for orderly administration and the public interest, as well as the interests of the parties, may grant such equitable relief as it deems appropriate, including granting an injunction against future violations of this section or ordering the agency to make available to the public such portion of the transcript, recording, or minutes of a meeting as is not authorized to be withheld under subsection (c) of this section.

(2) Any Federal court otherwise authorized by law to review agency action may, at the application of any person properly participating in the proceeding pursuant to other applicable law, inquire into violations by the agency of the requirements of this section and afford such relief as it deems appropriate. Nothing in this section authorizes any Federal court having jurisdiction solely on the basis of paragraph (1) to set aside, enjoin, or invalidate any agency action (other than an action to close a meeting or to withhold information under this section) taken or discussed at any agency meeting out of which the violation of this section arose.

(i) The court may assess against any party reasonable attorney fees and other litigation costs reasonably incurred by any other party who substantially prevails in any action brought in accordance with the provisions of subsection (g) or (h) of this section, except that costs may be assessed against the plaintiff only where the court finds that the suit was initiated by the plaintiff primarily for frivolous or dilatory purposes. In the case of assessment of costs against an agency, the costs may be assessed by the court against the United States.

(j) Each agency subject to the requirements of this section shall annually report to Congress regarding its compliance with such requirements, including a tabulation of the total number of agency meetings open to the public, the total number of meetings closed to the public, the reasons for closing such meetings, and a description of any litigation brought against the agency under this section, including any costs assessed against the agency in such litigation (whether or not paid by the agency).

(k) Nothing herein expands or limits the present rights of any person under section 552 of this title, except that the exemptions set forth in subsection (c) of this section shall govern in the case of any request made pursuant to section 552 to copy or inspect the transcripts, recordings, or minutes described in subsection (f) of this section. The requirements of chapter 33 of title 44, United States Code, shall not apply to the transcripts, recordings, and minutes described in subsection (f) of this section.

(l) This section does not constitute authority to withhold any information from Congress, and does not authorize the closing of any

5 § 552b THE AGENCIES GENERALLY

Ch. 5

agency meeting or portion thereof required by any other provision of law to be open.

(m) Nothing in this section authorizes any agency to withhold from any individual any record, including transcripts, recordings, or minutes required by this section, which is otherwise accessible to such individual under section 552a of this title.

Added Pub.L. 94-409, § 3(a), Sept. 13, 1976, 90 Stat. 1241.

Historical Note

References in Text. 180 days after the date of enactment of this section, referred to in subsec. (g), means 180 days after the date of enactment of Pub.L. 94-409, which was approved Sept. 13, 1976.

Chapter 33 of title 44, United States Code, referred to in subsec. (k), is chapter 33 of Title 44, Public Printing and Documents.

Effective Date. Section 6 of Pub.L. 94-409 provided that:

"(a) Except as provided in subsection (b) of this section, the provisions of this Act [see Short Title note set out under this section] shall take effect 180 days after the date of its enactment [Sept. 13, 1976].

"(b) Subsection (g) of section 552b of title 5, United States Code, as added by section 3(a) of this Act [subsec. (g) of this section] shall take effect upon enactment [Sept. 13, 1976]."

Short Title. Section 1 of Pub.L. 94-409 provided: "That this Act [enacting this

section, amending sections 551, 552, 556, and 557 of this title, section 10 of Appendix 1 of this title, and section 410 of Title 30, and enacting provisions set out as notes under this section] may be cited as the 'Government in the Sunshine Act'."

Declaration of Policy and Statement of Purpose. Section 2 of Pub.L. 94-409 provided that: "It is hereby declared to be the policy of the United States that the public is entitled to the fullest practicable information regarding the decision-making processes of the Federal Government. It is the purpose of this Act [see Short Title note set out under this section] to provide the public with such information while protecting the rights of individuals and the ability of the Government to carry out its responsibilities."

Legislative History. For legislative history and purpose of Pub.L. 94-409, see 1976 U.S. Code Cong. and Adm. News, p. 2183.

Library References

Administrative Law and Procedure C.J.S. Public Administrative Bodies and Procedure §§ 115, 132.
446, 473.

West's Federal Forms

Answers, see § 2011 et seq.
Declaratory judgments, matters pertaining to, see § 4781 et seq.
Jurisdiction and venue in district courts, matters pertaining to, see § 1000 et seq.
Preliminary injunctions and temporary restraining orders, matters pertaining to, see § 5271 et seq.
Taxation of costs, see §§ 4612 to 4632.

Code of Federal Regulations

Civil Service Commission, see 5 CFR 286.101 et seq.
Commission on Civil Rights, see 45 CFR 702.50 et seq.
Commodity Futures Trading Commission, see 17 CFR 147.1 et seq.
Consumer Product Safety Commission, see 16 CFR 1012.1 et seq.
Council on Environmental Quality, see 40 CFR 1517.1 et seq.
Department of Agriculture, Commodity Credit Corporation, see 7 CFR 1400.1 et seq.
Department of Defense, see 32 CFR 242a.1 et seq.
Department of Health, Education, and Welfare.
National Institute of Education, see 45 CFR 1440.1 et seq.
Social Security Administration, see 20 CFR 401.1 et seq.

code of federal regulations

Conservation of Power and Water Resources

18

PARTS 150 TO 399

Revised as of April 1, 1985

CONTAINING
A CODIFICATION OF DOCUMENTS
OF GENERAL APPLICABILITY
AND FUTURE EFFECT

AS OF APRIL 1, 1985

With Ancillaries

Published by
the Office of the Federal Register
National Archives and Records
Administration

as a Special Edition of
the Federal Register



§ 388.102

are intended for the Commission's consideration and those to the staff or a presiding officer which are signed or transmitted by or on behalf of the Chairman, a Commissioner, the Secretary, or the Executive Director.

(f) "Commission correspondence" includes written communications and enclosures received from others than the staff and intended for the Commission or sent to others than the staff and signed by the Chairman, a Commissioner, the Secretary, the Executive Director, or other authorized official, except those which are purely personal.

[Order 225, 47 FR 19052, May 3, 1982; 48 FR 786, Jan. 7, 1983]

§ 388.102 Scope.

This part prescribes the rules governing public notice of proceedings, publication of decisions, and public records of the Commission.

§ 388.103 Notice of proceedings.

(a) Public sessions of the Commission for taking evidence or hearing argument and public conferences and hearings before a presiding officer, including substantive rulemaking proceedings, will not be held except upon due notice.

(b) Notice of applications, complaints, and petitions, is governed by Rule 2009 (notice). Notice of applications for certificates of public convenience and necessity under section 7 of the Natural Gas Act is governed by § 157.9 of this chapter (notice of application). Notice of public sessions and proceedings and of meetings of the Commission is governed by Rule 2009 (notice). Notice of hearings and of initiation or pendency of rulemaking proceedings is governed by Rule 1903 (notice in rulemaking proceedings). Notice of applications under Part I of the Act for preliminary permits and licenses is governed by §§ 4.31 and 4.81 of this chapter (acceptance or rejection and contents). Notice of proposed alterations or surrenders of license under section 6 of the Federal Power Act may be given by filing and publication in the *FEDERAL REGISTER* as stated in Rule 1903 (notice in rulemaking proceedings), and, where deemed desirable by the Commission, by local

newspaper advertisement. Notice of rates charged and changes therein is governed by the filing requirements of Subchapters B and E of this chapter (regulations under the Federal Power Act and Regulations under the Natural Gas Act). Other notice required by statute, rule, regulation, or order, or deemed desirable, may be given by filing and publication in the *FEDERAL REGISTER* as governed by Rule 1903 (notice in rulemaking proceedings) or by service as governed by Rule 2010 (service).

§ 388.104 Notice and publication of decisions, rules, statements of policy, organization, and operations.

Service of intermediate and final decisions upon parties to the proceedings is governed by Rule 2010 (service). Descriptions of the Commission's organization, its methods of operation, statements of policy and interpretations, procedural and substantive rules, and amendments thereto will be filed with and published in the *FEDERAL REGISTER*. Commission opinions together with accompanying orders, Commission orders, and intermediate decisions will be released to the press and made available to the public promptly. Copies of Commission opinions, orders in the nature of opinions, rulemaking and selected procedural orders, and intermediate decisions which have become final are published in the *Federal Energy Regulatory Commission Reports* and, upon payment of applicable charges, may be obtained from: Commerce Clearing House, Inc., 4025 West Peterson Avenue, Chicago, Illinois 60646. Attention Order Department.

§ 388.105 Public records.

(a) The public records of the Commission, available for inspection and copying upon request reasonably describing the documents during regular business hours in the public reference room maintained by the Division of Public Information, include:

- (1) Submittals and filings as follows:
 - (i) Applications, declarations, complaints petitions, and other papers seeking Commission action;

Federal Energy Regulatory Commission

§ 388.105

(ii) Financial, statistical, and other reports to the Commission, power system statements of claimed cost of licensed projects, original cost and reclassification studies, proposed accounting entries, certificates of notification (under section 204(e) of the Federal Power Act), rates or rate schedules and related data and concurrences, and other filings and submittals to the Commission in compliance with the requirement of any statute, executive order, or Commission rule, regulation, order, license, or permit;

(iii) All answers, replies, responses, objections, protests, motions, stipulations, exceptions, other pleadings, notices, depositions, certificates, proof of service, transcripts or oral arguments, and briefs in any matter or proceeding;

(iv) Exhibits, attachments and appendices to, amendments and corrections of, supplements to, or transmittals or withdrawals of, any of the foregoing; and

(v) Commission correspondence relating to the foregoing;

(2) All other parts of the formal record in any matter or proceeding set for formal or statutory hearing and any Commission correspondence related thereto;

(3) Proposed testimony or exhibit filed with the Commission but not yet offered or received in evidence.

(4) Presiding officer actions, correspondence, and memoranda to or from others, with the exception of internal communications within the Office of Administrative Law Judges;

(5) Commission orders, notices, findings, opinions, determinations, and other actions in matter or proceeding and Commission minutes which have been approved;

(6) Commission correspondence relating to any furnishing of data or information, except to or by another branch, department, or agency of the Government;

(7) Commission correspondence with respect to the furnishing of data, information, comments, or recommendations to or by another branch, department, or agency of the Government where furnished to satisfy a specific requirement of a statute or where

made public by that branch, department or agency;

(8) Commission correspondence and reports on legislative matters under consideration by the Office of Management and Budget or Congress, but only after made public or released for publication by that Office or the Committee or Member of Congress involved;

(9) Staff reports on statements of claimed cost by licensees when such reports have been served on the licensee;

(10) Commission correspondence on interpretation of the Uniform System of Accounts and letters on such interpretation signed by the Chief Accountant and sent to others than the Commission, a Commissioner, or the staff;

(11) Commission correspondence on the interpretation or applicability of any statute, rule, regulation, order, license, or permit issued or administered by the Commission and letters of opinion on that subject signed by the General Counsel and sent to others than the Commission, a Commissioner, or the staff;

(12) Copies of the filings, certifications, pleadings, records, briefs, orders, judgments, decrees, and mandates in court proceedings to which the Commission is a party and the correspondence with the courts or clerks of court;

(13) The Commission's Administrative and Operating Manual;

(14) Transcripts, electronic recordings, or minutes of Commission meetings closed to public observation containing material nonexempt pursuant to Subpart B of Part 375 of this chapter (Government in the Sunshine Act rules);

(15) Other records of the Commission except those which are:

(i) Specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive Order.

(ii) Related solely to the internal personnel rules and practices of an agency;

(iii) Specifically exempted from disclosure by statute (other than 5 U.S.C. 552(b)), provided that such statute;

§ 388.106

(A) Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or

(B) Establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(iv) Trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(v) Interagency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency;

(vi) Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(vii) Investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would interfere with enforcement proceedings, deprive a person of a right to a fair trial or an impartial adjudication, constitute an unwarranted invasion of personal privacy, disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, disclose investigative techniques and procedures, or endanger the life or physical safety of law enforcement personnel; or

(viii) Geological and geophysical information and data, including maps, concerning wells;

(16) Any reasonably segregable portion of a record after deletion of the portions which are exempt under this section.

(b) The following are examples of information which are not part of the public records of the Commission:

(1) Files and records containing facts or information not permitted to be divulged by section 301 of the Federal Power Act or section 8 of the Natural Gas Act because knowledge thereof was gained during the course of examination of books, records, data, or accounts pursuant to those sections and divulgence thereof has not been ordered by the Commission;

(2) Files and records classified by E.O. 10501, 3 CFR 1949-5: 979, for national security purposes;

(3) Written communications or among the Commission, the Commission, the Secretary expressly designated members of the staff while particularly assigned, in accordance with all applicable legal requirements, to aid the Commission in the drafting of any order and findings, with or without opinion in any matter or proceeding; and

(4) Unaccepted offers of settlements in any matter or proceeding unless or until made public by act of the offeror.

[Order 225, 47 FR 19052, May 3, 1982; 48 FR 786, Jan. 7, 1983]

§ 388.106 Index of Commission actions.

The Division of Public Information maintains and makes available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this part to be made available or published. The index will be published quarterly and copies or supplements thereto will be distributed by sale or otherwise.

§ 388.107 Timetables and procedure in event of withholding of public records.

(a)(1) The Director of Public Information will determine within 10 days after receipt of a request for public records whether to comply with such request and will immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal any adverse determination in writing to the Chairman.

(2) Requests filed pursuant to this part must be in writing, addressed to the Director of Public Information, and clearly marked "Freedom of Information Request." Request for information received by the Commission not addressed and marked as indicated in paragraph (a)(2) of this section will be so addressed and marked by Commission personnel as soon as it is properly identified and forwarded immediately to the Director of Public Information. Requests made pursuant to

I. no.

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

_____)
_____) DOCKET TITLE
_____)
_____)

DOCKET NO. _____
PROTECTIVE ORDER NO. _____

INTRODUCTION:

1. Explain how the matter came before the Commission.
 - a. Motion of the producing party/person/entity.
 - b. Commission's own motion.
2. Statement of the statute, law or rule under which confidentiality is claimed.

TERMS OF THE ORDER:

This order governs the classification, acquisition, and use of confidential information in this docket.

IT IS HEREBY ORDERED as follows:

Classification:

1. Any party to this proceeding may designate any information to be "confidential" that it believes, in good faith, to be a trade secret or other confidential research, development, commercial or financial information, and such information shall be protected against disclosure to nonqualified persons pursuant to the terms of this protective order unless such information is declassified.
2. A person or entity not a party to this proceeding shall have the same rights as a party to designate information to be "confidential."
3. Any party/person/entity designating information to be "confidential" in this proceeding must submit a statement to the Commission

identifying the documents or other information such party/person/entity contends are or should be protected against disclosure and specify the basis for the claim.

4. In any appeal to the Commission, the party/person/entity claiming that documents or other information are or should be protected against disclosure shall bear the burden of establishing that the information should be protected.

Forms of Confidential Information:

5. All information furnished pursuant to responses to information requests, subpoenas or other modes of discovery, depositions, or provided in prefiled testimony and exhibits or in camera proceedings, or incorporated into pleadings, that is claimed to be "confidential" information shall be subject to the terms of this protective order, and shall be treated by all persons accorded access thereto pursuant to this protective order as constituting "confidential" information. Any notes, summaries, abstracts or analyses prepared by counsel, experts or other persons who have access to the confidential information pursuant to the protective order and which reflect the underlying confidential information, shall also be treated as confidential information.

Designation:

6. Any party/person/entity wishing to designate information as confidential shall place or cause to be placed upon each page of such material the following legend:

CONFIDENTIAL
SUBJECT TO PROTECTIVE ORDER

Whenever only a portion of a document, transcript, or other material is deemed confidential, the party claiming confidentiality shall, to the extent reasonably practicable, limit the designation to such portion of the material. However, if it is not reasonably practicable to so limit the designation, the entire document, transcript, or other material may be designated as confidential.

7. With respect to any confidential information which is not under the control of the party/person/entity claiming confidentiality, the other parties shall cooperate to ensure that all copies of the such confidential information bear the above-stated legend to the extent requested by the party/person/entity claiming confidentiality.

8. Each party may designate as confidential any documents or other information previously produced without having been designated as confidential, provided, however, that notice of such designation is received by the respective parties. Such notice shall be given in writing to the party to whom the documents or other information have been previously furnished.

Disclosures:

9. Confidential information shall not be made available or disclosed to any person/entity other than a "qualified person," as defined in paragraph 10 below.

10. "Qualified person" as used herein means an individual who is:

- a. The author(s), addressee(s), or originator(s) of the confidential information;
- b. The Commission and its staff;
- c. The Consumer Advocate and its staff;
- d. Counsel of record for a party;
- e. Persons employed directly by counsel of record;
- f. Any other person approved by the party/person/entity claiming confidentiality;
- g. Any other person/entity designated a qualified person by order of the Commission, after notice to all parties.

11. Parties, and employees of parties, are not "qualified persons" unless so designated pursuant to subparagraphs 10(f) or 10(g). However, nothing

in this protective order shall prevent or otherwise restrict counsel from rendering advice to their clients and, in the course thereof, relying generally on examination of confidential information; provided that in rendering such advice and otherwise communicating with such clients, counsel shall not make specific disclosure of any item so designated except pursuant to the procedures of paragraph 10.

12. When a party wishes to disclose confidential information to any person/entity other than those persons specified in paragraph 10, the party must request permission from the party/person/entity claiming confidentiality. The request shall state:

- a. The identity of the person(s)/entity;
- b. Any past, present, or anticipated affiliation between the person(s)/entity and any party;
- c. The exact information to be disclosed; and
- d. The specific reasons for such disclosure.

Procedure for obtaining Access:

13. Prior to disclosing confidential information to a "qualified person," the disclosing party shall require that person/entity to:

- a. Read a copy of this Protective Order;
- b. Complete a copy of a Protective Agreement attached hereto as Exhibit "A"; and
- c. Sign the Protective Agreement.

Upon request, counsel shall deliver a copy of the signed Protective Agreement to the party claiming confidentiality.

Use of Confidential Information:

14. With the exception contained in paragraph 20 herein, any confidential information obtained in connection with this proceeding shall be used solely for the preparation and litigation of this proceeding, and shall not

be used for any other purpose, including business, governmental or commercial purposes, or in any other administrative or judicial proceeding.

15. Subject to Rule 508 of the Hawaii Rules of Evidence, confidential information may be offered in evidence at hearing, provided that the proponent of the evidence gives ten days advance notice to the parties. Any party may move that the evidence be received in camera, or under other conditions which prevent unnecessary disclosure.

Retention of Confidential Information:

16. Confidential information shall be retained in a locked cabinet dedicated to the storage of confidential information.

17. Confidential material that is:

- a. Filed with the Commission, the Consumer Advocate or their staff;
- b. Made or incorporated into an exhibit;
- c. Attached to or incorporated into a pleading; or
- d. Incorporated into a transcript

shall be separately bound, and placed in sealed envelope or other appropriate sealed container on which the following legend shall be endorsed:

THIS ENVELOPE IS SEALED PURSUANT
TO PROTECTIVE ORDER NO. _____ AND
CONTAINS CONFIDENTIAL INFORMATION.
IT IS NOT TO BE OPENED OR THE CONTENTS
THEREOF DISPLAYED OR REVEALED EXCEPT
TO QUALIFIED PERSONS AUTHORIZED
TO INSPECT SAID DOCUMENTS.

18. To the extent possible, confidential information shall be segregated. If the confidential portion of a pleading or transcript cannot be conveniently segregated, then the entire pleading or transcript shall be deemed confidential.

19. Parties shall not reproduce or duplicate any confidential information except working copies and copies to be filed under seal. If a document contains information so sensitive that it should not be copied by anyone, it shall bear the additional legend "Copying Prohibited." Application for relief from this restriction against copying may be made to the Commission, with notice to counsel, so designating the document.

20. If a court or another administrative agency subpoenas or orders production of confidential information which a party has obtained under the terms of this protective order, such party shall promptly notify the party/entity/person who designated the document or other information as confidential of the pendency of such subpoena or order.

Duration of Confidentiality:

21. The confidentiality of information produced pursuant to the terms of this Protective Order shall be preserved until the Commission, by order, or the parties, by written stipulation, terminate the protection conferred by this order.

Appeal to the Commission:

22. If any party disagrees with the designation of information as confidential, the parties shall first attempt to dispose of the dispute on an informal basis. If the parties cannot resolve the dispute, the party contesting the confidentiality of the information shall file a motion with the Commission. The motion shall contain:

- a. The identity of the contested information;
- b. The reason(s) the information should not be classified confidential.

The information shall not be disclosed pending the Commission's ruling on the motion.

23. If a party wishes to disclose confidential information to an unqualified person, and the producing party does not consent to such disclosure within three business days, the party requesting disclosure may move the Commission to compel disclosure. The motion shall contain the following information:

- a. The identity of the person;
- b. Any past, present, or anticipated affiliation with a party;
- c. The information to be disclosed; and
- d. The reason(s) why disclosure is necessary.

The information shall not be disclosed pending the Commission's ruling on the motion.

NONWAIVER OF OBJECTIONS AND RIGHTS:

24. The parties retain the right to question, challenge, and object to the admissibility of confidential information on the grounds of relevancy or materiality.

25. The parties retain the right to contest any assertion or finding of confidentiality or of nonconfidentiality, and to appeal, in accordance with the applicable laws, any such determination by the Commission, or assertion by a party.

26. Nothing in this protective order shall prevent any person/entity, or other party from objecting to requests for production of information or other discovery requests.

MODIFICATION OF THE ORDER:

27. The Commission may modify this Order on the motion of any party, or on its own motion, upon reasonable notice to the parties and an opportunity for hearing.

DISPOSAL OF CONFIDENTIAL INFORMATION:

28. Within ninety (90) days after the conclusion of this proceeding, persons in possession of confidential information shall, at the option of the party/person/entity from which such material was obtained, return or destroy all such material and all copies, notes, tapes, other papers, and any other medium containing, summarizing, excerpting, or otherwise embodying any such material or its contents.

a. If the party/person/entity producing the confidential information requests destruction, a certification shall be submitted to the producing party/person/entity indicating the following:

- 1) The name of the person destroying the documents.
- 2) The method of destruction.
- 3) The specific documents destroyed.

29. Counsel shall be entitled to retain memoranda, pleadings, exhibits of record, written testimony, and transcripts embodying information derived from or incorporating confidential information to the extent reasonably necessary to preserve a file in this proceeding. The file shall not be disclosed to any other person.

30. Confidential information made a part of the record in this proceeding shall remain in the possession of the Commission for the duration required by statute.

DONE at Honolulu, Hawaii, this _____ day of _____,
1987.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By _____
Hideto Kono, Chairman

By _____
Albert Tom, Commissioner

By _____
Clyde S. DuPont, Commissioner

EXHIBIT A

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII**

PROTECTIVE AGREEMENT

1. I, _____, have been presented with a copy of Protective Order No. _____ issued in Docket No. _____ on the _____ day of _____, 19____.

2. I have requested review of the confidential information relating to _____.

3. I am requesting review of the above-stated confidential information on behalf of _____.

4. I understand that the confidential information protected by the protective order is to be used solely to assist the counsel for _____ with this proceeding, and that I am to make no other use of the confidential information, nor am I to disclose the confidential information to any other person, except upon instruction from such counsel, and only after a similar agreement is signed by such person.

5. I further understand that at the conclusion of my assistance to such counsel, I shall account for each copy, extract, note, and summary of or containing any part of such confidential information to such counsel, and I shall return all such copies, extracts, notes and summaries to such counsel.

6. I hereby certify that I have read the above-mentioned Protective Order and agree to abide by its terms and conditions.

DATED at Honolulu, Hawaii, _____, 19 ____.

Signature

Address

()

Telephone Number

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Notice)
by)
YOUNG BROTHERS, LIMITED)
of Changed Rates and Rate)
Structure Investigation)
_____)

DOCKET NO. 3216

STIPULATION RE DTB TOWING CHARGES

WHEREAS, the Commission has requested YB to provide certain information with respect to comparative towing charges of DTB for other clients, and YB has provided six contracts between DTB and unregulated third parties to the Commission in confidence; and

WHEREAS, the Commission recognizes that it cannot set rates for DTB or regulate DTB but wishes to consider the comparative towing charges for other parties in reaching a decision as to the reasonableness of DTB's charges to YB and therefore wishes the comparative information to be part of the record in this proceeding; and

WHEREAS, PUD, as Consumer Advocate, concurs in the Commission's desire to have the material part of the record; and

WHEREAS, YB asserts that this is privileged, confidential, proprietary information ("trade secrets") which DTB is not at liberty to make public and that public release of

the information could result in injury to DTB's customers and injury to DTB in its relations with present and future non-regulated customers and in its competitive posture with other non-regulated tug companies; and

WHEREAS, the Commission and PUD agree that the information constitutes "trade secrets" which should be given confidential treatment; and

WHEREAS, it appears possible to meet the foregoing objectives and concerns by including these contracts and testimony concerning them in the record but sealing it to prevent public disclosure and limiting the persons at the hearing to government officials and their attorneys who agree to maintain confidential treatment of the information.

THEREFORE, THE PARTIES AGREE THAT:

The material on DTB contracts with other customers will be admitted into evidence and testimony may be taken with respect to the same. However, all evidence and testimony regarding such contracts shall be taken in camera, and the hearing of any argument thereon shall be held in camera so far as the argument might involve or necessitate discussion of such contracts. This portion of the record will be sealed as containing trade secrets or confidential proprietary information. No person other than the Commission, its counsel, designated members of its Staff, counsel for PUD, designated members of PUD's Staff, and YB or DTB representatives and their counsel and the official reporter shall be present at the hearing or have access to this material. A transcript of the proceedings shall be taken and sealed. If the parties

wish to refer to particulars of the contracts or in camera proceedings in briefs or other pleadings, or if the Commission wishes to make findings of fact or conclusions of law disclosing basic facts or specific details of the contracts or testimony concerning them, then such briefs, pleadings, findings, or conclusions shall be submitted in camera, made subject to inspection by the parties, and sealed. All persons participating in in camera proceedings, or having access to portions of the record sealed or to be sealed, shall agree not to disclose any such information, and such persons shall have a continuing duty to maintain the confidentiality of such information.

If the Commission wishes to refer to the non-YB contracts of DTB in the public record, it will do so in general terms without disclosing confidential information.

DATED: Honolulu, Hawaii, June 19th, 1978.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By Albert Tom
Albert Tom, Chairman

APPROVED AS TO FORM:

By R. H. Rath, Sr.
R. H. Rath, Sr., Commissioner

Harry S. Y. K.
Harry S. Y. K.
Commission Counsel

By Sunao Kido
Sunao Kido, Commissioner

YOUNG BROTHERS, LIMITED

PUBLIC UTILITIES DIVISION of the
Department of Regulatory Agencies

By Marshall M. Goodsill
Marshall M. Goodsill
Its Attorney

By Barry M. Utsumi
Barry M. Utsumi
Deputy Attorney General



Century Center, Suite 3-262 / 1750 Kalakaua Ave. / Honolulu, Hawaii 96826

AN INDUSTRIAL RELATIONS CONSULTANT CORPORATION

August 5, 1987

(808) 942-3786

Mr. Matthew Chong
Governor's Ad Hoc Committee
on Public Records
P.O. Box 541
Honolulu, Hawaii 96809

Dear Mr. Chong:

Pursuant to your request, we attach herewith supplemental data on complaints we filed against contractors who were not complying with State statutory requirements.

Although we have taken similar action against contractors performing Department of Defense construction contracts, we are not citing these cases because our action was with the federal government.

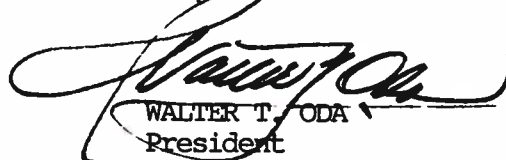
At issue is the fact that we are being denied access to certified payroll affidavits which precludes us from monitoring the activities of the State contracting agencies. We take exception to the State's position that payroll reports are privileged information and not accessible to the public.

We have successfully defended our position in court that payroll affidavits are public records, see Painting Industry of Hawaii Market Recovery Fund v Hideo Murakami, Director of Accounting and General Services; and the State of Hawaii S.P. No. 86-0323. We also have access to such information from the various federal contracting agencies pursuant to the requirements of the Freedom of Information Act, Title 5, U.S.C., Section 552.

We trust that the foregoing information would suffice in supporting our position in this matter. Please advise if you feel it necessary to review the responses we received from the federal contracting agencies regarding our request for payroll affidavits under the FOIA.

Respectfully,

IRC, INC.



WALTER T. ODA
President

enclosures

Memo from:

WALTER T. ODA

8/5/87

**Our complaints and settlement on
EMS Waterproofing.**

**Also included is the Court Order
permitting us access to certified
payroll affidavits.**



Century Center, Suite 3-262 / 1750 Kalakaua Ave. / Honolulu, Hawaii 96826

AN INDUSTRIAL RELATIONS CONSULTANT CORPORATION

(808) 942-3786

June 10, 1986

Mr. Robert C. Gilkey
Director, Department of Labor
and Industrial Relations
830 Punchbowl Street
Honolulu, Hawaii 96813

Dear Mr. Gilkey:

In behalf of the Fair Trades Practices Committee of the Painting Industry in Hawaii, may we respectfully request that the allegations of Mr. Michael C. Benn, as contained in the attached affidavit, be investigated.

Mr. Benn was employed by EMS Waterproofing Systems as a journeyman painter and worked on the Exterior Painting, Buildings H, G & J, Kailua High School (Job Nos. 02-16-6268, 6279, 6270) and/or Buildings F, T & L (Job Nos. 02-16-6271, 6273, 6274). His actual performance of work was on the ROTC and Horticultural Buildings.

Our cursory review of Mr. Benn's complaint indicates that he was illegally terminated from employment because of statements he made regarding his hourly wages; underpayment for actual hours worked; underpayment of wages, in lieu of fringe benefits.

It is rather difficult for us to analyze the total wage/fringe benefits obligations without access to the certified payroll affidavits. Consequently, may we be provided with a copy of the payroll reports as it pertains to Mr. Benn. Attached herewith is a copy of his authorization to release such information to us.

Mr. Benn's Social Security number is 070-62-6577 and he could be reached at 620-B Auwai Street, Kailua, Hawaii 96734. His residential telephone number is 262-2504.

Complaints against
EMS Waterproofing

Mr. Robert C. Gilkey
June 10, 1986
Page 2

We would appreciate it very much if Mr. Benn's complaint could be investigated as expeditiously as possible, pursuant to the requirements of Chapter 387, Section 387-12 (a) (3) HRS and Chapter 104 Section 104-2 (b) HRS. May we also be provided with a copy of your findings and disposition of this matter.

Respectfully,

IRC, INC.



WALTER T. ODA
President

WTO:joy

enclosures



Century Center, Suite 3-262 / 1750 Kalakaua Ave. / Honolulu, Hawaii 96826

AN INDUSTRIAL RELATIONS CONSULTANT CORPORATION

June 10, 1986

(808) 942-3786

Capt. Henry J. Rinnert
Officer In Charge of Construction
Naval Facilities Engineering
Command, Mid Pacific
Pearl Harbor, Hawaii 96860-5420

Dear Capt. Rinnert:

In behalf of the Fair Trades Practices Committee of the Painting Industry in Hawaii, may we respectfully request that the allegations of Mr. Michael C. Benn, as contained in the attached affidavit, be investigated.

Mr. Benn was employed by EMS Waterproofing Systems as a journeyman painter and worked on the Base Architectural Improvements at Pearl Harbor (IFB No. N62471-85-B-2333). The contract for this project was with the joint venture of Bodell Construction and Les Hirahara. Bids were opened on August 2, 1985.

Our cursory review of Mr. Benn's complaint indicates that he was paid less than the prevailing Davis Bacon rate for journeyman painter classification, without any fringe benefits, during the nine days he worked on the Pass and ID Office Building at Pearl Harbor.

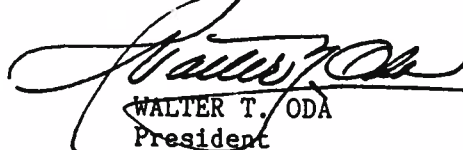
It is rather difficult for us to analyze the total wage/fringe benefits obligations without access to the certified payroll affidavits. Consequently, may we be provided with a copy of the payroll reports as it pertains to Mr. Benn. Attached herewith is a copy of his authorization to release such information to us.

Mr. Benn's Social Security number is 070-62-6577 and he could be reached at 620-B Auwai Street, Kailua, Hawaii 96734. His residential telephone number is 262-2504.

We would appreciate it very much if Mr. Benn's complaint could be investigated as expeditiously as possible and that we be provided with a copy of your findings and disposition of this matter.

Respectfully,

IRC, INC.



WALTER T. ODA
President

Amended complaint
against EMS

WTO:joy

Waterproofing.

enclosures



Century Center, Suite 3-262 / 1750 Kalakaua Ave. / Honolulu, Hawaii 96826

AN INDUSTRIAL RELATIONS CONSULTANT CORPORATION

June 23, 1986

(808) 942-3786

Mr. Robert C. Gilkey, Director
Dept. of Labor and Ind. Relations
State of Hawaii
830 Punchbowl Street
Honolulu, Hawaii 96813

Supplemental
complaint against
EMS Waterproofing.

Dear Mr. Gilkey:

Section 12-22-1, Administrative Rules and Enforcement of Chapter 104, HRS defines cost of fringe benefit as:

"Cost of fringe benefit" means the rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan, or program in providing benefits to a laborer or mechanic for: (1) Health and Welfare; (2) Vacation and Holiday Pay; (3) Pension; (4) Training; (5) Other bona fide fringe benefits as determined by the Director.

Section 12-22-5 of the Administrative Rules and Enforcement of Chapter 104, HRS provides:

Section 12-22-5 Meeting wage determination obligations. A contractor or subcontractor shall pay the basic hourly rates and fringe benefits where both are contained in a wage schedule applicable to laborers or mechanics in any of the following way.

(1) By paying not less than the basic hourly rate to the laborers or mechanics and by making the contributions for the fringe benefits as specified in the wage rate schedule; or

(2) By paying the basic hourly rate in cash directly to the laborers or mechanics and by making an additional cash payment in lieu of the fringe benefits required by the wage rate schedule.

EMS Waterproofing Systems is working on the Repaint, Building E, Kaahumanu Elementary School project (Job No: 02-16-6105) for the Department of Accounting and General Services. An interview with their employees, Wes Wheatley and Paul Thomas, revealed that they were being compensated at \$17.15 per hour in wages and they "may" also be provided with medical coverages.

Wheatley and Thomas were painting the facility with brush and rollers on Monday, June 23, 1986. Both employees were uncertain about their medical coverages. However, they readily admitted that they were not being

Mr. Robert C. Gilkey
June 23, 1986
Page 2

provided or compensated for other fringe benefits contained in the wage schedule.

Inquiries made of the payment procedure of EMS Waterproofing Systems on other DAGS projects confirmed that, in most instances, the journeyman painter is paid \$17.15 per hour. However, we understand that their employees were required to sign a statement that they are also being provided fringe benefits as well.

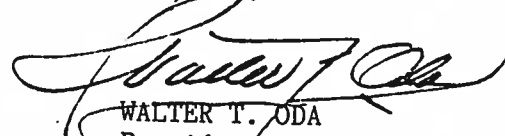
In checking with the various labor/management trust funds providing fringe benefits for the painting industry in Hawaii, we were not able to verify that any contributions were made by EMS Waterproofing Systems for its employees.

8 In light of the foregoing, we contend that the requirements of Chapter 104 HRS are explicit and that EMS Waterproofing Systems cannot satisfy payment of fringe benefits by merely obtaining waivers from its employees. Furthermore, the payment of such benefits should be made directly to the employees inasmuch as no contribution is being made to a bona-fide trust fund.

The flagrant disregard to statutory requirements is cause for review of the certified payroll affidavits filed. A payroll audit should also be conducted on this and other DAGS projects, to ascertain compliance with Chapter 104 HRS. To this end, we implore your immediate response to this inquiry and request and that we be advised of your findings and disposition of this matter.

Respectfully,

IRC, INC.


WALTER T. ODA
President

WTO:joy

cc: Mr. Hideo Murakami
Comptroller



DEPARTMENT OF THE NAVY
OFFICER IN CHARGE OF CONSTRUCTION
NAVAL FACILITIES ENGINEERING COMMAND CONTRACTS
MID PACIFIC
PEARL HARBOR, HAWAII 96860-5420

N62471-85-C-2333
Ser F-25:DGW:15958/154

9 DEC 1986

IRC, Inc.
Attn: Mr. Oda
Century Center, Suite 3-262
1750 Kalakaua Ave.
Honolulu, Hawaii 96826

Gentlemen:

LABOR RESTITUTION PAYMENT, CONTRACT N62471-85-C-2333, BASE
ARCHITECTURE IMPROVEMENTS, PEARL HARBOR, OAHU, HAWAII

Check in the amount of \$945.86 from the contractor, Bodell Construction Company/Les Hirahara, a Joint Venture, to Michael C. Benn for restitution payment has been received.

Please contact Mr. Benn and inform him that he can pick up this check at the ROICC PEARL Office, 4262 Radford Drive; Honolulu, Hawaii 96818-3297.

LTJG Douglas Ward, Construction Management Engineer for this contract, is the point of contact. It is suggested that Mr. Benn call for an appointment to ensure that LTJG Ward is available to complete this transaction. Phone number for ROICC PEARL is 471-9563.

Sincerely,

Response from Navy.

D. K. GEBERT
Commander, CEC, U. S. Navy
Acting Officer in Charge of Construction

Memo from:

WALTER T. ODA

8/5/87

Initially we requested a copy of the
certified payroll affidavit of EMS
Waterproofing.

Because we were denied access to such
information, we filed our suit.

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

1ST CIRCUIT COURT
STATE OF HAWAII

1995 OCT 10 PM 3:04

HOWARD R. GREEN 927
MICHAEL A. LILLY 1681
GREEN, NING, LILLY & JONES
Pauahi Tower Suite 1100
1001 Bishop Street
Honolulu, Hawaii 96813
Telephone: (808) 528-1100

H. SETO
CLERK

Attorneys for Plaintiff

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

PAINTING INDUSTRY OF	)	S.P. No.: 86-0323
HAWAII MARKET RECOVERY FUND)	
	)	STIPULATION PERMITTING
Plaintiff,	)	INSPECTION and ORDER
)	
vs.)	
)	
HIDEO MURAKAMI, DIRECTOR OF))	
ACCOUNTING AND GENERAL)	
SERVICES; and THE STATE OF)	
HAWAII)	
Defendants.)	

STIPULATION PERMITTING INSPECTION

The Painting Industry of Hawaii Market Recovery Fund and Hideo Murakami, Director of Accounting and General Services; and the State of Hawaii, by and through their undersigned counsel, hereby stipulate that:

1. Public contractors are required by H.R.S 104-3, to submit certified payroll affidavits to its state contracting agency;

2. The certified payroll affidavits submitted by EMS Waterproofing to the Department of Accounting and General Services, State of Hawaii, on its public works contracts in this case are "public records" pursuant to Section 92-50, H.R.S.;

~~Services, State of Hawaii, on its public works contracts in~~ *MM*
~~this case are "public records" pursuant to Section 92-50,~~ *mm*
~~H.R.S.~~ *mm*

3. The Department of Accounting and General Services, State of Hawaii, shall make the said certified payroll affidavits available to the Painting Industry for inspection, as required by Section 92-51, H.R.S.; and

4. The Painting Industry of Hawaii Market Recovery Fund's Application for an Order Allowing Inspection of Certain State of Hawaii Department of Accounting and General Services Records, in the above-entitled action, shall, upon the inspection authorized in paragraph 3, be dismissed.

DATED: Honolulu, Hawaii, September 19, 1986

Pat O'Hara
PAT O'HARA
Attorney General's Office
Attorney for Defendants.

Michael A. Lilly
MICHAEL A. LILLY
Attorney for Plaintiff

Phillip T. Chan

APPROVED AND SO ORDERED:

Phillip T. Chan
JUDGE OF THE ABOVE-ENTITLED COURT *HC*

PAINTING INDUSTRY OF HAWAII MARKET RECOVERY FUND v. HIDEO MURAKAMI, DIRECTOR OF ACCOUNTING AND GENERAL SERVICES, and THE STATE OF HAWAII. STIPULATION PERMITTING INSPECTION and ORDER S. P. No. 86-0323.

JOHN WAINEE
GOVERNOR



STATE OF HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
ENFORCEMENT DIVISION
830 PUNCHBOWL STREET, ROOM 340
HONOLULU, HAWAII 96813

MARIO R. RAMIL
DIRECTOR

SHARON Y. MIYASHIRO
DEPUTY DIRECTOR

June 1, 1987

Mr. Walter T. Oda, President
IRC, Inc.
Century Center, Suite 3-262
1750 Kalakaua Avenue
Honolulu, Hawaii 96826

Dear Mr. Oda:

This is in response to your letter of May 7, 1987,
requesting our findings in the investigation of EMS
Waterproofing Systems under Chapter 104, HRS.

Enclosed are copies of letters sent to the employer and
DAGS which list the violations and provide notice of conclusion
of the investigation.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Mario R. Ramil".
Mario R. Ramil
Director of Labor and
Industrial Relations

Enclosures

Settlement on EMS
Waterproofing
complaints.

JOHN WAIHEE
GOVERNOR



MARIO R. RAMIL
DIRECTOR

SHARON Y. MIYASHIRO
DEPUTY DIRECTOR

STATE OF HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
ENFORCEMENT DIVISION
830 PUNCHBOWL STREET, ROOM 340
HONOLULU, HAWAII 96813

April 28, 1987

FILE COPY

Mr. Russel S. Nagata, Comptroller
Department of Accounting and
General Services
Kalanimoku Building
1151 Punchbowl Street
Honolulu, HI 96813

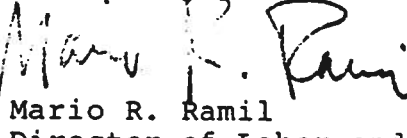
Re: Various Schools (see attached)

Dear Mr. Nagata:

This is to acknowledge checks totaling \$44,989.72 in full payment of back wages found due sixteen (16) employees of EMS Waterproofing Systems & Painting for work performed on various school projects. This concludes our investigation of this matter. Any balance of monies that are still being withheld on any of the projects may be released to the contractor.

Thank you very much for your cooperation.

Very truly yours,


Mario R. Ramil
Director of Labor and
Industrial Relations

Att.

cc: Kaoru Higaki, District Engineer
EMS Waterproofing Systems & Painting
Ralph Wataru, DAGS

MLD 5/4/87

315

Re: Kailua High School
Paint Exterior Bldgs. "H", "G", "J", "F", "T", "L"
Job Nos. 02-16-6268, 6269, 6270, 6271, 6273, 6274

Kalaheo High School
Paint Exterior Bldgs. "A", "K", "B", "C"
Job Nos. 02-16-6285, 6286, 6287, 6288

Kailua Elementary School
Paint Exterior Bldgs. "C", "D", "J"
Job Nos. 02-16-6259, 6260, 6261

Waimanalo Elementary School
Repaint Interior Bldg. "J"
Job No. 02-16-6753

Kapūnahala Elementary School
Paint Exterior Bldgs. "A", "E"
Job Nos. 02-16-6782, 6783

Kaahumanu Elementary School
Repaint Bldg. "E"
Job No. 02-16-6682

Waipahu Intermediate School
Paint Exterior Bldgs. "L", "N"
Job Nos. 02-16-6223, 6224

Paauiilo Elementary and Intermediate School
Interior Painting of Bldg. "B"
Job No. 01-16-6931

Honokaa High & Elementary School
Interior Painting of Bldg. "E"
Job No. 01-16-6935

Kalanianaʻole Elementary and Intermediate School
Paint Interior Bldg. "I"
Job No. 01-16-6927

Mokulele Elementary School
Repaint Interior Bldg. "E"
Job No. 02-16-6603

Waipahu Elementary School
Paint Exterior Bldg. "B"
Job No. 02-16-6682

Ilima Intermediate School
Repaint Exterior Bldgs. "A", "B"
Job Nos. 02-16-6699, 6700

GEORGE R. ARIYOSHI
GOVERNOR



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

Robert C. Gilke
~~XXXXXXXXXXXX~~
DIRECTOR
David M. Komori
~~XXXXXXXXXXXX~~
DEPUTY DIRECTOR

October 17, 1986

FILE COPY

EMS Waterproofing Systems & Painting
45-217 Kahuhipa Street
Kaneohe, HI 96744

Attention: Mrs. Lei Laimana

Re: Various Schools (See Attached List)

Gentlemen:

The department recently concluded an investigation of your firm for compliance with Chapter 104, HRS, Wages and Hours of Employees on Public Works Law, regarding the projects listed on the attachment. You were found in violation of the following sections of the law:

1. Section 104-2(b), in failing to pay proper prevailing wage rates;
2. Section 104-2(c), in failing to pay overtime for work performed on a Saturday, Sunday or State holiday;
3. Section 104-2(d)(1), in failing to pay the full amount of wages earned each week on a timely basis;
4. Section 104-2(d)(2), in failing to provide and post required wage rate information;
5. Section 104-3(a), in failing to submit correct and complete certified copies of payroll; and
6. Section 104-3(b), in failing to maintain and preserve payroll records for all laborers and mechanics who worked on the project.

317
med control

EMS Waterproofing Systems & Painting
October 14, 1986
Page 2

We understand that appropriate corrections are being made. Accordingly, pursuant to Section 104-5(b), this letter constitutes a first warning on the above-mentioned violations. Any violation of the law on the same contract or on another, within two years of the receipt of this letter, will result in further action as prescribed by law.

Very truly yours,

Robert C. Gilkey
Director

By Yukio Kagawa, Administrator
Enforcement Division

Att.

cc: Michio Tonokawa - DAGS
Ikuo Takenaka - DAGS

**RETURN RECEIPT
REQUESTED**

SENDER: Complete items 1, 2, 3 and 4.

Put your address in the "RETURN TO" space on the reverse side. NO The return receipt fee will provide you the name of the person delivered to and the date of delivery. For additional fees the following services are available. Consult postmaster for fees and check box(es) for service(s) requested.

1. ☐ Show to whom, date and address of delivery.

2. ☐ Restricted Delivery.

3. Article Addressed to: **EMS Waterproofing Systems & Painting**
45-217 Kahuhipa St. Kan. 96744
Attn.: Mrs. Lei Laimana

4. Type of Service:	Article Number
<input type="checkbox"/> Registered <input checked="" type="checkbox"/> Insured	P 006 113 635
<input checked="" type="checkbox"/> Certified <input type="checkbox"/> COD	
<input type="checkbox"/> Express Mail	

Always obtain signature of addressee or agent and **DATE DELIVERED:** 11/10

5. Signature of Addressee: [Signature]

6. Signature of Agent: ☐ ☒ [Signature]

7. Date of Delivery: 11/10

8. Addressee's Address (ONLY if requested and fee paid)

WAGE HOUR (AS) 104

218

Re: Kailua High School
Paint Exterior Bldgs. "H", "G", "J", "F", "T", "L"
Job Nos. 02-16-6268, 6269, 6270, 6271, 6273, 6274

Kalaheo High School
Paint Exterior Bldgs. "A", "K", "B", "C"
Job Nos. 02-16-6285, 6286, 6287, 6288

Kailua Elementary School
Paint Exterior Bldgs. "C", "D", "J"
Job Nos. 02-16-6259, 6260, 6261

Waimanalo Elementary School
Repaint Interior Bldg. "J"
Job No. 02-16-6753

Kapunahala Elementary School
Paint Exterior Bldgs. "A", "E"
Job Nos. 02-16-6782, 6783

Kaahumanu Elementary School
Repaint Bldg. "E"
Job No. 02-16-6682

Waipahu Intermediate School
Paint Exterior Bldgs. "L", "N"
Job Nos. 02-16-6223, 6224

Paauilo Elementary and Intermediate School
Interior Painting of Bldg. "B"
Job No. 01-16-6931

Honokaa High & Elementary School
Interior Painting of Bldg. "E"
Job No. 01-16-6935

Kalaniana'ole Elementary and Intermediate School
Paint Interior Bldg. "I"
Job No. 01-16-6927

Mokulele Elementary School
Repaint Interior Bldg. "E"
Job No. 02-16-6603

Waipahu Elementary School
Paint Exterior Bldg. "B"
Job No. 02-16-6682

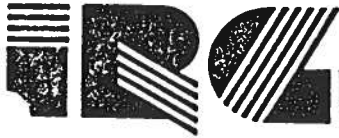
Ilima Intermediate School
Repaint Exterior Bldgs. "A", "B"
Job Nos. 02-16-6699, 6700

Memo from:

WALTER T. ODA

8/5/87

**These are recent complaints against
out-of-state contractors not complying
with statutory requirements.**



Century Center, Suite 3-262 / 1750 Kalakaua Ave. / Honolulu, Hawaii 96826

AN INDUSTRIAL RELATIONS CONSULTANT CORPORATION

July 28, 1987

(808) 942-3786

Mr. Robert Alm, Director
Department of Commerce
and Consumer Affairs
P.O. Box 3469
Honolulu, HI 96801

RE: Thiou Contracting, Christos Painting & Contracting
& Coliseum Construction, Inc.

Dear Director Alm:

In behalf of the Fair Trades Practices Committee of the Painting Industry of Hawaii, we would like to wage a formal complaint against the above three contractors, for violations of Chapter 415, Hawaii Revised Statutes.

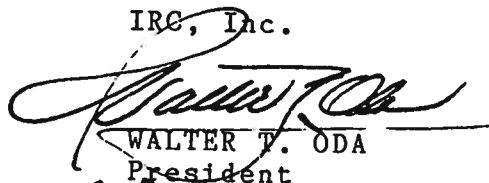
The three contractors are currently engaged in the business of contracting within the State of Hawaii, most notably on federal construction projects. Thiou Contracting is currently engaged in at least three federal construction projects (refer to Exhibits A1-A3), Christos Painting & Contracting is engaged in at least one project (refer to Exhibit B1), and Coliseum Construction, Inc. is also involved in at least one project (Exhibit C1-C2). A check with your Business Registration Division on July 23 & 24, 1987 revealed that none of the above three "foreign" contractors had a Certificate of Authority to transact business in the State of Hawaii. It should be noted that the projects of Christos Painting & Contracting and Coliseum Construction, Inc. are nearing completion and thus time is of the essence in their investigations.

Accordingly, we ask that your department investigate the alleged noncompliance with Chapter 415 by Thiou Contracting, Christos Painting & Contracting and Coliseum Construction, Inc. and take appropriate enforcement action. We ask that our office be notified of your disposition of these investigations.

Your prompt response to the foregoing complaint will be greatly appreciated.

Respectfully,

IRC, Inc.


WALTER T. ODA
President

(1)

321



Century Center, Suite 3-262 / 1750 Kalakaua Ave. / Honolulu, Hawaii 96826

AN INDUSTRIAL RELATIONS CONSULTANT CORPORATION

(808) 942-3786

July 24, 1987

Mr. Richard Kahle, Jr., Director
Department of Taxation
425 Queen Street
Honolulu, HI 96813

RE: Thiou Contracting, Christos Painting & Contracting
& Coliseum Construction, Inc.

Dear Director Kahle:

In behalf of the Fair Trades Practices Committee of the Painting Industry of Hawaii, we would like to wage a formal complaint against the above three contractors, for violations of Chapter 237, Hawaii Revised Statutes.

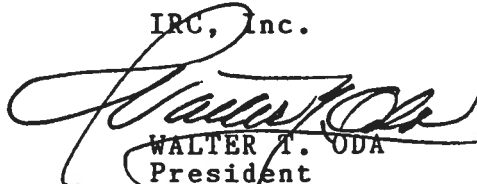
The three contractors are currently engaged in the business of contracting within the State of Hawaii, most notably on federal construction projects. Thiou Contracting is currently engaged in at least three federal construction projects (refer to Exhibits A1-A3), Christos Painting & Contracting is engaged in at least one project (refer to Exhibit B1), and Coliseum Construction, Inc. is also involved in at least one project (Exhibit C1-C2). A check with your General Excise Tax Division on July 23 & 24, 1987 revealed that none of the above three contractors had obtained a General Excise Tax License. It should be noted that the projects of Christos Painting & Contracting and Coliseum Construction, Inc. are nearing completion and thus time is of the essence in their investigations.

Accordingly, we ask that your department investigate the alleged noncompliance with Chapter 237 by Thiou Contracting, Christos Painting & Contracting and Coliseum Construction, Inc. and take appropriate enforcement action. We ask that our office be notified of your disposition of these investigations.

Your prompt response to the foregoing complaint will be greatly appreciated.

Respectfully,

IRC, Inc.


WALTER T. ODA
President

(2)

321-1



Century Center, Suite 3-262 / 1750 Kalakaua Ave. / Honolulu, Hawaii 96826

AN INDUSTRIAL RELATIONS CONSULTANT CORPORATION

July 27, 1987

(808) 942-3786

Mr. Mario R. Ramil, Director
Department of Labor &
Industrial Relations
830 Punchbowl Street
Honolulu, HI 96813

RE: Thiou Contracting, Christos Painting & Contracting,
Coliseum Construction, Inc.

Dear Director Ramil:

In behalf of the Fair Trades Practices Committee of the Painting Industry of Hawaii, we would like to wage a formal complaint against the above three contractors, for violations of Chapters 383 & 386, Hawaii Revised Statutes.

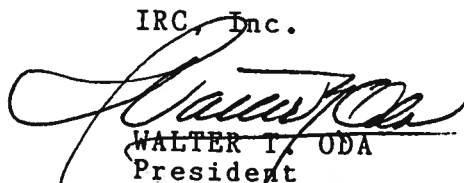
The three contractors are currently engaged in the business of contracting within the State of Hawaii, most notably on federal construction projects. Thiou Contracting is currently engaged in at least three federal construction projects (refer to Exhibits A1-A3), Christos Painting & Contracting is engaged in at least one project (Exhibit B1), and Coliseum Construction, Inc. is involved in at least one project (Exhibit C1-C2). A check with both your Workers' Compensation Division and Unemployment Insurance Division on July 23 & 24, 1987, revealed that none of the above three contractors had a Workers' Compensation Certificate of Insurance on file nor had any of the three obtained a Department of Labor identification number. It should be noted that the projects of Christos Painting & Contracting and Coliseum Construction, Inc. are nearing completion and time is of the essence in their investigations.

Accordingly, we ask that your department investigate the alleged noncompliance with Chapters 383 & 386 by Thiou Contracting, Christos Painting & Contracting and Coliseum Construction, Inc. and take appropriate enforcement action. We ask that our office be notified of your disposition of these investigations.

Your prompt response to the foregoing complaint will be greatly appreciated.

Respectfully,

IRC, Inc.



WALTER T. ODA
President

(3)

321-2

KAPIOLANI PARK PRESERVATION SOCIETY

P.O. BOX 90183. HONOLULU, HAWAII 96835

GOVERNOR'S COMMITTEE ON PUBLIC RECORDS AND PRIVACY
Attention: Mr. Robert A. Alm, Chairman
P.O. Box 541
Honolulu, Hawaii
96809

RECEIVED
AUG 17 8 38 AM '87
HAWAII
GOVERNMENT AFFAIRS

Dear Chairman Alm,

Our SOCIETY has been disturbed and frustrated by the procedures of the Land Board of the Department of Land and Natural Resources. Submitted in comment form below, are some of our concerns.

1. Minutes of the meetings of the Land Board are usually not available for at least three months.

2. When they do appear, minutes of the Land Board Meetings often are not actual transcripts of what was said in public at the meeting. We believe minutes have been doctored; material not spoken at the meeting is inserted, and material detrimental to the finding of the Land Board is deleted.

3. The files on the cases to be heard by the Land Board are often "not available" or incomplete when we have tried to examine them.

4. In a recent case, our SOCIETY was not told until Thursday afternoon that the Land Board was going to "add an item to the agenda" for the Friday meeting (next day). However, we found out the applicant (City and County of Honolulu) knew about this addition to the agenda well in advance of the Thursday decision to add. Only when the attorney for our SOCIETY protested that we had not been given "adequate notice" of the meeting, did the Board postpone their decision.

5. Then, the Land Board tried to reschedule this Oahu item to their next Board Meeting, which was to take place on Maui. Once again, our attorney protested, citing a Supreme Court ruling which mandates having matters pertaining to citizens conducted as close as possible to their domicile. Faced with this demand, the Land Board scheduled a special meeting on Oahu.

6. Our SOCIETY'S attorneys have been unable to get "Bid Documents" from any City agency, in spite of having requested them on more than one occasion.

Page two

Mr. Robert A. Alm, Chairman
August 14, 1987

7. When our SOCIETY has written pointing out that the City government is bound to follow the Revised Charter of the City and County of Honolulu, we have been met with silence.

8. The Deputy Corporation Counsel of the City and County of Honolulu made false statements in court, which may have influenced the Judge's decision. The City Charter states, ARTICLE XI STANDARDS OF CONDUCT, Section 11-101, Declaration of Policy-

"Elected and appointed officers and employees shall demonstrate by their example the highest standards of ethical conduct, to the end that the public may justifiably have trust and confidence in the integrity of government. They, as agents of public purpose, shall hold their offices or positions for the benefit of the public, shall recognize that the public interest is their primary concern, and shall faithfully discharge the duties of their offices regardless of personal considerations."

In the case cited above, we feel the Deputy Corporation Counsel may be in violation of the State Constitution, which states public money is not to be used to support private parties.

Sincerely,

KAPIOLANI PARK PRESERVATION SOCIETY

David S. Sterrett

David S. Sterrett
Executive Vice President

OAHU WATER

CONTAMINATION

WELL AND CHEMICAL IN PARTS PER TRILLION

- 1748-Kaimuki: Tetrachloroethylene 30
 1847-Palo: Tetrachloroethylene *
 1902-Proposed "desalting" filter - choice 3
 1904-Proposed "desalting" filter - choice 1
 1952-Kalihi: Toluene 200
 2006-Proposed "desalting" filter - choice 2
 2043-Waimanalo: Tetrachloroethylene *, Trichloroethylene 1,100
 2103-Barbers Point: Atrazine 100, Tetrachloroethylene *
 2202-Oahu Sugar: Atrazine 210
 2255-Haialua: Methylene Chloride 4,000, Tetrachloroethylene 3,000
 2301-Waipahu/Hoosier: Atrazine 170, Ethylbenzene 3,600, TCP 260, Tetrachloroethylene *
 2302-Kunila I: Atrazine 170, DBCP 2, EDB *, TCP 490
 2348-Hoomaluhia Res: 2,4-D 50, Diazinon 20 (area wells?)
 2354-Haialua: Tetrachloroethylene *, Tetrachloroethylene *
 2355-Aiea BWS: Trichloroethylene *
 2356-Kaamilo: Tetrachloroethylene 30
 2400-Waipahu: Benzene 360, Carbon Tetrachloride 140, Chloroform 3,200, TCP 260, DBCP 2, Dichloropropane 113, 1,2-Dichloropropane 200, Dichloropropane 87, EDB 190, Freon 2,000, Freon-II 400, TCP 350, Tetrachloroethylene 600, Trichloroethylene 1,200
 2402-Kunila II: DBCP 38, EDB *, TCP 1,100
 2458-Manana Shaft: Tetrachloroethylene 30
 2459-Waipio Hts/Oahu Sugar: Atrazine 20, TCP 200, Trichloroethylene 520
 2500-Waipio Hts: EDB 10, EDB 27, TCP 250, Tetrachloroethylene *, Trichloroethylene 520
 2501-Dole: DBCP 33
 2557-Waimano Home: TCP *
 2558-Waialua Shaft: DBCP 25, Phenols 2,000, TCP 210, Tetrachloroethylene *
 2600-Dairy Co/Millilani 7/Proposed Waipio Hts III Bromodichloromethane 2,800, Bromoform 18,000, Chloroform 700, DBCP 20, Dibromochloromethane 13,000, Tetrachloroethylene *, Trichloroethylene 700
 2603-Country Club: DBCP 15, Tetrachloroethylene 220
 2658-Oahu Sugar: EDB *
 2703-Former Kunila Village water: DBCP 14,000, EDB 300,000
 2800-Millilani I: Benzene 1,500, Carbon Tetrachloride 290, DBCP 51, 1,2-Dichloropropane 800, Dieldrin?, EDB 25, Freon 5,200, TCP 2,900, 1,1,2-TCP 210, 1,2,2-TCP 120, Tetrachloroethylene 20, Toluene *, Xylene *
 2803-Present Kunila Village water/Kunila Tunnel: Carbon Tetrachloride 400, DBCP 43, Dichloroethylene 400, EDB 480, Tetrachloroethylene 980, Trichloroethylene 3,700
 2857-Millilani 9: Ametrin 2,000, Atrazine 1,000
 2859-Millilani II/Dole: DBCP 740, EDB 20, TCP 4,200
 2901-Schofield/Waialua: Carbon Tetrachloride 500, DBCP *, TCP *, Tetrachloroethylene 900, Trichloroethylene 30,000
 2902-Waialua Sugar: TCP 250
 3102-Waialua Sugar: DBCP 22, TCP 510
 3203-Waialua Sugar: DBCP 115, TCP 430
 3307-Waialua Sugar: Hexachloro?, DBCP *, TCP *
 3404-Waialua Sugar: DBCP 10, TCP 290
 3405-Hailetiwa/Waialua Sugar: Atrazine 100, TCP 210, DBCP *
 3407-Waialua Sugar: TCP *
 3506-Waialua Sugar: Ametrin 200, Atrazine 600, Chloroform 4,000, Methylene Chloride 19,000

* The City and State switched low chemical numbers to "Non-Quantifiable."

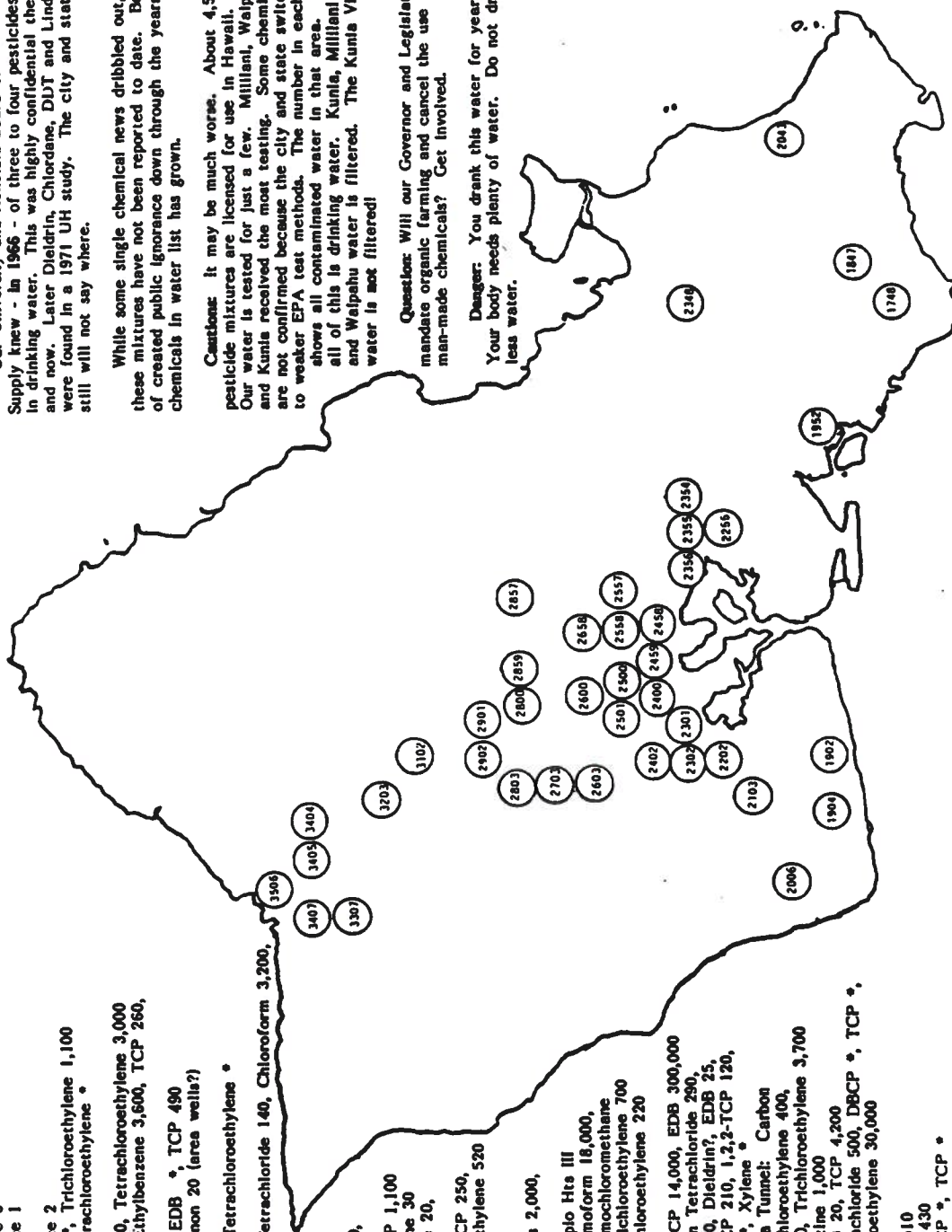
Our University and Honolulu Board of Water Supply knew - In 1966 - of three to four pesticides in drinking water. This was highly confidential then, and now. Later Dieldrin, Chlordane, DDT and Lindane were found in a 1971 UH study. The city and state still will not say where.

While some single chemical news dribbled out, these mixtures have not been reported to date. Because of created public ignorance down through the years, the chemicals in water list has grown.

Caution: It may be much worse. About 4,500 pesticide mixtures are licensed for use in Hawaii. Our water is tested for just a few. Millilani, Waipahu and Kunila received the most testing. Some chemicals are not confirmed because the city and state switched to weaker EPA test methods. The number in each circle shows all contaminated water in that area. Not all of this is drinking water. Kunila, Millilani and Waipahu water is filtered. The Kunila Village water is not filtered!

Question: Will our Governor and Legislature mandate organic farming and cancel the use of man-made chemicals? Get involved.

Danger: You drank this water for years. Your body needs plenty of water. Do not drink less water.



July 2, 1987

1230 Wilhelmina Rlee · Honolulu 96816 · Ph.735-5870

Bill Doughty
 Bill Doughty

JOHN WAIHEE
GOVERNOR



SUZANNE D. PETERSON
CHAIRPERSON, BOARD OF AGRICULTURE

TADASHI TOJO
DEPUTY TO THE CHAIRPERSON

State of Hawaii
DEPARTMENT OF AGRICULTURE
1428 So. King Street
Honolulu, Hawaii 96814-2512

Mailing Address:
P. O. Box 22159
Honolulu, Hawaii 96822-0159

September 8, 1987

MEMORANDUM

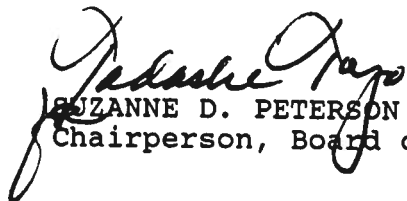
TO: Mr. Robert A. Alm
Director of Commerce and Consumer Affairs

SUBJECT: Public Records and Privacy

RECEIVED
SEP 9 3 02 PM '87
DIRECTOR OF COMMERCE AND CONSUMER AFFAIRS

The attached comments from various Department of Agriculture divisions are submitted in response to your letter of June 17, 1987. I apologize for the lateness of our submittal and for any inconvenience caused.

Please call Ann Oshiro of my staff at 548-7106 if there are any questions or if further information is required.


SUZANNE D. PETERSON
Chairperson, Board of Agriculture

Attachments

cc: ASO

State of Hawaii
DEPARTMENT OF AGRICULTURE

MEMO

Date: 7/21/87

From: Nohea Vaughan *N*

To: Ann Oshiro, Chief
Administrative Serv Off

Re: Public Records and Privacy

In applying privacy controls, the Personnel Office is guided by directives from Department of Personnel Services and Opinions from the Attorney General.

We do not release information without the employee's approval in writing.

State of Hawaii
Department of Agriculture
Agricultural Loan Division

HAWAII DEPT OF AGR

MEMORANDUM

DATE: July 9, 1987 87 JUL 9 All : 41
TO: Chairperson
SUBJECT: Governor's Committee on Public Records and Privacy;
Mr. Robert A. Alm's Ltr dated 6/17/87

Pursuant to section 92-50, HRS, most records and files concerning agricultural loan borrowers are confidential and not available to the public. Borrowers have a right to privacy from public access regarding their loan applications, financial statements and related information, including staff's notes and reports.

Current statutes appear adequate; however, section 92E grants extensive access to individuals' personal records. The exemptions and limitations of section 92E-3 have little application to agricultural loans. Compulsory disclosure of staff's notes, memoranda and communications would inhibit the free internal exchange of thoughts concerning individual borrowers.



Richard T. Morimoto

Agricultural Loan Division Head

July 13, 1987

MEMORANDUM

TO: Plant Industry Administrator *no - Young*

FROM: Pesticide Program Manager *WJ*

SUBJECT: Public Records

All records, files, and inspection reports of the Pesticide Branch are available to the public upon written request with the exception of the following:

1. Certification or examination application, examination, and examination scores (Applications for licenses are not "public records" - Chapter 92-50, Att. Gen. Op. 75-7)
2. Pesticide confidential statement formula (inert ingredients) and supporting data enclosed with pesticide license application (Application for licenses are not "public records" - Chapter 92-50, Att. Gen. Op. 75-7)
3. Inspection reports prior to the commencement of the the review and preparation of the appropriate enforcement action - Chapter 92-51, Chapter 92E-3(4))
4. Medical records obtained under the promise of confidentiality (Chapter 92E-5)

Because the disclosure of records are based on Chapters 92-50 and 92E, the Pesticide Branch has not been placed in any unusual situation where the statutes regarding public records has either hindered or aided in the availability of records.

LEGAL AID SOCIETY OF HAWAII

1108 NUUANU AVENUE
HONOLULU, HAWAII 96817

MAILING ADDRESS: P.O. BOX 37375, HONOLULU, HAWAII 96837

(808) 536-4302

MAX W. J. GRAHAM, JR.
President Board of Directors

ALLENE K. RICHARDSON, ESQ.
Executive Director

RECEIVED
SEP 16 8 24 AM '87
DEPARTMENT
OF COMMERCE AND
CONSUMER AFFAIRS

September 14, 1987

Representative Rod Tam
State House of Representatives
State Capitol
Honolulu, Hawaii 96813

Re: Department of Human Service's Procedure Manual

Dear Representative Tam:

I would like to thank you and your aide, Tony Rogers, for your help in obtaining a copy of the Department of Human Service's Public Welfare Procedures Manual. I have been contacted by Mr. Tom Farrell, Deputy Attorney General, and he has informed me that the Department will provide a manual for us to copy. We will use the Procedures Manual to help us in providing advice to our clients when they have welfare problems.

I am pleased to see that writing to the Governor's Committee helped us resolve this problem without the need for litigation. A non-legal resolution of this problem serves the interests in both the Department of Human Services and the Legal Aid Society of Hawaii. It further benefits all people on public assistance who need to know what procedures they must follow.

Again, thank you for your help in resolving this problem.

Sincerely,



JOHN ISHIHARA
Staff Attorney

JI:bl

cc: Robert Alm, Chairman
Governor's Committee on Public Records and Privacy
Department of Commerce & Consumer Affairs
1010 Richards Street
Honolulu, Hawaii 96813

Tony Rogers

JOHN WAIHEE
GOVERNOR



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

RECEIVED

SEP 3 8 09 AM '87

MARREN PRICE, III
ATTORNEY GENERAL

COVINE K. A. WATANABE
FIRST DEPUTY ATTORNEY GENERAL

ICE

August 31, 1987

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

Re: DHS Procedures

Dear Mr. Ishihara:

On March 13, 1986, you wrote to request a copy of written procedures used by the Public Welfare Division of the Department of Human Services. At that time you claimed that you were entitled to these documents because they interpret the department's regulations. I disagreed, and believed that these procedures do not in any way effect the substantive rights and benefits of applicants and recipients for DHS programs. As such, the department is under no obligation to provide them to you under Chapter 91, or under Administrative Rules which make DHS program manuals available to the public.

Since then, I note that you have made a complaint to the Governor's Committee on Public Records and Privacy concerning my refusal to provide you with these documents. A member of their staff contacted me concerning this matter, and provided me with your correspondence to the committee. As a preliminary matter, I must say that, while I do not question your right to complain to the committee (or any other governmental body) about my handling of our many disputes, I would appreciate it if you would do me the courtesy of sending me a copy.

In any event, after some discussion, it became apparent that the procedures sections are public records as defined by §92-51, Haw. Rev. Stat. While Chapter 92 was not the basis of your request, it certainly applies and I am constrained to admit that my original denial is in error. You are entitled to the documents which you sought.

John Ishihara, Esq.
August 31, 1987
Page 2

By copy of this letter, I am advising the Department that they must honor your request. Please contact Judith Ooka, Public Welfare Administrator, to obtain a copy of the procedures manual.

Sincerely,



THOMAS D. FARRELL
Deputy Attorney General

cc: ✓ The Honorable Robert A. Alm
The Honorable Warren Price, III
The Honorable Winona Rubin
Judith Ooka, Public Welfare Administrator

7924i

TONY T. KUNIMURA
MAYOR



RECEIVED
CECILIA N. RAMONES
DIRECTOR OF FINANCE

SEP 4 8 59 AM '87
ELMER J. MURAOKA
DEPUTY DIRECTOR OF FINANCE

DIP

DE

COUNTY OF KAUAI
DEPARTMENT OF FINANCE
4396 RICE STREET
LIHUE, KAUAI, HAWAII 96766
September 1, 1987

Matt

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

Gentlemen:

Thank you for the opportunity to submit our concern.

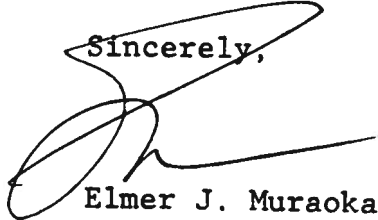
HRS, 92E-5(1) and (3) have consistently provided a source of uncertainty in our disclosure procedures. As an example, we recently received a request from Hawaii County, Real Property Tax Division, for access to our Driver License files for purposes of assisting their delinquent tax collection unit. A denial was issued based on 92E-5(1) because the proposed use of information was not "compatible with the purpose for which the information was collected or obtained;"

Another example relates to a request received from an Assistant Professor at the University of Hawaii. The request was for access to our Driver License files for purposes of a study on the impact of raising the drinking age on motor vehicles accidents in Hawaii. Our approval was issued based on 92E-5(3)--"Reasonably appears to be proper for the performance of the requesting agency's duties and functions;"

Basically, it appears that an approval could have been issued to Hawaii County based on 92E-5(3) also. And, conversely, a denial could have been issued to the assistant professor based on 92E-5(1). Obviously, our concern is there is a seeming lack of clear guidelines for the release of various data files to various agencies.

The Governor's Committee on Public
Records and Privacy
Attention: Robert A. Alm, Chairman
September 1, 1987
Page 2

Sincerely,



Elmer J. Muraoka

bhm

c: Attorney
Cecilia N. Ramones
Staff

AMERICAN ASSOCIATION OF UNIVERSITY WOMEN



HAWAII PACIFIC DIVISION

RECEIVED

SEP 15 8 33 AM '87

LEGISLATIVE PROGRAM CHAIR

matth

MR. ALM
COMMITTEE AND
CONSUMER AFFAIRS

229 Poipu Drive
Honolulu, HI 96825
September 5, 1987

Mr. Alm, Chair
Governor's Committee on Public Records and Privacy
1010 Richards Street
Honolulu, HI 96813

Mr. Chairman and Committee members:

The American Association of University Women (AAUW) wishes to add two items to its previous testimony:

1) The public does not have full access to information it is legally entitled to when it can not hear testimony, discussion and decisions during public hearings because so many speak so softly and often face the chair with their backs to the audience. This problem can be easily solved by using speakers connected to microphones.

2) The enclosed article from the Hawaii TribuneHerald has been called to our attention. AAUW believes that this situation merits investigation followed by appropriate action because it is a violation of the sunshine law.

AAUW would appreciate being advised as to what action is taken concerning these two complaints. Thank you for the time and attention spent serving on this important committee.

Sincerely,

Martha Black

Martha Black
State Legislative Chair
American Association of University Women

Council rules: Sometimes they matter, sometimes not

By Chris Reed
Tribune-Herald

The County Council's income tax procedure, was never on more graphic display than at last week's Planning Committee meeting.

The panel was debating a rule change proposed by Council Chairman Stephen Yamashiro that would allow Yamashiro to forward legislation directly to the full Council instead of the Planning Committee.

appropriate committee. Puna Councilman Russell Kahanu questioned the need for the change, saying the existing system — where priority items are regularly brought to the Council for quick approval — was working acceptably.

Managing Director Ronald Ihara, when he was the county's Corporation Counsel, had assured the Council that it was legal to approve measures that had bypassed the committee.

After Kahanu raised his objection, Councilman Marka emerged from the brief meeting, emerged from the brief meeting, emerged from the brief meeting.

News analysis

But Yamashiro, turned badly Chairman Takashi Domingo for his opinion. Domingo promptly called a recess, and all but Robert Hertel — the committee's lone Republican — walked back to Yamashiro's office.

Moments later, the group emerged from the brief meeting, emerged from the brief meeting, emerged from the brief meeting.

with Yamashiro to vote unanimously — without any explanation — for the proposed rule change.

The action appeared to be a flagrant violation of the state "sunshine" statute, which requires official bodies to make decisions in public.

Some Council members questioned that view of the committee's meeting with Yamashiro behind closed doors. But one said, "Obviously a decision was

made. There's no question it violated the 'sunshine' law."

The Council has appeared to ignore the openness requirement on matters far more important than its own rules. Asked in May about the unanimous support for revisions to the administration's \$77 million budget for 1987-88, one Council member let slip that a vote had been taken in private on certain items, to limit public bickering.

COUNCIL

From Page 1

Perhaps the most abused regulation of all is the one that appears in the Council's rules of procedure, directly below the section that is now under revision.

Rule 4, portion 1-(f) states: "The (Council) chairperson shall not engage in debate or discussion of any issue by the Council. He may do so by first relinquishing the chair to the vice-chairperson."

Council observers cannot recall a single instance where Yamashiro has asked Vice Chairman Spencer Kahanu Schutte to take over so he could enter debate.

But Yamashiro has hardly kept his opinions to himself. The 10-year Council leader is far and away the most influential member and the individual most likely to make recommendations on matters before the body.

Yamashiro says he only "asks questions" and "gives directions" in his floor comments and does not "engage in debate or discussion." The distinction escapes regular Council



COMMON CAUSE/ HAWAII

1109 Bethel St., Ste. 419 • Honolulu, HI 96813 • 533-6996/538-7244

August 31, 1987

Mr. Robert A. Alm, Director
Commissioner of Securities
Governor's Committee on Public Records and Privacy
1010 Richards Street, P.O. Box 541
Honolulu, Hawaii 96809

RECEIVED
SEP 1 / 8 13 AM '87
BUREAU OF SECURITIES
COMMERCIAL AFFAIRS

Dear Mr. Alm:

While I appreciate receiving communication from your committee, I would like to correct your records. In this matter, I represent Common Cause as Chair of the Committee on Sunshine. Please send further communication to my home address that I may receive it promptly.

Lola N. Mench
47-378 Kam. Hwy.
Kahaluu, Hawaii 96744

Previous correspondence has reached me as "Lola Mencher, Sierra Club".

Your committee has a serious and complex charge and has spent a good deal of time and effort in public hearings. We congratulate you. However, it was disturbing that there was minimum notice of your last meeting. We are interested in attending these meetings.

We are uncertain how to respond to the long list of issues raised. As we listened to testimony at the public hearings, it became apparent that the right to privacy is vital but quite specific. Therefore, these areas should be spelled out in order that they not be made an excuse for secrecy and closed records, as seems now to often be the case. Common Cause feels very strongly about the need for openness in government. When a person wins a public office, or is appointed by the elected official, that person works for the people and thus loses some of his right to privacy in all matters pertaining to the work.



COMMON CAUSE / HAWAII

1109 Bethel St., Ste. 419 • Honolulu, HI 96813 • 533-6996/538-7244

-2-

The Privacy Act is always going to be in conflict with openness, therefore it is important that rules be set up to establish the necessary balance.

As a prelude, does the Government have clear knowledge of what records it is keeping and why it is keeping them? Common Cause feels that the public has a right to this information, particularly in this electronic age. Records should not be kept just because they can be. Most probably, some records need not be taken at all and others should not be kept. This seemed to be the case with the records which destroyed Mr. Heftel's Governor campaign. Also, this was a point made in testimony, that unsubstantiated records should not be kept at all.

Common Cause would like to reiterate what we said in our testimony; when the public interest in disclosure outweighs the private interest, that information must be available to the public. The presumption should be that all government records, with certain clearly justified exemptions, are open to the public.

Thank you for permitting us to comment. We hope to be notified of future meetings.

Aloha

Lola N. Mench, Chair

Common Cause Sunshine Committee

RECEIVED

AUG 31 3 48 PM '87

Aug. 31, 1987

DE
CC: JARS

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

Dear Robbie:

Thank you very much for your letter of Aug. 12; I'm glad that my cheapie audiotapes were of use.

I circulated to two separate groups your four-page enclosure titled "Issues," an example of an issue expansion and your general cover letter. The first group to receive this material was the board of directors of the Society of Professional Journalists, of which I am a member. At its Aug. 20 meeting that board declined to participate in your exercise. The second group was the Sunshine Law Coalition, which meet Aug. 27. The half dozen or so persons, representing either themselves or interested organizations, also declined to participate. Their consensus was that the "Issues Raised" listing was too unstructured and unfocused to permit meaningful analysis or comment by laypersons.

Shortly after receiving this listing of "Issues Raised," I objected to Matthew Chung about this approach. I believe that the "Issues Raised" listing is mis-labelled; instead of "issues," only generalized topics are ticked off, an approach that I think waters down the the true, specific nature of the grievance or comment.

Moreover, now that I am scrutinizing that list of "Issues Raised" and recalling the testimony presented at the July 2 public hearing in Honolulu, I find even more ill suited the Committee's attempt to sloganize extremely complex concepts--including concepts that are often competing with other complex concepts.

For example, one important concept omitted from the "Issues Raised" list is the need to establish a balancing test between the public interest in disclosure and the privacy considerations that protect an individual from governmental intrusion into his/her personal life. This concept seems to me to be close to the heart of the problem--and perhaps of the solution--that the Governor's Committee was appointed to address. This concept directly relates to a large part of the testimony of Common Cause (p. 152) and of Michael Lilly (pp. 156-196).

A second important theme that escapes the Committee's sloganizing approach is the central problem of ineffectual administration, if not maladministration, by the state's

executive branch. This theme was articulated by Desmond Bryne and Michael Lilly in their oral presentations on July 2 and is dealt with extensively in my written testimony (pp. 355-371). Although fragments of this problem are sprinkled throughout your "Issues Raised" listing, I raise this central theme lest anyone, including a member of the legislature, believe that better statutes alone will resolve this public-versus-personal-records controversy.

Two other main points raised in my written testimony are missing from the "Issues Raised" listing:

--my appeal that the Committee review internal memoranda relating to personal and public records issued by the attorney general's office since statehood--and then to make public the results of that review, and

--my appeal that the Committee recommend numerous specific protections now provided under the federal Privacy Act be extended to safeguard individuals from unregulated state and local governmental recordkeeping, a point also made in the testimony of Honolulu's Managing Director (pp. 116-131). Only one of the protections I cite make the Committee's "Issues Raised" list--the one about accurate, relevant, complete records. The Committee's use of the phrase "computer matching capabilities" completely misses the point raised in my written testimony that government agencies need to be limited in the extent of computer-matching they are permitted to do.

I highlight my second appeal, noted above, because the draft minutes of the Aug. 6 meeting seem to imply that the Committee is reviewing as an option the federal FOIA by itself without studying it in tandem with the federal Privacy Act of 1974.

I will enclose a copy of Public Law 93-579: The Privacy Act of 1974.

Another important omission I notice is of a different nature--the failure of state department heads to itemize exactly what records are collected by their respective agencies and how that information is utilized. This failure seems to me to gravely undermine the Committee's fact-finding mission. Nevertheless, I hope that the Committee recommends that the Governor or the Legislature gather this information.

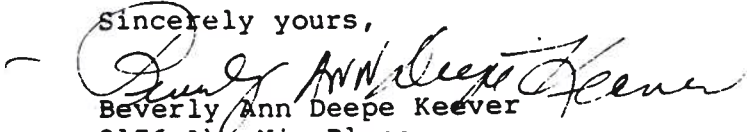
A complete inventory of records kept by agencies is not an overwhelming task, I believe, for at least two reasons. First, the written testimony of Lt. Gov. Ben Cayetano indicates that compiling such an inventory is not that burdensome; his testimony also shows how valuable the inventory is to the public--and possibly to others within the other branches and levels of government. Second, the administration in at least one other

small state indicates such an inventory is necessary for a fair and orderly management of information collected by its own agencies.

In an attempt to be constructive, I am attaching a portion of a booklet explaining Utah's information management system. I am attaching selected pages of the 207-page booklet titled Key to Privacy--1985 utah information practices act annual report. Perhaps this selection may be considered as a possible first-step, factgathering guide for Hawaii.

Thank you for considering these comments.

Sincerely yours,


Beverly Ann Deepe Kever
2176 Aha Niu Place
Honolulu, Hawaii 96821

Encl: Selected pages of Key to Privacy
 PL 93-579: The Privacy Act of 1974

1985 utah information practices act annual report



Key to Privacy

1985 utah information practices act annual report





NORMAN H. BANGERTE
GOVERNOR

STATE OF UTAH
OFFICE OF THE GOVERNOR
SALT LAKE CITY
84114

December 1, 1985

Dear Fellow Utahns:

The annual Utah Information Practices Act Report is compiled to give the citizens of the state an opportunity to review the kinds of information gathered by state agencies on individuals, the uses made of that information, and the policies for protecting and accessing the information. An inherent tension exists and a balance must be maintained concerning state government's administrative needs for information, the public's right to inspect public writings, and the individual's right to privacy. This publication has been compiled to report the uses of personal data and to demonstrate avenues the citizen may use to gain access and correct that information when necessary.

The state of Utah is working to improve information resource management throughout state government. Reporting to the citizens on a yearly basis what their government is collecting about them is an integral part of that information resource management. This report reflects our commitment to excellence in information practices. The principles espoused by national and international leaders in the field of balancing privacy and access have been incorporated.

It is hoped that this report will be easy to use and informative concerning the collection and use of information on Utah's citizens. We would appreciate comments, questions, and suggestions for improvements for next year's report.

Sincerely,


Norman H. Bangerter
Governor

P R E F A C E

The purpose of Information Resource Management is to bring some sense of order to what otherwise appears to be organizational and technological chaos.

To succeed, individuals, businesses and governments need easy, timely, and affordable access to the right information. Today, computers provide access to huge quantities of information. The amount of information that's now available is beyond what most people can cope with; it is often next-to-impossible to identify the right information.

Over the last few years every state agency has had to face the problem of gaining control over this information deluge. Agency plans addressing information management are becoming more and more common. In 1982, in an effort to coordinate agency plans, a statewide approach to information management planning was developed: the Utah Systems Plan (USP). The USP helped define statewide information management needs. In 1984 and 1985, several state agencies began working more closely together to improve information resource management -- I R M --.

The agencies have agreed on the following principles:

- Information is a valuable resource and must be managed as such.
- Information created and managed by the state is the property of the citizens, not the agencies or the state.
- Today, effective information resource management requires control and management of information systems and technology.

The agencies are working together to:

- Inventory and document state information, information systems, and information technologies.
- Develop policies and plans to improve the management of information.
- Provide information management training to employees.

In summary, the agencies want to help the state deliver:

- the right information, -- to the right person,
- at the right time, -- at the right price.

INTRODUCTION

USING THE 1985 UTAH STATE INFORMATION PRACTICES ACT REPORT

AUTHORITY

This annual report is published in compliance with the requirements of the Archives and Records Service and Information Practices Act (63-2-59 et seq.) and provides information about state agency records which contain data on individuals.

CUTOFF DATES

Data collected and compiled as of November 22, 1985.

DEFINITIONS OF CLASSIFICATIONS

CONFIDENTIAL DATA means data on individuals collected and maintained by state government which is available only to appropriate agencies for the administration and management of programs enacted by the Legislature or by executive order, to others with the express consent of the individual, but not to the individual himself.

PRIVATE DATA means data on individuals collected and maintained by state government which is available only to the appropriate state agencies for the administration and management of programs enacted by the Legislature or by executive order, to others with the express consent of the individual, and to the individual himself or next of kin when information is needed to acquire benefits due a deceased person.

PUBLIC DATA means data on individuals collected and maintained by state government which is not classified as private data or confidential data according to established procedures and is therefore open to the public, unless otherwise exempted by law.

AUTHORITY FOR INFORMATION CLASSIFICATION

The State Records Committee has statutory authority under section 63-2-68.1 of the Utah Code Annotated to approve classifications applied to record groups by the responsible authority of a state agency, or to classify records on its own initiative. These decisions are reported in the Annual Retention Schedule. The Committee also stands as a board of appeal and questions concerning classifications or access to records maintained by state agencies may be brought before the Committee if not satisfactorily resolved by the agency. Some of the classifications listed in this report have yet to be approved by the State Records Committee. To determine the status of a classification, consult the Annual Retention Schedule or contact the Division of Archives and Records Services, Bureau of Records Analysis.

HOW TO USE THIS COMPILATION

Using the KEY TO THE INFORMATION PRACTICES ACT REPORT found on the insert or on page xvi, determine the procedures for:

1. finding out how and why information is collected about Utah's citizens;
2. finding out if there is information about you; and
3. gaining access to that information.

Note all restrictions to access, such as a PRIVATE or CONFIDENTIAL classification. A list of the kinds of information that an agency gathers is presented with each subdivision of state government. Some of the categories contain an "OTHER" response where space would not permit the listing of specific cases. For information concerning specific responses, contact the Division of Archives and Records Services, Bureau of Records Analysis.

HOW TO MAKE A REQUEST

In most cases you can inquire in person or by mail. It will be easier for the agency to help you, and your request will be handled more quickly, if you follow these procedures:

1. Give your full name and address, and sign your request.
2. Specify the title(s) of records you believe contain information about you.
3. Provide any relevant information required by the record you are interested in, for example, dates of contracts, or loan application numbers.
4. Address your request to the responsible authority at the address given.

PROOF OF IDENTITY

To ensure that persons not authorized to gain access are prevented from doing so, the agency will need some proof of your identity such as:

1. a document with your full name and address;
2. a document that has your signature and/or your photograph such as a passport, medicare card, or driver's license; and
3. any other identification that the agency requires.

GENERAL INFORMATION

This report was compiled and edited by the Bureau of Records Analysis under the direction of Cherie A. Nash, Records Analyst-Information Practices Act Specialist, Loretta Hefner, Bureau Manager of Records Analysis, and M. Liisa Fagerlund, Director of the Division of Archives and Records Services. For further information concerning the technical aspects of this volume, call (801) 533-5250. Written comments or suggestions should be addressed to Cherie Nash, Division of Archives and Records Services, Archives Building, State Capitol, Salt Lake City, Utah, 84114.

ACKNOWLEDGMENTS

I wish to thank the following staff members of the Bureau of Records Analysis, Division of Archives and Records Services, for their time, energies, and support which have made the publication of Key to Privacy: 1985 Utah Information Practices Report possible:

Lawrence S. Epperson, Records Analyst
Kenneth A. Hansen, Records Analyst
Loretta L. Hefner, Bureau Manager
Dean M. Henriod, Records Analyst
Randolph S. Jones, Archivist
Gwen A. Moore, Archivist
Dahlia M. Nielsen, Office Specialist
Patricia L. Scott, Archivist
Kenneth A. White, Archivist

They have devoted many hours to the design, collection of information, and data entry required for the completion and the success of Key to Privacy.

I also wish to thank the directors, records officers, and other state agency personnel who assisted in the publication of this report.

Cherie A. Nash
November 30 1985

KEY TO THE INFORMATION PRACTICES ACT REPORT

SECOND COLUMN: CLASSIFICATIONS:

- PUB: PUBLIC DATA—OPEN TO ANYONE.
 PRIV: PRIVATE DATA—ACCESS RESTRICTED TO THE INDIVIDUAL, THE AGENCY AUTHORIZED TO COLLECT AND/OR USE THE DATA, AND THE INDIVIDUAL'S OFFICIAL REPRESENTATIVE.
 CONF: CONFIDENTIAL DATA—ACCESS RESTRICTED TO THE AGENCY AUTHORIZED TO COLLECT AND/OR USE THE DATA, THE INDIVIDUAL'S OFFICIAL REPRESENTATIVE, BUT NOT TO THE INDIVIDUAL.

THIRD COLUMN: PURPOSE AND USE MADE OF THE DATA:

- TO SUPPORT CLIENT CASE MANAGEMENT
- TO MANAGE FINANCIAL/AUDIT RECORDS
- TO SUPPORT PERSONNEL/EVALUATION/PROMOTION ACTIONS
- TO RECORD MEDICAL/DIAGNOSIS/DISEASE CONTROL INFORMATION
- FOR ADMINISTRATION AND PROGRAM MANAGEMENT
- TO MEET FEDERAL OR STATE LAW REQUIREMENTS
- TO SUBSTANTIATE CITIZENS' RIGHTS AND CLAIMS
- TO DETERMINE AND/OR DOCUMENT ELIGIBILITY
- TO PROVIDE STATISTICAL/SUMMARY STUDIES/RESEARCH INFORMATION
- TO SUPPORT ADMINISTRATION OF JUSTICE AND PUBLIC SAFETY
- TO SUPPORT REGULATORY/CERTIFICATION/LICENSING FUNCTIONS
- OTHER: For specifics in this area, contact the Utah State Archives.

FOURTH COLUMN: METHODS USED TO PROTECT THE DATA AND MAINTAIN THE INTEGRITY OF THE FILE:

- FILE GROUP SECURITY INCLUDING LOCKED CABINETS, OR PLACED IN THE STATE RECORDS CENTER OR ARCHIVES
- OFFICE PERIMETER SECURITY INCLUDING ONE OR MORE OF THE FOLLOWING: RESTRICTED OFFICE AREA, LOCKED OFFICE, ALARM SYSTEM, ARMED GUARD, SECURE STORAGE VAULT
- PROTECTED THROUGH DATA PROCESSING SECURITY PROCEDURES

FIFTH COLUMN: METHODS INDIVIDUALS MAY USE TO FIND OUT IF THEY ARE INCLUDED IN AN AGENCY'S FILES:

- CITIZEN ASKS AGENCY
- OTHER: For specifics in this area, contact the Utah State Archives.

SIXTH COLUMN: METHODS INDIVIDUALS MAY USE TO GAIN ACCESS TO DATA ABOUT THEMSELVES:

- ORAL REQUEST TO THE AGENCY
- WRITTEN REQUEST TO THE AGENCY
- REQUEST BY PROFESSIONAL REPRESENTATIVE
- COURT ORDER
- OTHER: For specifics in this area, contact the Utah State Archives.

SEVENTH COLUMN: METHODS INDIVIDUALS MAY USE TO CONTEST THE ACCURACY, COMPLETENESS, AND PERTINENCE OF THE DATA AND THE NECESSITY FOR RETAINING IT:

- CITIZEN ASKS AGENCY
- COURT ACTION
- OTHER: For specifics in this area, contact the Utah State Archives.

EIGHTH COLUMN: SOURCES FROM WHICH THE DATA WAS COLLECTED:

- THE INDIVIDUAL ABOUT WHOM THE RECORD PERTAINS
- THE GUARDIAN OR PARENT OF THE INDIVIDUAL
- ANOTHER AGENCY: For specifics in this area, contact the Utah State Archives.
- INVESTIGATION PROCESSES
- EMPLOYERS
- EDUCATORS
- PROFESSIONAL CLIENT RELATIONS—COUNSELORS, DOCTORS, LAWYERS
- REGULATED CORPORATIONS
- OTHER: For specifics in this area, contact the Utah State Archives.

NINTH COLUMN: CATEGORIES OF INDIVIDUALS COVERED BY THE DATA:

- INDIVIDUALS PARTICIPATING IN PROGRAMS ADMINISTERED BY THE AGENCY
- INDIVIDUALS APPLYING FOR OR RECEIVING ASSISTANCE FROM THE STATE THROUGH THE AGENCY
- INDIVIDUALS APPLYING FOR OR LICENSED BY THE AGENCY TO PERFORM CERTAIN FUNCTIONS OR PARTICIPATE IN SPECIFIC ACTIVITIES
- INDIVIDUALS APPLYING FOR STATE EMPLOYMENT OR ARE EMPLOYED OR HAVE BEEN EMPLOYED IN STATE SERVICE
- INDIVIDUALS UNDER INVESTIGATION
- TAXPAYERS
- INDIVIDUALS WHO HAVE FILED A COMPLAINT OR OTHERWISE CONTACTED THE AGENCY
- INDIVIDUALS NAMED IN A COMPLAINT
- INDIVIDUALS ON MAILING OR SUBSCRIPTION LISTS
- INDIVIDUALS APPLYING FOR OR RECEIVING COMPENSATION
- INDIVIDUALS DONATING GOODS OR SERVICES
- OTHER: For specifics in this area, contact the Utah State Archives.

TENTH COLUMN: CATEGORIES OF INDIVIDUALS WHO WILL HAVE ACCESS TO THE DATA IN THE EXERCISE OF THEIR DUTIES:

- THIS DIVISION
- OTHER STATE AGENCIES: For specifics, contact the Utah State Archives.
- PRIVATE SECTOR GROUPS: For specifics, contact the Utah State Archives.
- OTHER: For specifics, contact the Utah State Archives.

1985 INFORMATION ACT REPORT

DEPARTMENT: Administrative Services
DIVISION: Archives and Records Services
ADDRESS: Archives Building/State Capitol
Salt Lake City, UT 84114
PHONE NUMBER: 533-5250

RESPONSIBLE AUTHORITY: Liisa Fagerlund
TITLE: Director
RECORDS OFFICER: Danise Barney

THIS AGENCY COLLECTS THE FOLLOWING INFORMATION ON INDIVIDUALS:

age, birthplace, brothers and sisters, current and past addresses, educational level, employer, employment history, family history, income, job position information (grade/step, etc.), marital status, membership in groups, military service, name, name of kin, occupation, occupational preferences, parent's birth information, race, religious preference, salary, salary withholdings, sex, signature, social security number, telephone number.

RECORDS SERIES TITLE	CLASS- IFICATION	PURPOSE AND USE OF DATA	METHOD OF PROTECTION	METHOD TO DISCOVER INCLUSION	METHOD TO GAIN ACCESS	METHOD TO CONTEST OR CORRECT	SOURCES OF DATA	INDIVIDUALS COVERED	AUTHORIZED RECIPIENTS
Accession Log of Records Transfers	PUB	a	a	a	a	a	c	d	d
Archives Correspondence Inventory	PUB	e	c	a	a	a	i	d	d
Activity Reports	PUB	i	a	a	a	a	i	d	d
Director's Administra- tive Files	PRIV	e	a, c	a	a	a	e	d	a
Disposition Copy of Records Transfer Sheets	PRIV	f	a	a	a	a	a	1	a, b
Document Charge Out Cards (Out Cards)	PRIV	e	a	a	a	a	a	1	a, b
Index of Veterans Buried in Utah	PUB	f	a, c	a	a	b	a	1	d
Interfiles Log	PUB	e	a	a	a	a	c	d	d

1985 INFORMATION ACT REPORT

DEPARTMENT: Administrative Services
 DIVISION: Archives and Records Services
 PAGE 2

RECORDS SERIES TITLE	CLASS- IFICATION	PURPOSE AND USE OF DATA	METHOD OF PROTECTION	METHOD TO DISCOVER INCLUSION	METHOD TO GAIN ACCESS	METHOD TO CONTEST OR CORRECT	SOURCES OF DATA	INDIVIDUALS COVERED	AUTHORIZED RECIPIENTS
Management Specialist Working File	PRIV	e	a	a	a	a	e	d	a
Prison Inmate File Index	PRIV	e	a	a	d	b	a	1	a, b
Records Center Box Accounting Receipts (Box Slips)	PUB	e	a	a	a	a	c	d	d
Records Center Shelf Inventory (Shelf List)	PUB	e	a	a	a	a	c	d	d
Records Destruction Lists	PUB	e	a, c	a	a	a	c	d	d
Records Destruction Notifications and Authorization Letters	PRIV	e, f	a, c	a	a	a	c	a, b, d, 1	a, b
Records Transfer/ Inventory Sheets	PRIV	e	a	a	a	a	c	1	a, b
Reference Correspondence	PUB	e	a	a	a	a	a	a	d
Refiles Log	PUB	e	a	a	a	a	c	d	d
Register of Supreme Court Decisions	PUB	1	a	a	a	b	f	1	d
Semi-active Records Retrieval Rate at the Records Center Report (Reference Rate Slips)	PUB	e	a	a	a	a	c	d	d

1985 INFORMATION ACT REPORT

DEPARTMENT: Administrative Services
 DIVISION: Archives and Records Services
 PAGE 3

RECORDS SERIES TITLE	CLASS- IFICATION	PURPOSE AND USE OF DATA	METHOD OF PROTECTION	METHOD TO DISCOVER INCLUSION	METHOD TO GAIN ACCESS	METHOD TO CONTEST OR CORRECT	SOURCES OF DATA	INDIVIDUALS COVERED	AUTHORIZED RECIPIENTS
Utah State Bulletin Subscriber List	PRIV	f	a	a	a	a	1	f	a, b
Register of Veterans Buried in Utah	PUB	f	a, c	a	a	b	a	1	d

1985 INFORMATION ACT REPORT

DEPARTMENT: Administrative Services
 DIVISION: Central Services
 ADDRESS: 2222 State Office Building
 Salt Lake City, UT 84114
 PHONE NUMBER: 533-6943

RESPONSIBLE AUTHORITY: Scott Lawrence
 TITLE: Director
 RECORDS OFFICER: Scott Lawrence

THIS AGENCY COLLECTS THE FOLLOWING INFORMATION ON INDIVIDUALS:
 age, birthplace, current and past addresses, driver's license number, educational level, employer, employment history, ethnic group, income, job position information (grade/step, etc.), marital status, military service, name, national origin, occupation, occupational preferences, occupational licenses, physical disabilities, police records, race, references, sex, social security number, telephone number.

RECORDS SERIES TITLE	CLASS- IFICATION	PURPOSE AND USE OF DATA	METHOD OF PROTECTION	METHOD TO DISCOVER INCLUSION	METHOD TO GAIN ACCESS	METHOD TO CONTEST OR CORRECT	SOURCES OF DATA	INDIVIDUALS COVERED	AUTHORIZED RECIPIENTS
Job Applications Not Hired	PRIV	c, e, h	a	a	a	a	a	d	a, b

1985 INFORMATION ACT REPORT

DEPARTMENT: Administrative Services
DIVISION: Facilities Construction and Management
ADDRESS: 4110 State Office Building
Salt Lake City, UT 84114
PHONE NUMBER: 533-7773

RESPONSIBLE AUTHORITY: Jack Quintana
TITLE: Director
RECORDS OFFICER: Jenette Jeron

THIS AGENCY COLLECTS THE FOLLOWING INFORMATION ON INDIVIDUALS:

assets and debts, checking and savings accounts, civil/criminal court involvement, credit rating, current and past addresses, expenditures, home ownership, income, membership in groups, mortgage information, name, occupation, occupational preferences, occupational licenses, property ownership, references, security/other investigations, tax information, telephone number.

RECORDS SERIES TITLE	CLASS- IFICATION	PURPOSE AND USE OF DATA	METHOD OF PROTECTION	METHOD TO DISCOVER INCLUSION	METHOD TO GAIN ACCESS	METHOD TO CONTEST OR CORRECT	SOURCES OF DATA	INDIVIDUALS COVERED	AUTHORIZED RECIPIENTS
Contractors' Payroll Reports	PRIV	a, b, e	a	a	a	a	d	a	a
Contractors' Pre- qualification Applications	PRIV	a, e, f	a, c	a	a	a	a, d, g	a, c	a
Ledgers Financial Transactions	PRIV	a, b, e	a	a	a	a	d	a	a, b
Property Appraisals Applications	PRIV	b, e, f	a, c	a	a	a	a, d	1	a, b

1985 INFORMATION ACT REPORT

DEPARTMENT: Administrative Services
 DIVISION: Finance
 ADDRESS: 2100 State Office Building
 Salt Lake City, UT 84114
 PHONE NUMBER: 533-4523

RESPONSIBLE AUTHORITY: Gordon Crabtree
 TITLE: Director
 RECORDS OFFICER: Harry Sutton

THIS AGENCY COLLECTS THE FOLLOWING INFORMATION ON INDIVIDUALS:
 checking and savings accounts, current and past addresses, employer, employment history, job position information (grade/step, etc.), marital status, name, occupation, physical disabilities, race, salary, sex, social security number, tax information, exemptions and withholdings, telephone number, organization and position control ID.

RECORDS SERIES TITLE	CLASS- IFICATION	PURPOSE AND USE OF DATA	METHOD OF PROTECTION	METHOD TO DISCOVER INCLUSION	METHOD TO GAIN ACCESS	METHOD TO CONTEST OR CORRECT	SOURCES OF DATA	INDIVIDUALS COVERED	AUTHORIZED RECIPIENTS
Benefit Check Register	PRIV	b, e	a	a	b	a	e	d	a, b
Cross Reference Lists	PRIV	i	a, c	a	b	a	i	d	a, b
Electronic Funds Transfer Report	PRIV	b, e	a, c	a	b	a	e	d	a, b
Payroll Adjustment Report	PRIV	b	a, c	a	b	a	e	d	a, b
Payroll Deduction Report	PRIV	b, f	a, c	a	b	a	e	d	a, b, c
Payrolls Preliminary Report	PRIV	b	a, c	a	b	a	e	d	a, b
Payroll Update Audit Trail	PRIV	b, e	a	a	b	a	e	d	a, b
Payrolls Withholding Data Report	PRIV	b, f	a, c	a	b	a	e	d	a, b, d
Pre-Payment Records	PRIV	b, e	a	a	b	a	e	d	a, b

1985 INFORMATION ACT REPORT

DEPARTMENT: Administrative Services
DIVISION: Finance
Page 2

RECORDS SERIES TITLE	CLASS- IFICATION	PURPOSE AND USE OF DATA	METHOD OF PROTECTION	METHOD TO DISCOVER INCLUSION	METHOD TO GAIN ACCESS	METHOD TO CONTEST OR CORRECT	SOURCES OF DATA	INDIVIDUALS COVERED	AUTHORIZED RECIPIENTS
Staffing Plan for Agencies by Position (Schedule Six)	PRIV	b, e	a	a	b	a	e	d	a, b
Special Requests Correspondence	PRIV	b	a	a	b	a	e	d	a
State FICA Report	PRIV	b, f	a, c	a	a	a	e	d	a, b
Tax Earning Reports	PRIV	b, f	c	a	b	a	e	d	a, b
Void Warrant Requests	PRIV	b, e	a	a	b	a	e	d	a, b
W-2 Audit Trail Report	PRIV	b, e	a, c	a	b	a	e	d	a, b

1985 Information Practices Act Report

DEPARTMENT: Administrative Services
 DIVISION: Personnel Management
 ADDRESS: 2229 State Office Building
 Salt Lake City, UT 84114
 PHONE NUMBER: 533-5791

RESPONSIBLE AUTHORITY: Brian Harris
 TITLE: Director
 RECORDS OFFICER: Mary Monty

THIS AGENCY COLLECTS THE FOLLOWING INFORMATION ON INDIVIDUALS:

age, alcohol or drug addiction, birthplace, current and past addresses, date of birth, educational level, employer, employment history, ethnic group, family history, grade average or class standing, income, job position information (grade/step, etc.), marital status, medical information, military service, name, national origin, number of children, occupation, occupational preferences, occupational licenses, physical disabilities, police records, psychiatric information, race, references, salary, salary withholdings, sex, signature, social security number, tax information: FICA, withholding: telephone number, examination scores, job performance evaluations.

RECORDS SERIES TITLE	CLASS- IFICATION	PURPOSE AND USE OF DATA	METHOD OF PROTECTION	METHOD TO DISCOVER INCLUSION	METHOD TO GAIN ACCESS	METHOD TO CONTEST OR CORRECT	SOURCES OF DATA	INDIVIDUALS COVERED	AUTHORIZED RECIPIENTS
Administrative Corre- spondence	CONF	e	a	b	d	b	a, e	a, d	a, b
Agency Delegation and Agreements	PUB	c, e, f	a	a	a, b, c, d	c	e	d	a, b, c, d
Answer and Score Sheets	CONF	c, i, k	a	a	d, e	b, c	a	d	a, b
Cancelled Registers	PRIV	c, i	a	a	a, d, e	a, b, c	a	d	a, b
Case Card Files	CONF	a, i, l	a	b	d, e	b	a, e, g	a, l	d
Comprehensive Employment Training Act Client and Follow-up Files	PRIV	a, f, h	a	b	a	b	a	d	a, d
Classification Studies	PRIV	f, l	a	b	a, c, d, e	a, b, c	a, e	d, g	a, b
Completed Test Answer Sheets	CONF	f, h	a	b	d, e	a, b, c	a	d	a

1985 Information Practices Act Report

DEPARTMENT: Administrative Services
DIVISION: Personnel Management
PAGE 2

RECORDS SERIES TITLE	CLASS- IFICATION	PURPOSE AND USE OF DATA	METHOD OF PROTECTION	METHOD TO DISCOVER INCLUSION	METHOD TO GAIN ACCESS	METHOD TO CONTEST OR CORRECT	SOURCES OF DATA	INDIVIDUALS COVERED	AUTHORIZED RECIPIENTS
Employee Assistance Program Case Files	CONF	a, i	a	b	d	b	a, e, g	d, i	d
Employee Assistance Program Case Log	CONF	a, i	a	b	d	b	a, e, g	d	d
Employee Assistance Program Correspondence Files	PUB	e, i	a	b	a, b	a	i	d	a, d
Employee Performance and Appraisals	PRIV	c, i	a	a	a, b, c, d, e	a, b, c	a, e	d	a, b
Former Employee Files	PRIV	c, i	a	a	a, b, c, d, e	a, b, c	a, e	d	a, b
Human Resource Profile and Notice of Personnel Action	PRIV	c, i	a, c	a	a, b, c, d, e	a, b, c	a, e	d	a, b
Inquiries Regarding Availability for Appointment	PRIV	c	a	a	a, b, c, d, e	a, b, c	e	d	a, b
Job Swap or Career Mobility Files	PRIV	c, i	a	a	a, b, c, d	a, b, c	a, e	d	a, b
Management Certifica- tion Assessment Center and Feedback Information Files	PRIV	a, c	a	b	a, b	b, c	a	a, d	a, b, d
Notice of Results of Examination	PRIV	c	a	a	a, b, c, d, e	a, b, c	a, e	d	a, b

1985 Information Practices Act Report

DEPARTMENT: Administrative Services
DIVISION: Personnel Management
PAGE 3

RECORDS SERIES TITLE	CLASS- IFICATION	PURPOSE AND USE OF DATA	METHOD OF PROTECTION	METHOD TO DISCOVER INCLUSION	METHOD TO GAIN ACCESS	METHOD TO CONTEST OR CORRECT	SOURCES OF DATA	INDIVIDUALS COVERED	AUTHORIZED RECIPIENTS
Official Certification of Eligibles Register	PRIV	e	a	b	a, c, d, e	a, b, c	i	d	a, b
Official Requests for Certification of Eligibles	PUB	e, f	a	b	e	c	e	1	d
Organizational Develop- ment Project Computer Print-Outs	CONF	a, e, i	a	b	d, e	b, c	e	d	a, b
Organizational Develop- ment Project Workpapers	CONF	a, e, i	a	b	d, e	b, c	e	d	a, b
Payroll and Staffing Report	PRIV	e, 1	a, c	b	d, e	c	e	d	a, d
Personnel File Index	PRIV	c, e, 1	a, c	b	d	c	a, e	d	a, b, d
Personnel Study Manuals	PRIV	e	a	a	e	c	a, e	d	a, d
Personnel Study Work- papers	PRIV	e, f	a	b	e	b	a, e	d	a, d
Posting Payroll Report	PRIV	c, e	a, c	b	a, b, c, d	b, c	e	d	a, b, d
Reappointment Register	PRIV	c, i	a	b	d	d	a, e	d	a, b
Reappointment Register Case Files	PRIV	e, f, h	a	b	d, e	c	a, e	d	a, d
Register file: Applica- tions for Employment of Individuals Not Hired	PRIV	h	a	a	a	a	a	d	a

1985 Information Practices Act Report

DEPARTMENT: Administrative Services
DIVISION: Personnel Management
PAGE 4

RECORDS SERIES TITLE	CLASS- IFICATION	PURPOSE AND USE OF DATA	METHOD OF PROTECTION	METHOD TO DISCOVER INCLUSION	METHOD TO GAIN ACCESS	METHOD TO CONTEST OR CORRECT	SOURCES OF DATA	INDIVIDUALS COVERED	AUTHORIZED RECIPIENTS
Register File: Applica- tions of Nonqualified Applicants	PRIV	h	a	a	a	a	a	d	a, b
Register File: Applica- tions of Qualified Applicants	PRIV	h	a	a	a	a	a	d	a, b
Register File Recruit- ment Log	PRIV	c, e, 1	a	b	d, e	b, c	a	d	a
State Employee Personnel Files	PRIV	c, 1	a, c	b	b, c, d, e	b, c	a, e	d	a, b, d
Test Development Files	CONF	c, e	a	b	c, d, e	b, c	i	1	a, b
Workforce Adjustment Case Files	PRIV	e	a	b	c, e	c	e	d	a, d

AGENCIES NOT COLLECTING PERSONAL DATA

The following state agencies do not collect personal data on citizens other than the information contained in the personnel files and other office records used to manage staff functions. Personnel files carry a classification of "PRIVATE", although certain information concerning an employee is open to the public such as gross salary, experience and education, the city and county of residence, but not the street address. For the complete list of public information concerning a public employee, contact the Division of Archives and Records Services, Bureau of Records Analysis.

Administrative Services:

- Data Processing
- Executive Director
- Purchasing
- Surplus Property

Agriculture:

- Marketing and Productions
- State Laboratories

Business Regulations:

- Central Administration

Community and Economic Development:

- Executive Office
- Office of Indian Affairs
- International Business Development
- Community Development
- Community Services
- Travel Development

Corrections:

- Executive Director
- Administrative Services

Office of Education:

- Administrative Liaison
- Child Nutrition
- Information Technologies
- Legislative Relations and School Law
- Mastery Learning
- Personnel Services
- Principals' Academy
- School and Community Development
- Special Education
- Superintendent's Office
- Vocational Education

Committee for Executive Reorganization

Financial Institutions

Health:

Environmental Health:

Air Quality
General Sanitation
Water Pollution
Solid and Hazardous Waste

Family Health Services:

Management Support

Health Care Financing:

Medicaid Policy and Planning
Office of Contracts and Hearings

Management Planning:

Budget
Data Base Management
Health Planning and Policy Analysis

Legislative Fiscal Analyst

Legislative Printing and Graphics

Legislative Research and General Counsel

Natural Resources:

Executive Office/Controller
Geological and Mineral Survey
Oil, Gas, and Mining
State Lands

Office of Planning and Budget:

Administration
Administrative Support Services
Data Processing
Data Resource
Governmental Relations

Public Safety:

Administrative Services
Commission on Criminal and Juvenile Justice
Comprehensive Emergency Management
Council for Crime Prevention

Public Service Commission

Social Services:

Office of Planning and Evaluation

Department of Transportation:

Aeronautical Operations
Community Relations
Internal Audit
Motor Vehicle Carrier Advisory Committee
Passenger Tramway Safety Committee
Policy and Systems Planning
Preconstruction

APPENDIX 2.--TEXT OF THE PRIVACY ACT

Public Law 93-579:
The Privacy Act of 1974

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Privacy Act of 1974."

Sec. 2.

(a) The Congress finds that --

- (1) the privacy of an individual is directly affected by the collection, maintenance, use, and dissemination of personal information by Federal agencies;
- (2) the increasing use of computers and sophisticated information technology, while essential to the efficient operations of the Government, has greatly magnified the harm to individual privacy that can occur from any collection, maintenance, use, or dissemination of personal information;
- (3) the opportunities for an individual to secure employment, insurance, and credit, and his right to due process, and other legal protections are endangered by the misuse of certain information systems;
- (4) the right to privacy is a personal and fundamental right protected by the Constitution of the United States; and
- (5) in order to protect the privacy of individuals identified in information systems maintained by Federal agencies, it is necessary and proper for the Congress to regulate the collection, maintenance, use, and dissemination of information by such agencies.

(b) The purpose of this Act is to provide certain safeguards for an individual against an invasion of personal privacy by requiring Federal agencies, except as otherwise provided by law, to --

- (1) permit an individual to determine what records pertaining to him are collected, maintained, used, or disseminated by such agencies;
- (2) permit an individual to prevent records pertaining to him obtained by such agencies for a particular purpose from being used or made available for another purpose without his consent;

(36)

362

- (3) permit an individual to gain access to information pertaining to him in Federal agency records, to have a copy made of all or any portion thereof, and to correct or amend such records;
- (4) collect, maintain, use, or disseminate any record of identifiable personal information in a manner that assures that such action is for a necessary and lawful purpose, that the information is current and accurate for its intended use, and that adequate safeguards are provided to prevent misuse of such information;
- (5) permit exemptions from the requirements with respect to records provided in this Act only in those cases where there is an important public policy need for such exemption as has been determined by specific statutory authority; and
- (6) be subject to civil suit for any damages which occur as a result of willful or intentional action which violates any individual's rights under this Act.

Sec. 3

Title 5, United States Code, is amended by adding after section 552 the following new section:

"552a. Records maintained on individuals

"(a) DEFINITIONS: - For purposes of this section --

- "(1) the term 'agency' means agency as defined in section 552(e) of this title;
- "(2) the term 'individual' means a citizen of the United States or an alien lawfully admitted for permanent residence;
- "(3) the term 'maintain' includes maintain, collect, use, or disseminate;
- "(4) the term 'record' means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;
- "(5) the term 'system of records' means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual;
- "(6) the term 'statistical record' means a record in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an identifiable individual, except as provided by section 8 of title 13; and
- "(7) the term 'routine use' means, with respect to the disclosure of

a record, the use of such record for a purpose which is compatible with the purpose for which it was collected.

"(b) CONDITIONS OF DISCLOSURE. - No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior consent of, the individual to whom the record pertains, unless disclosure of the record would be --

"(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;

"(2) required under section 552 of this title;

"(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;

"(4) to the Bureau of the Census for purposes of planning or carrying out a census of survey or related activity pursuant to the provisions of title 13;

"(5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

"(6) to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Administrator of General Services or his designee to determine whether the record has such value;

"(7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;

"(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;

"(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;

"(10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the General Accounting Office; or

"(11) pursuant to the order of a court of competent jurisdiction.

"(c) ACCOUNTING OF CERTAIN DISCLOSURES. - Each agency, with respect to each system of records under its control, shall -

"(1) except for disclosures made under subsections (b)(1) or (b)(2) of this section, keep an accurate accounting of --
"(A) the date, nature, and purpose of each disclosure of a record to any person or to another agency made under subsection (b) of this section; and

"(B) the name and address of the person or agency to whom the disclosure is made;

"(2) retain the accounting made under paragraph (1) of this subsection for at least five years or the life of the record, whichever is longer, after the disclosure for which the accounting is made;

"(3) except for disclosures made under subsection (b)(7) of this section, make the accounting made under paragraph (1) of this subsection available to the individual named in the record at his request; and

"(4) inform any person or other agency about any correction or notation of dispute made by the agency in accordance with subsection (d) of this section of any record that has been disclosed to the person or agency if an accounting of the disclosure was made.

"(d) ACCESS TO RECORDS. - Each agency that maintains a system of records shall

"(1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence;

"(2) permit the individual to request amendment of a record pertaining to him and --

"(A) not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date of receipt of such request, acknowledge in writing such receipt, and

"(B) promptly, either -

"(i) make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or

"(ii) inform the individual of its refusal to amend the record in accordance with his request, the reason for the refusal, the procedures established by the agency for the individual to request a review of that refusal by the head of the agency or an officer designated by the head of the agency, and the name and business address of that official;

"(3) permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal,

and not later than 30 days (excluding Saturdays, Sundays, and legal public holidays) from the date on which the individual requests such review, complete such review and make a final determination unless, for good cause shown, the head of the agency extends such 30-day period; and if, after his review, the reviewing official also refuses to amend the record in accordance with the request, permit the individual to file with the agency a concise statement setting forth the reasons for his disagreement with the refusal of the agency, and notify the individual of the provisions for judicial review of the reviewing official's determination under subsection (g)(1)(A) of this section;

“(4) in any disclosure, containing information about which the individual has filed a statement of disagreement, occurring after the filing of the statement under paragraph (3) of this subsection, clearly note any portion of the record which is disputed and provide copies of the statement and, if the agency deems it appropriate, copies of a concise statement of the reasons of the agency for not making the amendments requested, to persons or other agencies to whom the disputed record has been disclosed; and

“(5) nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding.

“(e) AGENCY REQUIREMENTS.—Each agency that maintains a system of records shall—

“(1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President;

“(2) collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs;

“(3) inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual

“(A) the authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;

“(B) the principal purpose or purposes for which the information is intended to be used;

“(C) the routine uses which may be made of the information, as published pursuant to paragraph (4)(D) of this subsection; and

“(D) the effects on him, if any, of not providing all or any part of the requested information;

“(4) subject to the provisions of paragraph (1) of this subsection, publish in the *Federal Register* at least annually a notice of the existence and character of the system of records, which notice shall include—

“(A) the name and location of the system;

“(B) the categories of individuals on whom records are maintained in the system;

“(C) the categories of records maintained in the system;

“(D) each routine use of the records contained in the system, including the categories of users and the purpose of such use;

“(E) the policies and practices of the agency regarding storage, retrievability, access controls, retention, and disposal of the records;

“(F) the title and business address of the agency official who is responsible for the system of records;

“(G) the agency procedures whereby an individual can be notified at his request if the system of records contains a record pertaining to him;

“(H) the agency procedures whereby an individual can be notified at his request how he can gain access to any record pertaining to him contained in the system of records, and how he can contest its content; and

“(I) the categories of sources of records in the system;

“(5) maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination;

“(6) prior to disseminating any record about an individual to any person other than an agency, unless the dissemination is made pursuant to subsection (b)(2) of this section, make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes;

“(7) maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity;

“(8) make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record;

“(9) establish rules of conduct for persons involved in the design, development, operation, or maintenance of any system of records, or in maintaining any record, and instruct each such person with respect to such rules and the requirements of this

section, including any other rules and procedures adopted pursuant to this section and the penalties for noncompliance;

"(10) establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained; and

"(11) at least 30 days prior to publication of information under paragraph (4)(D) of this subsection, publish in the *Federal Register* notice of any new use or intended use of the information in the system, and provide an opportunity for interested persons to submit written data, views, or arguments to the agency.

"(f) AGENCY RULES. In order to carry out the provisions of this section, each agency that maintains a system of records shall promulgate rules, in accordance with the requirements (including general notice) of section 553 of this title, which shall

"(1) establish procedures whereby an individual can be notified in response to his request if any system of records named by the individual contains a record pertaining to him;

"(2) define reasonable times, places, and requirements for identifying an individual who requests his record or information pertaining to him before the agency shall make the record or information available to the individual;

"(3) establish procedures for the disclosure to an individual upon his request of his record or information pertaining to him, including special procedure, if deemed necessary, for the disclosure to an individual of medical records, including psychological records, pertaining to him;

"(4) establish procedures for reviewing a request from an individual concerning the amendment of any record or information pertaining to the individual, for making a determination on the request, for an appeal within the agency of an initial adverse agency determination, and for whatever additional means may be necessary for each individual to be able to exercise fully his rights under this section; and

"(5) establish fees to be charged, if any, to any individual for making copies of his record, excluding the cost of any search for and review of the record.

The Office of the Federal Register shall annually compile and publish the rules promulgated under this subsection and agency notices published under subsection (e)(4) of this section in a form available to the public at low cost.

"(g)

"(1) CIVIL REMEDIES.—Whenever any agency

"(A) makes a determination under subsection (d)(3) of this

section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;

"(B) refuses to comply with an individual request under subsection (d)(1) of this section;

"(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

"(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual.

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

"(2)

"(A) In any suit brought under the provisions of subsection (g)(1)(A) of this section, the court may order the agency to amend the individual's record in accordance with his request or in such other way as the court may direct. In such a case the court shall determine the matter *de novo*.

"(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

"(3)

"(A) In any suit brought under the provisions of subsection (g)(1)(B) of this section, the court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him. In such a case the court shall determine the matter *de novo*, and may examine the contents of any agency records *in camera* to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on the agency to sustain its action.

"(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

"(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines

that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of—

“(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of \$1,000, and

“(B) the costs of the action together with reasonable attorney fees as determined by the court.

“(5) An action to enforce any liability created under this section may be brought in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, without regard to the amount in controversy, within two years from the date on which the cause of action arises, except that where any agency has materially and willfully misrepresented any information required under this section to be disclosed to an individual and the information so misrepresented is material to establishment of liability of the agency to the individual under this section, the action may be brought at any time within two years after discovery by the individual of the misrepresentation. Nothing in this section shall be construed to authorize any civil action by reason of any injury sustained as the result of a disclosure of a record prior to the effective date of this section.

“(h) RIGHTS OF LEGAL GUARDIANS. For the purposes of this section, the parent of any minor, or the legal guardian of any individual who has been declared to be incompetent due to physical or mental incapacity or age by a court of competent jurisdiction, may act on behalf of the individual.

“(i) CRIMINAL PENALTIES.—Any officer or employee of an agency, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by this section or by rules or regulations established thereunder, and who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than \$5,000.

“(2) Any officer or employee of any agency who willfully maintains a system of records without meeting the notice requirements of subsection (e)(4) of this section shall be guilty of a misdemeanor and fined not more than \$5,000.

“(3) Any person who knowingly and willfully requests or obtains any record concerning an individual from an agency under

false pretenses be guilty of a misdemeanor and fined not more than \$5,000.

“(j) GENERAL EXEMPTIONS.—The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from any part of this section except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) if the system of records is—

“(1) maintained by the Central Intelligence Agency; or

“(2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of criminal laws from arrest or indictment through release from supervision.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

“(k) SPECIFIC EXEMPTIONS.—The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from subsections (c)(3), (d), (e)(1), (e)(4)(C), (H), and (I) and (f) of this section if the system of records is

“(1) subject to the provisions of section 552(b)(1) of this title;

“(2) investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2) of this section: *Provided, however,* That if any individual is denied any right, privilege, or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the

Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

"(3) maintained in connection with providing protective services to the President of the United States or other individuals pursuant to Section 3056 of title 18;

"(4) required by statute to be maintained and used solely as statistical records;

"(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

"(6) testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service the disclosure of which would compromise the objectivity or fairness of the testing or examination process; or

"(7) evaluation material used to determine potential for promotion in the armed services, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

"(f) ARCHIVAL RECORDS.

"(1) Each agency record which is accepted by the Administrator of General Services for storage, processing, and servicing in accordance with section 3103 of title 44 shall, for the purposes of this section, be considered to be maintained by the agency which deposited the record and shall be subject to the provisions of this section. The Administrator of General Services shall not disclose the record except to the agency which maintains the record, or under rules established by that agency which are not inconsistent with the provisions of this section.

"(2) Each agency record pertaining to an identifiable individual which was transferred to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, prior to the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall not be subject to the provisions of this section, except that a statement generally describing such records (modeled after the requirements relating to records subject to subsections (e)(4)(A) through (G) of this section) shall be published in the *Federal Register*.

"(3) Each agency record pertaining to an identifiable individual which is transferred to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, on or after the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall be exempt from the requirements of this section except subsections (e)(4)(A) through (G) and (e)(9) of this section.

"(m) GOVERNMENT CONTRACTORS. — When an agency provides by a contract for the operation by or on behalf of the agency of a system of records to accomplish an agency function, the agency shall, consistent with its authority, cause the requirements of this section to be applied to such system. For purposes of subsection (i) of this section any such contractor and any employee of such contractor, if such contract is agreed to on or after the effective date of this section, shall be considered to be an employee of an agency.

"(n) MAILING LISTS. — An individual's name and address may not be sold or rented by an agency unless such action is specifically authorized by law. This provision shall not be construed to require the withholding of names and addresses otherwise permitted to be made public.

"(o) REPORT ON NEW SYSTEMS. — Each agency shall provide adequate advance notice to Congress and the Office of Management and Budget of any proposal to establish or alter any system of records in order to permit an evaluation of the probable or potential effect of such proposal on the privacy and other personal or property rights of individuals or the disclosure of information relating to such individuals, and its effect on the the preservation of the constitutional principles of federalism and separation of powers.

"(p) ANNUAL REPORT. — The President shall submit to the Speaker of the House and the President of the Senate, by June 30 of each calendar year, a consolidated report, separately listing for each Federal agency the number of records contained in any system of records which were exempted from the application of this section under the provisions of subsections (j) and (k) of this section during

the preceding calendar year, and the reasons for the exemptions, and such other information as indicates efforts to administer fully this section.

"(q) EFFECT OF OTHER LAWS.--No agency shall rely on any exemption contained in section 552 of this title to withhold from an individual any record which is otherwise accessible to such individual under the provisions of this section."

Sec. 4.

The Chapter analysis of chapter 5 of title 5, United States Code, is amended by inserting:

"552a. Records about individuals."

immediately below:

"552. Public information; agency rules, opinions, orders, and proceedings."

[Section 5 of the Privacy Act established a Privacy Protection Study Commission for a period of two years. Its term has now expired. Among other things, the Commission was charged with the responsibility of assessing the effectiveness of privacy protections throughout the society. In July 1977, it issued a report entitled "Personal Privacy in an Information Society" which proposed a series of recommendations directed toward safeguarding personal privacy in both the public and private sector. This report can be obtained from the Superintendent of Documents, Government Printing Office, Washington, D.C. 20420 for a charge of \$5.]

Sec. 6.

The Office of Management and Budget shall--

- (1) develop guidelines and regulations for the use of agencies in implementing the provisions of section 552a of title 5, United States Code, as added by section 3 of this Act; and
- (2) provide continuing assistance to and oversight of the implementation of the provisions of such section by agencies.

Sec. 7.

- (a) (1) It shall be unlawful for any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number.
- (2) The provisions of paragraph (1) of this subsection shall not apply with respect to
 - (A) any disclosure which is required by Federal statute, or
 - (B) the disclosure of a social security number to any Federal, State, or local agency maintaining a system of records in existence and operating before January 1, 1975, if such disclosure was required under statute or regulation adopted prior to such date to verify the identity of an individual.
- (b) Any Federal, State, or local government agency which requests an individual to disclose his social security number to any Federal, State, or local agency maintaining a system of records in existence and operating before January 1, 1975, if such disclosure was required under statute or regulation adopted prior to such date to verify the identity of an individual.
- (b) Any Federal, State, or local government agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it.

Sec. 8

The provisions of this Act shall be effective on and after the date of enactment, except that the amendments made by section 3 and 4 shall become effective 270 days following the day on which this Act is enacted.

Sec. 9.

There is authorized to be appropriated to carry out the provisions of section 5 of this Act for fiscal years 1975, 1976, and 1977 the sum of \$1,500,000, except that not more than \$750,000 may be expended during any such fiscal year.

Approved December 31, 1974

MANAGING DIRECTOR
CITY AND COUNTY OF HONOLULU
STATE OF HAWAII

RULES AND REGULATIONS GOVERNING THE ACCESSIBILITY,
MAINTENANCE AND STORAGE OF PUBLIC AND CONFIDENTIAL
RECORDS OF ALL CITY AGENCIES

ARTICLE I - GENERAL PROVISIONS

1-1. AUTHORITY

These rules and regulations are hereby promulgated and established by the Managing Director as mandated by Ordinance No. 78-21 (Article 26, Chapter 8, Revised Ordinances of Honolulu 1969).

1-2. DECLARATION OF POLICY

A free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions. The more open a government is with its citizenry, the greater the understanding and participation of the public in government.

Therefore, the Managing Director, while mindful of the right of the individual to personal privacy, hereby finds and declares that access to information concerning the conduct of City agencies is a fundamental right of every person. Accordingly, it is declared to be the public policy of the City and County of Honolulu that public records of all City agencies shall be readily accessible for examination and copying by any person, subject to the conditions and exceptions provided herein which are required by law and deemed necessary for the protection of the public interest.

1-3. DEFINITIONS

Whenever used in these rules, unless plainly evident from the context that a different meaning is intended, the following terms mean:

- a. "Agency" means any office, department, board, commission or other governmental unit of the City, excluding the Council and its officers and employees;
- b. "Records Officer" means the officer or employee responsible for the maintenance and storage of records for an agency; and
- c. "Public Record" means any written or printed report, book, or paper, map or plan maintained by City agencies, which is the property of the City, 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 be received for filing, but shall not include records which invade the right of privacy of an individual.

EXHIBIT A

1-4. AMENDMENT OR REPEAL OF RULES

a. The Managing Director may amend or repeal these rules or add new rules as provided in HRS Section 91-3.

b. Any interested person may petition an agency requesting the adoption, amendment or repeal of any rule pursuant to the provisions of HRS Section 91-6.

1-5. AGENCY COMPLIANCE, WHEN

All agencies shall comply with these rules within ninety (90) days after the effective date of these rules and regulations.

1-6. SEVERABILITY AND EFFECTIVE DATE

a. If any section or part of these rules and regulations is held invalid for any reason, the invalidity shall not affect the validity of the remaining sections or parts of these rules and regulations.

b. These rules and regulations shall take effect ten (10) days after their filing with the City Clerk.

ARTICLE II - PUBLIC RECORDS

2-1. PUBLIC RECORDS DEFINED

a. Each agency shall, in accordance with the rules prescribed hereinbelow, make available for public inspection and copying the following records:

1. All rules and written statements of policy or interpretation formulated, adopted, or used by the agency affecting the public in the discharge of its function pursuant to HRS Section 91-2(3);

2. All final opinions and orders affecting the public pursuant to HRS Section 91-2(4);

3. All board minutes pursuant to and subject to the conditions prescribed in HRS Section 92-9(b); and

4. All other public records as defined herein, except as otherwise provided hereinbelow.

b. The accessibility, maintenance and storage of records which are part of the "state-wide traffic records system," pursuant to HRS Section 286-171, shall be governed by HRS Sections 286-171 to -172 and those rules and regulations promulgated thereunder.

2-2. PROCEDURE GOVERNING ACCESS TO PUBLIC RECORDS

a. Specific request required. Subject to the exemptions prescribed herein, City agencies shall make reasonably described public records available to any person making a request for such records. Ordinarily and whenever practical, the records shall be produced for immediate inspection.

b. Form of request. The initial request for such records must:

1. Be made in writing and signed by the person making the request. Each agency shall provide request memo forms for public use to expedite the filing of requests in an acceptable format;

2. Be addressed to and mailed or hand delivered to the records officer of the applicable agency, or if the person making the request does not know the agency responsible for the control of the records being requested, the request should be addressed to and mailed or hand delivered to the Managing Director;

3. Reasonably describe the records by giving the name, subject matter, date, location and any additional information which will clearly identify the requested record;

4. Set forth the address and telephone number where the person making the request desires to be notified of the determination as to whether the request will be granted;

5. State whether the requester wishes to inspect the records or desires to have a copy made;

6. State the firm agreement of the requester to pay the fees for duplication determined in accordance with Article 25, Chapter 8, RO 1969, as amended, and any other reasonable costs incurred by the agency in complying with the request.

c. Time for compliance with request. The agency shall make every reasonable effort to comply fully with all requests for access to records within ten (10) working days from the date of receipt of the request. However, where it is determined that a request for records would unduly burden and interfere with the operations of the agency, for example because the records requested are presently in use, voluminous or difficult to locate, the records officer may:

1. Extend the period of compliance up to ten (10) additional working days, and/or

2. Reasonably modify the request in order to be able to satisfy the request without creating disproportionate adverse effects on agency operations.

d. Granting of request. If the records officer determines that the request is to be granted, the requester will be notified as to when and where the records may be inspected, and the records will be made available for inspection at the time and place stated. Records will be made available for inspection during established office hours, provided that these inspections do not interfere with agency operations. If, after making inspection, the requester desires copies of all or a portion of the requested records, copies will be furnished to him upon payment of the established fees prescribed by law.

e. Denial of request. If the records officer determines that the request for records should be denied, the requester will be notified:

1. Of the denial and the grounds for the denial; and
2. Of his or her right to appeal the denial to circuit court in accordance with HRS Section 92-52.

f. Judicial review. In accordance with HRS Section 92-52, any person aggrieved by the denial of the right to inspect or obtain copies of a public record may appeal directly to the circuit court of the circuit wherein the public record is found for an order directing the records officer to permit the inspection of or to furnish copies of extracts of the public records. The court shall grant the order after hearing upon a finding that the denial was not for just and proper cause.

ARTICLE III - CONFIDENTIAL RECORDS

3-1. CONFIDENTIAL RECORDS DEFINED

a. Records which if made accessible to the public would invade the right of privacy of an individual, shall be considered confidential records. An invasion of the right of privacy of an individual shall be deemed to result from, but shall not be limited to the granting of access to:

1. Criminal history records and investigatory files compiled for law enforcement purposes;
2. Applications for licenses or permits required by law;
3. Personnel and employment records, employment examinations and personal references of applicants for employment. However, an examinee shall have the right to review his own completed examination;
4. Medical records;
5. Credit histories; and
6. Information of a personal nature when disclosure would result in economic or personal hardship to the subject party which outweighs the public's fundamental right of access to information concerning the conduct of City agencies.

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:

1. A person seeks access to his or her record, provided that, in order to insure that the record is made accessible to the proper person, the agency shall require reasonable identification of the person making the request. A person may establish his or her identity by:

A. Submitting with his written request for access, two pieces of identification bearing his or her name and signature;

B. Appearing at the agency that has custody of the record during established working hours and presenting either:

i. One piece of identification containing a photograph and signature, such as a driver's license, military I.D. or State of Hawaii I.D.; or

ii. Two pieces of identification bearing the individual's name and signature; and

C. Providing such other proof of identity as the agency deems necessary considering the circumstances of a particular request. Nothing in this section shall preclude the agency from requiring additional identification before granting access to the records if there is reason to believe that the person making the request may not be the individual to whom the record pertains, or where the sensitivity of the data may warrant additional precautions.

2. The person to whom the record pertains has given his written consent to the granting of access, provided that the consent is a notarized statement and further provided that the requesting party properly identifies him or herself according to the procedures prescribed above.

3. The granting of access is to a governmental agency, and the inspection of the record is to fulfill its duty, function or purpose.

4. The granting of access is to a person or group under contract to the City to provide services where use of the information disclosed shall be limited to a valid governmental purpose.

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.

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.

c. The following records are specifically exempted from public access and shall be deemed confidential:

1. Records specifically exempted from public access by federal, state or local law, such as:

A. Records that pertain to the preparation of the prosecution or defense of any action or proceeding, prior to its commencement, to which the City is or may be a party and which the City Attorney has determined should be withheld from public inspection (HRS § 92-51);

B. Records which do not relate to a matter in violation of law and the confidentiality of which are deemed by the City Attorney to be necessary for the protection of the character or reputation of any person (HRS § 92-51);

C. Records of the Police Department or of the Prosecuting Attorney unless permission for disclosure 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 (any person who may sue because of death resulting from any such accident shall be deemed a party directly concerned), or their duly licensed attorneys acting under written authority signed by either party (RCH § 12-105);

2. Records which if made accessible would impair present or imminent contract awards or collective bargaining negotiations;

3. Records containing trade secrets and commercial or financial information obtained from a person which is privileged or confidential;

4. Test questions, scoring keys and other data used to administer a licensing examination, examination for employment, or academic examination. However, an examinee shall have the right to review his own completed examination;

5. The contents of real estate appraisals, engineering or feasibility estimates and evaluations made for or by the City relative to the acquisition of property or any interest in property for public use, or to prospective public supply and construction contracts, until such time as title to the property has been acquired or the property interest has passed to the City, provided the law of eminent domain shall not be affected by this provision;

6. Records related solely to the internal personnel, rules and procedures of an agency;

7. Interagency or intraagency memorandums or letters which would not be available by law to a party other than one in litigation with the agency;

8. Investigatory files of any agency involved in administrative adjudication, if the granting of access to the information would interfere with the administrative proceeding, or deprive a person of an impartial adjudication, or identify a confidential source, or disclose confidential information, or if the granting of access would constitute an invasion of personal privacy; and

9. Any record which falls within a common law privilege of confidentiality.

3-2. CERTIFICATION OF CONFIDENTIAL RECORDS

a. Within ninety (90) days from the effective date of these rules, each agency shall submit to the Managing Director a listing (by title) of all confidential records in its custody. The list shall include the title of the record, the name of the records officer, the section which originated the record, the type of confidential information contained therein, the reason for confidentiality, when, if ever, such records would be made available to the public, and what security measures are utilized in maintaining such records. The agency head shall certify that the listing is accurate and complete and transmit said list to the Managing Director.

b. The Corporation Counsel shall review said list and certify that it is consistent with the rules prescribed herein and applicable law.

c. The records officer of an agency shall be responsible for keeping said listing current by notifying the Managing Director of any changes.

3-3. MAINTENANCE AND SECURITY OF CONFIDENTIAL RECORDS

a. All confidential records shall be maintained and stored in a manner which will safeguard them against illegal access and protect them against damage or loss.

b. Each agency shall appoint a records officer who, in addition to administering the accessibility of public records according to the procedures prescribed herein, shall also be responsible for the maintenance and storage of confidential records.

c. Each agency shall label confidential files with the words "Confidential," "Private," or with a similar designation, provided that such labeling will not be required where it is unwarranted in view of the security measures already in existence, or where it would unreasonably interfere with the activities and functions of the agency.

d. Where practical and where it would appreciably enhance the security of confidential records, each agency shall physically segregate confidential records from public records and maintain confidential records in a restricted area, provided that such physical segregation will not be required where it is unwarranted in view of the security

measures already in existence, or where it would unreasonably interfere with the activities and functions of the agency. A restricted area is an area to which entry is restricted only to authorized personnel during normal working hours. Restricted areas will be prominently posted and where feasible separated from nonrestricted areas by physical barriers which will control the movement of individuals and eliminate unnecessary traffic thereby reducing the opportunity for unauthorized access to confidential information. In addition, where feasible, the desk of a supervisor or other responsible employee may be located at the entrance to a restricted area to assure that only authorized persons enter.

e. None of the foregoing should be construed to limit the authority of an agency to adopt additional security measures such as the use of locked rooms or vaults, or automatic detection equipment where the circumstances warrant such measures.

f. When it is necessary for an office to move to another location, plans must be made to properly protect and account for all confidential records. Confidential records will be in locked cabinets or sealed packing cartons while in transit. Accountability will be maintained to ensure that cabinets or cartons do not become misplaced or lost during the move.

g. Where computerized data processing is employed, effective security measures shall be employed to prevent unauthorized access to confidential information. Due care shall be taken to insure that any confidential information stored by the computer cannot be modified, destroyed, accessed, changed or purged by unauthorized persons.

h. The destruction of confidential records shall be permitted only where authorized by law.

CERTIFICATION

I, Richard K. Sharpless, in my capacity as Managing Director, City and County of Honolulu, do hereby certify:

1. That the foregoing is a full, true and correct copy of the Rules and Regulations Governing the Disclosure, Maintenance and Storage of Public and Confidential Records of All City Agencies, which were adopted by said Managing Director on October 18, 1978, following a public hearing held on August 10, 1978; and
2. That the notice of public hearing on the foregoing Rules and Regulations, which notice included the substance of such Rules and Regulations, was published in the Honolulu Advertiser and the Honolulu Star-Bulletin on July 20, 1978.

Richard K. Sharpless
RICHARD K. SHARPLESS
Managing Director
City and County of Honolulu

APPROVED this 23 day of
OCTOBER, 1978.

Frank F. Fasi
FRANK F. FASI, Mayor
City and County of Honolulu

APPROVED AS TO FORM:

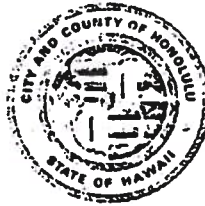
William M. Kotake
Deputy Corporation Counsel

Received this 23rd day of
October, 1978.

Eileen K. Lota
EILEEN K. LOTA, City Clerk

DEPARTMENT OF THE CORPORATION COMMISSIONER
CITY AND COUNTY OF HONOLULU
HONOLULU, HAWAII 96813

EILEEN R. ANDERSON
MAYOR



GARY M. SLOVIN
CORPORATION COUNSEL

STANLEY D. SUYAT
FIRST DEPUTY

December 30, 1983

MEMORANDUM

TO: ANDREW I. T. CHANG, MANAGING DIRECTOR

ATTN: MICHAEL LEACH; MANAGEMENT ANALYST

FROM: KATHLEEN A. CALLAGHAN, DEPUTY CORPORATION COUNSEL

SUBJECT: RELATIONSHIP OF CHAPTER 92E, "FAIR INFORMATION PRACTICE (CONFIDENTIALITY OF PERSONAL RECORD)," HRS, TO CHAPTER 5, ARTICLE 16, ROH 1978, AS AMENDED

This memorandum responds to the second issue raised by your memorandum dated September 13, 1983, entitled "HECO Distribution of OCDA Questionnaire." The first issue raised by your memorandum with respect to the distribution of the Oahu Civil Defense Agency questionnaire through the Hawaiian Electric Company was previously answered in a letter dated September 30, 1983, from Donna Y. L. Leong, Deputy Corporation Counsel.

The issue addressed in this memorandum is whether City departments and agencies may utilize the "Rules and Regulations Governing the Accessibility, Maintenance and Storage of Public and Confidential Records of all City Agencies" (hereinafter "MD's Rules Governing Public and Confidential Records"), which were promulgated in 1978 pursuant to Ordinance No. 78-21 (codified at Chapter 5, Article 16, ROH 1978, as amended) to determine whether to disclose personal records pursuant to Chapter 92E, "Fair Information Practice (Confidentiality of Personal Record)," Hawaii Revised Statutes (HRS).

We answer that Chapter 92E, HRS, governs determinations regarding access to "personal records" even if said personal record is also a public record or a

M 83-70

378
EXHIBIT B

MEMORANDUM

TO: ANDREW I. T. CHANG

-2-

December 30, 1983

confidential record within the meaning of Section 92-50, HRS, or Chapter 5, Article 16, ROH, and the MD's Rules Governing Public and Confidential Records, adopted pursuant thereto. Of course, if the public record or confidential record is not a personal record within the meaning of Chapter 92E, HRS, then the MD's Rules Governing Public and Confidential Records would be applicable.

In Chapter 92, HRS, entitled, "Public Agency Meetings and Records," the legislature declares that "it is the policy of this State that the formation and conduct of public policy--discussions, deliberations, decisions and action of governmental agencies--shall be conducted as openly as possible."* § 92-1, HRS. In implementing this policy, Chapter 92, HRS, provides the public with access to certain "public records," but excepts those records which invade the right of privacy of an individual.

Section 92-50, HRS, provides that:

As used in this part, '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. [Emphasis added]

Section 92-51, HRS, also limits public inspection of certain records as follows:

§ 92-51 Public records; available for inspection. 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

* Section 92-71, HRS, provides that the provisions contained in Chapter 92 are applicable to the City and County of Honolulu.

MEMORANDUM

TO: ANDREW I. T. CHANG

-3-

December 30, 1983

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.

Section 5-16.1, ROH, adopts the definition of the term "public records" as set forth in Section 92-50, HRS. Section 5-16.2, ROH, further mandates as follows:

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. [Emphasis added]

Pursuant to said ordinance, in 1978 the Managing Director subsequently adopted "Rules and Regulations Governing the Accessibility, Maintenance and Storage of Public and Confidential Records of All City Agencies."

MEMORANDUM

TO: ANDREW I. T. CHANG

-4-

December 30, 1983

In 1980, the State Legislature passed Act 226, Fair Information Practice (Confidentiality of Personal Record) which is codified as Chapter 92E, HRS. Session Laws of Hawaii 1980, Act 226, Section 1, provides that:

The purpose of this Act is to implement in part the 1978 amendments to the Hawaii State Constitution (Article I, Section 6) relating to the right to privacy.

This Act permits individuals to gain access to personal records relating to themselves maintained by State or county executive branch agencies and to correct or amend those records under certain circumstances.

Section 92E-1(3) sets forth the definition of "personal record" as follows:

- (3) 'Personal record' means any 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. [Emphasis added]

It is also important to note that as used in Chapter 92E, HRS, the term "individual" means a natural person (§ 92E-1(2), HRS). Consequently, Chapter 92E, HRS, does not apply to records about artificial or legally created beings such as corporations, which are maintained by an agency.

Pursuant to Section 92E-2, HRS, each City agency that maintains any accessible personal record shall make that record available to the person to whom it pertains in a reasonably prompt manner and in a reasonably intelligible form. However, the statute sets forth important exemptions and limitations regarding an individual's access to his or her personal record (§ 92E-3, HRS), limitations on the public's access to personal records (§ 92E-4, HRS) and

MEMORANDUM

TO: ANDREW I. T. CHANG

-5-

December 30, 1983

limitations on the disclosure of personal records to other agencies (§ 92E-5, HRS).

Pursuant to Section 92E-10, HRS, the Department of the Attorney General, State of Hawaii, and the county attorneys for the respective counties are currently developing a set of uniform rules and regulations for adoption and use, insofar as is practicable, by all State and county agencies. The completion date for said rules and regulations is undetermined.

In light of this situation, the issue raised is whether City departments and agencies may utilize the Rules promulgated in 1978 pursuant to Ordinance No. 78-21 to determine whether to disclose personal records pursuant to Chapter 92E, HRS.

It is important to note that the Rules were adopted in 1978 pursuant to ordinance, while Act 226 was enacted in 1980 by the State Legislature and thus, the Rules do not address "personal records" as defined by Chapter 92E, HRS. With respect to "personal records," Chapter 92E, HRS, a State statute, is expressly applicable to the counties (§ 92E-1(1)), and hence takes precedent over the Rules adopted by the City in 1978 pertaining to public records and confidential records when said records also constitute personal records.

However, the MD's Rules are still pertinent with respect to its application to public records which are not personal records and to limited confidential records which are not personal records. In short, the nature of the record involved will determine which procedure to adhere to in analyzing its accessibility.

For instance, Section 91-2(3), HRS, provides 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 the discharge of its functions. Said rules constitute public records within the meaning of Section 92-50, HRS, but clearly are not personal records and furthermore, are subject to a State statute, Section 91-2(3), HRS, which expressly makes such records subject to public inspection. Therefore, the MD's Rules Governing Public and Confidential Records would apply in governing the public's access to said record. The same logic would apply with respect to final opinions and orders

MEMORANDUM

TO: ANDREW I. T. CHANG

-6-

December 30, 1983

of an agency. Although said opinion and order of an agency might well contain information which would deem it a "personal record" within the meaning of Section 92E-1(3), HRS, the public is nonetheless allowed access to such a record pursuant to Section 92E-4(3), which allows disclosure of the personal record (which in this case is also a public record) to a person other than the individual to whom the record pertains when a State statute expressly authorizes the disclosure. And in this example, Section 91-2(4), HRS, requires each agency to "make available for public inspection all final opinions and orders." Consequently, the MD's Rules Governing Public and Confidential Records would be pertinent and applicable in this case pertaining to the procedures governing access to public records.

The more complex situation arises with respect to the overlap between the MD's Rules Governing Public and Confidential Records, Article III, which pertains to confidential records, and Chapter 92E, HRS, pertaining to confidential records. Generally speaking, most records which invade the right of privacy of an individual (§ 92-50, HRS), will also constitute "personal records" within the meaning of Section 92E-1(3), and therefore, the exemptions, limitations and procedures set forth in Chapter 92E, HRS, will apply to requests for disclosure of such confidential records. However, the MD's Rules also designate some records as confidential which may not necessarily constitute personal records within the meaning of Section 92E-1(3), HRS, and in such instances, the MD's Rules will control access to such a record. For example, Rule 3-1(c) of the MD's Rules specifically exempts from public access and deems confidential those records which, if made accessible, would impair present or imminent contract awards or collective bargaining negotiations and interagency or intra-agency memorandums or letters which would not be available by law to a party other than one in litigation with the agency. If said records do not contain information which would designate them as a "personal record," then Chapter 92E, HRS, would not apply and then the standards set forth in the MD's Rules would apply.

In conclusion, our final advice is that if an agency is unable to resolve a question regarding what constitutes a personal record, who may have access to a personal record, or any other issue relating to Chapter 92E, HRS, it should contact the Department of the Corporation Counsel for assistance. This is also essentially what we

MEMORANDUM

TO: ANDREW I. T. CHANG

-7-

December 30, 1983


advised in the Administrative Directive Manual update prepared by our office pertaining to Public Records Accessibility, a copy of which is attached.

If you should have any questions pertaining to this memorandum, please contact the undersigned at x 4925.



KATHLEEN A. CALLAGHAN
Deputy Corporation Counsel

APPROVED:



GARY M. SLOVIN
Corporation Counsel

KAC:as

Attach.

May 3, 1983

TO: ANDREW I. T. CHANG, MANAGING DIRECTOR

FROM: KATHLEEN A. CALLAGHAN, DEPUTY CORPORATION COUNSEL

SUBJECT: ADMINISTRATIVE DIRECTIVE MANUAL UPDATE - PUBLIC RECORDS ACCESSIBILITY

Pursuant to your memorandum dated November 4, 1982, this office has reviewed and updated Directive 134.1-1-1 concerning "Public Records Accessibility." The revisions to this particular directive are necessary because of the approval of Act 226, the Fair Information Practice Act, in 1980, by the State Legislature (Chapter 92E, HRS).

The Department of the Corporation Counsel is currently working with the Department of the Attorney General, State of Hawaii, and the county attorneys of the other counties in developing a set of uniform rules and regulations for use and adoption, insofar as practical, by all State and county agencies, pursuant to Chapter 92E-10, HRS. Consequently, once such rules and regulations have been promulgated, this directive will require further amendments.

If you should have any questions concerning this revised directive, please do not hesitate to contact the undersigned at local 4925.

APPROVED:

KATHLEEN A. CALLAGHAN
Deputy Corporation Counsel

GARY M. SLOVIN
Corporation Counsel
KAC:ek

Attach.

PUBLIC RECORDS ACCESSIBILITY

Reference:

Ordinance No. 78-21 (Article 16, Chapter 5, Revised Ordinances of Honolulu 1978) and Chapter 92E, Hawaii Revised Statutes, "Fair Information Practice (Confidentiality of Personal Record)."

Purpose:

With respect to Ordinance No. 78-21, to promulgate the rules and regulations governing the accessibility, maintenance and storage of public and confidential records of all City agencies.

With respect to Chapter 92E, HRS, to define "Personal record," to require all public agencies which maintain personal records concerning individuals to keep these records confidential, to allow the individual access to his or her personal record, to provide a procedure whereby an individual can have errors in his or her record corrected, and to promulgate rules and regulations implementing Chapter 92E, HRS.

I. GENERAL POLICY

- A. Public Records. Public records of all City agencies shall be readily accessible for examination and copying by any person subject to exceptions provided in the Rules and Regulations Governing the Accessibility, Maintenance and Storage of Public and Confidential Records of all City Agencies.
- B. Personal Records. Each City agency that maintains any accessible personal record shall make that record available to the person to whom it pertains in a reasonably prompt manner and in a reasonably intelligible form [§ 92E-2, HRS]. There are important exemptions and limitations regarding an individual's access to his or her personal record [§ 92E-3, HRS], the public's access to personal records [§ 92E-4, HRS], and disclosure of personal records to other agencies [§ 92E-5, HRS].

1. Definition of "Personal Record."
Section 92E-1(3), HRS, defines "personal record" as follows:

- (3) "Personal record" means any 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.

It should be emphasized that "personal record" is far broader in scope than the familiar term "personnel record." Although personnel records are included within the definition of "personal records," the latter includes other records involving nonemployees which may be kept by an agency, such as ambulance case records, gross liquor sales reports, and water consumption records.

II. AGENCY (Departments and separate offices) RESPONSIBILITY

- A. Each agency shall make public records defined in the Rules and Regulations established by the Managing Director on October 23, 1978, available for public inspection and copying. However, access to any public record which is also a "personal record" shall be governed by Chapter 92-E, HRS.
- B. Each agency shall appoint a records officer who, in addition to administering the accessibility of public records, according to the procedures prescribed in the rules and

regulations established by the Managing Director, and personal records, pursuant to Chapter 92E, HRS, shall also be responsible for the maintenance and storage of confidential records.

- C. Copies of the Rules and Regulations Governing the Accessibility, Maintenance and Storage of Public and Confidential Records of all City Agencies were sent to all departments on October 26, 1978. Key personnel should read this document and have continuing access to it.
- D. Pursuant to Chapter 92E-10, HRS, the Department of the Attorney General, State of Hawaii, and the county attorneys of the respective counties are currently developing a set of uniform rules and regulations for adoption and use, insofar as is practicable, by all State and county agencies. Prior to the adoption of said rules, if an agency is unable to resolve a question regarding what constitutes a personal record, who may have access to a personal record, or any other issue relating to Chapter 92E, HRS, please contact the Department of the Corporation Counsel for assistance.

DEPARTMENT OF THE CORPORATION COUNSEL, CITY AND COUNTY
OF HONOLULU, MEMORANDA, OPINIONS AND STUDIES, AND REPORTS
REGARDING PUBLIC AND CONFIDENTIAL RECORDS

MEMORANDA

87-8
86-36
86-28
86-26
86-16
85-37
85-18
85-3
84-27
84-15
83-70
83-65
83-54
83-13
83-6
82-95
81-29
80-44
79-73
79-8
79-4
78-82
78-54
78-7
77-112
77-68
77-11
76-111
76-47
75-43
75-23
72-68
71-110

OPINIONS

71-93
69-38
68-57
68-43
68-29
66-43
65-71
61-146
61-52
61-25
58-98
58-2
53-44
46-68
46-18

STUDIES & REPORTS

73-4
72-13
69-43
68-4
65-45

(These documents can be obtained at the City's Municipal
Reference Library, the Department of the Corporation Counsel
or the Hawaii Supreme Court Library.)

EXHIBIT C
389

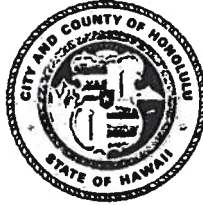
RECENT DEPARTMENT OF THE CORPORATION COUNSEL
MEMORANDA REGARDING PUBLIC/CONFIDENTIAL RECORDS
(COPIES ATTACHED)

M 87-8	Payroll Records (City Contractor)
M 86-36	Driver's License/Motor Vehicle Records
M 86-28	Department of Health Medical Records
M 86-26	Honolulu Police Commission Public Complaint Records
M 86-16	Construction of term: "duly authorized agent"
M 85-37	Payroll Records (City Contractor)
Letter dated October 11, 1985	City Ambulance Report Forms from Kathleen Callaghan
M 85-18	Ambulance Report Contents
M 85-3	Honolulu Police Commission Public Complaint Records
Letter dated August 20, 1984	Liquor Licenses from Kathleen Callaghan (Corp. officers, Articles of Incorporation, Bylaws)
M 84-27	Workers' Compensation Medical Records
M 84-15	Design/Bid Competition Proposals
M 83-70	Issue: Chapter 92E, "Fair Information Practice" vis-a-vis Chapter 5, Article 16, ROH 1978 (attached hereto as Exhibit B)
M 83-65	Office of Human Resources Fact-Finding Hearing Records
M 83-54	Building Permit Plans (prior to issuance of permits)
M 83-13	Water Service Consumption Data
M 83-6	Grant Officer's Letter to City (disposition of <u>Gary Elam v. City and County of Honolulu</u>)
M 82-95	Alleged Voter Irregularities: Investigation Records
M 81-29	Taxicab Licenses (Waiting List)
M 80-44	Computer Tapes: Street Names, Street Addresses, Tax Map Key Numbers, Zoning Information
M 79-73	Motor Vehicle Records
M 79-8	Crime Victims (Names)
M 79-4	Arrest Record (City Employee)
M 78-82	Senior Citizens' Records
M 78-54	Auctioneer's Records
M 78-7	Ethics Commission Investigation Records (Employees and Officers Being Investigated)

M 77-112	Liquor Commission Records
M 77-68	Medical Reports (Medical Examination of Prisoner)
M 77-11	Municipal Reference and Records Center (photographs and negatives)
M 76-111	Criminal Abstracts
M 76-47	Ambulance Statistical Reports
M 75-43	Municipal Archives (Donations)
M 75-23	Law Enforcement Records
M 72-68	City and County Employee Pay Records
M 71-110	Voter Registration (Application Affidavits)

DEPARTMENT OF THE CORPORATION COUNSEL
CITY AND COUNTY OF HONOLULU
HONOLULU, HAWAII 96813

FRANK F. FASI
MAYOR



RICHARD D. WURDEMAN
CORPORATION COUNSEL

May 19, 1987

MEMORANDUM

TO: ALFRED J. THIEDE, DIRECTOR AND CHIEF ENGINEER
DEPARTMENT OF PUBLIC WORKS

FROM: KATHLEEN A. CALLAGHAN, DEPUTY CORPORATION COUNSEL

SUBJECT: CONTRACT NO. C-71074, WAIAWA STREAM - FAIR
INFORMATION PRACTICE ACT REQUEST FROM MICHAEL W.
STEELE, ESQ.

This is in response to your letter dated March 16, 1987, requesting assistance in responding to a letter from Michael W. Steele, Esq., regarding Hawaii Revised Statutes (hereinafter "HRS") Chapter 92E, "Fair Information Practice." Mr. Steele, who represents the Operating Engineers' Trust Funds (hereinafter "Trust Fund"), has requested copies of the certified payroll reports submitted to the Department of Public Works by GEO Engineering for Contract No. C-71074, Waiawa Stream, Invert and Slope Lining Repairs.

GEO Engineering has allegedly failed to pay the employee benefits of its operator employees with regard to the project. The Trust Fund requires copies of the payroll records in order that the bonding company can verify and remit payment on the claims made. Mr. Steele states that the only information he is requesting from the payroll records are the names of approximately seven operating engineer employees and the number of hours each operating engineer employee worked each week on this project.

The issues presented are (1) whether the payroll records are personal records within the meaning of HRS Section 92E-1, and (2) whether the City can

M 87-8

EXHIBIT D
392

MEMORANDUM

TO: ALFRED J. THIEDE

-2-

May 19, 1987

release copies of said payroll records to the Trust Fund.

In 1980, the State Legislature passed Act 226, Fair Information Practice (Confidentiality of Personal Record) which is codified as HRS Chapter 92E. Session Laws of Hawaii 1980, Act 226, Section 1, provides that:

The purpose of this Act is to implement in part the 1978 amendments to the Hawaii State Constitution (Article I, Section 6) relating to the right to privacy.

This Act permits individuals to gain access to personal records relating to themselves maintained by State or county executive branch agencies and to correct or amend those records under certain circumstances.

HRS Section 92E-1 sets forth the definition of "personal record" as follows:

§92E-1 Definitions. As used in this chapter:

'Personal record' means any 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. (emphasis added).

It is also important to note that as used in HRS Chapter 92E, the term "individual" means a natural person (HRS § 92E-1). Consequently, HRS Chapter 92E does not apply to records about artificial or legally created beings such as corporations, which are maintained by an agency.

MEMORANDUM

TO: ALFRED J. THIEDE

-3-

May 19, 1987

Pursuant to HRS Section 92E-2, each City agency that maintains any accessible personal record shall make that record available to the person to whom it pertains in a reasonably prompt manner and in a reasonably intelligible form. However, the statute sets forth important exemptions and limitations regarding an individual's access to his or her personal record (HRS § 92E-3), limitations on the public's access to personal records (HRS § 92E-4) and limitations on the disclosure of personal records to other agencies (HRS § 92E-5).

The payroll records at issue contain information about all of the employees on the job including, but not limited to, the individual's name, rate of pay, union dues paid, withholding for State and Federal taxes, vacation time, earned and used, all payroll deductions, such as Christmas savings and garnishments, and the net wages paid to each individual. We believe that payroll records containing information of the type just cited constitute a personal record within the meaning of the definition set forth in HRS Section 92E-1. Consequently, we must now examine whether the Department of Public Works is permitted to disclose the payroll records to an individual other than the one to whom the record pertains.

HRS Section 92E-4 provides as follows with respect to the limitations and exceptions regarding the disclosure of personal records to any person other than the individual to whom the record pertains:

[§92E-4] Limitation on public access to personal record. 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;

MEMORANDUM

TO: ALFRED J. THIEDE

-4-

May 19, 1987

- (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.

The Trust Fund has not provided any proof that it is the duly authorized agent of the individuals to whom the payroll records pertains and, thus, it is not entitled to the release of the records pursuant to subsection (1) of HRS Section 92E-4. Nor do any of the other three exceptions set forth in HRS Section 92E-4 apply in this case. This conclusion is consistent with Corporation Counsel M 85-37 (November 25, 1985) which responded to whether a private company could have access to certified payroll records submitted to the City for a City construction contract.

However, we believe there may be several viable solutions which could ultimately lead to the legal disclosure of the information sought in this case. First, the contractor (who has apparently lost its copy of the payroll records) could request a copy of the payroll records from the City. Second, the seven individuals for whom the Trust Fund needs records could request that the City grant them access to the records relating to them personally (in which case the City would have to sanitize the records relating to other individuals). Third, the Trust Fund could be designated the duly authorized agent of the individuals to whom the records pertain (by providing written notarized statements from each individual granting said access to the agent in accordance with the Managing Director's Rules and Regulations Governing the Accessibility, Maintenance and Storage of Public and Confidential Records of All City Agencies (hereinafter "Managing Director's Rules") and obtain the records pursuant to its agent status. Finally, the Trust Fund could obtain a court order pursuant to HRS Section 92E-13, although one of the first three resolutions would be less expensive and more expeditious.

With respect to "sanitizing" the payroll records, we have previously suggested in some limited instances, that when a party requests a personal record

MEMORANDUM


TO: ALFRED J. THIEDE

-5-

May 19, 1987

that also contains non-confidential information, the City department involved should make reasonable efforts to excise the confidential information in order to accommodate the member of the public requesting the record. We recognize that HRS Chapter 92E does not require such an accommodation but, in this instance, we do not believe it would impose an undue burden on the department to provide the information for the seven individuals involved pursuant to alternatives two and three above.

In summary, we conclude that the payroll records are personal records within the meaning of HRS Section 92E-1 that cannot be released to the Trust Fund unless it submits documentation that it is the duly authorized agent of the seven individuals involved, as well as their written notarized permission for the release of said information in accordance with the Managing Director's Rules. In the alternative, the contractor or the seven individuals themselves could request the records in accordance with HRS Chapter 92E. We trust that this memorandum should assist you in responding to Mr. Steele; however, if you should have any questions, do not hesitate to contact me at ext. 4925.


KATHLEEN A. CALLAGHAN
Deputy Corporation Counsel

APPROVED:

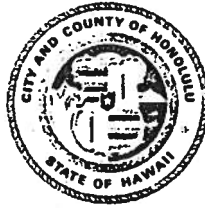

RICHARD D. WURDEMAN
Corporation Counsel

KAC:ek

cc: Michael W. Steele, Esq.

DEPARTMENT OF THE CORPORATION COMMISSIONER
CITY AND COUNTY OF HONOLULU
HONOLULU, HAWAII 96813

FRANK F. FASI
MAYOR



RICHARD D. WURDEMAN
CORPORATION COUNSEL

October 7, 1986

MEMORANDUM

TO: RIZALINO R. VICENTE, DIRECTOR
DEPARTMENT OF FINANCE

ATTN: DENNIS A. KAMIMURA, LICENSING ADMINISTRATOR

FROM: DIANE T. KAWAUCHI, DEPUTY CORPORATION COUNSEL

SUBJECT: REQUEST FOR DRIVER LICENSE AND MOTOR VEHICLE
INFORMATION

This is in response to your inquiry dated July 7, 1986, for opinion whether under Section 286-172, Hawaii Revised Statutes ("HRS"), motor vehicle and driver license information may be released without a court subpoena for the purposes of locating and identifying potential claimants in a real property quiet title action.

We respond that if the request for information is pursued under Section 286-172, HRS, and in accordance therewith presented to the State of Hawaii, Director of Transportation, we opine that release of the information under the conditions set forth in said chapter, may be made without court subpoena.

Background

We understand your inquiry to arise from a request of Mr. Matthew G. Jewell, Esq., of the law firm of Case, Kay & Lynch, attorneys for Mr. and Mrs. Robert W. Moeller, who have instituted a quiet title action involving real property situated in the County of Hawaii. Mr. Jewell's request is

M 86-36

MEMORANDUM

TO: RIZALINO R. VICENTE

-2-

October 7, 1986

addressed to the Automobile Registration and Driver Licensing Division of the Department of Finance and requests any information contained in the Division's records including but not limited to: 1) date of birth or death, 2) marital status and name of spouse, 3) address and phone number, 4) names and addresses of any heirs and 5) the identification of all documents which are a part of the Division's records regarding numerous individuals identified by name in a list attached to the request. The request for information explains that pursuant to the case of Hustace v. Kapuni, 6 Hawaii App. (No. 10370, decided April 8, 1986) counsel has the responsibility and duty to utilize his best efforts to identify and locate any and all persons claiming or potentially claiming an interest in the property, subject of the quiet title action.

Section 286-171, HRS, establishes a statewide traffic records system, charges the State Director of Transportation with the administration and operation of the system and authorizes the promulgation of rules and regulations pursuant to Chapter 91, HRS. The section also provides that the statewide traffic records system includes all traffic records of the county treasurers (i.e., finance directors). Section 286-172 sets forth the circumstances under which information contained in the statewide traffic records system may be released. Under subsection 286-172(a) the State Director of Transportation is authorized to release information in response to requests in the following circumstances:

- (1) Any request from a state, a political subdivision of a state, or a federal department or agency, or any other authorized person pursuant to rules adopted by the director of transportation under chapter 91;
- (2) Any request from a person having a legitimate reason, as determined by the director, as provided under the rules adopted by the director under (1) above, to obtain the information for verification of vehicle ownership, traffic safety programs, or for research or statistical reports; or
- (3) Any request from a person required or authorized by law to give written notice by mail to owners of vehicles.

MEMORANDUM

TO: RIZALINO R. VICENTE

-3-

October 7, 1986

Discussion

Initially, we must clarify that the opinion of this office on this matter is merely an opinion and in the event of any difference of opinion, the response of the Attorney General will control as to whether the State Director of Transportation may release any information in its statewide traffic records system absent court subpoena.

Pursuant to the authority granted to the State Director of Transportation in Section 286-171(a), HRS, administrative rules have been promulgated to implement the statutory provisions establishing the statewide traffic records system. A copy of the rules are attached hereto. Under Section 19-121-3(c), the rules require that the examiner of drivers in each county records information about licensed drivers including:

- 1) the identification of each licensee
- 2) the current address of each licensee
- 3) the physical characteristics of each licensee
- 4) any restrictions placed on the driving of each licensee; and
- 5) results of tests for blood alcohol.

Under Section 286-172(a)(1), HRS, the State Director of Transportation is authorized to furnish information to an "authorized person pursuant to rules adopted by the director of transportation under chapter 91." Pursuant to Section 19-121-6(a)(3)(C) of the administrative rules, the release of information is authorized where the State Director of Transportation has determined the request to be a legitimate one pursuant to standards set forth in subsection 19-121-6(c) of the administrative rules. The subsection provides as follows:

(c) The following are standards to be used by the director for the determination of a legitimate request pursuant to subsection (a)(3)(C). The director shall approve the request for the release of records when the director has determined with reasonable certainty that the release:

MEMORANDUM

TO: RIZALINO R. VICENTE

-4-

October 7, 1986

- (1) Is not in violation of any law or this chapter;
- (2) Is required by a specific compelling state interest;
- (3) Is necessary for the public health, safety, or welfare;
- (4) Conforms to this chapter; and
- (5) Would enhance the enforcement of county, state, or federal laws.

We find it reasonable that the State Director of Transportation would determine that the release of the information requested herein is required by a compelling state interest, is necessary for the public welfare and would enhance the enforcement of State law requiring the exercise of due diligence in the identification and location of all potential claimants in a quiet title action.

Lastly, we note that under Section 19-121-6(d) of the administrative rules, when a request for information is allowed under Section 19-121-6(a)(3), the request is to be accompanied by an affidavit stating the purposes for obtaining the information and attesting to the use of the information solely for said purposes and is also to be accompanied by a surety bond in favor of the State of Hawaii conditioned upon the full and faithful compliance with the terms and conditions of the affidavit.

Accordingly, we conclude that the information requested herein from the records of the motor vehicle and driver license file of the City may be obtained absent court subpoena through a request to the State Director of Transportation pursuant to Section 286-172, HRS, and we find it important to note that under this provision, the Director is able to obtain adequate assurances of the legitimate use of the requested information and for no other purposes, and to secure a surety bond for the faithful compliance with the terms of the release of the information.

As an aside, though we assume a concurrence of position on this issue by virtue of it not having been raised, we find the requested information to be a "personal record"

MEMORANDUM

TO: RIZALINO R. VICENTE

-5-

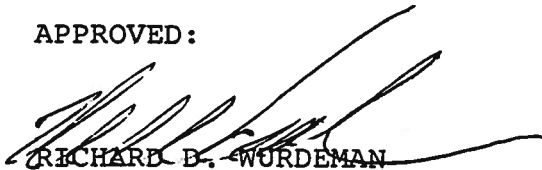
October 7, 1986

under Chapter 92E, HRS, and not subject to disclosure if the request for information were made directly to the City. The driver license record is a "personal record" as defined under Section 92E-1(3), HRS, in that it collects under an individual's name, the individual's current address, distinguishing physical characteristics, restrictions placed on the automobile operation of the individual, which may include medical restrictions, a photograph and fingerprints of the individual. Moreover, we do not find any exemption from the prohibition on public access to the record, either under Section 92E-4(4), HRS, which allows disclosure in compelling circumstances affecting the health or safety of any individual, or under Section 92E-13(2), HRS, which allows disclosure where a rule of court allows an individual to gain access to a personal record.

Diane T. Kawauchi

DIANE T. KAWAUCHI
Deputy Corporation Counsel

APPROVED:


RICHARD B. WURDEMAN
Corporation Counsel

DTK:dd
Attach.

SEP 23 1 37 PM '8

REFERRED TO:

HAWAII ADMINISTRATIVE RULES
TITLE 19
DEPARTMENT OF TRANSPORTATION

SUBTITLE 5
MOTOR VEHICLE SAFETY OFFICE

CHAPTER 121
TRAFFIC RECORDS

- \$19-121-1 Purpose and scope
- \$19-121-2 Responsibility of agencies to maintain and compile records
- \$19-121-3 County records
- \$19-121-4 State records
- \$19-121-5 Establishment of statewide traffic records system
- \$19-121-6 Release of information identifying individuals
- \$19-121-7 Release of information not identifying individuals
- \$19-121-8 Corporate or other surety bond requirements
- \$19-121-9 Fees and fee exemptions for traffic records release
- \$19-121-100 Severability
- \$19-121-101 Repeal

Historical note. This chapter is based substantially on the rules and regulations governing the development and maintenance of traffic records. [Eff 2/13/69; R 8/26/82]

\$19-121-1 Purpose and scope. Because of the ever increasing number of traffic accidents occurring on the public highways each year, it is deemed in the public interest that a statewide, interrelated traffic records system shall be established. The system shall be designed to assure that appropriate data on traffic accidents, drivers, motor vehicles, and roadways are available to provide:

- (1) A reliable indication of the magnitude and nature of the highway traffic accident problem;
- (2) A reliable means for identifying short-term changes and long-term trends in the magnitude and nature of traffic accidents; and

(3) A valid basis for:

- (A) The detection of high or potentially high accident locations and causes;
- (B) The detection of health, behavioral, and related factors contributing to accident causes;
- (C) The design of accident, fatality, and injury countermeasures;
- (D) The development of means for evaluating the cost effectiveness of these measures; and
- (E) The planning and implementation of selected enforcement and other operational programs. [Eff 8/26/82; am and comp JUN 26 1986] (Auth: HRS §286-171) (Imp: HRS §286-171)

§19-121-2 Responsibility of agencies to maintain and compile records. State and county agencies shall develop, maintain, and compile traffic records in accordance with these rules in a form approved by the director of transportation. [Eff 8/26/82; comp JUN 26 1986] (Auth: HRS §286-171) (Imp: HRS §286-171)

§19-121-3 County records. (a) County records shall be developed and maintained as provided in this section.

(b) The county agency designated by the executive officer of each county as responsible for the registration of vehicles in the county shall record information concerning the vehicles including:

- (1) Make of vehicle;
- (2) Model year;
- (3) Type of body;
- (4) Color;
- (5) Vehicle identification number (rather than motor number);
- (6) License plate number;
- (7) Name of current owner; and
- (8) Current address of owner.

(c) The examiner of drivers in each county shall record information about licensed drivers, including:

- (1) The identification of each licensee;
- (2) The current address of each licensee;
- (3) The physical characteristics of each licensee;
- (4) Any restrictions placed on the driving of each licensee; and
- (5) Results of tests for blood alcohol.

(d) The chief of police of each county shall use a statewide standardized traffic accident report form approved by the director of transportation to record information concerning accidents, including:

- (1) Identification of location in space and time;
- (2) Identification of drivers and vehicles involved;
- (3) Type of accident;
- (4) Description of injury and property damage;
- (5) Description of environmental conditions;
- (6) Causes and contributing factors, including the absence of or failure to use available safety equipment;
- (7) Results of tests for blood alcohol; and
- (8) Financial responsibility information.

(e) The county department designated by the county legislative body as responsible for the safety inspection of vehicles shall record information concerning the safety inspection of vehicles, including:

- (1) Date of inspection;
- (2) Make of vehicle;
- (3) Model year;
- (4) Class of vehicle;
- (5) Color;
- (6) Mileage or odometer reading;
- (7) Vehicle identification number;
- (8) License plate number;
- (9) Defects by component or category; and
- (10) Identification of inspector and inspection station.

(f) The county agency designated by the National Safety Council as the public cooperating agency shall record information concerning the defensive driving course and other remedial driver training courses given in the county. [Eff 8/26/82; am and comp JUN 26 1985] (Auth: HRS §§286-8, 286-162, 286-171) (Imp: HRS §§286-8, 286-162, 286-171)

§19-121-4 State records. State records shall be developed and maintained as follows:

- (1) The department of education shall record information concerning driver education, including the identification of students, their addresses, their ages, and whether they successfully completed courses;
- (2) The district and circuit courts shall record any information concerning violations of traffic ordinances and statutes and the

- conduct of remedial driver training courses available to them;
- (3) The department of transportation shall record information concerning the identification of accident locations; and
 - (4) The department of health shall record information concerning the declaration of persons as blind and the commitment of persons as mentally ill or retarded. [Eff 8/26/82; comp JUN 26 1986] (Auth: HRS §286-171) (Imp: HRS §286-171)

§19-121-5 Establishment of statewide traffic records system. At the request of the director of transportation, the county and state agencies shall provide the director, or a designated representative, all records which are required to be kept pursuant to sections 19-121-3 or 19-121-4 and which the director deems necessary for the purpose of establishing the statewide interrelated traffic records system. [Eff 8/26/82; am and comp JUN 26 1986] (Auth: HRS §§286-162, 286-171) (Imp: HRS §§286-162, 286-171)

§19-121-6 Release of information identifying individuals. (a) Subject to authorization granted by the chief justice of the supreme court of the State with respect to the traffic records of the violations bureau of the district and circuit courts, which are within the chief justice's control, information concerning any individual or in which any individual is identified may be furnished by the director of transportation if the requestor is:

- (1) Acting on behalf of a state, a political subdivision of a state, a federal department or agency;
- (2) Required by law to give written notice by mail to owners of vehicles; or
- (3) Deemed to have a legitimate request because the requestor:
 - (A) Is using the information for non-commercial research in traffic safety programs or statistical reports;
 - (B) Is a manufacturer performing or an agent acting on behalf of the manufacturer of new motor vehicles to perform a voluntary or ordered motor vehicle defect or safety defect recall pursuant to a specific request; or

- (C) Is determined otherwise to have a legitimate request by the director, pursuant to the standards of subsection (c) of this section.

Notwithstanding paragraphs (1) to (3), the director may refuse a request if the director determines that the applicant has previously given false information regarding the intended use of the requested information. A request may be cancelled if the director determines that reasonable evidence exists that the request constitutes an unwarranted invasion of privacy pursuant to article I, section 6 of the Hawaii state constitution or that the requestor has used or intends to use the information for a purpose which violates any restrictive provision of this chapter or has compromised the public health, safety, or welfare of the data subject.

(b) Any request for statewide traffic records under subsection (a) shall:

- (1) Be made in writing and addressed to the director of transportation;
- (2) State the reason for obtaining the records;
- (3) Describe the records requested by giving information which will clearly identify the requested record such as:
 - (A) The name, date of birth, social security number for drivers;
 - (B) The name of the vehicle manufacturer;
 - (C) The type of vehicle;
 - (D) Type of vehicle recall;
 - (E) Year, make, and model of the vehicle for vehicle recall; or
 - (F) Any other identifying information; and
- (4) Shall attach proof of the validity of the request and the authority of the requestor.

(c) The following are standards to be used by the director for the determination of a legitimate request pursuant to subsection (a)(3)(C). The director shall approve the request for the release of records when the director has determined with reasonable certainty that the release:

- (1) Is not in violation of any law or this chapter;
- (2) Is required by a specific compelling state interest;
- (3) Is necessary for the public health, safety, or welfare;
- (4) Conforms to this chapter; and
- (5) Would enhance the enforcement of county, state, or federal laws.

(d) If the director determines that the requestor of information qualifies under subsection (a)(3) to receive the information, the requestor, in addition to complying with subsection (b) and (c), shall:

(1) File an affidavit with the director stating the purpose for obtaining the information and making assurances that:

- (A) The information will be used only for the stated purpose;
- (B) Individual identities will be protected;
- (C) The information will not be used to compile a list of individuals for the purposes of any commercial solicitation by mail, phone, or otherwise, or for the collection of delinquent accounts; and
- (D) The requestor will assume full responsibility and will hold the State harmless in any civil suit arising from any subsequent misuse of the information;

(2) Where the requestor is acting on behalf of a principal, file with the director a copy of the principal's authorization for each request;

(3) File with the director a corporate or other surety bond in favor of the State in the penal sum as specified in section 19-121-8 conditioned upon the full and faithful compliance by the person or persons receiving the information with the terms and conditions of the affidavit; and

(4) Pay the fee specified in section 19-121-9.

(e) This section notwithstanding, the results of any test for alcohol content made upon any person pursuant to section 286-162 HRS shall be available only to the state and county highway safety councils and to other agencies the director deems necessary and advisable.

(f) The director may release all the information contained in the motor vehicle registration file only when all of the following conditions are met:

- (1) The director has determined that the State has a compelling interest in the public's safety or health which justifies the release, such as the state's inability to meet the time parameters set forth in subsection (i);
- (2) The director has determined that the requestor is qualified pursuant to section (a)(3)(B) and has a legitimate reason for obtaining the records;
- (3) The director has determined that the requestor is not engaged in the commercial distribution of names and addresses or the compilation of mailing lists.

(g) Any release of information contained in the statewide traffic records system shall be restricted to information the director deems necessary to conduct the activity in which the State has a compelling interest.

(h) Nothing in this chapter shall prohibit a person or authorized agent from obtaining information pertaining to that person's own record as contained in the statewide traffic records system. County agencies may release individual records described under section 19-121-3 which are within their control to individual requestors or their legal representatives.

(i) Subsection (f)(3) notwithstanding, if the request is made pursuant to subsection (a)(3)(B), the agency shall comply with requests for access to motor vehicle registration records within twenty working days from date of receipt of the request provided that delay or failure of the requestor to meet any requirement of this section shall toll the agency's compliance period accordingly. Where it is determined that a request for multiple records would unduly burden and interfere with operations of the agency, for example because the records requested are presently in use, voluminous, or difficult to locate, the director may:

- (1) Extend the period of compliance for an additional period as mutually agreed; or
- (2) If the request is made by a person qualifying under subsections (a)(3)(B) and (f)(1) and (2); instead of providing only the information requested, provide information on all models of the vehicle make that is being recalled, or provide all the information in the entire motor vehicle registration file whichever the director deems most appropriate under the existing circumstances. The director shall effect such a release as expeditiously as possible.

(j) County agencies may release ownership information from vehicle records under their control to towing companies for motor vehicles which have been towed in accordance with section 290-11 HRS. [Eff 8/26/82; am and comp JUN 26 1985] (Auth: HRS §§286-162, 286-171, 286-172) (Imp: HRS §§286-162, 286-171, 286-172)

§19-121-7 Release of information not identifying individuals. This chapter notwithstanding, information from the statewide traffic records system that does not identify individuals by name, address, or other means of enabling personal contact may be furnished to any person who pays the fees in section 19-121-9. [Eff and comp JUN 26 1985] (Auth: HRS §§286-171, 286-172) (Imp: HRS §§286-171, 286-172)

§19-121-8 Corporate or other surety bond requirements. Corporate or other surety bonds naming the State and the director as obligees in the appropriate amounts specified below shall be provided to the State prior to the release of traffic records under section 19-121-6(a)(3). Where the number of individual records provided is:

- (1) Not more than 3,333, the bond amount shall be \$1,000;
- (2) Greater than 3,333, the dollar amount of the bond shall be equal to thirty per cent of the number of records provided, up to a maximum bond amount of \$90,000.

Corporate surety bonds shall remain in effect for not less than a period of two years from the date of the release of the information, and they must be obtained from a surety company that is licensed to do business in the State of Hawaii. [Eff and comp JUN 26 1986] (Auth: HRS §§286-171, 286-172) (Imp: HRS §§286-171, 286-172)

§19-121-9 Fees and fee exemptions for traffic records release. (a) The director shall charge a flat \$100 administrative fee to requestors under sections 19-121-6(a)(3) and 19-121-7 for the release of statewide traffic records plus the actual cost for providing the information including but not limited to:

- (1) Supplies and equipment, actual cost;
- (2) Actual cost for first class postage;
- (3) Prorated computer use charges as follows:
 - (A) Central processing unit - \$621.63 per hour;
 - (B) Core - 2 cents per thousand bytes;
 - (C) Disk - \$5.62 per hour;
 - (D) Tape - \$17.13 per hour;
 - (E) Lines printed - 23 cents per thousand;
 - (F) Cards read - 69 cents per thousand;
 - (G) Cards punched - \$1.85 per thousand.
- (4) Labor charges as follows:
 - (A) Key punch - \$17.88 per hour;
 - (B) Programmer or analyst - \$26.11 per hour.

(b) Prior to the release of records, repeat requestors and requestors of information not identifying individuals, who the director has determined qualified, shall be required to pay the fees and costs under subsection (a) plus any miscellaneous costs mutually agreed upon unless the director enters into a written agreement for scheduled payments. When a written agreement exists, records may be released prior to

payment. Magnetic computer tapes and spools shall be provided by the requestor and shall be compatible with the state equipment.

(c) Government agencies and others identified under section 19-121-6(a)(1) and (2) are exempt from fees, affidavit, and bond requirements.


(d) County agencies authorized to release individual records under section 19-121-6(h) or (j) may charge a fee as determined by their respective county council for the release. [Eff and comp JUN 26 1986] (Auth: HRS §§286-171, 286-172) (Imp: HRS §§286-171, 286-172)


§19-121-100 Severability. If any provision of this chapter is held invalid, the invalidity shall not affect the remaining provisions of this chapter. [Eff 8/26/82; comp and ren §19-121-100 JUN 26 1986] (Auth: HRS §§286-171, 286-172) (Imp: HRS §§286-171, 286-172)

§19-121-101 Repeal. All rules relating to and governing the development and maintenance of traffic records in effect prior to August 26, 1982 are repealed. [Eff 8/26/82; am, comp, and ren §19-121-101 JUN 26 1986] (Auth: HRS §§286-171, 286-172) (Imp: HRS §§286-171, 286-172)

Amendments to and compilation of chapter 121, title 19, Hawaii Administrative Rules, on the Summary Page dated June 12, 1985 were adopted on June 12, 1985 following a public hearing held on May 24, 1985 after public notice was given in the Honolulu Advertiser on May 2, 1985 and in The Maui News, The Garden Island News and The Hawaii Tribune-Herald on May 3, 1985.

These amendments to and compilation of chapter 19-121, Hawaii Administrative Rules, shall take effect ten days after filing with the Office of the Lieutenant Governor.


WAYNE J. YAMASAKI
Director of Transportation


GEORGE R. ARIYOSHI
Governor
State of Hawaii

Dated: 6-12-86

Filed

REC'D. BY

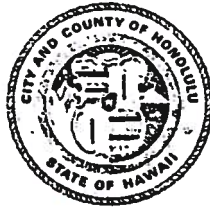
1986 JUN 15 PM 3 26

LI. GOVERNOR'S OFFICE

APPROVED AS TO FORM:


Beatrice K. Dawson
Deputy Attorney General

DEPARTMENT THE CORPORATION COUNSEL
CITY AND COUNTY OF HONOLULU
HONOLULU, HAWAII 96813



RICHARD D. WURDEMAN
CORPORATION COUNSEL

August 13, 1986

MEMORANDUM

TO: ALMA CHING CORN, M.D., DIRECTOR
DEPARTMENT OF HEALTH

FROM: MARIA C. AVINANTE-TANAKA
DEPUTY CORPORATION COUNSEL

SUBJECT: MEDICAL RECORDS

This is in response to your letters of March 21, 1986 asking whether Dr. J. David Curb could obtain confidential employee data through your Department for an N.I.H. high blood pressure program.

We answer in the negative.

Although this request involves gray areas in the applicable statutes, reasonable alternatives make "statute-bending" unnecessary in this case.¹

¹Compare, e.g., *Getman v. NLRB*, 450 F.2d 670 (1971), where law professors engaged in an NLRB voting study sued to compel the NLRB to furnish them with the names and addresses of employees eligible to vote in certain elections, such lists to be used to contact those employees willing to be questioned about their attitudes toward the election process. The Court of Appeals held that disclosure of the list sought by the plaintiffs was not an invasion of the employee's privacy. Although a limited number of employees would suffer some loss of privacy by receiving calls, the

(Footnote Continued)

MEMORANDUM

TO: ALMA CHING CORN, M.D.

-2-

August 13, 1986

The right to privacy is explicit in the Hawaii State Constitution. In 1978, the Hawaii State Constitution was amended to add Article I, Section 6, which provides:

RIGHT TO PRIVACY

Section 6. 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.

In 1980, the State Legislature passed Act 226, Fair Information Practice (Confidentiality of Personal Record), codified as Hawaii Revised Statutes (hereinafter "HRS") Chapter 92E. Session Laws of Hawaii 1980, Act 226, Section 1, provides:

The purpose of this Act is to implement in part the 1978 amendment to the Hawaii State Constitution (Article 1, Section 6) relating to the right to privacy.

This Act permits individuals to gain access to personal records relating to themselves maintained by State or county executive branch agencies and to correct or amend those records under certain circumstances.

"Personal record" is defined in HRS Section 92E-1(3) as follows:

(Footnote Continued)

loss would be minor. The applicable rule (Exemption 6 of the Freedom of Information Act, 5 USCS § 552(b)(6)) was meant to guard against the unnecessary disclosure of intimate details. Any disclosure beyond name and address would be voluntary because the employees could refuse to be interviewed. The court further noted the public interest purpose and quality of the study, and the possibility that the plaintiffs could pursue their study without the lists.

MEMORANDUM

TO: ALMA CHING CORN, M.D.

-3-

August 13, 1986

- (3) 'Personal record' means any 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 in section 92-50. [Emphasis added]

Pursuant to HRS Section 92E-2, each City agency that maintains any accessible personal record shall make that record available to the person to whom it pertains in a reasonably prompt manner and in a reasonably intelligible form. The statute, however, sets forth important exemptions and limitations regarding public access to personal records (HRS § 92E-4) and the disclosure of personal records to other agencies (HRS § 92E-5).

A. PUBLIC ACCESS TO PERSONAL RECORD.

With respect to limitations on public access to personal records pertaining to other persons, HRS Section 92E-4 provides:

§92E-4 Limitation on public access to personal record. 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;

MEMORANDUM

: ALMA CHING CORN, M.D.

-4-

August 13, 1986

- (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. [Emphasis added]

B. AGENCY'S ACCESS TO PERSONAL RECORDS.

HRS Section 92E-5 protects against the disclosure of personal records to other agencies, providing as follows:

§92E-5 Limitations on disclosure of personal record to other agencies. No agency may disclose or authorize disclosure of personal record to any other agency unless the disclosure is:

- (1) Compatible with the purpose for which the information was collected or obtained;
- (2) Consistent with the conditions or reasonable expectations of use and disclosure under which the information was provided;
- (3) Reasonably appears to be proper for the performance of the requesting agency's duties and functions;

. . . .

- (6) To the legislature or any committee or subcommittee thereof;
- (7) Pursuant to an order of a court of competent jurisdiction;

. . . . [Emphasis added]

MEMORANDUM

TO: ALMA CHING CORN, M.D.

-5-

August 13, 1986

Thus, Dr. Curb, by not falling explicitly within an exception to HRS Section 92E-4, lacks a right of access and the City Physician, by not falling within an exception to either HRS Section 92E-4 or 92E-5, lacks a right of access on Dr. Curb's behalf.

As an alternative, we suggest that Dr. Curb provide a flyer or have the City Physician disseminate a memorandum informing employees of his study. This circumvents the statutory disability, saves the City Physician work, and imposes no significant burden on a useful study that may prove helpful to its participants.

The same discussion applies to your query of March 12, 1986 regarding H.R. No. 112 and H.C.R. No. 69 calling for the release of ambulance service records. We believe that a Department of Health ambulance report form that contains information about an individual including name, medical, and other identifying information, constitutes a personal record within the definition set forth in HRS Section 92E-1(3).

The legislature, however, is exempt from the rule of confidentiality in that HRS Section 92E-5(6) specifically authorizes disclosure of personal records "[t]o the legislature or any committee or subcommittee thereof." We suggest that in the event records are released, the names of the patients be deleted and some kind of numbering system be substituted. The deletion of names would not interfere with the information the Legislature has requested and would conform to the spirit of the statute in protecting confidentiality.

The Legislature should also reimburse the Department of Health for any extraordinary expenses incurred in delivering 50,000 documents.


MARIA C. AVINANTE-TANAKA
Deputy Corporation Counsel

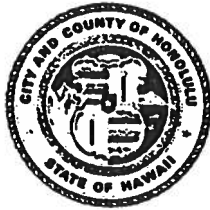
APPROVED:


RICHARD D. WURDEMAN
Corporation Counsel

MCAT:ct

(Prepared by Jan de Werd
Summer Law Clerk)

DEPARTMENT OF THE CORPORATION COUNSEL
CITY AND COUNTY OF HONOLULU
HONOLULU, HAWAII 96813



RICHARD D. WURDEMAN
CORPORATION COUNSEL

July 30, 1986

MEMORANDUM

TO: LEI R. LEARMONT, CHAIR
HONOLULU POLICE COMMISSION

FROM: MARIA C. AVINANTE-TANAKA
DEPUTY CORPORATION COUNSEL

SUBJECT: OMBUDSMAN'S REQUEST FOR RECORDS

This is in response to your memo of May 15, 1986, asking whether the State Ombudsman's Office may be permitted to review the records of the Honolulu Police Commission ("Commission") pertaining to the complaint filed by Lorraine Chun.

We answer in the affirmative provided certain limitations on the use of this information are made.

Attached is a copy of Opinion No. M 83-6 in which this office denied the request of Senator Abercrombie's office for personal records. We understand that the Ombudsman's Office is requesting a copy of personal records which in this case are confidential investigative reports of the Commission. Unlike Senator Abercrombie's request for confidential information, the Ombudsman's Office is permitted access to this information pursuant to Hawaii Revised Statutes Section 92E-5 which provides, in pertinent part, as follows:

§92E-5 Limitations on disclosure of personal record to other agencies. No agency may disclose or authorize disclosure of personal record to any other agency unless the disclosure is:

M 86-26

MEMORANDUM

TO: LEI R. LEARMONT

-2-

July 30, 1986

. . . .

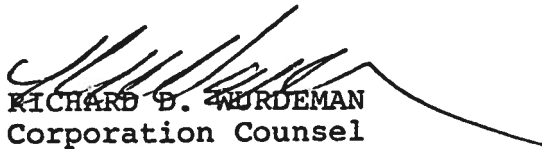
- (3) Reasonably appears to be proper for the performance of the requesting agency's duties and functions;

While the Ombudsman's Office may have access to these documents, you may want to request that they be reviewed only by the staff of the Ombudsman's Office and that the scope for which they are used is limited to determining whether the Commission acted reasonably in arriving at its written findings.



MARIA C. AVINANTE-TANAKA
Deputy Corporation Counsel

APPROVED:

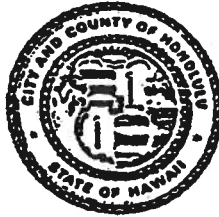


RICHARD D. WURDEMAN
Corporation Counsel

MCAT:ek

Attach.

DEPARTMENT OF THE CORPORATION COUNSEL
CITY AND COUNTY OF HONOLULU
HONOLULU, HAWAII 96813



SON

GARY M. SLOVIN
CORPORATION COUNSEL

STANLEY D. SUYAT
FIRST DEPUTY

January 19, 1983

MEMORANDUM

TO: HELEN H. BURNSIDE, DIRECTOR OF HUMAN RESOURCES

FROM: MARIA C. AVINANTE-TANAKA, DEPUTY CORPORATION COUNSEL

SUBJECT: REQUEST FROM SENATOR NEIL ABERCROMBIE

This is in response to your letter of December 1, 1982, inquiring whether a copy of the disposition of the matter of Gary Elam vs. the City and County of Honolulu may be released to Senator Abercrombie's Office. It is our understanding that Senator Abercrombie's request was made by his office and not pursuant to a Senate legislative, or Senate committee, investigation.

We answer that this record cannot be released.

We understand that the request would involve the releasing of a letter sent by Arthur Douglas, a grant officer for the Employment and Training Administration, to Mayor Eileen Anderson and your office. This letter involved several complaints with respect to alleged violations of CETA hiring practices by certain individuals and with respect to the final determination of the federal grant officer. The letter contains information about several individuals regarding their employment history and, in particular, how they acquired their jobs. In some instances several names are used in a context which could be damaging to the character and reputation of the individuals involved. The grant officer found no federal violation for certain individuals and in other cases found sufficient evidence to

M 83-6

419

MEMORANDUM

TO: HELEN H. BURNSIDE

-2-

January 19, 1983

determine a violation had occurred. For those individuals that were found not to have violated federal CETA regulation, this document would be deemed confidential.*

The matter involved should be evaluated first to determine whether or not it is a "public record," as defined in Section 92-50, and second, to determine whether or not the matter falls within the statutory exceptions.

Public Record

Section 92-50 defines public record as "any written or printed report, book or paper, map or plan" which is the property of the State or of a county and their respective subdivisions and boards and (1) in which an entry has been made or is required to be made by law, or (2) which any public officer or employee has received or is required to receive for filing. In our view, the letter in question is such a "public record." However, a document falling within the aforesaid definition is not subject to public inspection if it falls within certain exceptions. These exceptions are as follows:

*The Managing Director's Rules and Regulations governing the accessibility, maintenance and storage of public and confidential records of all City agencies provides that records deemed confidential are:

1. Records specifically exempted from public access by federal, state or local law, such as:

. . . .

B. Records which do not relate to a matter in violation of law and the confidentiality of which are deemed by the City Attorney to be necessary for the protection of the character or reputation of any person (HRS § 92-51);
[Emphasis added]

A. DRANDUM

TO: HELEN H. BURNSIDE

-3-

January 19, 1983

1. Section 92-50, HRS, excepts any "records which invade the right of privacy of an individual."

2. Section 92-51 excepts, among other things, public records which may not be inspected under State or federal law and records which do not relate to a matter in violation of law and are deemed necessary for the protection of the character and reputation of any person.

3. Chapter 92E, HRS, limits the release of "public records" which are also "personal records."

Personal Record

It is our opinion that it is more than merely arguable that the letter in question falls within the HRS Section 92E-1(3) definition of a "personal record," which read as follows:

- 3) 'Personal record' means any item, collection, or grouping or 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. [Emphasis added]

A. Public Access to Personal Record

Section 92E-4 protects against public access to personal record, providing as follows:

§92E-4. . . 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:

MEMORANDUM

TO: HELEN H. BURNSIDE

-4-

January 19, 1983

- (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.

B. Agency's Access to Personal Record

Section 92E-5 protects against the disclosure of personal records to other agencies, providing as follows:

No agency may disclose or authorize disclosure of personal record to any other agency unless the disclosure is:

- (1) Compatible with the purpose for which the information was collected or obtained;
- (2) Consistent with the conditions or reasonable expectations of use and disclosure under which the information was provided;
- (3) Reasonably appears to be proper for the performance of the requesting agency's duties and functions;

. . . .

- (6) To the legislature or any committee or subcommittee thereof;
- (7) Pursuant to an order of a court of competent jurisdiction;

MEMORANDUM

TO: HELEN H. BURNSIDE

-5-

January 19, 1983

We therefore conclude that while the grant officer's letter to the City is a public record, the disclosure of this matter is not permitted since 1) Section 92-51, HRS, prohibits inspection of a public record which is not related to a matter in violation of law and is necessary for the protection of the character and reputation of, in this case, several individuals; and 2) since this is also found to be a personal record, none of the requirements of HRS Section 92E-5 can be met.

Maria C. Avinante-Tanaka

MARIA C. AVINANTE-TANAKA
Deputy Corporation Counsel

APPROVED:

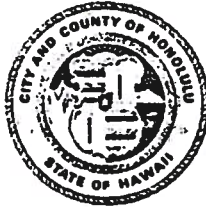
Gary M. Slovin

GARY M. SLOVIN
Corporation Counsel

MCAT:as

cc: Managing Director

DEPARTMENT OF THE CORPORATION COUNSEL
CITY AND COUNTY OF HONOLULU
HONOLULU, HAWAII 96813



RICHARD D. WURDEMAN
CORPORATION COUNSEL

May 12, 1986

MEMORANDUM

TO: DOUGLAS G. GIBB, CHIEF
HONOLULU POLICE DEPARTMENT

FROM: BURT T. LAU, DEPUTY CORPORATION COUNSEL

SUBJECT: RELEASE OF CONFIDENTIAL INFORMATION TO INDIVIDUAL'S
EMPLOYER

This is in response to your longstanding request in which you asked for an opinion as to the following questions.

They are:

(1) What is a reasonable construction of the phrase "duly authorized agent" within the context of Section 92E-4, Hawaii Revised Statutes (HRS)?

(2) If the "agent" is the individual's employer, what form of authorization should that agency be required to provide?

(3) Whether or not an "agent" must be required to comply with HPD's identification requirements at the time the confidential material is released.

As these questions call for discussions rather than yes or no responses, we have included abbreviated responses at the start of each of our discussions.

Inquiry (1): The terms "person" and "duly authorized agent," as used in Section 92E-4, HRS, may be interpreted to include corporations as well as individuals.

M 86-16

MEMORANDUM

TO: DOUGLAS G. GIBB

-2-

May 12, 1986

Section 92E-4, HRS, provides:

92E-4 Limitation on public access to personal record. 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. [Emphasis added]

The first issue you have raised is whether or not a "person" who is also a "duly authorized agent" includes only natural persons who are agents, or, it might include corporate entities which are also agents. McQuillin on Municipal Corporations has noted that whether or not the word "person," as used in a constitution or statute includes a corporation, depends on the purpose and spirit of the provision using the word. See Vol. I, McQuillin on Municipal Corporations § 2.22 at 160. This position has been reaffirmed by the decisions in other states. See Amoco Production Co. v. Landry, (La. App. 4, Cir.), 426 So. 2d 220 (1982); Structo Corporation v. Leverage Investment Enterprises, Limited, (Mo. App.), 613 S.W.2d 197 (1981); Village of El Portal v. City of Miami Shores, (Fla. App.), 362 S.2d 275 (1978). In some federal courts, the courts have held that the word "person" generally includes other entities, in addition to human beings. Church of Scientology of California v. U.S. Department of Justice, 612 F.2d 417 (9th Cir. 1979). In the State of Hawaii, we have Section 1-19, HRS, which states:

MEMORANDUM

TO: DOUGLAS G. GIBB

-3-

May 12, 1986

§1-19 "Person," "others," "any," etc.
The word "person," or words importing persons, for instance, "another," "others," "any," "anyone," "anybody," and the like, signify not only individuals, but corporations, firms, associations, societies, communities, assemblies, inhabitants of a district, or neighborhood, or persons known or unknown, and the public generally, where it appears, from the subject matter the sense and connection in which such words are used, that such construction is intended. [See also Mabe v. Real Estate Commission, 4 Hawaii App. 552, 670 P.2d 459 (1983)] [Emphasis added]

Our revised ordinances also contain a verbatim definition in Section 1-4.1(9), Revised Ordinances of Honolulu 1978 (1983 Ed.). It also states:

(9) The word "person," or words importing persons, for instance, "another," "others," "any," "anyone," "anybody," and the like, signify not only individuals, but corporations, firms, associations, societies, communities, assemblies, inhabitants of a district, or neighborhood, or persons known or unknown, and the public generally, where it appears, from the subject matter, the sense and connection in which such words are used, that such construction is intended. [Emphasis added]

These definitions, however, do allow room for interpretation, depending upon the subject matter and the sense and context in which the words are used.

In the Mabe v. Real Estate Commission, 4 Hawaii App. 552, 670 P.2d 459 (1983), the Intermediate Court of Appeals had to interpret the application of the term "person" as used in Section 467-16, HRS. Although the Court in Mabe was not directly concerned with the issue we are confronted with in the context of the provisions of Section 467-16, HRS, the Mabe Court indicated it would, in that instance, interpret "persons" to include "corporations."

In the statute, we are concerned with the term "any person," as used in the context of the phrase "a duly

MEMORANDUM

TO: DOUGLAS G. GIBB

-4-

May 12, 1986

authorized agent." In part, our resolution of this issue rests on whether corporations may act as agents on behalf of natural persons. Although there have been no decisions on this particular question in this State, it has been generally held that corporations may act as agents on behalf of natural persons. Restatement (Second) of Agency § 14M at 79, Restatement (Second) of Agency § 21 at 93. See 3 Am. Jur. 2d Agency § 13 at 427. See also Southern Pacific Transportation Company v. Continental Shippers, Inc., 642 F.2d 236 (8th Cir. 1981). On the basis of this application of the law on agency and the definition of the term "person" as contained in our statutes, we find that corporations may be included within the definition of "person."

Inquiry (2): The second issue you have raised is what documents would constitute an "authorized agency." We believe that a written authorization from the individual in question indicating that a specific individual is his agent for purposes of receipt of the personal record, should be required. While we hold that the term "person" may include corporations as well as "individuals" to act as agents, we also believe that requested documents should only be released to specifically named individuals employed by the corporate agents. This is because while the persons whose records are released may agree in general to allow their employers to look into their personal records; this is not a wholesale release to the public, or even to anyone or everyone who is an employee of that corporate agency. The only way to restrict access to certain authorized agents of a prospective corporate employer, is to have a written notarized statement from the individual indicating that a specifically named natural person from the prospective employer is his agent for purposes of receipt of the personal record. If the persons whose records are being released are not concerned about the problems of lack of confidentiality as noted above, he may sign a general authorization to "X Corporation, or its designated representative," however, we still anticipate problems with this arrangement. The first problem is the possibility of an unauthorized release or dissemination greater than what the individual expected. In essence, that would be a problem of a lack of "informed consent by HPD to the person signing the release." The second problem is a practical one for HPD in determining who is or is not a "designated representative" of a corporate agent. It would not be unusual for different companies to have different personnel with different amounts

MEMORANDUM

TO: DOUGLAS G. GIBB

-5-

May 12, 1986

of authority or even differing forms of "designation." This is an added reason for requiring that a specific individual be identified as the "designated representative" of the corporate agent in the written authorization signed by the prospective employee.

The reason for requiring that any authorization be written and notarized is simple. The statute permits the documents to be released to an "authorized agent." In effect, the statute is recognizing the validity of a special power of attorney, limited solely to this one specific act and for this limited purpose. These requirements are the only way the City can be reasonably assured that it is dealing with an "authorized agent."

The purpose of requiring a written authorization is to protect against the unauthorized release of personal information to unauthorized personnel, simply based on his "say so." Unlike situations in which a so-called principal-agent relationship can be implied based on an alleged agent's representation (implied agency) or an after-the-fact confirmation by the agent's principal (ratification), we need to be assured of the agent's authorization beforehand. The harm sought to be prevented cannot be remedied the instant the confidential information is wrongfully released. Thus, in order to prevent such an unauthorized release or to keep it at a minimum, any authorization presented to HPD must be in writing and signed by the individual whose records are being released.¹

In line with this intent, we would require that any written authorization must be notarized. This is the minimum requirement by which the Department can reasonably be sure that a written authorization truly represents the valid consent of the individual to whom the record pertains.

Inquiry (3): The issue of whether or not the agent must be present to receive the documents or not is dependent more upon HPD's own existing policies rather than the provisions of Chapter 92E, HRS. If we assume that an authorized

¹ Obviously, if the person to whom the records pertain is present to properly identify himself, release is proper; however, for your own protection, the manner in which the authorization is expressed and to whom, should be recorded in writing in some matter.

MEMORANDUM

TO: DOUGLAS G. GIBB

-6-

May 12, 1986

agent presents valid proof of his agency (e.g., a notarized written power of attorney), then the question of whether it is sent to that agent by mail after the request has been properly authorized or in person is dependent upon HPD rules for release.

If HPD rules allow the release of such documents by mail, and such a request comes in, the notarized authorization should also contain the agent's proper address and a specific request to have it returned by mail. If we have this, and our rules allow such a release, then Chapter 92E, HRS, does not appear to contain any prohibitions against the release of information in this manner.

Clearly, if there are reasonable HPD rules which themselves do not permit release of such documents by mail, then so long as these rules do not violate the terms of Chapter 92E, HRS, then these rules may control.

Burt T. Lau

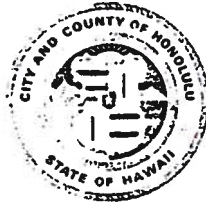
BURT T. LAU
Deputy Corporation Counsel

APPROVED:


RICHARD D. WURDEMAN
Corporation Counsel

BTL:dd

DEPARTMENT OF THE CORPORATION COUNSEL
CITY AND COUNTY OF HONOLULU
HONOLULU, HAWAII 96813



FRANK F. FASI
MAYOR

RICHARD D. WURDEMAN
CORPORATION COUNSEL

November 25, 1985

MEMORANDUM

TO: TOM NEKOTA, DIRECTOR
DEPARTMENT OF PARKS AND RECREATION

FROM: MARIA C. AVINANTE-TANAKA
DEPUTY CORPORATION COUNSEL

SUBJECT: REVIEW OF CITY CONTRACTOR'S PAYROLL RECORDS BY
PRIVATE CONCERN

This is in response to your letter of October 23, 1985, asking whether we may permit IRC, Inc., an industrial relations consultation firm, to look into the City's contractor's Sandwich Island Construction, Ltd. payroll records.

We answer in the negative.

We understand that your office received a letter from IRC, Inc. requesting approval to review and reproduce copies of certified payroll affidavits of the Sandwich Island Construction, Ltd. The firm is engaged in constructing the gymnasium and appurtenances at Salt Lake District Park. This project is being financed by General Improvement Bond Funds.

IRC, Inc. was particularly interested in reviewing the names of employees, classifications, rate of pay, fringe benefit contributions, hours worked, and payroll deductions reported on the aforementioned project.

M 85-37

MEMORANDUM

TO: TOM NEKOTA

-2-

November 25, 1985

Public Record

Section 92-50, Hawaii Revised Statutes ("HRS"), defines public record as "any written or printed report, book or paper, map or plan" which is the property of the State or of a county and their respective subdivisions and boards and (1) in which an entry has been made or is required to be made by law, or (2) which any public officer or employee has received or is required to receive for filing. In our view, the letter in question is such a "public record."

Based on this provision, it is our opinion that the documents requested are not the property of the City and are therefore not public records or records which the City has the authority or control to release.

Personal Record

It is our opinion that the information requested falls within the Section 92E-1(3), HRS, definition of a "personal record," which reads as follows:

- (3) 'Personal record' means any 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. [Emphasis added]

A. Public Access to Personal Record

Section 92E-4 protects against public access to personal record, providing as follows:

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:

MEMORANDUM

TO: TOM NEKOTA

-3-

November 25, 1985

- (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.

B. Agency's Access to Personal Record

Section 92E-5 protects against the disclosure of personal records to other agencies, providing as follows:

No agency may disclose or authorize disclosure of personal record to any other agency unless the disclosure is:

- (1) Compatible with the purpose for which the information was collected or obtained;
- (2) Consistent with the conditions or reasonable expectations of use and disclosure under which the information was provided;
- (3) Reasonably appears to be proper for the performance of the requesting agency's duties and functions;

. . . .

- (6) To the legislature or any committee or subcommittee thereof;
- (7) Pursuant to an order of a court of competent jurisdiction;
[Emphasis added]

MEMORANDUM

TO: TOM NEKOTA

-4-

November 25, 1985


We therefore conclude that disclosure of this personal record by the City is not permitted since none of the requirements of Sections 92E-4 and 92E-5 can be met.

If you have any questions, please call me at extension 4704.



MARIA C. AVINANTE-TANAKA
Deputy Corporation Counsel

APPROVED:

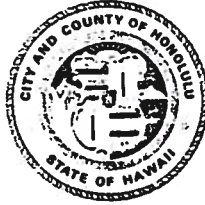


RICHARD D. WURDEMAN
Corporation Counsel

MCAT:ln

DEPARTMENT OF THE CORPORATION COUNSEL
CITY AND COUNTY OF HONOLULU
HONOLULU, HAWAII 96813

FRANK F. FASI
MAYOR



RICHARD D. WURDEMAN
CORPORATION COUNSEL

October 11, 1985

TO: ALMA C. CORN, M.D., DIRECTOR AND CITY PHYSICIAN
DEPARTMENT OF HEALTH

FROM: KATHLEEN A. CALLAGHAN, DEPUTY CORPORATION COUNSEL

SUBJECT: RELEASE OF CITY AMBULANCE REPORT FORMS
TO A NEIGHBORHOOD BOARD

This is in response to your inquiry dated August 29, 1985 requesting an opinion regarding whether the Department of Health must release copies of all ambulance report forms on a monthly basis to members of the Hawaii Kai Neighborhood Board when so requested. We answer in the negative for the reasons stated hereinbelow.

The Neighborhood Board is requesting said reports in order that they may review the reports, analyze the processing of the cases and make recommendations regarding the performance of the City and County paramedics. Essentially, the Board is interested in obtaining response time data. Apparently, the State Department of Health, Emergency Medical Services Division, conducts reviews of the emergency medical services provided by the City and County of Honolulu.

The issue presented is whether the release of the ambulance report forms to the members of the Hawaii Kai Neighborhood Board violates Chapter 92E, Hawaii Revised Statutes [HRS], "Fair Information Practice (Confidentiality of Personal Record)."

In M 85-18 dated July 11, 1985, we previously opined that a Department of Health ambulance report form, which contains information about an individual, including

TO: ALMA C. CORN, M.D.

-2-

October 11, 1985

his or her name, medical data, and other identifying information, constitutes a personal record within the definition set forth in Section 92E-1(3), HRS.^{1/} Consequently, we must now examine whether the Department of Health is permitted to release such personal records to another City agency, in this instance, the Hawaii Kai Neighborhood Board.

The Hawaii Kai Neighborhood Board clearly falls within the term "agency," which is defined as follows by Section 92E-1, HRS:

[§92E-1] Definitions. As used in this chapter:

- (1) 'Agency' means every office, officer, employee, department, division, bureau, authority, board, commission, or other entity of the executive branch of the State or of each county, but excludes:
 - (A) The legislature and the council of each county, including their respective committees, offices, bureaus, officers, and employees; and
 - (B) The judiciary, including the courts, and its offices, bureaus, officers, and employees.

^{1/} HRS Section 92E-1(3) sets forth the definition of "personal record" as follows:

- (3) 'Personal record' means any 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. [Emphasis added]

TO: ALMA C. CORN, M.D.

-3-

October 11, 1985

Section 92E-5, HRS, provides, in pertinent part, as follows with respect to the limitations on the disclosure of personal records to other agencies:

[\$92E-5] Limitations on disclosure of personal record to other agencies. No agency may disclose or authorize disclosure of personal record to any other agency unless the disclosure is:

- (1) Compatible with the purpose for which the information was collected or obtained;
- (2) Consistent with the conditions or reasonable expectations of use and disclosure under which the information was provided;
- (3) Reasonably appears to be proper for the performance of the requesting agency's duties and functions;
- (4) To the state archives for purposes of historical preservation, administrative maintenance, or destruction;
- (5) To an agency or instrumentality of any governmental jurisdiction within or under the control of the United States, or to a foreign government if specifically authorized by treaty or statute, for a civil or criminal law enforcement investigation;
- (6) To the legislature or any committee or subcommittee thereof;
- (7) Pursuant to an order of a court of competent jurisdiction;
- (8) To authorized officials of a department or agency of the federal government for the purpose of auditing or monitoring an agency program that receives federal monies.

TO: ALMA C. CORN, M.D.

-4-

October 11, 1985

We do not believe that the release of the ambulance report records to the Neighborhood Board would be permitted since none of the exceptions set forth in Section 92E-5, HRS, apply to this situation. The neighborhood boards were created pursuant to Article XIV of the Revised Charter of the City and County of Honolulu 1973 (1983 Edition) basically to increase and assure effective citizen participation in the decisions of the City. In order to participate in the decisions of the City with regard to the adequacy of the ambulance service to the Hawaii Kai area, it is not necessary for the Board to obtain records that contain non-relevant confidential information that clearly invades another individual's right to privacy. In this case, the individual's right to privacy clearly outweighs the interests of the requesting agency.

In summary, we do not believe that the disclosure of such records "reasonably appears to be proper for the performance of the requesting agency's duties and functions." See Section 92E-5(3), HRS. We have previously suggested in some limited instances, where a party requests a personal record that also contains non-confidential information, that the City department involved make reasonable efforts to excise the confidential information in order to accommodate the member of the public requesting the record. However, Chapter 92E, HRS, does not require such an accommodation, and in this instance, it would impose a burden on the agency that it cannot sustain.

Moreover, we understand that the Department of Health routinely provides data regarding the ambulance response times to the State Department of Health, Emergency Medical Services Division, which apparently maintains response time data on a computerized basis, without the confidential information. This might be a more appropriate source of information for the Hawaii Kai Neighborhood Board.

Finally, we note that although the Department of Health is under no legal obligation to disseminate the ambulance report records to the Neighborhood Board, it should make every reasonable effort to keep the Board informed regarding the performance of the Department. This might include appearing at a Neighborhood Board meeting or providing data on a monthly basis setting forth the average ambulance response times for that area.

TO: ALMA C. CORN, M.D.

-5-

October 11, 1985

If you should have any further questions regarding this matter, please do not hesitate to contact me at extension 4925.

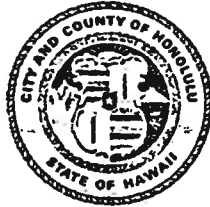
KATHLEEN A. CALLAGHAN
Deputy Corporation Counsel

APPROVED:

RICHARD D. WURDEMAN
Corporation Counsel

KAC:li

DEPARTMENT OF THE CORPORATION COUNSEL
CITY AND COUNTY OF HONOLULU
HONOLULU, HAWAII 96813



FRANK F. FASI
MAYOR

RICHARD D. WURDEMAN
CORPORATION COUNSEL

July 11, 1985

MEMORANDUM

TO: ALMA C. CORN, M.D., DIRECTOR AND CITY PHYSICIAN
FROM: KATHLEEN A. CALLAGHAN, DEPUTY CORPORATION COUNSEL
SUBJECT: DISCLOSURE OF CONTENTS OF THE AMBULANCE REPORT
FORMS TO HONOLULU POLICE DEPARTMENT OFFICERS

This is in response to your inquiry of June 20, 1985 for legal advice regarding whether the disclosure of the contents of the Ambulance Report Forms to Honolulu Police Department ("HPD") officers in the performance of their public duties violates Chapter 92E, Hawaii Revised Statutes ("HRS"), "Fair Information Practice (Confidentiality of Personal Record)."¹

We answer in the negative.

We understand the facts to be as follows: The paramedics routinely complete an Ambulance Report Form, leaving a copy of the report with the emergency room physician and filing the original with the Department of Health. The Department of Health has, in the past, permitted HPD detectives in the performance of their public duties to read an ambulance report on the Health Department premises in order to obtain the name of a particular paramedic involved in a case.

The issue presented is whether the disclosure of the contents of the Ambulance Report to HPD officers conducting an investigation violates Chapter 92E, HRS.

¹We have taken the liberty of rephrasing your inquiry.

M 85-18

MEMORANDUM

TO: ALMA C. CORN

-2-

July 11, 1985

In 1980, the State Legislature passed Act 226, Fair Information Practice (Confidentiality of Personal Record) which is codified as Chapter 92E, HRS. Session Laws of Hawaii 1980, Act 226, Section 1, provides that:

The purpose of this Act is to implement in part the 1978 amendments to the Hawaii State Constitution (Article I, Section 6) relating to the right to privacy.

This Act permits individuals to gain access to personal records relating to themselves maintained by State or county executive branch agencies and to correct or amend those records under certain circumstances.

Section 92E-1(3) sets forth the definition of "personal record" as follows:

- (3) 'Personal record' means any 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. [Emphasis added]

It is also important to note that as used in Chapter 92E, HRS, the term "individual" means a natural person (§ 92E-1(2), HRS). Consequently, Chapter 92E, HRS, does not apply to records about artificial or legally created beings such as corporations, which are maintained by an agency.

Pursuant to Section 92E-2, HRS, each City agency that maintains any accessible personal record shall make that record available to the person to whom it pertains in a reasonably prompt manner and in a reasonably intelligible form. However, the statute sets forth important exemptions and limitations regarding an individual's access to his or her personal record (§ 92E-3, HRS), limitations on the public's access to personal records (§ 92E-4, HRS) and limitations on the disclosure of personal records to other agencies (§ 92E-5, HRS).

MEMORANDUM

TO: ALMA C. CORN

-3-

July 11, 1985

We believe that a Department of Health ambulance report form, which contains information about an individual including his or her name, medical information and other identifying information, constitutes a personal record within the definition set forth in Section 92E-1(3), HRS. Consequently, we must examine whether the Department of Health is permitted to disclose such information to another City agency.

Section 92E-5, HRS, provides as follows with respect to the limitations on the disclosure of personal records to other agencies²:

[§92E-5] Limitations on disclosure of personal record to other agencies. No agency may disclose or authorize disclosure of personal record to any other agency unless the disclosure is:

- (1) Compatible with the purpose for which the information was collected or obtained;
- (2) Consistent with the conditions or reasonable expectations of use and disclosure under which the information was provided;
- (3) Reasonably appears to be proper for the performance of the requesting agency's duties and functions;

²The term "agency" is defined as follows by Section 92E-1, HRS:

[§92E-1] Definitions. As used in this chapter:

- (1) 'Agency' means every office, officer, employee, department, division, bureau, authority, board, commission, or other entity of the executive branch of the State or of each county, but excludes:
 - (A) The legislature and the council of each county, including their respective committees, offices, bureaus, officers, and employees; and
 - (B) The judiciary, including the courts, and its offices, bureaus, officers, and employees.

MEMORANDUM

TO: ALMA C. CORN


-4-

July 11, 1985

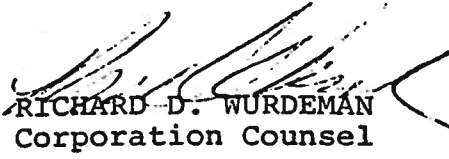
- (4) To the state archives for purposes of historical preservation, administrative maintenance, or destruction;
- (5) To an agency or instrumentality of any governmental jurisdiction within or under the control of the United States, or to a foreign government if specifically authorized by treaty or statute, for a civil or criminal law enforcement investigation;
- (6) To the legislature or any committee or subcommittee thereof;
- (7) Pursuant to an order of a court of competent jurisdiction;
- (8) To authorized officials of a department or agency of the federal government for the purpose of auditing or monitoring an agency program that receives federal monies. [Emphasis added]

We believe that the Department of Health's practice of disclosing the contents of an ambulance report to an HPD officer is permitted in accordance with Section 92E-5, HRS, because such disclosure reasonably appears to be proper for the performance of HPD's duties and functions (§ 92E-5(3); HRS) and pertains to an official law enforcement investigation (§ 92E-5(5), HRS).

If you should have any questions, pertaining to this memorandum, please do not hesitate to contact the undersigned at extension 4925.


KATHLEEN A. CALLAGHAN
Deputy Corporation Counsel

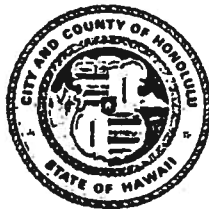
APPROVED:


RICHARD D. WURDEMAN
Corporation Counsel

KAC:li

DEPARTMENT OF THE CORPORATION COUNSEL
CITY AND COUNTY OF HONOLULU
HONOLULU, HAWAII 96813

FRANK F. FASI
MAYOR



RICHARD D. WURDEMAN
Acting CORPORATION COUNSEL

January 29, 1985

MEMORANDUM

TO: HONORABLE WELCOME S. FAWCETT, COUNCILMEMBER
CITY COUNCIL

FROM: KATHLEEN A. CALLAGHAN, DEPUTY CORPORATION COUNSEL

SUBJECT: NONDISCLOSURE OF NAMES OF HONOLULU POLICE
DEPARTMENT PERSONNEL WHO ARE SUBJECT TO
INVESTIGATION BY THE HONOLULU POLICE COMMISSION

This is in response to your request dated November 5, 1984, for clarification from this office regarding the City and County of Honolulu's (hereinafter "City") legal rationale for the nondisclosure of police officers' names in those cases where a public complaint against an officer is sustained by the Honolulu Police Commission (hereinafter "Commission"). You also request a copy of the opinion that the Department of the Corporation Counsel rendered in December 1978 on this issue.

We have attached as Exhibit A a copy of the Commission's Regular Meeting Minutes for December 27, 1978, which contains a statement prepared by the Department of the Corporation Counsel setting forth the reasons for the Commission's decision to discontinue the previous practice of publicly disclosing the names of police officers who are the subject of a Commission investigation. As you will discover from reading the meeting minutes, the primary basis for this decision was a concern that since the Commission does not provide an officer the opportunity for an adjudicatory hearing prior to issuing its findings, the disclosure

MEMORANDUM

TO: HONORABLE WELCOME S. FAWCETT -2- January 29, 1985

of an adverse finding against an identified officer would result in a denial of procedural due process.

Since 1978, there has been a further legal development that would prohibit the release of the name of an officer who has had a public complaint filed against him or her and sustained by the Commission. In 1978, the Hawaii State Constitution was amended to add Article I, Section 6, which provides as follows:

RIGHT TO PRIVACY

Section 6. 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.

Pursuant to this constitutional mandate, in 1980, the State Legislature passed Act 226, Fair Information Practice (Confidentiality of Personal Record) which is codified as Chapter 92E, Hawaii Revised Statutes (hereinafter "HRS"). Session Laws of Hawaii 1980, Act 226, Section 1, provides that:

The purpose of this Act is to implement in part the 1978 amendments to the Hawaii State Constitution (Article I, Section 6) relating to the right to privacy.

This Act permits individuals to gain access to personal records relating to themselves maintained by State or county executive branch agencies and to correct or amend those records under certain circumstances.

Section 92E-1(3), HRS, sets forth the definition of "personal record" as follows:

- (3) 'Personal record' means any 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,

MEMORANDUM

TO: HONORABLE WELCOME S. FAWCETT -3- January 29, 1985

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. [Emphasis added]

It is also important to note that as used in Chapter 92E, HRS, the term "individual" means a natural person. § 92E-1(2), HRS. Consequently, Chapter 92E, HRS, does not apply to records about artificial or legally created beings such as corporations, which are maintained by an agency.

Pursuant to Section 92E-2, HRS, each City agency that maintains any accessible personal record shall make that record available to the person to whom it pertains in a reasonably prompt manner and in a reasonably intelligible form. However, the statute sets forth important exemptions and limitations regarding an individual's access to his or her personal record (§ 92E-3, HRS), limitations on the public's access to personal records (§ 92E-4, HRS), and limitations on the disclosure of personal records to other agencies (§ 92E-5, HRS). We have attached as Exhibit B a copy of Chapter 92E, HRS, for your convenience.

With respect to limitations on the public's access to personal records pertaining to other persons, Section 92E-4, HRS, provides as follows:

§92E-4. Limitation on public access to personal record. 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;

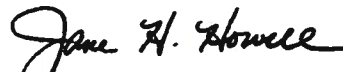
MEMORANDUM

TO: HONORABLE WELCOME S. FAWCETT -4- January 29, 1985

- (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.
[Emphasis added]

Generally speaking, unless the exceptions cited above apply, or unless one of the exceptions allowing disclosure to another agency applies (§ 92E-5, HRS), then a record identifying an officer against whom a complaint has been filed and sustained by the Commission, cannot be released to the public since it would constitute a "personal record" within the meaning of Section 92E-1(3), HRS.

If you should have any questions pertaining to this memorandum, please contact me at x4925.


for KATHLEEN A. CALLAGHAN
Deputy Corporation Counsel

APPROVED:


RICHARD D. WURDEMAN
Acting Corporation Counsel

KAC:ek

Attach.

NEW BUSINESS

Public

Complaints (continued)

Commissioner Turnbull (continued)

under the purview of the Chief. One, we deferred action on in order to gather further evidence. In 19 cases, we did not sustain the charge. Two cases were withdrawn. I move that this report be approved.

This motion was seconded by Commissioner Chun, there were no questions, the vote carried unanimously.

NOTE: Following the meeting, the Press called and questioned the figures. Executive Officer Ichiro Nakamura and Secretary Mary King went over the figures and they were revised to read as noted on the attached page 3 of the Disposition of Cases. (see red-pencil figures)

Opinion

On request of the Police Commissioners, the office of Corporation Counsel prepared a statement which was read by Commissioner Turnbull at the request of Chairman Ah Nee: (also attached)

On November 15, 1978, we announced that there will no longer be any public disclosure of the names of police officers who are the subject of Police Commission investigations. We adopted this policy because we believe that where an officer's good name, reputation and integrity is at stake because of a public charge of misconduct, that officer should be accorded an opportunity to clear his name before the government publicly discloses stigmatizing information that may jeopardize his or her professional career, as well as, subject him or her to public ridicule or embarrassment.

The Police Commission was neither intended nor designed to provide a police officer with an adjudicatory hearing in which he or she can attempt to vindicate him or herself of a public charge of misconduct. For example, the officer does not have the opportunity to appear personally to confront his or her accuser, or to seek the aid of legal counsel, or to confront and cross-examine adverse witnesses. The Commission's function is limited to receiving and investigating public complaints, ascertaining the facts with respect to the complaint, and then submitting a written report of its findings to the Chief of Police. A due process hearing is provided only after the Chief takes appropriate disciplinary action and the officer effects an

NEW BUSINESS

Public

Complaints (continued)

appeal pursuant to the grievance procedure outlined in the Revised Charter and the collective bargaining agreement. Therefore, until the officer has had an adequate opportunity to clear his or her name, his or her identity and the charges brought against him or her should not be disclosed.

The public complaints received by the Commission involve serious accusations, especially when leveled against a professional law enforcement officer who has an obligation to maintain the highest standards of honesty and integrity. Not only is the officer's personal reputation at stake; his or her professional future may be severely affected as well. An adverse Commission finding becomes part of the officer's personnel record and may be the basis for disciplinary action where deemed appropriate by the Chief. It may also negatively affect the officer's chances for promotions and also his opportunities for future employment. As Justice Frankfurter once said: "The right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." That principle should not be violated where police officers are concerned for they are entitled to the same rights and privileges as any other citizen.

In addition, we have been advised by legal counsel that there is an emerging judicial trend relating to the due process rights of public employees which strongly suggest that if a public official prematurely discloses stigmatizing or denigrating information about a public employee prior to affording the employee an adversary hearing, that official may be subject to a lawsuit based on the denial of due process under the Civil Rights Act.

As members of the Police Commission, it is our duty to serve as the advocate of the community in law enforcement matters. We shall therefore continue to receive and investigate public complaints against police officers and sustain those complaints where warranted. We shall also do everything within our power to insure that those officers who have violated the rules of the Department are properly disciplined. However, we do not feel that it is proper or in the public interest for 448

NEW BUSINESS

Public
Complaints (continued)

the Police Commission to condemn publicly an officer by disclosing his or her name before he or she has had the opportunity to clear his or her name before a due process hearing.

Commissioner Ah Nee informed the public that the aforementioned statement had been approved by the Honolulu Police Commission as a body.

HPC 78-216
HIDALGO
Complaint

Commissioner Chun reported that this complaint, filed by Irma D. Hidalgo concerning an officer, appears to be of an operational nature and not within the province of the Police Commission and, therefore, moved that it be forwarded to the Chief of Police for his perusal. The motion was seconded by Commissioner Mulder. There were no questions. The motion carried by a unanimous vote.

Election of
Chairman

Nominations were in order for Chairman of the Honolulu Police Commission for the year 1979.

Commissioner Turnbull nominated Herman E. Mulder. The nomination was seconded by Commissioner Chung. There were no other nominations. By a unanimous vote, Herman E. Mulder was declared elected as Chairman.

Election of
Vice-Chairman

Nominations were in order for Vice-Chairman of the Honolulu Police Commission for the year 1979.

Commissioner Chun nominated Charles G. Duarte. The nomination was seconded by Commissioner Chung. There were no other nominations. By a unanimous vote, Charles G. Duarte was declared elected as Vice-Chairman.

Next
Executive
Session

Chairman Ah Nee announced that the next Executive Session would be held on January 10, 1979 at 1100 hours in the Police Commission Conference Room 244, 1455 So. Beretania Street, Honolulu, Hawaii to discuss public complaints. There were no objections to the date.

1979
Chairman

Chairman Ah Nee turned the gavel over to the newly elected Chairman, Herman E. Mulder, to adjourn the meeting.

FAIR INFORMATION PRACTICE

Sec. 92-50

in the special fund authorized by section 416-97, and the balance deposited to the general fund of the State;

[am L 1983, c 153, §1]

Note. Provisions relating to the deposit of a portion of fees into the special fund authorized by section 416-97 shall terminate on June 30, 1984 at which time the entire amount of fees shall be deposited in the general fund. L 1983, c 153, §6.

Revision Note

Only the paragraph amended is included in this Supplement.

Amendment Note

L 1983 amended paragraph (4).

§92-28 State service fees, increase or decrease of.

Revision Note

For amendment effective July 1, 1986, see L 1983, c 167, §2.

[PART V.] PUBLIC RECORDS

§92-50 Definition.

Hawaii Legal Reporter Citations

Inspection of public records. 79 HLR 79-0117.
Inspection of building permit application and all related materials, including building plans and specifications. 79 HLR 79-0543.

[CHAPTER 92E] FAIR INFORMATION PRACTICE (CONFIDENTIALITY OF PERSONAL RECORD)

SECTION

- [92E-1] DEFINITIONS
- [92E-2] INDIVIDUAL'S ACCESS TO OWN PERSONAL RECORD
- [92E-3] EXEMPTIONS AND LIMITATIONS ON INDIVIDUAL ACCESS
- [92E-4] LIMITATION ON PUBLIC ACCESS TO PERSONAL RECORD
- [92E-5] LIMITATIONS ON DISCLOSURE OF PERSONAL RECORD TO OTHER AGENCIES
- [92E-6] ACCESS TO PERSONAL RECORD; INITIAL PROCEDURE
- 92E-7 COPIES
- 92E-8 RIGHT TO CORRECT PERSONAL RECORD; INITIAL PROCEDURE
- [92E-9] ACCESS AND CORRECTION; REVIEW PROCEDURES
- [92E-10] RULES AND REGULATIONS
- 92E-11 CIVIL ACTIONS AND REMEDIES
- [92E-12] VIOLATIONS; DISCIPLINARY ACTION AGAINST EMPLOYEES
- [92E-13] ACCESS TO PERSONAL RECORDS BY ORDER IN JUDICIAL OR ADMINISTRATIVE PROCEEDINGS; ACCESS AS AUTHORIZED OR REQUIRED BY OTHER LAW

Cross References

Right to privacy, see State Constitution, Article I, §6.

Sec. 92E-1 PUBLIC PROCEEDINGS AND RECORDS

[§92E-1] Definitions. As used in this chapter:

- (1) "Agency" means every office, officer, employee, department, division, bureau, authority, board, commission, or other entity of the executive branch of the State or of each county, but excludes:
 - (A) The legislature and the council of each county, including their respective committees, offices, bureaus, officers, and employees; and
 - (B) The judiciary, including the courts, and its offices, bureaus, officers, and employees.
- (2) "Individual" means a natural person.
- (3) "Personal record" means any 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. [L 1980, c 226, pt of §2]

[§92E-2] Individual's access to own personal record. Each agency that maintains any accessible personal record shall make that record available to the individual to whom it pertains, in a reasonably prompt manner and in a reasonably intelligible form. Where necessary the agency shall provide a translation into common terms of any machine readable code or any code or abbreviation employed for internal agency use. [L 1980, c 226, pt of §2]

Legislative purpose, see L 1980, c 226, §1.

[§92E-3] Exemptions and limitations on individual access. An agency is not required by this [chapter] to grant an individual access to personal records, or information in such records:

- (1) Maintained by an agency that performs as its or as a principal function any activity pertaining to the enforcement of criminal laws or any activity pertaining to the prevention, control, or reduction of crime, and which consist of:
 - (A) Information which fits or falls within the definition of "criminal history record information" in section 846-1; or
 - (B) Information or reports prepared or compiled for the purpose of criminal intelligence or of a criminal investigation, including reports of informers, witnesses, and investigators; or
 - (C) Reports prepared or compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through confinement, correctional supervision, and release from supervision.
- (2) The disclosure of which would reveal the identity of a source who furnished information to the agency under an express or implied promise of confidentiality.
- (3) Consisting of testing or examination material or scoring keys used solely to determine individual qualifications for appointment or promotion in public employment, or used as or to administer a licensing examination or an academic examination, the disclosure of which

FAIR INFORMATION PRACTICE

Sec. 92E-6

would compromise the objectivity, fairness, or effectiveness of the testing or examination process.

- (4) Including investigative reports and materials, related to an upcoming, ongoing, or pending civil or criminal action or administrative proceeding against the individual.
- (5) Required to be withheld from the individual to whom it pertains by statute or judicial decision or authorized to be so withheld by constitutional or statutory privilege. [L 1980, c 226, pt of §2]

Revision Note

In first line "chapter" substituted for "part" to correct apparent clerical error.

[§92E-4] Limitation on public access to personal record. 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. [L 1980, c 226, pt of §2]

[§92E-5] Limitations on disclosure of personal record to other agencies. No agency may disclose or authorize disclosure of personal record to any other agency unless the disclosure is:

- (1) Compatible with the purpose for which the information was collected or obtained;
- (2) Consistent with the conditions or reasonable expectations of use and disclosure under which the information was provided;
- (3) Reasonably appears to be proper for the performance of the requesting agency's duties and functions;
- (4) To the state archives for purposes of historical preservation, administrative maintenance, or destruction;
- (5) To an agency or instrumentality of any governmental jurisdiction within or under the control of the United States, or to a foreign government if specifically authorized by treaty or statute, for a civil or criminal law enforcement investigation;
- (6) To the legislature or any committee or subcommittee thereof;
- (7) Pursuant to an order of a court of competent jurisdiction;
- (8) To authorized officials of a department or agency of the federal government for the purpose of auditing or monitoring an agency program that receives federal monies. [L 1980, c 226, pt of §2]

[§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. [L 1980, c 226, pt of §2]

Sec. 92E-7 PUBLIC PROCEEDINGS AND RECORDS

§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. [L 1980, c 226, pt of §2; am L 1983, c 91, §1]

Amendment Note

L 1983 deleted the words "shall not include any cost of" before "searching".

§92E-8 Right to correct personal record; initial procedure. (a) An individual has a right to have any factual error in that person's personal record corrected and any misrepresentation or misleading entry in the record amended by the agency which is responsible for its maintenance.

(b) Within twenty business days after receipt of a written request to correct or amend a personal record and evidence that the personal record contains a factual error, misrepresentation, or misleading entry, an agency shall acknowledge receipt of the request and purported evidence in writing and promptly:

- (1) Make the requested correction or amendment; or
- (2) Inform the individual in writing of its refusal to correct or amend the personal record, the reason for the refusal, and the agency procedures for review of the refusal. [L 1980, c 226, pt of §2; am L 1983, c 91, §2]

Amendment Note

L 1983 amended subsection (b).

[§92E-9] Access and correction; review procedures. (a) Not later than thirty business days after receipt of request for review of an agency refusal to allow access to, or correction or amendment of, a personal record, the agency shall make a final determination.

(b) If the agency refuses upon final determination to allow access to, or correction or amendment of, a personal record, the agency shall so state in writing and:

- (1) Permit, whenever appropriate, the individual to file in the record a concise statement setting forth the reasons for his disagreement with the refusal of the agency to correct or amend it; and
- (2) Notify the individual of the applicable procedures for obtaining appropriate judicial remedy. [L 1980, c 226, pt of §2]

[§92E-10] 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. [L 1980, c 226, pt of §2]

§92E-11 Civil actions and remedies. (a) An individual may bring a civil action against an agency in a circuit court of the State whenever an agency fails to comply with any provision of this chapter, and after appropriate administrative remedies under sections 92E-6, 92E-8, and 92E-9 have been exhausted.

(b) In any action brought under this section the court may order the agency to correct or amend the complainant's personal record, to require any other agency action, or to enjoin such agency from improper actions as the court may deem necessary and appropriate to render substantial relief.

(c) In any action brought under this section in which the court determines that the agency knowingly or intentionally violated a provision of this chapter, the agency shall be liable to the complainant in an amount equal to the sum of:

(1) Actual damages sustained by the complainant as a result of the failure of the agency to properly maintain the personal record, but in no case shall a complainant (individual) entitled to recovery receive less than the sum of \$100; and

(2) The costs of the action together with reasonable attorney's fees as determined by the court.

(d) The court may assess reasonable attorney's fees and other litigation costs reasonably incurred against the agency in any case in which the complainant has substantially prevailed, and against the complainant where the charges brought against the agency were frivolous.

(e) An action may be brought in the circuit court where the complainant resides, the complainant's principal place of business is situated, or the complainant's relevant personal record is situated. No action shall be brought later than two years after the date of the cause of action, which shall be the date of the last written communication to the agency requesting compliance. [L 1980, c 226, pt of §2; am L 1983, c 91, §3]

Amendment Note

L 1983 amended subsections (a) and (c).

[§92E-12] Violations; disciplinary action against employees. A knowing or intentional violation of any provision of this chapter, or of any rule adopted to implement or administer this chapter, by any employee or officer of an agency shall be cause for disciplinary action, including suspension or discharge, by the head of the agency. Any person may file a complaint, with the head of the applicable agency, alleging such a violation. [L 1980, c 226, pt of §2]

[§92E-13] Access to personal records by order in judicial or administrative proceedings; access as authorized or required by other law. Nothing in this chapter, including section 92E-3, shall be construed to permit or require an agency to withhold or deny access to a personal record, or any information in a personal record:

(1) When the agency is ordered to produce, disclose, or allow access to the record or information in the record, or when discovery of such record or information is allowed by prevailing rules of discovery or by subpoena, in any judicial or administrative proceeding; or

(2) Where any statute, administrative rule, rule of court, judicial decision, or other law authorizes or allows an individual to gain access to a personal record or to any information in a personal record or requires that the individual be given such access. [L 1980, c 226, pt of §2]

Severability clause, see L 1980, c 226, §3.

August 20, 1984

TO: EUGENE T. CARSON, LIQUOR CONTROL ADMINISTRATOR
LIQUOR COMMISSION

FROM: KATHLEEN A. CALLAGHAN, DEPUTY CORPORATION COUNSEL

SUBJECT: DISCLOSURE TO PUBLIC OF INFORMATION PERTAINING TO
LIQUOR LICENSEES IN THE ALA MOANA/WAIKIKI AREA

This is in response to your oral request for legal advice regarding the request that the Liquor Commission of the City and County of Honolulu (hereinafter "Commission") received from Mr. Tony Rodgers of the Ala Moana Neighborhood Board No. 11 for a list of all the officers and directors of each corporate licensee in the Waikiki/Ala Moana area of Honolulu, Hawaii.

The issue presented is whether the disclosure of the requested information would be contrary to the provisions of Chapter 92E, "Fair Information Practices (Confidentiality of Personal Record)," Hawaii Revised Statutes (hereinafter "HRS") or Chapter 92, "Public Agency Meetings and Records," HRS.

As we understand the facts, the Commission recently provided Mr. Rodgers with a list of all license holders in the Waikiki/Ala Moana area and the location of each of those licensed premises. However, the Commission did not interpret the letter of Mr. Rodgers as requesting the names of all the officers and directors of each corporate licensee in the Waikiki area and, therefore, did not provide that information. Mr. Rodgers has now requested that the Commission provide him with that information.

We believe that the disclosure of the names of each officer and director of each corporate licensee in the Waikiki/Ala Moana area would not be in violation of

TO: EUGENE T. CARSON

-2-

August 20, 1984

Chapter 92E, HRS, since that law applies only to records pertaining to "natural persons," not to corporations.¹

Furthermore, we believe that the disclosure of the names of the corporate officers and directors of each Waikiki or Ala Moana establishment issued a license by the Commission would not be in violation of Section 92-50, HRS. Section 92-50, HRS, provides as follows:

§92-50 Definition. As used in this part, '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.

As a part of each liquor license application, a corporate applicant is required by Rule 2-5(b) (4) of the Rules and Regulations of the Commission to submit the corporation's articles of incorporation. Sections 416-14 and 416-23, HRS, require that articles of incorporation and subsequent amendments thereto be filed with the Director of the Department of Commerce and Consumer Affairs, State of Hawaii. Section 416-11(9), HRS, requires that said articles of incorporation contain the names and addresses of the officers and directors of the corporation. The articles of incorporation so filed are required by Section 416-14, HRS, to be open to public inspection, as follows:

¹Section 92E-1(2), (3) defines the terms "individual" and "personal record" as follows:

§92E-1 Definitions. As used in this chapter:

. . . .

- (1) 'Individual' means a natural person.
- (3) 'Personal Record' means any item, collection, or grouping of information about an individual that is maintained by an agency."

TO: EUGENE T. CARSON

-3-

August 20, 1984

§416-14 Articles of incorporation, charters, amendments, recorded where. The articles of incorporation and charters, and any subsequent amendments thereto, shall be filed with the director of commerce and consumer affairs and, if in compliance with the statutory requirements, shall be accepted for record and shall thereafter be open to inspection of the public during business hours. [Emphasis added]

Since the articles of incorporation and amendments thereto are by law made open for public inspection at the Department of Commerce and Consumer Affairs and the disclosure of such information would not invade the right of privacy of an individual, we advise that the Commission should disclose the names of the officers and directors of all the corporations holding liquor licenses in the Ala Moana/Waikiki area, as requested by Mr. Rodgers.

The cost of duplicating the records requested should be determined and allocated in accordance with Section 5-15.1, et seq., Revised Ordinances of Honolulu 1978, as amended, and Finance Circular No. 137, dated March 9, 1966 as amended by Finance Circular No. 362, dated May 15, 1978.

If you should have any questions pertaining to this matter, please contact me at ext. 4925.

KATHLEEN A. CALLAGHAN
Deputy Corporation Counsel

APPROVED:

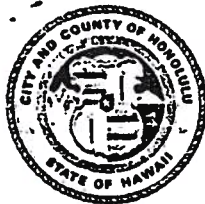
GARY M. SLOVIN
Corporation Counsel

KAC:gk

cc: Neighborhood Commission

²See also H 77-112 which, although not completely up to date in some respects, is nonetheless still accurate in opining that a licensee's articles of incorporation on file with the Commission may be open to public inspection.

DEPARTMENT OF THE CORPORATION COUNSEL
CITY AND COUNTY OF HONOLULU
HONOLULU, HAWAII 96813



GARY M. SLOVIN
CORPORATION COUNSEL

STANLEY D. SUYAT
FIRST DEPUTY

August 8, 1984

MEMORANDUM

TO: WALLACE Y. KUNIOKA, DIRECTOR
DEPARTMENT OF CIVIL SERVICE

FROM: CHARLOTTE J. DUARTE, DEPUTY CORPORATION COUNSEL

SUBJECT: SHARING OF WORKERS' COMPENSATION INFORMATION
WITH CLAIMANTS' DEPARTMENTS

This memorandum is in response to your request for a legal opinion concerning the following question:

May the Department of Civil Service share rehabilitation reports and medical reports received from treating physicians concerning employees who are on workers' compensation with the employees' department officials?

We answer in the affirmative.

Although an employee's workers' compensation records, inclusive of rehabilitation and medical reports, are "personal records" within the meaning of Section 92E-1(3) of the Hawaii Revised Statutes [HRS], and therefore subject to the Fair Information Practice law of the State of Hawaii and considered confidential, such records may be disclosed to the employee's department official. Disclosure is justified on two independent bases.

M 84-27

458

MEMOANDUM

TO: WALLACE Y. KUNIOKA

-2-

August 8, 1984

The first, is that the Civil Service Department merely acts as an agent for the employee's department in the handling of an employee's workers' compensation claim, and therefore disclosure between agent and principal, i.e., the department, is authorized, if not obligatory.

The second is based upon the express provisions of the Fair Information Practice law. Section 92E-5, HRS, permits disclosure of personal records to other agencies in certain instances. Of particular relevance are the following provisions:

No agency may disclose or authorize disclosure of personal record to any other agency unless the disclosure is:

. . . .

- (2) Consistent with the conditions or reasonable expectations of use and disclosure under which the information was provided;
- (3) Reasonably appears to be proper for the performance of the requesting agency's duties and functions;

. . . .

We believe that either section authorizes disclosure by the Civil Service Department to the employee-claimant's department for purposes of monitoring the employee's health status in relation to his ability to return to work.

We are of the opinion that under either the principal-agent theory or the express provisions of the Fair Information Practice law, your Department may disclose rehabilitation and medical reports of employees obtained in the context of their workers' claims to responsible individuals within their departments.

MEMOANDUM

TO: WALLACE Y. KUNIOKA -

-3-

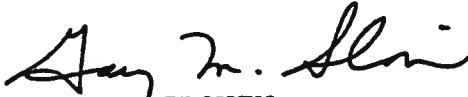
August 8, 1984

Should you have any questions concerning this opinion, please feel free to call me at x4718.



CHARLOTTE J. DUARTE
Deputy Corporation Counsel

APPROVED:

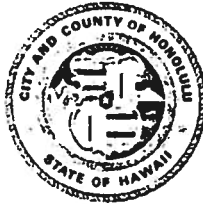


GARY M. SLOVIN
Corporation Counsel

CJD:ek

DEPARTMENT OF THE CORPORATION COUNSEL
CITY AND COUNTY OF HONOLULU
HONOLULU, HAWAII 96813

EILEEN R. ANDERSON
MAYOR



GARY M. SLOVIN
CORPORATION COUNSEL

STANLEY D. SUYAT
FIRST DEPUTY

April 12, 1984

MEMORANDUM

TO: JOSEPH K. CONANT, DIRECTOR
DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT

ATTN: HIROMI SHIRAMIZU, ADMINISTRATOR
COMMUNITY DEVELOPMENT DIVISION

FROM: DONNA Y. L. LEONG, DEPUTY CORPORATION COUNSEL

SUBJECT: APPLICABILITY OF SECTION 92-51, HRS, TO DESIGN/BID
COMPETITION PROPOSALS

This responds to your request dated December 19, 1983, in which you asked whether proposals submitted pursuant to a design/bid competition are public records available for inspection under Section 92-51, Hawaii Revised Statutes (HRS).¹

We answer that the proposals are not subject to inspection to the extent that:

1. the information is of a personal nature when disclosure would result in economic or personal hardship to the subject party which outweighs the public's fundamental right of access to governmental information; or

¹We have rephrased and narrowed your request.

MEMORANDUM

TO: JOSEPH K. CONANT

-2-

April 12, 1984

2. disclosure would impair present or imminent contract awards; or

3. the records contain trade secrets and commercial or financial information obtained from a person which is privileged or confidential.

The above limitations are not exclusive, but are applicable to your fact situation.

We understand that your request results from a letter to you from the Sunshine Law Coalition of Hawaii dated December 12, 1983, attached hereto as Exhibit A. That letter cites Chapter 92, HRS, in support of its position that proposals submitted in a design/bid competition should be available for public inspection. You are currently evaluating the one remaining proposal and are continuing negotiations with that developer. We also understand that certain aspects of certain proposals have been claimed by the developer(s) as "trade secrets."

Section 92-50, HRS, provides:

Definition. As used in this part, '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.

Section 92-51, HRS, provides in part:

Public records; available for inspection.
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,
. . . .

MEMORANDUM

TO: JOSEPH K. CONANT

-3-

April 12, 1984

Section 92-71, HRS, makes those provisions applicable to the political subdivisions of the State.

Generally, public policy favors the right of inspection of public records and documents. McQuillin, Municipal Corporations, § 14.14 (3rd Ed.). Courts have imposed limits on access based on express constitutional or statutory provisions or public policy reasons. Id.; Sands and Libonati, Local Government Law, § 12.01 and § 12.05. In your specific situation, certain information in the proposals may not be subject to inspection for two reasons: (1) the information invades the right to privacy of an individual, and/or (2) public policy dictates that the public interest in nondisclosure and an individual's interest in nondisclosure outweigh the public's interest in disclosure.

1. Right to privacy.

Records which invade the right to privacy of an individual are not public records as provided in Section 92-50, HRS. Two questions arise from this exception to inspection: (1) can information in a proposal be considered private property subject to a privacy right; and (2) can a corporation be an "individual" as that term is used in Section 92-50, HRS?

First, the Managing Director, pursuant to Section 5-16.2, Revised Ordinances of Honolulu (1978) ("ROH"), has promulgated Rules and Regulations Governing the Accessibility, Maintenance and Storage of Public and Confidential Records of All City Agencies ("Rules" or "Managing Director's Rules"). Those Rules provide in part as follows:

3-1. CONFIDENTIAL RECORDS DEFINED

a. Records which if made accessible to the public would invade the right of privacy of an individual, shall be considered confidential records. An invasion of the right of privacy of an individual shall be deemed to result from, but shall not be limited to the granting of access to:

. . . .

MEMORANDUM

TO: JOSEPH K. CONANT

-4-

April 12, 1984

6. Information of a personal nature when disclosure would result in economic or personal hardship to the subject party which outweighs the public's fundamental right of access to information concerning the conduct of City agencies.

In the case of Mountain States Telephone and Telegraph Company v. Department of Public Service Regulation, 634 P.2d 181, 186 (Mont. 1981), the court construed the privacy exception to its state's public information law, found in Montana Constitution, Article II, § 9, as applied to trade secrets, and stated in part that:

It is obvious to us that a trade secret which is used in one's business, and which gives one an opportunity to obtain an advantage over competitors who do not know or use it, is private property which could be rendered valueless or of less value to its owner if disclosure of the information to the public and to one's competitors were compelled. Surely, if an individual owned a trade secret and sought protection against compelled disclosure, we would hold such private property protectable under the exception in 1972 Mont. Const., Art. II, § 9, ('cases in which the demand of individual privacy clearly exceeds the merits of public disclosure'), to the extent necessary under the circumstances. Whether a corporate owner of a trade secret is entitled to the same exception we will discuss below.

MEMORANDUM

TO: JOSEPH K. CONANT

-5-

April 12, 1984

A trade secret, then,² may be private property protectable by a privacy right.

Cases which have construed a privacy exception to public record statutes have employed a balancing test to determine whether there has been an invasion of privacy. For example, the federal Freedom of Information Act (FOIA),

²In Southwestern Bell Telephone Company v. State Corporation Commission, 6 Kan. App.2d 444, 629 P.2d 1174, 1184 (1981), the court said that,

"An exact definition of a trade secret may not be possible, but factors to be considered in recognizing a trade secret are: (1) the extent to which the information is known outside the business, (2) the extent to which it is known to those inside the business, i.e., by the employees, (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information, (4) the savings effected and the value to the holder in having the information as against competitors, (5) the amount of effort or money expended in obtaining and developing the information, and (6) the amount of time and expense it would take for others to acquire and duplicate the information.

'A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.' Syl. ¶3."

"For purposes of disclosure, any distinction between trade secrets and confidential commercial information would appear immaterial."

MEMORANDUM

TO: JOSEPH K. CONANT

-6-

April 12, 1984

codified in 5 U.S.C. § 552, et. seq., contains a provision which excepts from public disclosure investigatory records compiled for law enforcement purposes, but only, among other things, to the extent that the production of such records would "constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). Cases which have construed this provision have applied a balancing test to determine whether there has been an unwarranted invasion of personal privacy. The individual's interest in maintaining his privacy has been weighed against the public's interest in disclosure. Lamont v. Dept. of Justice, 475 F.Supp. 761, 776-778 (S.D. N.Y. 1979); Ferguson v. Kelly, 448 F.Supp. 919, 922 (N.D. Ill. 1978); Tarnopol v. F.B.I., 442 F.Supp. 5, 7 (D.C. D.C. 1977).

The second question which the court in Mountain States faced, and with which we are likewise faced, is whether corporations can be considered individuals whose privacy may be invaded by disclosure. The court in that case, based on equal protection and due process considerations, held that a corporation is a person for purposes of its State's freedom of information act. 634 P.2d 188. The issue is unresolved in the State of Hawaii.

In summary, if a prospective bidder in a design/bid competition alleges that disclosure of his proposal would invade his right to privacy in that his trade secret is private property which should be protected, then the burden is upon that party to prove that the information is a trade secret and that his and the public's interest in nondisclosure would outweigh the public's interest in disclosure.

2. Public policy.

"Even absent statutory limitations on access, courts have felt free to define the contours of public policy which precludes access when detrimental to the public interest." Sands and Libonati, Local Government Law,

MEMORANDUM

TO: JOSEPH K. CONANT

-7-

April 12, 1984

§ 12.05. See also, Craemer v. Superior Court, 265 Cal.2d 216, 71 Cal.Rptr. 93 (1968); and MacEwan v. Holm, 226 Oregon 27, 359 P.2d 413, 85 ALR 2d 1086 (1961).

To guide us in the present case, public policy contours have been enunciated in three documents. First, the Managing Director's Rules provide in part as follows:

3.1. CONFIDENTIAL RECORDS DEFINED

c. The following records are specifically exempted from public access and shall be deemed confidential:

. . . .

2. Records which if made accessible would impair present or imminent contract awards or collective bargaining negotiations;

3. Records containing trade secrets and commercial or financial information obtained from a person which is privileged or confidential

Second, Section 30-3.1(11)(B), ROH (1978) impliedly recognizes the need for confidential communications during design/bid competition negotiations. That section provides that upon completion of the evaluation and selection process, certain reports must be filed with the City Clerk. The City Clerk, upon receipt of any of the written reports, must post the same for public inspection and such reports are only then designated as public records in that section.

Also, the Hawaii State Legislature has recognized that, in the letting of certain public contracts, certain information which is divulged by bidders to the contracts should remain confidential. In Section 103-25, HRS, prospective bidders may be required to submit answers to

MEMORANDUM

TO: JOSEPH K. CONANT

-8-

April 12, 1984

questions contained in a questionnaire setting forth a complete statement of the experience of the prospective bidders and their organization in performing similar work and a statement of the equipment proposed to be used together with adequate proof of the availability of the equipment. All information contained in the answers to the questionnaires are required to be and must remain confidential. Any government officer or employee who divulges such information may be fined. Similarly, in Section 102-3, HRS, relating to the bidding for concessions on public property, prospective bidders may be required to submit answers to questions in a questionnaire setting forth a complete statement of the experience, competence and financial standing of the prospective bidders. Such information is again confidential and any government employee who divulges such information may be fined.

The Rules, the provisions of the Lease or Rental Policy of the City contained in Article 3, Chapter 30, R.O.H., and the HRS, express policies that proposals may not be subject to inspection during the competition negotiations, and that trade secrets and commercial or financial information are not subject to disclosure so long as they are privileged or confidential.

To deny access to public records in any given case on a public policy ground once again requires a balancing of the interest to be served. See MacEwan v. Holm, 226 Or. 27, 359 P.2d 413, 85 ALR 2d 1086 (1961). In holding that certain trade secrets fall within the federal FOIA trade secrets exemption from disclosure, courts have held that the information is confidential where disclosure would either impair the government's ability to obtain necessary information in the future or cause substantial harm to the competitive position of the person from whom the information was obtained. Continental Stock Transfer and Company v. Securities and Exchange Commission, 566 F.2d 373 (CA 2, 1977). Courts have also considered whether alternatives exist to full disclosure.

MEMORANDUM

TO: JOSEPH K. CONANT

-9-

April 12, 1984

3. Conclusion.


If, in your discretion, disclosure of the proposals or any part thereof would impair your competition negotiations, then, at least during the duration of the negotiations, the records are not subject to inspection. If the party seeking nondisclosure proves to you that disclosure of the proposal or any part thereof would invade its right to privacy or would reveal trade secrets or confidential commercial information, then such records are not subject to public inspection even when negotiations have terminated.

Although the Managing Director's Rules do not provide notice of the granting of a request for public records to a party seeking nondisclosure, we recommend that you do so and that the inspection date be stayed for a few days.

Should you have any questions, please feel free to call me.


DONNA Y. L. LEONG
Deputy Corporation Counsel

APPROVED:


GARY M. SLOVIN
Corporation Counsel

DYLL:as

Attach.

DEPT. OF HOUSING
AND COMMUNITY DEVELOPMENT

DEC 13 2 02 PM '83

SUNSHINE LAW COALITION O HAWAII

P.O. BOX 22415

HONOLULU, HAWAII 96822

December 12, 1983

Joseph Conant
Department of Housing
and Community Development
City and County of Honolulu
650 S. King Street
Honolulu, HI 96813

Dear Mr. Conant:

I represent a coalition of civic groups vitally interested in open access to public meetings and records.

We have noted from a November 24 article in the Honolulu Star-Bulletin that your department has received various proposals for the City's planned hotel project in downtown Honolulu. We would like the opportunity to review the proposals being considered by your department because we believe them to be of interest to the public.

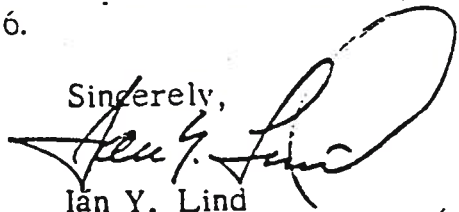
We are happy to note that the Aloha Tower Development Corporation considered its proposals to be of public interest and opened them to public inspection. We hope that you will do likewise. However, we are aware that your deputy was quoted as saying that he does not believe that the proposals should be available to the public. It would appear to us to be inappropriate to base such a decision on the fact that some developers may have submitted less than adequate proposals. All of the developers should have been aware that their proposals would enter the public domain.

We believe that the proposals are public records under the provisions of the state Sunshine Law, Chapter 92 HRS. The use of public property for private development is a concern of taxpayers. Public confidence in the selection process is important, especially in light of the controversy that plagued the city's Kukui Plaza project.

If you do not believe such records should be available to the public, please explain the reasons for such refusal in light of Chapter 92.

Thank you for your attention to this matter. If you should have any questions, feel free to contact me at 533-6996.

Sincerely,



Ian Y. Lind
Coordinator,
Sunshine Law Coalition

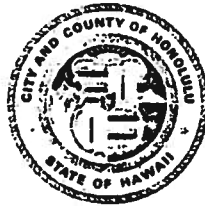
470

EXHIBIT A

DEPARTMENT OF THE CORPORATION COUNSEL
CITY AND COUNTY OF HONOLULU

HONOLULU, HAWAII 96813

EILEEN R. ANDERSON
MAYOR



GARY M. SLOVIN
CORPORATION COUNSEL

STANLEY D. SUYAT
FIRST DEPUTY

December 8, 1983

MEMORANDUM

TO: SUE E. REID, DIRECTOR
OFFICE OF HUMAN RESOURCES

FROM: MARIA C. AVINANTE-TANAKA
DEPUTY CORPORATION COUNSEL

SUBJECT: REQUEST FOR RELEASE OF OFFICIAL DOCUMENTS

This is in response to your predecessor's memorandum of October 6, 1983 requesting whether your department may release records of fact finding hearings conducted by your office.

We answer in the negative.

We understand that Mr. Willaim E. Woods, a former EEO/Coordinator for the Honolulu Job Training Program, submitted a request for a taped transcript. The tape is regarding a CETA complaint alleging discrimination by the State of Hawaii in which Mr. Woods participated as one of the charging parties on behalf of the Office of Human Resources (OHR). The charge was brought by OHR against the State Director of Employment and Training Office. The transcript does not concern Mr. Woods personally or his employment record.

A. Public Records

In Chapter 92, HRS, entitled, "Public Agency Meetings and Records," the legislature declares that "it is the policy of this State that the formation and conduct of

M 83-65

MEMORANDUM

TO: SUE E. REID

-2-

December 8, 1983

public policy, discussions, deliberations, decisions and action of governmental agencies, shall be conducted as openly as possible." §92-1, HRS. In implementing this policy, Chapter 92, HRS, provides the public with access to certain "public records."

Section 92-50, HRS, provides that:

As used in this part, '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.
[Emphasis added]

We believe that the transcript of this hearing pertaining to a CETA Complaint does not constitute a public record within the meaning of Section 92-50, HRS.

B. Personal Records

Moreover, we believe that the transcript constitutes a "personal record" within the meaning of Section 92E-1(3), HRS, which provides as follows:

- (3) 'Personal record' means any 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 finger or voice print or a photograph. 'Personal record' includes a 'public record,' as defined under section 92-50. [Emphasis added]

MEMORANDUM

TO: SUE E. REID

-3-

December 8, 1983

The law provides, with certain exceptions, an individual access to his or her own personal records in a reasonably prompt manner and in a reasonably intelligible form. §§ 92E-2 and 92E-3, HRS. However, Section 93E-4, HRS, places limitations on the public's access to personal records pertaining to other persons. Specifically, Section 93E-4 provides as follows:

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.

CONCLUSION

We conclude that the transcript of the hearing is not a "public record" within the meaning of Section 92-50, HRS. Furthermore, the disclosure of such information is not permitted by law since the records also constitute "personal records," and none of the exceptions in Section 92E-4 allowing the disclosure of such records to a person other than one to whom the record pertains apply in this situation.

Consequently, OHR is correct in refusing to release this information to Mr. Woods. However, in the event that Mr. Woods presents a written statement from the

MEMORANDUM

TO: SUE E. REID

-4-

December 8, 1983

State, and the individuals involved in that case authorizing the release of the aforementioned hearing, we suggest that the OHR require that the written consent conform to the requirements set forth in the Managing Director's Rules and Regulations Governing the Accessibility, Maintenance and Storage of Public and Confidential Records of All City Agencies (Rule 3-1(b)(2); promulgated pursuant to Ordinance No. 78-21) since no rules and regulations have yet been adopted implementing Chapter 92E, HRS.

Maria C. Avinante-Tanaka

MARIA C. AVINANTE-TANAKA
Deputy Corporation Counsel

APPROVED:

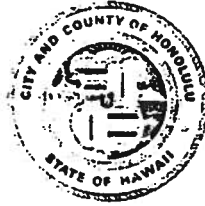
Gary M. Slovin
GARY M. SLOVIN
Corporation Counsel

MCAT:fyu

L. DEPARTMENT OF THE CORPORATION COUNSEL
CITY AND COUNTY OF HONOLULU

HONOLULU, HAWAII 96813

EILEEN R. ANDERSON
MAYOR



GARY M. SLOVIN
CORPORATION COUNSEL

STANLEY D. SUYAT
FIRST DEPUTY

October 12, 1983

MEMORANDUM

TO: ROY H. TANJI, DIRECTOR AND BUILDING SUPERINTENDENT

FROM: STEVEN S. C. LIM, DEPUTY CORPORATION COUNSEL

SUBJECT: PUBLIC RECORDS: BUILDING PERMIT PLANS

This letter is in response to your oral inquiry of October 7, 1983, in which you requested that our office discuss the issue of whether or not building permit plans, prior to issuance of the building permit, fall within the definition of "public records," subject to disclosure pursuant to Section 92-50, Hawaii Revised Statutes [HRS]. That section states:

§92-50 Definition. As used in this part, '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.

We answer in the negative. For purposes of expediting this request, we will limit the discussion of the legal issues to a brief summary. Should your Department require a comprehensive discussion of the issues at a later date, please contact our office.

We understand that the Building Department's present policy of nondisclosure of plans and specifications, prior to issuance of the building permit, is based upon (1) a prior Corporation Counsel opinion, and (2) Section 3-1(a)(2), Rules and Regulations Governing the

M 83-54

475

MEMORANDUM

TO: ROY H. TANJI

-2-

October 12, 1983

Accessibility, Maintenance and Storage of Public and Confidential Records of all City Agencies, Managing Director, City and County of Honolulu (1978), which provides that applications for permits are confidential records not open to public scrutiny.

Our Department previously issued an opinion (SR 73-4) that building permit plans were not public records prior to approval of the permit. The basis for that opinion was (1) that the specifications and design detail of the plans were subject to changes during the review process, and were, therefore, not final products until approved; (2) that the plans were not "required to be kept by law" where the permit was not issued, pursuant to then Section 302(b) of the Uniform Building Code of 1970; and (3) that because the applicant could withdraw his application and plans at any point prior to issuance of the permit, they were the private property of the applicant and did not become public records until kept by the Building Department after issuance of the permit. Upon further research, the second basis of SR 73-4 has been discovered to be incorrect, and that particular basis for the opinion is hereby overruled in part. Nevertheless, the Building Department's past and present policy has been to dispose of all plans for unissued permits.

Although there is no appellate case law in Hawaii discussing the issue of whether building permit plans are public records, recent cases in the Circuit Court of the First Circuit, State of Hawaii, have touched upon the issue.

In the one case that specifically deals with disclosure of building permit applications and plans,¹ the court ordered disclosure of the documents, but did

¹Pauoa-Pacific Heights Community Group, et al. v. Building Department, City and County of Honolulu, et al., Civil No. 59632 (Hawaii 1st Cir. 1980). Although the case was appealed to the Hawaii Supreme Court and later dismissed by the Court because there was no certification of the issues pursuant to Rule 54, Hawaii Rules of Civil Procedure, the issues raised did not involve the request for inspection of the building permit application and plans. Id., Hawaii Sup. Ct. No. 7907 (Order Dismissing Appeal filed May 16, 1983).

MEMORANDUM

TO: ROY H. TANJI


-3-

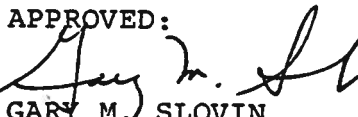
October 12, 1983

not classify them as public records. Although the issue of whether the application and plans were public records was briefed by counsel, the court did not address whether they were public records under Section 92-50, HRS, in its Order.²

In summary, the plans and specifications that accompany applications for building permits are not classified as "public records," subject to disclosure, until after the issuance of the permit. If the disclosure of such plans and specifications prior to issuance of the permit cannot be obtained voluntarily through the applicant for the permit, the recourse should be through proper application to the circuit court.

If there are any further questions in this regard, please feel free to call me at X4929.

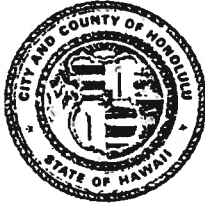

STEVEN S. C. LIM
Deputy Corporation Counsel

APPROVED:

GARY M. SLOVIN
Corporation Counsel

SSCL:ct

²The January 9, 1980 Order in the Pauoa-Pacific case, supra, did not even mention the term "public records" or Section 92-50, HRS. Compare Honolulu Advertiser, Inc. v. George Yuen, Director of Health; and the State of Hawaii, S.P. No. 4997, (Hawaii 1st Cir. 1979). The court's Order of October 10, 1979, stated, "the refusal of Defendants to make the requested records available to Plaintiff was without good cause and in derogation of HRS 92-50." (Emphasis added) The same judge issued the Order Allowing Inspection in the Pauoa-Pacific case, supra, just three months after the Honolulu Advertiser case. The question of why the second Order did not classify the building permit application and plans as public records remains unanswered.

DEPARTMENT OF THE CORPORATION COUNSEL
CITY AND COUNTY OF HONOLULU
HONOLULU, HAWAII 96813



GARY M. SLOVIN
CORPORATION COUNSEL

STANLEY D. SUYAT
FIRST DEPUTY

March 1, 1983

MEMORANDUM

TO: KAZU HAYASHIDA, MANAGER AND CHIEF ENGINEER
BOARD OF WATER SUPPLY

FROM: KATHLEEN A. CALLAGHAN, DEPUTY CORPORATION COUNSEL

SUBJECT: APPLICABILITY OF HRS CHAPTERS 92 AND 92E TO REQUEST
FOR ACCESS TO WATER SERVICE CONSUMPTION DATA

This is in response to your letter of February 1, 1983, inquiring whether water consumption data for the tenants of Campbell Industrial Park, Ewa Beach, Oahu, may be furnished by the Board of Water Supply in response to a request by the landlord of those tenants, the Estate of James Campbell, Deceased, without the tenants' written permission.

We answer that the above-described records cannot be released.

I. STATEMENT OF FACTS

We understand the facts to be as follows:

The Estate of James Campbell, Deceased (hereinafter the "Estate"), has requested the Board of Water Supply (hereinafter "the Board") to provide it with water consumption data pertaining to its tenants in Campbell Industrial Park. The Estate is interested in analyzing this data and utilizing its findings in projecting future development in that area. The Estate is requesting data containing the name, location, service number and water consumption figures for particular billing periods of each tenant. The Estate is not, however, requesting information from the Board concerning the credit history of these tenants.

M 83-13

MEMORANDUM

TO: KAZU HAYASHIDA

-2-

March 1, 1983

The present practice of the Board regarding the disclosure of water consumption data in such a situation is that the information is only released to the requesting water service¹ consumer.² It is the Board's policy that if such requests are received from persons other than the water service consumer, the information is furnished only with the water service consumer's written permission.

We must now analyze the nature of these records in light of Chapter 92, Hawaii Revised Statutes (hereinafter "HRS"), concerning "public records," and Chapter 92E, HRS, which limits the release of "public records," which also constitute "personal records."

II. CONSUMER'S WATER CONSUMPTION RECORDS CONSTITUTE A "PUBLIC RECORD," BUT CANNOT BE RELEASED TO THE ESTATE SINCE IT ALSO CONSTITUTES A "PERSONAL RECORD"

A. Public Records

In Chapter 92, HRS, entitled, "Public Agency Meetings and Records," the legislature declares that "it is the policy of this State that the formation and conduct of public policy--discussions, deliberations, decisions and action of governmental agencies--shall be conducted as openly as possible."³ Section 92-1, HRS. In implementing this policy, Chapter 92, HRS, provides the public with access to certain "public records."

¹The Rules and Regulations of the Board of Water Supply (as last amended in 1982) define the term "water service" to include the delivery of water to consumers.

²The Rules and Regulations of the Board of Water Supply define the term "consumer" to mean "the person, firm, corporation, association, governmental department, or other legal entity whose name appears on the records of the Board of Water Supply as the party responsible and liable for receiving water service." This term shall have the same meaning as used herein.

³Section 92-71, HRS, provides that the provisions contained in Chapter 92 are applicable to the City and County of Honolulu.

MEMORANDUM

TO: KAZU HAYASHIDA

-3-

March 1, 1983

Section 92-50, HRS, provides that:

As used in this part, '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.
[Emphasis added]

We believe that the water consumption records pertaining to each consumer at Campbell Industrial Park constitute a public record within the meaning of Section 92-50, HRS.

Section 92-51, HRS, requires that "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 . . . or when such records do not relate to a matter in violation of law and are deemed necessary for the protection of a [sic] character or reputation of any person." [Emphasis added] It is our opinion that the records in question do not fall within either one of the exceptions set forth in Section 92-51, which would restrict the public's right to inspect such records.

B. Personal Records

However, we believe that the water consumption records at issue constitute a "personal record" within the meaning of Section 92E-1(3), HRS, which provides as follows:

- (3) 'Personal record' means any 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

MEMORANDUM

TO: KAZU HAYASHIDA

-4-

March 1, 1983

reference to the individual's name, identifying number, symbol, or other identifying particular assigned to the individual, such as finger or voice print or a photograph. 'Personal record' includes a 'public record,' as defined under section 92-50.
[Emphasis added]

The law provides, with certain exceptions, an individual access to his or her own personal records in a reasonably prompt manner and in a reasonably intelligible form. Sections 92E-2 and 92E-3, HRS. However, Section 92E-4, HRS, places limitations on the public's access to personal records pertaining to other persons. Specifically, Section 92E-4 provides as follows:

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.

[Emphasis added]

The Estate has not been designated by any tenant of Campbell Industrial Park as its duly authorized agent and, thus, is not entitled to the release of the records pursuant to subsection (1) of Section 92E-4. Nor do any of the other three exceptions set forth in Section 92E-4 apply in this case.

MEMORANDUM

TO: KAZU HAYASHIDA

-5-

March 1, 1983

III. CONCLUSION

We conclude that although a consumer's water consumption records are "public records" within the meaning of Section 92-50, HRS, the disclosure of such information is not permitted by law since the records also constitute "personal records," and none of the exceptions in Section 92E-4 allowing the disclosure of such records to a person other than one to whom the record pertains apply in this situation.

Consequently, the Board is correct in refusing to release this information to the Estate. However, in the event that the Estate presents a written statement from any consumer authorizing the release of the aforementioned water consumption data, we suggest that the Board require that the written consent conform to the requirements set forth in the Managing Director's Rules and Regulations Governing the Accessibility, Maintenance and Storage of Public and Confidential Records of All City Agencies (Rule 3-1(b)(2); promulgated pursuant to Ordinance No. 78-21) since no rules and regulations have yet been adopted implementing Chapter 92E, HRS.

If you have any questions concerning this memorandum, please contact the undersigned at 523-4872.

Kathleen A. Callaghan

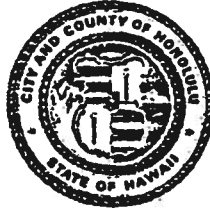
KATHLEEN A. CALLAGHAN
Deputy Corporation Counsel

APPROVED:

Gary M. Slovin
GARY M. SLOVIN
Corporation Counsel

KAC:yz

DEPARTMENT OF THE CORPORATION COUNSEL
CITY AND COUNTY OF HONOLULU
HONOLULU, HAWAII 96813



EILEEN R. ANDERSON
MAYOR

GARY M. SLOVIN
CORPORATION COUNSEL

STANLEY D. SUYAT
FIRST DEPUTY

January 19, 1983

MEMORANDUM

TO: HELEN H. BURNSIDE, DIRECTOR OF HUMAN RESOURCES

FROM: MARIA C. AVINANTE-TANAKA, DEPUTY CORPORATION COUNSEL

SUBJECT: REQUEST FROM SENATOR NEIL ABERCROMBIE

This is in response to your letter of December 1, 1982, inquiring whether a copy of the disposition of the matter of Gary Elam vs. the City and County of Honolulu may be released to Senator Abercrombie's Office. It is our understanding that Senator Abercrombie's request was made by his office and not pursuant to a Senate legislative, or Senate committee, investigation.

We answer that this record cannot be released.

We understand that the request would involve the releasing of a letter sent by Arthur Douglas, a grant officer for the Employment and Training Administration, to Mayor Eileen Anderson and your office. This letter involved several complaints with respect to alleged violations of CETA hiring practices by certain individuals and with respect to the final determination of the federal grant officer. The letter contains information about several individuals regarding their employment history and, in particular, how they acquired their jobs. In some instances several names are used in a context which could be damaging to the character and reputation of the individuals involved. The grant officer found no federal violation for certain individuals and in other cases found sufficient evidence to

M 83-6

MEMORANDUM

TO: HELEN H. BURNSIDE

-2-

January 19, 1983

determine a violation had occurred. For those individuals that were found not to have violated federal CETA regulation, this document would be deemed confidential. *

The matter involved should be evaluated first to determine whether or not it is a "public record," as defined in Section 92-50, and second, to determine whether or not the matter falls within the statutory exceptions.

Public Record

Section 92-50 defines public record as "any written or printed report, book or paper, map or plan" which is the property of the State or of a county and their respective subdivisions and boards and (1) in which an entry has been made or is required to be made by law, or (2) which any public officer or employee has received or is required to receive for filing. In our view, the letter in question is such a "public record." However, a document falling within the aforesaid definition is not subject to public inspection if it falls within certain exceptions. These exceptions are as follows:

* The Managing Director's Rules and Regulations governing the accessibility, maintenance and storage of public and confidential records of all City agencies provides that records deemed confidential are:

1. Records specifically exempted from public access by federal, state or local law, such as:

. . . .

B. Records which do not relate to a matter in violation of law and the confidentiality of which are deemed by the City Attorney to be necessary for the protection of the character or reputation of any person (HRS § 92-51);
[Emphasis added]

MEMORANDUM

TO: HELEN H. BURNSIDE

-3-

January 19, 1983

1. Section 92-50, HRS, excepts any "records which invade the right of privacy of an individual."

2. Section 92-51 excepts, among other things, public records which may not be inspected under State or federal law and records which do not relate to a matter in violation of law and are deemed necessary for the protection of the character and reputation of any person.

3. Chapter 92E, HRS, limits the release of "public records" which are also "personal records."

Personal Record

It is our opinion that it is more than merely arguable that the letter in question falls within the HRS Section 92E-1(3) definition of a "personal record," which read as follows:

- 3) 'Personal record' means any item, collection, or grouping or 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. [Emphasis added]

A. Public Access to Personal Record

Section 92E-4 protects against public access to personal record, providing as follows:

§92E-4. . . 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:

MEMORANDUM

TO: HELEN H. BURNSIDE

-4-

January 19, 1983

- (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.

B. Agency's Access to Personal Record

Section 92E-5 protects against the disclosure of personal records to other agencies, providing as follows:

No agency may disclose or authorize disclosure of personal record to any other agency unless the disclosure is:

- (1) Compatible with the purpose for which the information was collected or obtained;
- (2) Consistent with the conditions or reasonable expectations of use and disclosure under which the information was provided;
- (3) Reasonably appears to be proper for the performance of the requesting agency's duties and functions;

.

- (6) To the legislature or any committee or subcommittee thereof;
- (7) Pursuant to an order of a court of competent jurisdiction;. . . .

MEMORANDUM

TO: HELEN H. BURNSIDE

-5-

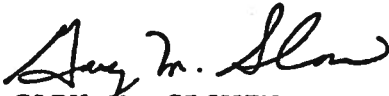
January 19, 1983

We therefore conclude that while the grant officer's letter to the City is a public record, the disclosure of this matter is not permitted since 1) Section 92-51, HRS, prohibits inspection of a public record which is not related to a matter in violation of law and is necessary for the protection of the character and reputation of, in this case, several individuals; and 2) since this is also found to be a personal record, none of the requirements of HRS Section 92E-5 can be met.



MARIA C. AVINANTE-TANAKA
Deputy Corporation Counsel

APPROVED:



GARY M. SLOVIN
Corporation Counsel

MCAT:as

cc: Managing Director

DEPARTMENT OF THE CORPORATION COUNSEL
CITY AND COUNTY OF HONOLULU
HONOLULU, HAWAII 96813



EILEEN R. ANDERSON
MAYOR

GARY M. SLOVIN
CORPORATION COUNSEL

STANLEY D. SUYAT
FIRST DEPUTY

November 23, 1982

MEMORANDUM

TO: WILFRED M. MITA, CITY CLERK

FROM: DONNA Y. L. LEONG, DEPUTY CORPORATION COUNSEL

SUBJECT: PUBLIC RECORD REQUIREMENT OF CHAPTER 92, HRS, AS
APPLIED TO VOTER CHALLENGES IN AN ELECTION

In your letter dated October 25, 1982, you asked when, if ever, does a written challenge by a voter to a person's voter registration become a public record. In addition, pursuant to our conversation, we understand that you are also asking (1) whether the file which you compiled during the course of your investigation of alleged voter irregularities is a public record, and (2) whether the result of the investigation, that is, the compiled list of stricken voters, is a public record. Pursuant to a letter to you from Charles Marsland dated November 8, 1982, we also understand that there is an on-going investigation by the Prosecutor's Office of alleged voter fraud based on the challenge.

As to the written challenge to the voter registration, we answer that the challenge is not a public record at least during the course of your investigation and possibly during the course of the criminal investigation. As to your investigative file, we answer that inasmuch as the file contains confidential investigative techniques, it is not a public record. Finally, as to the list of stricken voters compiled as the result of your investigation, we answer that it normally would have been a public record, but since there is an on-going criminal investigation, it is not a public record at this time.

M 82-95

MEMORANDUM

TO: WILFRED M. MITA

-2-

November 23, 1982

As background information, we cite several pertinent sections of the Hawaii Revised Statutes (HRS). Section 11-97 of the HRS provides:

Records open to inspection. The register of voters and all records appertaining to the registry of voters, or to any election, in the possession of the board of registration, the precinct officials, the chief election officer or the clerk shall, at all reasonable times, be open to the inspection of any voter.

Section 92-50, HRS, titled, "Public Agency Meetings and Records," provides:

Definition. As used in this part, '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.

Section 92-51 provides:

Public records; available for inspection. 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 [sic] character or reputation of any person.

MEMORANDUM

TO: WILFRED M. MITA

-3-

November 23, 1982

Section 92-71 makes the provisions contained in Chapter 92 applicable to the City and County of Honolulu. Generally, statutes requiring governmental agencies to conduct their business in open meetings are liberally construed and exceptions to them are strictly construed. Sands, Statutory Construction, Vol. 3, § 70.01 (4th Ed.); HRS § 92-1. With this general rule in mind, discussion focuses on each of the subject records.

I. Voter Challenge

Clearly, a written challenge by a voter pursuant to HRS Section 11-25, to the right of another person to vote falls within the definition of a public record unless it can be shown that it invades the right of privacy of an individual. The federal Freedom of Information Act (FOIA), codified in 5 U.S.C. § 552, et. seq., has a provision which excepts from public disclosure investigatory records compiled for law enforcement purposes, but only, among other things, to the extent that the production of such records would "constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552 (b) (7) (C).

Cases which have construed this provision have applied a balancing test to determine whether there has been an unwarranted invasion of personal privacy. The individual's interest in maintaining his privacy has been weighed against the public's interest in disclosure. In the following cases, the courts held that revealing the identities of persons who were the subjects of or witnesses in F.B.I. investigations together with any information that might identify these individuals would constitute an unwarranted invasion of personal privacy. Lamont v. Dept. of Justice, 475 F.Supp. 761, 776-778 (S.D. N.Y. 1979); Ferguson v. Kelly, 448 F.Supp. 919, 922 (N.D. Ill. 1978); Tarnopol v. F.B.I., 442 F.Supp. 5, 7 (D.C. D.C. 1977). In Lamont the court reasoned that disclosure would likely cause embarrassment or harassment to the individual, either because sensitive, derogatory, or intimate personal information about the individual is contained in the file or because the person's cooperation with the FBI would itself prove embarrassing.

MEMORANDUM

TO: WILFRED M. MITA

-4-

November 23, 1982

Thus, the names of and any information that might identify the persons challenged during the pendency of your investigation are exempt from disclosure under the definition of "public record" inasmuch as they are allegations which could cause embarrassment to the persons challenged. Whereas the FOIA only protects against unwarranted invasions of privacy, Hawaii's law is not qualified. Any record which invades the right of privacy of an individual is not a public record. HRS § 92-50. Thus, in Hawaii, the scale would seem to tip even further in favor of the personal right to privacy and against the public's right to disclosure.

In addition, the county attorney may determine which records to withhold when such records pertain to the preparation of the prosecution or defense of any action or proceeding to which the State or county may be a party. We note that this exception to the general rule of disclosure applies only until the commencement of the action or proceeding. HRS § 92-51; Standing Committee Report No. 135 for Senate Bill 30, later enacted as Act 43, SLH 1959, and codified in HRS Section 92-1(2), the predecessor of HRS Section 92-51. Pursuant to HRS Section 11-26, the clerk's ruling on the challenge may be appealed to the Board of Registration of the respective county. Subsequently, the Board's ruling may be appealed to the State Supreme Court. HRS § 11-51. Since HRS Section 92-51 specifically includes "proceedings," the section is not limited to actions before a court of law and the clerk's investigation and subsequent appeal to the Board of Registration fall within the exception.

Since there are no guidelines for the county attorneys in determining which records to withhold, it is helpful to look to the FOIA. One exception of the FOIA applies to,

[I]nvestigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source . . . (E) disclose investigative techniques and procedures, 5 U.S.C. § 552 (b) (7).

MEMORANDUM

TO: WILFRED M. MITA

-5-

November 23, 1982

You previously informed us that public disclosure of the names of those persons challenged before completion of the investigation would have interfered with your investigation. Based on this information, we concluded that the challenge was not a public record at least until the completion of your investigation.

It is possible that the disclosure of the names of persons challenged would interfere with or create unfair publicity before the criminal law proceedings. At that point, however, the Prosecutor's Office must determine whether or not to further withhold the challenged names.

II. Investigative File

The investigative file is not a public record. Our conclusion is based on three independent rationales: (1) there are records in the file which invade the right of privacy of an individual; (2) prior to the commencement of a criminal prosecution or Board of Registration proceeding, the file pertains to the preparation of the prosecution of either case; or (3) there are sensitive matters which concern public safety or security.

The right of privacy and preparation of the prosecution of an action or proceeding exceptions have been analyzed in the previous section. You have indicated that the investigation required "delving in depth into an individual's privacy," and have clarified the statement to mean that the file contains information about an individual's intimate personal life. On that basis, we conclude that the investigative file is exempt from the definition of a public record inasmuch as disclosure would invade the right of privacy of an individual.

You have also indicated that the investigative file is being used by the Prosecutor's Office to prepare for the potential prosecution of the criminal case. Had there not been a criminal case, the file would have been excepted since it pertained to the voter irregularity proceeding before the Board of Registration. This exception would have applied only until the commencement of the proceeding. There being a criminal proceeding, the file continues to not be subject to disclosure under this exception. This

MEMORANDUM

TO: WILFRED M. MITA

-6-

November 23, 1982

exception again expires upon the commencement of the criminal action.

Finally, the file is excepted from disclosure based on the legislative history of the public records law. The original public records act of 1959 allowed executive sessions only by a 2/3 vote of its membership. HRS Chapter 92; § 92-3 (1959). The Senate Committee on the Judiciary, in recommending the passage of Senate Bill 30, later enacted as Act 43, S.L.H. 1959, reported as follows:

Your Committee believes that there are only a few circumstances which would justify any board or commission or other agency of government to hold its meetings in executive or secret session and these circumstances are spelled out in the Bill.

With respect to inspection of public records, your Committee believes that the same types of matters should control the right of the public to inspect. . . . Your Committee also believes that minutes of any executive session should not become public records with the right of inspection until the lawful purpose of the executive session no longer requires secrecy.

In 1975 the Legislature limited the matters for which an executive meeting could be closed. HRS § 92-4. Among those matters were the investigation of criminal misconduct and the consideration of sensitive matters related to public safety or security. HRS § 92-5. The rationale for nondisclosure based on criminal investigation grounds has been discussed previously.

With respect to the sensitive matters exception, we note there is no definition of such matters. Once again, we look to the FOIA for guidance. The FOIA specifically exempts from disclosure investigatory records to the extent that production of such records would, among other things, disclose investigative techniques and procedures. The rationale for this exemption is to protect future law enforcement efforts by an agency. Frankel v. S.E.C., 460 F.2d 813 (2d Cir. 1972); cert. den. 409 U.S. 889, 93 S.Ct. 125, 34 L.Ed.2d 146 (1972).

MEMORANDUM

TO: WILFRED M. MITA

-7-

November 23, 1982

You have informed us that the investigative file contains confidential investigative techniques and procedures, the disclosure of which would hamper your office in the course of future investigations of voter irregularity. Based on this information, we conclude that the file contains sensitive matters related to public safety or security and is exempt from disclosure. We note that the purpose of nondisclosure, and therefore nondisclosure, continues even though an individual case may be concluded.

III. List of Stricken Voters

The compiled list of voters stricken as a result of your investigation would normally have been a public record. The court would have to weigh the individual's interest in privacy, that is, his interest in suppressing undesired publicity, against the public's interest in knowing about the voting irregularity. In our opinion, the court would probably find in favor of the public's right to know.

The compiled list would not fall within the exception relating to the preparation of the prosecution of the voter irregularity case since the exception applies only "prior to its commencement." That exception, however, may be applicable and the list may not be a public record if it pertains to the preparation of the prosecution of the criminal case. Given that the Prosecutor's Office has requested that the list not be disclosed because it does pertain to the criminal case, we conclude that it is not a public record at this time.

CONCLUSION

The challenge to the registration of certain persons to vote is not a public record at least through the course of your investigation because disclosure would invade the right of privacy of the persons challenged and also because revelation would interfere with your enforcement proceedings. The clerk's investigative file is not a public record because disclosure would invade the right to privacy of an individual, the file pertains to the prosecution of an action or proceeding to which the State or county may be a

MEMORANDUM

TO: WILFRED M. MITA

-8-

November 23, 1982

party or because the file contains confidential investigative techniques or procedures.

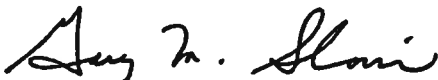
Once the clerk's investigation of voter irregularities is concluded and the list of stricken voters is compiled, the results of the investigation would normally be public records because the public's right to know about the voting irregularities outweighs the stricken voters' right to privacy. The Prosecutor's Office would then determine which records to withhold from public inspection for the purpose of the criminal prosecution.

If you have any questions, please call me at x.4065.



DONNA Y. L. LEONG
Deputy Corporation Counsel

APPROVED:

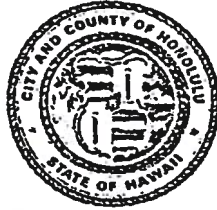


GARY M. SLOVIN
Corporation Counsel

DYLL:as

DEPARTMENT OF THE CORPORATION COUNSEL
CITY AND COUNTY OF HONOLULU
HONOLULU, HAWAII 96813

LEEN R. ANDERSON
MAYOR



GARY M. SLOVIN
CORPORATION COUNSEL

May 21, 1981

MEMORANDUM

TO: PETER D. LEONG, DIRECTOR
DEPARTMENT OF FINANCE

ATTN: DENNIS KAMIMURA
DIVISION OF MOTOR VEHICLE LICENSING

FROM: CHARLOTTE J. DUARTE, DEPUTY CORPORATION COUNSEL

SUBJECT: 1. PROCEDURES RE TAXICAB LICENSE WAITING LISTS;
2. INTERPRETATION OF SECTION 12-1.16(c), ROH,
RE LEASING OF TAXICAB LICENSES

This is in response to your written request of June 9, 1980, and oral request of February 17, 1981, in which you posed the following questions. We have rephrased your questions to better delineate the pertinent issues:

1. Is the waiting list for taxicab licenses maintained by the Division of Motor Vehicles and Licensing a public record subject to disclosure?
2. Under Section 12-1.16, Revised Ordinances of Honolulu 1978, as amended [ROH], is it permissible for lessees or purchasers to operate a taxicab business under the license of the named lessor or seller, with or without a power of attorney?

We answer both questions in the negative.

Regarding your first question, we understand the facts to be as follows:

M 81-29

496

MEMORANDUM

TO: PETER D. LEONG

-2-

May 21, 1981

There are a limited number of taxicab licenses which may be issued annually by the Division of Motor Vehicle Licensing, Department of Finance [DMV]. Unfortunately, the number of available licenses is always less than the number of applicants. Out of fairness to these applicants, the division established a waiting list to enable the division to keep track of applications and distribute licenses fairly as they become available.

This list is not maintained pursuant to a statute, ordinance, rule or regulation but is purely administrative in nature, used only for purposes of internal organization and record keeping. In addition, an applicant can now receive information regarding his position or ranking on the list but is not provided with the names or positions of other applicants who may also be on the list.

A public record is defined in Section 92-50, Hawaii Revised Statutes [HRS]:

As used in this part, '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.

In applying Section 92-50, HRS, to these facts, the waiting list clearly does not qualify as a public record requiring disclosure. However, disclosure is subject to Chapter 92E, HRS, Fair Information Practice, Confidentiality of Personal Records.

Section 92E-2, HRS, permits the disclosure of personal information on records to the individual to whom it pertains, subject to the limitations of Section 92E-3, HRS. Without further discussion of this section, it is enough to say that the information on the waiting list is not included in this section and must, therefore, be disclosed to the person to whom it pertains. This is so though the list is

MEMORANDUM

TO: PETER D. LEONG

-3-

May 21, 1981

not a public record. However, that person has no right to information on the list as it pertains to others. In fact, such a disclosure without the permission of the other applicants would constitute a violation by the DMV of Chapter 92E, HRS. See Section 92E-4, HRS.

Therefore, the waiting list is not a public record requiring disclosure though the applicant has a right to know his own position on the list. The procedures currently utilized by the DMV are proper and should be continued.

We now discuss your second question.

We understand the facts to be as follows:

Current taxicab licensees are attempting to use various methods to enable other persons to operate taxicab businesses without a license of their own. Such methods include leasing for an annual fee or sale of the right to conduct a taxicab business to prospective taxicab operators. In addition, such sales or leases are accompanied with powers of attorney enabling either the licensee, or lessee or purchaser to renew the license without changing the name of the licensee, thereby, arguably, avoiding the non-transferability provisions of Section 12-1.16, ROH. These powers of attorney may also permit the lessee or purchaser to further alienate the license to third parties.

We understand that this is the result of the limitations established by the City Council on the number of taxicab licenses which may be issued annually. As a result of these limitations, a licensee who would ordinarily be relinquishing an unprofitable license stands to make a profit by retaining the license and leasing or selling with a power of attorney since, theoretically, prospective operators would be willing to pay inflated prices for a valuable commodity. This practice may be seen as unfair to those applicants who are on the waiting list and unable to obtain by lease or purchase the use of the license of a current licensee.

Because of this leasing practice, DMV has effectively lost regulatory control of the industry. Applicable ordinances and rules and regulations can be enforced only against the

MEMORANDUM

TO: PETER D. LEONG

-4-

May 21, 1981

named licensee and cannot be enforced against the lessee or purchaser if not named as licensee. In addition, the licensee will commonly leave the jurisdiction once he has found a lessee or purchaser, leaving the City with no one against whom the ordinances can be enforced.

ROH: Transferability is addressed in Section 12-1.16(a),

The Director of Finance shall issue taxicab licenses and collect the required fees in accordance with the provisions of the law. The issued licenses shall not be transferable. [Emphasis added]

It is clear that, under Section 12-1.16(a), a taxicab license cannot be transferred. In addition, such a transfer subjects the licensee to criminal misdemeanor penalties of \$1,000.00 fine, imprisonment of up to one year, or both fine and imprisonment, under Section 12-1.18, ROH.

Licensees argue that the current practices are permissible as there is no transfer of the license taking place. The licensee's name remains on the license and, when armed with a power of attorney, the lessee or purchaser can stand in the shoes of the licensee and can operate the business as though he were the licensee.

These arguments are irrelevant to the issue at hand; that is, the authority of the Director of Finance to regulate this industry.

Section 70-75, HRS, granted the City Council the option to regulate the taxicab industry. This section provides:

§ 70-75 Passenger vehicles. Where not within the jurisdiction of the public utilities commission, the city council may regulate the use of public passenger vehicles, limit the number of public passenger vehicles when necessary in the interest of public safety, and fix the rates to be charged for the transportation of persons or personal baggage. [Emphasis added]

MEMORANDUM

TO: PETER D. LEONG

-5-

May 21, 1981

The Council exercised its option by enacting Chapter 12, Article 1, ROH. Council's intent in enacting this article is clear and unambiguous as evidenced by the text of the ordinance itself, the best evidence available regarding the intent. 2A Sutherland Statutory Construction, § 46.03 (4th Ed.). The Director of Finance has the exclusive authority to issue taxicab business licenses. The non-transferability provision of Section 12-1.16, ROH, merely guarantees that the Director, or persons duly authorized by him, shall determine who may operate a taxicab business, notwithstanding private agreements to the contrary.

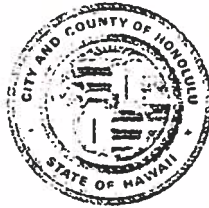
Licenses are personal in nature, similar to a special privilege entitling the licensee to do something he would not be entitled to do without the license. A license grants leave to do something that the licensor could prevent. As such, a license is non-transferable unless otherwise authorized. Adams v. Ohio Dept. of Health (CP), 5 Ohio Ops.3d 148, 356 N.E.2d 324.

In applying this principle to the instant case, a taxicab business license is issued to a particular person and permits that person only to operate a specific taxicab. All persons who operate taxicabs must apply for and receive a license to do so from the Director of Finance. The operator cannot acquire a license, that is, the authority to operate a taxicab business, from a current licensee through private agreement.

This is analogous to the regulation of businesses dispensing liquor. The Honolulu Liquor Commission regulates an otherwise private area of business requiring that a person first obtain a liquor license from the Commission before dispensing liquor. For example, a liquor store owner can sell or lease his establishment to another person, but the purchaser or lessee cannot himself operate the business under the owner's license. Rather, he must obtain his own license to do so. This requirement is not eliminated by the lease or purchase.

In much the same way, the authority of the Director of Finance cannot be circumvented or altered by agreement between private parties since the Director, under power of statute and ordinance, reserves the exclusive right to determine who shall operate a taxicab business. Therefore,

DEPARTMENT OF THE CORPORATION COUNSEL
CITY AND COUNTY OF HONOLULU
HONOLULU, HAWAII 96813



BARRY CHUNG
CORPORATION COUNSEL

November 30, 1977

MEMORANDUM

TO : GEORGE H. TAKABAYASHI, CHAIRMAN
LIQUOR COMMISSION

FROM : ROBERT E. TERUYA, DEPUTY CORPORATION COUNSEL

SUBJECT: RECORDS IN THE LIQUOR COMMISSION SUBJECT TO
PUBLIC INSPECTION

This is in response to a letter dated September 14, 1977, from the Liquor Commission, requesting an opinion as to whether the list of records described in the letter which are kept by the Commission in performing its function are open for public inspection. The list includes the following records:

1. Minutes of Commission meetings
2. Licensee file folders
 - a. Financial condition of applicant
 - b. Tax clearance for Department of Taxation
 - c. Personal history of all persons named in application
 - d. Partnership agreement, if applicable
 - e. Certificate of Incorporation and Articles of Incorporation
 - f. Map of properties within 500 feet of premises
 - g. List of names and addresses of property owners and lessees of records of properties within 500 feet of premises
 - h. Floor plans of premises
 - i. In event of transfer or sale, the amount of consideration
 - j. Communications to and from the Commission with the public

MEMORANDUM

TO: GEORGE H. TAKABAYASHI, CHAIRMAN
LIQUOR COMMISSION

-2- November 30, 1977

- k. Citations and Notifications issued by the Commission
- 1. Actions by the Commission
- 3. Gross Liquor Sales Reports
- 4. Employees Registration Records
- 5. Wholesaler's price posting
- 6. Record of citations issued to each of the premises
- 7. Intra-office and interdepartmental communications¹

The laws relating to intoxicating liquor are found in HRS Chapter 281. Section 281-14 thereof provides:

Sec. 281-14 Records. The liquor commission shall ensure that complete records are kept of all commission meetings, proceedings, and acts with reference to all business pertaining to licenses issued, suspended, and revoked, moneys received as license fees and otherwise, and disbursements by the commission or under its authority, and these records shall be open for examination by the public. The records may be destroyed as provided in section 46-43.

RCH Section 12-105 which applies to all City agencies provides:

Section 12-105. 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,

¹The list has been slightly altered after discussion with the Commission staff.

MEMORANDUM

TO: GEORGE H. TAKABAYASHI, CHAIRMAN
LIQUOR COMMISSION

-3- November 30, 1977

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.

Additional statutory provisions relating to public records applicable to both State and county agencies are found in HRS Sections 92-50 and 92-51. They provide as follows:

§92-50 Definition. As used in this part, '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.

§92-51 Public records; available for inspection; cost of copies. 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.

MEMORANDUM

TO: GEORGE H. TAKABAYASHI, CHAIRMAN
LIQUOR COMMISSION

-4- November 30, 1977

Certified copies of extracts from public records shall be given by the officer having the same in custody to any person demanding the same and paying or tendering twenty cents per folio of one hundred words for such copies or extracts.²

Reading the foregoing provisions in relation to each other, the law regarding inspection of public records in this jurisdiction appears to be as follows:

1. Any public record, with certain exceptions, is subject to public inspection.
2. The exceptions include:
 - a. Records pertaining 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 as determined by their respective attorneys.
 - b. Records which do not relate to a matter in violation of law and are deemed necessary for the protection of the character or reputation of any person as determined by such attorneys.
3. In addition, the following records may also be withheld from public inspection:
 - a. Records which invade the privacy of an individual.
 - b. Records of the Police Department or of the Prosecuting Attorney (both of the City) unless permission is given by the Chief of Police or the Prosecuting Attorney, except in the case of traffic accident reports where inspection is permitted to certain designated persons.

In previous opinions of this Department, "public records" as defined in HRS Section 92-50 has been construed to be limited to those records that are required to be kept

²We believe this section supplements RCH Section 12-105 and provides additional grounds whereby certain records may be withheld from public inspection.

MEMORANDUM

TO: GEORGE H. TAKABAYASHI, CHAIRMAN
LIQUOR COMMISSION

-5- November 30, 1977

by law.³ The phrase, "records which invade the right of privacy of an individual," in the same section is deemed to include the following types of records:

[E]xaminations, public welfare lists, unemployment compensation lists, application for licenses and other similar records.⁴ [Emphasis added]

Thus, as applied to the Liquor Commission, an application for a liquor license, including supporting documents required to be filed with such application would be exempted from the definition of "public records."⁵

Turning now to the specific items mentioned in your request, it is our view that they should be designated as follows:

³SR 73-4; M 72-68.

⁴Standing Committee Report No. 594 of the Committee on Judiciary of the State House of Representatives on S. B. No. 30, enacted as Act 43, Session Laws of Hawaii, Regular Session, 1959, containing the provisions of HRS Section 92-50. Pertinent part of the report provides: "Your Committee intends that records which invade the right of privacy of a person should remain confidential. Among the list of records which the Committee felt should remain confidential were examinations, public welfare lists, unemployment compensation lists, application for licenses and other similar records. Your Committee also does not intend to modify any common law or statutory privilege which exists by reason of a confidential relationship."

⁵We see no reason for not including accompanying documents inasmuch as they are part of the application. See Op. No. 75-7 of the Department of the Attorney General, State of Hawaii, wherein an application and accompanying documents for a motion picture operator's license were construed to be records which invade the right of privacy of an individual and, therefore, not subject to public inspection.

MEMORANDUM

TO: GEORGE H. TAKABAYASHI, CHAIRMAN
LIQUOR COMMISSION

-6- November 30, 1977

1. Application for liquor license and accompanying documents which we understand include the following:

- a. Financial condition of applicant;
- b. Tax clearance from Department of Taxation;
- c. Personal history of all persons named in application;
- d. Partnership agreement, if applicable;
- e. Certificate of Incorporation and Articles of Incorporation;
- f. Map of properties within 500 feet of premises;
- g. List of names and addresses of property owners and lessees of records of properties within 500 feet of premises;
- h. Floor plans of premises; and
- i. In the event of transfer or sale, the amount of consideration.

Designation: Not subject to public inspection for the reason that the documents are part of an application for a liquor license. However, the documents described in b., d. though h. are open to public inspection inasmuch as they are (1) available for such inspection at other public places (for example, Department of Regulatory Agencies); (2) ascertainable by anyone making physical inspection of the premises or surrounding areas or, (3) of such nature that the privacy, character or reputation of an individual is not infringed or injured. Hence, we see no reason why such documents may not be open to public inspection.

2.
 - a. Minutes of Commission meetings.
 - b. Citations and notifications issued by the Commission.
 - c. Action by the Commission.

MEMORANDUM

TO: GEORGE H. TAKABAYASHI, CHAIRMAN
LIQUOR COMMISSION

-7- November 30, 1977

d. Wholesaler's price posting.

e. Record of citations issued to each of the premises.

Designation: Subject to public inspection for the reason that they are records required by law to be kept and do not fall within any of the exceptions hereinabove discussed. The citations and notifications are analogous to complaints and charges filed in a court of law for hearing or trial to be held thereon, which are all open to the public. Wholesaler's price posting is required by law to be filed with the Liquor Commission. A licensee, having filed such schedule, may not sell liquor at a price other than the price filed in such schedule.⁶ Thus, public inspection is necessary to enforce the requirement of this provision.

3. Gross liquor sales reports.

Designation: Not subject to public inspection. These reports contain information generally kept confidential by licensees for competitive reasons. They are similar to information included in an application for licenses which the Legislature deemed to be confidential. Thus, disclosure of these reports would tend to invade the right of privacy of the individuals concerned.

4. Employees registration records.

Designation: Not subject to public inspection. These records contain information about employees hired by liquor licensees to work on licensed premises. The furnishing of such information by employer-licensee is required under Rule 7-5 of the Liquor Commission Rules and Regulations. We understand the records for each employee include such information as: name, address, social security number, birthplace, ancestry, marital status, x-ray certificate, citizenship, criminal record (if any),⁷ age, employer, date of

⁶HRS Section 281-43.

⁷The furnishing of this information has been discontinued inasmuch as it is no longer available from the Police Department. However, there are a number of outstanding employees' records that still contain such information.

MEMORANDUM

TO: GEORGE H. TAKABAYASHI, CHAIRMAN
LIQUOR COMMISSION

-8- November 30, 1977

employment and type of job -- data which are usually kept by an employer in the employees' personnel files and generally deemed to be confidential.⁸ The fact that they are required to be furnished to the Liquor Commission does not, we believe, transform them into public records, subject to public inspection, especially since some of the items are matters which are injurious to the character or reputation, or violative of the right of privacy of the individuals concerned. The employee records are primarily for internal use by staff and commissioners.

5. Communications to and from the Commission with the public.

Designation: Obviously, the question as to whether such communications are "public records" depends on their contents and purpose. We can only advise that a preliminary determination on the question be made in light of our discussion herein, before such communications are open to public inspection.

6. Intra-office and Inter-departmental communications.

Designation: The same comment as in 5. above would apply here. Generally, since such communications (1) tend to contain preliminary data or recommendation preceding final action by the department, and (2) are not necessarily records required by law to be kept, we are of the view that they do not fall within the definition of "public records."

In conclusion, while public inspection of governmental records is to be permitted wherever possible, this does not mean that such right of inspection cannot be made subject to reasonable rules and conditions. Such rules and conditions are often necessary to "guard against loss or destruction of records, and to avoid unreasonable disruption of the

⁸Under HRS Sections 387-6 and 387-8 (in Chapter 387 relative to Wage and Hour Law), employers are required to keep such records of their employees and the information contained therein are held to be confidential.

MEMORANDUM

TO: GEORGE H. TAKABAYASHI, CHAIRMAN
LIQUOR COMMISSION

-9- November 30, 1977

functioning of the office in which they are maintained."
66 Am Jur 2d Records and Recording Laws, § 14.9


ROBERT E. TERUYA
Deputy Corporation Counsel

APPROVED:


BARRY CHUNG
Corporation Counsel

RET:ct

Attach.

⁹Free schedule for public records is found in R.O. 1969,
Section 8-25.1 et. seq.

DEPARTMENT OF THE CORPORATION COUNSEL
CITY AND COUNTY OF HONOLULU
HONOLULU, HAWAII 96813



BARRY CHUNG
CORPORATION COUNSEL

July 27, 1977

MEMORANDUM

TO : BENJAMIN J. LAMBIOTTE, M.D., M.P.H.
CITY AND COUNTY PHYSICIAN

FROM : JOHN S. NISHIMOTO, DEPUTY CORPORATION COUNSEL

SUBJECT: RELEASE OF MEDICAL REPORTS TO PRISONER'S ATTORNEY

This is in reply to your request of June 24, 1977, for an opinion as to whether the Department of Health may release medical reports made pursuant to a medical examination of Velma E. Dunbar at the City and County Honolulu Emergency Treatment Center, Pawaa Annex, to the attorney of Ms. Dunbar.

We answer your request in the affirmative.

We understand that, at the time of the medical examination, Ms. Dunbar was a prisoner being held by the Honolulu Police Department and that the medical reports made by your Department were part of the normal procedures for such medical examinations. We further understand that Ms. Dunbar has consented to the release of the medical reports to her attorney.

HRS Section 92-50 defines the term "public record" as meaning "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" Section 92-50 further provides that

M 77-68

578

MEMORANDUM

TO: BENJAMIN J. LAMBIOTTE,
M.D., M.P.H., CITY AND
COUNTY PHYSICIAN

-2-

July 27, 1977

a public record "shall not include records which invade the right of privacy of an individual."¹ (Emphasis added)

Medical reports made by a physician pursuant to the medical examination of a patient can be deemed records of confidential matters concerning the physical condition of the person examined. The right of a patient to recover damages from a physician for unauthorized disclosure concerning the patient on the ground that such disclosure constitutes an actionable invasion of the patient's privacy has been upheld. Hammonds v. Aetna Casualty & Surety Co., 243 F. Supp. 793 (1965). Therefore, medical reports are generally not to be included in the term "public records" as defined in HRS Section 92-50.

Notwithstanding the general rule regarding the relationship of physician and patient that a physician is liable to his patient for disclosure of professional secrets to third persons, Berry v. Moench, 331 P.2d 814 (Utah 1958), where the examined patient consents to the release of medical reports made pursuant to the examination, the physician-client privilege is waived, and such reports may be released to a third person.

Accordingly, we conclude that, where Ms. Dunbar has consented to the release of medical reports made pursuant to her physical examination, she has waived her physician-patient privilege, and your department may release the medical records to her attorney.

APPROVED:

Barry Chung
BARRY CHUNG
Corporation Counsel

John S. Nishimoto

JOHN S. NISHIMOTO
Deputy Corporation Counsel

JSN:gk

¹The provision of RCH Section 12-105 relates to what records are open to the public. However, said section has been impliedly amended by HRS Section 92-50 to the extent that any provision thereunder conflicts with the provision of said Section 92-50. As such, the right of privacy concept is applicable when medical records creating patient-physician relationship arises out of City operations.

DEPARTMENT OF THE CORPORATION COUNSEL
CITY AND COUNTY OF HONOLULU
HONOLULU, HAWAII 96813



BARRY CHUNG
CORPORATION COUNSEL

February 3, 1977

MEMORANDUM

TO : JEAN K. MARDFIN, DIRECTOR
MUNICIPAL REFERENCE AND RECORDS CENTER

FROM : DUDLEY G. AKAMA, DEPUTY CORPORATION COUNSEL

SUBJECT: USE OF MUNICIPAL REFERENCE AND RECORDS CENTER
PHOTOGRAPHS AND NEGATIVES FOR COMMERCIAL
PURPOSES BY A PRIVATE GRAPHICS FIRM

This is in response to your memorandum dated March 12, 1976. Pursuant to a letter received by your department from a commercial graphics firm called "Kamaaina Graphics," you requested our opinion as to the following:

- 1) Whether or not a private graphics firm may borrow and reproduce negatives and photographs in the Municipal Reference and Records Center collection for commercial purposes?
- 2) Assuming arguendo that it is permissible to lend negatives and photographs to said commercial firm, whether it would be advisable to informally agree to permit it to copy and/or mutually exchange photographs and negatives?
- 3) If a more formal agreement were to be recommended, what form should be used?

Our response to the first question is No.

According to Rev. Ordinances of Honolulu 1969 Section 3-5.2, one of the duties of the Municipal Librarian is "to make available to any officer or employee of the City

M 77-11

580

MEMORANDUM

TO: JEAN K. MARDFIN, DIRECTOR
MUNICIPAL REFERENCE AND
RECORDS CENTER

-2-

February 3, 1977

government information on any subject desired." (Emphasis added.) Also according to Rev. Charter of Honolulu 1973 Section 6-103, the director of municipal reference and records shall:

(a) Fulfill the research and information needs of the city through the acquisition and maintenance of relevant research materials which shall be made available to the executive and legislative branches. [Emphasis added.]

It is clear from a reading of the above-cited ordinance and Charter section that the general public, much less a commercial entrepreneur, is not included in the category of persons referred to in the foregoing, and is therefore not entitled to use the Municipal Reference and Records Center [hereinafter MRRC]. Hence, revisions to the above-cited ordinance and Charter sections are in order, in light of the present use of the MRRC by the general public.¹

At such time that the revisions are proposed, it may be prudent to indicate for which specific purposes the public may use your facilities. In that way, you would avoid future problems with commercial graphics or photography services desiring to use documents or records for commercial purposes.

In the alternative, you may desire to propose to the Council, in your recommendations for revisions to the above-cited ordinance and Charter sections, that a royalty schedule be incorporated for those commercial users such as Kamaaina Graphics, who announce ahead of time their intended use of your materials for commercial purposes.²

¹ This is based on our telephone conversation of January 26, 1977.

² RCH Section 3-113 states in pertinent part that: "The council shall by ordinance fix the fees and charges for all services rendered by the city and for the use of city property and facilities, except as otherwise provided by this charter."

MEMORANDUM

TO: JEAN K. MARDFIN, DIRECTOR
MUNICIPAL REFERENCE AND
RECORDS CENTER

-3-

February 3, 1977

Additionally, in order to protect the City's interest in the materials in the MRRC, a copyright system may be one of your considerations. However, at this juncture, consideration of such a system would be premature. Also, you will need to weigh the economic feasibility of such a system against the real need for copyright protection for all of your documents and records.

Rev. Ordinances of Honolulu 1969 Section 8-25.1 provides a fee schedule for providing copies of extracts and certified copies of public records.³ Furthermore, the above-cited ordinance does not confer a right upon the general public to receive copies of the documents and records in the MRRC.

Our response to questions 2 and 3 will depend upon the respective revisions which you may propose to the Council.

Accordingly, we conclude that the applicable provisions of the Revised Ordinances and the Revised Charter of Honolulu presently preclude the use of the MRRC by any persons other than officers or employees of the executive and legislative branches of the City government. However, in fact, the general public has been permitted to use the MRRC. For this reason, we recommend that you propose revisions to the applicable provisions hereinbefore cited and that you incorporate either a purpose restriction or royalty schedule for commercial users in your proposal.⁴

APPROVED:



YOSHIAKI NAKAMOTO
Acting Corporation Counsel



DUDLEY G. AKAMA
Deputy Corporation Counsel

DGA:gk

³ Whether or not the documents and records in the MRRC are matters of public record open to inspection has not yet been determined.

⁴ We will assist you in drafting an ordinance embodying this problem.

DEPARTMENT OF THE CORPORATION COUNSEL
CITY AND COUNTY OF HONOLULU
HONOLULU, HAWAII 96813



BARRY CHUNG
CORPORATION COUNSEL

December 7, 1976

MEMORANDUM

TO : FRANCIS KEALA, CHIEF OF POLICE

FROM : RICHARD D. WURDEMAN, DEPUTY CORPORATION COUNSEL

SUBJECT: RELEASE OF CRIMINAL ABSTRACTS FOR APPLICANTS
REQUESTING AN EXPLOSIVES LICENSE

This is in response to your written request of August 28, 1975, for an opinion on whether or not HPD General Order 74-6, insofar as it relates to the release of criminal abstracts to the Industrial Relations Board is in conflict with the Uniform Act on Status of Convicted Persons, HRS Section 831-3.1, as amended by Act 113, 1976 [hereinafter Act].

It is our opinion that the release of criminal abstracts to the Board for purposes of granting explosive permits is not permitted by the Act. In addition, we are unable to find any authorization for this practice in General Order 74-6.

HRS Section 831-3.1(b), as amended, provides that the following types of criminal records may not be used, distributed or disseminated by the State or any of its political subdivisions:

- (1) Records of arrest not followed by a valid conviction;
- (2) Convictions which have been annulled or expunged;
- (3) Convictions of a penal offense for which no jail sentence may be imposed; and

M 76-111

MEMORANDUM

TO: FRANCIS KEALA, CHIEF
OF POLICE

-2-

December 7, 1976

(4) Conviction of a misdemeanor in which the period of twenty years has elapsed since the date of conviction and during which elapsed time there has not been any subsequent arrest or conviction.

On the other hand, the Act does permit the State or county to consider as relevant to the granting of occupational permits, offenses which directly relate to an applicant's performance in the job for which he applies. However, the convictions which are considered must be restricted to offenses not excepted above. HRS § 831-3.1(c).

The statute relating to the granting of licenses for the use of explosives does not specifically bar one with a criminal background from receiving a license. Rather, it refers to a "certificate of fitness," which shall set forth one's "competency." HRS § 396-9

It should be emphasized that there is no requirement in the rules governing the issuance of Blaster's Permits that an applicant have no criminal record. See Rules of the Occupational Safety and Health Division, Department of Labor and Industrial Relations, State of Hawaii, Chapter 310 Section 2.4. The only comparable requirement is that one not be addicted to narcotics, alcohol, and dangerous drugs.*

The General Order of the Police Department which pertains to the release of criminal record information is G. O. 74-6 (hereinafter G.O.). This provides, inter alia, that information relating to the criminal background of any individual shall be released only to government

*We are informed however by officials of the Occupational Health and Safety Division that they are drafting rules which would require applicants to get their own criminal abstracts. This would seemingly be merely a codification of what is the present actual practice.

MEMORANDUM

TO: FRANCIS KEALA, CHIEF
OF POLICE

-3-


December 7, 1976

agencies within the criminal justice system or when in the interest of national security, G.O. § 2-D. On the subject of explosives licensing, the Order only says that applicants may be fingerprinted for the purpose of a criminal background investigation for police use only, G.O. § III-D.

Accordingly, we conclude that while the Act allows the provision of criminal record information for certain purposes; until such time as the concerned state agency determines by valid rule or statute that criminal convictions are a basis for the denial of a Blaster's license, there is no valid purpose in providing the records of same. Second, even should such requirement exist, the Police Department should not provide criminal record information of arrests not resulting in convictions, or other convictions which are forbidden to be distributed by the provisions of HRS Section 831-3.1(b). (See discussion, supra) Finally, a reading of the General Order does not seem to provide conflict with these requirements. In fact, if abstracts are being routinely provided to the Labor Department upon request, it would seem to be in conflict with both the Act and with the General Order.


RICHARD D. WURDEMAN
Deputy Corporation Counsel

APPROVED:


BARRY CHUNG
Corporation Counsel

RDW:as

DEPT/MENT OF THE CORPORATION COUNS
CITY AND COUNTY OF HONOLULU
HONOLULU, HAWAII 96813



BARRY CHUNG
CORPORATION COUNSEL

RANK F. FASI
MAYOR

April 28, 1976

MEMORANDUM

TO : SAMUEL L. YEE, M.D.
ASSISTANT CITY AND COUNTY PHYSICIAN

FROM : RICHARD D. WURDEMAN, DEPUTY CORPORATION COUNSEL

SUBJECT: RELEASE OF COMPUTER TAPES ON AMBULANCE STATISTICAL REPORTS

This is in response to your request of April 5, 1976 for a written opinion on the legality of the release of computer tapes on Ambulance Statistical Reports from the Emergency Medical Services [EMS] Program to a University of Hawaii project entitled, "Cost-Benefit Analysis of Ambulance Services." This request was initiated by Dr. George Lee of the University Economics Department with an assurance that all information on individual patients would be kept absolutely confidential and furthermore that Dr. Lee would be personally liable for all litigation costs associated with any leakage of information.

Our answer is no.

It is our opinion that, unless the information released could be purged of individual patients' names and be thus made into a bare statistical recapitulation of the activities of EMS, the City would be exposed to too great a possibility of civil liability to make this release of information advisable.

The relationship between an individual and the person who treats him has traditionally been accorded high status in the law. Thus, our statutes provide that no physician shall, without the consent of the patient, divulge any information which he may have acquired while treating the

M 76-47

586

MEMORANDUM

TO: SAMUEL L. YEE, M.D.-
ASSISTANT CITY AND COUNTY
PHYSICIAN

-2-

April 28, 1976

patient in any civil action. HRS § 621-20.5. This privilege has been extended by implication to include communications to persons such as nurses and attendants who are acting under a physician's direction. Ostrowski v. Mockridge, 65 N.W.2d 185 (Minn. 1954). This aspect of the rule is not universal, however. Collins v. Howard, 156 F. Supp. 322 (D.C. Ga. 1957). Similarly, it has long been a tenet of common law that the imputation to another of a loathsome or contagious disease is libelous per se and thus does not require the proof of special damages. 50 Am. Jur. 2d, Libel and Slander, § 88. The rationale of all these principles seems to be that:

It expresses a long-standing public policy to encourage uninhibited communication between a physician and his patient. . . . 'There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate;'. [Hogue v. Massa, 123 N.W.2d 131, 133 (S.D. 1963)]

In analyzing the distinction between the effects of testimonial as against non-testimonial disclosure by physicians, the New Jersey Court has held that, even if there is no statutory privilege against the testimonial disclosure by physicians of their patients' medical histories, nevertheless a patient possesses a right against non-testimonial disclosure. This right is qualified only by "exceptions prompted by the supervening interest of society." Hague v. Williams, 181 A.2d 345 (N.J. 1962).

Once one finds this patient right, it is a natural extension to find that a physician is liable civilly anytime that this duty to the patient is breached. Horne v. Patton, 287 So.2d 824 (Ala. 1973). Furthermore, the mere fact that the disclosure is for some scientific purpose is not always a sufficient defense to liability. Griffin v. Medical Soc. of State of New York, 11 N.Y.S.2d 109 (1939). Even in cases where a patient has consented to the release of confidential information for medical science purposes, there is no guarantee that a disclosure more widespread than anticipated might result in civil liability. Feeney v. Young, 181 N.Y.S. 481 (1920).

MEMORANDUM

TO: SAMUEL L. YEE, M.D.
ASSISTANT CITY AND COUNTY
PHYSICIAN

-3-

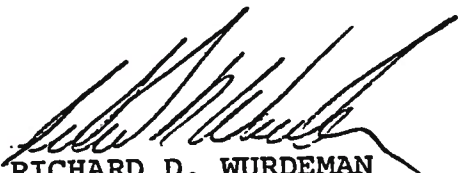
April 28, 1976

The only exceptions to this general rule of liability are found when either there is an overriding public interest in disclosure or where a physician is compelled to disclose by court order. For example, a disclosure made in a good faith effort to prevent the spread of a contagious disease, such as syphilis, has been held to be permissible. Simonsen v. Swensen, 177 N.W. 831 (Neb. 1920). Also, a physician who is required to testify about privileged communications cannot be held liable for any invasion of his patient's privacy. Boyd v. Wynn, 150 S.W.2d 648 (Ky. 1941).

It is noted that in Hawaii those public records which are open for inspection do not include any which violate the privacy of any individual. HRS § 92-50. Further, the wilful betraying of "a professional secret" is a basis for the suspension or revocation of a physician's license. HRS § 453-8.

We therefore conclude that any records maintained by EMS, which include the medical histories of individual patients, are privileged and must not be disclosed unless either there is an overriding public interest in doing so, their disclosure is ordered by a court, the patients concerned freely consent to disclosure, or there is specific legislation authorizing disclosure. We find none of these circumstances in the present request for data.

We are therefore of the opinion that the request for Ambulance Statistical Reports as part of a Cost-Benefit Analysis project should be refused.


RICHARD D. WURDEMAN
Deputy Corporation Counsel

APPROVED:


BARRY CHUNG
Corporation Counsel

RDW:gk

DEPARTMENT OF THE CORPORATION COUNSEL
CITY AND COUNTY OF HONOLULU
HONOLULU, HAWAII 96813



BARRY CHUNG
CORPORATION COUNSEL

May 27, 1975

MEMORANDUM

TO : JEAN K. MARDFIN, DIRECTOR
MUNICIPAL REFERENCE AND RECORDS CENTER

FROM : WILLIAM M. KAHANE, DEPUTY CORPORATION COUNSEL

SUBJECT: DONATIONS TO MUNICIPAL ARCHIVES

This is in response to your memorandum dated March 5, 1975 and a subsequent conversation relating to donations to the municipal archives.

Your first question was whether the donation of certain materials to the archives should be recorded in a written instrument. We answer in the affirmative.

By Resolution, adopted November 24, 1970, the City Council set forth those principles governing the acceptance of gifts valued at less than \$100.00. (Exhibit 1) As an executive agency, the Municipal Reference and Records Center comes within the prescriptions of this Resolution.

The form we have drafted, (Exhibit 2) should be adequate to handle those donations valued at less than \$100.00, made to the municipal archives.¹ An item valued

¹Numerous small gifts from the same donor may be itemized, and provisionally accepted as a whole under the same, "Declaration of Gift," so long as they don't collectively exceed \$100.00 in value.

MEMORANDUM

TO: JEAN K. MARDFIN, DIRECTOR
MUNICIPAL REFERENCE AND
RECORDS CENTER

-2-

May 27, 1975

in excess of \$100.00, or a number of items from the same donor collectively valued at more than \$100.00 should be referred to the City Council for acceptance.

Secondly, you asked whether the term "permanent loan" has a specific legal definition. We answer this question in the negative.

The term "permanent loan" has no special legal significance other than to represent a specific type of bailment² agreement. These loan agreements do not lend themselves to a standardized short form, and thus should be drafted as the occasions arise. Questions of liability for damage or loss to the loaned item, as well as questions of ownership if the lender is to die during the period of the bailment can more properly be addressed by the particular terms of the document.

Thirdly, you asked whether certain materials in the archives could properly be withheld from the general public, specifically papers and records of living mayors. We answer in the affirmative, with qualification.

We would direct your attention to House Bill 126 of this State legislative session, which should shortly be signed into law. This Bill amends HRS Chapter 92, and we refer you specifically to HRS Sections 92-50, et seq. relating to public records. HRS Section 92-50, which defines "public records," states that said records "shall not include records which invade the right of privacy of an individual." We are of the opinion that the personal papers and records of living mayors, and the personnel records of

²Bailment is defined as the delivery of personal property, by one person to another, in trust and held for a particular purpose, wherein the person given charge of the goods (the bailee) agrees to perform the trust and carry out its purposes, and thereafter redeliver the goods to the bailor, or dispose of them in conformance with the trust agreement.

Particularly, this is a commodatum bailment where the goods are lent to the bailee gratis, to be used by him. Black's Law Dictionary 179 (4th rev. ed. 1968).

MEMORANDUM

TO: JEAN K. MARDFIN, DIRECTOR
MUNICIPAL REFERENCE AND
RECORDS CENTER

-3-

May 27, 1975

other City employees and officers fall squarely within this exception. On the other hand, papers and records of living mayors that have been made a part of the public domain, i.e., a mayor's public position on a particular issue, should be made available to the public.

Fourth, you asked generally whether the publication of printed material or pictures in the archives collection can be restricted pending the approval of the proper authority. We would answer this question conditionally in the affirmative.

We understand that you are speaking specifically in terms of those public records which might be commercially exploited, for example, the use of old photographs of Honolulu to be duplicated and used on postcards. We would recommend to this end that you request the City Council to establish a policy by ordinance in an effort to control the commercial exploitation of these public records.³ Said ordinance could limit the duplication of any specified class of documents. As to what recourse the City and County might have with respect to materials published which give an erroneous or detrimental impression of the City or its officials, any opinion of this department would be premature at this time.

Fifth, you asked whether there were specific guidelines with respect to the attestation by the archivist or the Director of the Municipal Reference and Records Center in courts of law as to particular official records. We answer in the affirmative.

All official records may be authenticated as required in Hawaii Rules of Civil Procedure 44. (Exhibit 3) The District Court rule is identical.

³Under the Charter, the Director of Finance is authorized to sell the City's personal property pursuant to policies established by the Council. RCH 1973 art. VI, ch. 2, § 6-203(j) (1973).

MEMORANDUM

TO: JEAN K. MARDFIN, DIRECTOR
MUNICIPAL REFERENCE AND
RECORDS CENTER

-4-

May 27, 1975

Sixth, you asked whether we could suggest a fee schedule to cover the costs of certain functions of the municipal archives. We answer in the affirmative.

Certification and reproduction of certain documents may be charged at a rate correspondent to that prescribed by Ordinance 2743,⁴ a copy of which is attached. The fees established by ordinance, however, give way to the statutory fee schedule, i.e., HRS Section 92-21, in cases where the latter is applicable.⁵ With respect to photographic copies, the prevailing commercial rate may be assessed, the precise charge being left up to the discretion of the director.⁶

APPROVED:


WILLIAM M. KAHANE
Deputy Corporation Counsel


BARRY CHUNG
Corporation Counsel

WMK:as

Attach.

⁴Rev. Ordinances of Honolulu 1969 ch. 8, art. 25 (1969) (Exhibit 4). "The council shall by ordinance fix the fees and charges for all services rendered by the city" Rev. Charter of Honolulu 1973 art. 3, ch. 1, § 3-113 (1973).

⁵Id. § 8-25.3 (Exhibit 5).

⁶The City Council is preparing an omnibus fee bill which will combine in one ordinance fees charged for services performed by the City. We would suggest you refer to the Council a suggested fee schedule to cover the operations of your department.

**CITY CLERK
CITY HALL
HONOLULU, HAWAII**

To COUNCIL
... Auditor
... Clerk
... Committees:
... Finance
... Legislative
... Public Works
... Whole
✓ MAYOR
... Board of Water Supply
... Budget Director
... Civil Defense, Oahu
... Civil Service Dept.
... Corporation Counsel
... Finance Dept.
... Liq. Commission
... Inform & Complaints
... Municipal Library
... Planning Dept.
... Appeals Board
... Commission
... Royal Hawaiian Band
... Managing Director
... Auditors Dept.
... Building Dept.
... Appeals Board
... Fire Dept.
... Health Dept.
... Medical Examiner
... Parks & Recreation
... Police Dept.
... Commission
... Prosecuting Attorney
... Public Works:
... Chief Engineer
... Automotive
... Engineering
... Land
... Refuse
... Road
... Sewers
... Redevelopment
... Traffic Dept.
... Urban Renewal

... Governor
... Acct. & General Services
... Dept. of Education
... Dept. of Health
... Dept. of Transportation
... District Courts
... Land & Natural Resources

DATE OF PUBLICATION:

☐ ADV ☐ S D

RESOLUTION

WHEREAS, the City and County of Honolulu is the recipient of many gifts as a result of the generosity of its citizens; and

WHEREAS, the acceptance of such gifts will be in the public interest; and

WHEREAS, the City Council has been granted the sole authority to accept such gifts; and

WHEREAS, the administration and legislative clerical work involved in the processing of each gift individually imposes a heavy burden on the City and County; now, therefore,

BE IT RESOLVED by the Council of the City and County of Honolulu that it be and hereby requests that executive agencies take custody of any gift given by a donor subject to the following provisions:

1. the executive agency may take custody of the gift;
2. the executive agency shall record the gift listing the name and address of the donor and a description of the gift including value;
3. the executive agency shall not take custody of a gift of a value in excess of \$100.00;
4. the executive agency shall not accept custody of any gift which imposes any onerous conditions for its acceptance by the City;
5. the executive agency shall submit a quarterly report, which will be filed on or before the second Tuesday after the close of each quarter, of all gifts taken into custody by such agency to the City Council so that the Council may formally accept the gifts on behalf of the City;
6. the executive agency shall insure that all gifts taken into custody shall be properly maintained, secured or protected; and
7. the executive agency shall notify the donor that the acceptance of the gift is conditional only until formal acceptance by the Council at the next session scheduled for that purpose.

EXHIBIT 1.

☐ ADV. ☐ S. D.

Honolulu, Hawaii

-2-

2253

594

DECLARATION OF GIFT

I, _____ (name of donor) of _____ (address),
City of _____, County of _____,
State of _____, owned the items described below. I
desire to give the described property to the City and County
of Honolulu.

To carry out my purpose I do hereby give and deliver to
the City and County of Honolulu the property described as
follows:

It is distinctly understood by me that it my purpose
and intention to vest all incidents of absolute ownership
of the property in the City and County of Honolulu.

DATED: _____.

(signature)

ACCEPTANCE OF GIFT

I, _____, as Director of
the Municipal Reference and Records Center, on behalf of
the City and County of Honolulu, State of Hawaii, take
custody of the above-described gift. The acceptance of
this gift is conditioned upon its formal acceptance by the
Honolulu City Council.

DATED: _____.

(signature)

EXHIBIT 2 595

RULE 43

shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged.

(d) **Affirmation in Lieu of Oath.** Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.

(e) **Evidence on Motions.** When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.

(f) **Interpreters.** The court may appoint an interpreter of its own selection and may fix his reasonable compensation. The compensation shall be paid out of funds provided by law.

(Amended May 15, 1972, effective July 1, 1972.)

Rule 44. PROOF OF OFFICIAL RECORD.

(a) **Authentication**

(1) **Domestic.** An official record kept within the United States, or any state, district, commonwealth, territory, or insular possession thereof, or within the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied by a certificate that such officer has the custody. The certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office.

(2) **Foreign.** A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof; or a copy thereof, attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the

RULE 45

attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (A) admit an attested copy without final certification or (B) permit the foreign official record to be evidenced by an attested summary with or without a final certification.

(b) **Lack of Record.** A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement, authenticated as provided in subdivision (a) (1) of this rule in the case of a domestic record, or complying with the requirements of subdivision (a) (2) of this rule for a summary in the case of a foreign record, is admissible as evidence that the records contain no such record or entry.

(c) **Other Proof.** This rule does not prevent the proof of official records or of entry or lack of entry therein by any other method authorized by law.

(Amended May 15, 1972, effective July 1, 1972.)

Rule 44.1. DETERMINATION OF FOREIGN LAW. A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Rule 43. The court's determination shall be treated as a ruling on a question of law.

(Added May 15, 1972, effective July 1, 1972.)

Rule 45. SUBPOENA.

(a) **For Attendance of Witnesses; Form; Issuance.** Every subpoena shall be issued by the clerk of the circuit court of the circuit in

ORDINANCE NO. 2743
(BILL NO. 178, 1965)

AN ORDINANCE TO AMEND CHAPTER 8, R.O. 1961, BY ADDING A NEW ARTICLE THERETO,
RELATING TO CHARGES FOR FURNISHING COPIES OF PUBLIC RECORDS.

BE IT ORDAINED by the People of the City and County of Honolulu:

SECTION 1. Chapter 8, R.O. 1961, is hereby amended by adding thereto
a new article to read:

"Article 25. Fee Schedule for Public Records.

"Sec. 8-25.1. Charges for extracts and certified copies of
public records.

Except as otherwise provided in this article, a copy or extract of
any public document or record which is open to inspection of the
public shall be furnished to any person applying for the same by
the public officer having custody or control thereof pursuant to
the following schedule of fees:

- (1) Duplicated copy of any record (by duplicating machines
including, but not limited to, microfilm printer,
Thermofax, Verifax, Xerox, etc.)

For the first page of each document
or record..... \$.50

Each additional page or copy thereof..... .25

- (2) Abstract of information from public record

Each page..... .50

Each additional copy..... .25

- (3) Typewritten copy of any record

Per 100 words or fraction thereof..... 1.00

- (4) Copy of map, plan, diagram

Up to 22" x 36" size; per sheet..... 1.00

Larger than 22" x 36" size; per square foot. Prevailing
commercial
rate

Minimum charge per sheet..... 1.00

(5)	Photograph or photograph enlargement.....	Prevailing commercial rate
(6)	City Clerk's Certificate of Voter Registration...	.50
(7)	Voter Registration Lists (in printed forms as may be available).....	1.00 each precinct
(8)	Certified copy of medical examiner's report and autopsy report.....	5.00
(9)	Medical information extracted from Health Department records for insurance companies and other firms.....	5.00
(10)	Certified statement attesting to veracity of information obtained from public records	
	Per 100 words of statement or fraction thereof.....	1.00
(11)	Certification by public officer or employee as to correctness (or in attestation that document is a true copy) of any document, including maps, plans, and diagrams	
	Per page.....	.50

"Sec. 8-25.2. Charges for publications.

a. Charges for publications shall be based on cost, including reproduction costs, mailing and other handling charges attributable to making the publication available to the public.

b. The term 'publications' refers to copies of documents which are reproduced on a volume basis for general distribution and shall include, but not be limited to, such items as: ordinances, engineering and construction standards, directories, manuals, and handbooks. The term 'publications' shall not apply to resolutions or bills pending final adoption or enactment into ordinance by the City Council.

"Sec. 8-25.3. Applicability. The fees established in this article shall have no application to the furnishing of copies or extracts of public documents or records for which fees have been established by statutory provisions where such statutory provisions have not been superseded.

"Sec. 8-25.4. Exemption from payment of fees and charges.

a. The following agencies and organizations may be exempted from the payment of fees established in this article, as well as charges to cover mailing and other handling costs by the public officer having custody or control of the records involved:

- (1) Government agencies requiring the records or publications for official purposes;
- (2) Non-profit organizations directly concerned with the matter involved in the records or publications; provided, however, that exemption from payment of fees and/or charges shall be limited to one copy or one set of such records or publications.
- (3) Newspapers; provided, however, that exemption from payment of fees and/or charges shall be limited to one copy or one set of such records or publications.
- (4) Organizations which have arranged reciprocal agreement with a City agency for mutual exchange of records and publications;

PART III. COPIES OF RECORDS; COSTS AND FEES

§92-21 Copies of records; other costs and fees. Except as otherwise provided by law, a copy of any public document or record, including any map, plan, diagram, photograph, or photostat, which is open to the inspection of the public shall be furnished to any person applying for the same by the public officer having charge or control thereof upon the payment of the following:

- (1) \$1 for every hundred words or fraction thereof contained in any written document, record, entry, or other paper when the copy is made in writing or when typewritten or the like by the public officer having charge or control thereof;
- (2) \$1 per page or fraction thereof for reproducing any written document, record, entry, or other paper when the copy is made by the public officer having charge or control thereof by the use of any photostat, or other similar means of reproduction;
- (3) \$1 per page or sheet for making a copy of any map, plan, diagram, or photograph, which copy may be made by any method of reproduction;
- (4) 25 cents for every hundred words or fraction thereof for comparing any copy of a written document, record, entry, or other paper with the original thereof, when comparison is required or requested;
- (5) \$1 for the certification to any copy, when certification is required or requested;
- (6) Printed forms; certified copies:

Marriage certificates.....	\$1.50
Comparing and certifying of printed or photostatic copies, first copy full charge, all others certifying charge only.	
Exemplification.....	\$1.50
Certification or authentication of notaries.....	\$1.00
Legal notices, affidavits of publication.....	\$1.00;
- (7) All such fees shall be paid in by the public officer receiving or collecting the same to the state director of finance or county director of finance or by which the officer is employed as government realizations. [L 1921, c 96, §1; RL 1925, §166; am L 1929, c 166, pt of §1; am L 1931, c 178, §1; RL 1945, pt of §458; am L 1945, c 248, §1; am L 1949, c 345, §1; am L Sp 1949, c 23, §1; RL 1955, §7-1; am L Sp 1959 2d, c 1, §14; am L 1963, c 114, §1; HRS §92-21; am L 1974, c 145, §2]

[PART IV. NOTICE OF PUBLIC HEARINGS]

[§92-41] Publication of legal notices. Notwithstanding any law to the contrary, all governmental agencies scheduling a public hearing shall publish a notice in a newspaper which is printed and issued at least twice weekly in the county affected by the proposed action, to inform the public of the time, place and subject matter of such public hearing. This requirement shall prevail whether or not the publication by the governmental agency of a notice of public hearing in a newspaper of general circulation is specifically required by law, and shall be in addition to other procedures required by law. [L 1972, c 188, §2]

Attorney General Opinions

State agency required by section 91-3(a)(1) to publish notice of hearing must in addition comply with publication requirements of this section. Att. Gen. Op. 73-12.

This section does not require a public hearing in each county where a notice of public hearing is published. Att. Gen. Op. 73-13.

DEPARTMENT OF THE CORPORATION COUNSEL
CITY AND COUNTY OF HONOLULU
HONOLULU, HAWAII 96813

FAS1



BARRY CHUNG
CORPORATION COUNSEL

April 2, 1975

MEMORANDUM

TO : WILLIAM H. LUCAS, EXECUTIVE SECRETARY
LIQUOR COMMISSION

FROM : WILLIAM M. KAHANE, DEPUTY CORPORATION COUNSEL

SUBJECT: ACCESS TO LAW ENFORCEMENT RECORDS

This is in response to your letter dated December 20, 1974, in which you requested our opinion in two areas regarding the Liquor Commission's access to law enforcement records. Your first question asks whether an employee of the Liquor Commission can come within the construction of the term "law enforcement official" as it is employed in Act 45, SLH 1974.

We answer that question in the negative.

Act 45, SLH 1974, amended HRS Section 28-54 to read in part as follows:

Law enforcement records. (a) Confidentiality. All law enforcement records relating to the questioning, apprehension, detention, arrest, or charging of persons for or in connection with a criminal offense against whom no conviction is secured shall be deemed confidential and shall not be disclosed to or copies thereof transferred to any person other than (1) a law enforcement official of the State acting in the course and scope of his official duties; (2) a law enforcement official of the federal government or another state acting in the course and scope of his official duties, provided that the recipient law enforcement agency has agreed to keep said

M 75-23

602

1

MEMORANDUM

TO: WILLIAM H. LUCAS, EXECUTIVE
SECRETARY, LIQUOR COMMISSION

-2-

April 2, 1975

records confidential to the same extent as provided for herein; or (3) pursuant to an order of a court of competent jurisdiction.

Although the Liquor Commission is given certain police powers with respect to those laws that it is required to enforce, (see, e.g., HRS § 281-17(4), (9) (Supp. 1974)), we do not believe that its inspectors are "law enforcement officials" within the meaning of the Act.

The House Committee on Judiciary and Corrections commented with respect to Act 45:

[We are of the opinion that no justification exists for the release of information where interrogation or detention has occurred or an arrest or charge has been made but where the police or prosecutor has not obtained a conviction in a court of law. [Standing Committee Report No. 160-74, March 7, 1974.]

Apparently, the Legislature sought to circumscribe strictly those agencies having access to criminal records wherein the crime charged did not result in conviction. In doing so it attempted to limit the availability of these records to those police agencies, federal and state, who had agreed to keep said records confidential. In addition, Act 205, SLH 1974, which became law during that same legislative term, unequivocally prohibits the Honolulu Police Department from disseminating information relating to arrest which does not result in conviction where that information would be used in connection with a license application. This law fashions a conclusive presumption that such information is not relevant to the question of licensure. See p. 5 infra. Consequently, we are of the opinion that in this regard the term "law

MEMORANDUM

TO: WILLIAM H. LUCAS, EXECUTIVE
SECRETARY, LIQUOR COMMISSION

-3-

April 2, 1975

enforcement official"^{1/} cannot be read so broadly as to include those employees of a regulatory agency that might have quasi-police power.

For these reasons we believe that the Liquor Commission is not a law enforcement agency, nor are its employees law enforcement officials of the State as defined by Act 45, SLH 1974.

Secondly, you ask whether Act 205, SLH 1974 has impliedly repealed HRS Section 281-45 in whole or in part.^{2/}

We answer that HRS Section 281-45 has been partly repealed by implication.

HRS Section 281-45 states that no license shall be issued by the Liquor Commission to any person who was convicted of a felony and not pardoned. On the other hand, HRS Section 731 (Act 205, SLH 1974) provides in relevant part:

^{1/} The term "law enforcement official" is commonly used to describe those whose duty it is to preserve the peace. See Frazier v. Elmore, 173 S.W.2d 563, 565, 180 Tenn. 232 (1943); cf. In re Special Report of Grand Jury of Erie County Court, 77 N.Y.S.2d 438, 442, 192 Misc. 857 (1948) (State Bureau of Motor Vehicles not "law enforcement body" within rule that invasion of secrecy of Grand Jury proceedings permitted when such body presents to court facts showing public necessity of grand jury minutes).

The following have been held not to be "law enforcement" officers: attorneys (Daut v. U.S., 405 F.2d 312, 315 (9th Cir. 1969)); parole officers (State v. Johnson, 202 N.W.2d 132, 133 (S.D.Sup.Ct. 1972)); probation officers (Peo. v. W., 249 N.E.2d 882, 884, 24 N.Y.2d 732 (N.Y.Ct.App. 1969)). But see Vandiver v. Williams, 127 S.E.2d 168, 169, 106 Ga.App. 435 (1962) (Revenue Commissioner considered law enforcement officer for limited purposes).

^{2/} We have reworded your question. We shall advise you on how you may best comply with HRS Section 731 under separate cover.

MEMORANDUM

TO: WILLIAM H. LUCAS, EXECUTIVE
SECRETARY, LIQUOR COMMISSION

-4-

April 2, 1975

Prior convictions; criminal records; noncriminal standards. (a) A person shall not be disqualified from employment by the State or any of its political subdivisions or agencies, or be disqualified to practice, pursue, or engage in any occupation, trade, vocation, profession, or business for which a permit, license, registration, or certificate is required by the State or any of its political subdivisions or agencies, solely by reason of a prior conviction of a crime.

(b) The following criminal records shall not be used, distributed, or disseminated by the State or any of its political subdivisions or agencies in connection with an application for any said employment, permit, license, registration, or certificate: (1) records of arrest not followed by a valid conviction; (2) convictions which have been annulled or expunged; (3) convictions of a penal offense for which no jail sentence may be imposed.

Therefore, the Liquor Commission in reaching a licensing decision may not consider the applicant's or holder's arrest record, where no valid conviction followed, annulled or expunged convictions, or penal convictions for which no jail sentence could be imposed.

HRS Section 731 as enacted by Act 205 is an attempt to eliminate the disqualification of a person from licensure by political subdivisions solely by reason of a prior criminal conviction. Licensure may still be refused if the applicant is convicted of a crime which directly relates to the occupation for which he seeks or holds a license. To the extent that a rational connection can be shown between the applicant's past criminal conviction and his present performance or reliability, this section permits disqualification. (See Standing Committee Reports Nos. 129-74, March 4, 1974; 862-74, April 4, 1974.)

Subsection (d) of HRS Section 731 provides as follows:

This section shall prevail over any other law which purports to govern the denial or issuance of any permit, license, registration, or

MEMORANDUM

TO: WILLIAM H. LUCAS, EXECUTIVE
SECRETARY, LIQUOR COMMISSION

-5-

April 2, 1975

certificate by the State or any of its political
subdivisions or agencies.

At the same time HRS Section 281-45 casts an absolute prohibition on the issuance of a liquor license to any person convicted of a felony and not pardoned.

Where an act is so repugnant to, or so contradictory of, or so irreconcilably in conflict with, a prior act to the extent that it is impossible to harmonize the two acts in order to effectuate their purposes, the latter repeals the former to the extent of the conflict. U.S. v. Calif., 297 U.S. 175 (1936). This doctrine of repeal by implication rests on the notion that the last legislative expression in time prevails. C. Sands, Sutherland Statutory Construction § 23.09, nn. 11 & 12 (3d rev.ed. 1973) [hereinafter Sutherland]; see generally Sutherland §§ 23.09, 34.03.

We are of the opinion that HRS Section 731 was designed to vitiate what the Legislature felt to be an invalid presumption made precisely by such law as engendered in HRS Section 281-45, i.e., that a convicted felon, by virtue of that conviction alone was conclusively presumed unfit for licensing. Therefore, to the extent that HRS Section 731 conflicts with HRS Section 281-45, it supersedes that section. See State v. Atlantic Coast Line R. Co., 56 Fla. 617, 47 So. 969 (1908) (a portion of a statute may be repealed by implication).

William M. Kahane

WILLIAM M. KAHANE
Deputy Corporation Counsel

APPROVED:

Barry Chung

BARRY CHUNG
Corporation Counsel

WMK:gk

OFFICE THE CORPORATION COUNSEL
CITY AND COUNTY OF HONOLULU
HONOLULU, HAWAII 96813

F. FASI
YOR



PAUL DEVENS
CORPORATION COUNSEL

September 11, 1972

MEMORANDUM

TO : LORETTA ING
EXECUTIVE SECRETARY TO THE MAYOR

FROM : JOHN A. GRANT, DEPUTY CORPORATION COUNSEL

SUBJECT: PUBLIC DISCLOSURE OF CITY AND COUNTY EMPLOYEES PAY

This is in response to your inquiry of May 20, 1970, requesting our opinion to the following question:

"Can a citizen find out what an employee of the City and County is being paid, no matter what his reasons may be?"

We answer in the negative.

A person's motive for seeking to examine public records was significant at common law. Under the common law rule, an interest sufficient to maintain or defend an action had to be shown before a private individual would be entitled to examine public records. This rule has not generally been observed in this country. However, it has been held that there is no general right to inspect records of governmental departments which are not intended as notice, but are kept merely as evidence of the transactions in the departments. McGarrahan v. New Idria Min. Co., 96 US 316, 24 L.Ed. 630 (1877).

It is generally held that when a record is found to be a "public record", citizens have the right to examine such record for any lawful purpose, even to satisfy idle curiosity. People v. Harnett, 226 N.Y.S. 338, affirmed 230 N.Y.S. 28, affirmed 164 N.E. 602 (1927). Not all records relating to public business are "public records", however, and in these

M 72-68

607

MEMORANDUM

TO: LORETTA ING
EXECUTIVE SECRETARY
TO THE MAYOR

-2-

September 11, 1972

cases, only persons with an interest in such records will be permitted to inspect them, and then only when such inspection is not detrimental to the public welfare. People v. Harnett, supra. The question, therefore, becomes one of determining to what extent City and County employees' pay records are public records under Hawaii law.

The applicable section of the City Charter is Sec. 12-110, which contains the provision that:

"All books and records of every agency of the city shall be open to the inspection of any citizen at any time during business hours. . ."

In prior opinions, this office has interpreted "records", as used in Sec. 12-110, to mean "public records" as defined in the Hawaii Revised Statutes. (See Opinions 68-29 and 68-43). Section 92-1(2), HRS, provides as follows:

"The term '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."

In determining whether or not specific records are to be considered "public records" within the meaning of this section, this office has taken the position that only those records which are required to be kept by law fall within the definition set forth in Sec. 92-1(2). See the following opinions and citations therein: 58-2 (Civil Service performance ratings are public records), 65-63 (Employee addresses not public records), 68-29 (voter registration lists are public records, but not as stored on magnetic computer tapes), 68-43 (original notes of City Council not public records), SR 69-43 (traffic records restricted), 69-38 (drivers' license computer tapes not public records), and 71-110 (voter registration affidavit is a public record).

MEMORANDUM

TO: LORETTA ING
EXECUTIVE SECRETARY
TO THE MAYOR

-3-

September 11, 1972

A citizen and taxpayer has a right to inspect the public records to ascertain whether the public money is being properly expended. Nowack v. Fuller, 243 Mich. 200, 219 N.W. 749 (1928). It is, therefore, apparent that employee titles, grade levels, salary ranges and the amount the City expends in salaries are matters of public record. However, the City payroll records regarding individual employees' exact gross pay, deductions, garnishments and the like are kept for the same reasons that such records are kept by private employers, i.e. as part of a normal accounting system. In this regard, there is a statutory requirement that all employers keep payroll records. Sec. 387-6, HRS, provides in part:

"(a) Every employer shall keep in or about the premises wherein any employee is employed a record of the name, address, and occupation of each such employee, of the amount paid each pay period to each such employee. . ." (emphasis added)

These records are for the protection of the employee, and are to be accessible to the director of labor and industrial relations or his authorized representative to insure that the employer has complied with the provisions of the wage and hour laws. Regarding the disclosure of information contained in these records, Sec. 387-8, HRS, provides in part:

". . . information secured from inspection of the (pay) records. . . shall be held confidential and shall not be disclosed or be open to any person . . ." (emphasis added)

Referring again to the definition of "public records" in the Hawaii Revised Statutes, Sec. 92-1(2), set forth above, specifically excludes "records which invade the right of privacy of an individual." Standing Committee Report 594 of the 1959 House Journal at page 797 discloses the intent of the Legislature in enacting this provision of the statute:

MEMORANDUM

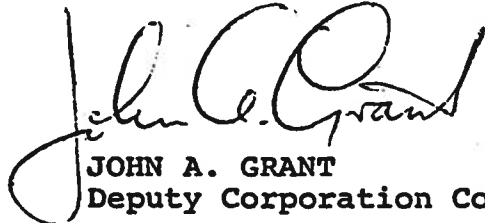
TO: LORETTA ING
EXECUTIVE SECRETARY
TO THE MAYOR

-4-


September 11, 1972

"Your Committee intends that records which invade the right of privacy of a person should remain confidential. . . Your Committee also does not intend to modify any common law or statutory privilege which exists by reason of a confidential relationship."
(emphasis added)

Therefore, in view of the fact that detailed pay records are kept primarily as a matter of ordinary accounting procedure, the confidentiality imposed upon such records by Sec. 387-8, HRS, and the stated intent of the Legislature to permit such records to remain confidential, it is our conclusion that exact individual pay records are not public records and not subject to public inspection without good cause.


JOHN A. GRANT
Deputy Corporation Counsel

APPROVED:


PAUL DEVENS
Corporation Counsel

JAG:as

December 27, 1971

MEMORANDUM

TO : EILEEN K. LOTA, CITY CLERK
ATTN : KENNETH M. HASHIMOTO
ASSISTANT ELECTIONS ADMINISTRATOR
FROM : ROBERT M. SETO, DEPUTY CORPORATION COUNSEL
SUBJECT: PUBLIC RECORDS

This is in response to your request relative to the following questions:

1. Whether the "Affidavit On Application For Voter Registration" is a public record under Section 11-14, HRS.
2. If it is a public record, whether the use of a public record for commercial purposes bars its accessibility.

We understand that the New York Life Insurance Company is interested in examining the City's voter registration records for the purpose of soliciting life insurance agents. In particular, we understand they are interested in using the information contained in the "Affidavit On Application For Voter Registration", hereinafter referred to as the "Affidavit".

With respect to your first question, the Affidavit is a public record.

Section 11-14, HRS, in pertinent part states that:

M 71-110

611
1

MEMORANDUM

TO: EILEEN LOTA, CITY CLERK

-2-

December 27, 1971

"The clerk of each county shall register all the voters in his county in the general county register. The register shall contain the information required by section 11-15. . . .The clerk shall keep the original or photographic copy of the affidavit of registration required by section 11-15. The general county register shall, at all times during business hours, be open to public inspection, and shall be a public record." (Emphasis supplied).

A reading of the cited provision clearly indicates that the Affidavit is a public record.

With respect to the second question, the information in the affidavit may be used so long as it is used for a lawful purpose.

In regard to the limitations of the use of a public record, the 1971 case of Ortiz vs. Jaramillo 483, P.2d 500, is applicable. In this case, the Supreme Court of New Mexico held that an affidavit of registration recorded on magnetic tapes, could be inspected and copied by anyone "acting lawfully and for a lawful purpose." (Emphasis added). The New Mexico court at page 501 added:

"The right to inspect public records commonly carries with it the right to make copies thereof, subject, however, to reasonable restrictions and conditions imposed as to their use, reasonable regulations as to appropriate times when and places where they may be inspected and copied, and such reasonable supervision by the custodian thereof as may be necessary for their safety and as will secure equal opportunity for all to inspect and copy them."

Also the court in Direct Mail Service Inc. vs. Registrar of Motor Vehicles, 5 N.E.2d 545 (1937) said:

"It is common knowledge that much use is made of public records for reasons having nothing to do with any present problem of the person examining them. Lists of conveyances, attachments, bankruptcies,

MEMORANDUM

TO: EILEEN LOTA, CITY CLERK

-3-

December 27, 1971

building permits and other matters having their sources in the public records are regularly published in commercial journals which are sold to business men and to the public generally. . . . We cannot believe that the Legislature intended to give to the custodian of a public record power to inquire of applicants for inspection as to the use which they intend to make of the information to be obtained or the motives which prompted them in seeking it."

In the case of Ortiz vs. Jaramillo, supra, the respondent contended that to permit inspection of the registration records which are on magnetic tapes will be an invasion of the right of privacy. The court in response made short-shrift of such contention by stating that:

"We fail to understand how it can be said the inspection and copying of information contained on a printed and written affidavit of registration, which is a public record, is proper, but the inspection and copying of this identical information from the 'working master record' tape, which is also a public record, constitutes an invasion of the privacy of the individual named in and identified by this information. . . . We are not concerned with whether an invasion of privacy might be involved in making the information available directly from the affidavits of registration, because no such question has been presented."

The cited cases clearly indicate that you cannot deny access to information in the affidavit to the New York Life Insurance Company simply because it plans to use such information to obtain leads to additional sales agents for its staff. On the other hand, the same courts stated you can impose reasonable restrictions relative to the gathering and copying of such information.

Additionally, the New Mexico court stated that there is no invasion of the right of privacy as the Affidavit is deemed to be a public record as prescribed in said Section 11-14. Moreover, there is no provision in the Omnibus Election Laws of SLH 1970 which expressly or impliedly restricts the use of information contained in the Affidavit.

MEMORANDUM

TO: EILEEN LOTA, CITY CLERK

-4-

December 27, 1971

In view of the foregoing, we conclude that the New York Life Insurance Company may inspect and copy information from the Affidavit for the purposes it desires since it is to be used for a lawful purpose.

/s/ Robert M. Seto
ROBERT M. SETO
Deputy Corporation Counsel

APPROVED:

/s/ Paul Devens
PAUL DEVENS
Corporation Counsel

RMS:si

JOHN WAIHEE
GOVERNOR



EMPLOYEES' RETIREMENT SYSTEM
HAWAII PUBLIC EMPLOYEES HEALTH FUND
OFFICE OF THE PUBLIC DEFENDER
PUBLIC UTILITIES COMMISSION

STATE OF HAWAII
DEPARTMENT OF BUDGET AND FINANCE

STATE CAPITOL
P.O. BOX 150
HONOLULU, HAWAII 96810-0150

YUKIO TAKEMOTO
DIRECTOR

ROBERT P. TAKUSHI
DEPUTY DIRECTOR

Thomas I. Yamashiro
Deputy Director

DIVISIONS:
BUDGET, PLANNING AND MANAGEMENT
ELECTRONIC DATA PROCESSING
FINANCE
Telecommunications

October 14, 1987

MEMORANDUM

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

FROM: Director of Finance

SUBJECT: PUBLIC RECORDS AND PRIVACY

RECEIVED
OCT 16 9 22 AM '87
COMMUNICATIONS

The attached information on public and private records within the Department of Budget and Finance is being provided to assist the Governor's Committee on Public Records and Privacy in its efforts to identify problems with the disclosure or nondisclosure of public records. The comments provided by all divisions and administratively attached programs of the department identify the types of records currently available for public information, as well as, those that need to be kept confidential.

If further assistance or clarification is required, please contact Ann Nishimoto of my staff at 548-5865.


YUKIO TAKEMOTO

Attachment

A REVIEW OF PUBLIC AND PRIVATE RECORDS
WITHIN THE
DEPARTMENT OF BUDGET AND FINANCE

Budget, Planning and Management Division

All records in the Budget, Planning and Management Division are public record except those that contain personal information which may invade the privacy of an individual pursuant to Sections 92-50 and 92E, HRS, and except for "staff work" which may be considered "privileged information." These documents include working documents, correspondence, internal references and other staff work for the Office of the Governor.

Electronic Data Processing Division

Ownership of records maintained and processed on the central computer facility at the Electronic Data Processing Division is vested in the specific agencies for which data processing services is being provided. Any request for information from such records or files is referred to the owner agencies and information is not released without written approval of the responsible agency.

Finance Division

Unclaimed Property Listings

Unclaimed property records contain detailed information relating to each account similar to those maintained by a bank. Typical data include:

1. Name
2. Address
3. Source of Account
4. Description of Account
5. Amount

Financial records of individuals are considered a matter of an individual's right to privacy pursuant to Section 92E, HRS. As such, detailed amounts or description of property is not advertised for public consumption. If detailed listings were to be made public, program operations would be disrupted due to the anticipated continuous demand to view such records. Additional program personnel would be required to service inquiry from requesters and a microfiche viewer and printer would have to be purchased to provide copy service.

Veterans Mortgage Loans

Information in regard to property description, legal owner, holder of outstanding liens and other information available at the Bureau of Conveyances with respect to the Veterans Mortgage Loan Program is considered public information. Information relating to outstanding loan balances and repayment status is considered confidential.

Reconciliation of Deposits in State Treasury and with Fiscal Agents

Information relating to amounts on deposit may be considered public information; however, reports from fiscal agents listing the holders of State bonds are and should continue to be kept confidential.

Special Purpose Revenue Bond Program

Public disclosure of all bond issuances are required by statutes:

1. Assisting not-for-profit corporations that provide health care facilities to the general public - S39A-49
2. Assisting Manufacturing Enterprises - S39A-89
3. Assisting Processing Enterprises - S39A-129
4. Assisting Industrial Enterprises - S39A-169

Telecommunications Division

The Telecommunications Division reports that the majority of its records are available as public record, except the following:

1. Correspondence, staff reports and studies which are not approved by the Department Head; surveys, data and research material which are being used in the development of a report or study; and personnel information.
2. Vendor proposals or proprietary information relative to projects of the division.

The division reports that if additional division records were to be made public, an increase in funding and staffing may be required, depending on the level of public demand, to supervise public review of divisional records and to reproduce requested documents

Employees' Retirement System

There are no Employees' Retirement System (ERS) records currently made available to the public. Active member files which include data on the amount of retirement contributions to the ERS, gross salary amounts, beneficiary names, home address, etc., and retiree files which include data on monthly pension amounts, bank accounts, beneficiary names, home address, federal withholding taxes, retirement option, etc., contain information of a private nature and are not should not be made available to the public.

Health Fund Division

The Health Fund handles three major categories of documents: 1) Enrollment Applications and Reports, 2) Premium Payment Report Summaries and 3) Health Fund Board Minutes. Of the three, only Enrollment Applications and Reports which contain personal employee data and Board Minutes dealing with individual employee matters are maintained in confidence. Premium Reports, which indicate the amount of premiums collected from public employers and employees and paid to insurance carriers, and the majority of approved Board Minutes are accessible as public information.

Public Defender

Budget and Accounting Records

Public access could be provided to these records. Access to many individual billing records that relate to general office operations could also be made available.

Billing relating to litigation expenses (e.g., medical services, expert witnesses), however, should not be subject to disclosure under disciplinary rules and ethical considerations and protection by attorney-client privilege and the HRS [92-E-4 and the definition of personal records set forth in 92E-1(3)].

Client Application for Court-Appointed Counsel

A written opinion by the Attorney General's Office concludes that the information contained in the application constitutes a "personal record" as the term is defined in Section 92E-1(3) which precludes access to applications by the public.

Names of Clients and Document, Correspondence, and Work Product Relating to Client's Case

Disciplinary rules, ethical considerations, the HRS and the attorney-client privilege would not permit disclosure or public access to this information.

Public Utilities Commission

All data filed with the Public Utilities Commission is available as public information, except confidential reports on the salary of officers and managers of utility companies and reports under protective order which contain proprietary information on regulated companies.

THE LAW OFFICES
JOHN A. CHANIN
ATTORNEY AT LAW
FOUR SOUTH KING STREET
HONOLULU, HAWAII 96813

RECEIVED
OCT 33 8 35 AM '87
DIRECTOR
OFFICE
CONSUMER AFFAIRS
TELEPHONE

RECEIVED

Nov 2 8 36 AM '87

DIRECTOR
OFFICE
CONSUMER AFFAIRS
TELEPHONE
(808) 538-1165

JOHN A. CHANIN

October 29, 1987

MATTHEW CHUNG, ESQ.
Department of Commerce & Consumer Affairs
1010 Richards Street
Honolulu, Hawaii 96813

Re: Uniform Information Practices Act

Dear Mr. Chung:

The undersigned has served as one of the draftsman of the Uniform Information Practices Act (UIPA). I have also served in a similar capacity on various other drafting committees dealing with disclosure of such matters as criminal history records, financial data and the like. During the initial drafting stages, UIPA was referred to as the Uniform Privacy Act and the essential focus was that all subject documents were considered non-disclosable, protected by privacy considerations unless there was a specific exception that allowed for disclosure. After considerable debate at the conference, the approach was altered so that all documents were to be disclosable unless certain privacy constraints which were specifically outlined in the act dictated otherwise. The initial model used as the drafting tool for the final UIPA was the Federal Privacy Act. Obviously, Chapter 92E, H.R.S. is taken substantially from one of the early drafts of the uniform law. The UIPA presently under consideration for adoption is a more comprehensive, thorough and better drafted piece of legislation.


At the present time, the passage of UIPA is being considered by the Minnesota legislature. It previously had been considered both in Minnesota and in Illinois. There has been, since the initial drafting phase, a considerable amount of resistance on a national level by the press. The overall policy that the press has evidenced with regard to considering any matters of this nature has been to resist them because of the view that the act would create constraints upon the free accessibility of information and therefore was undesirable. We have always viewed this as being a relatively shortsighted position and one which will eventually be overcome. Most jurisdictions appear at the present time to be awaiting an initial enactment which will then serve as the

THE LAW OFFICES
JOHN A. CHANIN

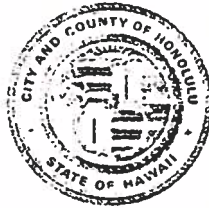
MATTHEW CHUNG, ESQ.
October 29, 1987
Page 2

justification for consideration by the legislatures. I believe that Hawaii is an appropriate forum for the consideration of the Information Practices Act. If you have any additional questions which you desire to ask with regard to this matter, we would be more than happy to be available at your request to assist you in such considerations. Thank you for the opportunity.

Very truly yours,


JOHN A. CHANIN
JAC:jf

DEPARTMENT OF THE CORPORATION COUNSEL
CITY AND COUNTY OF HONOLULU
HONOLULU, HAWAII 96813



BARRY CHUNG
CORPORATION COUNSEL

November 30, 1977

MEMORANDUM

TO : GEORGE H. TAKABAYASHI, CHAIRMAN
LIQUOR COMMISSION

FROM : ROBERT E. TERUYA, DEPUTY CORPORATION COUNSEL

SUBJECT: RECORDS IN THE LIQUOR COMMISSION SUBJECT TO
PUBLIC INSPECTION

This is in response to a letter dated September 14, 1977, from the Liquor Commission, requesting an opinion as to whether the list of records described in the letter which are kept by the Commission in performing its function are open for public inspection. The list includes the following records:

1. Minutes of Commission meetings
2. Licensee file folders
 - a. Financial condition of applicant
 - b. Tax clearance for Department of Taxation
 - c. Personal history of all persons named in application
 - d. Partnership agreement, if applicable
 - e. Certificate of Incorporation and Articles of Incorporation
 - f. Map of properties within 500 feet of premises
 - g. List of names and addresses of property owners and lessees of records of properties within 500 feet of premises
 - h. Floor plans of premises
 - i. In event of transfer or sale, the amount of consideration
 - j. Communications to and from the Commission with the public

MEMORANDUM

TO: GEORGE H. TAKABAYASHI, CHAIRMAN
LIQUOR COMMISSION

-2- November 30, 1977

- k. Citations and Notifications issued by the Commission
- 1. Actions by the Commission
- 3. Gross Liquor Sales Reports
- 4. Employees Registration Records
- 5. Wholesaler's price posting
- 6. Record of citations issued to each of the premises
- 7. Intra-office and interdepartmental communications¹

The laws relating to intoxicating liquor are found in HRS Chapter 281. Section 281-14 thereof provides:

Sec. 281-14 Records. The liquor commission shall ensure that complete records are kept of all commission meetings, proceedings, and acts with reference to all business pertaining to licenses issued, suspended, and revoked, moneys received as license fees and otherwise, and disbursements by the commission or under its authority, and these records shall be open for examination by the public. The records may be destroyed as provided in section 46-43.

RCH Section 12-105 which applies to all City agencies provides:

Section 12-105. 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,

¹The list has been slightly altered after discussion with the Commission staff.

MEMORANDUM

TO: GEORGE H. TAKABAYASHI, CHAIRMAN
LIQUOR COMMISSION

-3- November 30, 1977

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.

Additional statutory provisions relating to public records applicable to both State and county agencies are found in HRS Sections 92-50 and 92-51. They provide as follows:

§92-50 Definition. As used in this part, '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.

§92-51 Public records; available for inspection; cost of copies. 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.

MEMORANDUM

TO: GEORGE H. TAKABAYASHI, CHAIRMAN
LIQUOR COMMISSION

-4- November 30, 1977

Certified copies of extracts from public records shall be given by the officer having the same in custody to any person demanding the same and paying or tendering twenty cents per folio of one hundred words for such copies or extracts.²

Reading the foregoing provisions in relation to each other, the law regarding inspection of public records in this jurisdiction appears to be as follows:

1. Any public record, with certain exceptions, is subject to public inspection.
2. The exceptions include:
 - a. Records pertaining 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 as determined by their respective attorneys.
 - b. Records which do not relate to a matter in violation of law and are deemed necessary for the protection of the character or reputation of any person as determined by such attorneys.
3. In addition, the following records may also be withheld from public inspection:
 - a. Records which invade the privacy of an individual.
 - b. Records of the Police Department or of the Prosecuting Attorney (both of the City) unless permission is given by the Chief of Police or the Prosecuting Attorney, except in the case of traffic accident reports where inspection is permitted to certain designated persons.

In previous opinions of this Department, "public records" as defined in HRS Section 92-50 has been construed to be limited to those records that are required to be kept

²We believe this section supplements RCH Section 12-105 and provides additional grounds whereby certain records may be withheld from public inspection.

MEMORANDUM

TO: GEORGE H. TAKABAYASHI, CHAIRMAN
LIQUOR COMMISSION

-5- November 30, 1977

by law.³ The phrase, "records which invade the right of privacy of an individual," in the same section is deemed to include the following types of records:

[E]xaminations, public welfare lists, unemployment compensation lists, application for licenses and other similar records.⁴ [Emphasis added]

Thus, as applied to the Liquor Commission, an application for a liquor license, including supporting documents required to be filed with such application would be exempted from the definition of "public records."⁵

Turning now to the specific items mentioned in your request, it is our view that they should be designated as follows:

³SR 73-4; M 72-68.

⁴Standing Committee Report No. 594 of the Committee on Judiciary of the State House of Representatives on S. B. No. 30, enacted as Act 43, Session Laws of Hawaii, Regular Session, 1959, containing the provisions of HRS Section 92-50. Pertinent part of the report provides: "Your Committee intends that records which invade the right of privacy of a person should remain confidential. Among the list of records which the Committee felt should remain confidential were examinations, public welfare lists, unemployment compensation lists, application for licenses and other similar records. Your Committee also does not intend to modify any common law or statutory privilege which exists by reason of a confidential relationship."

⁵We see no reason for not including accompanying documents inasmuch as they are part of the application. See Op. No. 75-7 of the Department of the Attorney General, State of Hawaii, wherein an application and accompanying documents for a motion picture operator's license were construed to be records which invade the right of privacy of an individual and, therefore, not subject to public inspection.

MEMORANDUM

TO: GEORGE H. TAKABAYASHI, CHAIRMAN
LIQUOR COMMISSION

-6- November 30, 1977

1. Application for liquor license and accompanying documents which we understand include the following:

- a. Financial condition of applicant;
- b. Tax clearance from Department of Taxation;
- c. Personal history of all persons named in application;
- d. Partnership agreement, if applicable;
- e. Certificate of Incorporation and Articles of Incorporation;
- f. Map of properties within 500 feet of premises;
- g. List of names and addresses of property owners and lessees of records of properties within 500 feet of premises;
- h. Floor plans of premises; and
- i. In the event of transfer or sale, the amount of consideration.

Designation: Not subject to public inspection for the reason that the documents are part of an application for a liquor license. However, the documents described in b., d. though h. are open to public inspection inasmuch as they are (1) available for such inspection at other public places (for example, Department of Regulatory Agencies); (2) ascertainable by anyone making physical inspection of the premises or surrounding areas or, (3) of such nature that the privacy, character or reputation of an individual is not infringed or injured. Hence, we see no reason why such documents may not be open to public inspection.

2.
 - a. Minutes of Commission meetings.
 - b. Citations and notifications issued by the Commission.
 - c. Action by the Commission.

MEMORANDUM

TO: GEORGE H. TAKABAYASHI, CHAIRMAN
LIQUOR COMMISSION

-7- November 30, 1977

d. Wholesaler's price posting.

e. Record of citations issued to each of the premises.

Designation: Subject to public inspection for the reason that they are records required by law to be kept and do not fall within any of the exceptions hereinabove discussed. The citations and notifications are analogous to complaints and charges filed in a court of law for hearing or trial to be held thereon, which are all open to the public. Wholesaler's price posting is required by law to be filed with the Liquor Commission. A licensee, having filed such schedule, may not sell liquor at a price other than the price filed in such schedule.⁶ Thus, public inspection is necessary to enforce the requirement of this provision.

3. Gross liquor sales reports.

Designation: Not subject to public inspection. These reports contain information generally kept confidential by licensees for competitive reasons. They are similar to information included in an application for licenses which the Legislature deemed to be confidential. Thus, disclosure of these reports would tend to invade the right of privacy of the individuals concerned.

4. Employees registration records.

Designation: Not subject to public inspection. These records contain information about employees hired by liquor licensees to work on licensed premises. The furnishing of such information by employer-licensee is required under Rule 7-5 of the Liquor Commission Rules and Regulations. We understand the records for each employee include such information as: name, address, social security number, birthplace, ancestry, marital status, x-ray certificate, citizenship, criminal record (if any),⁷ age, employer, date of

⁶HRS Section 281-43.

⁷The furnishing of this information has been discontinued inasmuch as it is no longer available from the Police Department. However, there are a number of outstanding employees' records that still contain such information.

MEMORANDUM

TO: GEORGE H. TAKABAYASHI, CHAIRMAN
LIQUOR COMMISSION

-8- November 30, 1977

employment and type of job -- data which are usually kept by an employer in the employees' personnel files and generally deemed to be confidential.⁸ The fact that they are required to be furnished to the Liquor Commission does not, we believe, transform them into public records, subject to public inspection, especially since some of the items are matters which are injurious to the character or reputation, or violative of the right of privacy of the individuals concerned. The employee records are primarily for internal use by staff and commissioners.

5. Communications to and from the Commission with the public.

Designation: Obviously, the question as to whether such communications are "public records" depends on their contents and purpose. We can only advise that a preliminary determination on the question be made in light of our discussion herein, before such communications are open to public inspection.

6. Intra-office and Inter-departmental communications.

Designation: The same comment as in 5. above would apply here. Generally, since such communications (1) tend to contain preliminary data or recommendation preceding final action by the department, and (2) are not necessarily records required by law to be kept, we are of the view that they do not fall within the definition of "public records."

In conclusion, while public inspection of governmental records is to be permitted wherever possible, this does not mean that such right of inspection cannot be made subject to reasonable rules and conditions. Such rules and conditions are often necessary to "guard against loss or destruction of records, and to avoid unreasonable disruption of the

⁸Under HRS Sections 387-6 and 387-8 (in Chapter 387 relative to Wage and Hour Law), employers are required to keep such records of their employees and the information contained therein are held to be confidential.

MEMORANDUM

TO: GEORGE H. TAKABAYASHI, CHAIRMAN
LIQUOR COMMISSION

-9- November 30, 1977

functioning of the office in which they are maintained."
66 Am Jur 2d Records and Recording Laws, § 14.9


ROBERT E. TERUYA
Deputy Corporation Counsel

APPROVED:


BARRY CHUNG
Corporation Counsel

RET:ct

Attach.

⁹Free schedule for public records is found in R.O. 1969,
Section 8-25.1 et. seq.

DEPARTMENT OF THE CORPORATION COUNSEL
CITY AND COUNTY OF HONOLULU
HONOLULU, HAWAII 96813



BARRY CHUNG
CORPORATION COUNSEL

July 27, 1977

MEMORANDUM

TO : BENJAMIN J. LAMBIOTTE, M.D., M.P.H.
CITY AND COUNTY PHYSICIAN

FROM : JOHN S. NISHIMOTO, DEPUTY CORPORATION COUNSEL

SUBJECT: RELEASE OF MEDICAL REPORTS TO PRISONER'S ATTORNEY

This is in reply to your request of June 24, 1977, for an opinion as to whether the Department of Health may release medical reports made pursuant to a medical examination of Velma E. Dunbar at the City and County Honolulu Emergency Treatment Center, Pawaa Annex, to the attorney of Ms. Dunbar.

We answer your request in the affirmative.

We understand that, at the time of the medical examination, Ms. Dunbar was a prisoner being held by the Honolulu Police Department and that the medical reports made by your Department were part of the normal procedures for such medical examinations. We further understand that Ms. Dunbar has consented to the release of the medical reports to her attorney.

HRS Section 92-50 defines the term "public record" as meaning "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" Section 92-50 further provides that

M 77-68

578

MEMORANDUM

TO: BENJAMIN J. LAMBIOTTE,
M.D., M.P.H., CITY AND
COUNTY PHYSICIAN

-2-

July 27, 1977

a public record "shall not include records which invade the right of privacy of an individual."¹ (Emphasis added)

Medical reports made by a physician pursuant to the medical examination of a patient can be deemed records of confidential matters concerning the physical condition of the person examined. The right of a patient to recover damages from a physician for unauthorized disclosure concerning the patient on the ground that such disclosure constitutes an actionable invasion of the patient's privacy has been upheld. Hammonds v. Aetna Casualty & Surety Co., 243 F. Supp. 793 (1965). Therefore, medical reports are generally not to be included in the term "public records" as defined in HRS Section 92-50.

Notwithstanding the general rule regarding the relationship of physician and patient that a physician is liable to his patient for disclosure of professional secrets to third persons, Berry v. Moench, 331 P.2d 814 (Utah 1958), where the examined patient consents to the release of medical reports made pursuant to the examination, the physician-client privilege is waived, and such reports may be released to a third person.

Accordingly, we conclude that, where Ms. Dunbar has consented to the release of medical reports made pursuant to her physical examination, she has waived her physician-patient privilege, and your department may release the medical records to her attorney.

APPROVED:

Barry Chung
BARRY CHUNG
Corporation Counsel

John S. Nishimoto

JOHN S. NISHIMOTO
Deputy Corporation Counsel

JSN:gk

¹The provision of RCH Section 12-105 relates to what records are open to the public. However, said section has been impliedly amended by HRS Section 92-50 to the extent that any provision thereunder conflicts with the provision of said Section 92-50. As such, the right of privacy concept is applicable when medical records creating patient-physician relationship arises out of City operations.

DEPARTMENT OF THE CORPORATION COUNSEL
CITY AND COUNTY OF HONOLULU
HONOLULU, HAWAII 96813



BARRY CHUNG
CORPORATION COUNSEL

February 3, 1977

MEMORANDUM

TO : JEAN K. MARDFIN, DIRECTOR
MUNICIPAL REFERENCE AND RECORDS CENTER

FROM : DUDLEY G. AKAMA, DEPUTY CORPORATION COUNSEL

SUBJECT: USE OF MUNICIPAL REFERENCE AND RECORDS CENTER
PHOTOGRAPHS AND NEGATIVES FOR COMMERCIAL
PURPOSES BY A PRIVATE GRAPHICS FIRM

This is in response to your memorandum dated March 12, 1976. Pursuant to a letter received by your department from a commercial graphics firm called "Kamaaina Graphics," you requested our opinion as to the following:

- 1) Whether or not a private graphics firm may borrow and reproduce negatives and photographs in the Municipal Reference and Records Center collection for commercial purposes?
- 2) Assuming arguendo that it is permissible to lend negatives and photographs to said commercial firm, whether it would be advisable to informally agree to permit it to copy and/or mutually exchange photographs and negatives?
- 3) If a more formal agreement were to be recommended, what form should be used?

Our response to the first question is No.

According to Rev. Ordinances of Honolulu 1969 Section 3-5.2, one of the duties of the Municipal Librarian is "to make available to any officer or employee of the City

M 77-11

580

MEMORANDUM

TO: JEAN K. MARDFIN, DIRECTOR
MUNICIPAL REFERENCE AND
RECORDS CENTER

-2-

February 3, 1977

government information on any subject desired." (Emphasis added.) Also according to Rev. Charter of Honolulu 1973 Section 6-103, the director of municipal reference and records shall:

(a) Fulfill the research and information needs of the city through the acquisition and maintenance of relevant research materials which shall be made available to the executive and legislative branches. [Emphasis added.]

It is clear from a reading of the above-cited ordinance and Charter section that the general public, much less a commercial entrepreneur, is not included in the category of persons referred to in the foregoing, and is therefore not entitled to use the Municipal Reference and Records Center [hereinafter MRRC]. Hence, revisions to the above-cited ordinance and Charter sections are in order, in light of the present use of the MRRC by the general public.¹

At such time that the revisions are proposed, it may be prudent to indicate for which specific purposes the public may use your facilities. In that way, you would avoid future problems with commercial graphics or photography services desiring to use documents or records for commercial purposes.

In the alternative, you may desire to propose to the Council, in your recommendations for revisions to the above-cited ordinance and Charter sections, that a royalty schedule be incorporated for those commercial users such as Kamaaina Graphics, who announce ahead of time their intended use of your materials for commercial purposes.²

¹ This is based on our telephone conversation of January 26, 1977.

² RCH Section 3-113 states in pertinent part that: "The council shall by ordinance fix the fees and charges for all services rendered by the city and for the use of city property and facilities, except as otherwise provided by this charter."

MEMORANDUM

TO: JEAN K. MARDFIN, DIRECTOR
MUNICIPAL REFERENCE AND
RECORDS CENTER

-3-

February 3, 1977

Additionally, in order to protect the City's interest in the materials in the MRRC, a copyright system may be one of your considerations. However, at this juncture, consideration of such a system would be premature. Also, you will need to weigh the economic feasibility of such a system against the real need for copyright protection for all of your documents and records.

Rev. Ordinances of Honolulu 1969 Section 8-25.1 provides a fee schedule for providing copies of extracts and certified copies of public records.³ Furthermore, the above-cited ordinance does not confer a right upon the general public to receive copies of the documents and records in the MRRC.

Our response to questions 2 and 3 will depend upon the respective revisions which you may propose to the Council.

Accordingly, we conclude that the applicable provisions of the Revised Ordinances and the Revised Charter of Honolulu presently preclude the use of the MRRC by any persons other than officers or employees of the executive and legislative branches of the City government. However, in fact, the general public has been permitted to use the MRRC. For this reason, we recommend that you propose revisions to the applicable provisions hereinbefore cited and that you incorporate either a purpose restriction or royalty schedule for commercial users in your proposal.⁴

APPROVED:



YOSHIAKI NAKAMOTO
Acting Corporation Counsel



DUDLEY G. AKAMA
Deputy Corporation Counsel

DGA:gk

³ Whether or not the documents and records in the MRRC are matters of public record open to inspection has not yet been determined.

⁴ We will assist you in drafting an ordinance embodying this problem.

DEPARTMENT OF THE CORPORATION COUNSEL
CITY AND COUNTY OF HONOLULU
HONOLULU, HAWAII 96813



BARRY CHUNG
CORPORATION COUNSEL

December 7, 1976

MEMORANDUM

TO : FRANCIS KEALA, CHIEF OF POLICE

FROM : RICHARD D. WURDEMAN, DEPUTY CORPORATION COUNSEL

SUBJECT: RELEASE OF CRIMINAL ABSTRACTS FOR APPLICANTS
REQUESTING AN EXPLOSIVES LICENSE

This is in response to your written request of August 28, 1975, for an opinion on whether or not HPD General Order 74-6, insofar as it relates to the release of criminal abstracts to the Industrial Relations Board is in conflict with the Uniform Act on Status of Convicted Persons, HRS Section 831-3.1, as amended by Act 113, 1976 [hereinafter Act].

It is our opinion that the release of criminal abstracts to the Board for purposes of granting explosive permits is not permitted by the Act. In addition, we are unable to find any authorization for this practice in General Order 74-6.

HRS Section 831-3.1(b), as amended, provides that the following types of criminal records may not be used, distributed or disseminated by the State or any of its political subdivisions:

- (1) Records of arrest not followed by a valid conviction;
- (2) Convictions which have been annulled or expunged;
- (3) Convictions of a penal offense for which no jail sentence may be imposed; and

M 76-111

MEMORANDUM

TO: FRANCIS KEALA, CHIEF
OF POLICE

-2-

December 7, 1976

(4) Conviction of a misdemeanor in which the period of twenty years has elapsed since the date of conviction and during which elapsed time there has not been any subsequent arrest or conviction.

On the other hand, the Act does permit the State or county to consider as relevant to the granting of occupational permits, offenses which directly relate to an applicant's performance in the job for which he applies. However, the convictions which are considered must be restricted to offenses not excepted above. HRS § 831-3.1(c).

The statute relating to the granting of licenses for the use of explosives does not specifically bar one with a criminal background from receiving a license. Rather, it refers to a "certificate of fitness," which shall set forth one's "competency." HRS § 396-9

It should be emphasized that there is no requirement in the rules governing the issuance of Blaster's Permits that an applicant have no criminal record. See Rules of the Occupational Safety and Health Division, Department of Labor and Industrial Relations, State of Hawaii, Chapter 310 Section 2.4. The only comparable requirement is that one not be addicted to narcotics, alcohol, and dangerous drugs.*

The General Order of the Police Department which pertains to the release of criminal record information is G. O. 74-6 (hereinafter G.O.). This provides, inter alia, that information relating to the criminal background of any individual shall be released only to government

*We are informed however by officials of the Occupational Health and Safety Division that they are drafting rules which would require applicants to get their own criminal abstracts. This would seemingly be merely a codification of what is the present actual practice.

MEMORANDUM

TO: FRANCIS KEALA, CHIEF
OF POLICE

-3-


December 7, 1976

agencies within the criminal justice system or when in the interest of national security, G.O. § 2-D. On the subject of explosives licensing, the Order only says that applicants may be fingerprinted for the purpose of a criminal background investigation for police use only, G.O. § III-D.

Accordingly, we conclude that while the Act allows the provision of criminal record information for certain purposes; until such time as the concerned state agency determines by valid rule or statute that criminal convictions are a basis for the denial of a Blaster's license, there is no valid purpose in providing the records of same. Second, even should such requirement exist, the Police Department should not provide criminal record information of arrests not resulting in convictions, or other convictions which are forbidden to be distributed by the provisions of HRS Section 831-3.1(b). (See discussion, supra) Finally, a reading of the General Order does not seem to provide conflict with these requirements. In fact, if abstracts are being routinely provided to the Labor Department upon request, it would seem to be in conflict with both the Act and with the General Order.


RICHARD D. WURDEMAN
Deputy Corporation Counsel

APPROVED:


BARRY CHUNG
Corporation Counsel

RDW:as

DEPT/ MENT OF THE CORPORATION COUNS
CITY AND COUNTY OF HONOLULU
HONOLULU, HAWAII 96813



BARRY CHUNG
CORPORATION COUNSEL

RANK F. FASI
MAYOR

April 28, 1976

MEMORANDUM

TO : SAMUEL L. YEE, M.D.
ASSISTANT CITY AND COUNTY PHYSICIAN

FROM : RICHARD D. WURDEMAN, DEPUTY CORPORATION COUNSEL

SUBJECT: RELEASE OF COMPUTER TAPES ON AMBULANCE STATISTICAL REPORTS

This is in response to your request of April 5, 1976 for a written opinion on the legality of the release of computer tapes on Ambulance Statistical Reports from the Emergency Medical Services [EMS] Program to a University of Hawaii project entitled, "Cost-Benefit Analysis of Ambulance Services." This request was initiated by Dr. George Lee of the University Economics Department with an assurance that all information on individual patients would be kept absolutely confidential and furthermore that Dr. Lee would be personally liable for all litigation costs associated with any leakage of information.

Our answer is no.

It is our opinion that, unless the information released could be purged of individual patients' names and be thus made into a bare statistical recapitulation of the activities of EMS, the City would be exposed to too great a possibility of civil liability to make this release of information advisable.

The relationship between an individual and the person who treats him has traditionally been accorded high status in the law. Thus, our statutes provide that no physician shall, without the consent of the patient, divulge any information which he may have acquired while treating the

M 76-47

586

MEMORANDUM

TO: SAMUEL L. YEE, M.D.-
ASSISTANT CITY AND COUNTY
PHYSICIAN

-2-

April 28, 1976

patient in any civil action. HRS § 621-20.5. This privilege has been extended by implication to include communications to persons such as nurses and attendants who are acting under a physician's direction. Ostrowski v. Mockridge, 65 N.W.2d 185 (Minn. 1954). This aspect of the rule is not universal, however. Collins v. Howard, 156 F. Supp. 322 (D.C. Ga. 1957). Similarly, it has long been a tenet of common law that the imputation to another of a loathsome or contagious disease is libelous per se and thus does not require the proof of special damages. 50 Am. Jur. 2d, Libel and Slander, § 88. The rationale of all these principles seems to be that:

It expresses a long-standing public policy to encourage uninhibited communication between a physician and his patient. . . . 'There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate;'. [Hogue v. Massa, 123 N.W.2d 131, 133 (S.D. 1963)]

In analyzing the distinction between the effects of testimonial as against non-testimonial disclosure by physicians, the New Jersey Court has held that, even if there is no statutory privilege against the testimonial disclosure by physicians of their patients' medical histories, nevertheless a patient possesses a right against non-testimonial disclosure. This right is qualified only by "exceptions prompted by the supervening interest of society." Hague v. Williams, 181 A.2d 345 (N.J. 1962).

Once one finds this patient right, it is a natural extension to find that a physician is liable civilly anytime that this duty to the patient is breached. Horne v. Patton, 287 So.2d 824 (Ala. 1973). Furthermore, the mere fact that the disclosure is for some scientific purpose is not always a sufficient defense to liability. Griffin v. Medical Soc. of State of New York, 11 N.Y.S.2d 109 (1939). Even in cases where a patient has consented to the release of confidential information for medical science purposes, there is no guarantee that a disclosure more widespread than anticipated might result in civil liability. Feeney v. Young, 181 N.Y.S. 481 (1920).

MEMORANDUM

TO: SAMUEL L. YEE, M.D.
ASSISTANT CITY AND COUNTY
PHYSICIAN

-3-

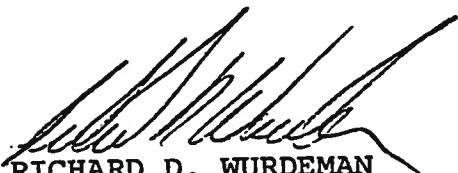
April 28, 1976

The only exceptions to this general rule of liability are found when either there is an overriding public interest in disclosure or where a physician is compelled to disclose by court order. For example, a disclosure made in a good faith effort to prevent the spread of a contagious disease, such as syphilis, has been held to be permissible. Simonsen v. Swensen, 177 N.W. 831 (Neb. 1920). Also, a physician who is required to testify about privileged communications cannot be held liable for any invasion of his patient's privacy. Boyd v. Wynn, 150 S.W.2d 648 (Ky. 1941).

It is noted that in Hawaii those public records which are open for inspection do not include any which violate the privacy of any individual. HRS § 92-50. Further, the wilful betraying of "a professional secret" is a basis for the suspension or revocation of a physician's license. HRS § 453-8.

We therefore conclude that any records maintained by EMS, which include the medical histories of individual patients, are privileged and must not be disclosed unless either there is an overriding public interest in doing so, their disclosure is ordered by a court, the patients concerned freely consent to disclosure, or there is specific legislation authorizing disclosure. We find none of these circumstances in the present request for data.

We are therefore of the opinion that the request for Ambulance Statistical Reports as part of a Cost-Benefit Analysis project should be refused.


RICHARD D. WURDEMAN
Deputy Corporation Counsel

APPROVED:


BARRY CHUNG
Corporation Counsel

RDW:gk

DEPARTMENT OF THE CORPORATION COUNSEL
CITY AND COUNTY OF HONOLULU
HONOLULU, HAWAII 96813



BARRY CHUNG
CORPORATION COUNSEL

May 27, 1975

MEMORANDUM

TO : JEAN K. MARDFIN, DIRECTOR
MUNICIPAL REFERENCE AND RECORDS CENTER

FROM : WILLIAM M. KAHANE, DEPUTY CORPORATION COUNSEL

SUBJECT: DONATIONS TO MUNICIPAL ARCHIVES

This is in response to your memorandum dated March 5, 1975 and a subsequent conversation relating to donations to the municipal archives.

Your first question was whether the donation of certain materials to the archives should be recorded in a written instrument. We answer in the affirmative.

By Resolution, adopted November 24, 1970, the City Council set forth those principles governing the acceptance of gifts valued at less than \$100.00. (Exhibit 1) As an executive agency, the Municipal Reference and Records Center comes within the prescriptions of this Resolution.

The form we have drafted, (Exhibit 2) should be adequate to handle those donations valued at less than \$100.00, made to the municipal archives.¹ An item valued

¹Numerous small gifts from the same donor may be itemized, and provisionally accepted as a whole under the same, "Declaration of Gift," so long as they don't collectively exceed \$100.00 in value.

MEMORANDUM

TO: JEAN K. MARDFIN, DIRECTOR
MUNICIPAL REFERENCE AND
RECORDS CENTER

-2-

May 27, 1975

in excess of \$100.00, or a number of items from the same donor collectively valued at more than \$100.00 should be referred to the City Council for acceptance.

Secondly, you asked whether the term "permanent loan" has a specific legal definition. We answer this question in the negative.

The term "permanent loan" has no special legal significance other than to represent a specific type of bailment² agreement. These loan agreements do not lend themselves to a standardized short form, and thus should be drafted as the occasions arise. Questions of liability for damage or loss to the loaned item, as well as questions of ownership if the lender is to die during the period of the bailment can more properly be addressed by the particular terms of the document.

Thirdly, you asked whether certain materials in the archives could properly be withheld from the general public, specifically papers and records of living mayors. We answer in the affirmative, with qualification.

We would direct your attention to House Bill 126 of this State legislative session, which should shortly be signed into law. This Bill amends HRS Chapter 92, and we refer you specifically to HRS Sections 92-50, et seq. relating to public records. HRS Section 92-50, which defines "public records," states that said records "shall not include records which invade the right of privacy of an individual." We are of the opinion that the personal papers and records of living mayors, and the personnel records of

²Bailment is defined as the delivery of personal property, by one person to another, in trust and held for a particular purpose, wherein the person given charge of the goods (the bailee) agrees to perform the trust and carry out its purposes, and thereafter redeliver the goods to the bailor, or dispose of them in conformance with the trust agreement.

Particularly, this is a commodatum bailment where the goods are lent to the bailee gratis, to be used by him. Black's Law Dictionary 179 (4th rev. ed. 1968).

MEMORANDUM

TO: JEAN K. MARDFIN, DIRECTOR
MUNICIPAL REFERENCE AND
RECORDS CENTER

-3-

May 27, 1975

other City employees and officers fall squarely within this exception. On the other hand, papers and records of living mayors that have been made a part of the public domain, i.e., a mayor's public position on a particular issue, should be made available to the public.

Fourth, you asked generally whether the publication of printed material or pictures in the archives collection can be restricted pending the approval of the proper authority. We would answer this question conditionally in the affirmative.

We understand that you are speaking specifically in terms of those public records which might be commercially exploited, for example, the use of old photographs of Honolulu to be duplicated and used on postcards. We would recommend to this end that you request the City Council to establish a policy by ordinance in an effort to control the commercial exploitation of these public records.³ Said ordinance could limit the duplication of any specified class of documents. As to what recourse the City and County might have with respect to materials published which give an erroneous or detrimental impression of the City or its officials, any opinion of this department would be premature at this time.

Fifth, you asked whether there were specific guidelines with respect to the attestation by the archivist or the Director of the Municipal Reference and Records Center in courts of law as to particular official records. We answer in the affirmative.

All official records may be authenticated as required in Hawaii Rules of Civil Procedure 44. (Exhibit 3) The District Court rule is identical.

³Under the Charter, the Director of Finance is authorized to sell the City's personal property pursuant to policies established by the Council. RCH 1973 art. VI, ch. 2, § 6-203(j) (1973).

MEMORANDUM

TO: JEAN K. MARDFIN, DIRECTOR
MUNICIPAL REFERENCE AND
RECORDS CENTER

-4-

May 27, 1975

Sixth, you asked whether we could suggest a fee schedule to cover the costs of certain functions of the municipal archives. We answer in the affirmative.

Certification and reproduction of certain documents may be charged at a rate correspondent to that prescribed by Ordinance 2743,⁴ a copy of which is attached. The fees established by ordinance, however, give way to the statutory fee schedule, i.e., HRS Section 92-21, in cases where the latter is applicable.⁵ With respect to photographic copies, the prevailing commercial rate may be assessed, the precise charge being left up to the discretion of the director.⁶

APPROVED:


WILLIAM M. KAHANE
Deputy Corporation Counsel


BARRY CHUNG
Corporation Counsel

WMK:as

Attach.

⁴Rev. Ordinances of Honolulu 1969 ch. 8, art. 25 (1969) (Exhibit 4). "The council shall by ordinance fix the fees and charges for all services rendered by the city" Rev. Charter of Honolulu 1973 art. 3, ch. 1, § 3-113 (1973).

⁵Id. § 8-25.3 (Exhibit 5).

⁶The City Council is preparing an omnibus fee bill which will combine in one ordinance fees charged for services performed by the City. We would suggest you refer to the Council a suggested fee schedule to cover the operations of your department.

**CITY CLERK
CITY HALL
HONOLULU, HAWAII**

To COUNCIL
... Auditor
... Clerk
... Committees:
... Finance
... Legislative
... Public Works
... Whole
✓ MAYOR
... Board of Water Supply
... Budget Director
... Civil Defense, Oahu
... Civil Service Dept.
... Corporation Counsel
... Finance Dept.
... Liq. Commission
... Inform & Complaints
... Municipal Library
... Planning Dept.
... Appeals Board
... Commission
... Royal Hawaiian Band
... Managing Director
... Auditors Dept.
... Building Dept.
... Appeals Board
... Fire Dept.
... Health Dept.
... Medical Examiner
... Parks & Recreation
... Police Dept.
... Commission
... Prosecuting Attorney
... Public Works:
... Chief Engineer
... Automotive
... Engineering
... Land
... Refuse
... Road
... Sewers
... Redevelopment
... Traffic Dept.
... Urban Renewal

... Governor
... Acct. & General Services
... Dept. of Education
... Dept. of Health
... Dept. of Transportation
... District Courts
... Land & Natural Resources

DATE OF PUBLICATION:

☐ ADV ☐ S N

RESOLUTION

WHEREAS, the City and County of Honolulu is the recipient of many gifts as a result of the generosity of its citizens; and

WHEREAS, the acceptance of such gifts will be in the public interest; and

WHEREAS, the City Council has been granted the sole authority to accept such gifts; and

WHEREAS, the administration and legislative clerical work involved in the processing of each gift individually imposes a heavy burden on the City and County; now, therefore,

BE IT RESOLVED by the Council of the City and County of Honolulu that it be and hereby requests that executive agencies take custody of any gift given by a donor subject to the following provisions:

1. the executive agency may take custody of the gift;
2. the executive agency shall record the gift listing the name and address of the donor and a description of the gift including value;
3. the executive agency shall not take custody of a gift of a value in excess of \$100.00;
4. the executive agency shall not accept custody of any gift which imposes any onerous conditions for its acceptance by the City;
5. the executive agency shall submit a quarterly report, which will be filed on or before the second Tuesday after the close of each quarter, of all gifts taken into custody by such agency to the City Council so that the Council may formally accept the gifts on behalf of the City;
6. the executive agency shall insure that all gifts taken into custody shall be properly maintained, secured or protected; and
7. the executive agency shall notify the donor that the acceptance of the gift is conditional only until formal acceptance by the Council at the next session scheduled for that purpose.

EXHIBIT 1.

RESOLUTION

BE IT FINALLY RESOLVED by the Council that the Clerk be, and she is, hereby directed to transmit a copy of this Resolution to Mayor Frank F. Fast.

INTRODUCED BY:

Lawrence
Holt. N. Y.

Council Members

DATE OF INTRODUCTION

NOV 24 1970

Honolulu, Hawaii

-2-

CITY COUNCIL

CITY AND COUNTY OF HONOLULU
HONOLULU, HAWAII

I hereby certify that the foregoing RESOLUTION was, on the date and by the vote indicated in the right hereof, adopted by the CITY COUNCIL of the City and County of Honolulu.

AT - 57:

WALTER M. HORN
ATTORNEY AT LAW
CITY OF LOS ANGELES

WALTER M. HILL

Dated NOV 24 1970

[illegible]

Reference D-1575

Report No. FCR-1939

PLATE NO.

2253

594

DECLARATION OF GIFT

I, _____ (name of donor) of _____ (address),
City of _____, County of _____,
State of _____, owned the items described below. I
desire to give the described property to the City and County
of Honolulu.

To carry out my purpose I do hereby give and deliver to
the City and County of Honolulu the property described as
follows:

It is distinctly understood by me that it my purpose
and intention to vest all incidents of absolute ownership
of the property in the City and County of Honolulu.

DATED: _____.

(signature)

ACCEPTANCE OF GIFT

I, _____, as Director of
the Municipal Reference and Records Center, on behalf of
the City and County of Honolulu, State of Hawaii, take
custody of the above-described gift. The acceptance of
this gift is conditioned upon its formal acceptance by the
Honolulu City Council.

DATED: _____.

(signature)

EXHIBIT 2 595

RULE 43

shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged.

(d) **Affirmation in Lieu of Oath.** Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.

(e) **Evidence on Motions.** When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.

(f) **Interpreters.** The court may appoint an interpreter of its own selection and may fix his reasonable compensation. The compensation shall be paid out of funds provided by law.

(Amended May 15, 1972, effective July 1, 1972.)

Rule 44. PROOF OF OFFICIAL RECORD.

(a) Authentication

(1) **Domestic.** An official record kept within the United States, or any state, district, commonwealth, territory, or insular possession thereof, or within the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied by a certificate that such officer has the custody. The certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office.

(2) **Foreign.** A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof; or a copy thereof, attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the

RULE 45

attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (A) admit an attested copy without final certification or (B) permit the foreign official record to be evidenced by an attested summary with or without a final certification.

(b) **Lack of Record.** A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement, authenticated as provided in subdivision (a) (1) of this rule in the case of a domestic record, or complying with the requirements of subdivision (a) (2) of this rule for a summary in the case of a foreign record, is admissible as evidence that the records contain no such record or entry.

(c) **Other Proof.** This rule does not prevent the proof of official records or of entry or lack of entry therein by any other method authorized by law.

(Amended May 15, 1972, effective July 1, 1972.)

Rule 44.1. DETERMINATION OF FOREIGN LAW. A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Rule 43. The court's determination shall be treated as a ruling on a question of law.

(Added May 15, 1972, effective July 1, 1972.)

Rule 45. SUBPOENA.

(a) **For Attendance of Witnesses; Form; Issuance.** Every subpoena shall be issued by the clerk of the circuit court of the circuit in

ORDINANCE NO. 2743
(BILL NO. 178, 1965)

AN ORDINANCE TO AMEND CHAPTER 8, R.O. 1961, BY ADDING A NEW ARTICLE THERETO,
RELATING TO CHARGES FOR FURNISHING COPIES OF PUBLIC RECORDS.

BE IT ORDAINED by the People of the City and County of Honolulu:

SECTION 1. Chapter 8, R.O. 1961, is hereby amended by adding thereto
a new article to read:

"Article 25. Fee Schedule for Public Records.

"Sec. 8-25.1. Charges for extracts and certified copies of
public records.

Except as otherwise provided in this article, a copy or extract of
any public document or record which is open to inspection of the
public shall be furnished to any person applying for the same by
the public officer having custody or control thereof pursuant to
the following schedule of fees:

- (1) Duplicated copy of any record (by duplicating machines
including, but not limited to, microfilm printer,
Thermofax, Verifax, Xerox, etc.)

For the first page of each document
or record..... \$.50

Each additional page or copy thereof..... .25

- (2) Abstract of information from public record

Each page..... .50

Each additional copy..... .25

- (3) Typewritten copy of any record

Per 100 words or fraction thereof..... 1.00

- (4) Copy of map, plan, diagram

Up to 22" x 36" size; per sheet..... 1.00

Larger than 22" x 36" size; per square foot. Prevailing
commercial
rate

Minimum charge per sheet..... 1.00

(5)	Photograph or photograph enlargement.....	Prevailing commercial rate
(6)	City Clerk's Certificate of Voter Registration...	.50
(7)	Voter Registration Lists (in printed forms as may be available).....	1.00 each precinct
(8)	Certified copy of medical examiner's report and autopsy report.....	5.00
(9)	Medical information extracted from Health Department records for insurance companies and other firms.....	5.00
(10)	Certified statement attesting to veracity of information obtained from public records	
	Per 100 words of statement or fraction thereof.....	1.00
(11)	Certification by public officer or employee as to correctness (or in attestation that document is a true copy) of any document, including maps, plans, and diagrams	
	Per page.....	.50

"Sec. 8-25.2. Charges for publications.

a. Charges for publications shall be based on cost, including reproduction costs, mailing and other handling charges attributable to making the publication available to the public.

b. The term 'publications' refers to copies of documents which are reproduced on a volume basis for general distribution and shall include, but not be limited to, such items as: ordinances, engineering and construction standards, directories, manuals, and handbooks. The term 'publications' shall not apply to resolutions or bills pending final adoption or enactment into ordinance by the City Council.

"Sec. 8-25.3. Applicability. The fees established in this article shall have no application to the furnishing of copies or extracts of public documents or records for which fees have been established by statutory provisions where such statutory provisions have not been superseded.

"Sec. 8-25.4. Exemption from payment of fees and charges.

a. The following agencies and organizations may be exempted from the payment of fees established in this article, as well as charges to cover mailing and other handling costs by the public officer having custody or control of the records involved:

- (1) Government agencies requiring the records or publications for official purposes;
- (2) Non-profit organizations directly concerned with the matter involved in the records or publications; provided, however, that exemption from payment of fees and/or charges shall be limited to one copy or one set of such records or publications.
- (3) Newspapers; provided, however, that exemption from payment of fees and/or charges shall be limited to one copy or one set of such records or publications.
- (4) Organizations which have arranged reciprocal agreement with a City agency for mutual exchange of records and publications;

PART III. COPIES OF RECORDS; COSTS AND FEES

§92-21 Copies of records; other costs and fees. Except as otherwise provided by law, a copy of any public document or record, including any map, plan, diagram, photograph, or photostat, which is open to the inspection of the public shall be furnished to any person applying for the same by the public officer having charge or control thereof upon the payment of the following:

- (1) \$1 for every hundred words or fraction thereof contained in any written document, record, entry, or other paper when the copy is made in writing or when typewritten or the like by the public officer having charge or control thereof;
- (2) \$1 per page or fraction thereof for reproducing any written document, record, entry, or other paper when the copy is made by the public officer having charge or control thereof by the use of any photostat, or other similar means of reproduction;
- (3) \$1 per page or sheet for making a copy of any map, plan, diagram, or photograph, which copy may be made by any method of reproduction;
- (4) 25 cents for every hundred words or fraction thereof for comparing any copy of a written document, record, entry, or other paper with the original thereof, when comparison is required or requested;
- (5) \$1 for the certification to any copy, when certification is required or requested;
- (6) Printed forms; certified copies:

Marriage certificates.....	\$1.50
Comparing and certifying of printed or photostatic copies, first copy full charge, all others certifying charge only.	
Exemplification.....	\$1.50
Certification or authentication of notaries.....	\$1.00
Legal notices, affidavits of publication.....	\$1.00;
- (7) All such fees shall be paid in by the public officer receiving or collecting the same to the state director of finance or county director of finance or by which the officer is employed as government realizations. [L 1921, c 96, §1; RL 1925, §166; am L 1929, c 166, pt of §1; am L 1931, c 178, §1; RL 1945, pt of §458; am L 1945, c 248, §1; am L 1949, c 345, §1; am L Sp 1949, c 23, §1; RL 1955, §7-1; am L Sp 1959 2d, c 1, §14; am L 1963, c 114, §1; HRS §92-21; am L 1974, c 145, §2]

[PART IV. NOTICE OF PUBLIC HEARINGS]

[§92-41] Publication of legal notices. Notwithstanding any law to the contrary, all governmental agencies scheduling a public hearing shall publish a notice in a newspaper which is printed and issued at least twice weekly in the county affected by the proposed action, to inform the public of the time, place and subject matter of such public hearing. This requirement shall prevail whether or not the publication by the governmental agency of a notice of public hearing in a newspaper of general circulation is specifically required by law, and shall be in addition to other procedures required by law. [L 1972, c 188, §2]

Attorney General Opinions

State agency required by section 91-3(a)(1) to publish notice of hearing must in addition comply with publication requirements of this section. Att. Gen. Op. 73-12.

This section does not require a public hearing in each county where a notice of public hearing is published. Att. Gen. Op. 73-13.

DEPARTMENT OF THE CORPORATION COUNSEL
CITY AND COUNTY OF HONOLULU
HONOLULU, HAWAII 96813

FAS1



BARRY CHUNG
CORPORATION COUNSEL

April 2, 1975

MEMORANDUM

TO : WILLIAM H. LUCAS, EXECUTIVE SECRETARY
LIQUOR COMMISSION

FROM : WILLIAM M. KAHANE, DEPUTY CORPORATION COUNSEL

SUBJECT: ACCESS TO LAW ENFORCEMENT RECORDS

This is in response to your letter dated December 20, 1974, in which you requested our opinion in two areas regarding the Liquor Commission's access to law enforcement records. Your first question asks whether an employee of the Liquor Commission can come within the construction of the term "law enforcement official" as it is employed in Act 45, SLH 1974.

We answer that question in the negative.

Act 45, SLH 1974, amended HRS Section 28-54 to read in part as follows:

Law enforcement records. (a) Confidentiality. All law enforcement records relating to the questioning, apprehension, detention, arrest, or charging of persons for or in connection with a criminal offense against whom no conviction is secured shall be deemed confidential and shall not be disclosed to or copies thereof transferred to any person other than (1) a law enforcement official of the State acting in the course and scope of his official duties; (2) a law enforcement official of the federal government or another state acting in the course and scope of his official duties, provided that the recipient law enforcement agency has agreed to keep said

M 75-23

602

1

MEMORANDUM

TO: WILLIAM H. LUCAS, EXECUTIVE
SECRETARY, LIQUOR COMMISSION

-2-

April 2, 1975

records confidential to the same extent as provided for herein; or (3) pursuant to an order of a court of competent jurisdiction.

Although the Liquor Commission is given certain police powers with respect to those laws that it is required to enforce, (see, e.g., HRS § 281-17(4), (9) (Supp. 1974)), we do not believe that its inspectors are "law enforcement officials" within the meaning of the Act.

The House Committee on Judiciary and Corrections commented with respect to Act 45:

[We are of the opinion that no justification exists for the release of information where interrogation or detention has occurred or an arrest or charge has been made but where the police or prosecutor has not obtained a conviction in a court of law. [Standing Committee Report No. 160-74, March 7, 1974.]

Apparently, the Legislature sought to circumscribe strictly those agencies having access to criminal records wherein the crime charged did not result in conviction. In doing so it attempted to limit the availability of these records to those police agencies, federal and state, who had agreed to keep said records confidential. In addition, Act 205, SLH 1974, which became law during that same legislative term, unequivocally prohibits the Honolulu Police Department from disseminating information relating to arrest which does not result in conviction where that information would be used in connection with a license application. This law fashions a conclusive presumption that such information is not relevant to the question of licensure. See p. 5 *infra*. Consequently, we are of the opinion that in this regard the term "law

MEMORANDUM

TO: WILLIAM H. LUCAS, EXECUTIVE
SECRETARY, LIQUOR COMMISSION

-3-

April 2, 1975

enforcement official"^{1/} cannot be read so broadly as to include those employees of a regulatory agency that might have quasi-police power.

For these reasons we believe that the Liquor Commission is not a law enforcement agency, nor are its employees law enforcement officials of the State as defined by Act 45, SLH 1974.

Secondly, you ask whether Act 205, SLH 1974 has impliedly repealed HRS Section 281-45 in whole or in part.^{2/}

We answer that HRS Section 281-45 has been partly repealed by implication.

HRS Section 281-45 states that no license shall be issued by the Liquor Commission to any person who was convicted of a felony and not pardoned. On the other hand, HRS Section 731 (Act 205, SLH 1974) provides in relevant part:

^{1/} The term "law enforcement official" is commonly used to describe those whose duty it is to preserve the peace. See Frazier v. Elmore, 173 S.W.2d 563, 565, 180 Tenn. 232 (1943); cf. In re Special Report of Grand Jury of Erie County Court, 77 N.Y.S.2d 438, 442, 192 Misc. 857 (1948) (State Bureau of Motor Vehicles not "law enforcement body" within rule that invasion of secrecy of Grand Jury proceedings permitted when such body presents to court facts showing public necessity of grand jury minutes).

The following have been held not to be "law enforcement" officers: attorneys (Daut v. U.S., 405 F.2d 312, 315 (9th Cir. 1969)); parole officers (State v. Johnson, 202 N.W.2d 132, 133 (S.D.Sup.Ct. 1972)); probation officers (Peo. v. W., 249 N.E.2d 882, 884, 24 N.Y.2d 732 (N.Y.Ct.App. 1969)). But see Vandiver v. Williams, 127 S.E.2d 168, 169, 106 Ga.App. 435 (1962) (Revenue Commissioner considered law enforcement officer for limited purposes).

^{2/} We have reworded your question. We shall advise you on how you may best comply with HRS Section 731 under separate cover.

MEMORANDUM

TO: WILLIAM H. LUCAS, EXECUTIVE
SECRETARY, LIQUOR COMMISSION

-4-

April 2, 1975

Prior convictions; criminal records; noncriminal standards. (a) A person shall not be disqualified from employment by the State or any of its political subdivisions or agencies, or be disqualified to practice, pursue, or engage in any occupation, trade, vocation, profession, or business for which a permit, license, registration, or certificate is required by the State or any of its political subdivisions or agencies, solely by reason of a prior conviction of a crime.

(b) The following criminal records shall not be used, distributed, or disseminated by the State or any of its political subdivisions or agencies in connection with an application for any said employment, permit, license, registration, or certificate: (1) records of arrest not followed by a valid conviction; (2) convictions which have been annulled or expunged; (3) convictions of a penal offense for which no jail sentence may be imposed.

Therefore, the Liquor Commission in reaching a licensing decision may not consider the applicant's or holder's arrest record, where no valid conviction followed, annulled or expunged convictions, or penal convictions for which no jail sentence could be imposed.

HRS Section 731 as enacted by Act 205 is an attempt to eliminate the disqualification of a person from licensure by political subdivisions solely by reason of a prior criminal conviction. Licensure may still be refused if the applicant is convicted of a crime which directly relates to the occupation for which he seeks or holds a license. To the extent that a rational connection can be shown between the applicant's past criminal conviction and his present performance or reliability, this section permits disqualification. (See Standing Committee Reports Nos. 129-74, March 4, 1974; 862-74, April 4, 1974.)

Subsection (d) of HRS Section 731 provides as follows:

This section shall prevail over any other law which purports to govern the denial or issuance of any permit, license, registration, or

MEMORANDUM

TO: WILLIAM H. LUCAS, EXECUTIVE
SECRETARY, LIQUOR COMMISSION

-5-

April 2, 1975

certificate by the State or any of its political
subdivisions or agencies.

At the same time HRS Section 281-45 casts an absolute prohibition on the issuance of a liquor license to any person convicted of a felony and not pardoned.

Where an act is so repugnant to, or so contradictory of, or so irreconcilably in conflict with, a prior act to the extent that it is impossible to harmonize the two acts in order to effectuate their purposes, the latter repeals the former to the extent of the conflict. U.S. v. Calif., 297 U.S. 175 (1936). This doctrine of repeal by implication rests on the notion that the last legislative expression in time prevails. C. Sands, Sutherland Statutory Construction § 23.09, nn. 11 & 12 (3d rev.ed. 1973) [hereinafter Sutherland]; see generally Sutherland §§ 23.09, 34.03.

We are of the opinion that HRS Section 731 was designed to vitiate what the Legislature felt to be an invalid presumption made precisely by such law as engendered in HRS Section 281-45, i.e., that a convicted felon, by virtue of that conviction alone was conclusively presumed unfit for licensing. Therefore, to the extent that HRS Section 731 conflicts with HRS Section 281-45, it supersedes that section. See State v. Atlantic Coast Line R. Co., 56 Fla. 617, 47 So. 969 (1908) (a portion of a statute may be repealed by implication).

William M. Kahane

WILLIAM M. KAHANE
Deputy Corporation Counsel

APPROVED:

Barry Chung

BARRY CHUNG
Corporation Counsel

WMK:gk

OFFICE THE CORPORATION COUNSEL
CITY AND COUNTY OF HONOLULU
HONOLULU, HAWAII 96813

F. FASI
YOR



PAUL DEVENS
CORPORATION COUNSEL

September 11, 1972

MEMORANDUM

TO : LORETTA ING
EXECUTIVE SECRETARY TO THE MAYOR

FROM : JOHN A. GRANT, DEPUTY CORPORATION COUNSEL

SUBJECT: PUBLIC DISCLOSURE OF CITY AND COUNTY EMPLOYEES PAY

This is in response to your inquiry of May 20, 1970, requesting our opinion to the following question:

"Can a citizen find out what an employee of the City and County is being paid, no matter what his reasons may be?"

We answer in the negative.

A person's motive for seeking to examine public records was significant at common law. Under the common law rule, an interest sufficient to maintain or defend an action had to be shown before a private individual would be entitled to examine public records. This rule has not generally been observed in this country. However, it has been held that there is no general right to inspect records of governmental departments which are not intended as notice, but are kept merely as evidence of the transactions in the departments. McGarrahan v. New Idria Min. Co., 96 US 316, 24 L.Ed. 630 (1877).

It is generally held that when a record is found to be a "public record", citizens have the right to examine such record for any lawful purpose, even to satisfy idle curiosity. People v. Harnett, 226 N.Y.S. 338, affirmed 230 N.Y.S. 28, affirmed 164 N.E. 602 (1927). Not all records relating to public business are "public records", however, and in these

M 72-68

607

MEMORANDUM

TO: LORETTA ING
EXECUTIVE SECRETARY
TO THE MAYOR

-2-

September 11, 1972

cases, only persons with an interest in such records will be permitted to inspect them, and then only when such inspection is not detrimental to the public welfare. People v. Harnett, supra. The question, therefore, becomes one of determining to what extent City and County employees' pay records are public records under Hawaii law.

The applicable section of the City Charter is Sec. 12-110, which contains the provision that:

"All books and records of every agency of the city shall be open to the inspection of any citizen at any time during business hours. . ."

In prior opinions, this office has interpreted "records", as used in Sec. 12-110, to mean "public records" as defined in the Hawaii Revised Statutes. (See Opinions 68-29 and 68-43). Section 92-1(2), HRS, provides as follows:

"The term '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."

In determining whether or not specific records are to be considered "public records" within the meaning of this section, this office has taken the position that only those records which are required to be kept by law fall within the definition set forth in Sec. 92-1(2). See the following opinions and citations therein: 58-2 (Civil Service performance ratings are public records), 65-63 (Employee addresses not public records), 68-29 (voter registration lists are public records, but not as stored on magnetic computer tapes), 68-43 (original notes of City Council not public records), SR 69-43 (traffic records restricted), 69-38 (drivers' license computer tapes not public records), and 71-110 (voter registration affidavit is a public record).

MEMORANDUM

TO: LORETTA ING
EXECUTIVE SECRETARY
TO THE MAYOR

-3-

September 11, 1972

A citizen and taxpayer has a right to inspect the public records to ascertain whether the public money is being properly expended. Nowack v. Fuller, 243 Mich. 200, 219 N.W. 749 (1928). It is, therefore, apparent that employee titles, grade levels, salary ranges and the amount the City expends in salaries are matters of public record. However, the City payroll records regarding individual employees' exact gross pay, deductions, garnishments and the like are kept for the same reasons that such records are kept by private employers, i.e. as part of a normal accounting system. In this regard, there is a statutory requirement that all employers keep payroll records. Sec. 387-6, HRS, provides in part:

"(a) Every employer shall keep in or about the premises wherein any employee is employed a record of the name, address, and occupation of each such employee, of the amount paid each pay period to each such employee. . ." (emphasis added)

These records are for the protection of the employee, and are to be accessible to the director of labor and industrial relations or his authorized representative to insure that the employer has complied with the provisions of the wage and hour laws. Regarding the disclosure of information contained in these records, Sec. 387-8, HRS, provides in part:

". . . information secured from inspection of the (pay) records. . . shall be held confidential and shall not be disclosed or be open to any person . . ." (emphasis added)

Referring again to the definition of "public records" in the Hawaii Revised Statutes, Sec. 92-1(2), set forth above, specifically excludes "records which invade the right of privacy of an individual." Standing Committee Report 594 of the 1959 House Journal at page 797 discloses the intent of the Legislature in enacting this provision of the statute:

MEMORANDUM

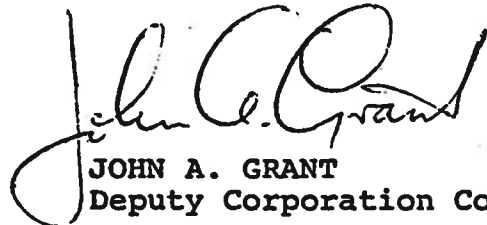
TO: LORETTA ING
EXECUTIVE SECRETARY
TO THE MAYOR

-4-


September 11, 1972

"Your Committee intends that records which invade the right of privacy of a person should remain confidential. . . Your Committee also does not intend to modify any common law or statutory privilege which exists by reason of a confidential relationship."
(emphasis added)

Therefore, in view of the fact that detailed pay records are kept primarily as a matter of ordinary accounting procedure, the confidentiality imposed upon such records by Sec. 387-8, HRS, and the stated intent of the Legislature to permit such records to remain confidential, it is our conclusion that exact individual pay records are not public records and not subject to public inspection without good cause.


JOHN A. GRANT
Deputy Corporation Counsel

APPROVED:


PAUL DEVENS
Corporation Counsel

JAG:as

December 27, 1971

MEMORANDUM

TO : EILEEN K. LOTA, CITY CLERK
ATTN : KENNETH M. HASHIMOTO
ASSISTANT ELECTIONS ADMINISTRATOR
FROM : ROBERT M. SETO, DEPUTY CORPORATION COUNSEL
SUBJECT: PUBLIC RECORDS

This is in response to your request relative to the following questions:

1. Whether the "Affidavit On Application For Voter Registration" is a public record under Section 11-14, HRS.
2. If it is a public record, whether the use of a public record for commercial purposes bars its accessibility.

We understand that the New York Life Insurance Company is interested in examining the City's voter registration records for the purpose of soliciting life insurance agents. In particular, we understand they are interested in using the information contained in the "Affidavit On Application For Voter Registration", hereinafter referred to as the "Affidavit".

With respect to your first question, the Affidavit is a public record.

Section 11-14, HRS, in pertinent part states that:

M 71-110

611
1

MEMORANDUM

TO: EILEEN LOTA, CITY CLERK

-2-

December 27, 1971

"The clerk of each county shall register all the voters in his county in the general county register. The register shall contain the information required by section 11-15. . . .The clerk shall keep the original or photographic copy of the affidavit of registration required by section 11-15. The general county register shall, at all times during business hours, be open to public inspection, and shall be a public record." (Emphasis supplied).

A reading of the cited provision clearly indicates that the Affidavit is a public record.

With respect to the second question, the information in the affidavit may be used so long as it is used for a lawful purpose.

In regard to the limitations of the use of a public record, the 1971 case of Ortiz vs. Jaramillo 483, P.2d 500, is applicable. In this case, the Supreme Court of New Mexico held that an affidavit of registration recorded on magnetic tapes, could be inspected and copied by anyone "acting lawfully and for a lawful purpose." (Emphasis added). The New Mexico court at page 501 added:

"The right to inspect public records commonly carries with it the right to make copies thereof, subject, however, to reasonable restrictions and conditions imposed as to their use, reasonable regulations as to appropriate times when and places where they may be inspected and copied, and such reasonable supervision by the custodian thereof as may be necessary for their safety and as will secure equal opportunity for all to inspect and copy them."

Also the court in Direct Mail Service Inc. vs. Registrar of Motor Vehicles, 5 N.E.2d 545 (1937) said:

"It is common knowledge that much use is made of public records for reasons having nothing to do with any present problem of the person examining them. Lists of conveyances, attachments, bankruptcies,

MEMORANDUM

TO: EILEEN LOTA, CITY CLERK

-3-

December 27, 1971

building permits and other matters having their sources in the public records are regularly published in commercial journals which are sold to business men and to the public generally. . . . We cannot believe that the Legislature intended to give to the custodian of a public record power to inquire of applicants for inspection as to the use which they intend to make of the information to be obtained or the motives which prompted them in seeking it."

In the case of Ortiz vs. Jaramillo, supra, the respondent contended that to permit inspection of the registration records which are on magnetic tapes will be an invasion of the right of privacy. The court in response made short-shrift of such contention by stating that:

"We fail to understand how it can be said the inspection and copying of information contained on a printed and written affidavit of registration, which is a public record, is proper, but the inspection and copying of this identical information from the 'working master record' tape, which is also a public record, constitutes an invasion of the privacy of the individual named in and identified by this information. . . . We are not concerned with whether an invasion of privacy might be involved in making the information available directly from the affidavits of registration, because no such question has been presented."

The cited cases clearly indicate that you cannot deny access to information in the affidavit to the New York Life Insurance Company simply because it plans to use such information to obtain leads to additional sales agents for its staff. On the other hand, the same courts stated you can impose reasonable restrictions relative to the gathering and copying of such information.

Additionally, the New Mexico court stated that there is no invasion of the right of privacy as the Affidavit is deemed to be a public record as prescribed in said Section 11-14. Moreover, there is no provision in the Omnibus Election Laws of SLH 1970 which expressly or impliedly restricts the use of information contained in the Affidavit.

MEMORANDUM

TO: EILEEN LOTA, CITY CLERK

-4-

December 27, 1971

In view of the foregoing, we conclude that the New York Life Insurance Company may inspect and copy information from the Affidavit for the purposes it desires since it is to be used for a lawful purpose.

/s/ Robert M. Seto
ROBERT M. SETO
Deputy Corporation Counsel

APPROVED:

/s/ Paul Devens

PAUL DEVENS
Corporation Counsel

RMS:si

JOHN WAIHEE
GOVERNOR



EMPLOYEES' RETIREMENT SYSTEM
HAWAII PUBLIC EMPLOYEES HEALTH FUND
OFFICE OF THE PUBLIC DEFENDER
PUBLIC UTILITIES COMMISSION

STATE OF HAWAII
DEPARTMENT OF BUDGET AND FINANCE
STATE CAPITOL
P.O. BOX 150
HONOLULU, HAWAII 96810-0150

YUKIO TAKEMOTO
DIRECTOR

ROBERT P. TAKUSHI
DEPUTY DIRECTOR

Thomas I. Yamashiro
Deputy Director

DIVISIONS:
BUDGET, PLANNING AND MANAGEMENT
ELECTRONIC DATA PROCESSING
FINANCE
Telecommunications

October 14, 1987

MEMORANDUM

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

FROM: Director of Finance

SUBJECT: PUBLIC RECORDS AND PRIVACY

RECEIVED
OCT 16 9 22 AM '87
COMMUNICATIONS

The attached information on public and private records within the Department of Budget and Finance is being provided to assist the Governor's Committee on Public Records and Privacy in its efforts to identify problems with the disclosure or nondisclosure of public records. The comments provided by all divisions and administratively attached programs of the department identify the types of records currently available for public information, as well as, those that need to be kept confidential.

If further assistance or clarification is required, please contact Ann Nishimoto of my staff at 548-5865.

YUKIO TAKEMOTO

Attachment

A REVIEW OF PUBLIC AND PRIVATE RECORDS
WITHIN THE
DEPARTMENT OF BUDGET AND FINANCE

Budget, Planning and Management Division

All records in the Budget, Planning and Management Division are public record except those that contain personal information which may invade the privacy of an individual pursuant to Sections 92-50 and 92E, HRS, and except for "staff work" which may be considered "privileged information." These documents include working documents, correspondence, internal references and other staff work for the Office of the Governor.

Electronic Data Processing Division

Ownership of records maintained and processed on the central computer facility at the Electronic Data Processing Division is vested in the specific agencies for which data processing services is being provided. Any request for information from such records or files is referred to the owner agencies and information is not released without written approval of the responsible agency.

Finance Division

Unclaimed Property Listings

Unclaimed property records contain detailed information relating to each account similar to those maintained by a bank. Typical data include:

1. Name
2. Address
3. Source of Account
4. Description of Account
5. Amount

Financial records of individuals are considered a matter of an individual's right to privacy pursuant to Section 92E, HRS. As such, detailed amounts or description of property is not advertised for public consumption. If detailed listings were to be made public, program operations would be disrupted due to the anticipated continuous demand to view such records. Additional program personnel would be required to service inquiry from requesters and a microfiche viewer and printer would have to be purchased to provide copy service.

Veterans Mortgage Loans

Information in regard to property description, legal owner, holder of outstanding liens and other information available at the Bureau of Conveyances with respect to the Veterans Mortgage Loan Program is considered public information. Information relating to outstanding loan balances and repayment status is considered confidential.

Reconciliation of Deposits in State Treasury and with Fiscal Agents

Information relating to amounts on deposit may be considered public information; however, reports from fiscal agents listing the holders of State bonds are and should continue to be kept confidential.

Special Purpose Revenue Bond Program

Public disclosure of all bond issuances are required by statutes:

1. Assisting not-for-profit corporations that provide health care facilities to the general public - S39A-49
2. Assisting Manufacturing Enterprises - S39A-89
3. Assisting Processing Enterprises - S39A-129
4. Assisting Industrial Enterprises - S39A-169

Telecommunications Division

The Telecommunications Division reports that the majority of its records are available as public record, except the following:

1. Correspondence, staff reports and studies which are not approved by the Department Head; surveys, data and research material which are being used in the development of a report or study; and personnel information.
2. Vendor proposals or proprietary information relative to projects of the division.

The division reports that if additional division records were to be made public, an increase in funding and staffing may be required, depending on the level of public demand, to supervise public review of divisional records and to reproduce requested documents

Employees' Retirement System

There are no Employees' Retirement System (ERS) records currently made available to the public. Active member files which include data on the amount of retirement contributions to the ERS, gross salary amounts, beneficiary names, home address, etc., and retiree files which include data on monthly pension amounts, bank accounts, beneficiary names, home address, federal withholding taxes, retirement option, etc., contain information of a private nature and are not should not be made available to the public.

Health Fund Division

The Health Fund handles three major categories of documents: 1) Enrollment Applications and Reports, 2) Premium Payment Report Summaries and 3) Health Fund Board Minutes. Of the three, only Enrollment Applications and Reports which contain personal employee data and Board Minutes dealing with individual employee matters are maintained in confidence. Premium Reports, which indicate the amount of premiums collected from public employers and employees and paid to insurance carriers, and the majority of approved Board Minutes are accessible as public information.

Public Defender

Budget and Accounting Records

Public access could be provided to these records. Access to many individual billing records that relate to general office operations could also be made available.

Billing relating to litigation expenses (e.g., medical services, expert witnesses), however, should not be subject to disclosure under disciplinary rules and ethical considerations and protection by attorney-client privilege and the HRS [92-E-4 and the definition of personal records set forth in 92E-1(3)].

Client Application for Court-Appointed Counsel

A written opinion by the Attorney General's Office concludes that the information contained in the application constitutes a "personal record" as the term is defined in Section 92E-1(3) which precludes access to applications by the public.

Names of Clients and Document, Correspondence, and Work Product Relating to Client's Case

Disciplinary rules, ethical considerations, the HRS and the attorney-client privilege would not permit disclosure or public access to this information.

Public Utilities Commission

All data filed with the Public Utilities Commission is available as public information, except confidential reports on the salary of officers and managers of utility companies and reports under protective order which contain proprietary information on regulated companies.

THE LAW OFFICES
JOHN A. CHANIN
ATTORNEY AT LAW
FOUR SOUTH KING STREET
HONOLULU, HAWAII 96813

RECEIVED
OCT 33 8 35 AM '87
DIRECTOR
OFFICE
CONSUMER AFFAIRS
TELEPHONE

RECEIVED

Nov 2 8 36 AM '87

DIRECTOR
OFFICE
CONSUMER AFFAIRS
TELEPHONE
(808) 538-1165

JOHN A. CHANIN

October 29, 1987

MATTHEW CHUNG, ESQ.
Department of Commerce & Consumer Affairs
1010 Richards Street
Honolulu, Hawaii 96813

Re: Uniform Information Practices Act

Dear Mr. Chung:

The undersigned has served as one of the draftsman of the Uniform Information Practices Act (UIPA). I have also served in a similar capacity on various other drafting committees dealing with disclosure of such matters as criminal history records, financial data and the like. During the initial drafting stages, UIPA was referred to as the Uniform Privacy Act and the essential focus was that all subject documents were considered non-disclosable, protected by privacy considerations unless there was a specific exception that allowed for disclosure. After considerable debate at the conference, the approach was altered so that all documents were to be disclosable unless certain privacy constraints which were specifically outlined in the act dictated otherwise. The initial model used as the drafting tool for the final UIPA was the Federal Privacy Act. Obviously, Chapter 92E, H.R.S. is taken substantially from one of the early drafts of the uniform law. The UIPA presently under consideration for adoption is a more comprehensive, thorough and better drafted piece of legislation.


At the present time, the passage of UIPA is being considered by the Minnesota legislature. It previously had been considered both in Minnesota and in Illinois. There has been, since the initial drafting phase, a considerable amount of resistance on a national level by the press. The overall policy that the press has evidenced with regard to considering any matters of this nature has been to resist them because of the view that the act would create constraints upon the free accessibility of information and therefore was undesirable. We have always viewed this as being a relatively shortsighted position and one which will eventually be overcome. Most jurisdictions appear at the present time to be awaiting an initial enactment which will then serve as the

THE LAW OFFICES
JOHN A. CHANIN

MATTHEW CHUNG, ESQ.
October 29, 1987
Page 2

justification for consideration by the legislatures. I believe that Hawaii is an appropriate forum for the consideration of the Information Practices Act. If you have any additional questions which you desire to ask with regard to this matter, we would be more than happy to be available at your request to assist you in such considerations. Thank you for the opportunity.

Very truly yours,


JOHN A. CHANIN
JAC:jf

